# Malcolm Wiener Center for Social Policy

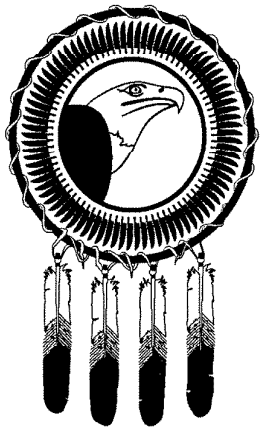
*Native American Tribal Trust Funds: Expanding the Options for Tribal Control*

by

Marie D. Monrad

*PRS 88-5*

April 1988



Harvard Project on
American Indian Economic Development

John F. Kennedy School of Government
Harvard University

## EXECUTIVE SUMMARY

The federal Bureau of Indian Affairs (BIA) holds roughly $1.2 billion in trust for American Indian tribes. This money represents the remaining legacy of tribes' original natural resources for the funds are largely derived from land claim settlements, leasing of tribal lands, and mineral royalties.

These funds are managed by the BIA as part of the general trust responsibility the Federal Government has assumed over many aspects of Indian life. In the last decade the BIA has been criticized both from inside and outside the government for its management of these funds. The need for improvements has been undisputed, even by the BIA.

However, the BIA's approach to solving its problems has been relatively narrow, focusing on improving such functions as accounting and reporting. In particular, the BIA has sought to contract out many of the services now performed by the BIA's Division of Trust Fund Management to a private bank.

This paper assumes that more improvements are needed beyond these technical changes; a broader approach should include greater tribal involvement with and control over funds. Currently tribes have little access to, control over or involvement with trust fund decisions.

This paper assumes that increased tribal involvement is necessary for several reasons. These assets are the main source of internal Indian capital, i.e., tribal use of them could diminish the need to seek outside non-Indian capital. These funds could be used to promote economic development on reservations, some of which experience unemployment rates above 60%. Greater input could ensure that such economic development is consistent with a tribe's own determination of its best interests. Greater control would also further the stated federal policy of self-determination for Indians.

First Nations Financial Project (FNFP), a non-profit organization that works with tribes to develop financial expertise and to decrease tribal dependence on the Federal Government, has proposed three models to improve the trust fund system. These models are designed to offer a range of alternatives appropriate to the different levels of experience and willingness of different tribes. FNFP believes that a tribe should have greater control over trust funds concurrent with a tribe's capability to exercise such control.

- "IN-TRUST" MODEL: would leave tribal funds in trust but would better protect tribal rights, provide technical assistance to tribes, and create a system for increased tribal communication with trust fund managers.

- "638" MODEL: seeks to use the Indian Self-Determination Act to gain greater tribal involvement. P.L. 93-638, commonly called "638", allows tribes to contract with the BIA to provide programs and services otherwise provided to tribes by the BIA, but it has never been used to contract trust fund services. Under this model, tribal funds would stay in trust, but tribes would be able to use the "638" process to contract trust management functions.

- "OUT-OF-TRUST" MODEL: would give tribes complete control over investing and managing their funds and would involve taking the funds out of trust status.

## PURPOSE OF THIS PAPER

The purpose of this paper is to address the legal arguments and implementation issues involved in reforming the trust fund management system to include greater tribal involvement and control. It answers the following questions:

What rights do tribes have over their funds? What legal questions arise if these three models are attempted? How can the models be refined so as to address these legal questions?

## CONFLICTING DOCTRINES GOVERN TRIBAL RIGHTS

The primary problem both in defining what rights tribes have and determining what changes can be made to the trust fund system stems from the fact that Indians are currently living under two apparently contradictory federal policies.

For the last 150 years the Federal Government has assumed a trust responsibility over Indian land, resources and affairs. This unique federal/tribal trust relationship provides the basis for the Federal Government to manage trust fund monies for the benefit of Indians. As trustee, the Federal Government can be held liable for failing to protect these funds. The BIA invokes the trust doctrine as the reason it is hesitant to allow tribal control over any functions that could potentially jeopardize the trust funds.

While still upholding the trust doctrine, the Federal Government has relatively recently begun a "new era" of federal policy toward Indians to promote self-determination by Indians over Indian affairs. The above mentioned Self Determination Act is one direct manifestation of that policy. Given that both these policies exist concurrently, the definition of what rights tribes have over tribal assets and property is ambiguous. These rights are being defined over numerous issues as tribes continually attempt to assert their sovereignty. The management of tribal trust funds is one such issue.

## TRIBES'RIGHTS AND THE BIA'S DUTIES

This paper attempts to clarify some of the ambiguity over the rights and responsibilities involved in managing trust funds. It presents a list of the rights tribes have over trust funds and the duties they can expect the Federal Government, as trustee, to fulfill. This list is compiled from statutes, Indian case law and the common law on trusts. Given the conflicting doctrines governing this issue, not all rights can be succinctly defined. In some places a discussion of the differing views is presented rather than a definitive statement. To summarize:

Tribes can expect the BIA as trustee to provide accurate and timely accounts of trust fund activities and to make the trust productive by investing funds in a manner that balances the need to provide income to current beneficiaries with the need to protect the trust property for future beneficiaries. Tribes can expect the BIA to secure the highest rate of return on investments unless the tribe can prove that other considerations are more important.

Tribes have the right to be informed about their trusts, to have the BIA bear administrative costs associated with managing the trusts, and, under certain circumstances, to request a change in the trustee. It is difficult to make a definitive statement about a tribe's right to have input on or direct the management of a trust. The law governing land settlement awards (the Judgment Fund Act) gives tribes the right to have input on how funds will be used, but the BIA and Congress retain final decision-making authority. Common law and court cases hold that a trustee does not have to obey the requests or directions of beneficiary. Yet the principle of self-determination leads to the conclusion that tribes do have such rights.

Even if tribes may not be able to assert a legal right to direct their investments, the BIA, as a responsible trustee, may still allow tribes such involvement and control. According to common law, if a trustee does respect the wishes of a fully informed beneficiary, the trustee would then be relieved of liability for the beneficiary's decision.

## ANALYSIS OF THE MODELS: CONCLUSIONS

This paper assesses the three models in light of this discussion on rights and responsibilities, consciously laying out arguments that support the models. Each model is fleshed out with suggestions that maximize tribal involvement and minimize legal liability concerns. Special attention is given to assessing the advantages and disadvantages of implementing the models. The conclusions for each of the models are presented below.

"IN-TRUST" MODEL: The protection of tribes' rights as beneficiaries could be promoted by having the Federal Government provide explicit trust documents for tribes that request them, outlining the tribe's rights and specifying the amounts of tribal input; by having Congress name another trustee besides the BIA for tribes that have especially hostile relations with the BIA; and/or by having the Federal Government establish a Trust Fund Oversight Committee that has tribal representation to monitor the BIA's trust fund management system.

Increased tribal input could be promoted by amending 25 USC 162 (a), the main statute governing tribal trust fund management to include a provision requiring tribal input; and/or by enacting legislation for tribes similar to the law which gave the Passammoquoddy and Pennobscot tribes of Maine the right to greater involvement in managing their judgment fund award.

"638" MODEL: It is not clear that tribes have the right to contract all trust fund duties now provided by the BIA. However, substantial arguments can be made that tribes should have the right to contract technical and implementational functions as well as investment advising services.

Technical and Implementational Functions: At least two arguments support the position that tribes should be able to contract technical functions. The BIA currently allows tribes to contract such duties for natural resource management, which is analogous to trust fund duties in that both constitute trust resources. In addition, the BIA is currently attempting to contract most technical functions to a private bank. The Bureau has repeatedly told tribes that such a delegation of duties to an outside party does not violate the BIA's trust responsibility. Furthermore, the Senate Select Committee on Indian Affairs has stated that the "638" law is intended to allow tribes to contract such technical functions.

Investment Advising Services: The BIA is also attempting to contract investment advising services and to have the private bank make actual investments. The BIA states this will not affect the BIA's trust responsibility because the BIA intends to retain final authority over the investment decisions. On that premist, tribes should be able to contract similar duties under "638" as long as the BIA retains final authority.

This paper suggests that guidelines or regulations could be drafted for the contracting process to minimize the BIA's fears of successful liability suits and to assure both tribes and the BIA that responsible investment decisions will be made.

"OUT-OF-TRUST" MODEL: Tribes do not have the right, per se, to take their funds out of trust since that right is limited by the need to secure "appropriate authorization" from either the BIA or Congress. This paper concludes that it is necessary to define what constitutes such appropriate authorization so tribes can know what criteria the BIA uses to make its determinations. This paper recommends that the burden of proof be put on the BIA to show why a tribe should not be allowed to take its funds out of trust rather than requiring a tribe to prove its ability to manage its funds. Appendices A and B suggest possible criteria both tribes and the BIA could use to determine when it would be appropriate for a tribe to assume complete control of its trust funds.

## CONCLUSION

This paper concludes that solid arguments exist to support each of the three models. The tasks that remain are to assess the political implications of the models and to set a strategy to make the models viable options for tribes. This paper lays the groundwork to make those tasks easier.

TABLE OF CONTENTS

TABLE OF CONTENTS, cont.

## INTRODUCTION:

### I. THE NEED FOR CHANGE/ THE NEED FOR GREATER TRIBAL INVOLVEMENT:

Currently Indian tribes do not have direct access to, control over, nor much opportunity for input in the use of their trust funds. The federal Bureau of Indian Affairs (BIA) has a fiduciary responsibility to manage the $1.2 billion in funds as part of the general "trust doctrine" that exists between the Federal Government and tribes.

First Nations Financial Project (FNFP), a non-profit organization that provides financial advice to tribes and seeks to diminish tribal dependence on the Federal Government, would like tribes to have greater opportunities to be involved in the management and investment of their trust monies. FNFP and this paper takes the position that such involvement is necessary for a number of reasons.

These trust funds primarily come from judgment claims awarded to tribes for lands illegally taken, revenues from leasing tribal land, and oil and gas royalties. As Sam Goodhope, former Special Assistant to the Assistant Secretary for Indian Affairs, said, "it is not an overstatement to observe that the trust funds represent the residual value of all the land, water and natural resources which were appropriated from the tribes as the United States expanded from coast to coast. The trust fund investment program then can be characterized as an effort to manage this important legacy." (1) Precisely because these trust assets represent non-renewable tribal resources and could be lost if mismanaged, it is crucial they be managed well and in line with tribal interests.

These funds also represent the chief source of internal Indian capital and could be used by tribes to promote economic development on reservations. Greater tribal involvement would promote the use of funds in ways that are consistent with a tribe's <u>own</u> assessment of its best interest.

Having more tribal involvement would also help fulfill the objective of the relatively recent federal policy of self-determination for Indians. Ushered in by President Nixon in 1970, this policy claims that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions... And we must make it clear that Indians can become independent of federal control without being cut off from federal concerns and federal support." (2)

To be consistent with this policy, tribes that are able and willing to exercise full and complete control over their money should be allowed to do so. But because the BIA historically has managed Indian funds so completely, many tribes have not had the opportunity to develop the capabilities to adequately manage their own funds. Therefore, FNFP believes self-determination implies that such tribes should be given the opportunity to learn how to develop investment objectives. Tribes that have ideas for economic development, but do not wish to actually manage the investments themselves, should have their input respected by the BIA.

Therefore, given the policy of self-determination and how important these assets are to tribes, the trust fund system needs to provide both responsible management of the trust and real opportunities for tribal involvement. The current system of BIA management, however, has been criticized for not adequately achieving either. Two studies in particular will be described below. A 1982 review by the General Accounting Office found major deficiencies, and an in-depth review conducted by the Price Waterhouse consulting firm in 1984 recommended major changes.

**A.) THE CURRENT BIA TRUST FUND MANAGEMENT SYSTEM**

A complete critique of the BIA's trust fund management system is attached in Appendix D, but the following brief summary explains its major features, particularly as they relate to opportunities for tribal involvement.

1.) ORGANIZATION: The BIA's decentralized organizational structure means each tribe has a unique relationship with its local Agency and regional Area office. This decentralization contributes to the fact that different tribes have different amounts of involvement with its funds. Each Area office has an Investment Co-ordinator (IC) who is to assist tribes in preparing budgets and developing investment objectives. However, these IC's seldom have experience in investments and often have other primary duties so tribes receive little technical assistance. (3)

Area directors have the authority to approve tribal budget requests and determine investment objectives for tribes. The Agency or Area office will communicate stated tribal objectives, if any, to the national Division of Trust Fund management in Albuquerque, New Mexico. The Albuquerque office, in turn, makes investments and accountings and sends periodic reports back to the tribes.

2.) ACCOUNTING AND REPORTING: The GAO report found that "financial information was unreliable and internal controls were inadequate. As a result, accountability for hundreds of millions of dollars...was lost and the Bureau did not meet its fiduciary responsibilities for the trust funds." (4) Some tribal officers have said they find the periodic reports difficult to understand. The BIA has conceded that "these reports are often inaccurate" and that "existing investment reporting is limited." (5)

3.) INVESTMENT OPTIONS: Because of statutory restrictions, the BIA limits tribal investments to governmentally guaranteed securities. Roughly 80% of trust fund money is invested in Certificates of Deposit and Treasury bills (most of which have short-term maturities) even though other investment options are available. (6) Tribal input is limited to specifying terms of maturities for investments. (7) Some tribes have requested the BIA to invest their funds through local banks on the belief that such practices would increase the tribes' ability to leverage further local economic development. But the BIA has discouraged these

suggestions on the grounds that local banks often are not able to provide the necessary collateral or sufficient rate of return for the investment. The BIA states that, as trustee, it will not allow a tribe to receive less than the maximum rate of return on investments. (8) (See Appendix D)

B.) PROPOSED CHANGES TO THE BIA SYSTEM:

1.) Price-Waterhouse Recommendations: The principal recommendation made by the Price-Waterhouse review was for the BIA to "develop and implement an on-going process to enable tribes and individuals to participate in the formulation of investment objectives for the Indian trust funds." (9) The report also recom-mended that "a permanent oversight body be instituted to protect the interests of Indian trust fund beneficiaries, the clients." (10)

2.) BIA's Request for Proposals: The Price Waterhouse report recommended that the BIA initiate an incremental process of improvement. The BIA's "first step" has been to draft a Request for Proposals (RFP) and seek a contract with a private bank to perform many of the tasks now performed by the Albuquerque office. (11) The RFP expects the contractor bank to provide deposit, cash management, accounting and reporting services to the BIA, as well as investment advice. Upon authorization by the BIA, the contractor would also invest the funds.

This RFP incorporates many of the recommendations made by the Price Water-house review to improve accounting, auditing, and reporting methods. It sets up pooled tribal accounts, as recommended. All tribal funds are to be invested in either short (1 year), medium (5 year) or long term investments. Tribes will be allowed to make proportional assignments of their funds among these three different accounts.

