

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

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August 31, 2006

VIA FAX AND ELECTRONIC MAIL DELIVERY

Ms. Michelle Singer
Office of the Associate Deputy Secretary of the Interior
1849 C Street, NW
Mail Stop 4141
Washington, D.C. 20240

Re: Comments on the proposed new Part 112 Tribal Trust Fund Accounting and Appeals Draft Regulations.

Dear Ms. Singer:

On behalf of the Intertribal Monitoring Association (ITMA), this letter provides comments on the proposed Part 112 regulations entitled "Tribal Trust Fund Accounting and Appeals" dated June 29, 2006, as circulated with the letter from Associate Deputy Secretary of the Interior James Cason to Tribal Leaders on July 7, 2006.

Generally, ITMA is concerned that the draft regulations would greatly diminish the ability of Indian tribes to access the federal courts with regard to federal management and administration of tribal trust funds accounting and management. Specifically, ITMA questions whether the Department of the Interior possesses the authority to unilaterally, through an administrative rule, undermine the Indian Tucker Act, which waives the immunity of the United States for money damages for breach of fiduciary duties owed to tribal beneficiaries. By compelling Tribes to submit to an administrative mechanism to settle and otherwise resolve all tribal trust fund accounting and related resource mismanagement claims, the draft rule essentially cuts off access to federal court. Moreover, the draft rule fails to take into account the Department's existing cooperative agreement with ITMA on the Tribal Trust Fund Settlement Project (TTFSP). There are no provisions that would "grandfather" or otherwise allow the participating TTFSP tribes to continue or follow through with phase II of the project, as originally intended in our cooperative agreement.

For these reasons, ITMA urges that the monumental policy decisions reflected in this draft rule are more appropriately the province of Congress than the Secretary of the Interior. In this forum, Tribes would have the ability to participate in hearings and have a voice in crafting the components of a legislative framework to resolve these claims. **ITMA therefore requests that the Department withdraw the draft Part 112 regulations.**

This type of effort could provide a strong foundation to properly bring these issues to Congress for legislative consideration and resolution. In support of our position, ITMA's detailed comments on the draft regulations are set forth below.

1. Effects Existing Tribal Trust Fund Claims

Both existing and potential tribal trust fund accounting or "funds-related" claims will be greatly impacted under the draft regulations. The draft regulations are intended to force every

tribe into an administrative track whereby all tribal trust fund claims, including resources management claims (which qualify under the draft rule's broadly defined "trust fund-related" claim) that a tribe has raised or could have raised from August 13, 1946, to the date a settlement is achieved under the rule, are disposed. The options for settlement that are proposed in the draft rules are crafted to dispose of these claims in a very narrow fashion and based almost entirely on the flawed Arthur Andersen reconciliation reports (the "Andersen Reports").

Contrary to existing law, which requires that all funds held in trust must be accounted for, the proposed Part 112 regulations encourage tribes to select options other than a full accounting. As written, the draft Part 112 grants priority to tribes that choose to enter into expedited settlement proposals or negotiate their claims above those who seek a full accounting. The draft regulation also limits the time periods for which the Department provides an accounting and severely limits the Secretary's statutory and equitable duties to account for tribal trust funds.

Furthermore, the proposed Part 112 regulations require tribes to exhaust administrative remedies set forth in the regulation, even if the tribe has pending trust fund mismanagement litigation. The draft rule would require tribes to remove their claims from a neutral forum established by the Congress to hear; and put their faith into the hands of the official they have sued. This result clearly will not be acceptable to many of the tribes that have expended significant time and resources on their respective lawsuits.

2. Effectively Adopts and Recognizes as Dispositive the Andersen Reports.

Essentially, the draft regulations provide an administrative mechanism to adopt the restrictive and deficient accounting work established in the Arthur Andersen reconciliation reports project. As a general matter, the reconciliation project did not comply with generally accepted accounting standards. Specifically, the project did not examine individual investment transactions or even categories of tribal trust accounts, but considered only a limited amount of tribal accounts; made assumption that there were overpayments made by the government and to third parties; included other undisclosed assumptions; and only accounted for a twenty-year period between 1972 and 1992. Under the project, only selected transactions were examined. As a result of all of the preceding deficiencies, the project ultimately resulted in an inaccurate and incomplete accounting.

Notwithstanding these unquestionable deficiencies with the Andersen Reports, the entire scope of the initial consultation within the draft regulations is based on a discussion of the Reports and any subsequent reconciliation work relating to the same Reports and performed by the same consultants. Similarly, the expedited settlement proposals are based on the Andersen Reports, and undoubtedly, the Department will insist on using these reports as primary and baseline data and information. Most disturbingly, if a tribe fails to participate in this process for a long enough period, it will be stuck with the results of the Andersen Reports as a matter of federal law.

