



SECRETARIAL COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM

Testimony
of
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Overview

- Part 1 - History Leading to the Enactment of the American Indian Trust Fund Management Reform Act and the Establishment of the Office of Special Trustee
- Part 2 – Self Determination is Part of the Trust Responsibility
- Part 3 – Recommendations

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Part 1:History

- It is important to understand the background and context for the enactment of the American Indian Trust Fund Management Reform Act of 1994 (P.L. 103-412; 108 Stat. 4239; 25 U.S.C. §§ 4001 et seq.) in order to address the question of whether Congress intended to create a permanent Office of Special Trustee
- The federal government first started holding tribal funds in trust in 1820.
- The BIA was created in 1824 in the Department of War. It was transferred to Interior in 1849.

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History

- In 1828, H. R. Schoolcraft (1793-1864), the explorer and traveler, who lived among Indian tribes for thirty years and is remembered for his work in recording Indian stories of Manabozho the Mischief-Maker and his adventures with the Wolf, the Woodpeckers and the Ducks famously observed that:

“The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled with a pitch fork . . . there is a screw loose in the public machinery somewhere.”

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History

- Little attention was paid to the financial systems in BIA, including the trust funds, until 1928 when GAO investigated, as it did again in 1952, 1955 and 1982. In addition there were at least 30 Inspector General audits and investigations between 1982 and 1992. All of these investigations reached similar conclusions with respect to the problems that needed to be corrected:

- Weak internal controls.
- Inadequate systems for accounting and reporting trust fund balances.
- Inadequate controls over receipts and disbursements.

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History

- Inability to determine accurate cash balances.
- Failure to consistently and prudently invest trust funds and pay interest to account holders.
- Inability to provide account holders with periodic statements.
- Absence of consistent written policies and procedures for trust fund management and accounting.
- No centralized management of IIM accounts.

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History

- Oil and gas royalties and interest payments were either not distributed in a timely way or were not distributed at all.
- Delinquent lease rentals were not collected and were not allocated to the correct trust accounts.
- Expired leases were not renewed.

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History

- Throughout the 1980's there were a number of other evaluations performed including the Linowes Commission on the Fiscal Accountability of the Nation's Energy Resources which concluded that there were massive oil thefts from federal and Indian lands.

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History

- In 1984 Price Waterhouse concluded that the BIA needed to: 1) define responsibilities for trust fund managers; 2) prepare a policies and procedures manual; 3) separate the tasks of investment and management; 4) establish an audit function; 5) implement a trust accounting system; 6) implement a system for tracking expected income in the form of accounts receivable; 7) implement a deposit reporting service; and, 8) use a commercial bank for cash deposits and disbursements.

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History

- Based on the Price Waterhouse report, BIA tried to privatize financial management of the trust funds in 1986 and 1987, first with the Mellon Bank and then with the Security Pacific Bank, even after Congress acted to prohibit any transfer of functions under a contract unless and until the trust accounts were audited and reconciled. The contracts with Mellon and Security Pacific included functions such as establishing an accounts receivable system, making and recording disbursements, investment services and trust accounting.

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History

- In 1988 and 1989 the BIA hired Arthur Anderson to audit the trust accounts. Arthur Anderson concluded that:
 - “[T]he accounting systems and internal control procedures utilized by BIA suffer from procedural weaknesses and other problems. The weaknesses are so pervasive and fundamental as to render the accounting systems unreliable.”
- In 1989 OMB put the BIA on its list of “high-risk” agencies and ordered the BIA to develop a strategic plan for corrective actions.

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History

- In 1990 the BIA started the process for audit and reconciliation of trust fund accounts under the contract with Arthur Anderson. Phase I of that process included 500 tribal trust accounts and 17,000 IIM accounts at a projected cost of \$2.3 million. Phase II was supposed to cover 1,500 more tribal accounts and 283,000 IIM accounts at a projected cost of \$12.6 million
- In 1991 Arthur Anderson reported concerns about the accuracy of the BIA land ownership records and evidence that revenues were distributed to closed estate accounts, lease payments were not collected in a timely way and revenues were posted to the wrong accounts.

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History

- During 1989, 1990 and 1991 Chairman Synar of the Subcommittee on Environment, Energy and Natural Resources of the Committee on Government Operations held several oversight hearings on BIA management of the trust funds. These hearings culminated in a report that was issued in April, 1992. Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund. H. Rept. 102-499, 102d Cong, 2nd Sess., Committee on Government Operations, April 22, 1992.

