

**Presentation of the Native American Rights Fund for the
Secretarial Commission on Indian Trust Administration and Reform Meeting #3
Albuquerque, NM
June 12, 2012**

From what began as a federal policy in 1820, today by federal law the United States government holds funds and assets in trust for American Indian and Alaska Native tribes. The government reports that as trustee it holds almost 3,000 accounts valued collectively at over \$3 billion for over 250 tribes.¹ U.S. Department of the Interior, *Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Managed by the U.S. Department of the Interior Office of the Special Trustee for American Indians Annual Report 2011*; U.S. Department of the Interior, Office of the Secretary, *News Release* (Nov. 18, 2009). The government categorizes most tribal trust accounts as either: 1) “Judgment Awards,” which are monetary awards or claims settlements to tribes typically from entities like the historic Indian Claims Commission) or 2) “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. Many statutes – some of which date back to the 1800s -- govern various aspects of the government’s fiduciary management of tribal trust funds including accounting for tribal trust accounts, investment of tribal trust funds, and management of tribal trust assets (land and natural resources). By these statutes Congress has delegated authority for fiduciary duties regarding tribal trust accounts, funds and assets primarily to the Departments of the Interior and the Treasury.

NARF’s presentation to the Indian Trust Commission today will focus on issues related to the government’s fiduciary accounting for tribal trust accounts. “Accounting” for a trust account is a trustee’s most basic fiduciary obligation. The definitions, standards and scopes of trust accountings may vary but there are several essential elements. A trust accounting involves record keeping and a detailed description of transactions and activity conducted by the trustee from the inception of the trust to the present. Dates and amounts of transactions must be verified as authorized and accurate under the

¹ The accounts that the government holds in trust for tribes are independent of the accounts that the government holds in trust for hundreds of thousands of individual Indians.

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terms of the trust. To this day not one tribe ever has received full and accurate historical accountings of each and every trust account the government holds or has held for it. In the past three decades in particular this basic unfulfilled trust obligation – accountings – has led to massive efforts by government agencies and contractors, Congress and the courts to address a problem that remains unresolved.

In the early 1980s two key agency reports criticized the government's accounting of tribal trust accounts. U.S. General Accounting Office, *Major Improvements Needed in the Bureau of Indian Affairs' Accounting System* (Sept. 1982); U.S. Department of the Interior, Office of the Inspector General, *Bureau of Indian Affairs Accounting Controls Over Tribal Trust Funds Audit Report* (Sept. 1983). Subsequent reports of government contractors agreed. Price Waterhouse, *Bureau of Indian Affairs In Depth Review of Indian Trust Funds* (1984); Arthur Andersen, *Trust Funds Managed by the U.S. Department of the Interior, Bureau of Indian Affairs, Report on Compliance and Report on Internal Controls as of Sept. 30, 1988* (1989).

When the Bureau of Indian Affairs (BIA) embarked on an official effort to contract out future collection of, accounting for, and investment management of tribal trust accounts and funds, in 1987 Congress prohibited the BIA from using any Interior appropriations funds "to transfer funds under a contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for such tribe or individual have been audited and reconciled, and the tribe or individual has been provided with an accounting of such funds." Pub. L. 100-202 (1987). Three years later Congress also provided that, "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds." Pub. L. 101-512 (1990).

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In 1991 the BIA awarded Arthur Andersen a \$12 million contract to reconcile all transactions in all tribal and individual Indian trust accounts from their inception. Arthur Andersen's contract work ultimately consisted of researching only some transactions in some tribal trust accounts for a twenty year period (FYs 1973 – 1992). Due to insufficient records, Arthur Andersen could not conduct full accountings or reconciliations; instead it applied agreed upon "alternative procedures" to review accounts and test transactions. Even with this reduced scope and procedures the Arthur Anderson contract final cost was \$21 million.

In 1996 the BIA sent Arthur Andersen reports to 311 tribes. Meetings, consultations, and correspondence ensued where the government tried to get tribes to agree that the Arthur Andersen reports were the "accountings" referred to by Congress in the contract prohibition and tolling legislation, and in the 1994 American Indian Trust Fund Management Reform Act. In 2002, mindful of the six year limitations statute tolling legislation, some tribes began to file court cases seeking full and complete trust accountings and declarations that the Arthur Andersen reports were not such accountings. Congress responded with yet another "legislative fix" providing that for purposes of applicable limitations statutes the date on which tribes received their Arthur Andersen reports was deemed to be December 31, 1999. In 2005 Congress deemed the Arthur Andersen report receipt date to be December 31, 2000. But in 2006 Congress declined to address the matter further.