In the Andersen Reports, Arthur Andersen explicitly disclaimed any views as to accuracy of the opening or closing balances reflected in the accompanying financial statements. If the firm that prepared these reports would not vouch for the balances, clearly, the Secretary of the Interior should not adopt them as accurate by operation of federal law.

3. Disposes of All Tribal Trust Fund and "Funds-Related" Claims through an Administrative Rule.

The draft rules also cover "accounting or funds-related claims", broadly defined to encompass actions or omissions relating to all management and accounting of funds from the point of collection through disbursement, including all claims relating to the collection of proper amounts, all facets of contracts and permits (presumably covering negotiations, valuation, good faith dealings, etc.), properly investing funds, proper posting and accrual of interest. The scope of coverage of these claims is incredibly broad. However, these types of issues and claims were not considered or even intended to be considered in the scope of the work performed in the Andersen Reports, and nothing in the regulations suggest that all such claims will be identified or examined prior to foreclosure of a tribe's claims. Therefore, it is patently unjust for the Department to dispose of these claims through an administrative process constructed to ensure that these issues will not be addressed.

4. Lacks Clarity on How Litigating Tribes Will Be Treated.

While the draft rules include a definition of "litigating tribe", the draft rules do not expressly explain how the rule will treat tribes currently in litigation. For example, the term is specifically referenced as one of the factors the Office of Historical Trust Accounting ("OHTA") may consider in determining its initial priorities and work it will perform. However, other sections of the rule require that a tribe either dismiss or agree to dismiss, with prejudice, any pending trust fund accounting or funds-related litigation, and therefore clearly contemplate that the regulations will apply with full force to litigating tribes. By operation of its language, the draft rules would require tribes to exhaust administrative remedies set forth in the regulation.

5. Requires Tribes to Relinquish Existing Statutory Rights and the Ability to Seek Equitable Relief through the Courts with No Guarantee that the Government Will Agree to a Final Settlement or That the Settlement Will Be Funded.

Regardless of when a claim accrues under the statute of limitations or when the statute of limitations runs, the Congress has made it abundantly clear that the sole SOL period is six years. The draft regulations would have the forward effect of shrinking that period to 90 days. The result is patently unfair and would represent a reversal of the Nation's policies, as expressed by the Congress through an administrative rulemaking process. The Department should not embrace such an approach.

A tribe that willingly elects to enter into an expedited settlement proposal effectively terminates all accounting and funds-related claims it has or could have for acts or omissions occurring at any time from August 13, 1946 until the date of acceptance. The tribe further agrees to dismiss, with prejudice, any pending litigation involving accounting and funds-related claims, and promises not to assert any statutory right in court regarding losses to or mismanagement of trust funds. By waiving a host of rights under a variety of statutes, a tribe effectively waives the ability to pursue any claims against the Department arising from fraud, concealment, mistake of law or any other claim arising at law or in equity with respect to matters otherwise resolved by acceptance of an expedited settlement proposal.

Even worse, if a tribe is interested in developing a negotiated plan, it must waive and release any right to receive additional trust fund accounting or reconciliation work set forth in the rules or through the courts. For historical accountings, the proposed regulations fail to require

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sufficient documentation for beneficiaries to determine whether the account statements are accurate. There is no guarantee that a settlement will be achieved, and if none is reached, the tribe would be severely limited on the issues it could raise for further review and appeal within the Department. Even assuming a settlement proposal is reached either through an expedited settlement or a negotiated plan, there is no guarantee that these proposals will be fully funded. Instead, the rule merely states that "the Department will use its best efforts to secure monies from appropriated funds or other sources to fund payment" of the agreed upon settlements.

All of the finality provisions of the proposed regulations presumably make final all claims relating to trust funds, whether known or unknown, disclosed or undisclosed. This presumably prevents any attempt by a tribe and the Department from working cooperatively to reach a partial settlement or sequential settlement of all of a tribe's trust fund claims. Furthermore, any funds received by a tribe through an expedited settlement proposal will not be taken into trust nor held in a trust account, and the proposed regulations give no explanation as to why such a requirement is imposed for expedited settlement but not for a negotiated tribal accounting, an historical statement of account, or through any of the objection, review or appeals processes.

