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LEGISLATIVE PROPOSALS RELATING TO THE STATUTE OF LIMITATIONS ON CLAIMS AGAINST THE UNITED STATES RELATED TO THE MANAGEMENT OF INDIAN TRIBAL TRUST FUND ACCOUNTS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 1857

TO ENCOURAGE THE NEGOTIATED SETTLEMENT OF TRIBAL CLAIMS

FEBRUARY 7, 2002
WASHINGTON, DC

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LEGISLATIVE PROPOSALS RELATING TO THE STATUTE OF LIMITATIONS ON CLAIMS AGAINST THE UNITED STATES RELATED TO THE MANAGEMENT OF INDIAN TRIBAL TRUST FUND ACCOUNTS

THURSDAY, FEBRUARY 7, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Campbell, Murkowski, Johnson, and Thomas.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee meets this morning to receive testimony on proposals addressing the statute of limitation on claims of tribal governments against the United States related to the management of Indian tribal trust funds.

Over the course of the last year the committee has received various proposals from representatives of tribal governments that are concerned with the very real possibility that the United States might assert that reports submitted to the tribes whose trust funds are held by the Federal Government constituted notice sufficient to commence the running of the statute of limitation against tribal claims.

One such proposal was introduced in the Senate in the closing days of the first session of the 107th Congress by the vice chairman of this committee, Senator Campbell. I was pleased to serve as a cosponsor of that measure.

For those who may not be familiar with the background of such claims, I will take 1 moment here to review some of the more recent history. As a function of treaties and the course of dealings between the United States and Indian tribes, the United States holds legal title to lands held in trust for individual Indians as well as for Indian tribal governments.

The revenues derived from trust lands are also held in trust by the United States for the benefit of individual Indians and tribal governments. Currently, the Department of the Interior maintains approximately 1,400 accounts of 315 Indian tribes with assets in

excess of $2.6 billion and over 260,000 individual Indian money trust fund accounts with a balance of $400 million as of September 30, 2000.

Receipts are deposited to these accounts primarily from land use agreements, royalties from natural resource depletion, enterprises related to trust resources, judgment awards, the settlement of Indian claims, and investment income.

However, an independent audit of the trust funds for fiscal year 2000 noted that reliance cannot be placed on the balances reflected in the trust fund accounts until tribal accounts are reconciled and/or resolved through negotiation and settlement or until a now pending class action lawsuit that has been brought on behalf of the individual Indian money account holders is resolved.

The Congress first established an Indian trust fund account reconciliation requirement in the Supplemental Appropriation Act of 1987 in response to tribal concerns that the Interior Department had not consistently provided them with statements of their account balances; that their trust fund accounts had never been reconciled and that the department planned to contract with a third party for the management of trust fund accounts.

The original provision required that the accounts be audited and reconciled before the department transferred the responsibility for managing the trust funds to a third party. From 1990–95 provisions in the Appropriations Acts for the Department of the Interior added a requirement that the accounts be reconciled to the earliest possible date and that the department obtain an independent certification of the reconciliation work.

In 1994, the Congress required the Interior Secretary to provide tribes with a reconciled account statement as of September 30, 1995 in the American Indian Trust Fund Management Reform Act.

From fiscal year 1992–2001, the Appropriations Acts for the Department have included an additional provision which requires that tribal and individual Indian money accounts holders be furnished with an accounting from which the beneficiary can determine whether there has been a loss.

Recognizing that it would be unfair to allow the statute of limitations to run on claims until each account holder was provided with an accounting, since fiscal year 1991, the Congress has included in the Interior Appropriation Acts a provision that tolls the statute of limitations on tribal and individual Indian claims against the United States arising out of the department's management of tribal and individual Indian trust funds.

A similar provision is contained in the President's budget request for fiscal year 2003. Beginning in 1992, the Interior Department did undertake work to provide for the reconciliation of tribal trust fund accounts and, at least initially to examine whether individual Indian money trust accounts could also be reconciled.

This work was accomplished through contractors, primarily the Arthur Andersen firm, and the Congress appropriated over $20 million so that this important work of reconciling trust fund accounts could proceed. The Congress also called upon the General Accounting Office [GAO] to oversee the reconciliation process.

Following the reconciliation work performed by the contractors and supplemented by additional work on part of the Interior De-

partment, reports were issued to each tribal government for whom the United States holds funds in trust.

It is these reports that are at issue, because it's alleged that the reports constitute notice sufficient to commence the statute of limitations running on any claims that tribal governments may have against the United States relating to the Government's management of trust funds.

In May 1996, GAO issued a report on the reconciliation process concluding that, and I quote:

> Interior's reporting of the reconciliation project results was not as complete as it could have been. Interior did not disclose in the report packages to tribes the procedures specified in the reconciliation contract that were not performed or those could not be completed and the reasons.
>
> For the procedures that were performed, Interior did not fully disclose scope limitations or changes in methodologies such as accounts and time periods that were not covered and alternative source documents used.

Thus, as we will hear this morning, the reconciliation process did not accomplish the primary objective it sought to achieve, namely to assure the affected tribal governments that the balances in the trust fund accounts were balances upon which they could rely.

It has now been 6 years since many of the tribal governments received the results of the reconciliation process. Faced with an assertion that the receipt of these reports commenced the running of the statute of limitations, most prudent tribal governments would take action to preserve their claims against the United States by filing legal claims before the running of the statute. These actions, if filed, and across Indian country many have been filed, hold the potential for a multitude of adjudications by different courts with varying and likely inconsistent results as well as exposing the United States to unlimited liability.

So, we are here this morning to explore whether there is a will and a way for well-intentioned people to come together and agree on a legislative proposal that will address the statute of limitations on tribal claims and thereby enable the parties to pursue some other path for the resolution of these claims.

[Text of S. 1857 follows:]

107TH CONGRESS
1ST SESSION

S. 1857

II

To encourage the negotiated settlement of tribal claims.

IN THE SENATE OF THE UNITED STATES

DECEMBER 19 (legislative day, DECEMBER 18), 2001

Mr. CAMPBELL (for himself and Mr. INOUYE) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

A BILL

To encourage the negotiated settlement of tribal claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SETTLEMENT OF TRIBAL CLAIMS.

(a) IN GENERAL.—Solely for purposes of providing an opportunity to explore the settlement of tribal claims, during fiscal year 2002, the statute of limitations shall be deemed not to have run for any claim concerning losses to or mismanagement of tribal trust funds.

(b) NO PRECLUSION OF FINDINGS.—Nothing in this section precludes a court or other adjudicatory entity from adjudicting a statute of limitations defense either:

(1) in an action filed on or after October 1, 2002; or

(2) in any case, controversy, or other proceeding pending on the date of enactment of this section against the United States in which a court or adjudicatory entity is called on to determine whether the statute of limitations on such a claim has run.

○

The CHAIRMAN. I call upon the gentleman from Alaska.

STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Good morning. Chairman Inouye, I am pleased to be here. I do support the legislation that has been proposed by both you and Senator Campbell to extend the statute of limitations. But I think that the issue goes far deeper than this.

We have had the past two Secretaries of the Interior noted for contempt of court. That's certainly a bipartisan selection by the court. So, this is not partisan. It's a reality. The reality, in my opinion, and I have been on this committee for, well, 21 years or thereabouts. I can't remember the exact dates. In any event, this is something that we have been faced with.

In my opinion, the BIA is inadequate to manage these trust accounts. I don't know how long or how many decades it's going to take for the Indian tribes to recognize this. This is not a lessening of the BIA's power. This is a function that ordinarily is done by competent trust departments that put their credibility behind their ability to manage trusts and do accounting work and keep track of records.

I recall, Chairman Inouye, being at previous hearings where we had pictures of how this stuff has been stored and there's just absolutely no excuse for it to go on.

So I am here to simply, I guess, express my frustration. Whether it be Secretary Norton or previous Secretary Babbitt, this process has been going on so long, you can't fix the blame anywhere. You can't fix it on an administration. The accountability obviously belongs with the BIA, but the BIA is faceless in the sense that, you know, who caused it? Well, we don't know. It's BIA, but it's the responsibility of the Secretary. Until a Secretary comes along and says:

> I am going to make an administrative decision to change it and we are going to do it and get it done right, this committee is going to be faced with extensions and situations like we have today.

I would encourage the members of the committee, the professional staff and the tribes and the BIA to recognize that in my opinion we are not trying to diminish their authority. We are trying to functionally meet the responsibility associated with managing the individual trusts for the tribes so they can be properly administered.

The BIA is incapable of that. It is not a criticism of the BIA, they are just not set up to do it. So, let us get them out of the business before we have to go through this any more. So, thank you for the opportunity to be with you again. I wish you well in your deliberations. I do support the legislation. Thank you.

The CHAIRMAN. As always, you are right on target.

Senator Johnson, do you have any statement you would like to make?

Senator JOHNSON. I will submit a statement for the record.

The CHAIRMAN. Without objection the statement will be made part of the record.

[Prepared statement of Senator Johnson appears in appendix.]

The CHAIRMAN. Now, it is my pleasure to call upon the chief of the Osage Nation and chairman of the Intertribal Monitoring Association, Charles Tillman.

Chief Tillman will be accompanied by Mr. Alan Taradash, consultant to the association.

STATEMENT OF CHARLES TILLMAN, CHIEF, OSAGE NATION AND CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION, ACCOMPANIED BY ALAN TARADASH, ESQUIRE, CONSULTANT TO THE INTERTRIBAL MONITORING ASSOCIATION

Mr. TILLMAN. Thank you, Chairman Inouye. It's a privilege to be here before the community once again and also to represent the Intertribal Monitoring Association before this distinguished group.

Mr. Chairman, I am too frustrated with our trustee. We, the 500 and some tribes, the beneficiary of the natural resources that go across this country, we, too, believe that the BIA is not capable of handling that trust. When we talk about trust, Dr. Charles Wilkerson of the University of Colorado was the speaker the other day at Shepherdstown, WV where a task force was gathered up of tribes. He said some very important things about trust. The trust law appeared in 1831 under Chief Justice Marshall and the *Cherokee Nation* case.

Marshall understood the treaty negotiations and knew what the tribes were asking for. That was: No. 1, disease protection against the white race protection against trespass of their land and protection for their land. This was 171 years ago.

Here we are today asking for protection and living up to what Congress said 171 years ago. What Congress realized, the Tribal Trust Law is the most direct, most private and should be held at the highest standard of all trust law. It is not a common trust law. It should be held at its highest standard.

The moral issue has been felt since the President Nixon administration and hopefully to every administration thereafter. We have not forgotten what Justice Marshall said, that Congress was the ultimate trust holder.

I am here today to ask Congress to flex some of its authority and in this bill, on S. 1857, the Intertribal Monitoring Association which I represent consists of 53 tribes or large stakeholders. It is a sad day that we come before this committee and we also recommend, highly recommend, this bill. If it's a possibility of this bill, and I met with my board yesterday solely for the purpose of providing an opportunity to explore the settlement of tribal claims during the fiscal year of 2002, the statutes of limitation shall be deemed not to have run for any claim concerning losses or to mismanagement of tribal trust funds and resources.

Further, with regard to the reconciliation report distributed to tribes by Arthur Andersen and the Department of the Interior in 1996, one, these reports shall not be considered to have started the running of the statutes of limitation for any claim against the United States or any Indian tribe regarding the management of tribal trust funds and resources, regardless of when such claim was filed.

No. 2, these reports shall not consider for any purpose to be an accounting sufficient to fulfill the United States duty to account as

required by the American Indian Trust Fund Management Reform Act of 1994 under other applicable law and under general principles of trust law.

No. 3, the United States is precluded from introducing these reports into evaluated and using them as rebuttal evidence and otherwise relying on them in administrative or judicial proceedings to provide any reported conclusion of fact contained in these reports.

Senator Inouye, we do support the bill and I am here to say that I have been here many times and I do believe in my heart this day that I am also a frustrated person that came 1,400 miles to say that Congress needs to make sure that these trust functions are carried out by our trustee, the BIA, and Congress should have its own oversight committee for this purpose and I would like to recommend that.

The Congress itself, the body itself, being the trustee should have that committee. Who else should serve as that committee is the Intertribal Monitoring Association because of its membership, because of its ownership and because of the purpose that it serves and that's to protect our asset.

I agree with Senator Murkowski. I agree that the Bureau needs to be reformed. I do not think that we should do away with the agency because the Native Americans across this country, that's the only we have to rely upon in certain matters. But it's not equipped or it is not geared to handle the vast functions of its responsibility right now.

Now, we can draw all the boxes and we can come up with all the management, but we have to have the M–O–N–E Y, money, to make those functions work. That has to be in place, Senator. If that money is not there, you may have the best widget in the world, but you will never produce another one without the money. That is what I am here to tell you.

We do agree on the Senate Bill 1857 and what it says, but I also wanted to interject those things into this is hearing. I wish we had more time, I would tell you a lot more. But I want to pass it on to my colleague, Alan Taradash. I am sure he has a few comments he would like to make.

[Prepared statement of Mr. Tillman appears in appendix.]

The CHAIRMAN. May I ask a few questions now before we go to Mr. Taradash because there is a vote pending in the Senate?

Mr. Tillman. Yes, sir.

The CHAIRMAN. GAO has advised us that in 1996 over 300 tribes were provided with these reconciliation reports. Those who wish to dispute the balances stated in those reports must file claims within 6 years. Otherwise they run the risk that the statute will be held to have been expired; 6 years have now passed

Now, you are in charge of this association. Do you know how many tribes have filed an action against the United States?

Mr. TILLMAN. I know that I can think of off the top of my head approximately maybe 12 tribes that I do know of. That includes the Osage. We were advised at that by the Assistant Secretary, Kevin Gover because he told me personally that this was going to drag on for years. He said, "The only way to do that is to take it to court."

We filed not because of the statute of limitations, but because of to stop the bleeding for one and to get it into the proper area of law, which was claims court. But I also understand there are three tribes in the northwest, or maybe four, that are filing before the end of the month.

So, you don't have many tribes that are filing, Senator. One reason is the lack of money. It is very expensive to get into court and some of our smaller tribes do not have the money to bring on a court action of this nature.

So, we represent the 53 tribes and we are beginning to find that out, that our trustee, the United States or the BIA is doing what it's capable of doing and everyday is the accounting, the wrong accountability. There's no accountability whatsoever with the BIA.

It goes on everyday and how do you stop that? Some of these tribes have no answer for that. Some of us tribes that do have the money have an answer to that. What I think is that when we, the Osage Tribe, a few years ago took an assessment of our agency in 1992 and 1996, that assessment was taken by Coopers Lybrand and that assessment told us that the BIA was operating back in the 1960's, the 1950's and 1960's.

Here we are in 2002 and how do you bring that system up to standard? That's the question.

The CHAIRMAN. I'll read from the President's budget request for fiscal year 2003. In that request there is the following language. I quote that:

> Notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of enactment of this act concerning losses to or mismanagement of trust funds until the affected tribe or individual nation has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Mr. Taradash, you are the consultant and the expert here. In your view, what would constitute an accounting from which a beneficiary can determine whether there has been a loss?

Mr. TARADASH. That is a very important point, Senator. I also want to first express my gratitude to you and the members of the committee for allowing us to present these views here. Many years ago, approximately ten, along with the president and delegation from the tribal council, the Hickory Apache Tribe and its auditor, we met with you, Senator Inouye, and showed you at that time the deficiencies in just oil and gas accounting that resulted in huge losses in the collection of disposed of, non-renewable resources.

I remember your reaction at the time. As you sat with this huge spreadsheet on your lap you said, "This is theft." Those words stuck with me because of the obviousness with which you grasped the deficiencies.

Now, there has been a great deal of focus on the so- called accounting. When one looks at what the Department of Justice produces in claims by tribes in the court of Federal claims as accounting reports, they do not give you the information you need to determine what happened to your assets, both cash and non-cash assets.

The difference is this, Senator: If one gets a report that is filled with disclaimers, such as all of the reconciliation reports produced by Arthur Andersen, and the disclaimers, I might add, are by design so that Andersen cannot be sued by any tribe—this is what they sought to achieve—for detrimental reliance upon any of the

numbers in that report, not the opening balance, not the additions or subtractions nor the closing balance.

So, Andersen receives, by its disclaimer, insulation from accountability and we were told in meetings with the then Comptroller of the United States, Ed Mazor, in 1992 that what he wanted were numbers he could defend on the Hill in this exercise that Andersen then proceeded with. He did not want a complete and accurate accounting because we discussed with him the need to account for completely and accurately non-cash assets that become the trust corpus of funds.

It's ludicrous for anyone to suggest that if one accounts for the cash that you happen to find in the bank, that that's an adequate accounting of one's assets.

We even have horrible examples. There was a Kickapoo gentleman, for example, that died under a bridge a millionaire, not known to him because the Bureau had never told him that he had that money from valuable mineral resources. These accounting reports do not give one any information on the totality of one's assets and what happened to them. And we are expressly told that you can't rely upon them.

If it is good enough for Arthur Andersen to stand behind as a shield against liability, then it ought to be good enough for the tribes to make the claim that they should not be bound in any way by those numbers, not even as notice of incompetence in the management of their money.

There is a case about 10 years vintage in the Court of Federal Claims which precluded a tribe from getting an accounting and going after damages because the judge in that case, with no citation to authority held that the tribal council had been complaining to the Bureau of Indian Affairs for years about no financial reports.

Because the tribe could not show that it was, and these are the judge's words, "shockingly ignorant" of their financial affairs, that they were going to be held to have been on notice from the time they started complaining.

Now, no one else is provided with that sort of ludicrous standard. When the savings and loan problems came up, nobody held the savings and loan account holders to those kinds of stratagems by the Department of Justice and Interior. That should not be done to tribes.

The CHAIRMAN. That was pretty clear. I will have to leave now to vote but Senator Campbell has already voted so he will continue the hearings.

Senator CAMPBELL [ASSUMING CHAIR]. Thank you, Mr. Chairman. I apologize for being here a little bit late. It was my understanding that the hearing was going to start after the vote, so I went over and did my duty.

It's nice to see you here, Chief Tillman, my old friend. Alan, welcome here, too. To the other witnesses who are here, I am sorry I didn't hear Senator Inouye's questions.

I apologize for not being here in time to do an opening statement, but will submit that for the record. I know that most of the witnesses recognize that this hearing, even though there are many aspects of the trust fund debacle, this basically is not about the history of the trust fund's management or about the proposals to re-

form it and not about the *Cobell* litigation either. It's about avoiding litigation. That is what this bill is all about. So, I know we will try to keep directed to that.

If you have already answered the questions I am going to ask you Alan, you might just tell me that so I don't encumber you again.

First of all, when the tribal lawsuits were filed, have any of your clients filed in the belief that they must do so or lose their right to having them filed?

Mr. TARADASH. Yes, Senator Campbell; on January 8 I filed three cases in the Court of Federal Claims, one for the Delaware Tribe of Oklahoma in Bartlesville, OK which is where they are located; one for the Pueblo of Laguna in New Mexico and one for the Hickory Apache Tribe, also in New Mexico, claiming losses to and mismanagement of all of their trust assets, both cash and non-cash assets.

We have had to make those claims precisely for the reasons that you alluded to.

Senator CAMPBELL. Do you anticipate others being filed, too, if we don't get an extension of the statute of limitations?

Mr. TARADASH. Absolutely. There's a decision in the *Shoshone-Arapaho* case of November 30 of last year in the Court of Federal Claims that expressly determined and interpreted the meaning of the tolling language that Congress has put into appropriations bills, that losses to is different from mismanagement of trust funds and thus in that case permitted those two tribes to go back to August 14, 1946 because they have never been provided an accounting of their trust funds which include upstream, so to speak, losses with respect to disposition or use of trust assets that should have gone into, resulting in cash that should have gone into the trust funds.

Obviously, the Government may appeal that case at some point when it gets concluded, but under the umbrella of very, very good reasoning in that case, I filed those three cases on January 8.

Senator CAMPBELL. Those cases that you did file, did you have an opportunity to get some feedback on how those tribes would feel about extending the statute of limitations and therefore making the filings unnecessary?

Mr. TARADASH. Obviously, Senator, we would much prefer not to have to litigate. It is terribly expensive. I can't stress how expensive it's. It's absolutely unconscionable, and I think obscene, for the Department of the Interior and Justice, along with the then Comptroller of the United States, to have a calculated plan to require especially little tribes that don't have the resources to, if you don't like the number that Andersen is going to churn out, then you sue us. That's an indecent proposal and it's an indecent strategy, which has been implemented. There's a need to correct that.

Senator CAMPBELL. Thank you.

Chief, did you have comments along that line?

Mr. TILLMAN. Yes; the comment I have is the haves and the have-nots. That pretty well sums it up. The tribes that have the money, they can file. The have-nots, they are at the mercy of whatever.

But the ITMA and its 53 membership and its website has made it known that what the Government claims, that the Arthur Andersen report, as long as it's running, when it runs out in the 6 years, wherever the statutes are, that you need to file something.

So, our organization has put that information out, sir.

Senator CAMPBELL. Well then, let me ask you, will this bill, assuming you have had a chance to look at it, do you think that your clients would be inclined to negotiate with the Federal Government to settle other claims if we can't extend the statute of limitations?

Mr. TILLMAN. The ITMA, in its board meeting as of 2 days ago, has sat down and looked at this bill and concurrently we support this bill wholeheartedly.

Mr. TARADASH. Senator Campbell, may I add one thing to that?

Senator CAMPBELL. Yes.

Mr. TARADASH. With respect to settlement, I would like to mention that it's terribly important to be mindful of the judicial closure and unintended results that occurred the last time Congress visited, in a sense, these kinds of issues when it passed the Indian Claims Commission Act in 1946.

What Congress intended was that tribes be fully compensated, not only for things which smacked of wrongs and legal theories recognized that law, but it added a section that's very unique in the annals of legislation that deal with litigation. The fair and honorable dealings clause.

Tribes were supposed to be able to come to court under the purview of that act and demonstrate that they had been dealt with dishonorably or even just unfairly and had resulted in losses and be compensated for it.

However, when one looks at those cases tribes lost horribly, initially because they couldn't prove up the cases because they didn't have the money to hire the experts necessary to do the prove-ups. One of the things that Senator Inouye alluded to before you arrived, Senator Campbell, was what about the desirability of entering into some kind of negotiation process.

I would like to bring to the committee's attention the structural problem that has a solution that if it were to be implemented I think it would make settlement discussions very, very fruitful and possible.

The structural problem is this: By statute the Attorney General of the United States must defend the United States when sued. Defense of the United States with respect to all of the Department of Justice is the only thing that has to be vindicated upon lawsuit.

There's no statute that says the functional equivalent of a private trustee's lawyer's duty and that's, if you find or are aware of losses to or mismanagement of the trust corpus that your client, the trustee, is responsible for, you as a lawyer have an obligation to tell the beneficiary, the failure of which in your performance subjects you to suit and liability for the failure to disclose. The trustee has a similar duty.

Our trustee has no such duty. Our trustee's lawyers have no such duty. So, the duty that they have is to defeat those claims by any means necessary. And the problem, Senator, comes up not just in the Court of Claims, but in district courts throughout the country there are at least 15 cases. In the last 15 years when lawyers

in the Department of Justice have been sanctioned because of obstruction of justice and deceit of courts in Indian claims cases of other cases brought by Indian tribes or allottees.

The reason is, they go to the extreme to defend because they have no legal duty to disclose. If Congress were to fix that and provide that same kind of vindication of honor and duty that a private trustee and a private trustee's lawyer has, then there would be remedies for the brief that are far more direct.

More importantly, there are very, very good people at Justice and Interior that work very hard. They need to have the right incentive to do the job correctly. They don't have it because by statute they have a different mandate.

Senator CAMPBELL. Well, we have dealt with this trust fund problem for a number of years. I am not an attorney and I can tell you that the more we get into it, the more complicated it gets for me.

I think most Americans, other than people who have a pretty strong background in the law, would be completely confused. Maybe we even confused it more in 1991 when we refined the definition of "accounting" and began using the phrase, "An accounting of such funds from which the beneficiary can determine whether there has been a loss."

Did we make it worse?

[Mr. Taradash nods his head in the affirmative].

Senator CAMPBELL. We did. That is the way we do it around here, unfortunately. A lot of times, in an effort to try to correct things we end up making things worse.

Well, let me go on and ask Senator Thomas if he has any questions of you before we move on.

Senator THOMAS. Thank you, Senator. I share your frustration sometimes and I wanted to come primarily to listen to the witnesses because this is an issue that has hung on and it needs to be resolved and we need to find a way to come to that resolution.

I have a short statement for the record.

Senator CAMPBELL. Okay. Without objection that will be included in the record.

[Prepared statement of Senator Thomas appears in the appendix.]

Senator CAMPBELL. We have also, before we go on to the next panel, some comments here that I was asked to read in the record for the benefit of the General Accounting Office [GAO].

We have called upon the GAO to appear before the committee today not in relation to the most recent work of the GAO which has related to the efforts of the previous administration to implement the TAAMs system, but because of the GAO's work in overseeing the department's efforts to reconciliation tribal trust fund accounts in the early 1990's.

At that time the GAO followed the work of the two contractors hired by the Interior Department including the work conducted by Arthur Andersen. However, we should understand that the GAO did not evaluate each of the reports that were sent to the tribal governments for their sufficiency or content, nor have we asked the GAO to appear before the committee to comment on any of those legislative proposals.

We do appreciate your being here. We will go on to the GAO witness, which is McCoy Williams.

STATEMENT OF McCOY WILLIAMS, ACTING DIRECTOR, FINANCIAL MANAGEMENT AND ASSURANCE, GAO, ACCOMPANIED BY MIKE KHOURY, ASSISTANT DIRECTOR, TRUST DEPARTMENT, DEPARTMENT OF THE INTERIOR AND TOM ARMSTRONG, OFFICE OF GENERAL COUNSEL

Senator CAMPBELL. Mr. Williams, welcome to the committee. You may proceed at your leisure.

Mr. WILLIAMS. Mr. Chairman and members of the committee, thank you for the opportunity to be here today to summarize observations from our past work regarding Indian travel trust fund accounts.

I am accompanied by Mike Khoury who is the assistant director responsible for our trust work at the Department of the Interior and Tom Armstrong who is from our Office of General Counsel.

As has been stated in the opening remarks and in other comments this morning, in a June 1993 letter to this committee we noted that the Appropriations Act for the Department of the Interior had for many years contained a provision that told the statute of limitations on claims for losses to or mismanagement of tribal trust funds until the tribe had been furnished with an accounting of its funds from which to try to determine whether there had been a loss.

We also noted that the parties envisioned that such an accounting would result from Interior' then ongoing reconciliation and audit of the tribe for trust fund accounts which the Congress had mandated.

At that time we expressed our view that until there was a mutually acceptable basis for determining account balances and any associated losses, it would be premature to allow the statute of limitations to run. We observed that holding the statute of limitations until reconciliation and audit of an account with this completed or until some mutually acceptable agreement was reached as to the account balance had two overall purposes.

First, it provided all interested parties, including account holders, Interior and the Congress, an opportunity to examine and evaluate all pertinent account information.

Second, it permitted interested parties to resolve all claims arising from Interior's management of the accounts rather than address the specific claims in a piecemeal fashion. To fulfill reconciliation requirements established by the Congress first in the Supplemental Appropriations Act of 1987, Interior contracted with two major independent public accounting firms. One to reconcile the trust accounts and the other to do an independent certification to indicate that the reconciliation resulted in the most complete reconciliation possible.

Interior's Indian trust fund account reconciliation project was completed in January 1996. During the reconciliation project, Interior spent about $21 million for contract costs over a 5-year period in a massive effort to locate supporting documentation and reconstruct historical trust transactions as well as to perform other rec-

onciliation procedures in its attempt to validate tribal account balances.

In January 1996, Interior began providing to each tribe a report package containing the tribe's reconciliation results. During a February 1996 meeting at which Interior officials and the reconciliation contractor summarized the reconciliation project results, tribes raised questions about the adequacy and reliability of the reconciliation results.

In May 1996, we reported on shortcomings of Interior's reconciliation project, including procedures that were not completed due to missing records, systems limitations, time and cost constraints.

In May 1997, we reported to this committee that as of May 6, 1997, Interior had provided reconciliation reports to 310 tribes; 51 of those tribes had disputed the reconciliation results and 41 had accepted the results. Of the remaining 218 tribes, 47 had requested more time to consider the result and 171 had not responded to the reconciliation results.

In summary, although Interior made a massive attempt to reconcile tribal accounts during this reconciliation project, missing records and systems limitations made a full reconciliation impossible.

Mr. Chairman, I would be glad to respond to any questions that you may have at this time.

Senator CAMPBELL. Did your colleagues have any comments? While Senator Inouye is getting reseated, let me ask you a couple of questions. On the certification of audits in 1990, Congress required an independent certification that the Arthur Andersen reconciliations were the most accurate possible. Did that certification occur?

Mr. WILLIAMS. No.

Senator CAMPBELL. It did not?

Mr. WILLIAMS. It did not occur.

Senator CAMPBELL. Why not?

Mr. WILLIAMS. There were procedures that were not performed. There were steps that they were unable to perform. I guess the bottomline is just that all of the procedures that were needed to give a full account were not complete.

Senator CAMPBELL. They were not fulfilled. The GAO has concerns about the Department of the Interior's process, the reconciliation process. Did the BIA follow the GAO's recommendations for informing tribes about the limited scope of the reconciliation reports and the changes that GAO believed were necessary in the reconciliation process?

Mr. WILLIAMS. We recommended that the tribes be provided full disclosure about the areas. A full disclosure of that information was not provided.

Senator CAMPBELL. And you have no way of knowing if those concerns were then passed on to the tribes?

Mr. WILLIAMS. No.

Senator CAMPBELL. Senator Inouye, did you have questions? I will turn it back to you.

The CHAIRMAN. [presiding] Needless to say, this is a very complicated matter. In my opening statement I quoted from the GAO. Do you believe that a tribe receiving a reconciliation report would

be more likely to question its accuracy if each report had fully described the limitations I quoted in the GAO's, May 1996 report?

Mr. WILLIAMS. If I had known of the limitations then I would have scrutinized the accuracy of the reports very carefully. Now, each tribe's interest may vary based on the circumstances. For example, some tribes may not have certain type of leases and shortcomings in that area may not be of a concern to me. But given the fact that there were limitations, I would have given it much scrutiny.

The CHAIRMAN. In the May 1996 GAO report the following also is stated:

> GAO suggested that substantial changes in the scope of procedures as a result of contract modifications and issue papers be explained in the report package transmitted to tribes.
>
> BIA considered providing issue papers to tribes on compact discs, however, the reconciliation project manager told us that due to cost considerations BIA considered instead that these issue papers be made available to tribes at the OTFM in Albuquerque or that tribes could request copies of specific documents by mail.

Would it be fair to say that the process ultimately followed by the BIA in making this information available was less certain to bring home to them an awareness of the deficiencies of the reports than were the alternatives GAO had proposed?

Mr. WILLIAMS. We believed in 1996, as well as today that if the tribes had received full information about the process and the shortcomings in the reconciliation process, then they would have been in the best position possible to make an informed decision.

The CHAIRMAN. In a June 1993 letter to this committee GAO sugested that tolling the statute until a reconciliation and audit of each account is completed or until some mutually acceptable agreement is reached as to the account balance serves two overall purposes. Can you describe those purposes?

