

**Section by Section Explanation
of Key Provisions and Changes to the
NW Tribes' Trust Reform Legislative Proposal
Offered by Tribal Trust Reform Coalition (TTRC)**

Section 1. Short Title.

The Northwest Tribes and the California Tribal Trust Reform Consortium proposal (the "NW proposal") provides a new short title to replace current section 1 of the 1994 Act, "the American Indian Trust Fund Management Reform Act Amendments of 2005." This proposal (presented by a "Tribal Trust Reform Coalition", ") makes no change to this proposed short title. Based on the other changes to the 1994 Act by the Tribal Trust Reform Coalition proposal (the TTRC proposal), a new table of contents has been created.

Section 2. Purposes.

This new section is based in part upon the purposes identified in the September 2003 Inter-Tribal Monitoring Association (ITMA)/National Congress of American Indians (NCAI) draft legislation, updated to reflect the broader objectives of the current legislation. The purposes can be summarized as follows:

- to create the Office of the Deputy Secretary for Indian Affairs with a direct line of authority to oversee and supervise the management and reform of Indian trust funds and assets
- to provide fiduciary standards for the administration of Indian trust funds and trust assets
- to promote and advance tribal self-determination through tribal management of such funds and assets
- to eliminate the Office of the Special Trustee
- to reorganize and consolidate trust functions within the BIA at the Central and Field office levels
- to establish a mechanism to evaluate and report as to the adequacy of funding levels and staffing for trust management
- to provide for independent review of the DOI's administration of trust functions
- to accelerate implementation of core trust business systems
- to provide procedures to resolve the *Cobell* trust fund class action litigation

Section 3. Definitions.

The NW proposal adds new definitions to those contained in Section 2 of the 1994 Act to include the terms "audit", "tribal government", "trust asset", "trust funds" and

"trustee". These definitions cover the terms used in the amended Act. The NW proposal also makes non-substantive formatting changes that this proposal adopts and refines.¹

Additionally, the TTRC proposal offers the following new terms for definitions:

"Agency office," "Bureau field office," "Bureau field office directors," "Central Office," "Individual Indian," "Inherent Federal Functions," and "Trust Resources."

The TTRC proposal also modifies the following two terms from the NW proposal: the term "trust asset" has been changed to Non-Monetary Trust Asset; and the term "trustee" has been expanded to acknowledge that the United States is the Trustee.²

TITLE I. RECOGNITION OF TRUST RESPONSIBILITY

Section 101. Congressional Findings and Declaration of Policy

The TTRC proposal adds a new section 101, to provide for Congressional findings and a declaration of policy, which were not provided as part of the Northwest Tribes' Proposal.³ The findings are found in Section 101(a) and are intended to provide context for interpretation of the statute. The findings first lay out an overview of the federal trust responsibility and its implications, including rulings in the *Mitchell* case and other cases that apply common law standards and duties with respect to the management of trust assets and funds. Additional findings are as follows:

- the right of self-determination flows from inherent retained sovereignty
- the Trust responsibility is an integral element of the government-to-government relationship between tribes and the United States
- the federal bureaucracy has failed to meet the United States' trust obligations to tribes
- the failure to meet trust obligations stems from the overly-centralized bureaucracy and the under-funding of trust functions (and the creation of OST has not relieved bottlenecks and inefficiencies, but rather created a duplicative bureaucracy that has eroded tribal self-determination)
- decentralizing authority to the local level and increasing tribal control have proved critical to enhance program effectiveness and accountability, provided that tribally-driven solutions are not entangled by agency bureaucracy
- corrective measures are required to constrain the agency given breadth of mismanagement

¹ The NW proposal organizes the definitions in alphabetical order. The format for the definitions proposed by the Northwest Tribes', however, is inconsistent with that of the 1994 Act. The TTRC proposal corrects this format problem.

² Compare with NW Proposal Section 2.

³ The Northwest Tribes' proposal relocates and consolidates Section 101 of the 1994 Act into paragraph (a) of Section 102, leaving section 101 blank.