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History

- Among other things the report found:
 - 330 Tribes with 2,965 accounts and 300,000 IIM accounts.
 - The effort in 1986 and 1987 to privatize the management of the trust funds had cost over a million dollars and had not resulted in the delivery of any services to the BIA.
 - The BIA land record system, known as the Integrated Resource Management System (IRMS) was operated differently at different BIA offices and had no overall system manager.

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History

- The problems in the land records were exacerbated by fractionation.
- BIA had been repeatedly directed to prepare a strategic plan for trust fund management by OMB, the Comptroller General, the House Appropriations Committee and the House Government Operations Committee but the BIA had never prepared a strategic plan and had failed to achieve reliable and timely trust fund management and reporting.

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History

– The BIA could not: 1) accurately account for trust funds, 2) provide account holders with accurate statements of their account balances, 3) consistently and prudently invest trust funds and pay interest to account holders; 4) develop and implement consistent written policies or procedures for its trust fund accounting.

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History

- The BIA's refusal to reconcile, audit and certify all Indian trust fund accounts was "arbitrary, capricious and unreasonable" and despite the expenditure of \$1.7 million on the Arthur Anderson contract little progress had been made in restructuring and reconciling Indian trust funds.

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History

- The Synar report made several specific recommendations, including:
 - Reduce and eliminate fractionation.
 - Develop a system for maintaining accurate and up-to-date tribal and individual land ownership records.
 - Develop an accounts receivable system.

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History

- Provide for prompt collection and accurate distribution of revenues.
- Produce accurate periodic account statements.
- Develop written policies and procedures for trust fund management and accounting.
- Provide for regular account audits.

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History

- Provide adequate staff with proper supervision and training.
- The House and Senate should pass legislation to provide for greater tribal control in the administration of trust funds and clarify the duties of the Secretary as the trustee including providing an accurate accounting and maximizing trust income through investment. (Emphasis Added)

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History

- If the BIA failed to act to implement the recommendations within 6 to 9 months, consider transferring the administration and control of the trust funds to the Federal Reserve Board.
- In November of 1992 the BIA set up the Office of Special Projects in the central office to coordinate trust fund management with OTFM and to oversee the on-going reconciliation project still being conducted under the contract with Arthur Anderson.

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History

- At the start of the 103rd Congress in 1993 Chairman Synar introduced H.R. 1846, the Native American Trust Fund Accounting and Management Reform Act of 1993. Senator Inouye introduced S. 925, the Senate companion bill. These bills proposed to:
 - Require the Secretary to invest and pay interest on IIM accounts.
 - Authorize demonstrations of new approaches to the management of trust funds by tribes. (Emphasis Added)

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History

- Establish the duties of the Secretary for management and administration of the trust funds.
- Provide for direct tribal administration of trust funds and authorize funds to provide for training. (Emphasis Added)
- Require periodic accounting and reporting to account holders.
- The bills did not address the transfer of the trust funds to the Federal Reserve.

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History

- In June, 1993, the Senate Committee on Indian Affairs held a hearing on S. 925. At that hearing the Chair of the Intertribal Monitoring Association (ITMA), Elouise Cobell, testified in opposition to the Synar Report's proposed transfer of the trust funds to the Federal Reserve and recommended the appointment of a "Special Master" with private trust fund expertise and a "Board of Directors composed of representatives of account holders and financial experts to manage the trust fund."

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History

- Under the ITMA proposal the Special Master would:
 - Provide overall management, direction and guidance on all trust fund matters;
 - Be responsible for the reconciliation, day-to-day management and improvement of OTFM;
 - Report directly to the Secretary and have a budget line separate from the BIA;
 - Be authorized to contract for specific functions, hire consultants and enter into contracts for personal services in order to avoid creating a new bureaucracy and becoming entrenched.

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History

- The overall concept of the ITMA proposal was to provide a mechanism for the administration of the trust funds while tribes developed the capacity to directly administer the funds and then phase out the work of the Special Master and Board of Directors. S. Hrg. 103-225, 103d Cong., 1st Sess. at 68-69, Hearing Before the Senate Committee on Indian Affairs on the Native American Trust Fund Accounting and Management Reform Act of 1993, June 22, 1993.

