THE NAVAJO NATION

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Fawn Sharp, Chair
Secretarial Commission on Indian Trust Administration and Reform
Department of Interior
Office of Regulatory Affairs and Collaborative Action
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Dear Ms. Sharp:

Thank you for this opportunity to comment on the work of the Secretarial Commission on Indian Trust Administration and Reform. As the Commissioners begin this important work, it is important to emphasize that the underlying focus of this Commission must be the solemn and long-standing trust relationship between the United States and Indian Country. Trust is sacred. Sadly, that trust relationship, to which the national honor was committed long ago has been systematically eroded to such a degree that the United States Department of Justice now flagrantly denies its most fundamental tenants. The most important task now before this Commission is to reestablish and revitalize that trust relationship.

Secretary Salazar stated that this Commission "will play a critical role in our forward-looking, comprehensive evaluation of how Interior manages and administers our trust responsibilities to the First Americans." That seemingly complex task will be less so when the Commission's objectives are firmly rooted in simple and clear acknowledgment of the trust duty of the United States.

Trust Duty

As reflected in the Navajo Nation's 1849 Treaty with the United States, 9 Stat. 974, 974-75 (Sept. 9, 1849), and recognized just earlier this month by Congress:

> Treaties and laws have created a fundamental contract between Indian tribes and the United States. Tribes ceded millions of acres of land that helped make the United States what it is today . . .. In return, the federal government made promises . . . known as the United States' trust responsibility to all Indians. The federal government acquired virtually all of its land through treaties or agreements with Indian tribes, and it is incumbent upon the federal government to protect tribal treaty rights, lands, assets, and resources, as well as carry out the mandates of federal law with respect to Indians.

S. Rpt. 112-166, at 3 (2012). The Supreme Court has recognized that this trust responsibility imposes meaningful restrictions on federal actions:

> In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy, which has found expression in many acts of Congress and numerous decisions of this Court, [the United States government] has charged itself with . . . the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

Notwithstanding these recognitions by coordinate branches of the federal government, the Executive Branch has taken to arguing that it is subject to only those trust duties that are expressly stated in statutes and regulations. But if the trust duty is limited to only those obligations that are expressly stated in statutes and regulations, then that is no trust duty at all. This was the problem with the approach the Supreme Court took in the *Navajo* case decided in 2003 and 2009 based on misrepresentations by the Department of Justice. The Department of Justice has recently become even bolder in its effort to erode the trust duty as we saw in the *Jicarilla* fiduciary exception case that went to the Supreme Court last year. It seems that the Executive Branch has forgotten the solemn commitments to Indian tribes to which the national honor has been committed in exchange for vast land cessions. Also, the Executive Branch has missed the point of Congress's 1992 "Misplaced Trust" report and the 1994 Indian Trust Reform Act that followed it.

It should not be necessary for Congress to reiterate its clear directives, but unfortunately it has become necessary. The Senate Committee on Indian Affairs recently held an oversight hearing on "Fulfilling the Federal Trust Responsibility". Members asked the panel about the Supreme Court's *Jicarilla* decision, in which the Court sided with the Executive Branch, which argued that the United States did not have a fiduciary duty to tribes. The Department of Justice representative blatantly disavowed the United States' trust duty to tribes even though that duty was clearly acknowledged in the Department of the Interior's own Departmental Manual. Committee members also asked about settlement of tribal breach of trust claims against the United States. Approximately seventy tribes still have breach of trust cases pending.

United States v. Navajo Nation

The Navajo Nation is all too familiar with the erosion of the United States' trust duty to tribes. Then-Secretary of Interior Donald Hodel colluded with Peabody Coal in *ex parte* discussions to send the Navajo Nation back to the bargaining table where it then lost a coal royalty rate that was very favorable to Navajo and that the BIA had already decided to approve. Instead, the Navajo Nation was left with a much lower royalty rate for its coal, not realizing at the time that the

higher rate would have gone into effect but for the intervention of the Secretary of Interior; the Navajo Nation's own unfaithful trustee. As former Navajo President, Peterson Zah, recently explained tribes' predicament: We need protection from our protectors.

The Court of Federal Claims in *Navajo* observed that: The relationship between the United States government and Native American tribes is a fiduciary one, with the United States serving as trustee for the Indians. 46 Fed. Cl. 217, 225 (2000). It concluded that the defendant, acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation. *Id.* at 220. Although the Court of Federal Claims found that it lacked jurisdiction to hold the Secretary of Interior accountable for his harmful actions, it nevertheless stated in no uncertain terms that:

> There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities. *Id.* at 226.