- the United States' fiduciary duties to tribes are legally enforceable
- the United States' obligations under treaties are legally enforceable

The TTRC proposed Declaration of Policy is found in Section 101(b). The declaration of policy relies upon the five trust principles adopted by NCAI resolution # NCAI Resolution #SD-02-094 of Nov. 2002. Based on those principles, it is the policy of the United States to

- govern Indian trust fund management by clear and enforceable standards
- protect the governing authority of Indian tribes, including the ability of tribes to regulate land use and resource management within their own reservations as well as the right to manage trust assets and accounts
- reform Indian trust fund management to respond flexibly to local needs without creating new levels of bureaucracy nor reprogramming funds from already under-funded BIA services
- increase tribal control over land and resources by providing federal technical assistance in flexible arrangements driven by the unique circumstances of each reservation;
- promote tribal involvement in developing systems and policies for trust management

Section 102. Responsibilities of the Secretary (Compare with NW proposed Section 3).

The NW proposal makes technical corrections to Sections 101 and 102 of the 1994 Act. The proposal reorganizes the 1994 Act by deleting existing section 101 and moving its substantive provisions to section 102(a).⁴ These provisions identify responsibilities of the Secretary in carrying out the trust responsibility. The Northwest Tribes' retains the responsibilities in the 1994 Act, modifying them with appropriate (non-substantive) editing clarifications. The TTRC proposal fully retains the Northwest Tribes' draft terms for section 102(a).

The TTRC proposal adopts the Northwest Tribes' approach to clarifying the 1994 Act's provisions regarding the Secretary's duties to account for daily and annual account balances by providing periodic statements of performance to each tribal and individual trust fund account holder. Section 102(b)(2). Consistent with the 1994 Act, the Northwest Tribes' proposal identifies the required information to be included in each statement.

The Northwest Tribes' Proposal modifies the 1994 Act's audit provision to require annual audits of *each* account containing trust funds. *Compare* 1994 Act Section 102(c)(3)(requiring annual audit of "*all* funds held in trust"); with Northwest Tribes' Section 102(b)(3) (defining audit process for "*each* account containing trust funds") (emphasis added in both provisions). The Northwest Tribes' proposed text authorizes the

⁴ The TTRC proposal has inserted Findings and Declaration of Policy as section 101.

use of statistical sampling to streamline the audit process for accounts with balances of less than \$1,000.

This proposal embraces these Northwest Tribes' proposed changes, but also inserts a new subparagraph at the end of the NW proposal's audit provision to clarify that the audit requirement is to be prospective only (and does not apply to past accounting). Thus, the TTRC proposal expressly requires the initial audit to cover the first fiscal year after enactment of the provision.

Section 103. Payment of Interest on Individual Indian Money Accounts.

This proposal endorses the Northwest Tribes' Proposal in making no changes to this provision of the 1994 Act. This provision requires the Secretary of the Treasury to invest funds held for IIM account holders in public debt securities and to credit those accounts with interest earned. Note that this provision of the 1994 Act refers to 25 U.S.C. § 162a, which contains a similar requirement by which the Secretary of the Interior, at the request of an Indian tribe, must invest principal of tribal trust funds in guaranteed public securities and credit those tribal trust accounts with the interest from those investments.

Section 104. Authority for Payment of Claims for Interest Owed.

Like the NW proposal, this proposal does not make any changes to this section of the 1994 Act, which authorizes payment of claims for interest losses to be brought by individual account holders.

Section 105. Affirmation of Standards (Northwest Tribes' Proposal Section 4).

The Northwest Tribes' proposal adds this new section at the end of Title I of the 1994 Act. The section addresses a key position that tribes have raised as a fundamental matter for any trust legislation – the codification of trust standards. The NW proposal for a new Section 105 to the 1994 Act contains a list of some 13 duties, which reflect common law trust duties along with at least one provision dealing with the unique trust responsibilities to Indian tribes. These duties are consistent with the standards established as DOI policy pursuant to the Secretarial Order issued by Secretary Babbitt in 2000.

The TTRC proposal modifies the NW proposal by adding several new subparagraphs (discussed below) to assure that the proposed legislation embraces both common law and Indian trust law principles protecting inherent tribal sovereignty and promoting tribal self-determination. See Gary Morishima, Discussion Paper on Trust Standards, March 31, 2005.

Section 105(c)(1) incorporates the terms found in Section 307(d) of the NW Proposal's "Tribal Management of Trust Assets Demonstration Project" provisions. The

terms recognize that tribes have developed trust management standards, which have been approved by the Secretary and which serve as applicable standards for activities within the scope of that approval. The intent is to be clear that the existence of "codified standards" may not be used by the trustee to decline or otherwise limit the scope of tribal trust asset and fund management. On the contrary, the purpose of these amendments is to strengthen and expand tribal involvement and management of trust funds and assets.

