

September 7, 2006

**ANALYSIS**  
**DOI Proposed Regulations**  
**'Part 112 - Trust Funds and Accounting Appeals'**

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This memorandum provides an overview of the major provisions contained within the latest draft regulation entitled "Tribal Trust Fund Accounting and Appeals" and discusses its potential impact on existing tribal trust fund claims and ITMA's tribal trust fund settlement project.

**I. INTRODUCTION**

On June 29<sup>th</sup>, the Department of Interior (Department) released its second version of draft regulations (to be issued as a new 25 CFR Part 112) entitled "Tribal Trust Fund Accounting and Appeals," under which the Department proposes to establish rules and procedures that would:

- (1) Set up a process in the Office of Historical Trust Accounting (OHTA) to provide tribes with the account statements required by the 1994 Act<sup>1</sup>;
- (2) Resolve tribal trust fund accounting and "funds-related claims" through OHTA;
- (3) Set up a quarterly reporting system to Indian tribes performed by the Office of Special Trustee (OST) to prepare a "Statement of Performance" that identifies the source, type and status of trust funds deposited and held in trust; and
- (4) Create a binding appeals process for challenging the resolution of accounting and funds-relating claims as well as the accuracy and sufficiency of the Statement of Accounts.

The June 29<sup>th</sup> draft rules eliminate from their scope and application the historical accounting and issuance of statements of performance for IIM accounts.<sup>2</sup> The new

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<sup>1</sup> The American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. § 4001 et seq.).

<sup>2</sup> The initial draft regulation proposed a process that the Office of Historical Trust Accounting (OHTA) would use to provide individual account holders with historical statements of account for land-based accounts and judgment and per capita accounts.

draft also eliminates OHTA's IIM Branch Chief, or his or her designee, from the definition of "decision maker."

The scope of the proposed rules would essentially affect every tribe that has or has had an interest in any tribal trust fund account administered by the Department. Specifically, the draft rules establish a framework under which an tribe would first undergo a consultation meeting with the Department to review its reconciliation report prepared by Arthur Andersen & Company (Arthur Andersen), as well as any subsequent "reconciliation efforts." Next, the tribe would be given a choice to select one of three processes to undergo for the ultimate resolution of trust fund accounting and "funds-related claims." The three processes include an "expedited settlement proposal," a "negotiated tribal accounting plan," and a "historical statement of account."

The rules, if implemented in their current form, would have the effect of placing every affected tribe on one of these three tracks for the purpose of resolving of all account balances for all accounts up to December 31, 2000. In arriving at and accepting a settlement figure through these processes, the tribe would be required to release and waive all accounting and "funds-related" claims; to dismiss, with prejudice, any pending litigation concerning accounting and funds-related claims; and to agree that none of the settlement proceeds received, *if any*, will be taken into or held in a trust account.

## **II. BACKGROUND – DEPARTMENT OF THE INTERIOR'S RECONCILIATION PROJECT.**

Pursuant to Section 304 of the 1994 Act, Indian tribes were to receive a tribal trust fund reconciliation project report from the federal government. These reports are commonly known as the "Andersen Reports" because they were prepared by Arthur Andersen. The Andersen Reports have been widely viewed as controversial and their thoroughness, credibility and integrity have been in question for years. This consideration was significant to the initial "tolling" of the statute of limitations for purposes of when a tribe received its respective reconciliation report, and it continues to be a key consideration.

Accordingly, in 2002, Congress passed Public Law 107-153 establishing the date of December 31, 1999, as the legal date of receipt of the Departmental/Andersen Reports on tribal trust fund accounts. One of the primary reasons for tolling the statute of limitations was to stem the filing of a flood of lawsuits, and to encourage negotiated settlements of these claims. Pursuant to the general federal six year statute of limitations, this law effectively set a deadline of December 31, 2005 for tribes to file lawsuits on the adequacy and sufficiency of the reconciliation reports. Last year, Congress extended the statute of limitations for an additional year which now provides a deadline of December 31, 2006 for tribes to file lawsuits as to these reports. Public Law 109-138 (December 30, 2005).

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Thus far, (42) Indian tribes have filed trust fund mismanagement claims, but many more have not taken similar action for a variety of reasons. Many tribes lack the resources to fully evaluate their potential claims and to pursue litigation. In addition, for years the Administration provided repeated assurances both to Congress and the tribes that it seeks to resolve these claims in a fair manner. It wasn't until the eleventh hour of the conclusion of the congressional session last year that the Department of Justice objected to Congress extending the statute of limitations for the filing of trust fund claims based on the Andersen Reports, then slated to expire on December 31, 2005 pursuant to Public Law 107-153. As expected, the Bush Administration is now vigorously opposing legislative efforts to extend the statute of limitations scheduled to expire at the end of this year.