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The 1994 Reform Act

- As enacted in 1994, the American Indian Trust Fund Management Reform Act of 1994 included the provisions of H.R. 1846 and S. 925 as they were introduced with two significant exceptions:
 - First, the “demonstration project” provisions for tribal administration of the trust funds were not included. In their place Congress provided that Tribes could voluntarily withdraw funds from federal administration and manage and administer the funds directly. 25 U.S.C. § 4022

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The 1994 Reform Act

- Second, significant new provisions for the Office of Special Trustee were included “to provide for more effective management of and accountability for the discharge of the Secretary’s trust responsibilities to tribes and individuals... ” 25 U.S.C. § 4041(1)

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The 1994 Reform Act

- OST was required to oversee and coordinate reforms within the Department in a unified manner including the development of policies, procedures and systems of the BIA, MMS, and BLM to ensure that they are effective, consistent and integrated. 25 U.S.C. § 4042(2)

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The 1994 Reform Act

- The Special Trustee reports directly to the Secretary and is appointed by the President and confirmed by the Senate. He or she is required to have demonstrated ability in management of large government or business entities and knowledge of trust fund management, financial institutions and investment. 25 U.S.C. § 4042(a) and (b)

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The 1994 Reform Act

- Within two years of its inception, OST’s oversight role over the BIA was expanded by Secretarial order to include operational functions: accounting, investment and disbursement of beneficiary funds. In addition, OST maintains trust records, conducts land appraisals and provides beneficiary services including a call center and Fiduciary Trust Officers.

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The 1994 Reform Act

- The 1994 Act made termination of the Office of Special Trustee conditional on the implementation of reforms including:
 - The preparation of a comprehensive strategic plan for all phases of trust management, including identification of reforms to the policies, procedures, practices and management of BIA, BLM and MMS, provisions for Tribes to manage trust accounts, and a timetable for implementation of the strategic plan, including the termination of OST. 25 U.S.C. §§ 4042(c) and 4043(a)(2)(C).

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The 1994 reform Act

- The Special Trustee is required to “ensure the continuation of the Office until all reforms identified in the strategic plan have been implemented to the satisfaction of the Special Trustee.” 25 U.S.C. § 4042(c)(1)
- The Special Trustee can recommend continuation or permanent establishment of OST “if the Special Trustee concludes that continuation or permanent establishment is necessary for the efficient discharge of the Secretary’s trust responsibilities.” 25 U.S.C. § 4042(c)(2)

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The 1994 Reform Act

- The duties of the Special Trustee include:
 - Monitor reconciliation.
 - Ensure establishment of investment policies and procedures.
 - Provide accurate and timely reports to account holders.
 - Establish policies and practices to maintain complete, accurate and timely data regarding ownership and lease of Indian lands. 25 U.S.C. § 4043(b)

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The 1994 reform Act

- Ensure that BLM enforces compliance with federal requirements with respect to leases of Indian lands.
- Ensure that MMS enforces federal requirements for accurate and timely reporting of production and payment of lease royalty revenues, including audits of leases.
- Integrate land records, accounting and asset management systems among agencies.
- Ensure that BIA land records interface with the accounting system. 25 U.S.C. § 4043(b)

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The 1994 Reform Act

- Develop and submit to OMB and Congress an annual budget for OST. 25 U.S.C. § 4043 (b)
- Employ such staff as he deems necessary and enter into contracts for consulting services. 25 U.S.C. § 4045
- Appoint a nine member advisory board – five of the members must represent account holders and the Board terminates when OST does. 25 U.S.C. § 4046

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1994 Reform Act

- Paul Homan was the first Special Trustee. He submitted his strategic plan to Congress in 1997. It called for the creation of a Government Sponsored Entity (GSE) to manage the trust funds; probate clean up; a national archive center; land consolidation; clean up of IIM records; training and the selection of competent management that would be held to the Prudential Investor standard of conduct. Congress did not take any action on the strategic plan.