Mr. WILLIAMS. Yes; as I included in my statement, we basically stated that first it provides all interested parties, account holders, BIA and the Congress an opportunity to examine and evaluate all pertinent account information.

Second, it permits parties to attempt to resolve all claims arising from BIA's management of the accounts, taking into consideration the practical limitations on the scope of the reconciliation such as the loss of critical records rather than addressing specific claims on a piecemeal fashion.

The CHAIRMAN. Can you explain why GAO believed that until there was a mutually acceptable basis for determining account balances and associated losses it would be premature for Congress to delete the Interior Department Act language tolling the statute?

Mr. WILLIAMS. In a 1993 letter GAO stated:

> The thrust of our position has been that the government, to fulfill its fiduciary responsibilities, must provide account holders a full accounting

The CHAIRMAN. Would the GAO still recommend that Congress continue to toll the statute until the tribal accounts are reconciled and/or resolved through negotiation and settlement?

Mr. WILLIAMS. I will let me Armstrong talk to that one, our attorney.

Mr. ARMSTRONG. Mr. Chairman, as you recognized in your opening statement, we have not done any work recently that would relate to that question. But I think we would suggest to the commit-

tee that if you feel that a tribe would be disadvantaged by an argument that a reconciliation report provided the tribe started the running of the statute of limitations and if you think that giving the parties more time to discuss this, to negotiate, possibly to come to settlement by giving them more time, you could avoid expensive litigation, I think we would suggest that you toll the running of the statute of limitations.

The CHAIRMAN. From what you know of the situation as of this moment, would you recommend that?

Mr. ARMSTRONG. From what I heard this morning—unfortunately, I have to apologize—I haven't been involved in this area for 4 or 5 years now. I was brought here because I was involved in the area back in the early 1990's when we were monitoring the reconciliation effort.

But from what I heard here this morning, you have Chief Tillman advising you that there are a number of tribes who are concerned and Mr. Taradash also advising you that there are a number of tribes who are concerned that they need to go to court in order to preserve their right to file a claim against the United States.

And you heard Mr. Taradash testify that that is a very expensive proposition.

The CHAIRMAN. Thank you. The committee understands that GAO did not review the individual reconciliation report packages that Interior sent to the tribes but you did review the prototype report package.

Based on this review, does GAO believe that the reports are accurate and reliable and do they provide tribal accountholders and tribal governments with a full accounting of their trust funds?

Mr. WILLIAMS. GAO has found that a number of reconciliation procedures called for by the original contract between the Department of the Interior and the independent professional auditor were either not performed or not completed as originally envisioned which could affect the reliability of the account statements.

In addition, the prototype report package did not explain to the Indian tribes the numerous changes in reconciliation scope and methodologies or extent to which reconciliation packages a fair and complete accounting.

The CHAIRMAN. Finally, if I may ask, what are the most significant limitations and shortcomings in the scope of methodology of BIA's reconciliation report?

Mr. WILLIAMS. A couple of the most important points are the ones that I pointed out earlier and that would be the missing documentation and the inability to reconcile the systems.

The CHAIRMAN. In other words, am I correct to conclude from your responses that this committee should proceed with what we are trying to do?

Mr. WILLIAMS. Yes.

The CHAIRMAN. Thank you very much, Mr. Williams.

Senator Thomas.

Senator THOMAS. Well, thank you, Mr. Chairman. I am clearly not as up on the details as you two gentlemen are. Let me just ask you some general questions. Is there in your opinion the possibility a satisfactory reconciliation through audits?

Mr. WILLIAMS. Two thoughts here: The audit would be a separate component from a reconciliation. You could do an audit, but you would need the reconciliation if you wanted to get a full accounting. As long as you have missing documentation and you can't reconcile these various areas, then your audit is not going to give you what you are trying to achieve in the end result and that's to be able to determine what those exact balances should be for those accounts.

Senator THOMAS. What do you have to do to accomplish that?

Mr. WILLIAMS. As long as you have those missing documents, that will be difficult. We have recommended in the past that the Congress should consider some type of negotiated settlement. So, you would have to look at some of the other options in our previous testimonies and statements. We have made some of those and I think we would still be making those same ones today.

Senator THOMAS. So, getting together the information you think is available will only get you part of the way and then you have to negotiate?

Mr. WILLIAMS. You have to negotiate the rest of the way, that's exactly right, because if you have missing documentation and there's no way that you are going to find that documentation, then it's going to be nearly impossible to do a complete reconciliation.

Senator THOMAS. If you have 1 year extension, what are you going to do in that year? What are you going to do differently? This has been going on for a very long time. What is the solution? What is the remedy?

Mr. WILLIAMS. Yes; I must admit, I have testified and reported on various agencies that have had long-standing accounting problems, but I think this one kind of sets the record for its long standing is concerned.

You have to work in a diligent manner to see how many of the records can you actually locate and based on that, then you had to begin from that point in trying to come up with some solution. That is the only way that you can do this. You make every effort possible to find all of the records that you possibly can and you do as good of a reconciliation as you possibly can. It's at that point in time when you make the call that:

This is all we can find. We have done everything that we possibly can and we have to come up with some solution to this problem through some negotiate.

Senator THOMAS. The accumulation of all the possible records has not been accomplished. Is that what you are saying?

Mr. WILLIAMS. If there was some missing documentation you would never be able to do a complete reconciliation of all of the transactions.

Senator THOMAS. You are saying you can't do it all, but you can get together what is available. Has that been done?

Mr. WILLIAMS. Yes; based on what we saw in 1996, we thought they couldn't go any further.

Senator THOMAS. So the accounting part is completed?

Mr. WILLIAMS. Well, that's basically why that particular point in time we stated that there should be some negotiation to try to come to some settlement. Yes, I think as far as looking for the records, the accounting part, I guess you could say would be complete.

Senator THOMAS. Thank you.

Mr. WILLIAMS. But it wasn't a complete accounting of the——

Senator THOMAS. Well, now that was my question. Has the accounting part, the reconciliation or the accounting for the records available, has that been completed?

Mr. WILLIAMS. They have done as much as they can with the documents, but an accounting has not been completed of the activities.

Senator THOMAS. In 5 years you have not been able to do the accounting on the documents that are there?

Mr. WILLIAMS. Yes; of the documents that are there that they have looked at, they have done an accounting for those.

Senator THOMAS. It is very confusing. You are talking about what you can get and what you can't get. Of what you can get, has that been accounted? Has that been added up? Is that there?

Mr. WILLIAMS. Yes.

Mr. ARMSTRONG. Being involved in GAO's work back in the early 1990's, I think where we were in 1996 when we reported to this committee was that the work that the Interior Department and their contractors had done to that date was deficient because they were missing documents.

We felt the Government was spending good money but not getting much bang for the buck, that it would be impossible, given the missing records, to prepare a complete accounting. So, we recommended to this committee a settlement proposal, legislation——

Senator THOMAS. So the documents are there, all the documents you think that are ever going to be there are there? Now you are dealing with an abstract.

Mr. ARMSTRONG. I am not sure that all the documents are there.

Senator THOMAS. Well, that's what you said.

Mr. ARMSTRONG. I'm sorry?

Senator THOMAS. You just got through saying that the accounting of the documents that were available was completed.

Mr. ARMSTRONG. But remember, too, that we were concerned with the limitations that the Interior Department had imposed on its contractor and looking for documents and in looking at documents.

Senator THOMAS. Then the answer is perhaps there are more documents that have not been looked at.

Mr. ARMSTRONG. Perhaps there are, yeah.

Senator THOMAS. That is what I am trying to find out.

Mr. ARMSTRONG. We were not in a position. We weren't in a position. We didn't go looking for documents. We were just monitoring the process. So, we are not in a position to say that there are in fact more documents there. But what we were saying was that there were other steps that could be taken to see if there were more documents there.

Senator CAMPBELL. One last question: Since the missing documents have created such a problem with getting a clearer account, this bill as you probably know, extends the statute of limitations for one year. But considering how complicated it has been, would you recommend that it be 2 years or 5 years or some other timeframe?

Mr. ARMSTRONG. You know, back in 1993 when we did recommend a tolling of the statute of limitations, our point was let's

maintain the status quo to give the parties time to work this out. Mr. Thomas' point is well taken, I think, and your point, Mr. Campbell, is well taken, how much are we going to be able to accomplish in 1 year?

I think the committee needs to look at that very closely because you may find yourselves back here in another year considering legislation to toll the running of the statute of limitations another year or another two years.

Our point, our advice to you is that based on the work we did back in the early 1990's, the early to mid 1990's, was that if you think that a tribe is disadvantaged by an argument and having to deal with an argument that a reconciliation report that the tribe received would start the running of the statute of limitations and if you think that giving the parties more time even by simply tolling the running of the statute of limitations, if you think by giving the parties more time you could avoid expensive litigation, Mr. Taradash just testified as to the expense of litigation. Then we would encourage you to consider very seriously tolling the running of the statute of limitations.

Senator CAMPBELL. Well, my concern, of course, is if tribes feel in the next 8 or 9 months as we get close to that year end, if this passes, which I assume it will, that they will still feel they will have to have a rush to judgment. I don't know but there still seem to be documents out there that many people believe are going to surface that have not yet. So, it might be wise to extend this timeframe.

Mr. ARMSTRONG. Mr. Campbell, I think that's a fair observation. I mean, part of the reasoning behind the settlement proposal, the legislation that we proposed back in 1995 or 1996 to this committee was as we had crafted that proposal it would give all of the parties a better opportunity to come up with and to present to the mediators and arbitrators any evidence, any documentation that they might have that would be useful to the settlement of their claims.

I think that your point is well taken that you could find yourselves back here in another 8 or 9 months dealing with legislation to extend the statute of limitations another year or for another period of time.

Senator CAMPBELL. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. Just for clarification, because we are speaking of documents that are not available, lost or destroyed, et cetera, are we speaking of records that were held by the BIA in the 12 regions and since they were handled manually, were there some that were misplaced or lost?

Second, there was an incidence where records were contaminated by deer mice droppings causing Hantavirus and therefore these records were not made available.

Third, a mysterious fire in the archives in Suitland, MD, destroyed some of the documents.

Fourth, some of the records were destroyed at the instruction of the Treasury and Justice Departments. Finally, some of the records were not located because the Arthur Andersen firm applied a model which excluded certain documents from review.

Is that what we are talking about?

Mr. WILLIAMS. Yes; that is correct.

The CHAIRMAN. So, you cannot fault Indian governments for the loss?

Mr. WILLIAMS. No; we did not.

The CHAIRMAN. I thank you very much, sir.

Mr. WILLIAMS. Thank you.

The CHAIRMAN. I appreciate your testimony. You have been very helpful.

Mr. WILLIAMS. Thank you.

The CHAIRMAN. Now, our final witness, the associate solicitor for Indian Affairs, Department of the Interior, Philip Hogen.

STATEMENT OF PHILIP HOGEN, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

The CHAIRMAN. Welcome, sir.

Mr. HOGEN. Good morning, Mr. Chairman, Senator Campbell, Senator Thomas. I am Philip Hogen, the associate solicitor for Indian affairs with the Department of the Interior.

I am an Oglala Sioux from South Dakota and I have been on the job since late October so I have some catching up to do.

The Department of the Interior is on board with what the proposed legislation intends to do: Extend the statute of limitations as has been discussed here.

It is a very complicated, frustrating issue with which we are faced. It is very expensive to litigate these cases. All would be better served if we might settle them and resolve them. I think it's obvious from what has just been said we are never going to find every last piece of paper to answer everyone's questions and consequently settlement would better address that situation than trying to sort it out in the courts.

With respect to what the committee intends to do, we have suggested some language that we think might better capture what the committee intends to do. That is, just extend the statute of limitations rather than get into these issues such as, what is the significance of these reconciliations which we have been discussing and the accountings and so forth.

We think that those issues are better handled in these negotiations that would occur during the period of time during which this statute might be extended.

The Department of the Interior today has devoted more time and attention and energy and focus to the issue of trust reform and trust accounts than I think ever before in its history. Yesterday over on the House side Secretary Norton testified with respect to trust reform. She told the committee that she has been devoting approximately 60 percent of her time to these trust reform issues; that trust reform is receiving not only more attention from her and from the department's leadership than any other issue in the department, but also more than all of the other issues in the department.

That is unfortunate with respect to those other issues, but nevertheless, it is because of the significance of this issue, because we have been at it so frustratingly long with so little success and frankly because the *Cobell* litigation has captured necessarily the attention of the department in this regard.

We are focused on it over there. We are doing historical accounting. We are proposing some reorganizational changes; we are consulting with tribal leadership. Last weekend the Secretary spent all weekend with a tribal task force discussing this very issue.

So far nothing is carved in stone. Nothing is cast in concrete. We want to set up a mechanism that will solve the problems of the past and make it work in the future.

We will be better equipped as we move down this road to sort these things and address these issues with these new mechanisms, with these new systems. We have learned that some of the things in the pipeline so to speak, the TAAMS program, things that we have talked about, were perhaps ill-designed or now we know that they were ill-designed.

With the benefit of this restructuring we should be able to not only come up with better numbers but have a better sense of the big picture and I think thereby be able to successfully be able to negotiate settlements with the tribes.

Certainly there will be things that we won't agree on. But right now, as has been observed, when the statute of limitations kicks in there's an obligation for the United States to assert that as a defense.

We believe the committee is on the right track here by suggesting that that be tolled. We suggest that the language set forth in my written testimony would crisply and simply capture this and we urge you to do that as you move in this direction.

I would be happy to respond to attempt to respond to questions you might have in this regard.

The CHAIRMAN. Well, I appreciate your candor and your response. From the Secretary's statement, it's obvious that the process is inadequate. The staffing is inadequate. It isn't possible to focus upon the problem.

Do you have any suggestions as to what this Congress can be doing legislatively to assist and expedite this process because it is not fair to Indian Country to have this dangling and having them wait another decade or two before we can come up with any sort of resolution.

Do you have any suggestions? I don't expect you to have them at this moment, but if you do, we would appreciate it if you could share them with us. I would like to look them over.

Mr. HOGEN. Well, we certainly will be happy to send that to you, Mr. Chairman. I would also, I guess, say in the same breath, the President's budget that recently was sent this way contains a big shot there that would be devoted to these very problems.

As that comes before you, we ask that you look sympathetically to those requests.

Senator CAMPBELL. Mr. Hogen, I know you haven't been in that position in all the years we have dealt with this problem, but I want to tell you: All we have heard over and over is:

> If we had new systems, if we had more money, if we had more computers, if we could revise the process, if we had increased staffing, whatever, we could fix it.

But in my view the Bureau has simply dropped the ball over and over and over. After hearing the GAO's testimony, I am even more convinced of it. They are all just forms of passing the buck to me. I don't think that is satisfying anybody that is involved in litigation

now or in future litigation to try to get fairness out of this government for what should have been done a long time ago.

Everybody knows Indian people across this country have been cheated out of their money, that the Government has cheated them out of their money. I want to tell you, if it was mine in the private world and a bank did that to me, I would be raising a lot more hell than they are raising with the Government. They have had a lot of patience. But I think they are running out of patience.

I have to tell you that as I understand your testimony this bill should be redrafted to cover the tribes that have already filed claims. That's not what this bill is about. It's to try to provide an atmosphere where they could get some negotiated settlement so they wouldn't be forced to file more and more claims, which is in no one's best interest.

We are trying to provide assurance to them that we are going to get to the bottom of this and we are going to fix it without prolonged litigation and fighting it out in court. That is what this bill is all about.

Would you like to comment on that?

Mr. HOGEN. Yes, I would, Senator; if that's the way you understood what I have suggested, I apologize because that's not what I intended to convey. We do not want to merely limit the application of an extension of the statute of limitations to the several tribes that have currently filed their claims or perhaps will file it before enactment of this legislation, which we hope is very soon.

We have nine, I believe, cases that have been filed, some in the Court of Federal Claims, some in U.S. District Court. We know that in the pipeline are probably dozens, if not hundreds of other cases. We would want this to apply to all of them and those that have filed, and that is why we said what we said, so we could go to the court and say, "We seek a stay so that we may continue these negotiations."

So, I certainly did not mean to narrow or limit that and I share your frustration.

Senator CAMPBELL. Well, part of my frustration, I guess, is that the faces keep changing over there and the problem keeps going on. I just think that tribes' patience is wearing thin and they are very justified in their patience wearing thin, too.

I have no further questions, Mr. Chairman. I would ask unanimous consent to include my formal statement for the record, if you would, and also submit the attached letter from the GAO dated August 30, 2001, for the record.

The CHAIRMAN. I can assure you that your statement and the letter from GAO will be made part of the record.

[Prepared statement of Senator Campbell appears in appendix.]

The CHAIRMAN. Mr. Hogen, sitting there you must have felt the frustration of Indian country. There is an atmosphere of uncertainty and a lack of credibility on the part of the Department. Until we can resolve these things and bring about certainty and credibility, it may be fair to say that you should be anticipating about 300 suits being filed in various courts throughout this land. That will not help the situation.

As Vice Chairman, Cochairman Campbell has indicated, time is running out. So, I hope we can get together, not just Congress and

the department, but more importantly, the beneficiaries and come up with a solution that all of us can accept.

With that I thank you very much.

Senator Thomas, do you have any questions?

Senator THOMAS. I have no further questions, thank you.

The CHAIRMAN. We are in recess.

[Whereupon at 11:18 a.m., the committee recessed, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Good Morning. Thank you Mr. Chairman for holding this hearing. It is worth stressing, it seems to me, that this hearing is not about the history of trust funds management. It is not about proposals to reform trust management. And it is not about the *Cobell* litigation.

It is about avoiding litigation which I think is in everyone's interest.

In the 1980's Congress directed the Department of the Interior to reconcile tribal trust accounts; required an independent certification to ensure the reconciliation was complete; and provided that the statute of limitations would not be triggered until the account holder received an accounting.

In January 1996, the Department of the Interior provided a report to each tribe. When the tribes received and reviewed the reports concerns were raised, concerns about their accuracy and reliability.

In May 1996, the GAO issued a report also raising concerns. If these reports constitute "accountings" then the statute of limitations will be considered "running" and out of a sense of caution many tribes will feel compelled to file suit to protect their claims.

Many tribes have already filed suit, as you know Mr. Chairman.

What we are interested in, and what the Chairman and I have been working on for some time now, is trying to provide a "cooling off period" in which the United States and the tribes have a chance to settle potential claims arising out of this reconciliation process.

I very much believe that a wave of lawsuits against the United States will serve no good purpose and will further alienate the parties.

Mr. Chairman, since 1996 the United States has been embroiled in litigation for Individual Indian Money [IIM] accounts in the case of *Cobell* v. *Babbit* [and now *Cobell* v. *Norton].*

I believe this committee can play a role in guiding the parties to a just settlement of all trust claims.

I also believe that legislation along the lines of S. 1857 could encourage settlement and discourage protracted and expensive litigation.

I know this Mr. Chairman: Without assurances to the tribes that their claims will not be barred, we will see an avalanche of lawsuits and that doesn't help anyone—other than the lawyers.

I ask unanimous consent to include in the Hearing Record a letter dated August 30, 2001, from the GAO that summarizes its concerns about the reconciliation process, and with that I look forward to hearing from our witnesses this morning.

Thank you Mr. Chairman.

U.S. GENERAL ACCOUNTING OFFICE,
Washington, DC, August 30, 2001

Hon. BEN NIGHTHORSE CAMPBELL,
Vice Chairman,
Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. VICE CHAIRMAN: This letter responds to your request that we summarize observations from our past work regarding the Department of the Interior's Indian trust fund account reconciliation project, which was completed in January 1996. From 1992 through 1997 we monitored and reported on various aspects of Interior's planning, execution, and reporting of results for the reconciliation project. Enclosure II to this letter is a list of GAO products on various aspects of Interior's Indian trust fund reconciliation project.

The Indian trust funds are of two types: tribal trust funds and Individual Indian Moneys (IIM) trust funds. An independent public accounting firm (IPA) audit of the trust funds for fiscal year 2000 showed a total of about $2.6 billion in approximately 1,400 separate tribal accounts for about 315 tribes, and about $400 million in approximately 260,000 IIM accounts as of September 30, 2000. Receipts are deposited to these accounts primarily from land use agreements, royalties on natural resource depletion, enterprises related to trust resources, judgment awards, settlement of Indian claims, and investment income, according to the IPA's audit report. The audit report noted that reliance cannot be placed on the balances reflected in the trust fund accounts until many tribal accounts are reconciled and/or resolved through negotiation and settlement and the IIM class action litigation is resolved.

The Congress first established an Indian trust fund account reconciliation requirement in the Supplemental Appropriations Act, 1987, in response to tribes' concerns that Interior had not consistently provided them with statements on their account balances, their trust fund accounts had never been reconciled, and Interior had planned to contract with a third party for management of trust fund accounts. The original provision required that the accounts be audited and reconciled before the Bureau of Indian Affairs (BIA) transferred funds to a third party. A provision in Interior's fiscal year 1990 appropriations act added a requirement that the accounts be reconciled to the earliest possible date and that Interior obtain an independent certification of the reconciliation work. A description of the history of the reconciliation requirements, which continued to be included in Interior's appropriations acts through fiscal year 1995, is included as enclosure I[1] to this letter. In 1994, the Congress, through the American Indian Trust Fund Management Reform Act of 1994 (Pub. L. 103–412, October 25, 1994; 108 Stat. 4239), required the Secretary of the Interior to provide tribes with reconciled account statements as of September 30, 1995.

To fulfill these requirements, Interior contracted with two major IPA's, one to reconcile the trust accounts and the other to do an independent certification that the reconciliation resulted in the most complete reconciliation possible. Following a preliminary assessment in March 1992 by Interior's reconciliation contractor, Interior decided to have the contractor reconcile the tribal accounts for fiscal years 1973 through 1992 and omit accounts for individual Indians from the reconciliation project due to the potential lack of supporting documents and the cost and level of effort that would be needed to include them in the project. Subsequent to this decision, Interior had BIA reconcile the tribal accounts for fiscal years 1993 through 1995 to comply with the 1994 act's requirement that Interior provide tribes with reconciled account statements as of September 30, 1995.

During the reconciliation project, Interior spent about $21 million for contract costs over a 5-year period in a massive effort to locate supporting documentation and reconstruct historical trust fund transactions, as well as to perform other reconciliation procedures, so that tribal account balances could be validated. In January 1996, Interior provided to each tribe a report package containing the tribe's reconciliation results, including unreconciled account statements with schedules of proposed adjustments based on reconciliation project results for each year covered by the reconciliation, and a transmittal letter that described the information provided. During a February 1996 meeting at which Interior officials and the reconciliation contractor summarized the reconciliation results, tribes raised questions; about the

[1] Enclosure I also describes a related provision tolling the statute of limitations for certain types of Indian trust fund claims.

adequacy and reliability of the reconciliation results. We also, reported shortcomings of Interior's reconciliation project.[2]

As we previously reported, the reconciliation project's shortcomings consisted of procedures that were not completed due to missing records, system limitations, or time and cost considerations as well as inadequate information in Interior's reports to tribes on the project's results. These are detailed in the following paragraphs.

Basic (Noninvestment) Transaction Reconciliation Procedure: The basic transaction reconciliation segment of the project included tracing 251,432 noninvestment transactions that had been recorded in the general ledger to source documents such as deposit tickets and disbursement vouchers. The total value of these receipt and disbursement transactions was $17.7 billion. Due to missing records, 32,901 of the transactions, with a total value of $2.4 billion (14 percent of the total value of the transactions), could not be reconciled. In addition to the limitation related to the unreconciled transactions, this segment focused only on transactions that had already been recorded in the general ledger, and no reconciliation procedure was performed to address the completeness of the general ledger itself.

Investment Transaction Reconciliation Procedure: The reconciliation contractor also did individual testing of $21.3 billion, or 16 percent, of the recorded investment transactions. However, to achieve efficiencies, Interior and the contractor substituted a review of tribal account investment yields for individual transaction testing for the remaining investment transactions.

Fill the Gap (Leases) Procedure: Another segment of the project reconciled collections for certain tribes with a sample of lease documents and timber sales contracts. Initially, the contractor was to review all leases greater than $5,000 and a test sample of 100 additional leases of less than $5,000 on a cross section of tribes. The reconciliation contractor identified 6,446 surface leases with annual collections of over $5,000. However, due to time constraints for completing the reconciliation, only 692 leases—10.7 percent of the leases originally identified for testing—were tested. In addition, because of missing records, a number of leases, and sample test months for timber contracts, were substituted for those in the original sample.

Systems Reconciliation Procedures: The systems reconciliation was to include reconciling (1) information in the trust fund investment system to the General Ledger in the Finance System, (2) the tribal general ledger in the Finance System to U.S. Treasury records, and (3) the Integrated Records Management System (IRMS) subsidiary records to the Finance System general ledger. The latter two reconciliations could not be performed or completed due to time and funding limitations, according to Interior officials.

Tribal IIM and Special Deposit Accounts Reconciliation Procedure: Interior maintained some IIM accounts for tribes in the IRMS accounting system. It also used Special Deposit accounts primarily as clearing accounts for funds received that had not been distributed to account holders because the account owners had not been identified. Due to missing records and the lack of an audit trail through IRMS, tribal transactions could not be efficiently isolated from individual Indian transactions. Because of this, tribal IIM accounts maintained in IRMS were not reconciled to source documents, and Special Deposit accounts were not reconciled with source documents that moved funds to tribes' general ledger accounts, as had been planned.

Fill the Gap (Minerals Management Service) Reconciliation Procedure: Interior's Minerals Management Service (MMS) collects and accounts for oil and gas royalties on Indian leases. The reconciliation project was to include some procedures to trace collections from the leases, through MMS, to the general ledger maintained by BIA. However, because MMS retained records for only 6 years, records for most of the 20-year reconciliation period were not available, and alternative procedures at MMS were not performed due to time constraints.

Certification Procedure: Interior's fiscal year 1990 appropriations act required a separate, independent certification that the accounts had been reconciled and audited to the earliest possible date and that the results were the most complete reconciliation possible. However, BIA's certification contract required that the certification contractor ensure only that the reconciliation effort was performed in accordance with the reconciliation contract and no independent assessment of completeness was required. In addition, because of cost and time constraints, the certification contract was terminated before the certification contractor completed its verification that the procedures in the reconciliation contract were performed. The certification contractor issued a status letter, which communicated preliminary results. However, because the certification work was performed while the reconciliation was in process

[2] *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results* (GAO/AIMD–96–63, May 3, 1996).

and the certification procedures were not completed, the usefulness of the status letter is limited.

Individual Indian Accounts Reconciliation Procedures: As previously mentioned, accounts for individual Indians were excluded from the reconciliation project due to the potential lack of supporting documents and the cost and level of effort that would be needed to include them in the project.

Reporting of Reconciliation Project Results: Interior's reporting of the reconciliation project results was not as complete as it could have been. Interior did not disclose in the report packages to tribes the procedures specified in the reconciliation contract that were not performed, or those that could not be completed, and the reasons. For the procedures that were performed, Interior did not fully disclose scope limitations or changes in methodologies, such as accounts and time periods that were not covered and alternative source documents used.

To summarize, although Interior made a massive attempt to reconcile tribal accounts during its reconciliation project, missing records and systems limitations made a full reconciliation impossible. In addition, due to cost considerations and the potential lack of supporting documentation, reconciliations for individual Indian accounts were not performed.

If we can be of further assistance, please phone me on (202) 512–9508.

Sincerely yours,

LINDA M. CALBOM,*Director, Financial Management and Assurance*

Enclosures

Enclosure I

SELECTED INDIAN TRUST FUNDS PROVISIONS CONTAINED IN APPROPRIATIONS ACTS

Appropriations Act Provisions for Audit and Reconciliation Requirements for Tribal and Individual Indian Trust Funds

In Supplemental Appropriations Act, 1987, the Congress established a requirement that tribal and individual Indian trust funds be audited and reconciled prior to the Bureau of Indian Affairs' (BIA) contracting with third parties for the management of Indian trust fund accounts. Pub. L. 100–71, 101 Stat. 391, 416 (1987). Similar provisions were included in the Department of the Interior's appropriations acts through fiscal year 1995. The provision in the 1987 Supplemental Appropriations Act stated:

> The Bureau of Indian Affairs shall not 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, and the appropriate Committees of the Congress and the tribes have been consulted with as to the terms of the proposed contract or agreement.

Pub. L. 100–71, 101 Stat. 391,416 (1987).

Interior's fiscal year 1988 and 1989 appropriations acts included the same requirement, albeit with a slight difference in language:

> Provided further, That none of the funds in this act shall be used by Bureau of Indian Affairs 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, and the appropriate Committees of Congress and the tribes have been consulted with as to the terms of the proposed contract or agreement. (emphasis added).

Pub. L. 100–202, 101 Stat. 1329 (1987); Pub. L. 100–446, 102 Stat. 1774 (1988).

From fiscal year 1990 through fiscal year 1995, Interior's appropriations acts added a requirement that the funds be reconciled to the earliest possible date and an independent party certify the reconciliation of the funds held in trust. See, for example, Pub. L. 101–121, 103 Stat. 701 (1989)("until the funds held in trust for such tribe or individual have been audited and reconciled to the earliest possible date, the results of such reconciliation have been certified by an independent party as the most complete reconciliation of such funds possible. . ."). See also B–236146, March 20, 1990 (certification must be performed by a party independent of the party performing the reconciliation).

Tolling of Statute of Limitations on Tribal and Individual Indian Claims Against the United States for Management of Trust Funds

Since fiscal year 1991, the Department of the Interior's appropriations acts have included a provision that tolls the statute of limitations on tribal and individual Indian claims against the United States arising from BIA's management of tribal and individual Indian trust funds. The provision in the fiscal year 1991 appropriations act stated:

> Provided further, 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, 104 Stat. 1915 (1990).

From fiscal years 1992 through 2001, Interior's appropriations acts have included the provision tolling the statute of limitations and added language requiring that the tribe or individual Indian be furnished an accounting "from which the beneficiary can determine whether there has been a loss . . ." See, for example, Pub. L. 102–154, 105 stat. 990 (1991).

Enclosure II

RELATED GAO PRODUCTS

Indian Trust Funds: Tribal Account Holders' Responses to Reconciliation Results (GAO/AIMD–97–102R, May 23, 1997).

Responses to Questions from June 11, 1996 Hearing (GAO/AIMD–96–125R, June 24, 1996).

Financial Management: Interior's Management of the Indian Trust Funds (GAO/T–AIMD–96–111, June 18, 1996).

Financial Management: Interior's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements (GAO/T–AIMD–96–104, June 11, 1996).

Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results (GAO)/AIMD–96–63, May 3, 1996).

Financial Management: Indian Trust Fund Accounts Cannot Be Fully Reconciled (GAO/T–AIMD–95–94, March 8, 1995).

Responses to Questions From September 26, 1994, Hearing (GAO/AIMD–95–33R, December 2, 1994).

Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds (GAO/T–AIMD–94–195, September 26, 1994).

Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds (GAO/AIMD–94–185, September 22, 1994).

Response to Questions on Two Recommendations in April 12, 1994, Testimony (GAO/AIMD–94–138R, June 10, 1994).

Letter on BIA Trust Fund Reconciliations (GAO/AIMD–94–110R, April 25, 1994).

Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements (GAO/T–AIMD–94–99, April 12, 1994).

Financial Management: BIA's Management of the Indian Trust Funds (GAO/T–AIMD–93–4, September 27, 1993).