The new 25 CFR Part 112 – Tribal Trust Fund Accounting and Appeals – draft rules would administratively create a regulatory framework based on the work and outcome of the Anderson Reports. In doing so, the ultimate effect of the rules is to cut off further attempts by tribes to pursue judicial relief through the courts to secure an accounting of tribal trust funds.

## **II. OVERVIEW OF SECOND DRAFT REGULATION - PART 112**

### **A. Initial Consultations**

The first step in the process is for a tribe to request in writing, within sixty (60) days of enactment of the final rules, an initial consultation with OHTA on its reconciliation report. During this session, OHTA will explain the following:

- How the reconciliation report was prepared;
- How its results were achieved;
- How “supporting documents” and other information were utilized and relied upon in the development of the report; and
- With respect to any subsequent reconciliation efforts:
  - ✓ The options available to obtain additional information relating to the tribe's accounts and accounting information; and
  - ✓ How to resolve accounting or funds-related claims by “mutual agreement.”

After consultation and consideration of the options, the tribe must then select one of the three process options discussed above, all of which would lead to a final resolution of the tribe's account balances. Tribes that request the expedited settlement proposal will have first priority, followed by tribes that request a negotiated tribal accounting plan, leaving as lowest priority, tribes receiving a historical statement of account.

OHTA will provide public notice of the initial priorities for the work it will perform for tribes. A list of factors that OHTA may consider in determining priority and the schedule of work to be performed under this section is specified in the draft rules.

Communications made during the initial consultation phase will remain confidential and are not admissible in any judicial, administrative or other legal proceeding.

If the tribe does not request an initial consultation, it cannot receive an expedited settlement proposal or pursue the development of a negotiated tribal accounting plan. Instead, these tribes will still receive a historical statement of account unless the tribe is an "accepting tribe."<sup>3</sup> An accepting tribe will be deemed to have accepted its balances as stated in the later of the tribe's reconciliation report or most recent account statement.

## **B. Expedited Settlement Proposals**

A tribe can request an expedited settlement proposal by submitting a written tribal resolution to OHTA within 60 days after its initial consultation. OHTA will then develop an expedited settlement proposal based on the *likelihood* that the account balance of a tribe is understated as a result of accounting or funds-related claims, and in consideration of the general results of the reconciliation project and the tribe's specific reconciliation report. To be eligible to receive an expedited settlement proposal, the tribe must:

- Agree to and accept as valid and correct in **all** respects, its tribal account balances as most recently stated in either its reconciliation report or its most recent statement thereafter;
- Compromise, release and waive **all** accounting and funds-related claims it has or could have raised for acts or omissions occurring at any time from August 13, 1946 until the date of acceptance;
- Dismiss, with prejudice, **any** pending litigation involving accounting and funds-related claims, and promise not to assert the applicability of **any** law regarding losses to or mismanagement of trust funds;
- Agree that settlement funds, if any, will not be taken into trust or held in a trust account and will be distributed according to requirements or restrictions as to the use of any such settlement funds; and
- Agree to execute and return **all** necessary documents within 45 days of acceptance.

Thereafter, OHTA will meet with the tribe to explain the basis of its expedited settlement proposal and to describe the pertinent time requirements for acceptance. Accordingly, a tribe has 60 days to accept or reject the proposal. If the tribe chooses to reject it, it

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<sup>3</sup> Under Section 112.001, an "Accepting tribe" is defined as one that has "accepted the reconciliation report by providing an attestation required by Section 304(2)(A) of the 1994 Act, or a tribe that has otherwise accepted tribal account balances prior to the effective date of this rule through a settlement, administrative action, or judgment."

must then request either a negotiated accounting plan or a historical statement of account. If the tribe does not respond within 60 days, the proposal will be deemed to have been rejected and will be withdrawn.

If a tribe, other than an accepting tribe, fails to respond or affirmatively rejects the proposal without requesting a negotiated accounting plan or a historical statement of account, the Department will provide a historical statement of account. As noted above, an accepting tribe will be deemed to have accepted its balance as stated either in the tribe's reconciliation report or in the most recent account statement, whichever occurred last.

### **C. Negotiated Tribal Accounting Plans**

A tribe must submit a written tribal council resolution to OHTA to initiate the process of establishing a negotiated tribal accounting plan. In the resolution, a tribe must describe the issues it would like OHTA to consider as well as the "legal basis" for those issues and a description of the accounts and revenue streams involved. The draft rules provide that a negotiated tribal accounting plan may include analyses of issues that are not part of the historical statement of account.