However, the BIA has experienced delays in letting this contract. The BIA issued the RFP in 1986 without either consulting with or explaining the proposal to tribes. In response to criticism from Congress and numerous tribes, the BIA began a consultation process in 1987 in an attempt to answer tribal questions.(12)

Tribal leaders expressed concern that using a contractor bank would violate the BIA's trust responsibility; the BIA states this new system will strengthen the BIA's performance of its trust functions. The BIA states it will retain final authority for all investment decisions and will only use the contractor bank for advice. (13) Since the contractor will be making investments on a daily basis, the BIA will more than likely provide guidelines to the bank on what investments are appropriate so that approval need not be given for every investment. (14)

The BIA has recently redrafted and reissued the RFP and expects the new system to ultimately be phased in over the next two years. The use of an outside contractor is expected to speed transaction times, increase the accuracy of reporting and investing, and perhaps even provide increased rates of return on investments since many assets will be held to longer maturities. If the proposed system achieves these results, tribal trust funds may be managed more responsibly than under the current system.

Yet while trust fund management may improve, the amount of tribal control and involvement will not change. All tribal input will still go through Agency and then Area channels, and the BIA will authorize the bank to make the invest-ments for the tribes. Better reporting and accounting alone does not help tribes set investment objectives or learn to ultimately manage their own funds. The RFP does not implement Price Waterhouse's two major recommendations to provide greater tribal input and an oversight committee. This means that, even with BIA's pro-posed changes, the need for further improvements will remain if FNFP's goal of increased tribal involvement is to be achieved.

## II. PURPOSE OF THE PAPER:

## ASSESSMENT OF THREE MODELS FOR INCREASING TRIBAL INPUT AND CONTROL:

FNFP has proposed three models to meet the dual needs of building financial management capabilities and gaining greater tribal control over trust funds. They range from simply establishing a more formalized procedure for input to providing tribes full and complete control. The range is intentionally designed to offer alternatives appropriate to the different levels of sophistication, experience and desire for control of various tribes.

1.) IN-TRUST MODEL: A tribe would choose to leave all of its money "in trust" to be managed and invested by the BIA, but the tribe would secure greater rights as beneficiary of the trust. This model would establish processes for the greatest possible tribal involvement in setting investment objectives. It would require both improved technical assistance and formalized communication between the tribe and the BIA to enable the tribe to make informed decisions.

2.) "638" MODEL: A tribe would choose to leave its funds in trust, but would contract with the BIA to administer certain or all parts of the management of the investment portfolio. This could include the tribe contracting and/or sub-contracting accounting and cash management services otherwise performed by the BIA, as well as broader investment services. Many tribes currently contract with the BIA under P.L.93-638 to provide health care and social services, so this model would simply expand the realm of what is possible under "638."

3.) OUT-OF-TRUST MODEL: A tribe would choose to remove its monies from trust completely and have total control over investing and managing the fund. This would require the tribe to choose an investment manager and design an investment portfolio that meets the tribe's needs.

FNFP would like to know what rights tribes have over their funds and what stands in the way of implementing these three models. This paper cannot answer all the legal questions on trust funds, since there are few tidy answers. (16) The purpose of this Policy Analysis Exercise is twofold: to provide a context in which the three models can be analyzed and to develop the models more fully within this context.

This paper will point out the major legal questions involved in changing the trust fund system, explain what governs the management of tribal trust funds, and discuss both tribes' legal rights and the Federal Government's duties to tribes

under the trust relationship. Using this background information, the paper will assess the three models, build arguments in their support, and suggest ways they can be fleshed out more fully to provide greater tribal involvement while assuring both the BIA and tribes that the funds would be managed responsibly.

## III. MAJOR LEGAL QUESTIONS:

The most obvious hurdle facing the models relates to the trust nature of the funds. The federal government has assumed general trust duties over many aspects of Indian life, and trust fund management lies at the very heart of the federal/tribal "trust relationship." This trust doctrine can be a double-edged sword. It is a weapon tribes can use to hold the federal government to a high standard of accountability, but it can also be invoked by the Federal Government to justify limited control and input by tribes concerning trust resources.

The Federal Government claims that any increased control on the part of tribes, particularly in making investment decisions, brings up the question of liability for those decisions. Since the BIA is legally responsible for protect-ing tribal assets under its control, it is hesitant to turn over control of trust funds to a tribe without being assured the tribe is capable of making sound decisions and would assume responsibility for those decisions.

This concern over liability includes financial considerations - - what if a tribal decision results in less than the maximum rate of return on an investment? What if tribal officers or investment managers chosen by the tribe do not manage the funds responsibly? It also includes fears about inter-tribal politics - - what if decisions from one tribal council are not be supported by the next tribal council and the BIA would be sued for having respected the original council's input? What if the tribal council's decision does not represent the wishes of individual tribal members? The BIA fears it will be held liable in each of these situations since it is the trustee for these funds.

These fears are not without foundation. In 1934 the Federal Government was held liable for turning over funds to the Seminole Tribal Council when that council used the funds fraudulently. (17) And, although they did not involve greater tribal involvement in fund decisions, other court cases have held the Federal Government liable for not securing the maximum rate of return on Indian funds and for not exercising high fiduciary standards as a trustee. (18) (See Appendix C for a summary of relevant court cases.)

As trustee, the BIA must, by law, take due care in managing trust funds. However, the BIA must also consider other principles that guide the federal/tribal relationship. The 19th century view that the trust doctrine is necessary to protect dependent tribal beneficiaris no longer fits the 20th century view that tribes should be able to exercise powers of self-government. The philosophy of tribes as sovereign governments implies that tribes should be treated as investment clients rather than dependent beneficiaries. The federal policy of self-determination strengthens this view.

Therefore, the management of trust funds, like many other aspects of tribal life, must incorporate both the trust doctrine and the policy of self-determination. And therein lies a problem for determining how the trust fund system can be changed; these two concepts seem to be contradictory and to defy reconcilia-tion. As noted Indian attorney Sam DeLoria said, this is one of those areas "where two legal standards exist inconsistantly side by side." (19) A major question becomes: what implications do these two different policies have for changing the trust fund system? In particular, given these two theories, what are the strengths of the legal arguments limiting and supporting the three models?

Such an understanding of the legal questions is crucial if federal policy makers are to be convinced the system could be changed to allow greater tribal input. Tribes also need to be able to evaluate what a change would mean for them, particularly concerning how funds will be protected and issues of liability.

## IV. WHAT GOVERNS THE USE OF TRIBAL TRUST FUNDS?

### A.) DIFFERENT RESTRICTIONS APPLY TO DIFFERENT ACCOUNTS:

Tribal funds vary both in their content and in the stipulations that limit their uses. There are 254 Tribes that have money in the BIA managed Tribal Trust Fund.* However, since some tribes have multiple accounts, this Trust Fund is actually 1,953 separate accounts. For example, a single Tribe may have one account holding a land claim award, another for oil leasing revenues, another for education expenses, and another for interest on its trust funds. "The size of tribal holdings varies greatly with 28 tribes having accounts over $10 million...In other words, 11% of the tribes hold about 75% of the Tribal Trust Fund monies." (20)

Understanding what can be done with trust funds is complicated by the fact that there is no legal instrument that explicitly created the trusts. Rather, the practice of keeping Indian money in trust (as well as the general trust doctrine for Indians,) has evolved through various laws, court cases, and assumptions. But there are three primary authorizations for depositing tribal money in BIA managed trust fund accounts, each of which have different requirements about what can be done with different accounts. These three authorizations are: specific treaties between the U.S. Government and individual tribes, the Judgment Fund Distribution Act, and various tribal constitutions and tribal ordinances.

#### 1.) TREATIES:

Most land cessation treaties of the 1800's gave discretionary powers regarding investments and annuities to the President of the United States based

---

* The BIA actually manages 7 different types of trust funds for Indians; the two major ones being Tribal Trust Funds and Individual Indian Monies (IIM). FNFP's models only focus on options for gaining tribal control of Tribal Trust Funds, which constitute by far the lion's share of Trust Funds - roughly $1.2 of the total $1.7 billion held in trust for Indians.

on the assumption that Tribes could not manage their own funds. The Chickasaws Treaty of 1832, for example, held that at the end of 50 years if the Nation 'shall have improved in education and civilization, and become so enlightened, as to be capable of managing so large a sum of money to advantage, and with safety,' the Nation may withdraw the funds, with the consent of the President and the Senate. (9)

Some treaties specified explicit purposes for the trusts, such as Indian schools, while other treaties required that specific interest rates had to be earned on money held trust, such as 5% per annum. (8) *

2.) JUDGMENT FUND DISTRIBUTION ACT:

A large portion of trust money comes from judgments awarded from the Federal Government to tribes for lands illegally taken. In 1973, Congress passed the Judgment Fund Distribution Act (25 USC 1402) which required the Secretary of Interior (Secretary) to prepare a plan for each tribe that had received a judgment award in a land claims settlement. Therefore, each tribe with such an award has unique requirements concerning the uses of its money. All such funds can be "withdrawn from investment only as currently needed under approved plans or legislation authorizing the use or distribution of such funds." (23)

The Judgment Fund Act is one of the few pieces of legislation that specifically allows tribal input into the disposition of tribal funds and regulations have been devised detailing the process for that input. If a tribe is to receive a judgment award, it has the responsibility to make a proposal to the Secretary for the uses of that award. However, both the Secretary and Congress must approve of the plan. The Secretary is obligated to provide legal and financial expertise to the tribe, to hold a hearing to determine tribal wishes,

---

* As early as the 1850's, some treaties show evidence of tribal discontent with federal management of funds. Two in particular required accounting and review procedures to verify BIA practices.

and to guarantee that at least 20% of the award is used for "common tribal needs such as educational and economic development programs." (24)

In practice, however, tribes have seldom been given adequate legal or financial assistance, and many have not proposed any concrete plans. The BIA has ignored, and at times actively resisted, specific tribal proposals for the uses of the money.* Most tribes end up with a fairly standard BIA plan which simply distributes 80% of the award on a per capita basis to individual tribal members and puts the other 20% of the award in trust with a plan for expending it.

3.) TRIBAL CONSTITUTIONS/ORDINANCES:

For some tribes, revenues from oil, gas and other mineral royalties represent a major source of trust funds. Different tribes may have specific ordinances, agreements, or restrictions on the use of such funds, but they are for the most part considered trust income and under the control of the BIA.

The Indian Reorganization Act of 1934 gave tribes the right to organize and draft constitutions. Some constitutions spell out the degree of authority tribes shall have over their trust funds, budgets, and natural resources. Some specify "restricted" accounts, and some specify "unappropriated reserves," each with unique requirements. Most, however, give tribes broad governmental powers but do not specifically address trust fund management issues.

## B.) GENERAL GUIDANCE REGARDING USES OF TRUST FUNDS:

Since requirements vary for different trust funds, a tribe must first look at any relevant treaties, judgment plans, or ordinances governing its funds before it can consider different options for fund management. However, there are a few

---

* When the Saginaw Chippewa of Michigan sought approval for its tribal proposal, the BIA insisted on per capita payments. Congressional legislation overrode the BIA's plan and approved the Saginaw's plan to manage their own funds, without either distributing the money on a per capita basis or putting their money in a BIA controlled trust. (25)

federal statutes which cover the general management of trust funds and these directly affect FNFP's ability to apply the models on a broad basis. Yet these statutes do not cover all the duties involved in managing trust funds. Since courts have been called upon to interpret these statutes, as well as the general trust doctrine, case law must also be examined to understand tribal rights and legal issues surrounding the implementation of FNFP's models.

1.) **STATUTES:** (26)

25 USC 161a and 162a are the primary group of statutes on trust funds and they describe the deposit, care and investment of "all funds held in trust by the United States.. to the credit of Indian tribes." The Secretary of the Interior is given the discretion to deposit tribal funds with the Treasury or in any bank that pledges full security or acceptable bond.

Funds can only be invested in public debt obligations of the United States or bonds and notes which are unconditionally guaranteed by the United States. When funds are in the Treasury, the Secretary of Treasury is responsible for determining the interest rate "comparing current market yields of comparable maturities." (Previously, the law required 4% minimum simple interest on any accounts over $500 with no other provisions for interest, such as a treaty.) The Secretary of Interior determines the possible needs of the fund to guide Treasury in determining rates of maturity.

25 USC 123 a,b,c describe specific expenses which can be paid for out of "the funds of any tribe of Indians under the control of the United States" including travelling and insurance expenses. 25 USC 123 (c) allows funds to be "advanced" to tribes, subject to approval of the Secretary of the Interior. While this does not speak directly to a tribe's right to take its money out of trust, the BIA asserts this is the law governing such a situation. (27)

These statutes share two key characteristics: discretion on investments is given to the Secretary of Interior, and there is no reference to input from

tribes. Also, there are no federal regulations or internal manuals elaborating on these broad discretionary powers.

2.) INDIAN CASE LAW:

There is no specific definition of what constitutes the "trust responsibility" between the Federal Government and tribes, nor any delineation of the duties and rights involved in that responsibility. In fact, it has not always been clear what aspects of tribal life fall under this "trust doctrine." When tribes have sued to hold the government to a high standard of protection for tribal resources, the Federal Government has often claimed that no such trust duties exist. However, courts have consistantly held in tribes' favor and found that trust duties exist "where the Federal Government takes on or has control or supervision over tribal monies or properties, unless Congress has provided otherwise, even though nothing is said expressly in the authorizing or underlying statute...about a trust fund, or a trust or fiduciary connection." (Emphasis added) (28)

Most trust funds fall in this category; no statute has created trust status, but funds are unmistakably under the Federal Government's control. In Cheyenne Arapaho Tribes of Oklahoma v. United States (Cheyenne Arapaho), the court explicitly named the Federal Government trustee over Indian monies held in Treasury and established a high standard of fiduciary responsibility for that trustee. (29).

This case leads to two conclusions: tribes have a solid basis on which to demand that the Federal Government act as a prudent trustee with their trust funds, and, at the same time, the BIA must see that any changes in fund management meet fiduciary standards. The question is how that trusteeship is to be defined -- whether it includes tribes having greater involvement or not. Cheyenne Arapaho, along with Manchester Band of Pomo Indians v. U.S., (Manchester Pomo) addresses in detail some of the Federal Government's responsibilities,

particularly on such issues as the appropriate rate of return on investments and adequate reporting to tribes. (30) Other cases hold that the Federal Government must act as a private trustee would. But no cases speak specifically to the right of tribal involvement.

## V. TRIBES' RIGHTS AND THE FEDERAL GOVERNMENT'S RESPONSIBILITIES:

While the above mentioned statutes and cases directly address some of the issues in trust fund management, they do not spell out all of the rights tribes have as beneficiaries and the duties tribes can expect the Federal Government to fulfill as trustee. Usually the courts have simply referred to the common law of private trusts to judge what the appropriate rights and responsibilites are for Indian trusts. (31) Therefore, to some degree, tribes should expect the same rights as a beneficiary of a private trust.

However, the common law cannot be grafted directly on to the federal/tribal trust relationship, since that relationship is considered unique.* As a result, it is difficult to craft one list that clearly defines the rights and duties involved in tribal trusts. However, using the applicable statutes, Indian law and common law, a general approximation can be made. In the list that follows, some aspects will have no clear cut definition, but a discussion will point out the various arguments.

Such a list is important for three reasons: it provides a way to evaluate how well the BIA is currently performing its trust duties; it develops arguments on how FNFP's three models could be used to strengthen the current system; and it sheds light on how the liability concerns raised earlier could be addressed.