Despite this grievous breach of trust, the United States effectively got off on a technicalityBand not even a bona fide technicality. It was instead a technicality contrived by the Executive Branch and then adopted by the Supreme Court after the fact, even though Executive Branch officials have long recognized that the governing statute always requires consideration of Indians best interests, and they knew at the time that they were violating their fiduciary duties to the Navajo Nation, and the then-governing regulation strictly regulated Indian coal leasing negotiations. The Executive Branch has seemingly determined that its long-standing trust relationship with Indian Country has become an inconvenience and now seeks to repudiate that trust duty, at least when tribes seek to enforce its breach. With alarming success in this Supreme Court, the Executive continually seeks to effectively rewrite the law without the sanction of Congress and to pretend that the now inconvenient trust relationship never existed.

Reaffirming the Trust Duty

The number one objective of this Commission should be to reaffirm the historic, meaningful, and enforceable trust duty that was fully paid for in advance by Indian tribes. The message from the Commission must be, as has been the message from Congress and historically from the Supreme Court, that the trust duty to Indian Country is not merely what is explicitly stated in statutes and regulations. It is much more than that. The United States is more than a mere contracting party and it is subject to the most exacting fiduciary standards. Moreover, Congress should not be expected to, and cannot, anticipate every permutation of the trust duty and every potential tactic the Department of Justice and others may invent to subvert it. The trust duty includes not only what is defined by treaties, statutes, and regulations, but also the duty described in the

common law of trusts that applies to all trustees.

In reestablishing the United States' trust duty to Indian Country, it is important for the Commission to consult the tribal beneficiaries themselves, not just the trustee. Past attempts at trust reform have served to confuse and further erode the trust duty rather than restore it. Consultation with tribal leaders, particularly tribal elders, must be a key step in establishing what the trust relationship was understood to be, and in recognizing the solemn and enduring bargain the United States struck with (and often imposed on) Indian Country. Consultation with the Executive Branch should serve only to confirm that the necessary reaffirmation of the trust responsibility will be effective to eliminate the Executive Branch's current misunderstandings and misrepresentations.

Recommendations to the Secretary and Congress

This Commission will make recommendations to the Secretary of Interior about administration of the trust duty to Indian Country. Secretarial Order 3292, of December 8, 2009, which establishes the Commission, states that: The proper management and administration of the Individual Indian Money ("IIM") accounts and trust assets (collectively the trust administration system) are among the Department's most significant *fiduciary* duties. (Emphasis added.) Duties of the Commission, in coordination with the Department of Interior include: ARecommending options to the Secretary to improve the Department's management and administration of the trust administration system based on information obtained from these activities, including whether any legislative or regulatory changes are necessary to permanently implement such improvements. *Id.*

While the Secretary's recognition of the need for this Commission and for reform in the administration of the trust duty is commendable, the problems do not lie entirely with the Department of Interior. Accordingly, the Commission's recommendations should include legislative changes in the form of reaffirmation and restoration of the historic trust relationship by Congress, to be followed by implementing regulations. The United States government as a whole, not just the Department of Interior, is responsible for carrying out the trust duty to Indian Country.

Tribal Breach of Trust Claims

The Commission's recommendations should include prompt and honorable settlement of yet pending tribal breach of trust claims. Some arguments advanced by the Department of Justice in its effort to defend the federal fisc by denying these claims amount to further breach of the trust duty. For example, in *Jicarilla*, the Department of Justice asserted the attorney-client privilege for communications between the Department of Justice and its client, the Department of Interior, about the administration of the tribal trust; the tribal beneficiary's own records. According to the fiduciary exception to attorney-client privilege, the United States, as fiduciary and trustee to the tribe, must make those records available to the tribal beneficiary. Amazingly,

the Department of Justice claimed that the United States was not a fiduciary to tribes and so could keep secret from tribes its communications about the administration of the tribes' trust estates. The Department of Justice told the Court that if tribes wanted those records, they would have to file FOIA requests like anyone else. This approach starkly contrasts with President Obama's Memorandum on Transparency and Open Government, which was his very first action as President, as well as the resulting National Action Plan for an Open Government Partnership, all of which promote accountability to improve performance. Sadly, the Executive Branch seems to wants to avoid accountability to decrease performance of the federal trust responsibility to Indians.

Apparently, Congress will have to address this bad faith argument and correct the Supreme Court decision adopting it by reaffirming that the United States is indeed a fiduciary to Indian tribes. The Commission should recommend that it do so.

Part of the rationale for the position taken by the Department of Justice in *Jicarilla* was based on alleged 'competing interests'. While a legitimate conflict between truly competing interests could arise as the Department of Justice or Department of Interior simultaneously protects the interests of Indian tribes and other interests of the United States as required by Congress, no such conflict existed in *Jicarilla*. Instead, based only on the possibility that such conflict could exist under other circumstances, the Department of Justice succeeded, with the cooperation of the Supreme Court, in the wholesale abandonment of a substantial component of the trust duty to Indian tribes, namely, the formally acknowledged duty to "[c]ommunicate with beneficial owners regarding the management and administration of Indian trust assets[,]" 303 DM 2.7(L), which includes "legal guidance from the Solicitor's Office[,]" Sec. Order No. 3215, § 2 (April 28, 2000). Perhaps sensing the Department of Justice's true motivation for keeping these trust records secret, Justice Ginsburg asked the attorney for the United States during *Jicarilla* oral arguments whether one of the competing interests might be "shielding government actors". *Jicarilla* transcript at 19 (April 20, 2011). The Commission should recommend that the United States not shirk its trust duty to Indian Country based on non-existent conflicts. If legitimate conflicts exist, they can be dealt with individually and appropriately, for example, by restoration of Asplit briefing, not by wholesale abandonment of trust obligations.