A new subparagraph, Section 105(c)(3), has been added to incorporate the decision in the *Cobell* case that the Secretary, in carrying out the trust responsibility, must do so in compliance with tribal law to the extent tribal law is consistent with the trust responsibility. See also 25 USC § 3712 (American Indian Agricultural Resources Management Act provision requiring Secretary to comply with tribal law); and 25 USC § 3108 (National Indian Forest Resources Management Act requirement).

Section 105(d) has been added to avoid an interpretation (under the maxim of "*expressio unius*") that would dismiss a claim for breach of trust if such a claim were brought pursuant to a standard that is not listed in the statute.⁵ Section 105(d) also affirms that the trust responsibility is not diminished by the enumeration of standards.

Section 105(e) provides that nothing in this Act diminishes, modifies or waives the sovereign immunity of the tribe (consistent with the American Indian Agriculture Resource Management Act, 25 USC § 3746).

TITLE II – Indian Trust Resource Management Program

This proposal calls for an expansion of this title to include not only trust fund management, but also non-monetary trust asset management.⁶ Thus, this proposal renames Title II, by replacing the term, "funds," with the term, "resource" to encompass both trust funds and non-monetary trust asset management.

The provisions for managing trust funds (§§ 202-207) are addressed separately from those providing for the management of trust assets (§§ 208-209). In either case, the applicable standards are those identified above in section 105. Additionally, this title establishes two demonstration projects. A tribal trust resource management demonstration project (§ 209) provides an approach consistent with assuming trust resource management under an Indian Self-Determination Act Self-governance Compact.

⁵ See Statutes and Statutory Construction §47:23 (Singer, 6th Ed., 2000) (the maxim of *expressio unius* provides that "where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions").

⁶ Note that the NW proposal does not modify this section, however, its proposal for a tribal trust asset management demonstration project implicitly expands the 1994 Act in the manner that TTRC proposes. Compare the TTRC proposed Sections 208 and 209 with NW Proposal Section 307.

The Great Plains Demonstration Project provides for tribal leadership in working with Agency Offices to establish Agency-specific trust resource management plans.

The TTRC proposal adds provisions for overcoming disagreements, resolving and appealing disputes and civil actions are provided in §§ 211 and 212 (modeled on Title V of the Indian Self-Determination Act). These provisions would apply to each section within Title II of the Act.

Section 201. Purpose.

This section of the 1994 Act explains that Title II is designed to give tribal governments greater control over the management of trust funds and to demonstrate how principles of self-determination apply to the management of trust funds.

Section 202. Voluntary Withdrawal from Trust Funds Program

The TTRC proposal endorses the Northwest Tribes' approach without any further modification. The NW proposal amends the 1994 Act by replacing paragraph (c) of this section with a provision clarifying the authority to manage trust funds and trust assets through Indian Self-determination Act agreements. Compare with Section 5 of NW Proposal.

Section 203. Judgment Funds.

No modification to this section of the 1994 Act, which authorizes the Secretary to approve tribal plans under which tribes would withdrawal and management judgment funds.

Section 204. Technical Assistance.

No change to this section of the 1994 Act, by which the Secretary is required to provide technical assistance to tribes for the development, implementation and management of investment plans by tribes.

Section 205. Grant Program.

No proposed changes to this section of the 1994 Act, by which the Secretary is authorized to award grants to tribes in order for them to develop and implement plans for the investment of tribal trust funds.

Section 206. Return of Withdrawn Funds.

The proposal does not modify this section of the 1994 Act providing procedures for tribes to return tribal trust funds for the Secretary to manage.

Section 207. Savings Provision.

The proposal makes no change to this section of the 1994 Act, which clarifies that approval of a tribal trust fund management plan does not constitute the tribe's acceptance of the account balance as being accurate nor waive any rights by the tribe with respect to account balances and compensation for loss.

Section 208. Tribal Management of Non-Monetary Trust Assets.

This section clarifies tribal authority to make decisions about how reservation lands will be used for the long term benefit of their members. This section is modeled on the resource management plan provisions of the AIARMA [25 U.S.C. § 3711(b)], which, at the option of a tribe, requires the development and implementation of 10-year resource management and monitoring plans. This type of provision was viewed positively by tribes in the Trust Reform Task Force.