Indian Trust Funds: Tribal Account Holders' Responses to Reconciliation Results (GAO/AIMD–97–102R, May 23, 1997).

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Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements (GAO/T–AIMD–94–99, April 12, 1994).

Financial Management: BIA's Management of the Indian Trust Funds (GAO/T–AIMD–934, September 27, 1993).

Response to Request for Views on Freeze of the Statute of Limitations on Claims Against the States Arising From BIA Management of Tribal and Individual Trust Funds (GAO/AFMD–93–84R, June 4, 1993).

Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing a Strategic Plan (GAO/AFMD–92–38, June 18, 1992).

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NATIONAL MORTGAGE NEWS

John D. Hawke, Jr.

Building Native Communities

By John D. Hawke
Comptroller of the Currency

In a recent newsletter published by the Office of the Comptroller of the Currency, Mr. Hawke underscored national bank efforts to meet the financial service needs of Native Americans.

In recent years, Native Americans living on tribal lands have begun to see progress in the financial services available to them. Some might say this progress is long overdue. Native Americans have historically lacked the kind of access to financial institutions and credit that most Americans have long since come to take for granted. There are many reasons for the disparity, some of them deeply rooted in the troubled history of relations between the first Americans and those who came later.

Yet it is also true that today there are tribes, banks, nonprofit organizations, and government agencies that, individually and in collaboration, are tackling the complex issue of access to financial products and services in Indian country. In fact, Native American tribes and individuals currently own or control 11 banks, allowing them to interact directly with the national banking system and facilitating their efforts to fund economic development initiatives. This issue of <I>Community Developments<I> focuses on some of the initiatives that these banks and other institutions are undertaking to address financial service needs on tribal lands.

Native Americans constitute less than 1% of the total population of the U.S., but face far more than their share of economic challenges. Data from the 2000 Census indicate that 26% of all Native Americans are impoverished -- more than twice the national average. The National American Indian Housing Council estimates that 69% of Native Americans in tribal areas live in severely overcrowded and often substandard housing. More than 30,000 people are on waiting lists for rental housing in tribal areas, and for most Native Americans the dream of homeownership has never seemed even close to becoming a real possibility.

Banks seeking to reach out to Native American communities encounter geographic, educational and legal barriers to provide traditional deposit and lending services in Indian country. For example, low population density and long travel distances

between population centers on many reservations can make it costly for banks to place traditional brick-and-mortar branches there. However, alternative methods of providing financial services -- such as locating branches in shared office space or incorporating greater electronic delivery of salaries and benefits -- hold promise to increase access to financial services on tribal lands. In addition, many Native Americans suffer from a lack of experience with and information about personal finance and credit. As a result, they are often reluctant to use banking services even when they are available. Finally, the sovereign immunity granted to tribes has been seen as a major impediment to establishing banking relationships, since banks cannot count on U.S. courts to resolve contractual disputes.

Banks seeking to reach out to Native American communities encounter geographic, educational and legal barriers to provide traditional deposit and lending services in Indian country.

But, along with challenges, come opportunities. The home mortgage market, for example, is virtually untapped. Current studies suggest that there are fewer than 2,000 home mortgage loans on tribal lands. The Department of Housing and Urban Development has estimated that 38,000 families living on tribal areas have incomes sufficient to afford traditional home mortgages. Assuming a loan size of $70,000 (the average loan size purchased in Freddie Mac's Native American Initiative), this estimate represents a potential $2.7 billion market in home mortgages.

The home mortgage market is gradually developing, thanks in part to a range of tools now available. HUD's Section 184 Loan Guarantee Program, is making it easier to resolve the unique challenges of providing mortgage loans in communities where land cannot be used as collateral. The program has gained the attention of the secondary markets as well. For example, Fannie Mae invests in Section 184 loans originated on more than 100 eligible Indian reservations.

To reduce regulatory barriers to homeownership on tribal lands, HUD and the Treasury Department helped to develop the One Stop Mortgage Centers. These centers are managed by local nonprofit intermediaries which, in turn, provide products and services, such as affordable mortgage packages and counseling programs, to assist homeownership efforts. Another innovative partnership, the Navajo Partnership for Housing program, an offshoot of the Neighborhood Reinvestment Corporation, provides access to a consortium of lenders offering mortgages to members of the Navajo Nation.

A first step to making home mortgages work for lenders and borrowers alike is ensuring that borrowers understand financial products. Financial literacy campaigns, such as the one developed by First Nations Development Institute and described in this issue, are a must if homeownership efforts are to succeed in underserved areas.

Some banks have discovered that by providing services in novel ways they can realize profits that they did not think could be achieved.

To provide information on issues frequently encountered when making mortgage loans on tribal lands, the OCC published "A Guide to Mortgage Lending in Indian Country."

Although the low population density on tribal lands presents barriers to traditional banking operations, some banks have discovered that by providing services in novel ways they can realize profits that they did not think could be achieved. Forming a bank can be a great catalyst for advancing economic development on tribal lands. While it takes a major investment of capital, energy and expertise, the national bank charter can be an effective tool for increasing access to financial services and capital.

At the core of these themes is the need to take the time to thoroughly understand the challenges unique to lending in Indian country, and to listen to what tribal leaders and individual tribal members want. Those institutions that are most successful in Indian country forge strong partnerships with tribes and together find creative solutions to lending challenges.

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INDIAN COUNTRY TODAY IndianCountry.com

Mortgages open up for Indian homelands

Posted: January 25, 2002 - 4:00PM EST
by: Mark Fogarty / Today Correspondent

SAN FRANCISCO -- There is a sea change starting to occur in the nascent effort to make mortgages to American Indians on and near their homelands. Rather than stressing the "exceptional" nature of finance in Indian areas, one new emphasis is on normalizing Native lending through standard programs and channels.

The implications are enormous: the blending of previously square peg-round hole Indian loan volumes into the most successful mortgage system in the world, one that has made homeowners of more than 68 percent of all Americans. It also leads the way to use of more private mortgage finance, as opposed to the government-guaranteed loans that have dominated tribal mortgage finance so far.

PMI Mortgage Insurance here, for instance, has begun to use automated underwriting to qualify borrowers in its many tribal programs - using the same loan programs used by many in the dominant culture.

PMI now runs Indian borrowers from tribes in Oklahoma, Alaska and elsewhere through Desktop Underwriter, the automated underwriting system of Fannie Mae, the semi-federal mortgage agency that last year handled 41 percent of the nation's products, $2 trillion in mortgage volume. And it uses Fannie Mae's standard loan products, the same as are used all over the country.

Neither Fannie Mae nor PMI is a lender, but are part of that super-efficient mortgage system. Fannie Mae buys loans from the actual lenders, giving them more money to make additional loans. PMI insures loans if the borrower is unable to make a 20 percent down payment (as most are not). Fannie Mae will buy all loans generated through PMI Indian programs.

According to Jean Garrison, PMI's Indian country representative, the speed of AU can lead to increased volumes of Indian mortgages because of the speed of approvals, which is in minutes rather than days or even weeks previously.

But what of those Indian borrowers that don't fit into the mortgage business' cookie cutters? According to Garrison, Fannie Mae's NACLI (Native American Conventional Lending Initiative) loans include flexible underwriting. These include the Timely Payments loan, where a borrower with less than perfect credit gets an automatic decrease in interest rate if she makes her payments on time for the first 24 months. Fannie also includes as a standard loan a popular product in Indian country - a 3 percent down mortgage in which the borrower needs only come up with one percent, while the tribe or another entity contributes 2 percent.

If a borrower doesn't fit even the flexible underwriting standards, there are still ways to qualify. So for example with the Saginaw Chippewa tribe of Michigan, which PMI anticipates doing a program with soon, its members get significant per capita payments from gaming which would be assigned to guarantee repayment of the mortgage.

The Saginaw Chippewa loans will be done with Flagstar Bank, both on and off tribal trust land, and Garrison anticipates a volume of a couple of hundred loans.

PMI is getting ready to announce a similar deal with the Menominee tribe of Wisconsin. The lender there will be Associated Bank, and Garrison thinks 100 loans may close in the first year of the program. The first couple of loans are set to close next month.

Other PMI initiatives forthcoming include ones in Louisiana, Washington and Oregon states. It also contemplates doing something on the Pine Ridge reservation of the Oglala Lakota in South Dakota through its "Gateway" rehab program.

In Oklahoma, one of PMI's original tribal partners, the Chickasaw Nation, has announced that it is expanding its mortgage program to Chickasaws around the nation. It is also switching over to the Fannie Mae DU program, with lender First Mortgage of Oklahoma City.

PMI's original Indian deals in Oklahoma were mostly with Washington Mutual Bank and Freddie Mac, Fannie Mae's cousin and competitor. They were not quite standard conventional program, though, since there was a risk-sharing arrangement in which the tribe would pledge money to be used in case of defaults. (In the Chickasaws' case, it was more than $200,000.)

"We all want to get to a place to say Native Americans shouldn't have to pay a premium for mortgages because they're Native Americans," said Garrison. "They should have access like any other borrower."

PMI is currently considering whether to dismantle those risk-sharing arrangements, freeing up the tribal money.

This article can be found at http://IndianCountry.com/?1011978509

INDIAN COUNTRY TODAY IndianCountry.com

Chickasaws, Fannie Mae turn tribal members into homeowners

Posted: January 30, 2002 - 7:00AM EST
by: Mary Pierpoint / Indian Country Today

ADA, Okla. -- The Chickasaw Nation, Fannie Mae and First Mortgage Company have joined forces in an effort to assist its citizens in becoming homeowners, the tribal government recently announced.

The new partnership will help members of the Chickasaw Nation obtain access to flexible mortgage products and will enable them to get loan decisions in minutes via the Fannie Mae Desktop Originator© on the web. The partnership is one of the first between a tribe and the mortgage providers. First Mortgage, one of the leaders in home loans across Indian Country, introduced the Desktop Originator on the Internet in 2001. Currently First Mortgage is providing services to tribes in more than a dozen states.

Chickasaw Governor Bill Anoatubby said, "This new partnership with Fannie Mae and First Mortgage Company is exciting because it will allow us to offer an even higher level of services to Chickasaw citizens in Oklahoma and expand the program to our citizens across the United States."

"Homeownership is a very high priority for our administration, and the expansion of this program will bring us closer to our goal of helping all Chickasaw citizens meet their housing needs," Anoatubby added.

In addition to the new services, Chickasaw Nation members will also be offered the option of the tribe's own Chuka Chukmasi (Beautiful Home) mortgage through the Desktop Originator. The Chuka Chukmasi program was laun ched in 1988 and is currently a collaborative effort between PMI Mortgage Insurance Company, the Chickasaw Nation and First Mortgage. It provides low down payment and flexible home loans for Chickasaws.

The new options are expected to make home ownership more obtainable for tribal members by using an automated underwriting system. Lenders review information provided by potential borrowers on the system in an attempt to provide unbiased and speedy loan recommendations.

"Families served by the Chickasaw Nation Division of Housing had long been expressing their need for a more efficient, streamlined mortgage loan process that would get them into homes faster," said First Mortgage Chairman Ron McCord. "We're pleased to give them access to technology that significantly reduces the waiting period and helps families realize their dreams sooner than they ever thought possible."

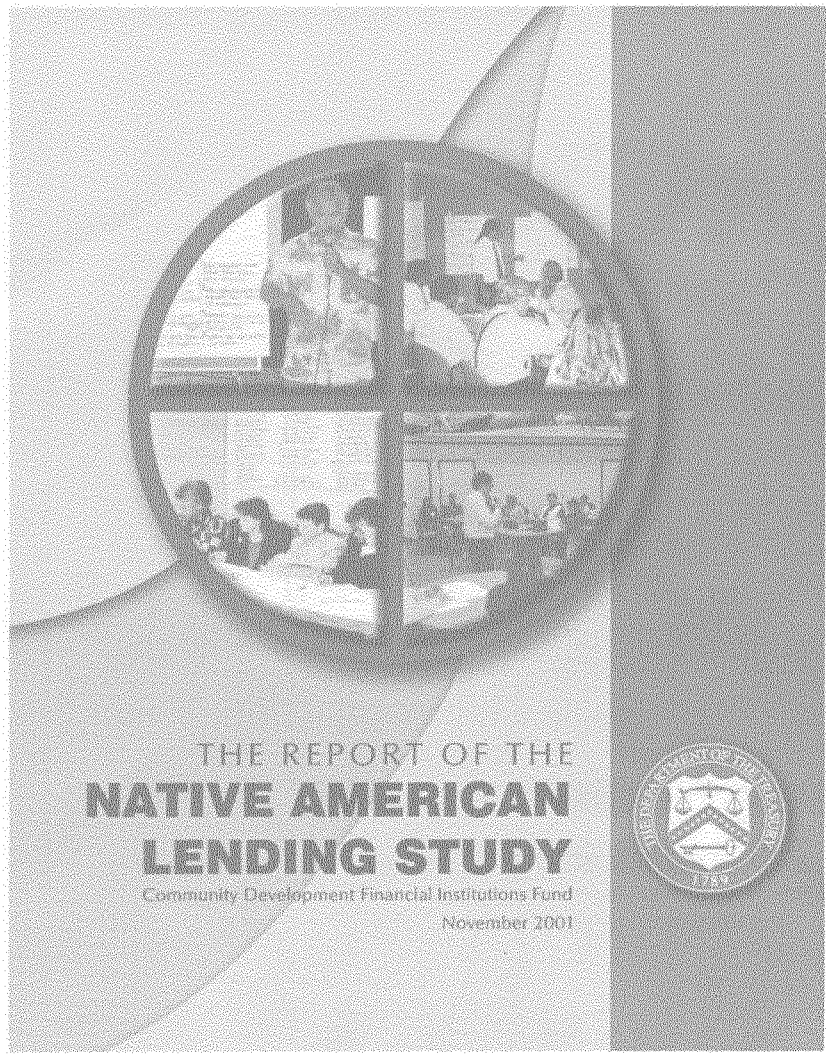
The partnership is part of a five year, $4 million investment plan that is part of Fannie Mae's HouseOklahoma, an investment plan designed to help more than 58,000 Oklahomans get into affordable housing.

HouseOklahoma is just a small part of the agency's $2 trillion program called American Dream CommitmentSM to increase homeownership to minorities and other groups that lag in the national rate of homeownership.

"Fannie Mae is strongly committed to providing affordable mortgage financing to Native American populations throughout the United States," said Lorrie Davis, deputy director of Fannie Mae's Oklahoma Partnership Office. "First Mortgage and PMI share the same vision and have partnered with us to give Native American families access to the best, most flexible mortgage products Fannie Mae has to offer," she added.

For more information, tribal members may call the Chickasaw Nation Division of Housing at (580) 421-8856. 499 words Chickasaw Nation and Fannie Mae.

This article can be found at http://IndianCountry.com/?1012229374


THE REPORT OF THE
NATIVE AMERICAN
LENDING STUDY
Community Development Financial Institutions Fund
November 2001

ACKNOWLEDGEMENTS

The CDFI Fund is very grateful to all the Tribal leaders, Tribal economic development professionals, Native Hawaiian representatives, representatives of commercial banking organizations, private equity investors, federal government agency officials, financial supervisory agency officials, and Native American entrepreneurs who took the time to participated in the Native American Lending Study Workshops and Roundtable meetings. Their economic development and financing expertise greatly contributed to identifying barriers to accessing capital and possible remedies. In addition, the advice and contribution by the Study's ad hoc advisory group is greatly appreciated.

The CDFI Fund acknowledges and appreciates the professionalism of the Johnson Strategy Group, Inc. for facilitating all the Workshops and Roundtable meetings, and for its contribution to the final report.

EXECUTIVE SUMMARY

The Native American Lending Study (the "Study") [1] was undertaken by the Community Development Financial Institutions Fund (the "CDFI Fund"), a government corporation within the U.S. Department of Treasury, for the purposes of examining the access to capital and financial services on Indian Lands[2] and Hawaiian Home Lands[3], identifying the barriers to access, and providing options to address these barriers. The mission of the CDFI Fund is to expand the capacity of financial institutions to provide capital, credit and financial services in underserved markets.

THE ISSUE

In the Community Development Banking and Financial Institutions Act (1994)[4], Congress found that "[m]any of the Nation's urban, rural and Native American communities face critical social and economic problems arising in part from the lack of economic growth, people living in poverty, and the lack of employment and other economic opportunities."[5] Indeed, many communities located in Indian Lands face economic and social challenges that place them significantly behind the rest of the U.S. economy.

Financial Survey respondents and Workshop participants identified a number of historical, economic, and institutional reasons for these conditions. Affirming the Congressional findings with respect to the absence of economic opportunity, many of

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[1] The *Native American Lending Study* reports the findings of: (1) 13 Regional Workshops (the "Workshops"), convened by the CDFI Fund from March through December, 1999 – which included over 700 individual participants, of whom: 43 percent were representatives of Tribal governments as herein after defined; 33 percent were representatives of federal, state and non-profit organizations; and 24 percent were representatives of financial institutions; (2) the National Roundtable, convened January 13-14, 2000; (3) the Community Development Financial Institutions Fund Financial Survey (the "Financial Survey"), administered October, 2000 to 1,600 Tribal and financial organizations; and (4) the Equity Investment Roundtable, convened on November 27-28, 2000, and the CDFI Fund Equity Research Investment Report. For a more detailed description of the Study design, see Chapter II.

[2] "Indian Lands" are defined for the purposes of the Study as lands owned by or under the control of Tribal governments, including reservations, Indian Lands in Oklahoma, and Alaska Native Villages. For purposes of the Study, Alaska Native Villages shall have the definition ascribed by 43 U.S.C. § 1602, *et. seq.*

[3] "Hawaiian Home Lands" are defined for the purposes of the Study as trust lands held for the benefit of Native Hawaiian people and are administered by the State of Hawaii's Department of Hawaiian Home Lands.

[4] 12 *U.S.C* §§ 4701, *et seq.* (2000).

[5] 12 U.S.C. § 4701 (a) (1) (2000).

the Study participants identified one significant factor: a lack of access to capital and financial services in Native American and Native Hawaiian communities.[6] In fact, the CDFI Fund's research found that there exists a significant difference in the amount of capital investment when comparing the rest of the United States to Indian Lands and Hawaiian Home Lands. [7]

The Financial Survey and supporting research found the following evidence of this historic underinvestment on Indian Lands and Hawaiian Home Lands[8]:

- 65 percent of Native American and Native Hawaiian respondents to the Financial Survey report that conventional mortgages are "difficult" or "impossible" to obtain. Home equity loans and construction and property rehabilitation loans are also in short supply on Indian Lands and Hawaiian Home Lands.
- Business loans were rated as "impossible" to obtain by 24 percent of Native American and Native Hawaiian respondents to the Financial Survey and as "difficult" to obtain by 37 percent. Larger business loans, those over $100,000, are even more difficult to obtain; 67 percent of said Financial Survey respondents rated them as "difficult" to impossible to obtain.
- 66 percent of Native American and Native Hawaiian respondents to the Financial Survey stated that private equity investments are "difficult" or "impossible" to obtain for Native American and Native Hawaiian business owners.
- The CDFI Fund's Equity Research Report estimates that the investment gap between Native American and Native Hawaiian economies and the United States overall totals $44 billion[9].

Accordingly, the major objectives of the Study are to identify the barriers to capital access, credit, and basic financial services on Indian Lands and Hawaiian Home Lands and to develop policy recommendations that address these barriers.

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[6] For the purposes of the Study, the term "Native Hawaiian" is defined as "a person having origins in the original peoples of Hawaii", see 62 *Fed. Reg.* 58,781 (1997). "Native Hawaiian" is not a term comparable to a federally-recognized American Indian Tribe. Inclusion of Native Hawaiians in the study does not confer or imply any specific, legally enforceable duties on the United States as trustee that apply under certain circumstances when it manages tribal or individual Indian property or resources. In addition, this study does not support or create any right enforceable or cause of action by or against the United States, its agencies, officers or any person. The CDFI Fund's experience with CDFIs and prospective CDFIs in Hawaii has suggested that Native Hawaiians face many of the same issues and barriers as Native Americans and Alaska Natives in their attempts to access loans and investment capital. Accordingly, in 1999, the CDFI Fund proposed to Congress to expand the Study beyond the original Congressional mandate to include Native Hawaiians. The Senate Committee on Indian Affairs encouraged and supported the proposed expansion.

[7] Based upon research prepared for the CDFI Fund by Complexity Management, Inc., a business, financial, and economic development consultant firm, it is estimated that a given region or country can support equity investment at a particular rate based on the level Gross Domestic Product, and other economic and demographic factors. Based on that calculation, Indian Lands and Hawaiian Home Lands, with their "local GDP" (i.e.- the cost of goods and services purchased and sold), could support equity investment in an amount equal to $16 billion. However, it is estimated that $10 billion is currently invested in Indian Lands and Hawaiian Home Lands. Indeed, similar estimates project that Indian Lands and Hawaiian Home Lands could support approximately $40 billion of equity investment if their demographics and economic conditions more closely reflected those of the rest of the United States as a whole. This Study refers to the difference between investment at the prescribed rate and current investment as the "investment gap" or "equity gap." See Ch. III for additional discussion.

[8] See Chapter II for a detailed description of the design of the research and the Financial Surveys. A more detailed discussion of the barriers follows in Chapter III.

[9] See Chapter II for a detailed description of the design of the equity research. See also, n. 7, above.

STUDY APPROACH

The Study was designed to produce a broad, if not necessarily exhaustive, qualitative review of the state of lending and investment on Indian Lands and Hawaiian Home Lands. This was accomplished largely through input from many of the stakeholders involved in capital access issues on Indian Lands and Hawaiian Home Lands. Simultaneously, the Study has attempted to supplement this review with meaningful quantitative input and analysis. This was accomplished through the Financial Survey, the Equity Investment Research Report, and other CDFI Research[10]. Accordingly, the Study approach was designed not only to provide a catalog of economic problems on Indian lands and Hawaiian Home Lands by integrating the concerns and recommendations of those who are attempting to lead their communities into the nation's economic mainstream, but to provide a statistical reporting as well.

To assist in accomplishing this, the CDFI Fund convened 13 regional and two national Workshops involving Tribal[11] leaders and economic development professionals, Native American and Native Hawaiian business people, private investors and bankers, federal and state government officials, and other stakeholders. Participants discussed the major barriers to Native American and Native Hawaiian access to capital and developed strategies and actions to overcome those barriers. The Workshops represent an extensive effort to bring together a broad array of stakeholders who each have specific economic development and financing expertise, with experience on Indian and Native Hawaiian lands, to discuss issues related to barriers to capital access and identify possible remedies. Workshop and Equity Investment Roundtable participants offered their diverse range of views and perspectives on accessing capital based on their individual expertise.

The Financial Survey was designed to probe the same set of issues with a broader group of individuals having expertise and experience similar to that of Workshop and Equity Roundtable participants, and who, for the most part were located in or within ten miles of Indian Lands and Native Hawaiian communities. The Financial Survey response rate (33 percent for representatives of FSOs and 25 percent for representatives of Tribal and Native Hawaiian organizations) was lower than expected due to the limited data collection time frame. Nonetheless, the Financial Survey results were consistent with the findings of the Workshops and Equity Roundtable.

The Workshops were complemented by the following research:

- The Financial Survey was administered to Tribal government housing and economic development directors and private financial service organizations (FSOs)[12] located on or near Indian Lands or located in Hawaiian Home Lands to identify the barriers to lending and provide financial services and to help develop recommendations to address those barriers.

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[10] A Bibliography detailing the sources for the CDFI Fund research is located on the CDFI Fund website at: www.treas.gov/cdfi/. The Bibliography is not intended to be exhaustive, or to indicate any CDFI Fund or Department of Treasury endorsement of the positions or opinions expressed in the materials listed therein. Rather, the Bibliography provides the reader with a list of the key sources of information that informed the preparation of this Study.

[11] In the Study, "Tribal" refers to Native American and Alaska Native governments, except as may be hereinafter specified.

[12] Financial Service Organizations (FSOs) are commercial banks, thrifts, credit unions and other related insured depository institutions.

- A study on equity investment on Indian Lands and Hawaiian Home Lands was conducted to provide the background and recommendations for enhancing equity capital access. This research included discussions with equity market participants, review of the relevant findings from the Financial Survey, and analysis of the findings from the Workshops. In addition, a questionnaire was administered to participants in the Equity Investment Roundtable that provided useful information about equity investment on Indian Lands and Hawaiian Home Lands.

BARRIERS TO CAPITAL ACCESS

The Study identified 17 major barriers to capital access, relating to legal infrastructure, government operations, economic, financial and physical infrastructure, and education and cultural issues. [13]

The Study identified one major barrier to capital access related to legal infrastructure:

1. *Uncertain Tribal Commercial Laws and Regulations and the Absence of an Independent Judiciary.* Investors and financial service providers who participated in Workshops and responded to the Financial Survey were concerned that, in many Tribal governments, Tribal courts may not be sufficiently independent of the executive branch of the Tribal government. Moreover, Workshop participants and Financial Survey participants cited the absence of codified Tribal commercial laws and regulations as causing investors to be hesitant to invest capital on Indian Lands.

Three major capital access barriers were identified that are related to government operations:

1. *Cumbersome, Conflicting, or Ineffective Federal Programs and Regulations.* Study participants noted their experience or perception that the pace of government decision-making is often slow and may involve extensive requirements and paperwork, program requirements often conflict with one another, some programs fail to meet the needs of the Native American and Native Hawaiian communities that they were designed to meet, and some programs have excessively restrictive entry guidelines.
2. *Uncertainty Generated by Changes in Tribal Government Leadership.* As is often true for elected governments, when a new Tribal administration is elected it may eliminate plans for programs begun by the previous administration. Since most Tribal governments do not exercise general taxing authority, many support their operation with revenues derived from their ownership of private businesses. Accordingly, a Tribal government sometimes operates simultaneously as both private sector investor and public sector "regulator" and Tribal business endeavors can at times take on both a public and private character.
3. *Poor Understanding of Tribal Sovereignty and Sovereign Immunity.* Study participants noted that lenders and investors are uncertain about the operation of Tribal and Alaska Native village sovereignty and sovereign immunity and, thus, often perceive greater risk to conduct business on Indian Lands.

[13] See Chapter III for a description of how the 17 barriers to capital access were identified.

Five major economic barriers to capital access were identified:

1. *Limited Use of Trust Land as Collateral.* Study participants and Fund research revealed that financing home mortgages and business loans presents a major challenge, since most Indian Lands and Hawaiian Home Lands are held in trust by federal or state governments and cannot be sold or encumbered by a mortgage lien, except as authorized by the Secretary of the Interior or other appropriate state official.
2. *Inflexible Bank Lending Rules and Regulations.* In many cases, Study participants noted their experience or perception that underwriting standards of traditional financial institutions do not appear to be structured to account for the particular economic circumstances of Native American and Native Hawaiian people, many of whom might otherwise be creditworthy.
3. *Lack of Capital, Collateral, and/or Credit Histories of Native Americans and Native Hawaiians on Indian Lands and Hawaiian Home Lands.* Fund research suggests that most Native Americans and Native Hawaiians living on Indian Lands or Hawaiian Home Lands do not have access to capital in the form of home equity, stock holdings, or other assets.
4. *Negligible Economic Base on Indian Lands and Hawaiian Home Lands.* Fund research found that, at present, many Native American and Native Hawaiian communities on Indian Lands or Hawaiian Home Lands lack adequate economic bases to meet the needs of their communities.
5. *Lack of Networking of Native-owned Businesses With Equity Investors.* The CDFI Fund Equity Investment Research Report reveals that many of the nation's venture capital investors are concentrated in areas that are physically and even socially remote to Native American and Native Hawaiian entrepreneurs. The equity research and comments of Workshop participants confirm that little investment occurs when potential investors and entrepreneurs live in different states and operate in different social and business circles.

There are two major capital access barriers related to financial and physical infrastructure:

1. *Lack of Financial Institutions on or Near Indian Lands.* A number of Financial Survey and Workshop participants stated that few financial institutions, bank branches, or even ATMs are located on or near (within 30 miles) Indian Lands. The participants posited that the absence of financial institutions impedes the development of bank-community relationships, and drives up borrowing costs.
2. *Lack of Physical and Telecommunications Infrastructure on Indian Lands or Hawaiian Home Lands.* Many areas within Indian Lands lack the physical infrastructure necessary for business development and expansion. A New Mexico State University Study[14] reports, and Study participants confirm, that many households on Indian Lands lack telephones, electricity and/or natural gas and improved roads. Workshop participants reported that similar conditions prevail in Hawaiian Home Lands.

[14] *Assessment of Technology Infrastructure in Native Communities*, College of Engineering of New Mexico State University, 2000, prepared for the Economic Development Administration, U.S. Department of Commerce.

Six major capital access barriers related to education and cultural issues were identified:

1. *Lack of Knowledge or Experience With the Financial World on the Part of Native Americans and Native Hawaiians.* Some Study participants related that in many Native American and Native Hawaiian economies, financial transactions have traditionally been conducted using cash. Thus, according to Study participants, many Native Americans and Native Hawaiians lack experience with and understanding of banking, credit reporting, and loan qualification processes and standards. They may have difficulty obtaining credit, and often lack knowledge and experience in preparing business plans required for bank financing or equity investment.
2. *Lack of Technical Assistance Resources.* The Study identified the lack of technical assistance and training resources, in areas including financial literacy, financial management and entrepreneurship, as a serious barrier to capital access and, throughout the Workshops, participants identified a variety of unmet training needs for Tribal governments and Native American and Native Hawaiian entrepreneurs.
3. *Failure of Lenders and Investors to Understand Tribal Government or Legal Systems.* Study participants noted that lenders and investors have had limited exposure to Tribal government operations, regulations, and enforcement, and thus may be concerned about not being able to collect on their debts or may fear that the process of doing so will be complex and difficult.
4. *Historical Absence of Trust Between Tribes and Banks.* Study participants noted that there has been a historical lack of trust between Native Americans and Native Hawaiians and FSOs. This may cause misunderstandings that lead to failed negotiations for loans, increased costs of doing business for Native Americans and Native Hawaiians, and a reluctance on the part of banks to underwrite loans.
5. *Differences Between Native American and Native Hawaiian Cultures and Banking and Investor Cultures.* The differences between Native American and Native Hawaiian cultures and banking and investor cultures are substantial, according to Study participants. There are, for example, differing views of the concepts of wealth and wealth sharing, profit motive, asset accumulation, credit worthiness, and land ownership.
6. *Discrimination Against and/or Stereotyping of Native American and Native Hawaiian Communities.* Financial Survey respondents and Workshop participants reported that Native Americans and Native Hawaiians suffer from stereotyping and discrimination, with problems ranging from cultural misunderstandings to overt redlining and discriminatory lending practices.

REMEDIES AND RECOMMENDATIONS

Study participants identified a number of potential remedies and recommendations related to the major capital access barriers identified above.

Participants identified one recommendation related to the legal infrastructure barrier cited above.