The tribe must also agree in this resolution to dismiss or stay any related pending litigation during the timeframe that the tribe and the Department work on establishing the negotiated tribal accounting plan. OHTA will provide the tribe with a proposed schedule for negotiations. The rules set out three phases of negotiating the accounting plan.

In the first phase, the tribe and OHTA will jointly develop a list of issues and will perform initial fact finding and document collection. In the second phase, the tribe and OHTA will narrow and define the issues to establish a negotiated tribal accounting plan. However, the tribe must waive and release any right to receive additional reconciliation or accounting work under Part 112 or in court. In the third phase, OHTA will then perform the work identified in the plan and, when completed, will meet with the tribe to present and explain the "draft deliverables."

Within thirty (30) days following the meeting on the outcome of OHTA's work, the tribe can submit comments before OHTA issues a final report. The rules provide that OHTA "will consider" any comments before issuing the final report.

Within ninety (90) days after the date of the final report, the tribe and the Department will exchange written settlement proposals and "legal position papers" on any outstanding issues that may affect the settlement of accounting or funds-related claims.

After 180 days following the exchange of proposals, the negotiation period will terminate if the parties are unable to settle all accounting and funds-related claims. The parties may agree to extend the negotiation period. If the parties fail to agree on a negotiated

plan, OHTA will proceed with the process of providing to the tribe a historical statement of account.

If a negotiated plan is ultimately established and performed, the tribe and the Department may then attempt to settle all trust fund mismanagement issues using the results of the accounting conducted in accordance with the negotiated tribal accounting plan and any other information the parties consider appropriate. A tribe can seek administrative review and appeal, more fully discussed below, if the plan has been established but not implemented.

#### **D. Historical Statements of Account**

Under this process, OHTA will provide to a tribe a historical statement of account, which will consist of a written statement of historical transactions derived primarily from the general ledger, under the following circumstances:

- By written request of the tribe, if supported by a tribal council resolution affirming the completion of the initial consultation and stating that the tribe's authorized financial officer has reviewed the reconciliation report;
- If a tribe and the Department fail to agree on an expedited settlement proposal or a negotiated tribal accounting plan; or
- If a non-accepting tribe (1) fails to request and participate in the initial consultation, (2) participates in the initial consultation but later fails to request an expedited settlement offer or a negotiated accounting plan, or (3) properly requests an expedited settlement offer but no agreement is reached, and the tribe fails to request a negotiated historical statement of account.

The historical statement will include the following information:

- Source, type and status of the funds;
- Beginning balance;
- Gains and losses;
- Receipts and disbursements;
- Ending balance; and
- Brief description of methodology used to prepare the statement, including results of any reconciliation performed.

The draft rules specifically exclude from a historical statement information relating to funds that were received through direct pay. The rationale for this exclusion is the Department's assertion that under the 1994 Act, it is only responsible to account for and report on those trust funds received into and maintained by the Department's trust funds management systems.

In addition, certain transactions over a certain but unspecified dollar amount will be subject to reconciliation procedures in accordance with the Accounting Standards

Manual. Transactions that do not meet this threshold will not be subject to the reconciliation process, and will only be “reconciled” subject to select random sampling. After the tribe receives the statement, OHTA will schedule a meeting, followed by a comment period and development of a final revised statement.

Tribes scheduled to receive a historical statement of account would be allowed to request, at a later undetermined time, a negotiated accounting plan or an expedited settlement proposal. The draft rules provide that the Department “will issue guidelines” to govern these requests and similarly provides that “periodic notices” will be published in the Federal Register reporting the timeframe within which OHTA will take to complete the accounting work for tribes.

After completion of the accounting work, OHTA will schedule a meeting with the tribe to explain the statement within ninety (90) days after the work is delivered to the tribe.

Within sixty (60) days after this meeting, a tribe may submit written comments on the statement. OHTA will consider such comments, and to the extent that it determines it is necessary, OHTA *may* issue a revised statement.

Within thirty (30) days after the revised statement is issued, a tribe may submit additional comments. OHTA will consider the comments and again, to the extent it determines it is necessary, OHTA *may* issue an amended statement.

If OHTA declines to issue a revised statement, the tribe must file a written objection with the Decision Maker, as set forth in the administrative appeal provisions, more fully discussed below.

#### **E. Statements of Performance**

Under a new Subpart C, the draft rules describe what information will be provided to tribes by OST in a “Statement of Performance” for tribal accounts, which includes:

- Source, type and status of the funds deposited and held in a trust account;
- Beginning balance;
- Gains and losses;
- Receipts and disbursements; and
- Ending balance of the statement.