The ten-year management plan that would establish management objectives for Indian trust assets, define critical values of the Indian tribe, and provide identified management objectives. It is essential to stress that the terms of this section expressly state that the development of the management plan may be *carried out under ISDEAA agreements or by the Secretary (direct service)*. Additionally, this section may be utilized by any tribe that wishes to establish its own management plan, regardless of whether it wants the plan to be *developed or implemented by the Secretary (direct service) or through an ISDEAA agreement*. In the interest of preserving tribal self-determination, the provisions make clear that even if the management plan is developed by the Secretary (direct service), the tribe may nevertheless opt to implement the plan under an ISDEAA agreement (and *vice versa* – a plan developed pursuant to an ISDEAA agreement could be implemented by the Secretary (direct service)).

When seeking to contract under title I of the ISDEAA for the development of the management plan, or to assume functions to implement the management plan, the tribe shall not be subject to the quality assurance, audit or oversight provisions that apply to the BIA when it performs those functions. Rather, Section 208 makes clear that the ISDEAA provisions govern.⁷

To address possible conflicts between the interests of the tribes and allottees, the process for developing a 10-year management plan includes a term requiring consultation with all stakeholders. The TTRC proposal also inserts a disclaimer at the end of this

⁷ See 25 U.S.C. § 450m (Secretary may rescind a contract and/or reassume functions for gross negligence or mismanagement after notice and hearing in which the Secretary has the burden of proof). Title I of the ISDEAA requires the tribal contractor to maintain the same *level* of service to trust beneficiaries as the Department. See 25 U.S.C. § 450l(c) (model agreement, section 1(c)(4)).

section providing that nothing in this Act shall limit the rights of individual owners of trust or restricted lands to lease such lands without Secretarial approval pursuant to Section 5 of the Indian Land Consolidation Act (ILCA).⁸

Section 209. Establishment of the Tribal Management of Trust Assets Demonstration Project.

This section provides for a self-determination demonstration project as provided in Section 307 of the NW proposal.⁹ This proposal makes only a few changes to the text of the NW proposal. This proposal adds a disclaimer stating that none of the auditing, reporting, quality assurance or independent evaluations that apply to USG management of trust assets under other sections of this Act shall apply to the tribes who manage trust assets pursuant to the demonstration project. Additionally, the TTRC proposal makes available several dispute resolution and appeal provisions to the participating tribes. Note that the demonstration project has its own "joint evaluation criteria and reporting procedure."¹⁰

Section 210. Great Plains Demonstration Project.

This new section introduced by the TTRC proposal provides for a Great Plains demonstration project, allowing the Great Plains Tribes and their related Agencies to develop Agency-specific plans to implement trust resource management at the Agency level. To participate in the demonstration project, a Great Plains Tribe would request that the Agency Superintendent consult with it to devise an Agency Plan. The Agency Plan would be submitted to the Secretary, who then would write a report of the plan, solicit Agency and tribal comments, and submit the Plan, report, and comments to appropriate U.S. Senate and House Committees.

This section includes authorization for appropriations of \$200,000 annually for each Agency to co-develop with its respective tribes an Agency-specific Plan. For the implementation and operation of the Plans, such funds as necessary shall be appropriated for a period of 5 years, or until 2010, at the completion of the Project period.

⁸ The American Indian Probate Reform Act of 2004 (PL 108-374) added new section to the Indian Land Consolidation Act which provides as follows:

where the owners of all of the undivided trust or restricted interests in a parcel of land have submitted applications to the Secretary pursuant to subsection (a), and the Secretary has approved such applications under subsection (d), such owners may, without further approval by the Secretary, enter into a lease of the parcel for agricultural purposes for a term not to exceed 10 years.

⁹ Note that this section has been relocated in this proposal because its provisions are thematically consistent with the remainder of this title.

¹⁰ This procedure has been designed pursuant to Title IV of the ISDEAA, which provides for monitoring tribal administration of trust functions through a trust evaluation process. 25 U.S.C. § 458cc(d).

All Great Plains Tribes would be consulted and its Agency Plan considered by the Secretary before any changes to an existing tribal trust resource management plan could occur. Until the Agency Plan is developed, the Secretary is limited to implementing probate procedures and continuing tribal efforts of land consolidation. While all Great Plains Tribes are eligible to participate in the program, any Tribe may opt-out (even once it has participated in the program). This section is consistent with this proposal's goal of consolidating local control and implementing corrective trust reform measures through the active participation of Tribes and their respective BIA Agencies/Regions.

Section 211. Provisions Related to the Secretary.