1. *Enhance the Tribal Legal Infrastructure.* Some Study participants recommended a strategy of creating a more pro-business legal environment on Indian Lands, through such actions as:
   - Establishment of a Tribal legal infrastructure for business development, including Tribal commercial codes, foreclosure regulations, bankruptcy codes, permitting processes, and general regulatory frameworks
   - Development of zoning codes and land use plans
   - Clarification of sovereignty and sovereign immunity, particularly regarding business and housing development

Study participants identified four recommendations related to the three government operations barriers:

1. *Improve Tribal Planning Processes and Structures.* Some Workshop participants felt that Tribal governments need to enhance their ability to establish, articulate and manage a clear and concise vision, to formulate policies and strategic plans for overall economic development, and to cultivate the professional government workforce necessary to implement such plans.
2. *Separate the Goals and Management of Tribal Government From Those of Tribal Business.* Some Workshop participants recommended separating the management of business and government, spinning off Tribally-owned enterprises to a separate bodies for oversight and management, delegating privately-owned enterprise oversight to nonpolitical bodies, and clarifying the differences between Tribal government and corporate liability.
3. *Strengthen Tribal Courts.* Some actions recommended by Study participants include:
   - Further development of independent Tribal courts
   - Provision of training for court personnel on commercial and financial law
   - Increasing the skills and capacity of judges and judicial personnel regarding lender and investor issues
   - Establishment of enforcement procedures for foreclosure, repossession, garnishment, and bankruptcy
4. *Streamline and Improve the Efficiency and Effectiveness of Certain Federal and State Programs Used By Native Americans and Native Hawaiians.* Many Workshop participants expressed the need to accelerate the pace of decision-making, reducing excessive requirements and paperwork, rationalizing conflicting requirements and revising programs with overly restrictive entry guidelines, of certain state and federal programs.

There were four remedies identified that relate to economic barriers:

1. *Create Alternative Collateral Options for Trust Land.* Workshop participants recommended recognizing and leveraging the value of trust assets; facilitating development of trust land through alternative means of valuation and collateralization, such as the creation of leaseholds and master leaseholds; building equity pools from trust lands and other resources; and converting

traditional assets into collateral. Workshop participants also recommended that, for Indian Lands and Native Hawaiian Home Lands, the U.S. Department of the Interior and the Hawaii Department of Hawaiian Home Lands, respectively, examine the feasibility of further streamlining leasing procedures.

2. *Develop New Local and Non-traditional Mechanisms to Deliver Capital on Indian Lands and Hawaiian Home Lands.* Workshop participants suggested that Tribal governments should develop their capacity to orchestrate and leverage all sources of capital, and financial institutions should develop new lending and financing products and revise underwriting criteria to meet the unique needs of Native American and Native Hawaiian markets, including the development of micro-lending programs for small businesses and securitization of oil and gas reserves and timber. Workshop participants proposed two options for providing access to nontraditional sources of debt and equity capital:

   - Develop Tribal or Inter-Tribal CDFIs, community banks, and other lending and investment institutions.
   - Create Tribal or Inter-Tribal pools for loan guarantees, equity investments/venture capital, micro-lending and lending for housing and small business.

3. *Increase Equity Investment on Indian Lands and Hawaiian Home Lands.* Equity Investment Roundtable participants suggested the following methods of increasing equity investment in Native American and Native Hawaiian communities:

   - Create industry sector specific incubators that provide management and technical assistance to start-up businesses and that focus on the specific needs of Native American and Native Hawaiian business owners.
   - Use existing "angel investor" networks (i.e. – networks of investors who provide start-up capital for new business, sometimes accompanied by technical expertise and contacts networks).
   - Build an "angel" network that specializes in investments in Native American-owned or Native Hawaiian-owned businesses.
   - Create community development venture capital (CDVC) funds,
   - Use existing corporate venture capital programs.
   - Use state and city venture capital programs.
   - Form a public/private intermediary to direct funds into Native American and Native Hawaiian CDFIs, businesses, or projects.

4. *Establish a Native American/Native Hawaiian Equity Fund.* To attract equity investments in Native American and Native Hawaiian communities, Workshop participants suggested that the federal government sponsor an equity fund to help encourage private sector investors and public/private partnerships to invest on Indian Lands and Hawaiian Home Lands.

Four recommendations related to the two financial and physical infrastructure barriers cited above, were identified:

1. *Increase the Number of Financial Institutions on or Near Indian Lands.* To provide Native Americans and Native Hawaiians greater access to financial services, a number of policies need to be considered, including:
   - Creating more financial institutions, including CDFIs, on Indian Lands
   - Encouraging existing financial institutions that are not located on Indian Lands to open branches on Indian Lands
2. *Develop Regional Financial Institutions.* The Workshop participants believed that regional partnerships and alliances are essential to overcoming barriers to capital and credit access, and possible strategies include:
   - Building on partnerships established with the CDFI Fund's regional Inter-Tribal cosponsors and holding follow-up forums similar to those conducted in the Study
   - Establishing information clearinghouses at the regional level on model financing approaches, methods of accessing equity capital, and sources of training and technical assistance
   - Providing channels of information to Native American and Native Hawaiian communities so that they can adapt existing models to their unique cultural and community needs
   - Establishing regional partnerships among banks, lending institutions, venture capitalists, federal agencies, and Tribes/Inter-Tribal organizations
3. *Develop Financial Products and Services That Will Meet the Needs of Native American and Native Hawaiian Depositors and Borrowers.* Workshop participants suggested that this could be accomplished by financial institutions through the development of new lending and financing products, revised underwriting criteria more suited to the unique attributes of Native American and Native Hawaiian communities, the creation of micro lending programs for small business, and the creation of CDFIs.
4. *Create Innovative Strategies to Develop Physical Infrastructure on Indian Lands and Hawaiian Home Lands.* Various initiatives were explored at the Workshops to facilitate development of a more adequate infrastructure system on Indian Lands and Hawaiian Home Lands, including creation of partnerships with private developers to plan for infrastructure development and development of an infrastructure investment strategy that utilizes available federal resources and encourages private partnerships to participate in the funding and development process.

Study participants identified four recommendations related to the seven educational and cultural barriers:

1. *Expand Financial Literacy Education Opportunities for Native Americans and Native Hawaiians.* Workshop participants agreed that providing financial literacy education and personal finance education for Native Americans and Native Hawaiians can provide them with the means to participate in the

contemporary economy and that culturally appropriate financial literacy curriculum is available from various sources. Many existing CDFIs regularly provide this type of training in their communities.

2. *Develop Entrepreneurship Programs for Native Americans and Native Hawaiians.* Workshop participants recommended that these programs include:
   - Development of core materials on small business finance and entrepreneurship
   - Establishment of teaching partnerships with Tribal and non-Tribal colleges, financial institutions, CDFIs, and nonprofits
   - Incorporation of web-based training in the curriculum
   - Facilitation of funding and teacher recruitment through the private sector, Tribes, Inter-Tribal organizations, and federal agencies
3. *Conduct Lender and Investor Education.* Actions recommended by the Workshop participants include:
   - Development of informational handbooks on issues such as Tribal government structures, sovereignty and sovereign immunity, and land status
   - Creation of a directory of Tribal credit officers, economic development officers, and department heads and a directory of attorneys qualified to practice in Tribal courts
   - Development of a marketing campaign that illustrates effective practices and success stories, initiation of educational outreach seminars by Native American and Native Hawaiian communities for potential lenders and investors
   - Initiation of "road shows" focusing on investment opportunities on Indian Lands and Hawaiian Home Lands
4. *Expand Technical Assistance and Training.* From the Workshops, several initiatives were identified for increasing technical assistance and training on Indian Lands and Hawaiian Home Lands:
   - Provide Native Americans and Native Hawaiian business owners with technical assistance related to developing business plans and proposals and other business management needs[15].
   - Help Tribal governments develop a comprehensive strategic plan to meet development and financing needs.
   - Assist lenders, investors, and potential business partners in developing an understanding of Tribal laws, Tribal enforcement capabilities, and lender rights.
   - Help lenders, investors, and potential business partners understand federal programs, requirements, and application processes.

[15] In Fall 2001, the CDFI Fund will publish in the Federal Register a Notice of Funds Availability (NOFA), inviting applications for the initial round of the Native American CDFI Technical Assistance (NACTA) Component of the CDFI Program. The NACTA Component will be supported by the CDFI Fund's Native American CDFI Training Program. These programs are designed to assist the creation and capacity building of existing and nascent CDFIs and to build financial management capacity on Indian Lands.

EXAMPLES OF INITIATIVES AND PROGRAMS

One of the important aspects of the Study was the identification by participants of programs and initiatives that involve government, the private sector and Tribes to address the major barriers identified above. Each initiative identified below, designed to meet the needs of a particular community, may offer insights to other communities that can be adapted to meet the unique needs of other particular communities or regions.

For example, some Tribes have enacted legislation to promote business development, Tribal commercial codes, land use and planning codes, zoning codes and laws regulating corporate and business activity.[16]

Workshop participants noted that lenders and investors are often reluctant to accept the jurisdiction of Tribal courts to enforce financial contracts and, to address this problem, suggested increasing the capacity of Tribal courts to resolve commercial and financial disputes and to enforce commercial codes. Some initiatives are currently underway:

- The Federal Bureau of Justice Assistance, Department of Justice, and Bureau of Indian Affairs[17] are currently funding technical assistance and training grants for Tribal Court capacity building.
- The National American Indian Court Judges Association has established the National Tribal Justice Resource Center[18] to assist Tribes in strengthening methods of self-government and to provide technical assistance for enhancing Tribal justice systems.
- The Tribal Court Clearinghouse[19] has been created as a resource for Tribal court development, training, court review, code drafting, and training.

To provide Native Americans and Native Hawaiians greater access to financial services, Study participants felt that a number of options need to be considered, including creating more financial institutions on Indian Lands and Hawaiian Home Lands, expanding and/or rebuilding existing financial institutions on Indian Lands, purchasing existing banks, expanding Native-ownership of financial institutions through purchase or de novo creation of new institutions, and creating more CDFIs. Workshop participants and CDFI Fund research identified the following examples of successful initiatives:

- The Cheyenne River Sioux Tribe used an existing revolving loan fund to create the non-profit Four Bands Community Fund, which makes business loans.
- In 1990, the Navajo Nation had only three bank branches and one ATM serving a geographic area of 17 million acres. To increase the availability of financial services on the reservation, the Tribe entered into an agreement with Norwest Bank (now Wells Fargo) to build four new branch banks with ATMs, hire and train Navajo personnel, and target financing to business startups and housing development.
- In all, nine Tribally-owned commercial banks, seven credit unions, and 14 loan funds have been developed nationwide to serve Native American communities.
- Hawaiian Community Assets, Inc. is developing a charter for the first Native Hawaiian-owned bank.

[16] For a brief description of some strategies that Tribes have implemented to improve business climates, see Ch. III.

[17] For further information, see www.doi.gov/bia/courts.

[18] For further information, see www.naicja.org.

[19] For further information, see www.tribal-institute.org.

- As of September 30, 2000, the CDFI Fund had made awards totaling nearly $27 million to 33 CDFIs that provide some level of service to Native American or Native Hawaiian communities.

Workshop participants identified regional partnerships and alliances as essential components to overcoming barriers to capital and credit access, and examples of successful regional initiatives include:

- The Native American Development Corporation is a CDFI that provides Native American business communities in Montana and Wyoming with funds to create jobs, develop long-term economic self-sufficiency, and facilitate access to capital. Its Capital Loan Fund was initially capitalized with funding from banks, the federal government, First Nations Development Institute, and private corporations.
- The Native American Lending Group, Inc. is a nonprofit multi-Tribe CDFI in New Mexico that serves 19 Pueblo communities. It was created to provide Tribes, businesses, and individuals access to private investment capital.
- Coastal Enterprises, Inc. is a nonprofit CDFI that serves low-income communities in Maine and provides financial and technical assistance for development and expansion of certain targeted industries, small businesses, housing, and social services. CEI has established a partnership with the Penobscot Indian Nation to develop a CDFI to fund housing and business development.

Tribal leaders and private investors participating in the Workshops suggested strategies that relied on accessing capital sources that have not traditionally been on the Native American investment "radar screen" and on expanding Native American awareness to include more equity and nontraditional financing and thus increase the likelihood of securing funding. One example of an existing strategy captured significant Workshop participant attention: Center of North America Capital Fund is an "angel" investor network and investment fund in North Dakota that links two Tribes — the Turtle Mountain Band of Chippewa and the Spirit Lake Sioux — with investors. The CONAC Fund was modeled after Minnesota's Regional Angel Investor Networks Fund, a series of rural investment funds formed by the Minnesota Investment Network Corporation.

The following are examples of public/private intermediaries cited by Workshop participants that direct funds to Native American and Native Hawaiian businesses:

- The Hopi Credit Association is a Tribal credit union that provides a bridge between banks and Tribal borrowers, obtaining funds from banks, handling all loan selection and servicing with Tribal members. Participating banks thus gain a point of entry to the Tribal community, via a Tribal credit union that understands banking needs, and Tribal members are served directly by a credit union that understands their needs.
- Another example is the Southern Ute Growth Fund, which uses a partnership approach and co-invests, using its growth fund and capital provided by outside investors, in a variety of growth opportunities.

The following Chapters One through Four of this Study contain quotes that are attributed to Workshop, Equity Roundtable, and other Study participants. The Fund has not included such quotations to indicate Fund or Treasury Department endorsement of the positions therein expressed, or to represent, necessarily, a prevailing point of view among any particular group of participants. Rather, the Fund has included quotations to add context and background to the report where such additions might help inform the reader's understanding of the subject.

"...we recognize that we're the ones that have to go in there and make it happen, and we have to take a pro-active stand to identify who we are, what we stand for, what we want, and to be able to identify the opportunities and position ourselves to take advantage of those opportunities."
—Curtis Zunigha, Oklahomans for Indian Opportunity

INTRODUCTION

MANDATE FOR THE STUDY

In September 1994, Congress mandated that the Community Development Financial Institutions Fund (the CDFI Fund), a wholly-owned government corporation within the Department of the Treasury, conduct a study on lending and investment practices on Indian reservations and other lands held in trust by the United States.[20] Congress mandated that the Study:

- Identify barriers to private financing.
- Identify the impact of such barriers on access to capital and to credit for Native Americans[21] and Native Hawaiians[22]
- Develop recommendations for statutory and regulatory changes to existing federal programs.
- Develop policy recommendations for community development financial institutions (CDFIs), insured depository institutions, secondary market institutions, and private-sector capital institutions.
- Submit final report to Congress and the President.

ECONOMIC CONDITIONS ON THE INDIAN LANDS AND HAWAIIAN HOME LANDS

Economic and social conditions on many Indian Lands[23] and Hawaiian Home Lands[24] place them significantly behind the mainstream U.S. economy. For example:

- According to U.S. Department of Commerce census data[25], unemployment rates on Indian Lands in the continental United States range between 20 percent and 80 percent, and are over 90 percent in some Alaska Native Villages where it is common

[20] 12 U.S.C. §§ 4701 *et seq.*

[21] See footnote 4, Executive Summary for a definition of Native American.

[22] See footnote 5, Executive Summary for a definition of Native Hawaiian.

[23] See footnote 2, Executive Summary for a definition of Indian Lands and Alaska Native Villages.

[24] See footnote 3, Executive Summary for a definition of Hawaiian Home Lands.

[25] U.S. Department of Commerce, *Census 1990*

for 90 - 100 percent of the population to depend on subsistence farming or hunting for their livelihood, according to Financial Survey respondents. Average unemployment rates on Indian Lands are about 50 percent, whereas the rate for the United States as a whole is less than five percent.[26]

- According to U.S. census data, poverty rates in the late 1990s were 26 percent for Native Americans, lower than earlier in the decade, but still far above the national average of 12 percent.[27]
- Also, U.S. census data estimates that Native American household income is about three-quarters the national household average.[28]
- Workshop participants report that transportation, telecommunications, energy, financial, and other infrastructures are often substandard and inadequate to support new business formation.
- While it is not clear precisely how many mortgages there are on Indian Lands held in trust, as of 1999, there were 471 home mortgages on Indian Lands, overall [29], even though an estimated 38,000 households have sufficient income to qualify for a mortgage[30].

"We all know that as we live on the Reservation,...our money goes off each time, every two weeks, we go off to the malls somewhere else. We spend our money. So we're supporting the jobs in Rapid City, Bismarck, Missoula, Great Falls, and we're not making jobs of our own."

—Linda Pease, Native American Development Corporation, Montana

In addition, the Financial Survey revealed the following:

- Only 14 percent of Indian Lands located in the continental United States have a financial institution in the community, fewer than half have such an institution anywhere nearby, and 15 percent of Native American people must travel more than 100 miles to reach a bank or automatic teller machine (ATM).
- Although 85 percent of financial institutions on or near Indian Lands located in the continental United States offer deposit accounts to Native Americans residing there, 50 percent of these financial institutions offer primarily two financial services — ATMs and personal consumer loans.
- Conventional home mortgages were rated as "difficult" or "very difficult" to finance by 65 percent Tribal respondents, and 35 percent of FSO respondents. Home equity loans, construction and property rehabilitation loans are also in short supply on Indian Lands and Hawaiian Home Lands.
- Business loans were rated as "impossible" to obtain by 24 percent of Native American and Native Hawaiian respondents and as "difficult" to obtain by 37 percent. Larger business loans, those over $100,000, are even more difficult to obtain, 67 percent of respondents rated them as difficult to impossible to obtain.
- The percentage of the overall financial service organization (FSO) loan portfolio represented by conventional home mortgages is disproportionately lower on Indian Lands and Hawaiian Home Lands (81.9 percent of the overall portfolio versus 54.3 percent of the portfolio of products offered to Native Americans and Native Hawaiians).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] U.S. Department of Housing and Urban Development, U.S. Department of Treasury, *One Stop Mortgage Center Initiative In Indian Country, A Report to the President*, October 2000.

[30] Estimated household income information is based on a study by First Nations Development Institute

- Conventional home mortgages were rated as "difficult" or "very difficult" to finance by 65 percent of Tribal respondents and 35 percent of FSO respondents.
- Only one-third of financial institutions on or near Indian Lands and Hawaiian Home Lands offer state loan or loan guarantee programs to Native Americans and Native Hawaiians residing there.
- 66 percent of Native American and Native Hawaiian respondents stated that private equity investments are "difficult" or "impossible" to obtain for Native American and Native Hawaiian business owners.

Native American economies have about half of the level of equity that comparable international economies (that is, countries or regions with similar GDP, population and other demographic factors) have.[31] Further, the Equity Investment Research Report's comparisons of Indian Lands to similar economies suggests that if external equity investors were located in or serving Indian Lands and if the strategies to overcome existing obstacles were pursued and were successful, an additional $10 billion in equity could be invested in the Native American economy.

What accounts for the equity gap on Indian Lands and Hawaiian Home Lands? The Equity Research and Workshops identified the following causes:

- The perception of unreasonably high risk surrounding private lending on Indian Lands and Hawaiian Home Lands results in little infusion of development capital.
- The underdeveloped nature of Native American and Native Hawaiian economies.
- The difficulty that private investments on Indian Lands and Hawaiian Home Lands have in producing adequate financial returns.
- The inability of Native American and Native Hawaiian communities to attract conventional financing due to trust land status.
- Only seven percent of Native American and Native Hawaiian respondents to the Financial Survey reported obtaining private equity investment with relative ease. Less than one percent reported that private equity was easy to obtain, while 66 percent found obtaining private equity difficult or impossible. Moreover, Workshop participants reported that even profitable and growing businesses in Native American and Native Hawaiian communities have difficulty obtaining even small amounts of equity capital to expand because entrepreneurs do not know how to apply for it and have difficulty locating equity investors.

"...often time with Native Americans there's one product or there's just one source of loans, and there's less competition for it...it forces people [Native Americans] who need loans to go to alternative sources, which are often exploitative, often charge a high interest rate...a lot of time the Tribes see that there's limited lending resources, so they put their own resources into lending. Now, the effect that this has on them is they're using their money instead of bringing in outside money like other communities."

—Ken Goosens, Seminole Tribe of Florida

PROFILE OF THE NATIVE AMERICAN COMMUNITY

There are approximately 2.7 million Native American and Native Hawaiian people living in the United States, of whom approximately half live on Indian Lands or Hawaiian Home Lands.[32] This population has grown rapidly since the 1970s, and Native Americans and Native Hawaiians constitute the third fastest growing population

[31] For a more comprehensive discussion of the comparison, see Equity Investment Roundtable and Research Report, January 2001.

[32] The US Census Bureau estimates that there were 2.45 million American Indians, Eskimos, and Aleuts living in the United States as of October 1, 2000. The Office of Hawaiian Affairs has 250,000 enrolled members who, as of December 2000, declare Native Hawaiian descent.

segment in the nation, after Hispanics and Asians. The nation's 562 federally recognized Tribes and Alaska Native Villages, along with Native Hawaiian communities, are heterogeneous with respect to traditions, cultures, and languages, and about half of the population lives in economically depressed rural communities. There are 334 Indian Tribes[33] in the continental United States and 228 Alaska Native Villages. Tribal populations range from fewer than five members on several acres of land to the Navajo Nation with 250,000 enrolled members and a land base of 17 million acres. Tribal governments vary in size and organization from small elected councils to three-branch governments that include executive and legislative bodies as well as independent court systems.

The federally recognized Tribes in the continental United States and Alaska have been recognized as sovereign entities through peace treaties, Congressional legislation, and U.S. Supreme Court decisions. Congressional legislation — such as the Indian Reorganization Act of 1934[34], the Indian Financing Act of 1974[35], and the Indian Self-Determination and Educational Act of 1975[36] — further established the principle of Tribal self-government. Most Tribes, with the exception of those in Oklahoma, have a land base that comprises trust, allotted, and fee-simple land.

In the early 1970s, Alaska Natives negotiated the transfer of Alaskan land, previously held in trust by the federal government for their benefit. This land was given to Alaska Natives in exchange for the sale of land to the federal government for the Alaska oil pipeline right-of-way. The Alaska Native Settlement and Claims Act of 1971[37] divided the state into 12 regions, created a for-profit corporation and a non-profit corporation wholly owned by the Alaska Natives of that region, and transferred ownership of that trust land to the 12 regional for-profit corporations. Some land was also transferred to several dozen village corporations.

Native Hawaiians, who number approximately 250,000, are not members of a separate, federally recognized entity, but do maintain a formal relationship with the State of Hawaii. Native Hawaiians lived under a monarchy until 1893, and 203,000 acres of land were set aside for them under the provisions of the Hawaiian Homes Commission Act of 1920[38]. At present, this land holding totals 193,935 acres held as state trust land and administered by the Department of Hawaiian Home Lands, a state government agency. In 1970, the state created the Office of Hawaiian Affairs (OHA), both a government agency and a trust, to assist Native Hawaiians. OHA operates economic development, education, health and human services, land, and natural resource programs.

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[33] Here we use the terms *Tribe* and *Tribal* interchangeably to refer to Tribal governments and to a given Tribe as a whole — i.e. the Tribal government and the individual members. We use the term *Tribal government* to refer only to the Tribe's government.

[34] 25 U.S.C. §§ 461 *et seq.*

[35] 25 U.S.C. §§ 1452 *et seq.*

[36] 25 U.S.C. §§ 450 *et seq.*

[37] See, note 47, *infra*.

[38] 48 *U.S.C.* §§691*et seq.* (omitted as obsolete after admission of Hawaii to the Union).

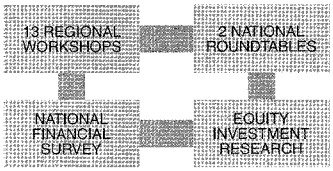
RESEARCH DESIGN

The CDFI Fund developed the design for the Study to ensure that findings and recommendations were derived from empirical data and research. Also, very importantly, the Study was designed to obtain as much meaningful input as possible from many of the stakeholders involved in the issue of capital access on Indian Lands and Hawaiian Home Lands. Consequently, the Study presents a non-exhaustive quantitative review of the state of lending and equity investment on Indian Lands and Hawaiian Home Lands, together with qualitative information reported by Workshop participants. The Study did not catalogue or review every program or policy (federal, state, local, or otherwise) operative on Indian Lands and Hawaiian Home Lands. Rather, the Study chronicles Financial Survey respondents' and Workshop participants' experiences with particular programs and policies.

Specifically, the Study included:

- Thirteen regional Workshops conducted to identify the barriers to lending and investment in Native American and Native Hawaiian communities (the "Workshops").
- A national roundtable on barriers to lending on Indian Lands and Hawaiian Home Lands (the "National Roundtable").
- A national Financial Survey of lending practices relating to Native Americans and Native Hawaiians (the "Financial Survey").
- A national roundtable and a research report on equity investment on Indian Lands and Hawaiian Home Lands (the "Equity Investment Roundtable" and "Equity Investment Report").

STUDY APPROACH BUILDING BLOCKS



REGIONAL WORKSHOPS AND NATIONAL ROUNDTABLE

"It has to be a two-way street. The lenders have to learn what we are, just as you expect us to learn how to operate in your world."

—Samuel Rock, White Earth Band of Chippewa, Minnesota

The Study design combined two approaches. First, the CDFI Fund identified and involved experts in the field. Second, to ensure that all the major issues were addressed, to quantify the incidence and severity of access to capital barriers, and to ascertain whether the problems identified were widespread, the CDFI Fund conducted extensive additional research, including the Financial Survey.

The Study design ensured that input from a substantial group involved in the provision of capital access on Indian Lands and Hawaiian Home Lands would be obtained. Tribal[39] leaders, Tribal economic development professionals, Native American and Native Hawaiian entrepreneurs, commercial banking organizations and other financial institutions, private equity investors, secondary market organizations, U.S. government officials from financial supervisory agencies and other federal agencies, officials from state agencies, and other financial services and lending experts participated in numerous and detailed discussions.

The 13 regional Workshops were conducted with the assistance of 14 co-sponsors, including: regional Native American organizations, Alaska Native corporations, and Hawaiian state agencies.

Of the approximately 700 Workshop participants, 43 percent represented Native American or Native Hawaiian organizations, 24 percent represented financial institutions, and 33 percent represented federal, state and non-profit organizations.

Regional Workshops were held as follows:

- Northwest Region — Seattle, Washington, March 24-25, 1999; cosponsored by the Affiliated Tribes of Northwest Indians Economic Development Corporation, Seattle, Washington
- Southwest Region — Phoenix, Arizona, April 1-2, 1999; cosponsored by the Inter-Tribal Council of Arizona
- Southwest Region — Albuquerque, New Mexico, April 28-29, 1999; cosponsored by the All Indian Pueblo Council
- West Region — Reno/Sparks, Nevada, May 12-13, 1999; cosponsored by the Inter-Tribal Council of Nevada and the California Indian Manpower Consortium, Inc.
- Midwest Region — Oklahoma City, Oklahoma, June 2-3, 1999; cosponsored by the Oklahomans for Indian Opportunity
- Great Lakes Region — Minneapolis, Minnesota, June 29-30, 1999; cosponsored by the Midwest Alliance of Sovereign Tribes
- North Central Region — Rapid City, South Dakota, July 26-27, 1999; cosponsored by the Rapid City Housing Coalition and the Montana- Wyoming Tribal Leaders Council
- Hawaii Region — Honolulu, Hawaii, August 11-12, 1999; cosponsored by the State Department of Hawaiian Home Lands and the State Office of Hawaiian Affairs

"I'm kind of seeing this as the meeting of the minds. I really don't think that there is a right answer and a wrong answer to all of these issues that are coming together; it's coming together in knowing how we each think and communicate."

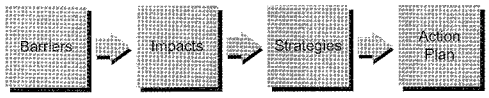
—John Lucero, First National Bank, Santa Fe

[39] In the Study, "Tribal" refers to Native American and Alaska Native governments, except as may be hereinafter specified. See n.12

- Hawaii Region — Hilo, Hawaii, August 17-18, 1999; cosponsored by the State Department of Hawaiian Home Lands and the State Office of Hawaiian Affairs
- Alaska Region — Anchorage, Alaska, November 15-16, 1999; cosponsored by Alaska Village Initiatives
- Alaska Region — Fairbanks, Alaska, November 18-19, 1999, cosponsored by the Tanana Chiefs Conference, Inc.
- Northeastern Region-Mystic, Connecticut, December 1-2, 1999; cosponsored by the United South And Eastern Tribes
- Southeastern Region — Tampa, Florida, December 14-15, 1999; cosponsored by the United South and Eastern Tribes

Participants identified and discussed the major barriers to Native Americans' and Native Hawaiians' access to capital, prioritized the significance of those barriers, noted impacts for each barrier, and identified strategies and actions to address such barriers. A report of the proceedings of each Workshop was prepared.

Workshop Consultation Process



In addition, in January 2000, representatives of Native American and Native Hawaiian communities, along with federal and financial institution representatives, were invited to Washington, D.C. for a roundtable discussion on barriers and strategies. After discussing the issues raised in the regional workshops, participants focused on:

- How to access capital, equity, and investments.
- How to establish effective, mutually beneficial partnerships across stakeholder groups.
- The kinds of messages that should be delivered to the various audiences.
- Plans for implementing the recommendations.
- Success stories that demonstrate how Native American and Native Hawaiian communities have partnered with and/or leveraged public and private sources of capital.

The discussions at this workshop formed the basis for the recommendations contained in this Study.

THE FINANCIAL SURVEY

OBJECTIVES OF THE FINANCIAL SURVEY

Following the National Roundtable, the CDFI Fund developed a nationwide Financial Survey, which was administered to Tribal governments, Native Hawaiian representatives and FSOs familiar with lending on Indian Lands and Hawaiian Home Lands to identify the barriers to capital access and to help develop and recommend strategies to address those barriers. Specifically, the objectives of the Financial

Survey were to: provide quantitative data to complement and enhance the qualitative and anecdotal findings of the Workshops and the National Roundtable; identify the kinds of relationships that exist between FSOs and Native American and Native Hawaiian communities, as well as the mix of financial services available or provided by FSOs to Native American and Native Hawaiian communities; and ensure that the issues addressed are representative of the diversity of both Native American and Native Hawaiian communities and FSOs.

The Financial Survey results were then compared to the results of Workshops and the National Roundtable.

FINANCIAL SURVEY METHODOLOGY

To conduct the Financial Survey, the CDFI Fund engaged three contractors: Deloitte & Touche LLP, an accounting and professional services firm with extensive experience in designing and conducting Financial Surveys, the Metro Chicago Information Center, a non-profit research and consulting firm, and the Johnson Strategy Group, Inc., the firm that conducted the 13 Workshops and the National Roundtable.

This team developed two Financial Survey instruments, one for Tribal governments and one for FSOs. Slightly different versions of each instrument were developed for respondents in Alaska and Hawaii to reflect the appropriate terminology used in those areas.[40]

The Financial Survey was sent to all federally recognized Tribes, including those in Alaska, as well as to non-federally recognized Tribes in Oklahoma and organizations representing Native Hawaiians, including the two Hawaii State agencies with missions relating to the Native Hawaiian community. The final Financial Survey response rates were: for FSOs, 735 Financial Surveys were sent and 245 Financial Surveys were completed, for a response rate of 33 percent; for Tribes and Native Hawaiian representatives, 851 Financial Surveys were sent, and 212 were completed, for a response rate of 25 percent.

THE EQUITY INVESTMENT ROUNDTABLE AND RESEARCH REPORT ON EQUITY INVESTMENT

THE EQUITY INVESTMENT ROUNDTABLE

In November 2000, the CDFI Fund convened a second meeting of Tribal officials, Native American entrepreneurs, private equity players, government agency representatives, and experts on issues related to accessing equity capital in underserved communities. Like the CDFI Fund's 13 Workshops, the goal of Equity Investment Roundtable was to obtain input from individuals who have direct experience in dealing with the barriers of accessing or providing equity investments, and to develop appropriate strategies and actions to address these barriers. Forty-seven people participated in a two-day roundtable discussion, and a proceedings report was prepared.