OST would be required to provide the statement on a quarterly basis, no later than 20 days after the close of each quarterly period. The rules provides that a tribe may request, pursuant to Part 115, Subpart G, information on a more frequent basis. The rules also provide procedures for providing and changing an address of record for an account. Finally, the rules provide that the Department will not be held to account for or report on those funds that are paid through direct payment to an account holder.

## **F. Appeals Procedures**

The draft regulation includes a Subpart D which sets forth procedures for challenging all of the account statements prepared by both OHTA and OST set forth in this proposed Part 112 rules. The rules provide several types of appeals procedures depending on which type of statement is being challenged, beginning with written objections to the respective OHTA or OST "Decision Maker." The decision of the Decision Maker is subject to further appeal and review by the respective OHTA or OST "Reviewing Official." Further appeals of either the OST or OHTA "Reviewing Official" must be made by formal appeal to the Interior Board of Indian Appeals (IBIA).

To challenge the accuracy or completeness of any statement, a written objection must be submitted to the respective OHTA or OST Decision Maker, within the timeframes described below, and subject to further administrative appeal, as set forth below. To initiate an appeal, a written objection must include:

- A statement describing all errors or omissions, including any funds-related claims, along with as much "explanatory detail" as possible;
- A statement describing what action should be taken; and
- All supporting documents, arguments, or any other supporting information.

A written objection may also include a request for an additional ninety (90) days to submit the information required to support an objection. Beyond these parameters, the Department will not grant *any* extension of time to submit a written objection. If an account holder fails to submit an objection, the account statement will be deemed accurate and complete, and the account holder relinquishes all rights to invoke the remainder of the review and appeals process for that account statement (e.g. no further administrative or court review is available).

For statements prepared by OST, including historical statements of account and the statements of performance, all appeals must be made in the form of a written "objection" to the Deputy Special Trustee – Trust Services. An appeal of a decision by the Deputy Special Trustee must be made to the Principal Deputy Trustee, in the form of a "request for review."

For statements prepared by OHTA, including negotiated tribal accounting plans, a written objection must be made to the OHTA Tribal Branch Chief. An appeal of a decision by the OHTA Tribal Branch Chief must be made to the Executive Director of OHTA, in the form of a "request for review."

An objection to any statement provided from January 1, 2001 through the effective date of these regulations must be submitted within 180 days after the effective date of the regulations. An objection to a statement provided *after* the effective date of the

regulations must be submitted within ninety (90) days of the issuance date printed on the statement.

A tribe will have forty-five (45) days from the date of the Decision Maker's decision to file a written request for review by the Reviewing Official. Such a request must include a statement describing why the decision was incorrect, and a description of the action that should be taken by the Reviewing Official. The draft rules provide that the review cannot consider information or material that was not made available to the Decision Maker, except upon "good cause." Such a request to include new information will be answered within sixty (60) days, and will include any new deadlines for the submission of new supporting materials.

Within sixty (60) days of receiving a request for review, the Reviewing Official will make a final decision or advise that additional time or information is needed.

Within forty-five (45) days of the issuance of the Reviewing Official's decision, a tribe may file a written notice of appeal with the IBIA. Appeals to the IBIA are governed by 43 CFR Part 4, under which only final actions or decisions are subject to appeal. Therefore, a final agency action would not include both expedited settlement proposals and negotiated tribal accounting plans or any documents used to support or further either an expedited proposal, a negotiated accounting plan, or related account statements. Moreover, only those matters raised and documents submitted before the reviewing official are subject to review by the IBIA. However, in its discretion, the IBIA may exercise the authority of the Secretary to consider new information to correct a "manifest injustice or error."

No extensions are available under the draft rules, and the account holder will not be allowed to raise new facts, issues or arguments unless good cause is shown. If the account holder fails to request review, then the decision will be final, the account statement deemed accurate and complete, and all rights to invoke the remainder of the appeals process for that account statement are relinquished.

### **III. ANALYSIS OF POTENTIAL IMPACTS OF THE DRAFT REGULATION**

#### **A. Effect on Existing Tribal Trust Fund Claims**

##### ***1. Effects Existing Tribal Trust Fund Claims***

Both existing and potential tribal trust fund accounting or funds-related claims will be greatly impacted under these draft rules. The draft rules 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 rules' broadly defined tribal trust "funds-related" claims) that a tribe has raised or could have raised from August 13, 1946, to the date a settlement is achieved under the rules, 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 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 rules would require tribes to remove their claims from a neutral forum established by the Congress to hear such claims; and put their faith in 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 rather considered only a limited amount of tribal accounts; made assumptions 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. Furthermore, 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 Administrative Rules.***

The draft rules 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, and 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 rules will treat tribes currently in litigation. For example, the term is specifically referenced as one of the factors the OHTA may consider in determining its initial priorities and work it will perform. However, other sections of the rules 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 their 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 statute of limitations 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 U.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 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 rules merely state 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," 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."