The TTRC proposal incorporates "final best offer" and burden of proof provisions modeled on the similar terms in Title V of the Indian Self-Determination Act. These provisions are designed to facilitate the execution of agreements between tribes and the Secretary and to provide mechanisms for an efficient Secretarial approval process. Additionally, this proposal adds terms for negotiating procedures for records management when a tribe is carrying out trust management functions. The terms of these agreements assure that the Secretary provides funding for the costs of records management activities, that access to such records shall be limited to visual inspection by the Secretary upon adequate notice to the tribe (involuntary removal of records is prohibited) and that the tribe (at its option) may utilize federal storage facilities for such records with no expense to the tribe.

Section 212. Civil Actions.

The TTRC proposal provides a cause of action in district court without requiring exhaustion of agency remedies in order to enhance the efficient of the dispute resolution process. Section 212 is modeled on the civil action provisions from Title I of the Indian Self-Determination Act.

Section 213. Report to Congress.

This section from the 1994 Act has been renumbered in order to follow the new sections regarding tribal management of trust assets and the demonstration project. The changes proposed for this Section (originally 208 of the 1994 Act) are to clarify that the annual reporting requirement includes annual reporting on the new tribal management of trust assets provisions (Sections 208 and 209) and that participating tribes shall be given the opportunity to review and submit comments on the report prior to its presentation to Congress. The TTRC proposal adds a provision stating that this report will serve as one topic for an annual oversight hearing.

Section Relocated. Regulations.

The NW proposal retains section 209 of the 1994 Act requiring the Secretary to promulgate regulations regarding the provisions in Title II of that Act. The TTRC proposal rejects the 1994 Act approach to developing regulations. Rather, this proposal relocates the rulemaking requirements to Title V of the Act and calls for the development of regulations pursuant to negotiated rulemaking procedures adapted to the government-to-government relationship as employed in statutes such as the ISDEAA, NAHASDA and others. See discussion below, Title V, Section 601.

Title III. Institutional Reform Related to the Trust Responsibility

The NW proposal significantly modifies the 1994 Act, as the NW proposal elevates the Assistant Secretary Indian Affairs to a Deputy Secretary for Indian Affairs. It also abolishes the Special Trustee and places the Special Trustee's responsibilities under the Deputy Secretary. The NW proposal clarifies that all functions carried out under the Deputy Secretary may be assumed by tribes under the ISDEAA. See NW Proposal Section 6 (Deputy Secretary for Indian Affairs).

The TTRC proposal fully adopts these improvements identified by the Northwest Tribes. The TTRC proposal, however, also inserts several new paragraphs in order to more fully account for the considerations of tribes in other regions and to establish corrective measures on the DOI, given its failure to properly manage the trust.¹¹ As a result, the section topics and matters addressed are somewhat different from the NW proposal as drafted. Those elements are identified here in summary form and then discussed in greater detail in the specific sections below.

- Elevation of the AS-IA to a Deputy Secretary – Indian Affairs. The TTRC proposal adopts the Northwest Tribes' provisions regarding the elevation of the AS-IA to a Deputy Secretary-Indian Affairs (DS-IA) and the corresponding duties associated with that office.
- Consolidation of trust functions in one institution. The TTRC proposal concurs with the Northwest Tribes' objective of consolidating functions into one institution (BIA) and terminating the OST.¹²
- Institutional reform to correct trustee failures. The TTRC contains terms to correct institutional deficiencies in DOI's discharge of its trust responsibility. The internal (quality assurance) functions and independent audit functions by an Assistant Inspector General for the Indian Trust are designed to provide

¹¹ Several of the key issues here were recently summarized in a March 29 draft memorandum from John Dossett (NCAI).

¹² Note that the DOI already presents OST and BIA as two components of the same functional effort – see FY 2006 Budget Request, "Unified Trust Budget" for BIA and OST.

permanent monitoring and accountability measures. These corrective measures shall not apply to tribes managing trust assets pursuant to ISDEAA agreements.

- Consolidation of functions and resources at the Bureau field office level. The TTRC proposal targets the regional and agency level "field offices" for consolidation of functions as they are where the government to government relationship is carried out on a daily basis.
- Accelerate and preserve advances in core business systems development. Consolidation must not reverse course on the advances over the past few years with respect to core business systems, particularly accounting systems implemented by the Office of Trust Fund Management (OTFM). These core business systems, staff, technologies, processes, etc. are to be reintegrated into the BIA.