6. Unfairly Undercuts Tribes' Litigation and Evidentiary Rights

Jurisdiction over any lawsuit against the federal government requires a clear statement from the United States waiving its sovereign immunity. The Tucker Act 28 U. S. C. §1491(a)(1), contains such a waiver, granting the Court of Federal Claims jurisdiction to award damages upon proof of "any claim against the United States founded either upon the Constitution, or any Act of Congress," 28 U. S. C. §1491(a)(1), and its companion statute, the Indian Tucker Act, 28 U. S. C. §1505, provides a similar waiver for Indian tribal claims that "otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe," §1505.

While the Indian Tucker Act provides the jurisdictional basis for tribes to bring suits against the government, it does not create a substantive right enforceable against the Government by a claim for money damages. To state a claim cognizable under the Indian Tucker Act, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and demonstrate that the Government has failed to perform those duties or meet those obligations. In one of the most recent breach of trust cases decided by the Supreme Court, the Court provided the following analysis:

A statute creates a right capable of grounding such a claim only if it "can fairly be interpreted as mandating compensation by the ... Government for the damages sustained." [citing *United States v. Mitchell*, 463 U. S. 206, 217 (1983)]. This "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity that is necessary to authorize a suit against the Government. It is enough that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. See *id.*, at 218-219. While the premise to a Tucker Act claim will not be "lightly inferred," *id.*, at 218, a fair inference will do. Pp. 4-6.

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

The two seminal Supreme Court cases which set forth the framework for breach of trust claims against the government for damages, are *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U. S. 206 (1983) (*Mitchell II*). In *Mitchell I*, the Court

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held that the Indian General Allotment Act (Allotment Act), 24 Stat. 388, as amended, 25 U. S. C. §331 *et seq.* (1976 ed.) (§§331-333 repealed 2000) established nothing more than a "bare trust" for the benefit of tribal members, and therefore created no enforceable and compensable duty of the United States to manage timber resources, tribal members. In *Mitchell II*, the Court reached the opposite result in considering the federal government's duties based on tribal timber management statutes. Under these laws and implementing regulations, the Court determined that the United States assumed "elaborate control" over the tribal forests and further identified a specific trust relationship enforceable by award of damages for breach of those duties. If the Tribe meets this threshold, "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].' " *Ibid.* (quoting *Mitchell II*, 463 U. S., at 219).

Essentially, the draft rule would undermine tribal governments' access to federal court under the Indian Tucker Act for a broad range of claims covered under the scope of the tribal trust fund accounting and funds-related definition in the draft rule. Thus, it is highly questionable whether the Department actually possesses the authority to undermine the Indian Tucker Act and otherwise diminish the existing framework governing breach of trust action against the federal government, as recognized by the *Mitchell* decisions.

Moreover, the Federal Rules of Evidence generally provide that statements made in compromise negotiations or settlement offers are generally not admissible in court to prove a claim; however, this evidentiary rule of exclusion is subject to several limitations, such as for evidence that is otherwise discoverable in litigation, to prove prejudice or bias, or to show that an agreement existed between the parties. Section 112.105 of the draft regulations works an end-run of these well-established rules by simply stating that statements made by the U.S. in initial consultations, expedited settlement agreement proceedings, or negotiated tribal accounting plans are inadmissible in subsequent legal proceedings. One of the possible results of such a complete rule of exclusion would be to keep a disputed tribal account statement from ever being presented to the IBIA if it accompanies an expedited settlement proposal or negotiated tribal accounting.

There are also several provisions within the draft regulations that require a tribe to compromise its legal rights. Section 112.124 requires that any negotiated tribal accounting plan contain a tribal waiver of its rights to receive any additional reconciliation or accounting work. This could deprive a tribe of its principal form of relief available through the appeals process in section 112.126 if the tribe believes the OHTA failed to perform the negotiated accounting plan, not to mention prevent the tribe from amending or modifying a negotiated accounting plan. Section 112.121 of the draft regulations would require a tribe to agree to dismiss or stay any pending accounting or funds-related claims in litigation as the price of even requesting a negotiated tribal accounting plan, thus discouraging tribes from even considering such an option.

Furthermore, the ability to stay proceedings will not always be within a tribe's power under rules of court, and there is no suggestion in the draft regulations that the government will join requests for a stay. Section 112.115 goes a step further and requires that a tribe accepting an expedited settlement proposal agree not to assert the applicability of federal legislation "concerning accounting losses or mismanagement of trust funds[.]" Such a requirement effectively insulates the Department against possible claims by a tribe that do not go to the merits of the claim, such as fraud, mutual mistake, or concealment, that would in effect permit the government to work an injustice against the tribe. Sections 112.129 and 112.204 also state that the Department is only responsible for accounting and reporting only "those monies received into, and

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maintained by, the Department's trust funds management systems[,] which completely overlooks and dismisses the Department's other statutorily-imposed trust and accounting duties.