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Appropriations

- For FY'13 the Special Trustee proposed a budget of \$146 million to fund an office that includes 681 Full Time Employees.
- Currently, OST maintains approximately 2,900 accounts for 315 Tribal entities with assets exceeding \$3.2 billion, and over 383,000 IIM accounts with assets of approximately \$490 million. Annually, more than \$800 million passes through the Tribal trust funds system, and over \$300 million passes through IIM accounts.
- The Special Trustee has developed and implemented a Comprehensive Trust Management Plan (CTM) that incorporates the Fiduciary Trust Model (FTM)

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Appropriations

- OHTA was created by Secretarial Order in 2001 to plan, organize, direct and execute the historical accounting for the IIM accounts. In 2002 OHTA was expanded to include the tribal accounts. OHTA was transferred to OST in 2007. The Fy '13 budget request called for \$26.8 million for OHTA.
- The Trust Asset Accounting Management System (TAAMS) interfaces with the Trust Fund Accounting System to provide a single repository for ownership information for trust resources and financial transactions. TAAMS became fully operational in FY 2008 and allows OST to distribute trust funds to beneficiary accounts and to produce the performance statements for account holders as required by the 1994 Act.

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Appropriations

- Funding for the Land Consolidation program was zeroed out in Fy '09. In 2008 OST reported that since 1999 about \$170 million had been spent on consolidation to purchase 360,000 interests but there had not been a reduction in management costs.
- The request for funding for appraisal services was \$10.6 million and 71 FTE for Fy '13. Office of the Special Trustee for American Indians, Budget Justifications and Performance Information for Fiscal Year 2013.

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Appropriations

- From 1996 to 2008 the Department invested about \$3.9 billion in the “management, reform and improvement of Indian trust programs.” S. Hrg. 110-48, 110th Cong., 1st Sess. at 3-4, 72. Oversight Hearing on the President’s Fiscal Year 2008 Budget Request for Tribal Programs, February 15, 2007.

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Part 2: Self-Determination

“The doctrine of self-government is right – absolutely and eternally right.”

Abraham Lincoln 1955 – D. K. Goodwin “Team of Rivals” at 167 (2006)(Pbk).

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Self-Determination

“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . . We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. ...

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Self-Determination

. . . [We must] affirm that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians. . . . In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a federal agency.”

Special Message to the Congress on Indian Affairs, Public Papers of the Presidents of the United States: Richard Nixon, July 8, 1970, pp. 565-567

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Self-Determination

Congressional Statement of Findings
 (a) Findings respecting historical and special legal relationship; and resultant responsibilities

. . .

(1) . . . prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the . . . opportunity to develop leadership skills [necessary for] self-government . . . and has denied to the Indian people an effective voice in the planning and implementation of programs . . . which are responsive to the true needs of Indian communities; and

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(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons. 25 U.S.C. § 450, Pub.L. 93-638, § 2, Jan.4, 1975, 88 Stat. 2203.

- Congress also expressly recognized its trust responsibility in entering into self-governance compacts and funding agreements. 25 U.S.C. § 458cc

Self-Determination

UN Declaration on the Rights of Indigenous Peoples

Article 3
 “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 18
 “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

Self-Determination

- There is strong evidence that “devolution of powers of self-rule to tribes can bring, and has brought, improvements in program efficiency, enterprise competency and socioeconomic condition. The reasons are to be found in the fact that self-rule brings decision making home, and local decision makers are held more accountable to local needs, conditions and cultures than outsiders. (cont’d)

Self-Determination

“On the other hand, prior to the present era of Indian self-determination, decades of distant decision making by federal and state authorities accountable to non-Indian constituents and masters had shown little discernible ability to break repeated patterns of poverty and social disarray.”

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Self-Determination

- Kalt & Taylor, American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses, Harvard Project on American Indian Economic Development, January, 2005 at i and xi. (Documenting the growth in per capita income, the reduction in poverty and unemployment rates and the improvement in housing conditions among both gaming and non-gaming tribes.)

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Part 3: Recommendations

- The Department should move from a concept of the trust responsibility that is primarily focused on tangible trust assets and financial resources toward a concept that fully embraces self-determination and self-governance and the political status of the tribes.

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Recommendations

- Doing so is consistent with Congressional policy and is an appropriate response to the recent decisions of the Supreme Court that have narrowed the judicial understanding of the trust responsibility on terms that frustrate and undermine the federal/tribal relationship. *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2213 (2011); *United States v. Navajo Nation*, 556 U.S. 287 (2009); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

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Recommendations

- Ask Congress to amend 25 U.S.C. §§ 4022 – 4027 to provide tribes with the option of entering into self-determination contracts or self-governance contracts to administer and manage trust funds.
- Support enactment of H.R. 409, introduced by Representative Simpson and S. 165, introduced by Senators Crapo and Risch on January 28, 2013 to provide for an Indian Trust Asset Management demonstration project and to restructure the Bureau of Indian Affairs and the Office of Special Trustee.

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