---

* Navajo Tribe v. United States states that "this does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries ... necessarily apply in full vigor ....In each situation the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the government and the particular tribe." (36)

In the following discussion, some of the duties and rights will lend themselves more directly to the legal issues of one model more than another. But they are treated all together here to provide a complete legal framework. Their application to the models will be detailed in later sections.

## VII.THE FEDERAL GOVERNMENT'S FIDUCIARY DUTIES: (32)

### A.) Definition of Trustee:

Since in most cases tribal trusts were never explicitly created, they are not similar to a private trust where a "settlor" has expressed his/her intent for the trust property through a legal document and has named a particular trustee. The BIA/tribal situation is more akin to the common law concept of an "implied trust" with the Federal Government as both the settlor and the trustee.

The definition of "Federal Government as trustee" includes Congress as well as the Secretary of Interior and the BIA, but Congress retains ultimate powers over the trust. Reid Chambers, one of the foremost authorities on the tribal trust relationship, writes that "Congress can manage the trusteeship, alter its purposes, or even terminate it altogether...Reading all the cases together, the principle that emerges is that Congress intends specific adherence to the trust responsibility by executive officials unless it has expressly provided otherwise." (33) Yet Congress has given the Secretary broad discretionary powers to 'adhere to this trust respons-ibility.' (34)

### B.) Duties of the Trustee:

1.) Duty To Provide Accurate Accounting: Based on Yankton Sioux Tribe v. United States, Curtis Berkey writes, "the duty to make a full accounting of property and funds held in trust is perhaps the most basic of the government's duties." (35) These accountings should be on a continuing basis and should inform the tribe "in clear terms the specific investments made with the ..(tribes) money, the rate of interest and the amount earned on each investment." (37)

How well the BIA, or any trustee, provides accountings is to be judged by tne highest standard of "one conducting the business affairs for another," and in common law, failure to account for funds may be grounds for removal of the trustee. (38)

2.) Duty To Make the Trust Productive: As trustee, the BIA must invest funds to make the trust productive. This is based on the assumption that every trustee has either an express or implied duty to provide income to beneficiaries. (39)

3.) Duty To Preserve the Trust While Providing Income to Beneficiaries: While trustees are to secure investments that provide income for beneficiaries, Yankton Sioux Tribe v. US held that the Federal Government is also "under a duty to ... preserve the trust property" for a tribe. So there must be a balance between providing income for current recipients and preserving the principal of the trust for later recipients. According to common law, "it might held a breach of duty to place the whole trust fund in low yield government securities in order to secure maximum safety.. at the expense of income beneficiaries." (40) And, at the same time, it would be irresponsible to make highly productive, but risky, investments.

3.a.) Appropriate Investments: Under 25 USC 162(a), the BIA is restricted to investing tribal funds in federally guaranteed securities. (41) The Manchester Pomo and Cheyenne Arapaho cases detailed what this means, and Appendix B lists those approved securities along with a comparison of those investments held by common law to be appropriate for trust investments.

3.b.) Discussion of Duty to Secure Maximum Returns:

Courts will often hold a private fiduciary liable if s/he could have made a higher return and failed to do so. In Cheyenne Arapaho the court held the Federal

---

* As another point of reference, this appendix also lists those investments allowed under the Code of Federal Regulations for individual Indian trusts set up for the Five Civilized Tribes of Oklahoma. (42) This Appendix lists investments tribes are allowed to request for funds held in trust and provides a frame of reference on relatively secure investment for tribes considering taking funds out of trust.

Government liable for the difference between interest paid on tribal funds kept in Treasury and higher yields that would have been available outside of Treasury if they had been "properly invested." (43)

However, while a strict interpretation could require investment in the highest yeilding options, common law provides a broader criteria that funds be invested "to meet the needs of the trust". An argument could be made that the needs of a tribal trust are to promote self-governance and to make investments that promote tribal economic development and leveraging objectives.

The law does not hold that a fiduciary will always be held liable for the hypothetical one percent lower rate of return on the investment. On the contrary, Bogert's Law on Trusts states that

> in determining whether a trustee used the care and ability of a prudent investor, the courts will consider many factors, for example, the extent of the investigation made by the trustee before investing, ratings and opinions of experts, the adaptability of the investment to the needs of the particular trust, diversification, protection against inflation, and the tax effects on the beneficiaries. (45) (Emphasis Added)

The Federal Government should not fear it will be held liable for not having the same 20-20 vision into the future that may be available to scrutinze the trustee's past actions. A trustee can only be held to then current economic conditions, not later ones which were unforseen. (46)

C.) Powers of A Trustee:

While a trustee does not have a duty to pool tribal funds nor use outside advice, these two areas deserve some attention because the BIA intends to both pool funds and contract for outside advice on investments. With the "638" and "Out-Of-Trust" Models tribes could also consider pooling funds and employing investment advisors.

1.) Power to Pool Tribal Trust Funds: While the Court held in Manchester Pomo that the Secretary, in exercising his discretion, might consider whether to pool funds and "thereby extend to small trusts the benefits of larger returns from

larger and longer term investments," common law has not resolved whether such pooling is appropriate. Relying on common law as expressed in the Restatement of Trusts, Second, the Associate Solicitor for Indian Affairs concluded in his 1978 Opinion that "the state of the law ... is not crystal clear." Absent any legislation authorizing pooling, "it appears that the combination of tribal funds... is subject to challenge. If challenged, however, I believe that the chances are good that pooling ...may be successfully defended." A subsequent 1986 Opinion affirmed this optimistic view, albeit expressing concerns that any pooled account be fully insured. (47)

2.) Power to Use Outside Advice and Counsel:

As trustee the BIA has the power to employ outside advice and counsel. (48) A 1985 Solicitor's Opinion used the common law of trusts as its basis and found that the Secretary may employ such advisors when "the (BIA's) Branch of Investments cannot adequately perform needed investment services as the outside agent could. Questions of possible liability ... could be avoided by (having the tribes as equitable owners of trust funds) give explicit approval and consent to such investment handling for their funds." (49)

Therefore, the BIA can and possibly should use outside advisors if the BIA is unable to provide the expertise themselves, and liability should not be a concern if tribes approve of using these advisors.

In a private trust, the settlor is allowed to appoint an advisor to the trustee whose advice or consent must be obtained before making certain decisions. Given the vagueness of tribal trusts, it is unclear if tribes could be appointed as such "advisors" or if tribes themselves could employ such advisors. If they could, the BIA might not be held liable for decisions of these advisors. Some state laws do not hold the trustee liable for investment losses when acting on the advice of an advisor, particulary when that advising is authorizied by the trust. (50)

## VIII.) RIGHTS OF TRIBES AS BENEFICIARIES:

### A.) DEFINITION: Who are the Beneficiaries of a Tribal Trust?

Since trust funds represent assets held in common for all tribal members, as well as future members, it is not immediately clear who the legal beneficiaries of the trust are. According to Felix Cohen's definitive Handbook on Federal Indian Law, the tribal council or the governing body representing the tribal members is the actual beneficiary of the trust fund. Individual tribal members are not. In a 1985 Solicitor's Opinion, complainant Bernice Muskrat was told "tribal members have no more inherent right to a share of their tribe's assets than does a citizen of a state have a right to a pro rata share of state's funds and assets. Such a right would cripple the state's ability.... (and similarly that of) a modern Indian tribe." (51)

This definition of beneficiary mitigates the BIA's argument that increased tribal control could bring successful lawsuits from tribal members disatisfied with how a tribal council might exercise that control. The trustee's relationship vis a vis tribal trust funds is with representatives of tribal members and not each of those members directly.

#### 1.) The Right to Be Informed:

Tribes have the right to be informed about their trusts. A beneficiary "is the owner of the trust property.. and it is obvious that he is entitled to know how the business of the trust is being carried on." The trustee must furnish on demand all information regarding the trust to the beneficiary and permit the beneficiary to inspect trust records, documents and any legal opinions which the trustee has obtained. (52)

#### 2.) The Right to Have Input/Direct the Management of Funds:

This right is critical to the analysis of FNFP's models. Common law holds that the trustee is NOT under a duty to obey requests or instructions of a beneficiary as to how trust funds shall be invested. According to Bogert's Law on Trusts,

"The trustee is, or ought to be, a person of judgment and capacity; often the beneficiaries are not skilled in investment work. The very purpose of the trust is to give the beneficiaries the benefits of the property without placing upon them the burdens of management. A trustee who submits every proposed investment to his beneficiaries and secures their written approval is attempting to shift his investment burden to the beneficiaries." (Sect. 102)

However, application of the common law on private trusts does not embrace the complex relationship between tribes and the Federal Government or the issues involved in tribal self-determination. The principle of self-determination might dictate that the Federal Government as trustee should be shifting the burden of managing trust funds to its tribal beneficiaries. There have been no court cases to test this argument. In Cheyenne Arapaho, however, the Federal Government claimed that it did not make tribal funds productive because the tribe had not advised the BIA on how it wanted its funds invested. The Court of Claims rejected this defense and said the Federal Government, as fiduciary, "was duty bound to make the maximum productive investment unless and until specifically told not to do so by a tribe and until (the government) also made an independent judgment that the tribe's request was in its own best interest." (Emphasis added) (53)

In conclusion it appears that when tribes are treated as beneficiaries they do not have the legal right to direct the management of their trust funds. Even if a tribe provides input to the BIA, the BIA, as trustee, ultimately is responsible for making its own determination.

However, a distinction must be made between having the right and being allowed to have input. Even if there is no legal requirement to do so, a trustee may still respect the wishes of a fully informed beneficiary on what should be done with the trust fund. If a tribe knowingly requests or vetoes a certain investment/action, the BIA would not likely be held liable for that decision. Common law states that if the "trustee makes an improper investment at the request or direction or with the consent of a competent and fully

informed beneficiary, he will not be liable for losses as a result of the improper investment. But the consent must be with full knowledge of the facts and of the legal rights of the beneficiaries in order to relieve the trustee from liability." (Emphasis added) (54)

Therefore, tribes could direct what is to be done with their funds if they are fully informed. IF, for some reason, these decisions were found to be in violation of the trust, it appears the BIA would not be held liable. This conclusion is solely on the basis of private law.

The concepts of soveriegnty and self-determination provide even greater support for the argument that tribes could have input into, and even control over, the use of their funds. The Indian Reorganization Act, while it did not specify the right of tribes to govern investment decisions, gave tribes the right to govern disbursement decisions. "The Indians should unquestionably have a voice in the spending of their own money.." So wrote the Acting Solicitor in a 1936 Opinion that was quoted as recently as 1985 to justify tribal rights over trust funds. "The language (of the IRA) ...seems to indicate that it was the intent of Congress to modify existing law, under which Indian tribes had merely an advisory function in the expenditure of tribal funds, and to confer upon organized tribes a definite veto power." (55)

The statute governing judgment fund awards clearly states that tribes have the right to a say in how their funds should be used. But Congress retains ultimate discretion. The Judgment Fund Act provided the basis for the conclusion by the Price Waterhouse review that "participation by tribes.. in the setting of investment objectives for funds held in trust for them by the BIA is consistent with the current U.S. Government policy of Indian self-determination." (56)

In conclusion, no definitive statement can be made about a tribe's right to input. Common law would say tribes, as beneficiaries, do not have the right

to a say in trust decisions whereas self-determination would imply that tribes, as sovereign governments, do. Yet both doctrines would conclude that if a fully informed tribe requested or specifically approved a trust manage-ment decision, the trustee could be protected from liability.

3.) Right to Change Who is the Trustee:

In common law, the test to decide if a beneficiary has the right to change the trustee is if the "beneficiary can prove that his financial interests will be seriously endangered by a continued operation of the trust by the trustee." (57) The following statement from private law could very well have been written about the situation between many tribes and the BIA:

> Disagreement and unpleasant personal relations between the trustee and beneficiaries are not usually enough to warrant removal. The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies.. But the settlor has entrusted the management to the trustee and not to the beneficiary. The very fact that he created a trust showed that he did not want the beneficiary to be the controlling factor in the management of the property. However, in some instances, the hostile relations between trustee and beneficiary have gone so far that the court feels a new trustee should be appointed. If ill will exists and the trustee has discretion... the court may feel that it will be impossible for him to give an impartial and unbiased administration." (58)(Emphasis added)

Therefore, we can conclude from common law that the trustee can be changed when the trustee is not acting as a responsible fiduciary or when there is an extremely poor relationship between the beneficiary and the trustee. From Indian law, it is clear that Congress could name another trustee for an Indian tribe since it has full plenary power over the Indian trust relationship.

4.) Right to Have Administrative Costs Borne by Trustee:

In private trusts, trustees' regular administrative expenses should be borne from trust income, and extraodinarily large expenses may be paid from trust principal. However, Indian case law forbids administrative expenses of the BIA to be paid from tribal trust funds. (59) Therefore, as long as a tribal trust fund is administered by the BIA, all administrative expenses are paid out of the BIA's budget and not from the fund's earnings nor from the tribe's operating budget. (60)

## VII. ANALSYS OF FNFP'S THREE MODELS:

This paper can not resolve whether these models will ultimately be perceived by the courts or the BIA as legal within the Indian/ federal trust doctrine. However, the preceding discussion of legal rights and responsibilities provides a framework to suggest specific ways the models could be made realities and guidelines which would minimize liability concerns.

### A.) "IN-TRUST MODEL:

This model has three purposes: 1.) to ensure that tribal rights as beneficiaries and investment clients are protected; 2.) to provide greater technical assistance to tribes so they are better able to determine their own trust fund needs; 3.) to create a system that allows those needs to be communicated to the actual trust fund managers. Suggested options under this model would be appropriate for tribes that do not yet have the sophistication or will to manage their funds themselves, but that want to gain experience from being more involved. It provides such tribes with a 100% guarantee of their funds, as well as as the continued payment of administrative costs by the BIA.

1.) Protection of Tribal Rights as Beneficiaries:

a.) Create Explicit Trust Documents: Creation of an explicit trust document, similar to that governing any private trust, would help ensure the protection of a tribe's rights as a beneficiary. This could be done in a number of ways -- by seeking special legislation for each tribe that requests it, by amending the primary law on trust fund management (25 USC 162a) to give the Secretary the right to write such documents as an exercise of his discretion, or by asking the Secretary to create such a document as a valid exercise of his current discretion. (61)

Since upcoming judgment awards allow room for such creativity, a tribe could request that the BIA or Congress create a detailed trust instrument for any funds that would otherwise be vaguely "put into trust" from a judgment claim.

Terms of the trust could specify explicitly the amount of input from tribes, appropriate investments, and the use of outside advisors, etc. It is common in private trust documents to specify the length of the trust; tribes might request specification of a certain date when the tribe could take over the management of their own funds, if it so chose. Or a time might be specified to review the trust and the tribe's capabilities and willingness to assume responsibilities. The trust instrument could require the trustee to provide information and technical assistance to the tribe so the tribe could gain expertise in fund management while funds remain protected in trust.

b.) Name another trustee: A tribe could keep its money in trust with the Federal Government but have a private trustee named. (62) The U.S. government would be the "settlor" (creator of the trust) who would name a specific private trustee (such as a bank) and the Tribe as beneficiary. This could be done with monies already held in trust for a tribe, or with monies that are expected to go into BIA trusteeship under a new judgment plan.