The Equity Investment Roundtable focused on defining the equity investment landscape and identifying Native American and Native Hawaiian opportunities for "getting on the equity investment radar screen." Structured discussion topics included:

[40] Appendices A and B of this report contain the Financial Survey instruments.

- The equity investment landscape and "radar screen", i.e. types of equity investors and their investment criteria
- The equity investment gap on Indian Lands and Hawaiian Home Lands
- Barriers to equity investment on Indian Lands and Hawaiian Home Lands
- Strategies to overcome these barriers and improve access to equity capital
- Action plans and model approaches that can be adapted for use on Indian Lands and Hawaiian Home Lands

THE EQUITY INVESTMENT REPORT

The CDFI Fund also conducted research on equity investment on Indian Lands and Hawaiian Home Lands to provide the background and recommendations for enhancing equity capital access. Primary research included extensive discussions with equity market participants about equity investment on Indian Lands and Hawaiian Home Lands. Other primary research included review of the relevant findings concerning equity investment from the Financial Survey and analysis of the major preliminary findings from the Workshops. In addition, a questionnaire was developed for participants in the Equity Investment Roundtable that provided useful information about equity investment performance and demand for equity on Indian Lands and Hawaiian Home Lands.

"Indian Country appears to be an 'equity desert.' What is needed is irrigation, seeding, weeding, and growth."

—Equity Investment Research Report

The CDFI Fund also conducted research on the level of equity investment on Indian Lands, using mostly census data and Native American-owned business data obtained from the Dun & Bradstreet Minority-Owned Business Database. The CDFI Fund estimated the amount of equity in economies comparable to those on Indian Lands based on census and related information, and data on underdeveloped countries was obtained from various UN, International Monetary Fund, and World Bank, and other sources.[41] The CDFI Fund's Equity Research analyzed these data, along with information on the effects of various public sector-sponsored, economically targeted, and community development equity investment programs, to estimate the potential benefits of bridging the estimated equity gap. The CDFI Fund supplemented this primary research with a review of over 150 secondary sources.[42]

In addition, the CDFI Fund studied models being used elsewhere that may have applicability to Native American and Native Hawaiian communities based on published reviews of these efforts, analysts' knowledge of different programs, interviews with practitioners, and the roundtable discussions. Materials from the Equity Investment Report were also used in the Equity Investment Roundtable to provide a general overview of the equity landscape and to provide structure for the roundtable discussions.

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[41] These sources included the International Finance Corporation/ Standard & Poor's global stock market figures, the Milken Institute Capital Access Index, Heritage Foundation ratings on ease of capital flows, and others.

[42] These included articles in the general press, books on investment and/or obtaining financing, government publications, testimony, and press releases, academic research articles, practitioner articles and guides, and Tribal and Indian Land publications. A complete list is provided in the Bibliography, available on the CDFI website at: www.treas.gov/cdfi/. Inclusion of materials in the Bibliography, or in this Study, does not indicate CDFI Fund or U.S. Department of Treasury endorsement of the positions or opinions expressed therein. The Bibliography is provided for informational purposes only.

"You know, probably the scariest thing for a Tribal member and for the bank, too, if you're sitting across the desk from a banker who really doesn't understand what the Tribe is all about, and on the other side of the table it's a Tribal member who really never has been in a position of borrowing money, they don't know what the financial statement is all about, ...they know what they want to do, but they've never been in that position."

—Pat Strong, Chitimacha Tribe

BARRIERS TO PRIVATE FINANCING AND POTENTIAL REMEDIES

The 13 Workshops resulted in the identification and prioritization of barriers to lending and investment in Native American and Native Hawaiian communities and development of strategies for addressing the barriers. The Workshops provided a forum for the stakeholders who live and work with these issues on a day-to-day basis and, working in teams, participants identified, in the aggregate, hundreds of barriers. They then prioritized the barriers and developed strategies and action plans to address them. The CDFI Fund synthesized the barriers into 17 priority barriers.

The 17 priority barriers were used as the basis for further research, and the results from the Financial Survey permitted a more detailed analysis of the barriers identified by type of respondent. Finally, barriers were reviewed during a National Roundtable and an Equity Investment Roundtable. The priority barriers are grouped into five categories, as follows:

- Legal Infrastructure
- Government Operations
- Economic
- Financial and Physical Infrastructure
- Educational and Cultural

LEGAL INFRASTRUCTURE BARRIERS

Study participants identified one legal infrastructure barrier:

- Inadequate Tribal Commercial Laws and Regulations.

Participants suggested the following recommendation:

- Enhance the Tribal Legal Infrastructure.

IDENTIFICATION OF BARRIER

Inadequate Tribal Commercial Laws and Regulations

Tribal sovereignty generally entails the right to govern, adjudicate disputes, and be immune from suit. In 1975, Congress promoted Tribal self-government by enacting the Indian Self-Determination and Educational Assistance Act[43]. Since then, Tribal governments have assumed from federal agencies increasing

[43] 25 *U.S.C.* §§ 450, *et seq.*

responsibility for day-to-day Tribal affairs. Several Workshop participants related that, in their respective experience, when lenders and investors express concerns about sovereign immunity, often they meant that Tribal governments had not developed or clearly defined the legal infrastructure for the enforcement of contracts or other commercial arrangements. Many of the FSO representatives who participated in the Workshops reported their perception that many Tribes lacked clear, predictable guidelines for the operation of Tribal sovereignty comparable to those of the neighboring states and municipal governments.

Fund research found that Tribal commercial codes and Tribal courts are at varying stages of development. Some Tribal governments have fully developed commercial codes and court systems, including trial and appellate courts, while others maintain the Tribal council or executive body as the legal enforcement mechanism. Some Tribes are too small to have their own court system and rely on the courts of neighboring states. Others are in the process of developing commercial laws, regulations, and trial and appellate courts.

Fund Equity Research and Roundtable participants reported that When Tribal commercial laws and regulations are inadequate and ambiguous, uncertainty results for potential lenders and investors. Such uncertainty can increase investors' perceived risks and cost. As a result, investors and lenders are unwilling, without increased compensation in the form of higher rates or other terms, to make investments or extend credit for home mortgages and business loans.

Additionally, some FSOs are concerned that existing Tribal courts may not be sufficiently independent of the executive branch of the Tribal government to offer a secure source of recourse to aggrieved parties from outside the community. Until investors feel confident that they can sue to enforce a contract, and appeal an adverse decision to a higher court, they may be hesitant to invest on Indian Lands.

POTENTIAL REMEDY

Enhance the Tribal Legal Infrastructure

Workshop participants reported that one potential remedy to the barriers presented by Tribal sovereignty would be the development of clearer, more predictable guidelines. In particular, Workshop participants expressed a need to inform potential lenders and investors of the circumstances under which Tribes would waive or invoke their sovereign immunity in the context of commercial transactions. It was noted that following the model of federal and state governments, many Tribal governments have enacted limited waivers of their immunity from suit for commercial development as a matter of standard business practice.

Fund research found that as Tribal economies expand and as their capital needs increase, Tribal governments need to cultivate an environment conducive to entrepreneurship, lending, and investment. A key component of a pro-business environment is a legal infrastructure that supports contract enforcement and facilitates commercial activity in the communities.

Study participants recommended a strategy of creating a more pro-business environment on Indian Lands through such actions as:

- Establishment of Tribal uniform commercial codes, foreclosure regulations, bankruptcy codes, permitting processes, and general regulatory frameworks
- Development of zoning codes and land use plans
- Development of educational programs for lenders and investors on Tribal government, laws, codes, and sovereignty and sovereign immunity

Workshop participants and CDFI research identified the following strategies implemented by various Tribal governments and examples of activities that have helped to create and strengthen those communities' respective legal infrastructures and, in some cases, have improved access to capital:

- The *Tribal Commercial Code (UCC)*: developed by the Navajo Nation, Crow Tribe, Hoopa Valley Tribe, Lummi Indian Nation, Northern Cheyenne Tribe, Cheyenne River, Mille Lacs Band, Rosebud Sioux Tribe, and Standing Rock Sioux.
- The *Tribal Land Use and Planning Code*: developed by the Navajo Nation, Cabazon Band of Mission Indians, and Gila River Indian Community.
- *Tribal Zoning Codes:* developed by the Navajo Nation, Colville, Muckleshoot, and Menominee Tribes.
- *Building Codes:* developed by the Colorado River Standing Rock Sioux and the Navajo Nation.
- *Tribal Corporation Codes* (licensing, incorporation, and contracts): developed by the Navajo Nation, Cherokee Nation (Oklahoma), and the Hoopa Valley Tribe.
- *Tribal Housing Codes:* model codes developed by the HUD Office of Native American Programs.
- The *Model Tribal Code:* developed by the University of Montana-Missoula School of Law and has been adopted by several Tribes.
- Two hundred governance projects specifically for code development have been funded by the Administration for Native Americans, Department of Health and Human Services.

GOVERNMENT OPERATIONS

There is a group of barriers identified by Workshop participants and Financial Survey respondents that point to the role of government (Federal, state and Tribal) in slowing the flow of capital into these communities. The three most significant of those barriers are:

- Cumbersome, conflicting, or ineffective Federal or state programs and regulations
- Inflexible banking regulations
- Uncertainty generated by changes in Tribal government leadership

Participants suggested four recommendations:

- Improve Tribal planning processes and structure

"...most people just flat don't understand how Tribal governments are set up. ...A lot of times, they look at it as 'no-mans-land.' ...The impact of that is that there's a great fear of investment."

—Richard Kontz, Navajo Partnership for Housing

- Separate the goals and management of Tribal government from those of Tribal business
- Strengthen Tribal Courts
- Streamline and improve the efficiency and effectiveness of Federal and state programs for Native Americans and Native Hawaiians

IDENTIFICATION OF BARRIERS

Cumbersome, Conflicting, or Inefficient Federal or State Programs and Regulations[44]

Workshop participants expressed their perceptions of: the slow pace of government decision-making; excessive requirements and paperwork; conflicting requirements of certain programs; programs that fail to address the needs of the community; and programs with overly restrictive entry guidelines. Frustration was especially pronounced because, according to participants, the role of the federal government in developing Native American and Native Hawaiian economies can be critical. Participants noted that federal funding, combined with Tribal resources, has been a major source of capital that often is necessary to leverage private capital. Accordingly, breakdowns or delays in the systems that deliver federal funding stymie the flow of private capital. Some participants related that many federal agencies have made strides in streamlining their applications and review processes with improved coordination and shortened response times, but there remains considerable room for improvement.

Inefficient regulations can discourage lenders and investors from doing business in Native American and Native Hawaiian communities. According to Workshop participants, resultant bureaucratic delays increase investor risk and the costs of doing business, and discourage business development.

Inflexible Bank Lending Rules and Regulations

"Traditional loans don't work in rural Alaska because we don't qualify. We don't have a steady income. We have seasonal income or else we're on welfare."

—Fred Bahr, Noorvik, Alaska

Many Study participants felt that, in many cases, underwriting standards that financial institutions use in non-Tribal and non-Native Hawaiian communities are inappropriate to evaluate the unique attributes of potential borrowers on Indian Lands or Hawaiian Home Lands. Moreover, many participants felt that most mainstream financial institutions do not offer credit products appropriate for the income and credit histories of non-traditional income earners or for individuals with minimal credit histories. Few resources are available in Native American and Native Hawaiian communities to help people establish or repair their credit rating.

Study participants cited the following examples of Native American and Native Hawaiian economic circumstances that may disadvantage certain borrowers under traditional underwriting standards:

[44] This section is based upon the reported experiences with certain programs of Workshop participants and Financial Survey respondents. It does not contain a comprehensive review of all programs purporting to serve Native American or Native Hawaiian communities.

- Seasonal, agricultural, and part-time incomes are common in Native American, Native Hawaiian communities, and especially in Alaska Native Villages.
- Many non-traditional income earners use cash for all of their transactions and consequently have not established credit histories.

Uncertainty Generated by Changes in Tribal Government Leadership

Newly-elected Tribal administrations have the authority, at their discretion, to change and or eliminate the priorities of prior administrations. Because Tribal governments frequently operate private business enterprises to augment the Tribal tax base, these priorities may, or may not, include prior administrations' business arrangements. This represents one kind of possible economic disruption resulting from transitions of Tribal governments, but Tribal ownership of businesses create other uncertainties as well. When Tribal governments maintain a dual role of governance and management oversight of Tribally-owned enterprises, the dual role can become complicated — especially when the two roles are in conflict. In the Workshops, both lenders and Tribal participants expressed concerns that newly elected officials and their administrations may change a previous administration's policies and programs in such a way as to affect private sector business arrangements. The possibility that new administrations would undermine the business arrangements of their predecessors may create uncertainty and, accordingly, risk for lenders and investors as well as for Tribal business people.

"...you need to ensure that the policies are in place that bridge the administrations and councils - both banks, Tribes, and Feds - so that as people are constantly revolving and going in and out, the policies will already be in place so you have something to fall back on."

—Justin Parker, Administrative Services Director, Makah Tribe, Washington

According to Workshop participants, uncertainties resulting from changes in Tribal government leadership can imply that Tribal businesses may not operate efficiently because management may emphasize meeting political goals instead of business goals, Tribal entrepreneurs may become frustrated and move their businesses out of Native American and Native Hawaiian communities, and lenders and investors may invest less in Tribal businesses.

POTENTIAL REMEDIES

Improve Tribal Planning Processes and Structure

Workshop participants felt that Tribal governments have the responsibility to establish a clear and concise vision for the community's long-term future, to formulate policies and strategic plans for overall economic development, and to build a well-trained government workforce. They felt that a Tribally-driven, systematic approach to economic development will foster an environment that is more favorable to economic development. A plan will allow Tribal governments to proactively develop their business climate from within, rather than reacting to isolated opportunities from outside the community. Potential business partners and investors will be assured that the Tribe will continue to move in a given direction and that specific future initiatives will be implemented. The Financial Survey revealed that some Tribes have economic development plans, land use plans, and programs encouraging entrepreneurship; however, many of these plans lack crucial components for success.

"The lack of a comprehensive, cohesive plan for development, ... sometimes forces the Indian Nation to, or the government and the people to, place greater reliance on the federal government or the state government."

—Phil Scott, Chief Financial Office, Navajo Nation Division of Economic Development

Specifically, participants recommended that Tribal plans should include strategies for economic diversification, a consumer spending assessment, and land use and zoning plans. They should identify businesses the Tribe wishes to target — those that are appropriate for the Tribe and that are consistent with the Tribe's culture and goals — such as, maximizing economic growth or job creation. In addition, performance evaluation plans containing measures to monitor progress should be included.

Separate the Goals and Management of Tribal Government From Those of Tribal Business

Lenders, investors, and Native American and Native business partners participating in the Workshops recommended that Tribes separate management of Tribal enterprises from the management of Tribal government operations. This would de-politicize business decisions and encourage business management decision making to focus solely on the benefit of the business operation. One strategy suggested by Workshop participants is to spin off Tribally-owned enterprises to a separate body for oversight and management, and delegate privately owned enterprise decision-making authority to a nonpolitical body, thus clarifying the roles between Tribal government activities and Tribally-owned enterprise/corporation business activities. For example, several Tribes have created Tribally-owned enterprises and corporations with separate boards and management. The Navajo Nation and Southern Ute Tribes have created Tribal for-profit oil and gas corporations, the Salt River Pima-Maricopa Community owns and operates a sand and gravel business and a cement company, and the Mississippi Band of Choctaw Indians owns and operates manufacturing plants and construction companies, all with separate governing bodies.

Strengthen Tribal Courts

Tribal courts are an integral part of a legal environment that promotes/facilitates economic development on Indian Lands, but they vary widely in their capacity and breadth of jurisdiction. Some Tribes are too small to have a court system and rely primarily on courts in surrounding jurisdictions and federal courts for enforcement. CDFI Fund research determined that there are approximately 275 formal Tribal courts, including peacemaker, traditional, and formal courts.

Workshop participants noted that lenders and investors are often reluctant to accept the jurisdiction of Tribal courts to enforce financial contracts, although it is unclear whether this reluctance is based on experience with courts or lack of knowledge of them. To address this problem, Workshop participants recommended an increase in the capacity of Tribal courts to resolve commercial and financial disputes and to enforce commercial codes. Recommended actions include the further development of independent Tribal courts, provision of training for court personnel on commercial and financial law, increasing the skills and capacity of judges and judicial personnel regarding lender and investor issues, and establishment of enforcement procedures for foreclosures and repossession, garnishment, and bankruptcy. Some initiatives are currently underway:

- The Bureau of Justice Assistance, U.S. Department of Justice, and BIA are currently funding technical assistance and training grants for Tribal Court capacity building.[45]
- The National American Indian Court Judges Association has established the National Tribal Justice Resource Center to assist Tribes in strengthening methods of self-government and to provide technical assistance for enhancing Tribal justice systems.[46]
- The Tribal Court Clearinghouse has been created as a resource for Tribal court development, training, court review, code drafting, and training. [47]

Streamline and Improve the Efficiency and Effectiveness of Federal and State Programs for Native Americans and Native Hawaiians

Workshop participants acknowledged the important role that state and federal programs play in economic development on Indian Lands and Hawaiian Home Lands. However, Workshop participants also consistently expressed the need to accelerate the pace of government decision-making, reduce excessive requirements and paperwork, rationalize the requirements of different programs that conflict with one another, reform programs that do not meet the needs of the community, and revise programs with overly-restrictive entry guidelines. They stressed that bureaucratic delays and onerous programmatic requirements extend timelines for physical and business development on Indian Lands and Hawaiian Home Lands. Many participants felt that if the federal government and the State of Hawaii could shorten their decision-making processes and ease programmatic requirements, development timelines could be shortened, and the associated risk and cost could be reduced.

Moreover, many Workshop participants felt that streamlining the processes that limit Tribes' abilities to alienate land, so that Tribal governments and individuals can exercise greater control over the assets that benefit them, would help remove barriers to the private sector to finance real estate and business development. As an example, in 2000 Congress passed the Omnibus Indian Advancement Act, Public Law 106-568.[48] The Act provided the opportunity to establish a streamlined process for the Navajo Nation to lease trust lands without having to obtain the approval of the Secretary of the Interior for individual leases, except leases for exploration, development, or extraction of any mineral resources. The terms of these leases, in the case of business or agricultural leases, would not exceed 25 years, but may include an option to renew for up to an additional 25 years. For residential purposes, the lease could be for a term of 75 years.

[45] *See*, note 15, *supra*.

[46] *See*, note 16, *supra*.

[47] *See*, note 17, *supra*.

[48] 25 *U.S.C.* §§ 4101, *et seq.*

ECONOMIC BARRIERS

Workshop participants identified four major barriers that affect the economic capacity of Native American and Native Hawaiian communities:

- Limited use of trust land as collateral
- Lack of capital, collateral, and/or credit histories of Native Americans on Indian Lands and Native Hawaiians
- Negligible economic base on Indian Lands
- Lack of networking of Native-owned businesses with equity investors

Participants suggested four recommendations:

- Create alternative collateral options for trust land
- Develop ways to access debt and equity capital on Indian Lands and Hawaiian Home Lands
- Increase equity investment on Indian Lands and Hawaiian Home Lands
- Establish a Native American and Native Hawaiian equity fund

IDENTIFICATION OF BARRIERS

Limited Use of Trust Land as Collateral

"...that is the biggest impediment, in our view, as far as banks coming on and lending dollars to Tribes is because of collateral issues. You cannot put the land that is in trust as collateral because if you default, there is no way for the bank to come in and to recoup so they don't have a loss."

—Keller George, President, United South and Eastern Tribes, Inc.

One of the most complex and long-standing barriers identified in the course of the Study is the status of Indian Lands. In the latter part of the eighteenth century, Congress passed the Trade and Intercourse Act[49], which voided any transfer trust of Tribally-owned land without the approval of the federal government. In 1887, Congress passed the Allotment Act[50], which provided to individual Native Americans land from both the public domain and from the reservations themselves. Often, reservation land that remained after allotments were issued would be sold in fee status to non-Indians, creating a checkerboard land tenure system and jurisdictional uncertainty. This practice was ended in 1934. At present, land tenure on most reservations is identified as Tribal trust, individual allotment in trust, and fee-simple (which is privately owned land that is transferable and may be encumbered by a mortgage or lien). Historic changes in federal policy, the historical distrust of certain federal policies and programs by Native Americans, and basic cultural differences relating to land ownership have led to the present confusing, hybrid system of land tenure on reservations.

Trust land (tribal or allotted) is held in trust by the federal government for the benefit and use of the Tribe or the allottee and cannot be conveyed by the Tribe or members for such transactions as business leases or mortgages, without the approval of the Secretary of Interior. In Hawaii, the situation is very similar for Hawaiian Home Lands. These lands are held in trust for the benefit of the Native Hawaiian people, who may homestead a parcel of this trust land only with the approval of the State Department of Hawaiian Home Lands.

[49] 25 *U.S.C.* § 177.

[50] 25 *U.S.C.* §§ 331, *et seq.*

According to Workshop participants, slow and inefficient operation of such restrictions can effectively deprive Native Americans and Native Hawaiians of opportunities to use what is potentially the most valuable asset in their communities and thus creates an obvious barrier to the availability of debt financing. This barrier was identified in the Workshops and in the Financial Survey, with 55 percent of the FSOs citing limited use of trust land as collateral as a significant barrier to lending.

Even leasing, an alternative to sale requires approval from the Bureau of Indian Affairs or (in the case of Hawaiian Home Lands) the State of Hawaii. According to Workshop participants, the approval process can often take six months to two years and, even after approval, many mortgage lenders are reluctant to accept a leasehold interest in property as collateral for a mortgage. The result is that most Native Americans and Native Hawaiians either purchase mobile homes, rent apartments, reside with friends or family, wait for public housing, or purchase homes outside their communities.

In Alaska, federal ownership is replaced by regional corporation ownership of land, creating similar difficulties. As in the continental United States and Hawaii, an Alaska Native does not own the land on which his/her home or business may be constructed. [51]

According to Workshop participants and Fund research, the limited use of trust land as collateral has the following results:

- As of 1999, there were 471 home mortgages on Indian Lands.
- The out-migration of Indian Lands caused by those seeking home ownership, results in the loss of talent and economic vitality in Native American communities.
- Native Americans and Native Hawaiians often lack home equity to pay for small-business start-ups, consumer loans, and college expenses.

Lack of Capital, Collateral, and/or Credit Histories of Native Americans on Indian Lands and Native Hawaiians

Many Native Americans and Native Hawaiians do not have access to capital in the form of home equity, stock holdings, or other assets and, according to Workshop participants, the result is that:

- Low levels of home-ownership deny Native Americans and Native Hawaiians the most common form of collateral to obtain loans for purchases or small-business startups.
- Individual Native Americans and Native Hawaiians wishing to start a business, purchase a home, or make another large purchase are often not able to qualify for the loans that they need.
- Fund research and Workshop participants suggest that compared to the United States overall, fewer business and consumer loans are granted on Indian Lands and Hawaiian Home Lands.

[51] The Alaska Native Claims Settlement Act of 1971, codified at 43 U.S.C. §§ 1601 *et seq.*, transferred trust land beneficiary status from the Alaska Native Tribes and Villages to 12 regional corporations. See also, *Alaska v. Venetie Tribal Government*, 118 S. Ct. 948 (1998).

Negligible Economic Base on Indian Lands

Another key barrier that Workshop participants identified is the limited economic base in most Native American communities, which is due to a combination of small population, remote location, and the other barriers discussed in this report. According to Workshop participants, the impacts of this barrier are severe:

- Native American communities cannot support the establishment or expansion of local businesses, so that community members are forced to seek work, goods and services off Indian Lands or Hawaiian Home Lands.
- Native American communities experience a "brain drain," as the most highly skilled members of the community emigrate in search of employment and housing opportunities.
- Private firms, investors, and financial institutions are unable to obtain the scale or volume necessary to support business.
- Community economies are concentrated in one economic sector and are vulnerable to the economic fortunes of that sector.

As a result, according to Workshop participants, Native American economies lack the diversity to withstand economic shocks or even more routine, cyclical movements. Native American communities, accordingly, are more sensitive to downturns in particular sectors.

Lack of Networking of Native-owned Businesses With Equity Investors

The CDFI Fund's Equity Investment Research Report shows that locations with significant numbers of investors and significant volume of investment activity do not coincide with significant populations of Native American and Native Hawaiian people. Additionally, investors and Native American and Native Hawaiian entrepreneurs often operate in different social/business circles. This separation can inhibit investment in Native American and Native Hawaiian businesses. "Angel" and venture capital investors generally take an active role in the management of the companies in which they invest, and most prefer to invest in companies located in close proximity to them. Areas with the highest number of venture capital offices, such as Silicon Valley in California and Boston, Massachusetts, are not generally the locations with large numbers of Native American and Native Hawaiian firms. In addition, "angel" investors and venture capitalists often obtain investment leads and business plan submissions through a network of trusted sources, generally colleagues that they have worked with or socialized with for years, and Native American and Native Hawaiian business owners and entrepreneurs are not usually members of these referral networks. This geographic and social mismatch between Native American and Native Hawaiian entrepreneurs and investors can impede access to outside investment for many Native American and Native Hawaiian entrepreneurs.

POTENTIAL REMEDIES

Create Alternative Collateral Options for Trust Land

One strategy recommended by Workshop participants is to recognize and leverage the value of trust assets and other commercial or financial assets and to build equity pools from these resources. For example, the Southern Ute Tribe has established a growth fund built on the Tribal mineral estate. This fund has leveraged outside capital and currently provides the basis for Tribal economic self-sufficiency.

Another potential strategy identified by Workshop participants is to facilitate development of trust land and unlock the value of assets through alternative means of valuation and of turning assets into collateral. Alternative collateral options could be utilized, including master leases, and streamlined leasing procedures could be implemented to overcome restrictions on using trust land as collateral. For example, in 2000, Congress passed the Omnibus Indian Advancement Act (P.L.106-568), which established a streamlined process for the Navajo Nation to lease trust lands without having to obtain the approval of the Secretary of the Interior for individual leases.[52]

Develop Ways to Access Debt and Equity Capital on Indian Lands and Hawaiian Home Lands

There are four potential sources of capital on Indian Lands and Hawaiian Home Lands:

- Tribal financial resources. Tribal respondents to the Financial Survey reported that they use their own resources to fund infrastructure on Indian Lands, Tribally owned businesses, economic development, and home construction and purchases.
- Federal and state government loans and grants. These are primarily used, according to Financial Survey respondents, to finance infrastructure on Indian Lands and Hawaiian Home Lands, economic development, home construction, property redevelopment, and large businesses.
- Debt capital from banks. According to Financial Survey respondents, banks most commonly finance consumer purchases.
- External equity for businesses, investment. According to the Fund's research, external equity investment is the least used form of financing on Indian Lands and Hawaiian Home Lands.

Another recommendation from Workshop participants was to form more FSOs and CDFIs on Indian Lands and Hawaiian Home Lands. Workshop participants felt that locally controlled FSOs and CDFIs could be an important source of investment, loans and financial services that would be crafted to respond to their particular community's needs. A CDFI, in order

[52] P.L. 106-568 provides modification to existing law concerning the leasing of Navajo Nation trust lands. The Navajo Nation Trust Land Leasing Act of 2000 allows trust land to be leased, subject to Tribal regulations, without the approval of the Secretary of the Interior. The terms of these leases, in the case of business or agricultural leases, cannot exceed 25 years, but may include an option to renew for an additional 25 years. For residential purposes, leases can be for a term of 75 years.

to be certified as such by the CDFI Fund, is required to provide services to support the consumers of its products and to demonstrate that its products and services are targeted to the market that it serves. Several Workshop participants stated that, in many instances, only financial institutions and investors that have some broader stake in Native American and Native Hawaiian communities will undertake the level of activity and investment needed to serve the communities adequately.

Accordingly, Workshop participants recommended that Tribes and Native Hawaiian communities should develop their capacity to orchestrate and leverage all sources of capital, that financial institutions should develop new lending and financing products and revise underwriting criteria to meet the unique needs of Native American and Native Hawaiian communities, and that lending programs of regulated and unregulated entities be developed to finance businesses of all sizes and home ownership, especially on trust land.

"It seems like the underlying question is: How do you create - carve a channel for capital to flow into Indian Country in terms of equity funding?"

—Glenn Yago, The Milken Institute

Increase Equity Investment on Indian Lands and Hawaiian Home Lands

Equity Investment Roundtable participants noted that having access to new equity investments would provide financing for businesses and allow greater lending to these businesses by allowing them increased ability to leverage their equity. As explained in the Equity Investment Research Report, however, external equity investment, although widely used throughout the U.S. and in countries around the world, has not been widely used on Indian Lands and Hawaiian Home Lands. Equity investment is a critical missing ingredient because equity investments often do not require the types of physical assets as collateral that loans or other types of credit financing require. In particular, equity investment does not require using land as security and accordingly, equity investments overcomes the obstacles presented by impediments to using trust land as security. Equity investments can thus provide money to businesses that do not qualify for loans but are still good investments. Bankers provide liquidity and expansion capability to businesses with cash flow and collateral, whereas equity investors invest in management teams with credible business plans — teams that investors expect will generate returns on their investments.

"The latest research we did both on the angels [startup equity investors] and the venture capital markets are interesting in the fact that there is plenty of capital out there. What they miss is quality deal flow, putting the emphasis on quality... You will certainly have to develop that pipeline that feeds the systems."

—Jeffrey Sohl, Professor, University of New Hampshire

Many Workshop participants agreed that in order to improve access to equity capital, investors must understand Native American and Native Hawaiian communities and Native Americans and Native Hawaiians must understand how equity markets function — what investors want and why. There are many sources of equity to suit different needs: some companies evolve through one or more of these equity sources as they change and grow, whereas others may only use the type most applicable to them at the time they need it. Tribal

leaders and private investors suggested strategies that relied on accessing capital sources that have not traditionally been on the Native American investment "radar screen" and on expanding Native American awareness to include more equity and nontraditional financing and thus increase the chance of securing funding. Exhibit 1 depicts the new tribal-investment "radar screen" and illustrates how participants at the November 28-29, 2000, Equity Investment Roundtable Meeting view future awareness of equity sources.

The New Native American Investment Radar Screen
(From Perspectives of Participants at the November 28-29, 2000 Equity Investment Roundtable)

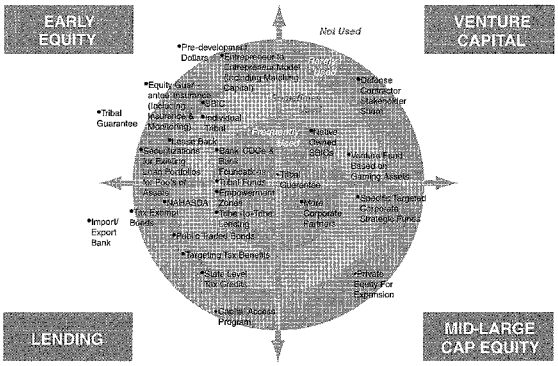

EXHIBIT 1

Exhibit 2 illustrates an equity landscape in terms of types of equity investment versus enterprise stages of business development.