Section 301. Purpose.

The Northwest Tribes' proposal does not modify this provision of the 1994 Act other than to insert Deputy Secretary for Special Trustee. The TTRC proposal identifies the purposes of the title as follows:

- to consolidate the administration and oversight of the trust responsibility under one line of authority
- to consolidate bureau field office trust functions and authority
- to create internal quality assurance mechanisms to enhance beneficiary (tribal and individual) services and participation
- to provide for a heightened level of independent review by the Office of the Inspector General
- to clarify that corrective measures applicable to the trustee shall not result in additional requirements for tribes assuming trust fund or asset management functions under the ISDEAA or the Section 209 Demonstration Project.

Section 302. Single Executive Agency Trust Management Sponsor.

The TTRC proposal adopts the same terms as Section 302(a) of the NW proposal (establishing a Deputy Secretary for Indian Affairs by elevating the AS-IA).¹³ Tribes in the trust reform task force process endorsed elevation of the AS-IA in order to positively address a major issue that has been raised in every significant study of trust management at Interior, including the EDS Report, and by the *Cobell* court: the lack of clear lines of authority and responsibility within the Department to ensure accountability for trust

¹³ Note the "succession" provision eliminates the need for an incumbent AS-IA to go through the nomination/confirmation process.

reform efforts by the various divisions of the Department of Interior.¹⁴ Nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies.

This proposal also endorses the NW proposal (section 302(b)), which defines the duties of the Deputy Secretary-Indian Affairs (DS-IA) and abolishes OST. The six delineated duties require the DS-IA to: (1) oversee BIA; (2) assume duties of AS-IA; (3) assume all trust fund/trust asset matters; (4) engage in consultation on trust fund and asset matters with tribes and individuals; (5) carry out duties assigned by Sec. and (6) assume all duties of the Special Trustee, which is abolished by the Act. This proposal further clarifies that the transfer of functions from OST to BIA requires the transfer to BIA of all funding related to those functions.

The proposal to eliminate OST and transfer functions requires Congress to direct the DOI to accelerate the development and integration of core business systems: Title; Leases/Sales; and accounting. See Section 302(c).¹⁵ The proposal notes that records management procedures for trust functions carried out by tribes under a self-determination agreement must be consistent with the records management procedures set forth in Section 211(d). Additionally, this paragraph creates a process to identify, freeze and reconsider poorly-designed business systems.

The TTRC proposal retains NW proposal Section 302(d), which clarifies that tribes may assume any non-inherent federal functions of the DS-IA, including those previously associated with the Special Trustee under the ISDEAA. Similarly, TTRC adopts the NW proposal at Section 302(e), which clarifies that the duties carried out by the existing Deputy Secretary of Interior are not affected by the elevation and that the DS-IA shall have overall management and oversight authority on matters of the Department relating to trust asset and trust fund management and reform.

The TTRC' proposal inserts as Section 302(f) a term from the NW proposal providing that reference to the Assistant Secretary – Indian Affairs in statutes, regulations, agreements, etc. shall be deemed to be to the Deputy Secretary for Indian Affairs. Section 302(g) provides for substitution of the DS-IA for the AS-IA in pending court proceedings.

¹⁴ The distinction between a Deputy Secretary and other tribal proposals for an Under-Secretary are not based on substantive difference. This proposal retains the term Deputy Secretary but would consider an Under-Secretary equally satisfactory to meet the objectives of this legislation.

¹⁵ Section 302(c) of the NW proposal identifies staffing and consultants. This NW proposal provision has been moved to Section 308 of the TTRC proposal, which addresses personnel issues.

The NW proposal terms for Section 302(f) establish an office of trust implementation and oversight. The TTRC proposal strikes this provision.¹⁶ While tribes consistently have called for one line of authority for all implementation and decision-making authority – there has also been a demand for an "auditing" function should be in place to serve as a "check" on that implementing institution. Moreover, tribes have insisted that trust implementation must be carried out by local staff, not a central office bureaucracy. The TTRC proposed Sections 304, 305 and 306 address these considerations.