There is some precedent for this. Congress named a private trustee for a portion of the Umatilla's judgment fund and the tribe was granted ultimate decision making power over the terms of that trust. This fund is to be used only for educating tribal members and if the tribe were to choose to use income for any other purpose, the Secretary's approval would be required. (63)

In addition, Congress named a "national banking association located in the state of Oklahoma" as trustee for a $500,000 portion of the Cheyenne Arapaho of Oklahoma's judgment fund. This legislation held that "the trust agreement shall be authorized and approved by the tribal governing body and approved by the Secretary of the Interior." (64) In this situation the tribe's money is still protected by trust, the Secretary retains approval authority, but the tribe has substantial input regarding the terms of the trust.

If, even with such precedents, the Federal Government is concerned about the

potential liability involved in naming a private trustee, it could adopt the same criteria for choosing the trustee and setting the terms of the trust as those already set by regulation to cover individual trusts for the Five Civilized Tribes of Oklahoma.(65) Assuming these regulations were written to safely protect individ-ual Indian funds, they could serve the same purpose for tribal funds. (See Appendix B)

c.) Establish a Trust Fund Oversight Committee: Protection of tribes' rights as beneficiaries could be enhanced by establishing an outside oversight committee to evaluate BIA compliance with tribal wishes, a step recommended in the Price Waterhouse study. This could be modelled after the proposal submitted by the Bank of America to the BIA's first RFP. Following Price-Waterhouse's recommendation, this proposal had tribal representatives on the committee which set broad investment objectives for the pooled funds and conveyed these objectives to the contractor bank.

**2.) Provide Greater Technical Assistance:**

It could be argued that, given the policy of self-determination, one of the purposes of a tribal trust is to increase tribal proficiency in financial matters related to the trust funds. Therefore, the BIA would be obligated, either by itself or through outside agents, to somehow provide technical assistance and cash management/ budget planning services to fulfill its trust responsibility.

Price Waterhouse concluded that if the BIA were to provide technical assistance it would require BIA commitment, including funding and a specific program. A specific program could be created through any of the following mechanisms: the BIA could create manuals/ regulations that must be followed by all Area offices and would be disseminated to the tribes along with training sessions; the new contractor bank could provide area office training; (66) the BIA could utilize or contract with organizations such as FNFP and the Native American Finance Officers Association to provide on-going seminars for tribes; and/or the BIA could provide grants for tribes to secure their own technical assistance from sources outside of the BIA. (67)

The disadvantages of such programs are that they would provide only a small

step toward greater tribal involvement, and they could be limited in their effectiveness because of the BIA's decentralized nature. One of the advantages of such programs is that they meet FNFP's criteria that the models allow for differences in tribes'needs and levels of expertise. Also, the programs suggested have no liability issues as they do not change the fundamental relationship of federal control over final investment decisions.

**3. Tribal Input:**

a.) Amend 25 USC 162a to Require Tribal Input: A change in legislation could create a formal system of communication and a right of tribal involvement. Currently no law or regulation makes tribal input the primary factor in investment decisions. 25 USC 162(a), the primary legislation governing trust funds, could be amended to expressly encourage tribal input. The Secretary would still retain final authority but the burden would be on the Secretary to defend his disregard of a tribe's input. This idea is similar to the over-riding concept of P.L. 93-638 law that assumes tribes have the right to contract out a service now provided by the BIA unless the BIA can prove otherwise.

Model language for such a shift in focus has already been written by the 1977 American Indian Policy Review Commission: "Whenever the Secretary finds it necessary to disapprove a proposed tribal initiative, he must file a written statement with the tribe notifying them of the reason for his disapproval of their proposed action and afford them an opportunity for a hearing." (68) If the Federal Government does not believe the tribal government's plans are in line with tribal members' wishes, the Secretary may require a referendum to test the tribal support. The tribe could override Secretarial disapproval of their proposed use of trust assets" provided the Government was waived of liability for those uses. (69)

b.) Special legislation for each tribe: The Penobscot Nation and Passamaquoddy Tribe of Maine obtained unique legislation (in 1980) providing them substantial control over how a good portion of their judgment fund would be invested

while it remained in trust. (70) Supporters of the law thought this language would be used as a model for other tribes, and, while no other tribe has adopted it, it provides another option for substantial tribal involvement.

The two tribes were each awarded $13.5 million to be held in trust by the Secretary, who would administer the trust "according to reasonable terms established by the Penobscot Tribe and Passamaquoddy Nation, and agreed to by the Secretary." (71) It was not intended that the Secretary would necessarily make the investment decisions nor carry them out. Rather, the tribes could choose to create investment committees to set investment policies and could select private investment managers to implement those policies.

If, however, a tribe were to choose an investment option that was not federally guaranteed and went beyond the scope of investments allowed by statute, the tribe must first submit a specific waiver of liability to protect the United States for any loss which may result from such an investment. In this situation the monies are still in trust and remain free from attachment, but the Indians are free to control the funds. The BIA still retains final authority and is free from liability for investments not authorized by statute. (72)

## B.) "638" MODEL:

### Using P.L. 93-638 to Contract Out Trust Fund Management Duties:

1.) The Intent of the Law: The intent of the Indian Self-Determination and Education Assistance Act (25 USC 40), commonly called "638", seems to exactly fit the intent of FNFP to provide tribes with a structured way to gain both expertise and control over their funds. The law was created to "permit an orderly transition from Federal domination of programs and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services." (73) It directs the

Secretary to enter into a contract with any tribal organization for any program that the Secretary is authorized to administer for Indians. The intent of the law is to give tribes the right to contract programs; contracting decisions are not intended to be within the discretionary power of the Secretary. (74)

FNFP's objective of providing options that are designed to meet the different levels of interest and skills among different tribes is also met by the "638" option. A fundamental premise of "638" is that tribes also have the right NOT to contract. (75) It is up to each tribe to determine its own need and willingness.

2.) The BIA Can Decline Contracts that Jeopardize "Trust Resources":

If the BIA denies a tribe's contract proposal, the burden is on the Secretary to show cause. The law allows only three reasons for declining a tribe's contract:

1.) If the services performed by the contract "will not be satisfactory". According to regulations, this means if the contract would provide the service at a lesser standard than would the BIA.

2.) If the proposed project cannot be completed by the contract.

3.) If "adequate protection of trust resources is not assured." Regulations have determined this to mean that the Secretary will decline a contract if it delegates to the tribe a "trust responsibility vested by law in the Secretary or Commissioner" or if it "provides for the termination of trust responsibility." (76) (Emphasis added)

The law says the Secretary must also consider if there is "community support for the contract" which has been taken to mean there must be a tribal council resolution passed supporting the contracting.

Many tribes have actively used this law, contracting to provide their own health care, education and natural resource management. However, no tribe has used "638" to contract trust fund management. The Navajo tribe considered it, but because of other priorities, did not push it beyond the discussion phase. John Vale, of the BIA's Albuquerque Division, told the tribe that the BIA would never allow the use of "638" for contracting out trust funds because the government could not be protected from liability.

It is not clear what tasks constitute a trust responsibility "vested by law" in the Secretary and are therefore not contractable. A continuum of possible involvement exists on which tribes may choose to use the "638"process. The more involved the tribe would want to become and contract invesment advising and decision making, the more the contract would expose the vagueness of the law on this issue. In other words, the more control a tribe would exert over its trust fund decisions, the more important becomes the liability concern expressed to the Navajo by John Vale.

This paper can not answer whether tribes have a legal right, under existing law, to contract out all of the trust fund services now performed by the BIA. But arguments can be made that tribes do have such a right, or could if certain requirements were established. For example, Reagan's Task Force on Economic Development concluded that "The BIA should issue guidance clarifying BIA policy that contracting of trust-related economic and natural resource functions to tribes in most cases does NOT conflict with the Department's trust responsibility." (77) Another supporting argument is the analogy to natural resource "638" contracts.

3.) Contracting Trust Resources:

a.) Comparison of Natural Resource Management and Trust Fund Management:

The declination criteria specified in the law has not meant that tribes cannot contract trust resources. The BIA currently allows tribes to contract natural resource management.(77a) Existing regulations have been very clear about what natural resources are contractable, and about what extra standards of care are necessary to protect the trust resource. But the regulations are silent regarding contracting of trust fund services as another component of "trust resources."

It can be argued there is very little conceptual distinction between managing natural resources, such as forestry or range land, and managing a tribe's trust funds. Both require specialized skills and the ability to master technical information. Both require the tribe to plan what would best serve current as well

as future tribal members since both represent resources that once abused are non-renewable.

Existing regulations on natural resource contracting do not assume tribes have all the requisite abilities to manage the resources; they assume tribes will often sub-contract with "outdsiders" for skills the tribe can not perform as efficiently. If the BIA feels the tribe's plan would endanger the trust resources, the BIA can decline the contract. The regulations for all tribal contracts require strict monitoring and spell out penalities for fraud or misuse. Therefore, there appears to be no conceptual reason the BIA would not allow tribes to contract trust fund services under similar protections as it allows tribes to contract natural resource management.

BIA personnel state that "638" can only be used to contract the implementation and management of trust duties; it can not be used by tribes to actually make trust decisions. Allegedly, tribes are currently not allowed to contract decisions regarding how natural resources should be used but only the implementation of those decisions. While this is a difficult distinction to pin down, the same logic would imply that tribes wanting to contract out only "implementational" aspects of their trust fund progam should be able to do so.

**4.) WHAT TRUST FUND DUTIES COULD TRIBES CONTRACT?**

a.) Technical and "Implementational Duties":

A strong argument can be made that BIA duties such as depositing, accounting and reporting are contractable, since the BIA is about to enter into a contract with an outside bank for those very functions. This is not a contract through "638", as it is technically being let by Treasury, but it is still proof that the BIA as trustee can contract out some of its duties and still retain its ultimate fiduciary responsibilities.

If the BIA can find a justification to pursue this type of contract, then it could not support a claim to tribes that these duties are "trust" functions and

thererfore not contractable. It would also be difficult for the BIA to make such an objection given the very specific intent of the "638" legislation to transfer self-government skills to tribes.

The Senate Select Committee on Indian Affairs, through its Chairman Senator Inouye, submitted a report in conjunction with pending amendments to the "638" law clearly stating that trust functions are meant to be contractable:

> "The Committee intends ... tribes to enter into contracts with the Secretary of the Interior to carry out trust related functions... including but not limited to...trust fund investment and accounting services... The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to the trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources. Clearly, the Secretary continues to maintain trust responsibility for tribal resources when the tribe operates a program under a self-determination contract...." (Emphasis added) (78)

This supports the argument that tribes should be able to contract the technical aspects of trust fund management. In fact, the Committee's report stated that "tribes often are in the best position to provide the technical services that will afford the best possible protection of trust resources by the Secretary." (79) Since the BIA has specified all of the "technical" and "implementational" services it needs from a private contractor, this list of duties could be borrowed as a guideline for functions that are contractable by tribes as well.

b.) INVESTMENT DECISIONS:

It would appear that tribes could go beyond contracting for accounting, reporting and technical assistance with cash management. Since the BIA has also requested advice about investment decisions as well as the actual placing of funds in investments in its current RFP, tribes should be able to contract those duties as well and still not be "assuming a vested trust responsibility." The BIA says these duties, when provided outside of the BIA, do not not violate its fiduciary responsibility. (80) So it would be inconsistent for the BIA to deny a tribe that seeks to contract these services, as long as the actual investments were approved by the BIA.

Such contracting could be structured in a number of ways. Tribes could establish an on-going process to have their decisions approved by the BIA in a similar manner as the BIA intends to approve the new contractor bank's suggestions. Then tribes would be able to make their own investments or use their own investment managers. Or the BIA could authorize a certain range of investments in advance through the terms of the contract. These would most likely be limited to the guaranteed securities in which the BIA is currently allowed by law to invest.

If the BIA retains ultimate authority over investment decisions, there should be no more liability concerns than the BIA has with the RFP or with other "638" contracts. The Secretary would still be responsible for the performance of the contract and the management of the trust funds. The BIA may feel more comfortable delineating requirements for the protection of trust funds similar to those spelled out for natural resource contracting. Or, since the RFP specifies how the BIA is able to turn over major portions of its duties to an outside contractor and still have adequate protection for liability, many of these protections could be borrowed.

Such regulations could limit the BIA's liability concerns by establishing criteria for choosing an investment advisor, expressly limiting what investments could be made, setting strict requirements for reporting and audits, and possibly establishing a pre-requisite amount of tribal experience with monitoring or sub-contracting similar duties.

Contracts could be set for a limited time, such as one year, unless tribes and involved sub-contractors establish an acceptable record for extension. And the BIA could use the current "638" law to terminate a contract if it was not being adequately carried out, just as a tribe could return the service to the BIA for management if the tribe determined the BIA could better manage it.

Many tribes that have managed their own tax revenues or money awards from court settlements have devised ways to protect these assets. Many of these systems

could be adopted to assure both tribes and the BIA that assets will be protected under a "638" contract. (82) Appendices A and B suggest ideas, based on the experiences of these different tribes as well as on existing regulations covering similar investment strategies, that could be incorporated into such guidelines.

**5.) ADVANTAGES AND DISADVANTAGES:** The benefits to a tribe of using the "638" process are that the tribe's investments remain guaranteed, the tribe can gradually gain experience with management while the Federal Government stays involved in monitoring the fund, and the funds are free from any attachments.

Tribes could include limited waivers of liability in the "638" contract for any decisions they exercise with respect to their trust funds but this may defeat the purpose of keeping the money in trust. Also, such waivers should not be necessary if the contract is granted under specific criteria and the BIA still retains ultimate authority. If a tribe plans to make investment decisions beyond those that could be authorized by the BIA, the tribe may be better suited to take its money out of trust completely and manage it themselves (unless it doesn't expect to be frequently waiving liability for decisions.)