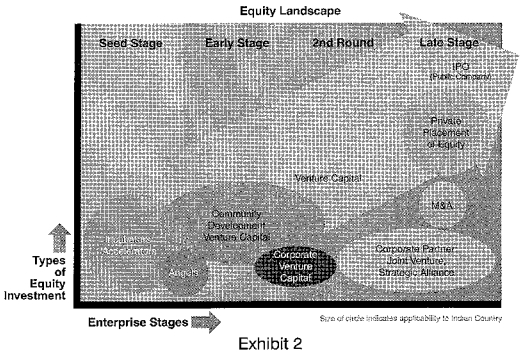

Exhibit 2

Equity Investment Roundtable participants discussed, and the Equity Investment Research Report reviewed, several potential strategies[53]:

- First, business incubators provide seed capital, physical space, and expert advice on technical and management issues to small businesses and start-ups. Industry or sector-specific incubators can provide full spectrum management and technical assistance on Indian Lands and Hawaiian Home Lands, and thus meet the needs of Native American and Native Hawaiian communities.
- Second, "angel" investors are another source of early money (seed capital) and expert advice. Most angel investors are entrepreneurs who have successfully launched one or more businesses of their own and enjoy helping other entrepreneurs get their businesses started. In addition to money and advice, they contribute time and help with contacts. They are usually very involved in the day-to-day management of the business, and they usually prefer to finance businesses in an industry in which they have experience and in businesses that are in close physical proximity to their headquarters.

  Existing angel investor networks could be utilized and, in addition, a Native American and Native Hawaiian angel network could be created. A relevant example is the Center of North America Capital Fund (CONAC), an angel investor network and investment fund that links two Tribes — the Turtle Mountain Band of Chippewa and the Spirit Lake Sioux — with nationwide investors for investment in North Dakota. The CONAC Fund was modeled after Minnesota's Regional Angel Investor Networks (RAIN) Fund, a series of rural investment funds formed by the Minnesota Investment Network Corporation.

[53] For a more complete discussion of the equity strategies discussed here, see *CDFI Fund Native American Lending Study, Equity Investment Roundtable and Research Report*, January 2001, prepared by Complexity Management, Inc. and The Johnson Strategy Group, Inc.

- Third, existing community development venture capital (CDVC) funds can be used and Native-specific ones can be created. CDVC combines venture capital with high levels of technical assistance, similar to what incubators and angels provide. CDVC strives for both financial and social returns. CDVC has been a successful and growing approach to bringing capital to businesses in underserved communities, but is still a small part of the overall equity investment landscape, representing only about 0.03 percent of all private equity available in 2000. Traditional venture capital funds typically raise funds and then liquidate their investments and return money to investors in ten-year increments. Funding such as grants, foundation loans, and official aid does not always require a market rate of financial return. However, while some private sector equity investors are willing to accept less-than-market returns for helping the community, their resources are limited. The social returns sought by CDVCs vary, but are typically characterized by increased minority and women ownership, job creation, diversity in hiring, employment of residents in the targeted disadvantaged communities, quality benefits as part of compensation, and environmental criteria. Sensitivity to the culture of Native American and Native Hawaiian communities can also be built into the investment criteria of these funds.

  For example, the Kentucky Highlands Investment Corporation (KHIC) has succeeded in providing training and technical assistance to Appalachian entrepreneurs. The corporation initiates new businesses by helping the entrepreneur create a viable business, management team, and business plan, and thus investing equity in the business.

- Fourth, some corporations have internal venture capital funds. Generally, they invest in businesses that can potentially offer a promising new technology, a complementary product or component of their own product line, or a new or complementary market approach. Corporate venture capital funds may invest in an early stage or an expansion stage of a business.

  Becoming a partner with, and receiving equity investments from, corporations outside Native American and Native Hawaiian communities has been used occasionally on Indian Lands, and could be used more widely in the future. Corporate "partnering" offers not only financing, but also management skills, industry expertise, and informal networks to assist small businesses.

- Fifth, state and city venture capital programs can be used. Public sector sponsored funds, fund guarantees, and incentives of various types are proving to be a source of learning and information for investors. Public and private sector partnership approaches, often joint funds with an intermediary, have proven successful. For example, several states, including Massachusetts and Oklahoma, have launched profitable, growing businesses that created jobs and a more diverse economy.

- Finally, public/private intermediaries could be formed to direct equity and loan funds to Native American and Native Hawaiian businesses. For example, the Hopi Credit Association provides a bridge between banks and Tribal borrowers. The credit union obtains funds from banks and handles all loan

"Demand for equity is exactly equal to the number of businesses that you start. If you put it in the vernacular, there ain't a business that's going to be started without equity."

—Ray Moncrief, Kentucky Highlands Investment

selection and servicing interaction with Native Americans, the banks with a responsible Tribal credit union that understands banking needs, and the Native Americans are comfortable with a credit union that understands their needs. In another case, the Southern Ute Growth Fund uses a partnership approach: the Tribe co-invests, using its growth fund and capital provided by outside investors, in a variety of growth opportunities. This approach initially began with the Tribe's oil and gas business, and then expanded to other ventures.

Establish a Native American and Native Hawaiian Equity Fund

Equity Investment Roundtable participants, noting that an emerging economy can find it difficult to become self-sustaining until adequate levels of private debt and equity capital are available to the businesses in that economy, felt that public funds can play an important role in this process. Since public funds can have the mission of developing a particular region, they can be provided on the basis of greater risk and lower returns than private sector investors may be willing to accept. Historically, the public sector has often played a crucial role in investing in underdeveloped areas, and can help develop a critical mass of investment to encourage the private sector to invest.

To attract equity to Native American and Native Hawaiian communities, one option identified by Workshop participants was for the federal government to play an initial role by sponsoring an equity fund on Indian Lands and Hawaiian Home Lands. According to Workshop participants, this could encourage private sector investors to invest on Indian Lands and Hawaiian Home Lands and could be combined with other incentives, such as guarantees, tax credits, or other risk-reduction measures.

FINANCIAL AND PHYSICAL INFRASTRUCTURE

Workshop participants and Financial Survey respondents identified the lack of financial and physical infrastructure as a significant barrier to investment in Native American and Native Hawaiian communities. These issues will be discussed in the following barrier sections:

- Lack of financial institutions on or near Indian Lands or Native Hawaiian communities
- Lack of physical and telecommunications infrastructure on Indian Lands or Hawaiian Home Lands

Participants and respondents suggested the following four potential recommendations:

- Increase the number of financial institutions on or near Indian Lands and Hawaiian Home Lands
- Develop regional financial institutions
- Develop financial products and services that will meet the needs of Native American and Native Hawaiian depositors and borrowers
- Create innovative strategies to develop Indian Lands and Hawaiian Home Lands infrastructure

"Without necessary infrastructure to build an economy, why would a banking industry want to lend money? It wants money returned. But for money to return, it has to have a sustained economy... But to have a sustained economy, you need necessary infrastructure."

—Brian Henry, Alaska Village Initiatives

IDENTIFICATION OF BARRIERS

Lack of Financial Institutions on or Near Indian Lands or Native Hawaiian Communities

The Financial Survey identified the lack of financial institutions based in Indian Land and Hawaiian Home Land as a serious problem and noted that, unlike non-Native American or non-Native Hawaiian communities, Indian Lands and Hawaiian Home Lands are not generally served by a variety of financial institutions. In the Financial Survey, 33 percent of Tribal respondents indicated that they had to travel at least 30 miles to reach an ATM or a bank branch, and many Native Americans and Native Hawaiians have difficulty in accessing any form of banking service. This lack of basic financial services has implications for financial literacy, capacity building, and banker-customer communication. It exacerbates the capital access gap and increases the difficulty of starting new businesses and acquiring home mortgages. The Financial Survey also found that:

- Only 14 percent of communities on Indian Lands have a financial institution in their community.
- Approximately half of these communities have a financial institution nearby, and only about half have an easily accessible ATM.
- Six percent of the residents of Indian Lands must travel more than 100 miles to reach the nearest bank or ATM.

Native American Workshop participants noted that in many of their communities that lack financial institutions, individuals needing credit must often rely on sub-prime lenders who charge high fees for their services. In addition, the absence of financial service providers reinforces the cash and barter system of trade and contributes to Native Americans' and Native Hawaiians' unfamiliarity with financial institutions and the contemporary financial services culture. According to CDFI research and Workshop participants, the impact of this lack of financial institutions on Indian Lands and Hawaiian Home Lands is substantial:

- Native Americans and Native Hawaiians' access to even basic banking services is limited, and they must leave Tribal lands to obtain these services.
- Financial services are costly for Native Americans and Native Hawaiians.
- Native Americans and Native Hawaiians have limited opportunity to acquire financial expertise or the capacity and experience to manage community-based financial institutions.
- Many Native Americans and Native Hawaiians have either no credit history or a poor credit history that prevents them from qualifying for loans.

Lack of Physical and Telecommunications Infrastructure on Indian Lands or Hawaiian Home Lands

According to Workshop participants, there is serious lack of physical and telecommunications infrastructure[54] on Indian Lands and Hawaiian Home Lands. Several Workshop participants and, in particular, investors who

[54] For purposes of this report, physical infrastructure is defined as water, sewer, and electrical lines and roads; telecommunications infrastructure is defined as telephone, cable, and fiber optic lines.

participated in the Equity Investment Roundtable cited this absence of developed infrastructure as a significant impediment to attracting investment to Indian Lands. Further, participants reported that undeveloped infrastructure significantly increased the costs associated with business development on Indian Lands:

- Only 47 percent of households on Indian Lands have telephones, compared to 94 percent for non-Native rural communities in the United States.[55]
- Twenty-six percent of Tribes report that they do not have 911 police/fire emergency services.[56]
- In rural areas (with populations of 2,500 or fewer), 12 percent of Native American households lack electricity and 23 percent do not have access to natural gas.[57]
- Only nine percent of rural Native American households have personal computers and, of these, only eight percent have Internet access.[58]
- There is significant unmet need for road and bridge improvements on Indian Lands and Hawaiian Home Lands.[59]
- More than 66 percent of the Indian Reservation Roads (IRR) system consists of unimproved earth and gravel surfaces that wash out in severe weather, and 26 percent of IRR bridges are deficient. The annual fatality rate on these roads is more than four times the national average.[60]

Workshop participants expressed concern about infrastructure, and a recent study by the New Mexico State University also found that Tribes identified infrastructure development as one of their top priorities.[61] The NMSU Study of infrastructure needs on Indian Lands in the lower 48 states and Alaska found that "Tribes overwhelmingly identified their top investment priorities as housing, roads, wastewater technology, and medical facilities."[62]

Moreover, the NMSU Study reports that due to this inferior physical and telecommunications infrastructure:

- The cost of economic development is increased and private commercial development is decreased.
- Business startups face prohibitive costs, and economic activity on Indian Lands is limited to a large degree to service industries.

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[55] "Fact Sheet Promoting Deployment/Subscribership in Underserved Areas, Including Tribal and Insular Areas", Federal Communications Commission, June 8, 2000.

[56] *Assessment of Technology Infrastructure in Native Communities*, New Mexico State University, 2000.

[57] Ibid.

[58] Ibid.

[59] Senator Ben Nighthorse Campbell, "Amending the Indian Reservation Roads Program," *Senate Report 106-406*, September 11, 2000, p. 3.

[60] Ibid.

[61] *Assessment of Technology Infrastructure in Native Communities*, op. cit.

[62] Ibid.

- The Native American economies are not self-sustaining and create relatively few jobs.
- Internet access is more expensive and more difficult to obtain in Native American communities.

POTENTIAL REMEDIES

Increase the Number of Financial Institutions on or Near Indian Lands and Hawaiian Home Lands

Workshop participants noted that different approaches have been used to address the lack of access to financial services. A few Tribes have formed agreements with banks to build branch banks on their land, some Tribes and Native American non-profits have started revolving loan funds (some are CDFIs), and some Tribal governments have instituted government-run revolving loan funds.

Workshop participants strongly felt that the creation of community based financial institutions in Native American and Native Hawaiian communities should be given high priority, and CDFIs were identified as a crucial and underutilized resource. Since, no single financial institution model can address the needs of all Native American and Native Hawaiian communities, establishing and expanding CDFIs on Indian Lands and Hawaiian Home Lands offers important advantages for they can provide lending and investment funds that employ people from the community. In addition, CDFIs provide opportunities for to develop partnership programs among Tribes, other financial institutions, equity investors, and federal agencies.

Another strategy is the expansion of existing financial institutions to Indian Lands and Hawaiian Home Lands, and purchasing existing banks. There are examples of successful initiatives cited by Workshop participants:

- The Cheyenne River Sioux Tribe used an existing revolving loan fund to create the non-profit Four Bands Community Fund, a CDFI that provides loans to businesses.
- In 1990, the Navajo Nation had only three bank branches and one ATM serving a geographic area of 17 million acres. To increase the availability of financial services on the reservation, the Tribe entered into an agreement with Norwest Bank (now Wells Fargo) to build four new branch banks, hire and train Navajo personnel, and target financing to business startups and housing development.
- In all, nine Tribally-owned commercial banks, seven credit unions, and 14 loan funds have been developed nationwide to serve Native American and Native Hawaiian communities.
- Hawaiian Community Assets, Inc. is developing a charter for the first Native Hawaiian-owned bank.
- As of September 30, 2000, the CDFI Fund had certified 34 CDFIs that serve Native American or Native Hawaiian communities.

"...this is the first time I've met some of the credit officers from Tribal credit enterprises here, and it's really exciting to see them here, but I think they're all set up separately and I think an association might be real helpful for training, for collaboration, for working with other banks, for partnerships."

—Dave Tovey, Confederated Tribes of the Umatilla Indian Reservation, Oregon

Develop Regional Financial Institutions

Workshop participants stated their belief that regional partnerships and alliances are essential to overcoming barriers to capital and credit access.

The regional focus is important because, according to Workshop participants:

- Tribes and Tribal organizations can coordinate with federal agency financial assistance providers at the regional level for initiatives such as Small Business Investment Companies (SBICs) or CDFIs.
- Regional partnerships and alliances can address economies of scale for small or newly recognized Tribes that do not have the necessary legal, economic, and physical infrastructure necessary to support financial institutions.

Possible strategies identified by Workshop participants include building partnerships established through the Workshop cosponsors[63] and other Inter-Tribal organizations; establishing regional information clearinghouses for information on model financing approaches, accessing equity capital, and sources of training and technical assistance; and providing channels of information to Tribal communities so that they can adapt model approaches unique to their cultural settings; and holding follow-up forums similar to those conducted in this Study.

Another approach is to establish regional partnerships among banks, lending institutions, venture capitalists, federal agencies, and Tribes/Inter-Tribal organizations to:

- Conduct regional forums to assist Tribal businesses in identifying types and sources of financing that best serve a given enterprise.
- Create financing intermediaries that provide regional and local assistance to Tribes and Tribal entrepreneurs.
- Develop technical and underwriting standards at the regional level that can be adapted to varying Tribal business environments.

Examples of successful regional initiatives cited by Workshop participants include:

- The Native American Development Corporation is a nonprofit CDFI that provides Native American business communities in Montana and Wyoming with funds to create jobs, develop long-term economic self-sufficiency, and facilitate access to capital. Its Capital Loan Fund was initially capitalized with funding from banks, the federal government, First Nations Development Institute, and private corporations.
- The Native American Lending Group, Inc. is a nonprofit multi-Tribe CDFI in New Mexico that serves 19 Pueblo communities. It was created to provide Tribes, Native American businesses, and individuals access to private investment capital.

[63] See Chapter II, pages 18-19, for the list of the 14 cosponsors.

- Coastal Enterprises, Inc. is a nonprofit CDFI serving low-income communities in Maine, provides financial and technical assistance for development and expansion of industries, small businesses, housing, and social services. CEI has partnered with the Penobscot Indian Nation to develop a CDFI to fund housing and business development.

Develop Financial Products and Services That Will Meet the Needs of Native American and Native Hawaiian Depositors and Borrowers

Many Workshop participants expressed the opinion that, in order to bridge the divide between lenders and Native American communities, FSOs should develop products and services that will address the economic attributes of Native American or Native Hawaiian markets. For example, many participants suggested that FSOs develop underwriting standards that can evaluate potential borrowers who are employed seasonally, or who have lived in mostly cash economies. In addition, Workshop participants believed that there would be more creditworthy borrowers in Native American communities if FSOs provided more educational and outreach services.

Create Innovative Strategies to Develop Indian Lands and Hawaiian Home Lands Infrastructure

According to Workshop participants, infrastructure must be in place if Native American and Native Hawaiian economies are to develop and create jobs, and that, absent commercial grade infrastructure, projects proposed for financing are frequently rejected by lenders. Various ideas were explored at the Workshops to facilitate development of an infrastructure system capable of supporting commercial and industrial needs on Indian Lands and Hawaiian Home Lands:

- Conduct a commercial and industrial infrastructure assessment to determine infrastructure needs throughout Native American and Native Hawaiian communities.
- Create partnerships between Tribal governments and private developers to plan for comprehensive infrastructure development, including information technology needs.
- Ensure that a federal infrastructure investment strategy best utilizes available federal resources and encourages private partnerships to participate in the funding and development process.
- Assess the feasibility of creating an entity similar to the Rural Community Assistance Project (RCAP) that would focus on infrastructure development in rural Native American and Native Hawaiian communities.

Workshop participants noted that the federal government has already begun to address some of these issues. As an example, the Workshop participants cited an initiative by the Federal Communications Commission (FCC) has to increase assistance to Native Americans through the *Lifeline* and *Link Up* programs, and conduct outreach to ensure that Native Americans are familiar with these programs and know how to qualify for them. FCC has also changed its auction

rules to increase incentives for wireless carriers to serve Indian lands, and has streamlined the process for telecommunications companies to receive universal-service support in serving Indian Lands.[64]

Another opportunity may exist through the Indian Financing Act of 1974[65], under which Tribes may issue tax-exempt bonds to fund "essential government functions" that state and local governments customarily provide — including principal infrastructure improvements. However, according to Workshop participants, most Tribes do not have the ability to service tax-exempt bond debt. While Tribes as sovereigns have the authority to levy taxes, there is frequently an inadequate tax base to finance infrastructure improvements.

A number of other mechanisms exist to finance infrastructure development, including loans from Tribal trust funds, loans to Tribes from revolving credit funds (established in section 10 of the Indian Reorganization Act of 1934[66]), loans for infrastructure development pursuant to the Indian Financing Act, Tribal (general obligation) bonds, publicly issued and traded Tribal bonds, revenue bonds, joint ventures with the private sector, and grants. However, most of these are based on some form of debt, and most Tribes, according to Workshop participants, do not have tax bases that would enable them to qualify for loans or bonds.

EDUCATIONAL AND CULTURAL BARRIERS

Workshop participants and Financial Survey respondents identified banker, investor, and Tribal lack of knowledge, understanding or capacity more often than any other set of barriers to private investment. Specifically, they identified the following seven barriers that were grouped into this theme:

- Lack of knowledge or experience with the financial world on the part of Tribes and individual Native Americans and Native Hawaiians
- Lack of technical assistance resources
- Failure of lenders and investors to understand Tribal government or legal systems
- Poor understanding of Tribal sovereignty and sovereign immunity
- Historical absence of trust between Tribes and banks
- Differences between Native American and Native Hawaiian cultures and the banking and investor cultures
- Discrimination against and/or stereotyping of Native American and Native Hawaiian communities

[64] "Federal Communications Commission Takes Steps to Promote Access to Telecommunications on Tribal Lands," Federal Communications Commission, June 8, 2000, p.1.

[65] 12 *U.S.C.* §§ 1451, *et seq.*

[66] 12 *U.S.C.* § 465.

Participants and respondents suggested the following four recommendations:

- Expand financial education for Native Americans and Native Hawaiians
- Develop entrepreneurship programs for Native Americans and Native Hawaiians
- Conduct lender and investor education
- Expand technical assistance

IDENTIFICATION OF BARRIERS

Lack of Knowledge or Experience With the Financial World on the Part of Tribes and Individual Native Americans and Native Hawaiians

According to CDFI Fund research, in Native American and Native Hawaiian economies, most transactions have been conducted using cash. Many Native Americans and Native Hawaiians thus lack an understanding of banking, credit reporting, and loan qualification processes and standards and have difficulty obtaining credit because they have no credit histories or, in some cases, bad credit histories. Moreover, Native American residents of Indian Lands and Native Hawaiians often lack knowledge and experience in preparing the business plans required for bank financing. In addition, many are unfamiliar with how financial markets work, how to make equity financing choices, and what investors require.

According to CDFI Fund research and Equity Investment Roundtable, equity investment has not traditionally been a Tribal focus for capital formation. While Tribes are beginning to reinvest their funds as equity in new businesses, accepting external equity investment is still often a foreign concept. Native American and Native Hawaiian cultures have not traditionally been profit-driven, and the Tribal government's objective in business management and business development is often job creation to address immediate unemployment problems. Moreover, according to Workshop participants, in the past, some unscrupulous salespeople have taken advantage of these Tribal sensibilities to offer investments to Tribes that subverted Tribal values and returned little. Such experiences have contributed to a history of Tribal distrust of "outside" business interests. This is often exacerbated when a non-Native investor or lender requires that, as part of the deal, the Tribe or entrepreneur relinquish partial ownership and control of the business to the investor.

In evaluating potential funding opportunities, bankers and equity investors analyze the loan applicant's management skills, financial knowledge, and business planning ability. Equity investors also require that applicants seeking investment capital have business plans, which is often an unfamiliar concept to many Native Americans and Native Hawaiians, according to Workshop participants. Therefore, before they even apply for capital, potential Native American and Native Hawaiian entrepreneurs are likely need assistance with strategic, business, and financial planning. Equity Investment Roundtable participants noted that the consequences of inexperience with the financial services sector can be serious:

- Many Native Americans and Native Hawaiians do not establish credit histories or have poor credit histories that disqualify them from many loans, and they tend to have relatively high loan default rates.
- Native Americans and Native Hawaiians can be vulnerable to predatory lenders.
- Native Americans and Native Hawaiians can be subject to high financial service costs that are passed on in high interest rates on loans.

Similarly, according to Workshop participants, the implications of a lack of understanding of private equity investment can be serious:

- Tribes do not know how to locate and approach equity investors.
- Native American and Native Hawaiian business proposals are not funded if they do not meet equity investors' goals.
- Native Americans and Native Hawaiians often do not know how to package development proposals for consideration for loan in equity investment, and are thus not successful in obtaining funds.

Lack of Technical Assistance Resources

The Study identified the lack of technical assistance and training financial literacy, financial management and banking and investment standards as serious barriers. Workshops participants identified a variety of unmet training needs for Tribal governments and Native American and Native Hawaiian entrepreneurs. Many stakeholders would benefit from technical assistance and training that facilitate greater access to lending and investments in Native American communities. The consensus of Workshop participants was that a lack of technical assistance limits Tribes' opportunities to build the internal capacities of potential financial managers or entrepreneurs.

"...there is a misunderstanding of Tribal sovereignty... We fear what we don't understand. And when you fear what you don't understand, it makes you reluctant to work with the Tribes. And if the lenders won't work with the Tribes and they fear them, then biases are created. And when the biases are created they get carried generation to generation and the problem just persists over and over again."

—Sharon Scott, Alatna Tribal Council, Alaska

Failure of Lenders and Investors to Understand Tribal Government or Legal Systems

Equity Investment Roundtable participants suggested that many lenders and investors have had limited exposure to Tribal government operations, regulations, and enforcement. Lenders and investors are concerned about not being able to collect on their debts or fear that the process of doing so will be complex and difficult. They may not know how to get Tribal government approval or how to get a stalled project moving. They may not have or know how to find attorneys that are knowledgeable about a particular Tribe's laws and regulatory requirements and they may not trust the impartiality of the Tribe's courts. As a result, lenders and investors perceive higher risk and cost associated with lending and investment activity on Indian Lands and thus few lenders and investors pursue Native American markets.

Poor Understanding of Tribal Sovereignty and Sovereign Immunity

Study results indicate that lenders and investors do not understand Tribal and Village sovereignty and sovereign immunity, and thus often are reluctant to conduct business on Indian Lands because they fear that they will not be able to recover assets or enforce contracts in the event of a default or a bankruptcy.

Further, a number of lenders and investors who participated in Workshops or the Equity Investment Roundtable reported that they have tried to make loans in Native American communities and have been unsuccessful because they underestimated the time required or did not adequately address community concerns.

Historical Absence of Trust Between Tribes and Banks

The Financial Survey revealed significant differences in perception between Tribes and FSOs, involving the difficulty of accessing financial products and services. Workshop participants reported that there has been a historical lack of trust between Native Americans and Native Hawaiians and FSOs. Further, they reported that this lack of trust has impeded the development of working relationships, and caused misunderstanding that has led, in turn, to: failed negotiations for loans; cultural isolation; increased costs of doing business for Native Americans and Native Hawaiians; and a reluctance on the part of banks to underwrite loans.

"...a lot of the Tribes are faced with the fear of losing self-governance and control. So we felt it was real important they understand...the rules of lending and how it would apply to them as a sovereign nation."

—David Salmon, Chalkyitsik Traditional Council, Alaska

Differences Between Native American and Native Hawaiian Cultures and the Banking and Investor Cultures

A key difference between Native American and Native Hawaiian cultures and the financial and investment culture on views of wealth and sharing became evident in the Workshops and the Equity Investment Roundtable. As participants explained, traditional banking and investor cultures value profit and the accumulation of assets; creditworthiness is determined by "objective" standards based an individual's accumulated wealth, income stream, controlling assets, and credit history; and land is an asset with a value that is determined (it belongs to individuals and can be legally transferred).

In contrast, according to Workshop participants, Native Americans and Native Hawaiians with an asset to lend to another are more likely to consider the borrower's character and the relationship between the lender and the borrower. The traditions and customs regarding debts of Tribal members exist in various ways. Workshop participants and commentators have observed that debtor creditor relationships in Native American communities frequently are family as well as individual obligations. Moreover, they have noted, Native American creditors' determinations of potential borrowers' creditworthiness factors in the individuals' character and the ongoing relationship between the lender and the borrower. Perhaps most telling, CDFI Fund research found, and Workshop participants confirmed, that such local "underwriting" practices yield more than competitive repayment rates.

"We need to come up with a balance, and they [cultural heritage vs. western values] both have a place in our lives today in the Hawaiian community. But that is a very sensitive issue. You don't want to have to give up one in order to pursue the other."

—William Chang, Hina-Malailena, Hawaii

In many Native American and Native Hawaiian communities, relationships are built on interdependence and resource sharing. Generosity and giving away one's possessions is a mark of Native American wealth. This is often demonstrated at social gatherings where one's possessions are distributed at a "give away" or "potlatch" to members of the community. The concept of wealth building, as most bankers and investors understand it, is often foreign in many Native American and Native Hawaiian cultures. Land is held communally and its value belongs to the community. The idea that one can establish a credit history and develop assets through a home mortgage is not seen as creating wealth.

"It takes me back to my point this morning about communication, knowledge, and understanding. The more both sides have that, the more you reach a level of trust. That's really where the partnerships need to go between Indian Country organizations and outside organizations."

—James W. Wagele, Bank of America

The lack of understanding of these differences in value systems and their impact on relationship building, approaches to contract making and receptiveness to marketing approaches was apparent in the Workshops. For example, some Native American and Native Hawaiian representatives discussed the importance of maintaining their cultures and the difficulties that they encounter when trying to establish new policies and procedures that fulfill lender and investor demands and expectations. Workshop participants from FSOs, investment, Native American, and Native Hawaiian communities expressed a desire to learn more about each other in ways that will facilitate relationship-building, contract-making and product development.

Discrimination Against and/or Stereotyping of Native American and Native Hawaiian Communities

According to Workshop participants, Native Americans and Native Hawaiians suffer from discrimination and/or stereotyping in lending arenas. Study participants reported that such activity plays out in many subtle and overt ways ranging from misunderstandings and missteps that occur when two individuals raised with different values communicate with each other to overt redlining and discriminatory lending practices. Workshop participants report that much discrimination today is subtle, and sometimes surfaces as less outreach by lenders to Native American and Native Hawaiian communities than to other communities and as prospective Native American and Native Hawaiian borrowers feeling unwelcome and uncomfortable in the lending arena. In addition, Workshop participants report that few in the Native American and Native Hawaiian communities are familiar enough with federal and state consumer protection and fair lending laws to address potential discrimination in lending.

POTENTIAL REMEDIES

Expand Financial Education for Native Americans and Native Hawaiians

"Our group felt that education was our No. 1 priority... We're talking about Tribal leaders being educated as to what is needed to get loans, what processes you have to go through; the lenders as to how Tribes are run, what our Tribal codes are..."

—Sharon Holmdahl, Colville Tribal Credit, Washington

A key strategy identified by Workshop participants for addressing educational and cultural barriers is to provide financial education to Native Americans and Native Hawaiians. Such education can enhance economic and community development efforts on Indian Lands and Hawaiian Home Lands by giving people the expertise to shape their own and their communities' economic futures. Financial literacy curricula are readily available from various sources, although they may need to be adapted for Native American and Native Hawaiian students. [67]

[67] For example, First Nations Development Institute, in partnership with the Fannie Mae Foundation, has developed a personal finance curriculum that is tailored to the Native American community. In addition, the National Partnership for Financial Education, a consortium of federal agencies and regulators, non-profits, and trade associations, is working to improve financial literacy in Native American communities.

The actions recommended by Workshop participants include:

- Establishment of teaching partnerships among Tribal and non-Tribal colleges, financial institutions, nonprofits, and CDFIs.
- Incorporation of web-based training in the curriculum.
- Facilitation of funding and teacher recruitment through the private sector, Tribes, Inter-Tribal organizations, and federal agencies.

"We're only going to be here for so long, but we need to start working with young people, you know, the kids, and that's part of your vision here and I want to see that continued further."

—Mark Madsen, Jamestown S'Klallam Tribe, Washington

Develop Entrepreneurship Programs for Native Americans and Native Hawaiians

According to Workshop participants, entrepreneurs and small business owners are essential to Native American and Native Hawaiian economies; however, the skills of the trade of a good mechanic or restaurateur, for example, are qualitatively different from the financial, marketing, and personnel development skills required of a successful entrepreneur. An entrepreneurial training program and small business finance education program can help bridge this gap.

Educational curricula can be adapted to fit elementary-to-high-school educational programs, and Workshop participants recommended teaching entrepreneurial skills to both school children and adults. Moreover, Workshop participants suggested that entrepreneurship programs in high school could be reinforced with business development programs, such as Junior Achievement, where young people learn to start small businesses, and core materials on personal finance, small business finance, and entrepreneurship can be presented.

An example of a training program cited by Workshop participants is the American Indian Business Leaders entrepreneurial training program, headquartered at the University of Montana in Missoula, for Native American high school and college students.

Conduct Lender and Investor Education

One initiative suggested by Workshop participants is to develop educational programs on Native American and Native Hawaiian economies and markets so as to increase lender and investor awareness of Native American and Native Hawaiian market opportunities, business successes, and emerging entrepreneurs. Workshops and National Roundtable discussions revealed that stakeholders are interested in continuing the information and education exchanges begun here. Specific actions recommended by the participants include:

- Development of guides to Tribal government structures and procedures, sovereignty and sovereign immunity, land status, Native American and Native Hawaiian culture, protocol, and etiquette Tribal laws, regulatory/licensing requirements and financing and economic development needs.
- Creation of a directory of Tribal credit officers, economic development officers, department heads, and attorneys qualified to practice in Tribal courts.
- Development of a general marketing campaign that illustrates effective practices and success stories by implementing awards programs, such as Honoring Nations (Harvard University's annual awards for innovative Tribal government programs).

