

**Testimony of the NATIVE AMERICAN RIGHTS FUND before the
Senate Committee on Indian Affairs
Oversight Hearing on Fulfilling the Federal Trust Responsibility:
The Foundation of Government-to-Government Relationship
May 17, 2012**

Introduction and Overview

Good afternoon Members of the Committee. I am Melody McCoy, an enrolled member of the Cherokee Nation and a Staff Attorney at the Native American Rights Fund (NARF). NARF thanks the Committee for the opportunity to testify today regarding the statutes and cases that govern the accounts, funds and assets that are held by the United States government in trust for American Indian and Alaska Native Tribes. NARF represents over 40 tribes in their historical claims for breach of trust accounting and management duties. Some of these cases have been in court for 20 years and all them have been in settlement negotiations with the government.

The government's holding of trust accounts for tribes dates back to an 1820 federal policy. At that time when the United States by treaty purchased land from tribes the government did not make direct payment to tribes; rather, it held the money in trust for tribes unless and until it distributed the money to the tribal beneficiaries. Over time this policy and practice evolved into statutes by which the government holds in trust "Judgment Awards," which are monetary awards or claims settlements to tribes typically from entities like the historic Indian Claims Commission, and "Proceeds of Labor" accounts, which are based on income earned from land and natural resources that are under trust management for tribes by the government. Today the government purports to hold about 2,900 trust accounts for about 250 tribes.

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Tribal Trust Statutes

The government's management of tribal trust accounts, funds, and assets are governed by several statutory schemes. There are statutes that address tribal trust accounting duties and issues. There are statutes that address the investment of tribal trust funds. There are statutes that address the management of tribal trust assets and natural resources. By these statutes Congress has delegated authority for fiduciary duties regarding tribal trust fund accounts, funds, and assets primarily to the Departments of the Interior and the Treasury.

Investment Statutes. Nineteenth century treaties and statutes usually ensured that while it held funds in trust for tribes, the government was obligated to earn interest on the funds. Throughout the twentieth century, statutory fiduciary investment duties and beneficiary protections increased for tribal trust funds. The statutes governing the government's investment of tribal trust funds are codified at 25 U.S.C. §§ 161, 161a, 161b and 162a. Generally, the Interior Department has discretion to deposit tribal Proceeds of Labor account funds in the Treasury or invest them outside of the Treasury in a range of statutorily approved financial instruments. If deposited in the Treasury, since 1984 they must earn interest at rates determined by Treasury considering current market yields on comparable marketable obligations. Since 1974 Interior regulations have required Judgment Awards to be invested outside of Treasury.

Resource Management Statutes. A good summary of the general statutes governing the management of tribal land (including leases for agriculture, grazing and rights of way) and natural resources such as oil, gas, minerals and timber that the government holds in trust for tribes can be found in Felix S. Cohen, *Handbook of Federal Indian Law* §§ 17.01 – 17.04 (2005

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ed.). These statutes typically include provisions for the government's collection of income from the management of tribal trust assets and deposit of that income in Proceeds of Labor accounts for tribal beneficiaries. There are also a few "tribe specific" statutes that govern the government's management of the trust assets or natural resources of a specific tribe.

Accounting Statutes. Congress recently has addressed tribal trust account accounting matters in several ways. Since 1987 Congress has mandated that the government perform and provide tribal trust account accountings, audits and reconciliations. Pub. L. No. 100-202 (1987). The accounting and audit mandates are key features of the American Indian Trust Fund Management Reform Act of 1994. Pub. L. No. 103 – 412; 25 U.S.C. §§ 4044, 4011(c). In addition, since 1990, in the so-called Indian Trust Accounting Statutes, Congress has provided that, with respect to tribal trust fund mismanagement claims, the general six year statute of limitations for claims against the government does not begin to run unless and until the government has provided tribal beneficiaries with proper trust fund accountings. Pub. L. No. 101-512 (1990) – Pub. L. No. 112-74 (2011). In the wake of the provision of reports to tribes in 1996 as a result of a government contract with the accounting firm of Arthur Andersen to perform tribal trust accountings, in 2002 and 2005 Congress provided that for purposes of applicable statutes of limitations the date on which tribes received their Arthur Andersen reports is deemed to be December 31, 1999 and December 31, 2000 respectively. Pub. L. No. 107-153 (2002), Pub. L. No. 109-158 (2005). These last two sets of statutes are intended to toll the commencement of statutes of limitations on tribal trust accounting and mismanagement claims and defer the accrual of such claims.