Using the "638" model also has its disadvantages. One of the greatest problems with 638 contracts has been tribes' inability to recover indirect administrative costs from the BIA. Tribes have often had to cover such costs themselves, resulting in reduced funds for the contracted program. (83)

Tribes have also experienced problems with the BIA not responding to contract proposals in a timely manner, (sometimes taking between six months and a year to approve a contract)(84), not showing any commitment to encouraging contracting, and not respecting the appeals process. Phillip Martin, Chief of the Mississippi Band of Choctaw Indians testified to the Senate Select Committee that "one of the reasons why we have so many problems with contracts with ... the BIA is because they really don't have a contracting management system in place. It's not a priority with them to be contracting with tribes. So when we make our proposals, they take their good

old time. There is no penalty in case they don't carry out their agreement." (85)

If these problems can be addressed with the amendments currently pending in Congress then tribes could have the advantages of greater involvement in directing investments without having to pay the administrative costs associated with taking funds out of trust and investing the money themselves. (86)

## C.) "OUT-OF-TRUST" MODEL:

### 1.) DO TRIBES HAVE THE RIGHT TO TAKE FUNDS OUT OF TRUST?

Because of bureaucratic problems and/or an inability to use funds in a broader fashion, many tribes may not be interested in using the "638" process but may want to totally control their own funds. Both personnel at the BIA and activist Indian attorneys agree that tribal trust funds are the tribes' property and tribes should have the right to take their money out of trust if they so choose. The 1984 annual report of the Divison of Trust Fund Management states that "tribes have complete authority over... trust funds, except where that authority has been restricted or altered by Congress through legislation." (87) In another document answering tribal questions about trust funds, the BIA confirmed that, "Yes, upon appropriate authorization, tribes may withdraw funds" from trust. (88)

Congress also appears to uphold this view that tribes have the right to withdraw their money from trust. For example, in awarding a judgment fund to the Clallam Bands to manage rather than the BIA, the Senate was sympathetic to the following statement of Ted Georges: "Our objection, essentially, has to do with having the Interior Department supervise our funds again....We think we are ready. It is our money... It is ours. It is due. It is long overdue." (89)

The above statements aside, there is no language in statute or case law giving tribes the right to take their funds out of trust. Tribes have the legal right to propose, as a part of plans for judgment awards, that money not be put into trust. But such plans must also be approved by the Secretary, or Congress if the Secretary

does not approve. (90) 25 USC 155(c) allows tribes to get their funds advanced, but this is only after securing approval of the Secretary.

So the conclusion to be drawn is that, under existing laws, tribes do not actually have the right to take their funds out of trust. Rather, they have the right to propose and request that their funds be taken out of trust. The final arbiter of that right, in practice, is either the BIA or Congress. The tribe's right is qualified by having to "secure appropriate authorization."

The reason attorneys and BIA personnel assert that tribes have the right to take their funds out of trust is because tribes, like most beneficiaries of a trust, actually own the trust property. As owners, tribes assume full responsibility once they have full control over their funds. (91) The typical way to terminate trust responsibilities is for the trustee to turn over the trust to the beneficiary; once a beneficiary controls the property, the trustee's duties end.

However, the Federal Government may be held liable for its decision to turn over control of the funds to the tribe. The trustee must still show fiduciary responsibility in deciding whether to approve the transfer of control. This is where the ghost of Seminole v. U.S. haunts the BIA's and Congress's memory.

While it is a pertinent case, the Seminole experience should not be exaggerated; it is fundamentally different than what this model suggests. The 1934 Seminole case was an example of the BIA turning over funds to the tribal council when the BIA knew or should have known that the council was acting fraudulently with the funds. Citing the common law on trusts, the court said the test for determining liability in such situations is whether the federal officials "actually knew the Council was defrauding the (tribal) members." (See Appendix C) The overriding objective of each of these models is to manage tribal funds responsibly. Therefore, this model does not intend tribes to have the right to act fraudulently with tribal funds. And it assumes the BIA will act prudently as a trustee and not allow funds to be fraudulently spent.

However, it is not clear what criteria the BIA uses to decide when a tribe has the "right" to take its funds out of trust or not. No uniform guidelines exist. Currently decisions are made on a case by case, "Area by Area" basis. Therefore, this model seeks to define what constitutes 'appropriate authorization,' as noted by the BIA document.

**2.) GUIDELINES COULD HELP DEFINE CRITERIA**

Potentially tribes could have more control if the Secretary's discretion was not so broadly defined. Guidelines could be adopted by the BIA or Congress to determine a tribes capacity to manage its funds and protect the trust. Tribes do not need more bureaucratic rules to limit their ability to control their funds. On the contrary, these guidelines are aimed at providing a standard by which to judge whether the BIA is being arbitrary or hostile to a tribe's right as beneficiary and sovereign government. If a tribe were to meet some/all of these guidelines then it should be assured of its right to take its funds out of trust. Similar to the tone of the "638" law, the burden could be put on the Secretary to defend his action if a qualified tribe was denied control of its money. Such guidelines could ease BIA fears of liability, as well as provide tribes with a standard. (92)

These guidelines could be specified in regulations, BIA manuals or broadly defined in statute. However, guidelines should not be so rigid that tribes lose the ability to plan for their own unique needs. The statutes which gave control to the Saginaw and the Penobscot and Passamaquoddy tribes were broadly defined, allowing tribes to determine the details of a plan for investments. (93)

Appendix A suggests that the following issues should be addressed by the guidelines: methods to determine both how much popular support there is among the tribe to take the funds out of trust as well as what the needs are for the trust funds; and standards to use when choosing competent investment managers and appropriate investments. Many of the suggested guidelines come from tribal governments' experiences of managing tribal monies. This implies that such guidelines

would be helpful not only to secure a minimum set of rights from the BIA and to ease the BIA's liability concerns, but also to assist tribes in determining whether this model is appropriate for them. Tribes contemplating whether to remove their funds from trust could benefit from the experiences other tribes have had in managing funds outside of the BIA's system. *

**3.) Advantages and Disadvantages:**

One disadvantage for tribes that take funds out of governmental trust is losing the 100% guarantee on investments. But there is no reason a tribe could not also choose to limit its investments to government guaranteed securities once it manages its funds itself. Such a choice, however, could possibly produce a lower rate of return than that offered under the BIA's proposed pooling system unless the tribe has substantial amounts of money or is willing to pool its funds with others. A tribe that invests a small amount of money on its own would not capture the relative advantage of a larger, pooled fund. Tribes that take their funds out of trust would also have to assume administrative costs and investment managers' fees. These could effectively lower their total income also.

These disadvantages may be outweighed by numerous advantages. Tribes need not be restricted to the same conservative investment options and could gain a substantially higher rate of return than the BIA ever could. However, for many tribes the issue is not getting the highest rate of return but exercising complete control. Tribes may be able to use a local bank or investment firm and generate

---

* For example, the Confederated Tribes of Siletz received approval to remove $1 million from BIA management to invest on Wall Street in the following way: When the Area office required a new, written tribal plan before granting approval, the tribe submitted all of the various tribal resolutions and plans that had been developed over the years to help the tribe decide for itself how it wanted to use its funds.

additional leverage for economic development on the reservation as a result. (95) Tribes would more than likely gain increased contact with their investment managers and bankers, who may be more attentive and experienced than BIA personnel. (96) Tribes have also been known to receive other non-financial advantages; one of the Navajo contracts requires the investment management firm to hire a tribal member.

## VIII. CONCLUSION:

Given the conflicting doctrines of trust on the one hand and self-determination on the other, a tribe's right to have greater involvement with and control over its trust funds remains ambiguous. However, this paper concludes that well-founded arguments exist to support each of the three models. In many cases tribes do have the right to greater involvement, and if the right does not exist per se, the Federral Government still has the authority to allow greater tribal involvement.

Concerns of responsible management and liability come up because of how important these funds are to tribal economies and because of their trust status. But these issues can be be minimized, if not eliminated, by borrowing many of the protections used by tribes that have had experiences with money management, the BIA itself, and by adopting principles from the common law on trusts.

This paper made no attempts to assess the political implications or practical feasibility of these models. Those tasks remain. Hopefully this paper has laid the groundwork and outlined the major issues so that such efforts will be easier.

## APPENDIX A:

## SUGGESTED GUIDELINES:

1.) Determining Tribal Needs / Securing Tribal Support:

a.) Tribal decisions will be made after holding x number of public hearings, and/or after initiating a survey of tribal needs. This process has been used by most tribes that have developed long-term strategies for their funds.

b.) The tribe will prepare a long-term investment plan with objectives for uses of the funds. The Confederated Tribe of Siletz made 40 year projections, the Navajo planned for 20 years, and the Saginaw created a 10 year plan.

c.) Any changes to the investment plan must be approved not only by the tribva council but by some majority of the tribal membership as well. The Navajo have specified that changes to plans for one of its investment funds must be made after a 2/3 vote of the membership and a 2/3 vote of the council.

d.) An oversight committee or business council could be created outside of the tribal council to provide oversight to management of investments.

f.) Spending decisions for investment income could be decentralized among the trbie by having tribal organizations receive block grants. The Navajo allow some interest from their $60 million "Nation Building Fund" to be spent by local chapters of the tribal government. The amounts are designated by population, similar to the concept in federal revenue sharing grants.

e.) Tribal Councils could be named trustee over the funds so that tribal members have all of the rights of private trust beneficiaries regarding the fiduciary responsibility over their funds. The Saginaw Chippewa were named trustees over funds for the tribe in legislation awarding them their judgment funds.

f.) Yearly external audits would be performed of all investment activities.

2.) Protecting the Trust:

a.) The investment plans would specify when and how much income is needed. The tribe would stipulate that the principal can not be spent until a certain amount of time, or only for specified activities, and that a certain percentage of the interest earned would be reinvested into the principal. The Saginaw return at least 10% of their earned income to the principal for at least ten years, and the Navajo return at least 12% of the income from their "Permanent Fund" to the principal for at least 20 years. Both tribes detail what the remaining income can be spent on.

b.) Investments could be limited to any of those criteria listed in Appendix B.

c.) Investments could be diversified, such that no more than a certain percentage is invested in one type of investment. Again, see Appendix B for similar guidelines taken from the RFP, the Code of Federal Regualtions and other sources.

d.) Tribes could require that their investment managers guarantee a minimum rate of return. This may have the draw back of keeping investors conservative but it may provide security to tribes that are just beginning their management. The Saginaw specified a guaranteed rate of return in its contract with its investment managers, and the Confederated Tribe of Siletz, while not getting a guarantee, expects at least a 10% return indexed to inflation.

3.) Setting criteria for choosing investments and advisors:

a.) Managers must have x number of years experience with similar type of investments and furnish all tribe with proof of track record. External published standards, such as a rating from Standard and Poors may also be used. (zu)

b.) The tribe could specificy that the manager be local or easily accessible. The Saginaw limited their search to investment managers in the state of Michigan.

c.) The tribe could require that more than one manager be used for any fund. The Confederated Tribe of Siletz, even with its relatively small amount of $1 million, hired two separate advisors to manage $500,000 each. The Saginaw also split their $10 million sum into two funds for two different managers.

d.) Contracts with managers will be limited to 1 to 3 years so that tribe is not locked into a poor relationship.

## APPENDIX B:

The following guidelines are taken from the BIA's most recent RFP and from 25 CFR 116 and provide further comparisons of how investment managers could be chosen and how trust assets could be protected when managed outside of the BIA.

### A.) GUIDELINES IMPOSED BY RFP ON CONTRACTOR BANK AS INVESTMENT MANAGER:

Choosing / Evaluating the Investment Manager:

* The bank must currently have $250 million under management and provide audits and quarterly performance reports for the past five years.

* The bank will submit monthly service reports on quality of activity, deviations from Statement of Work, plan for solving problems if any, etc.

* The bank's performance will be measured including all fees and will be compared to the Sharpe performance index.

* The bank cannot include restrictive clauses in the contract limiting the BIA's right to inspect.

* The bank must have a system of disaster recovery.

Approved Investment Practices:

* Except for U.S. Treasury securities, no more than 5% of the total portfolio value may be in a single financial instrument.

* There will be no self-dealing, commingling of trust and contractor bank's funds, nor buying on the margin and selling short.

* Repurchase agreements must mature within 5 days and be fully collateralized; collateral must have a market value in excess of the face value of the agreement by at least 10 basis points.

* Investments in bank instruments can only be made in banks insured by FDIC or FSLIC whose guarantee for commercial paper enables a borrower to obtain A or A1 ratings by Standard & Poor's or P1 or P2 ratings by Moody's.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

### B.) 25 CFR 116: GUIDELINES FOR TRUSTS ESTABLISHED FOR FIVE CIVILIZED TRIBES:

* Not more than $3 million can be placed in trust with any one trustee.

* The trustee can receive, as a maximum, 5% of the gross annual income of the trust estate as compensation for adminstering the trust.

* The trustee must submit a statement in writing, similar to that prescribed by the Comptroller of Currency, of the trustee's financial condition, and the Secretary must deem the trustee to be on a sound financial basis.

* The trustee must provide an annual accounting of the trust's activity to both the Secretary and the Indian beneficiary.

* No trust shall last for more than 21 years.

# APPENDIX B:

## LEGALLY APPROVED INVESTMENTS

A.) CURRENT LEGAL OPTIONS: Besides Certificates of Deposit and Treasury bills, the following options are currently available for the BIA to invest tribal trust funds. The list comes from the Cheyenne-Arapaho Tribes of Oklahoma v. U.S. case in which the court held that "at least 12 of the obligations listed ... must be considered legal alternate investments for trust funds." (at 1395) The BIA's RFP also specified this list as legal investment options.

1.) Export-Import Bank participation certificates.

2.) Federal National Mortgage Association participation certificates.

3.) All other obligations, participations or instruments of the Federal National Mortgage Association.

4.) Debentures of the Federal Housing Administration.

5.) Farm loan bonds issued by federal land banks.

6.) Obligations of the Federal Home Loan Banks.

7.) Debentures of the Federal Intermediate Credit banks.

8.) Debentures of the banks for cooperatives.

9.) Bonds and notes of the Tennessee Valley Authority (TVA).

10.) Notes guaranteed as to principal and interest of the Small Business Administration.

11.) Bonds issued by local housing authorities secured by annual contributions contracts with the United States.

12.) Bonds or notes of local housing and urban renewal authorities secured by a contract with the United States.

## APPENDIX B:

These two lists are provided merely as a comparison of investment options that have been seen as legal by other authorities for other trust funds. The following are not necessarily legal options for tribal trust fund investments, unless portions of these lists overlap with those approved on the preceeding page.

B.) COMMON LAW: The following list are those investments generally approved, occassionally approved, and seldom approved by common law for private trustees, as cited in Bogert's TRUSTS, Sec. 104.

GENERALLY APPROVED:
* Obligations of the U.S., and those guaranteed by the U.S.
* State guaranteed obligations and municipal bonds
* First mortgage or fee simple title to real property
* Bonds of public utility companies
* Certain corporate bonds secured by mortgage

OCCASIONALLY APPROVED INVESTMENTS:
* Canadian bonds
* Public housing authority bonds and railroad bonds
* Insured interest bearing bank deposits
* Notes secured by a pledge of high grade securities
* Common trust funds and mortgage pools

GENERALLY DISAPPROVED:
* Loans without security
* Investment in businesses with sole partners
* Personal business of the trustee

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

C.) 25 CFR 116: GUIDELINES FOR CREATING INDIVIDUAL TRUSTS FOR MEMBERS OF THE FIVE CIVILIZED TRIBES OF OKLAHOMA.

* Not more than 30% may be invested in securities which appear in the list of legal investments for savings banks prepared by the Superintendant of banks of the State of New York;

* Not more than 20% may be invested in general obligations issued by States or political subdivisions of states;

* Not more than 10% may be invested in public utilities or railroad securities;

* Not more than 15% may be invested in Federal land bankd bonds;

* Not more than 40% may be invested in total loans secured on first deeds or mortgages on improved real estate;

* No part of the trust may be invested in stocks;

* No part of the trust may be invested in any kind of foreign securities.