Section 303. Additional Authorities and Functions of the Deputy Secretary

The TTRC proposal expands the NW proposal by charging the Deputy Secretary with oversight responsibility for Indian trust functions and treaty-based rights throughout the Department (including *all* Bureaus, not just BIA, BLM and MMS). Other duties of the Dep. Secretary are those assigned to the Special Trustee under the 1994 Act (Monitor Reconciliations, develop and submit trust management budget and certify its adequacy). The TTRC proposal adds two new provisions: (1) the Assistant Inspector General is required to review and report to Congress on the DS-IA's certification (or failure to certify) a budget request; and (2) clarifying that trust records held by the Secretary are deemed "inter-agency" or "intra-agency" documents for the purpose of the exemption of such records from the Freedom of Information Act (FOIA).

Section 304. Trust Administration and Service Requirements for Field Offices.

The TTRC proposal includes "field office requirements" to emphasize that consolidation must take place where the government to government relationship is carried out on a daily basis – at the bureau field offices. Tribes have demanded that institutional reform for trust administration must provide "one stop shopping" – one decision-maker with delegated line authority from the DS-IA for all matters. Any separation of trust and "non-trust" functions duplicates bureaucracy, introduces potentially conflicting authorities with jurisdiction over an issue, and produces an organization incapable of efficiently administering the trust responsibility. Similarly, resources and authority must not be stacked at the Central Office. Rather, field offices must have staff, resources and decision-making authority to resolve in a timely manner the vast majority of issues at the point of first contact with the tribe – in the field at either the Regional Office or Agency level (depending on the practices of the affected tribe).¹⁷

The TTRC proposal sets statutory parameters for institutional reorganization whereby consolidation of authority under the Deputy Secretary must flow from the consolidation of authority at the local level. At the agency level, one Agency

¹⁶ This is the only provision of the NW proposal that the TTRC proposal does not accept.

¹⁷ Review of unprecedented, unique and/or highly complex matters may be appropriate for the Agency Superintendent or Regional Director to refer to the Central Office in order to avoid being bogged down on matters that may be beyond the expertise of the field office.

Superintendent, and at the regional level, one Regional Director must be delegated oversight/decision-making authority over all functions carried out at his/her respective level from the Deputy Secretary.¹⁸

The statutory parameters identify that in order to consolidate trust functions within the BIA, the structure must retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelming tribal preferences. The parameters require the Deputy Secretary to ensure that adequate staffing, training and funding levels are maintained and that technical assistance is readily available. Additionally, performance standards reflecting the administration of the trust responsibility must be established and enforced.

Section 305. Quality Assurance and Audit.

The TTRC proposal requires the Deputy Secretary to provide measures for internal control and quality assurance in trust administration throughout the BIA to ensure timely resolution of problems. This quality assurance mechanism complements the consolidation of authority at the local level by providing for qualified professional staff on-site to provide technical assistance, conduct unannounced reviews of systems and processes for trust management at the local level and make recommendations to the Agency Superintendent or Regional Director regarding administrative deficiencies and identify staffing, training, technical assistance and other resources needed to provide for effective trust management at the local level. The mechanism would neither oversee nor report to the consolidated authority at the field office level (e.g., the Agency Superintendent or the Regional Director). Nor would this internal control and quality assurance body within BIA have any authority with respect to tribal management of trust funds or assets pursuant to ISDEAA agreements.

At the option of a tribe, the existing OST trust officers may be retained to provide quality assurance functions within specified parameters.

Section 306. Independent Accountability.

The TTRC proposal calls for an expansion of the office of the Inspector General in DOI to provide for independent accountability reviews of the Department's administration of the trust responsibility. See Section 306(a). The TTRC legislation would create a new Assistant Inspector General for Indian Trust. The Assistant IG for Indian Trust would have the same authorities as other Assistant IG's, but would be dedicated solely to Indian Trust matters, including responsibilities for auditing, investigations and compliance, and monitoring the certification of the DOI budget. The

¹⁸ Note that these parameters cover not only reorganization with respect to trust reform, but also recent BIA reorganization which shifted budget and finance authority and accountability (and personnel) to the Central Office, rather than the Regional Director.

IG for Indian Trust would not have authority with respect to tribes who manage trust functions on their reservations.

Although the IG is under the "general supervisory" power of the Secretary of each agency, the IG retains a unique level of independence, as "an agency head may not limit" any of the IG's audit/investigating powers. See e.g., Nuclear Reg. Comm'n v. Fed. Labor Rel. Authority, 24 F.3d. 229 (4th Cir. 1994) (except where such limits are expressly provided by agency-specific statutes).