"...we want to increase the awareness with the partners that we have, the Federal government, lenders, private players, by bringing them out to the communities... This then, we would hope, would lead to specific projects that were designed specifically for that community..."

—Jeri Walters, National Bank of Alaska

- The initiation of educational seminars by Native American and Native Hawaiian communities focusing on Native American and Native Hawaiian business investment opportunities.
- Creation of speakers bureaus, to be offered through extension services, chambers of commerce, Tribal community colleges, Inter-Tribal organizations and Alaska Native regional corporations.
- Development of web-based databases that include economic and institutional profiles of Native American and Native Hawaiian communities, federal programs that may be available to support economic development projects, and lending and investment resources.
- Development of educational materials about fair lending laws and creation of forums to present these materials to Native American and Native Hawaiian audiences.
- Development of educational materials about discrimination and cultural awareness, and creation of forums to present these materials to lenders, investors, and state and federal officials.

Expand Technical Assistance

Workshop participants recommended developing technical assistance resources for small business owners on Indian Lands and Hawaiian Home Lands. Most Workshop participants agreed that small business finance and entrepreneurship training and education alone would not be enough to create financial opportunities on Indian Lands and Hawaiian Home Lands, for entrepreneurs and small-business owners would likely require assistance in applying the training to their unique situations. The Financial Survey indicated that Native Americans and Native Hawaiians with access to counseling, training, and/or technical-assistance resources are more likely to rate financial products and services as easier to obtain.

Actions recommended by Workshop participants include:

- Development of small business incubators, resource centers, "one-stop shops," and CDFIs to provide business development and management technical assistance.
- Use of circuit riders or loaned staff from partner business and financial institutions to augment small business resource center nonprofit staff in training Tribal and Inter-Tribal office staffs.
- Creation of regional business resource centers funded by federal, Tribal, and private sources.

Examples of such assistance cited by Workshop participants include the SBA Micro Loan program, the SBA Tribal Business Information Centers, and technical assistance programs for program borrowers such as the Hopi Credit Association, the Lakota Fund, and the Alaska Growth Capital BIDCO, Inc.

According to Workshop participants, another useful strategy may be to coordinate technical assistance resources by establishing a national clearinghouse of training and technical assistance resources relating to lending and investment, developing a training package that includes planning models relevant to Tribal business opportunities, and conducting regional forums and inviting Tribal businesses to test plans before panels of experts.

According to Workshop participants, the basic financial training discussed above can be further strengthened with student internships and with exchanges for adults. Internships for Native American and Native Hawaiian students with financial regulatory agencies and financial institutions could be an effective way for students to obtain financial training and job skills. In addition, Tribal government professionals could use exchange programs and details or rotations in administration and regulatory agencies to improve their financial skills. An exchange could be particularly useful because it will allow federal and FSO staff to gain understanding of the workings and needs of Tribal governments. Actions recommended by Workshop participants include enhanced recruitment of Native Americans and Native Hawaiians by financial institutions and establishment of Federal and private sector internships, exchange programs, technical assistance and training programs, personal finance and entrepreneurship education programs, and college and graduate school student programs in business, finance, and economics.

Additionally, Workshop participants recommended the development of mentoring programs with industry that would involve educating Tribal entrepreneurs on the decision criteria and processes used by equity investment fund boards, chambers of commerce, and industry and trade groups.

"I know what we need to do. All the ingredients are there. We just need to put the pieces together. The challenge is, are tribes ready and is Congress and the Administration willing to provide or create the necessary receptive environment and support to 'enable' Native Nations to prosper."

—Bobby Whitefeather, Tribal Chairman, Red Lake Band of Chippewa Indian, Minnesota

CONCLUSION: KEY INITIATIVES

Tribal and Native Hawaiian communities throughout the nation confront daunting economic challenges. They are confronted with legal infrastructure, governmental operations, economic financial, physical infrastructure, education and cultural barriers. As indicated in this Report, there has been palpable progress in addressing these challenges. A significant number of Tribes have mounted innovative development strategies. Efforts are underway to enhance the capacities of Tribal governments. There are many examples of "win-win" relationships with major manufacturing and financial service organizations. Real, albeit modest, progress has been made in addressing the backlog of investment in human and physical capital. Recent federal policies that stress government-to-government relationships are beginning to provide more Tribal governmental control.

Despite these achievements, much more remains to be accomplished. This requires a disciplined focus on expanding access to capital for businesses and households located in Tribal and Native Hawaiian communities. Workshop participants and Financial Survey respondents identified a host of remedies for Tribal governments, the financial community and the federal government acting independently or in concert to achieve this objective. There are, however, a few critical initiatives that can serve as essential catalysts for accelerating progress.

FEDERAL GOVERNMENT NEXT STEPS

This Study does not purport to review every program or policy that operates on Indian Lands or Native Hawaiian Home Lands, whether federal, state or local. In particular, the discussion of federal government programs set forth in this Study was generated primarily from the comments and experiences of Workshop participants. From among their many recommendations, priority initiatives involve maintaining investments for physical, telecommunications and utility infrastructure, facilitating the creation of public-private equity investment funds, and supporting for an array of vehicles for training, technical assistance for both Tribal governments and businesses, and facilitating linkages to financial markets. These and other initiatives would be assisted by the ongoing Congressional charge to the General Accounting Office and the Department of Commerce for a comprehensive review of federal government programs and policies that affect, and attempt to facilitate, economic development and capital allocation on Indian Lands.

TRIBES' AND NATIVE HAWAIIANS' NEXT STEPS

In addition to "next steps" for government entities, information gathered for this Study also revealed a number of steps that Tribes and Native Hawaiians must take to facilitate the flow of debt and equity capital into Indian Lands and Native American Home Lands. The most oft-repeated step for Tribes is the need to rationalize Tribal legal systems and promulgate commercially reasonable, predictable guidelines for their exercise of sovereign immunity. One of the chief barriers to lending and equity investment in Indian Lands that is squarely in Tribal control, as reported by Workshop participants, is unpredictability of Tribal judicial systems. Accordingly, an important next step for Tribes is the development of court systems that provide for the orderly disposition of the rights of aggrieved parties to commercial transactions. Such reform would be buttressed by codifying or adopting local commercial codes, zoning and planning codes, and laws generally regulating corporate activity.

Another important step identified by the Study's participants is the adoption and publication of rational, predictable rules for the operation of sovereign immunity in commercial transactions.

In addition, Tribes and Native Hawaiian communities will have to build their respective local capacities to facilitate economic development and the financing of local activity. Tribal authorities, for example, will have to expand their capacity to plan and coordinate economic activity. Tribal Authorities and Native Hawaiian communities will need to build the capacities of prospective local entrepreneurs. Tribes and Native Hawaiian groups can forge regional cooperation through inter-Tribal organizations, and use programs like the CDFI Fund's Native American CDFI Technical Assistance (NACTA) program to increase their respective capacities.

FINANCIAL INSTITUTIONS' NEXT STEPS

Financial institutions, including private equity investors, also have a continuing role in addressing the barriers to lending and equity investment in Indian Lands and Native Hawaiian Home Lands. Financial institutions have to develop a local presence that is flexible enough to participate in transactions that do not fit 'typical' profiles. This might entail the opening of branch offices in Indian Land or Native Hawaiian communities. It also might entail partnering with Tribes and Native Hawaiian groups to form local CDFIs, loan funds or investor groups. To do this, financial institutions will have to find models for managing risk, while addressing the non-traditional profiles of some borrowers.

Financial institutions can be important partners for Tribes. The institutions can be an important resource in the capacity building that Tribes and Native Hawaiian communities must undertake by providing technical assistance. Financial institutions can also work as a bridge between Tribes or Native Hawaiian communities and the government to develop new financial products that are tailored to the particular needs of the communities (for example, mortgages for trust land).

COOPERATIVE ACTIVITY

Much of the progress in expanding access to capital was not achieved by tribal governments, financial institutions or federal agencies acting alone. Rather, progress often depended on these stakeholders acting together. One of the most important themes to emerge from the CDFI Fund's research, Workshops, and Equity Research is the need to foster even greater coordinated activity among stakeholders. For example, input of Tribal or Native Hawaiian

representatives to any review of the effectiveness of government programs or policies would help to answer questions about community compatibility and relevance. Neither technical assistance nor cultural education will have the desired effect unless Tribes, Native Hawaiian communities, and FSOs commit to such processes. Moreover, FSOs, government regulators, and Tribes would all likely have to participate in attempts to create new loan products for Native American or Native Hawaiian communities, or to address the peculiar issues arising from attempting to mortgage trust lands.

APPENDICES

APPENDIX A

FINANCIAL SURVEY—FINANCIAL SERVICES ORGANIZATIONS

APPENDIX B

FINANCIAL SURVEY—TRIBAL LEADERS

APPENDIX A: FINANCIAL SURVEY—FINANCIAL SERVICES ORGANIZATIONS

This Financial Survey seeks to gather information on the assets and activities of branch offices located closest to Reservations or Indian Lands. To the extent possible, please provide branch level data.

1. **What portion of your Branch's loan portfolio is comprised of the following products?**
   (Loan portfolio is defined as: Total Loans Outstanding as of June 30, 2000)

(PLEASE ✓ AS APPROPRIATE)	Not Applicable	Minor Component (10% or Less)	Not Applicable
Conventional mortgages	❑	❑	❑
Loans for mobile home purchases	❑	❑	❑
Property rehabilitation loans	❑	❑	❑
Home equity loans	❑	❑	❑
Personal/consumer loans (e.g., trucks, autos, home furnishings)	❑	❑	❑
Construction loans (residential and commercial real estate)	❑	❑	❑
Start-up business loans (in operation for fewer than 2 years)	❑	❑	❑
Micro business loans under $25,000	❑	❑	❑
Small business loans between $25,000 and $100,000	❑	❑	❑
Large business loans over $100,000	❑	❑	❑

2. **Does your branch or institution offer the following products to residents of Native American reservations or Indian Lands?**

(PLEASE ✓ AS APPROPRIATE)	Not Applicable	Yes, a Minor Component (10% or Less of Loan Portfolio)	Yes, a Major Component (Greater than 10% of Loan Portfolio)
Conventional mortgages	❑	❑	❑
Loans for mobile home purchases	❑	❑	❑
Property rehabilitation loans	❑	❑	❑
Home equity loans	❑	❑	❑
Personal/consumer loans (e.g., trucks, autos, home furnishings)	❑	❑	❑
Construction loans (residential and commercial real estate)	❑	❑	❑
Start-up business loans (in operation for fewer than 2 years)	❑	❑	❑
Micro business loans (under $25,000)	❑	❑	❑
Small business loans (between $25,000 and $100,000)	❑	❑	❑
Large business loans (over $100,000)	❑	❑	❑

3a. Does your branch or institution maintain and/or offer the following...

	YES	NO
Financial services (deposit accounts) to tribal members residing on a Reservation or Indian lands	❑	❑
A branch(s) or service center(s) on a Reservation or Indian lands	❑	❑
An ATM(s) on a Reservation or Indian lands	❑	❑
Branches and ATM's near a Reservation or Indian lands that are readily accessible to Reservation or Indian land residents	❑	❑
If so, what is the approximate distance from the Reservation or Indian Lands to these services?	_____ miles	
A "mobile" branch serving the Reservation or Indian lands	❑	❑
Federal loan or loan guarantee programs (e.g., SBA, HUD, VA, BIA, USDA, etc.) to tribal members residing on a Reservation or Indian lands	❑	❑
State loan or loan guarantee programs (e.g., state financing or mortgage authority, etc.) to tribal members residing on a Reservation or Indian lands	❑	❑

3b. Does your institution provide grants or equity investments to community development financial institutions(s) on reservations or Indian Lands, or does your institution partner with local CDFI's to finance projects or businesses on the reservation or Indian Lands?

If yes, does your institution participate in the CDFI Fund's Bank Enterprise Awards program?	❑	❑

4. Does your branch or institution have...

	YES	NO
a marketing or outreach program for reservation-based or Indian Land-Based Communities in your area?	❑	❑
specific products for reservation or Indian Land-Based communities in your area?	❑	❑

If yes to either question, please provide examples:

5. To what extent does your branch fund or directly provide training, counseling, or technical assistance to Native Americans, tribes, or Native American organizations on a reservation or Indian Lands on the following topics…

	NONE	VERY LIMITED	MODEST	SUBSTANTIAL
Basic financial literacy (e.g., family budget, managing a checkbook, savings plan)	❑	❑	❑	❑
Consumer credit counseling and/or credit repair	❑	❑	❑	❑
Your institution's financial products and services	❑	❑	❑	❑
Home buyer education	❑	❑	❑	❑
Basic small business financial literacy (e.g., writing a business plan, sources of financing, obtaining a bank loan – what banks look for)	❑	❑	❑	❑
Accounting and bookkeeping	❑	❑	❑	❑
Federal laws and regulations	❑	❑	❑	❑

Other (please specify)

6. Please indicate the degree of ease or difficulty branch or institution typically experiences financing the following on reservations or Indian Lands…

	NOT APPLICABLE	EASY	SOMEWHAT EASY	SOMEWHAT DIFFICULT	DIFFICULT	EXTREMELY DIFFICULT
Conventional mortgages	❑	❑	❑	❑	❑	❑
Loans for mobile home purchases	❑	❑	❑	❑	❑	❑
Property rehabilitation loans	❑	❑	❑	❑	❑	❑
Home equity loans	❑	❑	❑	❑	❑	❑
Personal/consumer loans (e.g. trucks, autos, home furnishings)	❑	❑	❑	❑	❑	❑
Construction loans (residential and commercial real estate)	❑	❑	❑	❑	❑	❑
Start-up business loans (in operation for fewer than 2 years)	❑	❑	❑	❑	❑	❑
Micro business loans under $25,000	❑	❑	❑	❑	❑	❑
Small business loans between $25,000 and $100,000	❑	❑	❑	❑	❑	❑
Large business loans over $100,000	❑	❑	❑	❑	❑	❑

Comments:

7. **Review the list of items below and indicate the degree to which each item presents a barrier to your branch's or institution's lending activity on the Reservation(s) or Indian Lands in your area.**
Please rate each barrier by placing a ✓ in the corresponding box. You may add additional barriers in the space provided below.

The following list of items does not necessarily reflect the views of the Treasury Department, but is the stated views of participants in 13 national Workshops conducted by the CDFI Fund's Native American Lending Study/Action Plan Program regarding possible barriers to lending on Native American, Native Hawaiian, and Alaska Native Communities.

	NOT APPLICABLE	NOT A BARRIER	MINOR BARRIER	MODERATE BARRIER	SIGNIFICANT BARRIER	VERY SIGNIFICANT BARRIER
A. Cumbersome, conflicting, or ineffective State and/or Federal programs and regulations	❑	❑	❑	❑	❑	❑
B. Inflexible lending/underwriting regulations	❑	❑	❑	❑	❑	❑
C. Limited use of Trust land as collateral	❑	❑	❑	❑	❑	❑
D. Tribal members on the Reservation or Indian lands lack capital, collateral, and/or credit histories	❑	❑	❑	❑	❑	❑
E. Lenders do not understand Tribal governmental or legal systems	❑	❑	❑	❑	❑	❑
F. Tribes and Tribal members on the Reservation or Indian lands lack knowledge of or experience with the financial world	❑	❑	❑	❑	❑	❑
G. Insufficient or non-existent written Tribal commercial laws and regulations (e.g., commercial code, zoning code, or building code)	❑	❑	❑	❑	❑	❑
H. Differences between Native American culture and the banking culture	❑	❑	❑	❑	❑	❑
I. Lack of understanding of Tribal sovereignty and sovereign immunity	❑	❑	❑	❑	❑	❑
J. Tribes or Tribal members and banks have historically not trusted each other	❑	❑	❑	❑	❑	❑
K. Lack of physical and telecommunications infrastructure on the Reservation or Indian lands	❑	❑	❑	❑	❑	❑
L. Discrimination against and/or stereotyping of Native American communities	❑	❑	❑	❑	❑	❑
M. Insufficient number of banks on or near the Reservation or Indian lands	❑	❑	❑	❑	❑	❑
N. Lack of technical assistance resources	❑	❑	❑	❑	❑	❑
O. Change in Tribal governmental leadership creates uncertainty	❑	❑	❑	❑	❑	❑

Comments or other barriers not listed:

8. Select and rank the top three barriers from the previous question in order of significance and recommend a strategy or strategies to overcome each barrier.

Strategies may include initiatives that can be implemented by lending institutions, Native American communities, or nationally (by Federal or private institutions). You may have more than one strategy per barrier. Please feel free to attach additional sheets of paper if necessary.

RANK	LETTER OF BARRIER (FROM LIST IN #7)	STRATEGY TO OVERCOME THE BARRIER
(most significant) 3		
2		
(least significant) 1		

9. To which industry sectors do you extend lending? (Please check all that apply)

- ❑ Agriculture
- ❑ Construction
- ❑ Manufacturing
- ❑ Natural Resources (Energy/Minerals/Timber)
- ❑ Retail
- ❑ Housing
- ❑ Services
- ❑ Tourism, Hospitality, Recreation
- ❑ Transportation
- ❑ Utilities and Telecommunications
- ❑ Other (please specify)

10. What is your Branch or Institution's minimum loan threshold for…

Personal/Consumer Loans $

Business Loans $

11. What type of charter does your institution have? (Please check all that apply)

- ❑ Federally chartered bank
- ❑ State-chartered bank
- ❑ Federally chartered thrift, savings association, or savings bank
- ❑ State-chartered thrift, savings association, or savings bank
- ❑ Federally chartered credit union
- ❑ State-chartered credit union
- ❑ Other (please specify)

12. Please indicate the asset size of your branch or institution as of 6/30/2000

- ❑ Up to $100 million
- ❑ $101 million to $1 billion
- ❑ $1 billion to $10 billion
- ❑ $10 billion to $20 billion
- ❑ More than $20 billion

13. Office or official responding:

Name and contact number (optional):

What state and Reservation(s) or Indian lands do you serve? (optional):

APPENDIX B: FINANCIAL SURVEY—TRIBAL LEADERS

1. Does your tribe currently sponsor, fund, partner with, or otherwise offer to its members any of the following…

- ❑ Credit office, credit department, or credit association
- ❑ Rental assistance
- ❑ Mortgage assistance (down payment or subsidy)
- ❑ Business lending program (business/financing assistance)
- ❑ Cooperative services (agricultural, arts & crafts, or other cooperative services)
- ❑ Tribally-owned bank or other financial institution
- ❑ Community development corporation (CDC)
- ❑ Community development financial institution (CDFI)
  (e.g., a community-based loan fund, credit union, venture capital fund, etc.)

2. Are non-tribally affiliated institutions offering the following types of financial products and services to your tribe, tribal entities, or tribal members living on the reservation or Indian Lands…

(✓ IF YES)	LOCATED **ON** THE RESERVATION/ INDIAN LANDS?	LOCATED **NEAR** THE RESERVATION/ INDIAN LANDS?
Conventional home mortgages	❑	❑
Loans for mobile home purchases	❑	❑
Property rehabilitation loans	❑	❑
Home equity loans	❑	❑
Personal/consumer loans (e.g., vehicles, home furnishings, etc.)	❑	❑
Construction loans (residential and commercial real estate)	❑	❑
Start-up business loans (in operation for fewer than 2 years)	❑	❑
Micro business loans (businesses requiring under $25,000) to individual tribal members	❑	❑
Small business loans (businesses requiring between $25,000 and $100,000) to individual tribal members	❑	❑
Private equity investments (venture capital investments, start-up capital)	❑	❑
Financial services (checking and savings accounts)	❑	❑
Large business loans (businesses requiring over $100,000) to individual tribal members	❑	❑
Large business loans (businesses requiring over $100,000) to tribe	❑	❑
"Mobile" banking services	❑	❑
Automated Teller Machines (ATM's)	❑	❑
What is the approximate distance from the Reservation or Indian Lands to the nearest branch or ATM?		

3. Indicate the ease or difficult Tribal members residing on the reservation or Indian Lands typically experience obtaining...

(PLEASE ✓ ONE FOR EACH ITEM LISTED)	NOT APPLICABLE	EASY	SOMEWHAT EASY	SOMEWHAT DIFFICULT	DIFFICULT	EXTREMELY DIFFICULT
Conventional home mortgages	❑	❑	❑	❑	❑	❑
Loans for mobile home purchases	❑	❑	❑	❑	❑	❑
Property rehabilitation loans	❑	❑	❑	❑	❑	❑
Home equity loans	❑	❑	❑	❑	❑	❑
Personal/consumer loans (e.g., vehicles, home furnishings, etc.)	❑	❑	❑	❑	❑	❑
Construction loans (residential and commercial real estate)	❑	❑	❑	❑	❑	❑
Start-up business loans (in operation for fewer than 2 years)	❑	❑	❑	❑	❑	❑
Micro business loans (businesses requiring under $25,000)	❑	❑	❑	❑	❑	❑
Small business loans (businesses requiring between $25,000 and $100,000)	❑	❑	❑	❑	❑	❑
Large business loans (businesses requiring over $100,000)	❑	❑	❑	❑	❑	❑
Business site leases	❑	❑	❑	❑	❑	❑
Homesite leases	❑	❑	❑	❑	❑	❑
Private equity investments (venture capital investments, start-up capital)	❑	❑	❑	❑	❑	❑
Financial services (checking and savings accounts)	❑	❑	❑	❑	❑	❑

4. **From the list below, please ✓ the sources of funds your tribe or its members use most often to finance the activities listed. (■ = not applicable)**

(Please ✓ all that apply)	Personal Source (e.g., savings, credit cards, loan from family)	Tribal Source (e.g., credit office, tribal corporation)	Banks	Venture Capital	Federal or State Government (e.g., grants or loans)	Bonding Authority
How Your Tribe Finances…						
Reservation infrastructure	■	❑	❑	❑	❑	❑
Large business (26 or more employees)	■	❑	❑	❑	❑	❑
Economic development (e.g., capital improvement projects, neighborhood revitalization, etc.)	■	❑	❑	❑	❑	❑
How Tribal Members Finance…						
Consumer purchases (vehicles, home furnishings, etc.)	❑	❑	❑	❑	❑	■
Home purchases	❑	❑	❑	❑	❑	❑
Home construction	❑	❑	❑	❑	❑	❑
Home equity loans	❑	❑	❑	❑	❑	❑
Property rehabilitation	❑	❑	❑	❑	❑	❑
Micro business (5 or fewer employees)	❑	❑	❑	❑	❑	❑
Small business (6-25 employees)	❑	❑	❑	❑	❑	❑
Large business (26 or more employees)	❑	❑	❑	❑	❑	❑

5. **Approximately how many organizations on or near the reservation/Indian Lands provide training, counseling, or technical assistance to tribal members residing on the reservation or Indian Lands regarding…**

	FILL IN A NUMBER (e.g., 0,1,2,…)	IS THIS SUFFICIENT TO MEET THE NEEDS OF YOUR COMMUNITY? YES	NO
Basic financial literacy (e.g., family budget, managing a checkbook, savings plan)		❑	❑
Consumer credit counseling and/or credit repair		❑	❑
Banking and lending practices		❑	❑
Home buyer education		❑	❑
Basic small business financial literacy (e.g., writing a business plan, sources of financing, obtaining a bank loan, etc.)		❑	❑
Accounting and bookkeeping		❑	❑
Federal laws and regulations		❑	❑
Other (please specify)		❑	❑

6. Review the list of items below and indicate the degree to which each item presents a barrier to your tribe's and/or its members' ability to obtain credit, equity investments, and/or financial services from the private sector (financial institutions, investors, etc.)

Please rate each barrier by placing a ✓ in the corresponding box. You may add additional barriers in the space provided below.

The following list of items does not necessarily reflect the views of the Treasury Department, but is the stated views of participants in 13 national Workshops conducted by the CDFI Fund's Native American Lending Study/Action Plan Program regarding possible barriers to lending on Native American, Native Hawaiian, and Alaska Native Communities.

		NOT APPLICABLE	NOT A BARRIER	MINOR BARRIER	MODERATE BARRIER	SIGNIFICANT BARRIER	VERY SIGNIFICANT BARRIER
A.	Cumbersome, conflicting, or ineffective State and/or Federal programs and regulations	❑	❑	❑	❑	❑	❑
B.	Inflexible lending rules and regulations	❑	❑	❑	❑	❑	❑
C.	Limited use of Trust land as collateral	❑	❑	❑	❑	❑	❑
D.	Tribal members on the Reservation or Indian lands lack capital, collateral, and/or credit histories	❑	❑	❑	❑	❑	❑
E.	Lenders do not understand Tribal governmental or legal systems	❑	❑	❑	❑	❑	❑
F.	Tribes and Tribal members on the Reservation or Indian lands lack knowledge of or experience with the financial world	❑	❑	❑	❑	❑	❑
G.	Insufficient or non-existent written Tribal commercial laws and regulations (e.g., commercial code, zoning code, or building code)	❑	❑	❑	❑	❑	❑
H.	Differences between Native American culture and the banking culture	❑	❑	❑	❑	❑	❑
I.	Lack of understanding of Tribal sovereignty and sovereign immunity	❑	❑	❑	❑	❑	❑
J.	Tribes or Tribal members and banks have historically not trusted each other	❑	❑	❑	❑	❑	❑
K.	Lack of physical and telecommunications infrastructure on the Reservation or Indian lands	❑	❑	❑	❑	❑	❑
L.	Discrimination against and/or stereotyping of Native American communities	❑	❑	❑	❑	❑	❑
M.	Insufficient number of banks on or near the Reservation or Indian lands	❑	❑	❑	❑	❑	❑
N.	Lack of technical assistance resources	❑	❑	❑	❑	❑	❑
O.	Change in Tribal governmental leadership creates uncertainty	❑	❑	❑	❑	❑	❑

Comments or other barriers not listed:

7. Select and rank the top three barriers from the previous question in order of significance and recommend a strategy or strategies to overcome each barrier.

Strategies may include initiatives that can be implemented by lending institutions, Native American communities, or nationally (by Federal or private institutions). You may have more than one strategy per barrier. Please feel free to attach additional sheets of paper if necessary.

RANK	LETTER OF BARRIER (FROM LIST IN #6)	STRATEGY TO OVERCOME THE BARRIER
(most significant) 3		
2		
(least significant) 1		

8. Does your tribe have the following? (Please check all that apply)

- ❑ Tribal tax code
- ❑ Overall economic development plan
- ❑ A program that encourages entrepreneurship
- ❑ Land use plan including roads, communication, and future building uses
- ❑ Tribal zoning code
- ❑ Tribal building code
- ❑ Tribal court system
- ❑ Tribal mortgage code
- ❑ Tribal commercial code
- ❑ Tribal foreclosure code/ordinance
- ❑ Authority to waive or provide a limited waiver of sovereign immunity

9. **In your best estimate, which of the following industry sectors on your reservation or Indian Landshave the most significant need for credit and/or capital?** (Please check no more than four)

- ❑ Agriculture
- ❑ Construction
- ❑ Manufacturing
- ❑ Natural Resources (Energy/Minerals/Timber)
- ❑ Retail
- ❑ Services (Government)
- ❑ Services (Non-Government)
- ❑ Housing
- ❑ Tourism, Hospitality, Recreation
- ❑ Transportation
- ❑ Utilities and Telecommunications
- ❑ Other (please specify)

10. **What is your Tribe's current unemployment rate?** _____%

11. **To the best of your knowledge, what percentage of the total adult tribal population are employed full time or part time, in...**

	FULL TIME	PART TIME
Agriculture	%	%
Construction	%	%
Manufacturing	%	%
Natural Resources (Energy/Minerals/Timber)	%	%
Retail	%	%
Housing	%	%
Services (Government)	%	%
Services (Non-Government)	%	%
Tourism, Hospitality, Recreation	%	%
Transportation	%	%
Utilities and Telecommunications	%	%
Other (please specify)	%	%

12. **Office or official responding** (chairman's office, community development or economic development office, planning office, etc.):

_____

Name and contact number (optional):

PREPARED STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Mr. Chairman, I am pleased that we have this opportunity to hear from the witnesses testifying today to help us determine whether legislation would be an appropriate and desired course of action to address the statute of limitations that may have been triggered by reports of tribes' trust accounts released in 1996.

Mr. Chairman, I have serious concerns about the management of both tribally held and individual Indian trust accounts. The Federal Government has a legal responsibility to maintain these accounts accurately, and I believe that account holders should be able to hold the Government accountable if this is not done.

In 1987, Congress first mandated that the Department of the Interior audit and reconcile trust fund accounts and provide these statements to account holders. Since fiscal year 1992, the appropriations acts for the Department have included requirements that tribes and individuals with trust accounts be provided with reconciled accounting statements, and, in 1994, Congress reiterated the need to give tribes this information with the passage of the Trust Fund Management Reform Act. This law required the Secretary of the Interior to supply tribes with reconciled account statements as of September 30, 1995.

Interior contracted with one public accounting firm in order to reconcile trust accounts and a second firm to verify that the reconciliation was as thorough as possible. In January 1996, each tribe was given a report of its account. However, tribes and the U.S. General Accounting Office have concerns that the 1996 reports may not provide reliable or sufficiently thorough information about the accounts. As a result, tribes cannot rest assured that these reports accurately represent the actual value in their accounts, and tribes may not have the necessary information to make informed decisions regarding whether accounts have been mismanaged and, if so, to take legal action.

Because of the doubts surrounding the sufficiency of these reports, it is uncertain whether the reports actually triggered the 6-year statute of limitations for tribes to file claims against the United States. However, the committee has been advised that the Department of Justice believes that the reports did do so. Several tribes have already filed claims because the statute of limitations, if it began to run, expired last month or will expire in the very near future.

If the Government is providing tribes with inaccurate or incomplete reports of their accounts, then these reports should not work to limit tribes' recourse toward holding the Government responsible for trust fund mismanagement. Moreover, it is likely in the best interests of tribes and the Government alike to extend the statute of limitations specifically to allow more time to explore how these claims might be settled out of court. Bringing hundreds of cases before the courts would cost tribes and the government dearly in time and resources.

In the final days of the last session of Congress, my distinguished colleagues Senators Campbell and Inouye introduced a measure to encourage the negotiated settlement of tribal claims. This bill would extend the statute of limitations on claims against the United States relating to trust fund account mismanagement through fiscal year 2002. I am very interested in the views of today's witnesses and my colleagues on the committee regarding how this legislation might help efforts to resolve trust fund mismanagement.

Indeed, the daunting task of rectifying trust fund mismanagement will require the diligent participation, patience, and wisdom of the Department of the Interior, the Native American community, the courts, and Congress. We are meeting today to discuss only one facet of this complex problem, but I am interested in what Congress can do to see that the problem is addressed with consistency, efficiency, and most importantly, justice.

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Chairman Inouye, Vice Chairman Campbell, and other members of the committee, the issue of trust fund mismanagement is one of the most urgent problems we are faced with in Indian country. Of all the extraordinary circumstances we find in Indian country, and especially in South Dakota, I do not think there is any more complex, more difficult and more shocking issues then the circumstances we have surrounding trust fund mismanagement.

This problem has persisted literally for generations, and continues today. Administrations of both political parties have been inadequate in their response, and the level of direction and the resources provided by Congress over past decades has also been sadly inadequate. The Federal Government, by law, is to be the trustee for Native American people. When the Trust Fund Management Act of 1994 was passed,

I was hopeful that this accounting situation would at last be remedied. Unfortunately, this has not been the case.