# APPENDIX C:

## SUMMARY OF RELEVANT COURT CASES

SEMINOLE NATION v. UNITED STATES, 316 U.S. 286 (1942)

This Supreme Court case dealt with numerous claims by the tribe, one of which was that the Federal Government had violated a treaty by not distributing interest from a $500,000 trust to individual tribal members in per capita payments. From 1870 to 1874 the Federal Government paid $37,500 directly to the tribal treasurer upon request of the Seminole General Council.

What is relevant for this paper is that the Federal Government claimed it was proper to distribute the money as it did "since those payments were made at the request of the tribal council, the governing body of a semiautonomous political entity. ... These payments at the request of the General Council discharged the treaty obligation, because the agreement was one between the United States and the Seminole Nation and not one between the United States and the individual members of the tribe." (at 295)

But the Court found that "the argument of the Government, however sound it might otherwise be, fails to recognize the effect of the fiduciary duty of the Government to its Indian wards" because the Government did not consider that the Seminole General Council's conduct was notoriously well known. "It was reported to officers of the United States that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them, and robbing the members of the tribe of an equal share of the tribal income. Reports of the Dawes Commission show conclusively that the governments...were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness and that by such methods the tribal officers acquired large fortunes, while the other members entitled to share in the tribal income received little benefit therefrom." (at 295)

Therefore, quoting the common law of trusts, the Court laid out that standard that if "the officials administering Indian affairs and disbursing Indian moneys actually knew that the Council was defrauding the members of the Seminole", the Federal Government could be held liable for giving the funds to the General Council. (at 296)

## APPENDIX C:

MANCHESTER BAND OF POMO INDIANS V. UNITED STATES, 363 F. Supp. (N.D. Cal.1973)

The Manchester Band of Pomo Indians in California operated a dairy business and revenues from it were deposited in an account managed by the Sacramento Area office of the BIA. The Court found the BIA liable for "deficient management" of that account; for the entire eighteen years that the dairy business was in operation, the BIA only made two interest payments to the Band, totalling $26.00.

The BIA had invested most of the Band's account in the Treasury, where, according to the existing law, the money earned 4% simple interest. The Court declared that this requirement of 4% interest was a minimum and not a maximum, and that the BIA, as a responsible fiduciary, should have invested outside of Treasury to gain higher returns for the Band. Because the BIA did not choose such higher income producing investments, it was liable for damages for the mismanagement of funds.

The court also held the BIA to a continuing obligation to provide accountings of fund activity to the Band. The Court found that the BIA's responsibilities as a trustee are to be measured by the same standard as for a private trustee.

CHEYENNE-ARAPAHO TRIBES OF INDIANS OF OKLAHOMA v. UNITED STATES, 512 F.2d 1390 (Ct. Cl. 1975)

This case was brought on behalf of a number of Indian tribes to challenge the Federal Government's performance of fiduciary responsibility regarding the tribes' trust accounts. The tribes claimed the BIA did not fully use all of the investment options authorized by Congress but instead left funds in lower interest bearing Treasury accounts when higher interest rates were available elsewhere.

The Court found that the Federal Government, as trustee, has the obligation to maximize trust income by prudent investment and also has the burden of proof to justify less than maximum return. It is this case which spells out the 12 other investment alternatives which the BIA should considered when investing Indian funds. (See Appendix B )

NAVAJO TRIBE OF INDIANS v. UNITED STATES, 624 F.2d 981 (Ct. Cl. 1980)

This is a complex case involving numerous accounting claims and complaints by the tribe that the BIA did not properly disburse or invest funds, nor accurately account for fire-damaged timber. One of the major issues was whether the BIA could be held to a standard of fiduciary responsibility since no statute explicitly created the responsibility for the tribe's property or funds. The Court found that no explicit authorization was necessary through statute or treaty because whenever the Federal Government takes control or supervision over tribal monies or properties a fiduciary responsibility exists.

The Court defined the Federal Government's duties as trustee to be similar to those of a private trustee, although the common law of trusts could not be grafted completely on to the tribal/federal trust relationship. Each case needs be decided on its own merit.

## APPENDIX D
## CURRENT BIA SYSTEM FOR MANAGING TRIBAL TRUST FUNDS:

Organization:

The BIA is organized in a very decentralized fashion. There are 93 Agency offices located throughout the United States in close proximity to reservations, which are organized under 12 Area offices. Tribes communitcate directly with their Agency and/or Area offices, which are responsible for receiving, recording and depositing money into Federal Reserve banks. Area offices, in turn, communicate with the coordinating headquarters for trust funds, which is located in Albuquerque, New Mexico. The Albuquerque office has both an Investment Branch, which buys and sells securities for the fund accounts, and an Accounting Office, which maintains summary accounts of trust funds based on information given to it by local offices and the investment branch.

The decentralized nature of the BIA means each tribe has its own unique relationship with its Agency and Area offices and resultingly, differing amounts of input into the uses of its funds. However, if a generalization can be made, a tribe will usually get involved with its trust funds in the following way: The tribe is told by its Area office how much money is in the tribe's account and the tribe prepares an annual budget for those funds based on the applicable restrictions of the account. Each Area, (and a few Agencies) has an Investment Coordinator (IC) who is to assist tribes in preparing budgets, setting investment objectives and understanding what can be done with funds. However, these ICs are often given other primary duties and are seldom full time investment adivsors. Most have no training or expertise in investments and BIA personnel admit that the system is inadequate to provide any real technical assistance to tribes. (3)

As long as the tribe's budget request is shown to be for the legal use of the tribe, it should be approved at the Area level. ibes will be denied budget requests if they exceed the amount of funds in their account. But tribes could theoreticlly draw down their whole trust fund account in one budget year if it is for legal tribal purposes, if it does not violate judgment plans or other restrictions, and if it is approved by the Area director. In this sense, trust funds look more like savings accounts for tribes than private trust funds for beneficiaries. Similarily, if a tribe has leasing or mineral royalty income, the money could simply be passed through the BIA and, absent any restrictions, be available for for tribal luse as outlined in their approved tribal budget.

The Area Director has final authority to approve tribal budgets, although there is an appeal process to the Secretary if tribes want to protest an Area Director's action. (98) Area officers then communicate the tribe's investment needs to the Trust Fund Division in Albuquerque, which in turn makes appropriate investments and accountings. Tribes need never talk to the Albuquerque office, although some have been known to.

Investments:

If the Investment Branch does not get any specific request from the tribe via the Agency or Area office, it will invest the account in liquid funds of less than a year. (99) While this practice does not generate high returns, personnel feel this allows tribes to have more flexibility without paying any penalties.

The BIA uses no published guidelines or regulations when making investments. Rather, personnel say that since they limit investments largely to Certificate of Deposits (CDs) and Treasury bills, there is very little variation and therefore little need for regulations. (100) The Branch of Investments has approved roughly 600 banks as having the acceptable guarantee required by statute. The Branch holds a weekly bid to see which of those banks are offering the highest rates on those guaranteed securities and then invests different tribes' accounts in the highest bearing banks for the appropriate maturity dates.(101) There are currently no pooled accounts for tribal funds.

While options for tribal investments are relatively limited due to the requirement that they be federally guaranteed, the Branch of Investments has not chosen to use even many of the options contained in that category. For example, it seldom invests in government agencies, such as the TVA, or in Federal Housing Administration obligations, which are allowed. Under existing law it also appears that the BIA could invest in the 90% U.S. guaranteed portion of many loans made to tribes, and thereby encourage a market for such loans to tribes. (102) Since the BIA has largely invested tribal funds in CDs, the only real choice a tribe has is to specify the lengths of time it wants its money invested.

Investing in Local Banks:

At various times, different tribes have requested that the Branch of Investments invest tribal funds in local banks so the tribe can use the relationship with the local bank to further leverage economic development on the reservation. The BIA's response has been to advise the tribe that funds legally can only be invested in a bank that has sufficient collateral to cover the investment and that is the highest bidder for that week.

If the tribe is willing to forgoe some extra income to have their money in an approved bank of their choosing, the BIA would not allow it. Ross Swimmer, Assistant Secretary for Indian Affairs, testifed that, "because it's a trustee relationship,... we could not, unless the tribe withdrew the money from our system, allow them to invest the money at a lower rate of interest someplace else than what we could obtain." (103) Joe Weller at the Branch of Investments said in an interview that he was unaware of any tribe pushing this issue and therefore the hard legal decision has never had to be made.

Rate of Return:

Even though the BIA has been getting higher rates of return than average for those investments, it has also been criticized for the practices leading to those returns. (104) Due to poor financial accounting, the General Accounting Office (GAO) found in 1982 that the BIA must rely on mere estimates of fund balances as a basis for investment decisions, resulting in inaccurate

investments. (105) Also, the higest bid the Branch of Investments often accepts is from a failing Savings and Loan that is trying to attract investors but may soon need to be bailed out by the Federal Government. The BIA is taking advantage of federal subsidies implicit in the FDIC and FSLIC insured CD's and "this subsidy is currently under attack by various financial institution regulators and may not be available long-term." (106)

Tribes should not assume such relatively high returns will continue for another reason as well. The BIA's practice of investing in short-term assets allowed it recently to capture rapidly increasing interest rates which were unique to the early 1980's. Now that capital markets have returned to the more traditional pricing behavior that rewards long term investments over short, the BIA's investments may not fare as well.

Accounting and Reporting:

The BIA states that tribes are sent two kinds of reports on their funds. One is a summary report which gives the status of the trust fund and comes from the accounting branch monthly. The other, which comes from the investment branch, is a more detailed investment report which explains where funds are invested, maturity dates, and interest rates.

The BIA has received some of its most scathing criticism for its performance on accounting and reporting. The 1982 GAO report to Congress blatantly stated that "financial information was unreliable and internal controls were inadequate. As a result, accountability for hundreds of millions of dollars ... was lost and the Bureau did not meet its fiduciary responsibilities for the trust funds." (107) This same report found that subsidiary ledgers, maintained on a local level, differed from general ledgers maintained by the Albuquerque office by as much as $25 million in the two year period of study and did not reconcile in that period. (108)

The BIA admits it has not been able to provide adequate accounting. Ross Swimmer testified to the Senate Select Committee on Indian Affairs that "We have a number of deficiencies. I think one individual mentioned it had been 150 years since we have been able to balance the checkbook. Well, there is some truth to that, some exaggeration. But we do ...have a serious problem, and have had for a long time in the trust fund accounting management and investment program." (109)

Tribes have complained that while they are supposed to receive monthly reports, many do not and that some tribes have difficulty determining how much money is in their accounts at any one time. Some tribal officers have stated they find the reports difficult to read and understand. The BIA itself stated in a printed document that currently "these reports are often inaccurate" and that "existing investment performance reporting is limited." (110)

Tribal Input:

The amount of tribal input varies among different Area offices and tribes. But it is clear that, at most, tribes are limited to specifying terms of their investments and suggesting banks in which to invest. In the 1988 BIA budget hearings before the Select Committee, Ross Swimmer confirmed this conclusion:

**Chairman Inoyue:** In making these investments, do you as a matter of practice, consult or receive suggestions from Indian tribes? Or do you just do it on your own initiative?

**Mr. Swimmer:** We pretty much have done it on our own initiative throughout the years. About the only request that we have received from the tribes in the past has been on a maturity...in some cases the tribes can instruct the investment office to give a particular bank an opportunity to bid and to meet the high bid." (37)

Allegedly there would be room under the BIA's new proposal for tribes to be more involved, but no system has been put in place to achieve that. (38)

**ASSESSMENT:**

The above explanation of how well the BIA has and is expected to carry out its fiduciary responsibilities provides a useful way to a assess the BIA's argument that liability concerns stand in the way of increased tribal control. Since the BIA itself has been managing trust funds in apparent violation of its standards of fiduciary responsibility in many areas such as accounting and reporting, some Indian and tribal attorneys claim the BIA is not really worried about liability unless it serves the BIA's purposes. To be overly concerned about breach of trust suits when the BIA for years may have breached its own responsibilities does not seem sincere to these attorneys. (112)

## NOTES

1. Testimony of Sam Goodhope, Former Special Assistant to the Assistant Secretary of Indian Affairs, to the Senate Select Committee on Indian Affairs, September 23, 1986, S. Hrg. 99-917.

2. President Nixon, Special Message to Congress on Indian Affairs, 213 Pub. Papers of Richard Nixon 564, July 8, 1970.

3. Conversation with Arlene Brown, Special Assistant to the Assistant Secretary for Indian Affairs, Bureau of Indian Affairs.
Also, the 1982 GAO's report found that one of the greatest problems with the BIA was a shortage of qualified and trained staff. Report to Congress: Major Improvements Needed in the Bureau of Indian Affairs' Accounting System. GAO/AFMD 82-71, September 8, 1982, p. 13.

4. Ibid., p. i.

5. "BIA: Comparison of Current And Anticipated Procedures Under the Proposal," February 8, 1988, p. 4.;
FY 1984 Annual Report of the BIA Trust Fund Division, p. a-7.

6. Ibid., p. 2.

7. It is instructive to note the exchange between Mr. Pete Taylor, then Chief Counsel for the Senate Select Committee, and Ross Swimmer, Assistant Secretary for Indian Affairs, at the Select Committee's Oversight Hearing on Trust Fund Management. They discussed how much input tribes are allowed in the current system and the potential for greater involvement under the new contract.

**Mr. Taylor:** "This discussion leads...to a final line of questioning, which involves the capacity of tribes to have an input into investment options of their own trust funds, their capacity to have knowledge of moneys that are in their account, and for them to gain some participation in the process. As you point out right now, the investment options are locked in through the Federal statutes. But what procedure is presently followed so that there is an opportunity for consultation with the separate tribes ... with respect to investment of their trust funds?"

**Mr. Swimmer:** "The tribes do have the opportunity to visit Albuquerque. They sometimes will give instructions such as designating depositories, assuming that they meet that high rate of interest and what have you. But I will deter to John (Vale) on the investment opportunities. Generally, I think the office has been pretty much limited to CD's from different banks.

**Mr. Vale:** "Basically, the criteria for investment funds is set by Treasury statute, and at the present time the tribes have an input as to the terms of their investment....Through this contract, I think it would allow the Treasury staff to consult with the individuals in the tribes more than they are now.

38. Cont.

**Mr. Taylor:** It would make the knowledge base that is available to you,..that could also become available to the tribes as well, couldn't it?

**Mr. Swimmer:** Yes; it could.
**Mr. Vale:** Yes.

**Mr. Taylor:** I know that there is a cadre of tribal investment and finance officers building. It seems to me that it is a valuable tool that could be available and might fit well into this."

However, Sam Goodhope's testimony at the same hearing points out how unlikely such utilization will be: "The procurement request places responsibility with the BIA to increase the interaction between tribes and the contractor in developing investment strategies and in reviewing investment performance. To do so, this requires an efficient investment coordination system between the BIA and the tribes."

Indian Trust Fund Oversight Hearing, September 23, 1986.

8. FY 1988 Budget Hearing, February 9, 1987, p. 36.

9. "Price Waterhouse In-Depth Review of Indian Trust Funds for the Bureau of Indian Affairs, Task V Recommendations," January 11, 1984, p.1.

10. Testimony of Sam Goodhope, Trust Fund Oversight Hearing, p. 17.

11. This phrase was often used by BIA personnel in explaining the proposed system, yet it was never clear what the second and or third "steps" might be and if they could possibly include greater tribal participation.