This new Assistant Inspector General for Indian Trust must be established through a conforming amendment to the Inspector General Act of 1978. See below in Title VII. The IG Act currently provides for Congressional reporting on investigations, and can be amended in order to provide additional agency-specific authorities. The Assistant IG for Indian Trust is assigned an annual report to Congress, which will be the subject of an annual oversight hearing in which tribal testimony will be requested. See Section 306(b).¹⁹

Section 307. Reconciliation Report.

Neither the TTRC nor the NW proposal makes any substantive changes to this provision from the 1994 Act other than to change the reference to the Special Trustee to the Deputy Secretary. The Deputy Secretary would thereby be required to provide Congress with a complete report on the reconciliations of all trust fund accounts.

Section 308. Staff and Consultants.

The TTRC builds upon the NW proposal for modifying and relocating what was Section 305 of the 1994 Act. The provision authorizes the Deputy Secretary to employ staff or request staff from other bureaus in the DOI as needed. Similarly, it authorizes the contracting of consultants as needed (and as appropriation permit), including contracts with individuals, public agencies and/or private organizations.

Additionally, the TTRC proposal incorporates the position from the NW proposal at Section 11, which allows the Deputy Secretary to retain an independent legal counsel on trust issues. This counsel would be independent of counsel provided by the Office of the Solicitor.

¹⁹ The amendment to the IG Act of 1978 creating the Assistance Inspector General for Trust is provided for in Title VII of this proposal. The amendment builds in a requirement that the Assistant IG must respond to a tribal request with a decision whether or not to carry out the requested action with an explanation of the basis for the decision within 30 days.

Title IV. INDIVIDUAL INDIAN MONEY ACCOUNT HOLDER CLAIMS SETTLEMENT.

The TTRC proposal does not take any position to endorse, amend or object to the NW proposal on this topic. Rather, the TTRC proposal simply recognizes that the NW proposal has been put forward as one approach to be considered and defers to the stakeholders in that litigation to alter the NW proposal as needed.

TITLE V. LAND CONSOLIDATION

The NW proposal included placeholder for fractionated lands and heirship. It also includes terms stating that tribal laws governing heirship and probate shall be the prevailing law. The TTRC proposal notes also that the Tribal Trust Reform Legislation Work Group has identified principles that should be taken into account. Title V of the TTRC proposal is reserved.

TITLE VI. ADMINISTRATIVE PROVISIONS AND DISCLAIMERS

Section 601. Regulations.

This section requires the development of regulations to implement this Act to be developed pursuant to negotiated rulemaking procedures adapted to the government-to-government relationship as employed in statutes such as the ISDEAA, NAHASDA and other statutes. The procedures set forth clear timelines to assure that the regulatory process does not result in agency delay in implementation of the statute.

The negotiated rulemaking committee would include representatives not only from "Indian tribes with trust funds held by the Secretary" (as stated in the 1994 Act), but also by tribes managing trust funds and/or trust assets under Self-Determination Act agreements, tribes planning, implementing or administering ten year trust asset management plans (pursuant to the ISDEAA or through direct service from the Secretary), tribes participating in the trust asset management demonstration project, and other affected Indian tribes. The provision includes consultation requirements to solicit the views of individual account holders.

Section 602. Savings Provisions.

This section states that nothing in the Act diminishes the trust responsibility or rights pursuant to the ISDEAA.

Section 603. Severability.

The TTRC proposal includes this measure to permit the Act to continue in force and effect if a portion of it is deemed unconstitutional on its face or as applied.

TITLE VII. CONFORMING AMENDMENTS

This Title addresses amendments required to statutes other than the 1994 Act. The NW proposal identifies the need to amend two provisions of the United States Code dealing with federal agencies and employees with respect to the creation of the DS-IA.

The TTRC proposal identifies the need to amend the Inspector General Act of 1978 to create an Assistant IG for Indian Trust. This amendment would create a new section 8K of the Act entitled "Special Provisions relating to the Inspector General of the Department of the Interior." The terms of the section establish the position, define its primary functions, and clarifies that it does not apply to tribes carrying out trust management functions. Additionally, the provisions require the Assistant IG for Trust to respond within 30 days to a tribal request for an action with the determination of whether or not the IG will carry out the requested action. In denying such a request, an explanation of the basis for the decision must be provided.

TITLE VIII. AUTHORIZATION OF APPROPRIATIONS

The TTRC proposal adopts the NW proposal in providing standard terms for authorizing appropriations ("there are authorized to be appropriated such sums as are necessary to carry out this Act")