7. *Unfairly Establishes a Category of "Accepting Tribes" and Penalizes Their Accounting and Settlement Options.*

In a prior legislative proposal put forth by Secretary Babbitt, he identified 41 tribal account holders that had "accepted" the account balances reflected in the Andersen Reports received by those tribes in 1996. The proposed regulations would treat those 41 tribes very differently from the 200+ other tribes that received Andersen Reports. However, there is no basis for treating such "accepting tribes" differently from any other tribe. Those "accepting tribes" should be given the opportunity to verify and ratify the exact implications of tribal official actions that were taken under the pretense of acknowledging the Department's efforts as part of good-faith negotiations but which now have become a basis to differently treat such tribes as "accepting tribes."

Furthermore, the "accepting tribes" should be given the opportunity to review such acceptance given that most of the "accepting tribes" are likely not aware of their status as such under the proposed regulations. This is necessary because the "accepting tribes" are treated punitively based simply on their status. For example, under the draft regulation's Section 112.110(b), such tribes will be deemed committed to the Andersen Report balances if they do not request initial consultation.

8. *Provides for Discounting of Settlement Proposals With Invalid Assumptions and Calculations and Use Of Non-Standard Accounting Methods*

The Department will purportedly offer monetary incentives for tribes accepting expedited settlement proposals but offers no explanation as to how such settlement proposals will be discounted through the application of other "factors" (Section 112.114). Such factors are to include the incomplete and highly controversial Andersen Reports, and the "generic likelihood" of losses within categories of transactions (which the Department has consistently denied exist as to certain types of transactions). The regulations further provide for the application of the Department's policies of netting, forgiveness, and interest without explanation as to how such policies will be implemented.

ITMA is concerned with the draft rule's attempt to apply unwritten, undisclosed, and heretofore unknown Departmental policies of netting and forgiveness to offers for settlement of tribal trust fund account balances. ITMA questions the Department's authority to net unilaterally determined amounts or to forgive collectable debts owed to the United States. This proposal is either beyond the scope of the Department's authority or illusory.

The proposed regulations also provide that any reconciliation work performed in preparing a historical statement of account is to be performed in accordance with the *Accounting Standards Manual* first issued by OHTA on July 2, 2002, as amended. However, this *Manual* is not generally available to the public or to tribes. Thus, there is no way to determine if such reconciliation work will be performed in accordance with generally accepted accounting principles, or for that fact, in accordance with any principles at all.

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9. Establishes a Punitive Review and Appeals Procedure which Unfairly Shifts the Burden of Proof to Tribal Account Holders.

The draft regulations repeatedly require a tribe to identify and provide supporting materials relating to errors or omissions in the Department's accounting statements. This completely turns on its head the legal responsibility of a trustee to maintain complete and accurate records, thus shifting the burden to tribes. Furthermore, the appeals process provided in the regulations are completely unforgiving.

Most importantly are the initial deadlines required to appeal. The clock on any administrative appeal arising from any objection to any account statement issued after January 1, 2001, starts running upon the promulgation of these regulations. All objections to any account statement received from OST during the period January 1, 2001, through the effective date of these regulations must be submitted in writing within 180 days of the effective date of these regulations. All objections to any account statement received after the effective date of these regulations must be submitted in writing within 90 days of the issuance date of the statement.

According to Section 112.307 of the draft regulations, the Department will *NOT* grant *any* extension of time for the submission of a written objection. This apparently means that a tribe could completely forego a claim by missing a single deadline. Should a tribe file its claim and make it through the appeals process specified in the proposed regulations, then only upon receiving a decision from the IBIA will the tribe be able to seek judicial review. Such delayed opportunity for judicial review is unprecedented.

Conclusion

Based on the foregoing, it is the position of ITMA that the Department should withdraw the draft Part 112 regulations given the substantial adverse impact they will have on national policies as expressed in laws duly enacted by the Congress and on the federal government's long-recognized fiduciary duties to Indian tribes and peoples.

ITMA looks forward to working with both the Congress and the Department to establish a statutory and regulatory regime for tribal trust fund accounting and appeals that is both consistent with national policy and law and fair to all affected parties.

Thank you for your attention and consideration of our comments and request.

Sincerely,

INTERTRIBAL MONITORING ASSOCIATION
ON INDIAN TRUST FUNDS



Mary Zuni-Chalan
ITMA Executive Director

cc: ITMA Board of Directors
ITMA Tribal Membership