Question #61 of the "BIA: Questions and Answers" says that "the proposal would enable the Bureau to standardize the way cash deposits, disbursements, transfers, investments and accounting is handled. This and other improvements would address many operational deficiencies in our current systems and thereby upgrade the quality of trust services to Indian beneficiaries. While they are not instant solutions to our in-house management problems, the proposed contracting of such services would be an important step forward."

12. For a concise explanation of this "Mellon Bank controversy," (so named because Mellon Bank was allegedly awarded the contract by the BIA before Tribes were told of the plan to contract out management), see FNFP's "Business Alert", Vol 2, 1987, pgs. 3-6.

13. Question #134 of the "BIA: Questions and Answers" asks:
"Does this contracting proposal constitute a delegation of trust responsibility?
Answer: This proposal does not constitute a delegation of trust responsibility. Moreoever, the proposed improvements would in no way diminish our responsibility..." See also Question #60: "BIA: Questions and Answers"

14. Conversation with Arlene Brown, Special Assistant to the Assistant Secretary for Indian Affiars. See also Questions #121 and #107 of the "BIA: Questions and Answers," February 8, 1988.

## NOTES

15. Question #106 of the "BIA: Questions and Answers" asks: "What can tribes expect in terms of investment assistance and coordination? Answer: Our investment staff would continue to work with tribes to determine their cash requirements and to provide assistance in selecting those investments portfolio options which would best meet their liquidity needs... In addition, we are open to any suggestions in developing better procedures for tribal cash planning and investment coordination."

16. JD Colbert, former Special Assistant to the Office of Trust Responsibility and currently with the Department of Interior's Finance office, stated in a telephone interview that "Indian law is one of the vagues aspects of American law, and trust fund law is one of the vaguest aspects of Indian law."

17. Seminole Nation v. United States, 316 U.S. 286 (1942).

18. Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (D.C. Cal. 1973); Cheyenne Arapaho Tribe of Indians of Oklahoma v. United States, 512 F. 2d 1390 (Ct. Cl. 1975).

19. Telephone conversation with Sam DeLoria, Director of the American Indian Law Center, University of New Mexico Law School.

Mr. DeLoria is not alone in this conclusion:

In a review of the November 1984 Report of the Presidential Commission on Indian Reservation Economies, Melanie Beth Oliviero wrote in Indian Truth, that "the need to 'reduce the federal presence' is emphasized simultaneously with the 'maintenance of the federal trust responsibility.' How will these two polar aspects be reconciled?" (February 1985 at page 5).

Robert Nelson wrote in his paper "Native Americans and the Bureaucracy: A Brief History of the Theory and the Practice of the Federal Trust Responsibility for American Indians" that "some observers have concluded that ... the concepts of self-determination and trust protection are contradictory." (May, 1987 at page 4).

20. Summary, Issues and Comments: Price Waterhouse In-Depth Review of Indian Trust Funds, 1985, p. 3.

21. Berkey, Curtis,

For an excellent overview of how various treaties dealt with trust funds, see Curtis Berkey's paper "Historical and Legal Analysis of the Federal Government's Fiduciaray Duties Regarding American Indian Trust Funds", (Indian Resource Law Center, November 1986).

All information on treaties contained in this paper come from that source; See, e.g.,

Choctaw Treaty of 1820 was the first treaty to set up a tribal fund, which was to be used for Choctaw schools.

Treaty with the Senecas (in Ohio) of 1831 was the first treaty where the U.S. agreed to pay interest, which was set at 5% annually.

Treaty with the Sioux of 1837 specifies interest at 5% annually, as does the Treaty with the Wyandots of 1850.

22. Ibid., p.12.

23. 25 CFR 87.11.

## NOTES

24. 25 CFR 87.3.

25. P.L. 99-346, June 30, 1986.

The Saginaw experience shows that while tribal input may be authorized for trust funds coming out of judgment fund awards, the BIA has discretion to oppose that input. Congress retains the ultimate discretionary power, but securing Congressional approval through special legislation may be a burdensome way for a tribe to get their wishes respected.

For a more thorough overview of the BIA's resistance to the Saginaw's proposal, see Senate Select Committee on Indian Affairs Hearing on S.2823, August 6, 1984 and Senate Select Committee Hearing on S. 1106, July 10, 1985.

26. See Felix Cohen's Handbook of Federal Indian Law, (Albuquerque: University of New Mexico Press, 1982), Chp. 5, Sec. 10 for examples of other statutes applicable to specific tribal trust funds.

27. Telephone conversations with Duard Barnes, Solicitor's Office, Indian Division, Department of Interior, and Ralph Reeser, Office of Legislation, Bureau of Indian Affairs.

25 USC 123 (c) is a relatively new law, passed in 1984. Prior to it, all advancements or expenditures needed to be approved by Congress and this was done through the annual Department of Interior's appropriations bill. This was a relatively cumbersome process and 25 USC 123 (c) was meant to give the Secretary approval to disburse funds to tribes that submit plans or budgets for the uses of those funds, without securing Congressional approval each time.

28. Navajo v. United States, 624 F.2d 43 (Ct. Cl. 1981). See also Duncan v. United States, 667 F.2d (Ct. Cl. 1981).

Two relatively recent Supreme Court cases, known as "Mitchell I" and "Mitchell II" gave conflicting signals as to the justification of the Federal Government's role as trustee. In a 1980 case involving Indian land governed by the General Allotment Act, United States v. Mitchell, 445 U.S. 535 (1980) rejected the idea that fiduciary duties can arise from a general trust relationship. Mitchell I required that such duties be expressed unambiguously in a statute, regulation or treaty.

However, in United States v. Mitchell, 463 U.S. 206 (1983), the general trust relationship was considered sufficient. The Court cited Navajo v. U.S. in this later case and said that when the Federal Government has taken on control of tribal monies, a fiduciary connection exists even though nothing is said expressly in the statute about a trust fund or trust connection.

Given the relatively recent nature of these seemingly conflicting cases, it is not clear what the exact implications will be for future cases on the trust relationship. Nor is it clear how, concerning the specific issue of trust fund management, the federal government will try to buttress arguments for or against greater tribal control.

Perhaps one of the most definitive works on the subject of the Federal /tribal trust relationship is Reid Payton Chambers' "Judicial Enforcement of the Federal Trust Responsibility to Indians", Stanford Law Review, May 1985. See also Nel Newton's "Enforcing the Federal-Indian Trust Relationship after Mitchell", Catholic University Law Review, Vol. 31:635, 1982.

## NOTES

29. Cheyenne Arapaho Tribes of Oklahoma v. U.S. at 1392: "It is clear from past opinions of this court and of the Supreme Court, and from the actions of both Congress and the Executive Branch, that funds appropriated to Indians to satisfy judments of the Indian Claims Commission or of this court, as well as funds produced by tribal activities, are, when kept in the Treasury, held in trust for Indians."

See also Seminole Nation v. U.S. at 297 where the court "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.." and said the government's conduct must be "be judged by the most exacting fiduciary standards."

30. See Note 18, above.

31. Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944); Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977)

See, e.g., the recent case commonly referred to as Mitchell II at 225, where the Supreme Court held that "all the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees) and a trust corpus (Indian timber, lands, funds.)" And in Manchester Band of Pomo Indians v. United States, at 818: "Reasoning that the conduct of the government as a trustee was measured by the same standards applicable to private trustees, the court held the governmnet liable for breach of its duty to use reasonable care and skill to make the trust property productive."

See Also "Indians May Sue for Breach of Federal Trust: U.S. v. Mitchell: Casenotes", Boston College Law Review, May, 1985, p. 820.

32. George T. Bogert, Trusts, (St. Paul: West Publishing Co., 1987), Secs. 93-96.

The two most important duties of a trustee are to have loyalty to the beneficiary and to exercise the care and prudence of an ordinarily skilled man conducting business either for himself. Some duties require the higher standard of that of an ordinary person conducting business for another. Good faith or intentions does not excuse a standard of less than that of an "ordinary prudent man", nor does having wide discretionary powers. And, a professional trustee, or others that are considered "unusually competent", may be held to a higher standard because they are specialists with expertise.

33. Chambers, p. 1234.

See also the Senate Select Committee's August 6, 1984 Hearing on S.2328 where Mr. Fritz, Deputy Assistant Secretary of Indian Affairs told Senator DeConcini that "In my perspective, Congress can use its judgment to do what it will. It has primacy pursuant to the Constitution, so I suppose that in its wisdom, it could act in any fashion it would so choose."

NOTES

34. Therefore, borrowing from the common law on trusts, the BIA is not implementing a "passive trust" in which the trustee has only mechanical and prescribed duties, but rather an "active" trust in which "the trustee has affirmative duties to manage.. and make investments." Bogert, Secs. 45-47.

Sam DeLoria suggested that one way to assure that tribal funds are protected by trust but that the BIA is limited in its powers would be to borrow from the concept of passive trusts and somehow have the BIA only carry out specific, prescribed functions as the trustee.

35. Berkey, p. 28;

In American Indians Residing on the Maraicopa Ak-Chin Reservation v. United States, 667 F.2d 980 (ct. Cl. 1981), the court applied the "Navajo" rule requiring the government to account for all Indian money its custody, including money held outside the Treasury in a private bank. If the government contends that control of the funds has been transferred to the tribe, the U.S. has the burden of proving that fact, and "where tribal leadership did not control use of the money, the Government must account." (at 1003).

36. Navajo v. United States, 624 F.2d 981 (Ct. Cl. 1980) at 988;
Also, Judge Nichols wrote in his dissent to "Mitchell II" that "Congress's function as trustee of money and property has always been treated differently from that of private trustee." See also Oneida Tribe v. United States, 165 Ct. Cl. 487, cert denied, 379 U.S. 946 (1964).

37. Manchester Band of Pomo Indians v. U.S., 363 F. Supp. 1238 (N.D. Cal. 1973) at 1248.

38. Bogert, Sec. 140.

39. Ibid., Sec. 101;
See also Manchester Band of Pomo Indians v. U.S., at 1245-6; Cheyenne Arapaho Tribe of Indians of Oklahoma v. U.S., at 1393.

40. Bogert, Sec.106.

41. If tribes want the BIA to invest their funds beyond those now authorized by law, legislation would be required. The Library of Congress reported to the American Indian National Bank that pooling funds in a mutual funds, even of authorized investments, would require an amendment to 25 USC 162a.
However, any such legislative change could be made based on those approved by common law, or taken from the model established in 25 CFR 116: Creation of Trusts for Restricted Property of Indians, Five Civilized Tribes, Oklahoma.

For a discussion of the pros and cons of expanding the BIA's legal investment options, see the September 23, 1986 Indian Trust Fund Oversight Hearing of the Senate Select Committee, pgs. 9-19.
Sam Goodhope, former Special Assistant to the Assistant Secretary for Indian Affairs, testified at that hearing that, given the existing organizaztional structure, it may be premature to expand the BIA's investment authority. "The part of the investment process that is missing at this point

## NOTES

67. See the Senate Select Committee's December 22, 1987 Report on S. 1703 Amendments to the Indian Self-Determination Act which contained the following statment in support of tribes securing their own technical assistance:

The act should "authorize the Secretary to provide a grant to a tribe to obtain technical assistance in program planning...whether or not such technical assistance is available from a Federal agency. Technical assistance may be provided by sources chosen by the tribe..(and ) include other tribes, tribal organizations, local experts, sttate and county agencies...It is apparent that many tribal organizations have greater technical capabilities in the areas of program planning and evaluation.. than the BIA... For too long, however, federal agencies have monopolized technical assistance funds and have used those resources to establish centralized offices which are inaccessible to most tribes..."

68. American Indian Policy Review Commission, Final Report, May 17, 1977, p. 16.

69. The Commission did not view such waivers as eliminating the BIA's trust responsibility. The Report said, " a tribal override of a Secretarial disapproval shall not diminish the trust character of the asset in question. The trust responsibility of the United States to aid the tribe in the implementation of their decision and to protect the future well-being of the asset shall continue undiminished." (at

70. 25 USC 1724.

71. The intent of the law was to obligate the Secretary to agree to any reasonable terms for investment, using the Uniform Management of Institutional Funds Act as a standard for what is "reasonable."

72. In an interview, Tom Tureen, partner at Tribal Assets Management and investment advisor to the Maine tribes, stated that neither tribe has ever really used this portion of the law, except for the first few months after the law was passed. Both tribes have instead chosen to be cautious with their funds and keep them in short term CD's. For this strategy, the BIA's management has been sufficient, particularly since the BIA has been getting a relatively high rate of return on such investments.

73. 25 USC 450 (a).

74. Senate Select Committee Report on Amendments to P.L. 93-638, (S. 1703) p. 3

75. Ibid., p. 28.

76. 25 CFR 271.33

77. Baekey, Carole A., "A Summary Review of the Department of Interior's 'Report of the Task Force on Indian Economic Development'", January 20, 1987, p. 24.

## NOTES

77a. 25 CFR 271. Subpart C is titled "Additional Requirements for Trust Responsibilities" and states that "this subpart gives additional requirements applicable to the application and appraoval process for contracts under this part which involved the Bureau's trust responsibilities in areas of natural resources, such as assessments, irrigation, real estate, forestry, range management, wildlife and parks, water inventories and hunting and fishing."

78. See Note 74, p. 25.

79. Ibid., p. 25

80. The Answer to Question #60, "BIA: Question and Answers" states that "the procurement proposal would not grant any management nor decision-making functions to the prospective contractor. Consistent with our legal responsibility, the contractor would only provide transactional or advisory services in nature. The Bureau would continue to direct, monitor and authorize those transactions and activities performed by the contractor."

81. The Committee's Report on S. 1703, says that "clearly the Secretary of the Interior continues to maintain a trust responsibility for tribal resources when the tribe operates a program under a self-determination contract." p. 25.

Also see Question #130, "BIA: Questions and Answers": "The current contracting effort would not alter the Bureau's current liability for failure to administer the funds properly."

82. Eric Eberhard, ex-tribal attorney for the Navajo, said that when that tribe was preparing to contract out trust fund management, they had prepared ways they were going to diminish Albuquerque's fears of liability. First, they were only going to put funds into governmentally guaranteed securities. Since they have a substantial amount of money in trust, they were were going to use more than one investment manager to handle different amounts of money. And they were going to only use invesmtent managers who had experience with similar types of investments and had a reputable, proven record.

The money would be protected by locking it into a long range plan where the principal could not be used for twenty years, and then it would require a 2/3 vote of the registered tribal voters and 2/3 vote of the council to be used.

83. From Committee's Report on S. 1703: "Tribes with no independent income are faced with the onerous choice of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems." In some cases, tribes simply choose to retrocede the contract back to the Federal agency, defeating the purpose of self-determination.

84. Testimony of William Mayo, Assistant to the President, Tanana Chiefs Conference to the Senate Select Committee's Hearing on the Public Law 93-638, April 22, 1987, p. 26.

is that the investment objectives and goals of the beneficiaries, the clients, are not being at this time transmitted to those people who are doing the investing. So, really before that part of the problem is addressed or is taken care of, it would be difficult to justify any expansion in the investment authority because when you expand investment authority and you still don't have a program for developing investment objectives and goals, it becomes even more difficult to meet industry standards."