The Department of Justice argues that the United States' trust duty to tribes is something less than that of a common law trustee because other trustees pay for the cost of trust administration from the trust corpus while the United States pays for administration of the Indian trust from congressional appropriations. This is simply a gross misrepresentation of well-established history, ceding millions of acres of land and ceasing hostilities were full consideration that more than paid in advance for permanent federal fiduciary duties. The Commission therefore should recommend that Congress reaffirm that the trust duty to Indian Country was bought and paid for long ago and that the United States' trust duty to tribes not only encompasses the duties of a common law trustee, but is also an enhanced duty taken on by the United States, willingly assumed as a solemn national commitment by one sovereign to others.

Tribal Self-Determination

In addition, protection and promotion of tribal self-determination and self-sufficiency is an essential and original aspect of the federal trust responsibility to Indian tribes. Nevertheless, the Department of Justice attempts to misuse tribal self-determination to further erode the United States' trust duty to Indian Country in derogation of the clear intent of Congress. In enacting the Indian Self Determination Education and Assistance Act of 1975, Congress was careful to provide that: "Nothing in this Act shall be construed as . . . authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." P.L. 93-638 § 110.

Contrary to the recent arguments of the Executive Branch and the misguided assessment of the Supreme Court in its *Navajo* decision, there should not be any tension between self-determination and the trust responsibility, as Congress has repeatedly recognized. Thus, promotion of self-determination does not mean abdication of federal trust responsibility or a get-out-of-jail free card for breaches of the trust duty by the United States. Reestablishing the trust duty as it is meant to be today therefore means affirming that existing laws intended to promote self-determination do not absolve the United States of its duties, or its responsibility to pay for its breach. While the Commission may also decide to look at how laws regarding self-determination may evolve further, it cannot be disputed that to date neither Congress nor the tribes have intended that the trust duty give way to self-determination.

Accountability and Oversight

Finally, for there to be any meaningful change there must be accountability to an independent board of tribal leaders selected by Indian people. Such an Indian Trust Board should be small, perhaps 3 or 5 members. Those members must have real oversight authority. If the Board includes government officials, such as the Secretary of the Interior, or the Attorney General, we must ensure that those government officials can be constrained by the true tribal representatives. Accountability is the key.

The Board must have independence in decision-making and oversight that is meaningful. In the past, failures have resulted when the Department of Justice has been interposed in a process otherwise intended to provide redress to Indians harmed by federal action, whether at the tribal level (such as the Indian Claims Commission Act of 1946) or at an individual Indian level (such as the Radiation Exposure Compensation Act). In each of these instances, notwithstanding the clear intention of Congress to provide redress to Indians, the Department of Justice acted as a barrier to indemnification and thus was able to defeat Congressional intent.

Conclusion

The underlying focus of this Commission must be trust; specifically the solemn, legal, and long-standing trust relationship between the United States and Indian tribes (and through them,

individuals). The most important task now before this Commission is to reestablish and revitalize that trust relationship.

These comments have deliberately focused on two themes: reaffirming the trust relationship and promptly and honorably settling yet pending tribal breach of trust cases. That focus applies mostly to the Commission's questions 4 and 5:

> 4. Do you have any recommendations and/or suggestions that would improve the nation-to-nation relationship between DOI and Tribes with respect to trust administration
>
> 5. Do you have any recommendations to improve or strengthen trust management and/or administration based on information gathered in the course of litigation and settlement of recent tribal breach of trust cases announced in early April of this year.

Trust Reform to date has been an exercise in futility. It is important that we not let the work of this Commission merely be more of that. That's why we placed reaffirming the trust relationship before the Commission's first three questions, which include, for example, streamlining delivery of services to trust beneficiaries. Similarly, other trust administration models and sun-setting OST are important considerations, but the Commission has two years to deal with the mechanical details of trust administration. If those mechanical details become the primary focus of the Commission, reaffirmation of the trust duty and settlement of claims for past breach of that duty are at risk of becoming mere footnotes.

It would be a mistake to suppose that the trust relationship can be restored through administrative fine tuning such as streamlining delivery of services to trust beneficiaries, reorganizing BIA staff, or transferring tribal records to a Kansas depository for "safekeeping." While we look forward to continued dialogue addressing the detailed mechanics of trust administration, we cannot let those details prevent the Commission from rebuilding a solid foundation for a revitalized trust relationship between the United States and Indian Country.

Respectfully,

Ben Shelly, President
THE NAVAJO NATION