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 to bring 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 held that the Indian General Allotment Act (Allotment Act), 25 U. S. C. §331 *et seq.* (1976 ed.) (§§331-333 repealed 2000), as amended, 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 for 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 a 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 rules 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 rules. 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 actions 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 broad 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 substantive 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 "those monies received into, and 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-plus 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.

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.

***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.

### **B. Effect on ITMA's Tribal Trust Fund Settlement Project**

One of the stated purposes of the draft rules is to provide "tribes the opportunity to engage in government-to-government negotiations to settle accounting or funds-related claims." However, the draft rules completely ignore the Department's existing cooperative agreement with ITMA on its Tribal Trust Fund Settlement Project (TTFSP). There are no provisions in the bill which would "grandfather" or otherwise allow the ITMA TTFSP tribes to continue or follow through with phase II of the project.

Based on the potential impact to existing and future tribal trust fund claims, as well as ITMA's TTFSP, it would be to ITMA's advantage to encourage the Department to withdraw the draft regulation or to substantially amend it so as not to improperly:

- Give priority to those who seek to settle or negotiate their claims over those who seek a full accounting;
- Limit the time period in which the Department must provide an accounting;
- Require tribes, including those with pending trust fund mismanagement claims in litigation, to exhaust administrative remedies;
- Fail to provide or obtain necessary supporting documentation; and
- Use restrictive and deficient accounting standards.

ITMA has already spent considerable time and resources in carrying out the settlement project, and developing methodologies for accounting. ITMA and its member tribes should encourage the Department to consider the project and methodology that is developed from it between ITMA and the Department.

## **IV. RECOMMENDATIONS**

ITMA should exercise every effort to oppose the draft Part 112 Regulations and ensure that they are not finalized and implemented. The regulations are intended to force every tribe into an administrative track whereby tribal trust fund claims, including resources management claims (which qualify under the draft rules' broadly defined

"trust fund-related" claim) would be disposed of in a very narrow fashion and based almost entirely on the flawed Anderson Reports.

For tribes that have not filed trust fund claims in federal court before these rules are enacted, the proposed mechanism would effectively block a tribe's access to federal court for an accounting available now under existing law and legal precedence. Instead, tribes would be limited to restrictive confines of the proposed rules.

On a broader scale, the regulation is an attempt to change the existing framework governing the ability of tribes to pursue breach of trust actions for trust fund and asset mismanagement in federal court. Under current law, a tribe can assert a cause of action in federal court, the basis of which is a comprehensive federal statutory, regulatory and management scheme governing trust funds management as well as the duty to conduct a trust fund account pursuant to the 1994 Act. The draft rules would essentially cut off this type of access to federal court.

Moreover, Subpart C appears to be a superfluous section that lays out the quarter reporting system because such reporting is already required by current law. However, by placing the burden on tribal account holders to review these reports and provide written objections as to their accuracy, the draft rules are intended to eliminate a tribe's ability to later rely on the statutorily mandated duties of reporting, if found to be in error or otherwise mismanaged, as a basis for a breach of trust action.

In support of the proposed drastic departure in existing law, the Department has publicly cited a provision in the 1994 Act as the basis of its authority to promulgate these rules. Undoubtedly, it was not the intent of Congress to delegate to the Department such broad sweeping authority. Rather, Congress itself should consider these issues which have significant magnitude for Indian Country through the appropriate deliberation of hearings and outreach.

Therefore, ITMA should oppose the regulations, and inform the respective authorizing committees in Congress, the House Resources Committee and the Senate Indian Affairs Committee of these concerns, and request that they spearhead an effort to delay the implementation of these regulations until their Committees have had the appropriate time to consider these issues.

## **V. CONCLUSION**

The draft regulations will vastly change the way existing and future tribal trust fund claims are handled. In addition, the Department explicitly claims that it is only responsible to account for and report on those trust funds received into, and maintained by, the Department's trust funds management systems. This will likely alter the government's obligation to undertake trust management as established under other statutes and regulations. If the ITMA Board is in agreement with these

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recommendations, we will prepare comments based on the analysis set forth in this memorandum.