By January 2007 about 114 tribes had filed federal court cases for historical trust accountings or for damages for trust funds and trust asset mismanagement. As of June 2012 about 70 of these cases involving about 110 tribes remain pending (although settlements by over 40 tribes recently have been announced). Not one court has reached the merits of whether tribes are due historical trust accountings, whether such accountings have been provided, or whether, if such accountings cannot be

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provided, what liability if any the government has and what remedies if any tribes have. In short, there are no final appeals-exhausted decisions on tribal trust accountings. In addition to threshold jurisdictional, procedural, and evidentiary issues in tribal trust cases, the accounting claims themselves raise a host of issues over accounting “standards,” records “availability,” and the “cost and time” presumably entailed in such accountings.

The 1994 Trust Reform Act really focuses on ‘improving accounting controls and reporting rather than managing’ tribal trust funds and assets. Leslie S. Oakes and Joni J. Young, *Reconciling Conflict: The Role of Accounting in the American Indian Trust Fund Debacle* (2009). The 1994 Act requires the Secretary to “account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian” 25 U.S.C. § 4011(a). The Secretary also must provide quarterly “periodic statements of performance” (PSPs) that identify “the source, type, and status of the funds; the beginning balance; the gains and losses’ receipts and disbursements; and the ending balance.” 25 U.S.C. § 4011(b).² The Secretary must “cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian” 25 U.S.C. § 4011(c).³

The duties of the Office of the Special Trustee (OST) for American Indians created by the 1994 Act include monitoring “the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders with a fair and accurate accounting of all trust accounts.”

25 U.S.C. § 4043(b)(2)(A). The Special Trustee must also “ensure that the Bureau imposes standardized

² Under regulation tribes may request monthly trust account statements and may “make arrangements to access account information electronically.” 25 C.F.R. § 115.802(b) and (c).

³ The OIG reports that in the 2011 Annual Audit which was performed by KPMG LLP under a contract with OST, KPMG issued qualified opinions on Tribal and IIM financial statements. “KPMG was unable to satisfy themselves as to the fairness of trust fund balances due to the effects of certain parties, for whom OST holds assets in trust, disagreeing with the balances recorded by OST and/or having requested an accounting of their trust funds, and of which certain of these parties have filed claims against the United States.”

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trust fund accounting procedures throughout the Bureau.” 25 U.S.C. 4043(c)(2). Legal scholarly writing about the 1994 Act is scant. From a private sector perspective, the 1994 Act leaves Interior’s accounting responsibilities for tribal trust accounts “relatively limited.” Oakes and Young, *Reconciling Conflict*.

The recent “Settlement Proposal to the Obama” (SPOA) Joint Stipulations of Settlement that will likely end the pending historical accounting claims of over 40 tribes, *inter alia*, provide generally that in consideration for claims settlement payments received, tribes “waive and release” their claims against the government for historical accountings and reconciliations of their trust funds and assets. SPOA settlements also require tribes to attest to their trust account balances as stated in the most recent PSPs from OST. SPOA tribes must accept the PSPs as “accurate, full, true, and correct . . . as of the date of the Statements” and “in fulfillment of any accounting of [their] trust fund accounts that is required by law as of the date” of settlement as approved by the Court. Finally, SPOA tribes must accept that the government has satisfied “any duty and responsibility to account for and report to” them regarding their trust funds. As long as the government continues to provide PSPs, the SPOA tribes attest that the “mailing, provision, or otherwise making available” to tribes of the PSPs satisfies the 1994 Reform Act reporting requirements including investment reporting requirements. Similarly, the SPOA tribes attest that the mailing, provision or otherwise making available to tribes letters on an annual basis regarding Interior’s annual audit of all tribal trust funds satisfies the Reform Act’s annual audit requirements.

Absent fraud or gross negligence, settling SPOA tribes may contest the accuracy of Interior’s post-court-approved settlement reports only if they provide notice in writing by certified mail to Interior within six years. Interior has 60 days within which to respond to such claims, and SPOA tribes may not file pre-response damages or equitable relief claims unless the government fails to timely respond or a tribe believes in good faith that claims are about to expire under an applicable limitations statute.

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The current state of tribal trust accounting issues can be summed up as follows: there are still pending claims for historical accountings – indeed there are many tribes that have yet to file such claims. The tolling statute fix, which provides that “the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss,” is still on the books. There is little reported analysis or consensus on the sufficiency of the 1994 Act accounting and reporting provisions. The recent SPOA settlement accounting and reporting provisions have barely been approved by a court, let alone tested.

The tribal and IIM financial statements independently audited for OST are still receiving qualified opinions (KPMG, Nov. 10, 2011). This is an annual audit at the “aggregate,” not individual tribal level. Less has been studied and reported about the trustee’s obligations and the beneficiaries’ needs and rights at the tribal level. Accountability at the tribal level is all the more important given its context in a unique government to government fiduciary relationship. Future assurance and enforcement of the fiduciary accountability of the government to each and every tribal beneficiary for even the most basic record keeping, reporting and accounting obligations will require resources and joint decision making by both sovereigns.