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Tribal Trust Cases

Indian Claims Commission. Historically tribes had limited access to federal courts and had to get special acts of Congress authorizing their claims against the government. In 1946 Congress created the Indian Claims Commission (ICC). Pub. L. No. 79-726. The ICC was authorized generally for a limited time period to hear and adjudicate historic claims of tribes against the government that accrued before August 13, 1946. It had jurisdiction only to award money damages. There were over 600 ICC claims filed. When the ICC began, the government was holding about \$28 million in trust for tribes. The ICC ultimately awarded over \$1.2 billion to tribes as Judgment Awards held in trust by the government unless and until distributed.

Supreme Court. Tribal access to federal courts today is generally more available but the U.S. Supreme Court has set strict requirements for tribes suing the government for money damages for alleged breaches of trust. The Court requires tribes to show a substantive statute or regulation that 1) imposes specific fiduciary duties or creates specific beneficiary rights and 2) can be “fairly interpreted” as mandating compensation by the government in the event of a breach. *United States v Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*); *United States v Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*); *United States v Navajo Nation*, 556 U.S. 287 (2009) (*Navajo II*).

Post-AA Reports. As noted above, tribal trust account holders were provided Arthur Andersen reports in 1996. The Arthur Andersen reports examined some transactions in some tribal trust accounts for a 20 year period (1972 to 1992). Also as noted above, for limitations statute purposes, in 2005 Congress deemed these reports to have been received by tribes on

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December 31, 2000. Without further addressing of the matter by Congress, by the end of 2006, over 100 tribes had filed claims in federal courts for historical trust accountings or for damages for trust funds and asset mismanagement.

Due to threshold issues of jurisdiction, discovery, evidence and procedure very few tribal trust cases have proceeded to determinations regarding the merits of a tribe's claims or remedies. To this day there are no final unappealed court decisions on the merits of government liability for historical failure to account or for funds or assets fiduciary mismanagement. There are no final decisions with appeals exhausted regarding the existence or scope of remedies or relief that may be judicially awarded. Tribal trust cases are costly and time consuming.

Settlements. Between 2001 and 2009 there were four full or partial negotiated settlements of tribal trust claims. From 2010-2011 there were another three negotiated settlements. In 2012 there have been negotiated settlements in 42 tribal trust cases.

Conclusion

Many reports from federal agencies including the Government Accountability Office and the Department of the Interior's Office of the Inspector General have been highly critical of the government's historical failure to account for and properly manage tribal trust funds and assets. Government contractors including Arthur Andersen and Price Waterhouse have reached similar conclusions. The 1994 Trust Reform Act was preceded by House Report No. 102-488 (1992), entitled "*Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund.*"

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In light of these reports, court cases and settlements, NARF believes that it is timely for Congress to review the government's on-going fiduciary management of tribal trust accounts, funds and assets. While it is not for NARF to make specific recommendations, in keeping with tribal sovereignty, the federal policy of government-to-government relations with tribal nations and the recent United Nations Declaration on the Rights of Indigenous Peoples – which includes the right of indigenous peoples to “free, prior and informed consent” to approve or reject proposed actions or projects that may affect them and their land and resources -- NARF urges Congress to work with tribes regarding any needed trust reform. The new Secretarial Commission on Indian Trust Administration and Reform is tasked with providing advice and recommendations to the Secretary of the Interior on trust management. As part of its comprehensive evaluation of government trust management the Commission is seeking the input of tribes and Indian organizations at a scheduled series of public meetings this year. Tribes and national and regional tribal organizations have invaluable experience and expertise on tribal trust accounts, funds and assets that can be shared with the Commission, and with Congress through hearings such as this.

Thank you for the opportunity to assist the Committee at this Oversight Hearing.