



NEZ PERCE TRIBE, et al. v DIRK KEMPTHORNE, et al.
No. 06-2239 in the U.S. District Court for the District of Columbia

TEN FREQUENTLY ASKED QUESTIONS WITH ANSWERS February 2007

On December 28, 2006, a lawsuit (*Nez Perce Tribe, et al. v. Kempthorne, et al.*) was filed by the Nez Perce Tribe, the Mescalero Apache Tribe, the Tule River Indian Tribe, the Hualapai Tribe, the Yakama Nation, the Klamath Tribes, the Yurok Tribe, the Cheyenne-Arapaho Tribe, the Pawnee Nation of Oklahoma, the Sac and Fox Nation, and the Santee Sioux Tribe of Nebraska against the Secretaries of the U.S. Interior and Treasury Departments. The lawsuit seeks full and complete trust fund accountings from the government as the trustee of tribal trust funds. The lawsuit seeks to be a class action on behalf of the eleven named Plaintiff Tribes and all other tribes similarly situated that have not filed their own trust fund accounting lawsuits. The Tribes that filed *Nez Perce Tribe v. Kempthorne* are represented by the Native American Rights Fund.

1. Q. Why was it necessary or desirable to bring this lawsuit as a class action?

A. Because the United States is the trustee for the trust fund accounts of all Tribes - more than 300 of them; the law requires the United States as trustee to provide full and complete accountings of the funds to all tribal trust fund account holders; and, the United States never has provided full and complete accountings to tribal trust fund account holders. Many Tribes could and did file their own lawsuits, but not all tribes had the resources and information necessary to do so.

The situation was even more dire because Congress, at the urging of the Presidential Administration, had given Tribes a firm deadline of December 31, 2006 by which Tribes had to challenge the accounting adequacy of the Arthur Andersen "Agreed Upon Procedures" tribal trust fund reports prepared by Arthur Andersen under a contract with the Bureau of Indian Affairs (BIA), and sent to Tribes by the BIA in 1996 or risk losing their right to challenge the reports forever.

2. Q. How can I find out if my Tribe is part of the class in *Nez Perce Tribe v. Kempthorne*?

A. At this time there is no certified class in *Nez Perce Tribe v. Kempthorne*. There is only what the law calls a "putative" (potential) class. There are many procedural steps involved in class certification. The named plaintiffs have to define the class that they want certified and ask the Court to certify the class. The Defendants have the right to object to class certification and the proposed class definition. The Court rules provide that before a class is certified, all potential class members must be notified and be given the option of remaining in the class or "opting out," that is, being excluded from the class. If and when a class is certified by the Court, all class members will be notified of certification.

3. Q. Will Tribes that filed their own tribal trust fund accounting lawsuits in U.S. District Courts be part of the class in *Nez Perce Tribe v. Kempthorne*?

A. No. Tribes that filed their own tribal trust fund accounting lawsuits in U.S. District Courts will not be part of the class in *Nez Perce Tribe v. Kempthorne*. The Complaint that the plaintiff Tribes filed in *Nez Perce Tribe v. Kempthorne* expressly states that they are not seeking to include in the class Tribes that filed their own trust fund accounting lawsuits in U.S. District Courts.

4. Q. What about Tribes that have tribal trust fund lawsuits not in a U.S. District Court but only in the U.S. Court of Federal Claims; will those Tribes be part of the class in *Nez Perce Tribe v. Kempthorne*?

A. The answer ultimately depends on how the Court in *Nez Perce Tribe v. Kempthorne* defines the class. It is possible that the Court could find that Tribes that have trust fund lawsuits only in the U.S. Court of Federal Claims are part of the class, if, for example, the Court were to find that the kinds of accountings that the U.S. Court of Federal Claims can provide are not the "full and complete accountings" required by law for tribal trust fund accounts. But even if Tribes that have tribal trust fund lawsuits only in the U.S. Court of Federal Claims are found to be part of the class in *Nez Perce Tribe v. Kempthorne*, those Tribes still will have the right to opt out of the class.

5. **Q. What about Tribes that just do not want to be part of the class in *Nez Perce Tribe v. Kempthorne*?**
- A. Tribes that for whatever reason do not want to be part of the class in *Nez Perce Tribe v. Kempthorne* will have the option of opting-out of the class. The Court supervises all of the procedural steps of class certification to ensure that the rights of class members and those who opt out are protected
6. **Q. When and how can Tribes opt-out of the class in *Nez Perce v. Kempthorne*?**
- A. At some point during the class certification process, the Court will require the Plaintiff Tribes to give notice to each and every potential class member. The notice typically includes an opt-out form that simply can be returned to the Court. The class certification process in *Nez Perce Tribe v. Kempthorne* has not begun yet and when it does begin it could take many months or even years.
7. **Q. Will the named Plaintiff Tribes in *Nez Perce Tribe v. Kempthorne* be able to settle the lawsuit and bind all of the Tribes that are members of the class but that are not named plaintiffs?**
- A. No. The federal court rules that govern class action lawsuits provide that no settlement on behalf of a class, or even on behalf of a named plaintiff, can be achieved without approval of the Court. If settlements are reached, the Court will require each and every class member – should a class be certified – to be notified of the potential settlement and given the option to opt out and not be bound by the settlement
- 8 **Q. Will the named Plaintiff Tribes in *Nez Perce Tribe v. Kempthorne* be able to conclude a congressional settlement of the tribal trust fund accounting claims of all Tribes that are members of the class without the participation of the other class members?**
- A. The power of Congress to settle tribal trust fund accounting claims is not affected by lawsuits like *Nez Perce Tribe v. Kempthorne*. But any legislation considered by Congress will be subject to the ordinary process for review and comment by every tribe in the Nation.

9. **Q. How is *Nez Perce Tribe v. Kempthorne* similar to or different from the other Indian trust fund class action lawsuit, *Cobell, et al. v. Kempthorne, et al.*?**

A. Both lawsuits seek to hold the United States accountable as the trustee for billions of dollars of Indian trust funds. The difference is that *Cobell v. Kempthorne* involves the trust fund accounts of individual Indians, and *Nez Perce Tribe v. Kempthorne* involves the trust fund accounts of Tribes.

10. **Q. Where can I get more information about *Nez Perce Tribe v. Kempthorne*?**

A. A website, www.tribaltrust.org has been set up to provide general information about *Nez Perce Tribe v. Kempthorne*.