During my service in the House of Representatives, I was appointed to the Congressional Task Force on Indian Trust Fund Management, to review and study the management and reconciliation of funds administered by the Department of the Interior's Office of Trust Fund Management. Those meetings were informative but far from productive, as many years and millions of dollars later, this problem still persists.

A few years ago, this committee directly saw the reverence the Department of the Interior held for the records of this Nation's First Americans. Records were heaped into piles with trash, appliances, and cleaning supplies interspersed with the trust records of Native Americans. Other records were burned, flooded, and infested with colonies of rodents. All of this gives great concern to the Native people in my State and across the country.

I am convinced that there is no way for the Federal Government, regardless of political party, to be able to account for every last record that was lost. However, we should not simply throw up our hands and say "oh well." This does not adhere to the trust responsibility of the Federal Government on behalf of the American Indians and Alaska Natives of this Great Land. We need to do better.

We need to address the millions of dollars that will never be accounted for, and we need to come to a solution where those Native Americans who are owed money are paid money. Some of these account holders are of the poorest of the poor. Some of these account holders solely rely on these payments as their only source of income. We need to end the practice of treating our First Americans as Third Class citizens.

Mr. Chairman, I thank you for holding this first in a series of hearings on this important issue. I look forward to working with my colleagues of this committee, as well as tribal leaders to come to a viable solution to this problem. I look forward to hearing the testimony of the witnesses we have here today.

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Thank you, Mr. Chairman. Let me begin by saying it is important for this committee to remain interested and involved with Indian trust management issues. Throughout my time in Congress and as a member of this committee, I have been involved with efforts to remedy the existing problems with the current management system. It continues to be my hope that we can develop a dependable system.

As we are all aware, the *Cobell* v. *Norton* litigation has prompted an intense reevaluation of our Government's trust responsibility. Consequently, Secretary Norton has put forth a proposal to restructure the Bureau of Indian Affairs [BIA], thereby creating a new agency solely charged with managing Indian trust accounts. I understand this proposal has been met with opposition throughout areas in Indian country. I also understand the tribes' frustration with the Department's consultation process. However, I strongly believe that we must not lose focus in our efforts to resolve this long-standing problem and move forward to establish an accountable system of trust management.

The Department of the Interior is not the only agency to bear the burden of finding a solution or addressing the problem. Each branch of our Government continues to shape the future outcome of Indian trust management. We are here today to discuss one of the many issues surrounding trust reform. The history of mismanagement must be eradicated and replaced with a renewed commitment to providing a fair, accountable system. I look forward to working with my colleagues as we proceed in this difficult task.

Thank you, Mr. Chairman, I look forward to hearing from our witnesses.

PREPARED STATEMENT OF CHARLES TILLMAN, CHIEF, OSAGE NATION AND CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION

Mr. Chairman, Mr. Vice Chairman, and members of the committee, this written testimony is submitted to supplement the oral testimony given on behalf of the InterTribal Monitoring Association on Indian Trust Funds by Charles Tillman, Chairman of the ITMA Board of Directors and Chief of the Osage Tribal Council. ITMA is an unincorporated association of 53 federally recognized Indian tribes committed to monitoring the Indian trust fund and asset management and reform efforts of the U.S. Department of the Interior. The Association was formed in 1990 to provide a coherent voice from Indian country on Indian trust issues and to inform

its member tribes of developments and setbacks in the attempts to reform a deficient system.

The dilemma faced by tribes today was created by the issuance of reports to each tribe by Arthur Andersen LLP in 1996 purporting to "reconcile" tribal trust accounts for the fiscal years 1973–92. For the reasons stated below, those reports cannot be considered adequate accountings, as required by law, of the beneficiaries' trusts by their trustee, the United States. And yet, tribes are justifiably concerned that the Department of Justice would raise a statute of limitations defense based on the issuance of those reports. Given that the 6-year statute of limitations would run this year if such an argument by Justice were accepted, tribes must either file suit now or risk that a remedy might be unavailable in the Federal courts. As discussed below, it is neither in the interest of tribes or the United States to force tribes to file suit at this time.

The Association will not belabor the tortured history of the United States' mismanagement of tribal trust funds and resources. The committee is well aware that the Department of the Interior has failed its Indian beneficiaries for decades by mismanaging their land, their natural resources, and their funds. As a House committee concluded in 1992:

> [s]cores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

"Misplaced Trust: The BIA's Mismanagement of the Indian Trust Fund," H.R. Rep. 102–499, at 2 (1992). The House Committee further resoundingly condemned BIA's ongoing obdurate refusal to implement the needed reform:

> The committee is particularly troubled by BIA's efforts-undertaken only grudgingly—to implement repeated congressional directives designed to provide a full and accurate accounting of the individual and tribal account funds. In short, the BIA has repeatedly failed to take resolute corrective action to reform its long-standing financial management problems. The Bureau has repeatedly ignored directives to undertake needed management reform measures. As a result of this dismal history of inaction and incompetence, there is no assurance that the Bureau actually desires to, or will, make any substantial advancement toward rectifying the basic financial management failures brought to their attention.

Id. at 2–3, 5. The intervening 9 years have proven the House committee to be prophetic. We are no closer to a "full and accurate accounting" of the tribal trust than we were then.

The Arthur Andersen Reports

The directives mentioned in the House Report included numerous mandates from Congress that the BIA and the Department provide tribes with an accurate accounting of their trust funds and assets.[1]

The current dilemma faced by tribes arises from the Department's response to those mandates. In 1991, the Department contracted with Arthur Andersen LLP to conduct a so-called "reconciliation" of tribal trust accounts. The original charge to Arthur Andersen was that it was to "reconcile[the accounts] as accurately as possible back to the earliest date practicable, using available accounting records and transaction data." After 5 years, roughly $20 million in fees, and 31 contract modifications, Andersen submitted a report to each tribe regarding it purported trust fund balances.

The Andersen project was fatally flawed for a number of reasons. Andersen itself acknowledged the deficiencies in each report. It stated that each report did "not constitute an audit made in accordance with generally accepted auditing standards." Therefore, Andersen did not express an opinion on the accuracy of any of its findings. As Andersen stated in each report:

> The congressional mandate for the Bureau Tribal Trust Funds Reconciliation Project [Reconciliation Project] requires an accounting to each tribe for each of their trust accounts. The primary objective of the Reconciliation Project, as stated in the contract, is to reconstruct historical transactions, to the extent practicable, for all years for which records are available for all tribal trust accounts

[1] See Act of December 22, 1987, Pub. L. No. 100–202 and Act of September 27, 1988, Pub. L. No. 100–446 (requiring the Bureau of Indian Affairs ("BIA") to audit and reconcile tribal trust funds, and to provide tribes with an accounting of such funds; Act of October 23, 1989, Pub. L. No. 101–121, Act of November 5, 1990, Pub. L. No. 101–512, and Act of November 13, 1991, Pub. L. No. 102–154 (requiring the BIA to audit, reconcile, and certify through an independent party the results of the reconciliation of tribal trust funds as the most complete reconciliation of such funds possible, and to provide tribes with an accounting of such funds).

managed by the Bureau. Phase I of the Reconciliation Project substantiated that not all records would be available for a full accounting of such funds. Due to the unavailability of some records, the scope of the Reconciliation Project is designed to provide reasonable assurance as to the accuracy of each tribal trust account balance. The agreed-upon procedures performed, as required by the contract, represent the Bureau's standard of reasonableness.

[Emphasis added.] Most tribes agree that the reconciliation project did not provide any "reasonable assurance" regarding their account balances, in part for the reasons summarized below. But this statement by Andersen is particularly relevant to the issue currently before the committee because Andersen concedes expressly that, although Congress required an accounting, a full accounting was not possible. Instead, the Bureau substituted its own "standard of reasonableness" for the accounting required by Congress and by trust law.

Many of the reports' deficiencies are obvious from the "agreed-upon procedures" that guided Andersen's work.[2] Only a few of the deficiencies are discussed here to give the committee some understanding of the incomplete nature of the project and to underscore the fact that the reports cannot be considered an accounting that would trigger the statute of limitations for tribal claims.

Because of the limited availability of electronic data, Andersen only looked at records from 1972 forward. Losses to the tribal trust prior to that date were not analyzed in any way. This means that there is simply no way to know whether the beginning balance used by Andersen bears any resemblance to the amount that should have been in any given tribal account in 1972.

Another significant deficiency involves investment of tribal trust funds. Andersen—with the consent of the Department—did little substantive analysis of the investment of each tribe's trust funds. Instead, Andersen conducted an "Interest Yield Analysis" for each tribe. This "agreed-upon" procedure involved calculating each tribe's investment yield for each year. Andersen then derived a "benchmark rate" for all tribes based on the total return for all tribes in any given year. If the investment return on a given tribal account was within 2 percent below or 5 percent above the so-called benchmark, Andersen did nothing else.

Several flaws in this procedure are worth highlighting. First, the "benchmark" rate was derived not from some external source but from tribal trust accounts themselves. Thus, systemic problems in trust fund management could not be identified because they were simply included in the average against which individual tribal accounts were measured. If better returns were available generally—either through different investment strategies or through better procedures—Andersen's procedure could not have identified the losses. Second, the margin of deviation allowed by Andersen from that flawed benchmark is considerable. A tribe that consistently received almost 2 percent less than the benchmark would have earned less than two-thirds of the interest over a 20-year period that a tribe that received the benchmark return each year would have earned.

Perhaps the most egregious failing in the Andersen project was that Andersen was not charged with analyzing the Department's management of the underlying trust assets that generate the majority of trust funds in the first place. Without attention to the underlying trust assets, there can be no analysis of what the true balances should be. For example, natural gas producers leasing Indian lands have routinely underreported their production of gas from leased Indian lands by 20 to 40 percent, but the MMS has only recently—and even then sporadically—begun auditing production with any degree of care. Mismanagement of other trust resources has resulted in similar losses. And yet, with the exception of five "Fill-the-Gap" tribes, no attempt was made to sure that adequate rents, royalties, and other income was being collected in exchange for use or purchase of tribal resources.

For these reasons, and others too detailed to explore here, it would be dishonorable and legally impermissible for the United States to construe the Arthur Andersen reports as fulfilling its legal obligation to the tribes to account for tribal trust funds and assets.

The Annual Appropriations Language

Congress has recognized the legal interrelationship between an accounting and the statute of limitations. In each Interior appropriations act passed since 1990, Congress has stated in this or similar language, "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 indi-

[2] Of course, only the Department and Andersen "agreed upon" those procedures. The beneficiaries had no role in determining how their trust funds and assets would be analyzed.

vidual Indian has been furnished with the accounting of such funds." See, e.g., Pub. L. 101–512, 104 Stat. 1915, 1930 (1990).

ITMA believes that this language, which has appeared unchanged before and after issuance of the Andersen reports, would assist tribes in defeating any statute of limitations defense raised by the Department of Justice. But tribal leaders cannot be expected to risk the claims of their tribes based on language that does not make it clear that the Andersen reports were not the "accounting" Congress directed and that has been mentioned in each appropriations bill.

The Importance of Trust "Resources" or "Assets"

The importance of tribal trust resources, or assets, was mentioned in the discussion of the Andersen report above. ITMA wishes to stress the importance of mismanagement of those underlying resources to the committee. If the goal of Congress and the United States is to make tribes whole for the losses tribes have suffered because of breaches of trust by the Department, mismanagement of the underlying land, minerals, oil, gas, timber, and other resources must be examined and quantified. If tribes—and individual Indians—are not able to recover for that mismanagement, whether through a comprehensive settlement or tribe-by-tribe litigation, one of the greatest thefts in history will have been countenanced by the United States.

Time after time, tribes have litigated and won substantial judgments or settlements because of the United States' failure to fulfill its duties as trustee of Indian lands. For example, in *Confederated Tribes of the Warm Springs Reservation* v. *United States,* 248 F.3d 1365, 1371, 1375 (Fed. Cir. 2001), the Federal Circuit required a determination of damages regarding several categories of BIA's failure to manage tribal timber resources in a manner that obtained the greatest appropriate revenue for the tribal beneficiaries. In *Jicarilla Apache Tribe* v. *Andrus,* 687 F.2d 1324, 1331 (10th Cir. 1982), the Tenth Circuit found that the Secretary of the Interior did not even intend to comply with the regulatory notice requirements for offering tribal mineral leases, and indeed failed to comply with those requirements. Just 4 years later, the Tenth Circuit held that the Department had again breached its fiduciary duties to the same tribe by failing to correctly interpret the royalty terms in leases and regulations, by failing to ensure that lessees complied with lease terms, and by failing to insure the protection of leased lands. See *Jicarilla Apache Tribe* v. *Supron Energy Corp.,* 728 F.2d 1555, 1565 (10th Cir. 1984) (Seymour, J. concurring & dissenting), adopted as majority opinion as modified, 782 F.2d 855 (1986) (en banc), supplemented, 793 F.2d 1171 (1986), cert. denied, 479 U.S. 970 (1986).

The Tenth Circuit also has found that the Secretary "uncontrovertedly" breached trust duties to a tribe by failing to examine all relevant factors before approving a communization agreement for mineral development. See *Cheyenne-Arapaho Tribes of Oklahoma* v. *United States,* 966 F.2d 583, 590 (10th Cir. 1992), cert. denied, 507 U.S. 1003 (1993). More recently, the Federal Circuit flatly rejected the Government's contention that a balancing of national interests excuses the Secretary's flagrant breach of fiduciary duties by suppressing and concealing an administrative appeal decision to favor a mineral lessee to the detriment of the relevant tribe. See *Navajo Nation* v. *United States,* 263 F.2d 1325, 1332 (Fed. Cir. 2001).

Given the documented failure of the United States to fulfill its duties regarding management of tribal resources, any comprehensive settlement of the tribal trust debacle must include the damages arising from that mismanagement. If a settlement is not forthcoming, tribes must be able to litigate those issues. In the meantime, tribes should not be forced to file suit simply because of concerns relating to their resource claims and the statute of limitations.

The Need for Legislation

The Department of Justice is infamous in Indian country for raising every possible defense to Indian claims in litigation. Whether considered dishonorable attempts to avoid the United States' fiduciary obligations or vigorous advocacy in defense of its client, those historical tactics lead to the very real concern that the Government's lawyers will attempt to construe the Arthur Andersen reports as accountings that would trigger the statute of limitations. If tribes are to avoid the cost and risk of litigating that issue, they must either file suit immediately or Congress must act.[3]

[3] There is some uncertainty as to precisely what date might be regarded as beginning the running of the statute of limitations were the Andersen reports considered to be "accountings." Summary reports were issued in January 1996. More detailed reports were issued to at least some tribes in February 1996. Exit conferences with tribes were held throughout that year.

Because tribes should not be expected to shoulder the burden for the United States' failures and because a flood of litigation is in neither the tribes' nor the United States' interests, ITMA urges Congress to Act. Since the Andersen reports were issued, tribes (and Congress) have received a series of promises from the Department that the trust system would be reformed. Presumably, any reform would also include efforts to rectify the effects of past mismanagement. But as tribes have waited anxiously, each successive reform effort has stalled.

ITMA believes that a comprehensive settlement would be in the best interests of tribes and the United States. But thus far, the Department has failed to show any willingness to develop a process that could lead to such a settlement. Regardless, it seems certain that no meaningful settlement could be reached in a matter of months-the necessary analysis (probably including modeling) would require a significantly longer period. If tribes are to continue to wait for a tenable settlement plan, they must be assured that they are not foregoing their rights in court in the meantime.

Comments on S. 1857

ITMA is grateful for the support of the Vice Chairman, who introduced S. 1857 in the closing days of the last session in an attempt to resolve this problem; the Chairman, who cosponsored that bill; and other members of both houses of Congress who have already recognized the importance of the issue before the committee. It is hoped that today's hearing will lead to the passage of legislation that will resolve the Hobbesian choice faced by tribes.

With the qualifications discussed below, ITMA supports S. 1857 as currently drafted. It would provide tribes with some additional months in which to file suit or to secure the passage of additional legislation further extending the statute of limitations. If S. 1857 is to go forward in its current form, however, ITMA believes that the legislation would be much more effective if section 1(a) were amended to read:

> (a) IN GENERAL.-Solely for purposes of providing an opportunity to explore the settlement of tribal claims, during fiscal year 2002, the statute of limitations shall be deemed not to have run for any claim concerning losses to or mismanagement of tribal trust funds **and resources. Further, with regard to the reconciliation reports distributed to tribes by Arthur Andersen and the Department of the Interior in 1996:**
>
> (i) Those reports shall not be considered to have started the running of the statute of limitations for any claim against the United States by an Indian tribe regarding the management of tribal trust funds and resources, regardless of when such claim is filed; and (ii) Those reports shall not be considered for any purpose to be an accounting sufficient to fulfill the United States' duty to account as required by the American Indian Trust Fund Management Reform Act of 1994, under other applicable law, or under general principles of trust law. (iii) The United States is precluded from introducing those reports into evidence, from using them as rebuttal evidence, or otherwise relying on them in any administrative or judicial proceeding to prove any purported conclusion or fact contained in those reports.

With such an amendment, ITMA would enthusiastically support passage of S. 1857.

Since the pressures of the final days of a session are no longer present, ITMA respectfully suggests that the committee might also consider revisiting the basic goals of the legislation. If the committee is willing to explore a more comprehensive solution to the current problem, ITMA would propose that an amended bill specifically include the following in addition to the amendments discussed above:

> Specific language stating that the statute of limitations defense shall be deemed not to have run for any claim concerning losses to or mismanagement of tribal trust funds and resources through the end of fiscal year 2007.
>
> *Comment: It would waste the resources of both Congress and the tribes to require annual legislation regarding the statute of limitations issue. Five years is a reasonable period for the Department, if it proceeds in good faith, to develop a fair settlement structure in conjunction with tribes. In the meantime, tribes should not have to be concerned that they will surrender legal rights by pursuing a good faith settlement. Note: tribal trust "resources" are included for the reasons stated above.*
>
> Specific language mandating that the Department attempt in good faith to negotiate a full and fair settlement regarding losses resulting from mismanagement of tribal trust funds and resources by the end of fiscal year 2007.
>
> *Comment: Generally, see above. Tribes have seen no sincere attempt by the Department to develop a comprehensive settlement. Without a mandate from Con-*

gress to do so, it is very likely that ITMA will be before this Committee again in 5 years and that many tribes will be forced to file suit.

Specific language creating a right to reasonable attorneys' fees and costs (including expert costs) for any successful tribal claim relating to mismanagement of trust funds and resources:

(1) in which judgment is entered after the end of fiscal year 2003, if suit was filed before the enactment of this legislation, or

(2) in all suits filed after the end of fiscal year 2007.

Comment: Such a provision would encourage timely resolution, hopefully through settlement, of such suits that are currently pending. It would also provide a strong incentive for the Department to comply with the mandate that a comprehensive settlement acceptable to tribes and to Congress be reached within a 5-year period by imposing a penalty, tribes' litigation costs, if tribes must ultimately litigate their claims. The two-tier structure is intended to discourage tribes from filing suit after enactment of this legislation and before the settlement period ends.

As laudable as S. 1857 is, now is the time for Congress to consider how the trust fund debacle can be resolved fairly and finally within a reasonable period of time. ITMA would welcome the opportunity to work with the Committee on an amendment, or separate legislation, incorporating these additional concepts.

Conclusion

The statute of limitations issue relating to the Andersen reports of vital importance to tribes, and ITMA is grateful for the opportunity to testify and to enter these written comments in the record. Whether the Committee opts for an interim measure or a bill intended to reach the broader issues of Indian trust reform and past mismanagement, ITMA urges the Committee to move forward to ensure that the dilemma faced by tribes does not force them into litigation unnecessarily.

PREPARED STATEMENT OF MCCOY WILLIAMS, ACTING DIRECTOR, FINANCIAL MANAGEMENT AND ASSURANCE, GAO

I am pleased to be here today to summarize observations from our past work regarding Indian tribal trust fund accounts.

In a June 1993 letter to this committee, we noted that the appropriations acts for the Department of the Interior had for many years contained a provision that tolled the statute of limitations on claims for losses to, or mismanagement of, tribal trust funds until the tribe had been furnished with an accounting of its funds from which the tribe could determine whether there had been a loss. We also noted that the parties envisioned that such an accounting would result from Interior's then-ongoing reconciliation and audit of the tribal trust fund accounts, which the Congress had mandated.

At that time, we expressed our view that until there was a mutually acceptable basis for determining account balances and any associated losses, it would be premature to allow the statute of limitations to run. We observed that tolling the statute of limitations until reconciliation and audit of an account was completed, or until some mutually acceptable agreement was reached as to the account balance, had two overall purposes. First, it provided all interested parties, including accountholders, Interior, and the Congress, an opportunity to examine and evaluate all pertinent account information. Second, it permitted interested parties to attempt to resolve all claims arising from Interior's management of the accounts rather than addressing specific claims in a piecemeal fashion.

The Congress first established an Indian trust fund account reconciliation requirement in the Supplemental Appropriations Act of 1987. The requirement was in response to tribes' concerns that Interior had not consistently provided them with statements on their account balances, their trust fund accounts had never been reconciled, and Interior planned to contract with a third party for management of trust fund accounts.

The original provision required that the accounts be audited and reconciled before the Bureau of Indian Affairs [BIA] transferred funds to one-third party. A provision in Interior's fiscal year 1990 appropriations act added a requirement that the accounts be reconciled to the earliest possible date and that Interior obtain an independent certification of the reconciliation work. In 1994, the Congress, through the American Indian Trust Fund Management Reform Act of 1994 (Pub. L. 103–412, 108 Stat. 4239; Oct. 25, 1994), required the Secretary of the Interior to provide tribes with reconciled account statements as of September 30, 1995.

To fulfill these requirements, Interior contracted with two major independent public accounting firms, one to reconcile the trust accounts and the other to do an inde-

pendent certification to indicate that the reconciliation resulted in the most complete reconciliation possible. Following a preliminary assessment in March 1992 by Interior's reconciliation contractor, Interior decided to have the contractor reconcile the tribal accounts for fiscal years 1973 through 1992. Subsequent to this decision, Interior had BIA reconcile the tribal accounts for fiscal years 1993 through 1995 to comply with the 1994 act's requirement that Interior provide tribes with reconciled account statements as of September 30, 1995.

Interior's Indian trust fund account reconciliation project was completed in January 1996. During the reconciliation project, Interior spent about $21 million for contract costs over a 5-year period in a massive effort to locate supporting documentation and reconstruct historical trust transactions, as well as to perform other reconciliation procedures, in its attempt to validate tribal account balances. In January 1996, Interior began providing to each tribe a report package containing the tribe's reconciliation results. Each package included unreconciled account statements with schedules of proposed adjustments based on reconciliation project results for each year covered by the reconciliation, and a transmittal letter that described the information provided.

During a February 1996 meeting at which Interior officials and the reconciliation contractor summarized the reconciliation project results, tribes raised questions about the adequacy and reliability of the reconciliations results. In May 1996, we reported on shortcomings of Interior's reconciliation project.[1] The shortcomings consisted of procedures that were not completed due to missing records, systems limitations, or time and cost considerations. Attachment I to my statement describes the major shortcomings presented in our 1996 report.

From 1992 through 1997, we monitored and reported on various aspects of Interior's planning, execution, and reporting of results for the reconciliation project. In May 1997, we reported[2] to this committee that as of May 6, 1997, Interior had provided reconciliation reports to 310 tribes, 51 of those tribes had disputed the reconciliation results, and 41 had accepted the results. Of the remaining 218 tribes, 47 had requested more time to consider the results, and 171 had not responded to the reconciliation results. Attachment II is a list of GAO products issued between 1992 and 1997 on various aspects of Interior's Indian trust fund reconciliation project.

In summary, although Interior made a massive attempt to reconcile tribal accounts during its reconciliation project, missing records and systems limitations made a full reconciliation impossible.

I would be pleased to respond to any questions that you or other members of the committee may have.

Attachment I

RECONCILIATION PROJECT SHORTCOMINGS

Basic (Noninvestment) Transaction Reconciliation Procedure: The basic transaction reconciliation segment of the project included tracing 251,432 noninvestment transactions that had been recorded in the general ledger to source documents such as deposit tickets and disbursement vouchers. The total value of these receipt and disbursement transactions was $17.7 billion. Due to missing records, 32,901 of the transactions, with a total value of $2.4 billion (14 percent of the total value of the transactions), could not be reconciled. In addition to the limitation related to the unreconciled transactions, this segment focused only on transactions that had already been recorded in the general ledger, and no reconciliation procedure was performed to address the completeness of the general ledger itself.

Investment Transaction Reconciliation Procedure: The reconciliation contractor also did individual testing of $21.3 billion, or 16 percent, of the recorded investment transactions. However, to achieve efficiencies, Interior and the contractor substituted a review of tribal account investment yields for individual transaction testing for the remaining investment transactions.

Fill the Gap (Leases) Procedure: Another segment of the project reconciled collections for certain tribes with a sample of lease documents and timber sales contracts. Initially, the contractor was to review all leases greater than $5,000 and a test sample of 100 additional leases of less than $5,000 on a cross section of tribes. The reconciliation contractor identified 6,446 surface leases with annual collections

[1] U.S. General Accounting Office, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results.* GAO/AIMD–96–63. Washington, DC: May 3, 1996.

[2] U.S. General Accounting Office, *Indian Trust Funds: Tribal Account Holders' Responses to Reconciliation Results.* GAO/AIMD–97–102R. Washington, DC: May 23, 1997.

of over $5,000. However, due to time constraints for completing the reconciliation, only 692 leases—10.7 percent of the leases originally identified for testing—were tested. In addition, because of missing records, a number of leases, and sample test months for timber contracts, were substituted for those in the original sample.

Systems Reconciliation Procedures: The systems reconciliation was to include reconciling (1) information in the trust fund investment system to the General Ledger in the Finance System, (2) the tribal general ledger in the Finance System to U.S. Treasury records, and (3) the Integrated Records Management System [IRMS] subsidiary records to the Finance System general ledger. The latter two reconciliations could not be performed or completed due to time and funding limitations, according to Interior officials.

Tribal IIM and Special Deposit Accounts Reconciliation Procedure: Interior maintained some IIM accounts for tribes in the IRMS accounting system. It also used Special Deposit accounts primarily as clearing accounts for funds received that had not been distributed to account holders because the account owners had not been identified. Due to missing records and the lack of an audit trail through IRMS, tribal transactions could not be efficiently isolated from individual Indian transactions. Because of this, tribal IIM accounts maintained in IRMS were not reconciled to source documents, and Special Deposit accounts were not reconciled with source documents that moved funds to tribes' general ledger accounts, as had been planned.

Fill the Gap (Minerals Management Service) Reconciliation Procedure: Interior's Minerals Management Service [MMS] collects and accounts for oil and gas royalties on Indian leases. The reconciliation project was to include some procedures to trace collections from the leases, through MMS, to the general ledger maintained by BIA. However, because MMS retained records for only 6 years, records for most of the 20-year reconciliation period were not available, and alternative procedures at MMS were not performed due to time constraints.

Certification Procedure: Interior's fiscal year 1990 appropriations act required a separate, independent certification that the accounts had been reconciled and audited to the earliest possible date and that the results were the most complete reconciliation possible. However, BIA's certification contract required that the certification contractor ensure only that the reconciliation effort was performed in accordance with the reconciliation contract and no independent assessment of completeness was required. In addition, because of cost and time constraints, the certification contract was terminated before the certification contractor completed its verification that the procedures in the reconciliation contract were performed. The certification contractor issued a status letter, which communicated preliminary results. However, because the certification work was performed while the reconciliation was in process and the certification procedures were not completed, the usefulness of the status letter is limited.

Individual Indian Accounts Reconciliation Procedures: Accounts for individual Indians were excluded from the reconciliation project due to the potential lack of supporting documents and the cost and level of effort that would be needed to include them in the project.

Attachment II

RELATED GAO PRODUCTS

Indian Trust Funds: Tribal Account Holders' Responses to Reconciliation Results. GAO/AIMD–97–102R. Washington, DC: May 23, 1997.

Responses to Questions from June 11, 1996, Hearing. GAO/AIMD–96–125R. Washington, DC: June 24, 1996.

Financial Management: Interior's Management of the Indian Trust Funds. GAO/T-AIMD–96–111. Washington, DC: June 18, 1996.

Financial Management: Interior's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements. GAO/T–AIMD–96–104. Washington, DC: June 11, 1996.

Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results. GAO/AIMD–96–63. Washington, DC: May 3, 1996.

Financial Management: Indian Trust Fund Accounts Cannot Be Fully Reconciled. GAO/T–AIMD–95–94. Washington, DC: March 8, 1995.

Responses to Questions from September 26, 1994, Hearing. GAO/AIMD–95–33R. Washington, DC: December 2, 1994.

Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds. GAO/T–AIMD–94–195. Washington, DC: September 26, 1994.

Financial Management: Focused Leadership and Comprehensive Planning Can Improve Interior's Management of Indian Trust Funds. GAO/AIMD–94–185. Washington, DC: September 22, 1994.

Response to Questions on Two Recommendations in April 12, 1994, Testimony. GAO/AIMD–94–138R. Washington, DC: June 10, 1994.

Letter on BIA Trust Fund Reconciliations. GAO/AIMD–94–110R. Washington, DC: April 25, 1994.

Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements. GAO/T–AIMD–94–99. Washington, DC: April 12, 1994.

Financial Management: BIA's Management of the Indian Trust Funds. GAO/T–AIMD–93–4. Washington, DC: September 27, 1993.

Response to Request for Views on Freeze of the Statute of Limitations on Claims against the United States Arising from BIA Management of Tribal and Individual Trust Funds. GAO/AFMD–93–84R. Washington, DC: June 4, 1993.

Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing a Strategic Plan. GAO/AFMD–92–38. Washington, DC: June 18, 1992.

PREPARED STATEMENT OF PHILLIP HOGEN, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning, Mr. Chairman and members of the committee. My name is Phil Hogen. I am the associate solicitor for Indian affairs at the Department of the Interior. Thank you for the opportunity to present the Department of the Interior's views on S. 1857, an act "To Encourage the Settlement of Tribal Claims."

The Department supports the intent of S. 1857, although we suggest clarifying changes in order to make the language of the bill consistent with the intent. S. 1857 attempts to establish a date certain on which the statute of limitations would commence to run on claims concerning alleged losses to or mismanagement of tribal trust funds. The bill seeks to provide the tribes and the Government with additional time to address and determine a process to encourage and facilitate the resolution of tribal trust fund mismanagement claims based on the results of the Arthur Andersen reconciliation reports that were provided to the tribes in 1996. The proposed legislation would also provide tribes that have already filed litigation with a sufficient basis to obtain a stay of their pending claims, until the tribes and the Department have had further opportunity to engage in attempts to resolve those claims, before resorting to what will almost certainly be expensive and burdensome litigation for both sides. We support this approach, but recommended the following changes:

With respect to subsection (a), we recommend that the language be amended to state as follows:

(a) IN GENERAL—Solely for purposes of providing an opportunity to explore the settlement of tribal claims, the statute of limitations shall be tolled through September 30, 2003, for any claim not already time-barred concerning losses to or mismanagement of tribal trust funds.

This recommended change would obviate the need for the language currently found in subsection (b) of the bill. As such, we recommend that subsection (b) be deleted.

Once again, I would like to thank you the opportunity to testify on this legislation. I would be pleased to answer any questions you may have.

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