Common law holds that if a private trustee has discretionary powers, h/she may go outside of statutorily declared legal investments, so long as the trustee uses good faith and reasonable prudence. However, these investments should not include speculative ventures, because then it will be hard to protect the principal. Bogert, Sec. 102, especially at p. 366-7.

42. 25 CFR 116.

43. Cheyenne Arapaho Tribe of Indians of Oklahoma v. U.S., at 1396: "The fiduciary duty which the U.S. undertook with respect to these funds includes the obligation to maximize the trust income by prudent investment and the trustee has the burden of proof to justify less than a maximum return." See also Question #123 of "BIA's: Question and Answers."

44. Bogert, Sec. 102.

45. Bogert, Sec. 106. This is called the "Prudent Investor Rule."

Also, liability for less than maximum return is lessened if the tribes were to agree to the action knowing it would lead to a lower return. The American Indian National Bank (AINB) researched their proposal to establish a mutual fund for tribal trust funds in 1985, and was told by John Fritz, Interim Acting Assistant Secretary, that the "Secretary's maximum return liability may be eased somewhat if tribes become overriding participants in the Secretary's investment decisions." Internal AINB memo, March 8, 1985, p. 3.

46. Bogert, Sec. 93.

47. Opinion of Associate Solicitor Thomas Fredericks, "Pooling of Tribal Funds for Investment Purposes", January 24, 1978; Opinion of Associate Solicitor Tim Vollman, "Pooling of Tribal Funds for Investment Purposes", February 10, 1986.

48. Testimony of Mike Smokovich, Financial Management Service, Department of the Treasury to the Senate Select Committee's Hearing on Trust Fund Management: "In processing transactions, BIA could seek advice from whoever they wanted to. They could have six invesment counselors if they chose to."

49. Opinion of Associate Solicitor Tim Vollman, "Investment of Indian Trust Funds", May 13, 1985, pgs. 6-7.

50. Bogert, Sec. 30; 106.

51.

51. Office of the Solicitor: "Application of Bernice Muskrat Under 25 USC 119", 12 Indian Law Reporter 7022, August 1985.

## NOTES

See also Cohen, Chp. 15, Sec. 22.6: "Tribal funds are the property of the tribe as an entity rather than common property of individual members."

52. Bogert, Sec. 140; 141.

53. Ibid., Sec. 102.
Cheyenne Arapho Tribe of Indians of Oklahoma v. U.S., at 1396.

54. Bogerts, Sec. 102; See also Note 45, above.

55. See Note 51, above.

56. Summary, Issues and Comments: p. 6.

57. Bogert, Sec. 152.

58. Ibid., Sec. 160.

59. Berkey, p. 33.

60. However, John Fritz told the AINB that administrative costs could be passed on to the tribal beneficiaries if they were devised more as a "service" than as a "trust" function. Internal AINB Memo, March 8, 1985, p. 2.

61. There may be some question if the Secretary can accomplish this without a legislative change. A relatively old Opinion of the Solicitor, dated June 26, 1929 held that the Secretary was not allowed to create trusts for restricted Indian funds unless authorization was first given by Congress. M-25258: "Creation of Trusts by Restricted Indians", Opinions of the Solicitor, Vol. II, p. 218. This opinion addressed trusts for individual Indians of the Five Civilized Tribes of Oklahoma and legislation was ultimately passed and regulations written in 1957 authorizing such trusts. (See Appendix B)

62. According to common law, this could particularly be justified if a tribe has had especially hostile relations with the BIA. See Note 58, above.

63. 25 USC 1195: "The $200,000 withheld from per capita distribution... shall be invested or placed in trust with an institutional trustee by the Secretary of the Interior, under terms and conditions approved by the tribal governing body."

64. 25 USC 1162.

65. 25 CFR Part 116.

66. If it is too late to include it in this RFP, it could be attached to the renewal of the contract in 1-3 years.

85.) Senate Hearing on P.L. 93-638, S. Hrg. 100-250, p. 27.

See also the testimony of Gerald James of the Lummi Indian Business Council at the Senate Select Committee's April 9, 1987 Hearing on Economic Development Conditions, p. 13: "The fluctuations in 638 contracts have caused so much instability in tribal governmnet that it is very hard to operate. You are spending over half your time chasing around grants and contracts, rather than implementing the good goals and objectives and accomplishmnets that should be derived from PL 93-638."

86. S.1703, 100th Congress
Co-operative Agreements:
But since tribes have had problems with the bureaucracy of implementing 638 contracts, some have suggested adopting a simplified version that gets at the same intent. One model that has been suggested is the Uniform Co-op Agreement Act which, as Eric Eberhard testifed to the Hearing on Economic Development Conditions, "is very simple. Any function that is performed by the Federal Government can be performed by a unit of State or local government through an agreement between the appropriate Federal agency and that State. There have never been any sizeable regs published for that act, and there are ongoing agreements between the Federal Government and the States, negotiated on a case-by-case basis. They trun out to be 2-page contracts, and the real problem getting them negotiated is the agencies have never thought of the idea of using this legal mechanism to deal with tribes."
The Committee's Report on S. 1703 also suggest this idea. "Tribes also have the right not to contract. Instead, tribes may participate with Federal agencies in cooperative, joint planning efforts to determine the manner in which those Federal agencies may better deliver federall-operated services to such tribes."
President Reagan's Task Force also recommended that "the BIA should experiment with co-operative management agreements with tribes as an alternative to contracting. If new legislation is required for htis purpose, the Department should seek it." Baekey, p. 24.

87. FY 1984 Annual Report, p. 9. The same document also stated that "tribal funds are invested unless the tribe that owns the funds objects; the decision to not invest is the result of the council's determination." p. 22

88. "BIA: Contract for Trust Fund Services, Questions and Answers", undated version; Question #44.

89. Senate Select Committee Hearing on S. 1340, Clallam Judgment Funds, July 30, 1981, p.9.

90. As the Saginaw Chippewa of Michigan found, earning this "right" can be a difficult and lengthy process. See Note 25 above.

91. Even within the plan that a tribe may set for its invesments, it is not sensible to be too detailed or restrictive. Karl Funke of Funke and Associates pointed out the experience of the Penobscot and Passsamaquoddy Tribes to the Senate Select Committee's July 10, 1985 Hearing on the Saginaw Chippewa's Judgment Fund. "They had no preset plan for the use of their $84

million, and it is ridiculous to try and set in concrete any kind of formal plan for an ongoing fund. Bank and investment houses make decisions on an hourly and daily basis as to where they're going to be putting their money, and I don't think the (Saginaw) tribe should be forced to bootstrap themselves into a long-range, fixed plan as to how they're going to be utilizing these funds. It doesn't make any sense in the investment world, and any banker or investment firm will tell you you're crazy if you lock yourself into a preset plan." pgs. 58-9

92. There are, however, arguments against even trying to placate the BIA's fears. One arugment against setting guidelines is as follows: Determining when a tribe has the capacity to manage its own funds is an outdated interpretation of tribes as incompetent beneficiaris in the trust relationship. A more current view of tribes as sovereign governments would hold that tribes simply have the right to control their assets and the BIA has no authority to determine a tribe's ability to do so. True self-determination may include the right to fail as well as succeed.

93. Daniel Zilkah of Tribal Assets Management and investment manager for the Penobscot and Passamaquoddy tribes, says that he has daily contract with tribal managers about the tribes' investments.

94. Some tribes may have issues regarding reservation residents vs. non-reservation residents such that where it becomes difficult to reach consensus on a plan for the money. This was particularly true for the Saginaw Chippewa with their Judgment Fund award, and the tribe ultimately modified its constitution to allow input for non-reservation members.

95. Eric Eberhard, ex-tribal attorney for the Navajo, stated that one of the Navajo's objectives in controlling its trust funds was to gain some regional clout with its money so that it could secure prime rates for its projects and gain further capital for economic development.

98. Joe Weller, of the Trust Fund Division in Albuquerque, explained in a telephone interview that such line authority is outlined in the BIA's "Delegation Order."
The appeals process is authorized in 25 CFR Section 2.

99. An exception to this is the roughly $180 million fund held for the Consolidated Sioux, which is invested for much longer periods because the BIA does not expect any instruction to be forthcoming from the Sioux, nor any withdrawals to be made for at least five years.

100. Telephone conversation with Joe Weller.
Summary, Issues and Comments:" states that "it is interesting to note that at the time of the Price Waterhouse study, the BIA did not have a published statement of investment objectives." at p.6.

## NOTES: PERSONAL CONTACTS

I appreciate the time, effort and information numerous Indian lawyers, BIA personnel, and Senate Select Committe staffers were kind enough to make available to me during my research. While it is not possible to list them all here, I would like to especially thank the following people for the extra help and resources they provided: Arlene Brown, Theresa Carmody, Curtis Berkey, Eric Eberhard, Karl Funke, Sam Goodhope, Michael Hughes, Patti Marx, Phil Rilatos, Pete Taylor, Tom Tureen, Joe Weller and Leroy Wilder.

## NOTES

101. In a Trust Fund Oversight Hearing held by the Senate Select Committee on September 23, 1986, Mr. Mike Smokovich, Finance Management Service, Department of the Treasury, testified: "Our requirements are basically that, to the extent a depositor places money in a financial institution and the amount of the deposit is going to be in excess of the FDIC insurance or some other insurance agency's insurance, that the bank put certain forms of collateral.

In a telephone conversation, Joe Weller stated that the Branch of Investments uses five different ratios to determine whether a bank is acceptable, including percentage of of bad loans, percentage of unencumbered capital, and a total asset to loan ratio.

102. Summary, Issues and Comments:, p. 22

103. Testimony to the Senate Select Commmittee Hearing on the FY 1988 Budget, February 19, 1987, p. 40.

?? 28. Telephone conversation with Joe Weller, who also said that when tribes have been informed that they would get a lower rate of return, the tribes themselves have opted against using the local bank.

104. In 1984, according to the BIA's Annual Report, 79.2% of the total investments were in CDs and the remaining 20.8% were in government securities and agency issues. The average rate of return on trust funds invested by the BIA was 10.56%. According to the Price Waterhouse review, these rates exceeded returns to privately managed funds with similar investment authorization during the 1976-82 period.

106. Summary, Issues and Comments:, p. 17.

105. 1982 GAO Report, p. iii.

107. See Note 4, above.

108. Ibid., p. 18.;
and Summary, Issues and Comments:, p. 38.

109. See note 8, above.

110. See Note 5, above.

111. See Note 7, above.

112. Conversations with Leroy Wilder, attorney with Hobbs, Straus, Dean and Wilder; Sam Goodhope, attorney with Swidler and Berlin; Eric Eberhard, attorney with Gover, Stetson and Williams.

## BUREAU OF INDIAN AFFAIRS DOCUMENTS:


United States Department of the Interior, Bureau of Indian Affairs, "Expanded Tribal Contracting of Fish and Wildlife Resource Programs." Internal Memorandum, November 5, 1986.

-----, "Fiscal Year 1984 Annual Report of the Office of Trust Responsibilities, Division of Trust Funds Management, Albuquerque, New Mexico."

-----, "H.R. 4174, A Bill to Amend the Indian Self-Determination Act of 1974," Memorandum to Congressional and Legislative Affairs, undated.

-----, "Request for Proposals for Financial Management Services for the Bureau of Indian Affairs: DRAFT," February 2, 28, 1987.

-----, "Request for Proposals for Financial Management Services for the Bureau of Indian Affairs: DRAFT," April 22, 1986.

-----, "Trust Fund Management Enhancements: DRAFT," undated.

-----, "Contract for Trust Fund Services: Questions and Answers: DRAFT," undated.

-----, "Proposal for Financial Trust Fund Services: Questions and Answers," February 8, 1988.

-----, "Comparison of Current and Anticipated Procedures Under the Proposal; Summary of Recommendations," February 8, 1988.

-----, "News Release: Contract Award for BIA Financial Trust Services," October 6, 1986.


## OPINION'S OF THE SOLICITOR OF INDIAN AFFAIRS:


-----, "Application of Bernice Muskrat Under 25 USC 119," May 3, 1985, Office of the Solicitor, 12 Indian Law Review 7020, August 1985.

-----, "Creation of Trusts by Restricted Indians," Opinions of the Solicitor, M-25258, June 26, 1929.

-----, "Expenditure of Tribal Funds," Opinions of the Solicitor, Volume Two October 5, 1936.

-----, "Investment of Indian Trust Funds," Memorandum from the Associate Solicitor of Indian Affairs to the Deputy Assistant Secretary for Indian Affairs, B.I.A. IA.0598, May 13, 1985.

-----, "Pooling of Tribal Funds for Investment Purposes," Memorandum from the Associate Solicitor of Indian Affairs to the Deputy Assistant Secretary of Indian Affairs, January 24, 1978.

-----, "Pooling of Tribal Funds for Investment Purposes," Memorandum from the Associate Solicitor of Indian Affairs to the Assistant Secretary of Indian Affairs, BIA.IA.0694, February 10, 1986.

-----, "Use of Trust Funds - Annuity Policies," Opinions of the Solicitor, M-28256, April 28, 1936.

HEARINGS AND REPORTS OF THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS:

Clallam Judgment Funds, 97th Congress, First Session, July 30, 1981.

Fiscal Year 1988 Budget, 100th Congress, First Session, February 19, 1987, S. Hrg. 100-102.

Indian Economic Development Conditions, 100th Congress, First Session, April 9, 1987, S. Hrg. 100-189.

Indian Self-Determination and Education Assistance Act, P.L. 93-638, 100th Congress, First Session, April 22, 1987, S. Hrg. 100-250.

Indian Self-Determination and Education Assistance Act Amendments of 1987, Report of Sen. Inoyue, December 22, 1987, Report 100-274.

Indian Trust Fund Oversight, 99th Congress, Second Session, September 23, 1986, S. Hrg. 99-917.

Making Miscellaneous Technical and Minor Amendments to Laws Relating to Indians, and for Other Purposes, Report of Senator Inoyue, September 29, 1987, Report 100-186.

Shoalwater Bay Indian Tribe - Dexter by the Sea Claim Settlement Act, 99th Congress, First Session, August 30, 1983, S. Hrg. 98-406.

To Provide for the Use and Distribution of Funds Awarded to the Saginaw Chippewa Tribe of Michigan, 99th Congress, First Session, July 10, 1985, S. Hrg. 99-263.

To Provide for the Use and Distribution of Funds to the Saginaw Chippewa Tribe in Dockets Numbered 59 and 13 E, 99th Congress, Second Session, August 6, 1984, S. Hrg. 98-1028.

Letter from the Senate Select Committee to Assistant Secretary Ross Swimmer, February 4, 1987.

Internal Memorandum: "Investment and Management of Indian Trust Funds," February 3, 1987.

Internal Memoranda to the Files: "Tribal Trust Funds," January 15 and 20, 1987.

## SPECIAL REPORTS:

American Indian Policy Review Commission, Final Report. Volume One, U.S. Government Printing Office, May 17, 1977.

Comptroller General of the United States, Report to Congress: Inappropriate Use of An Indian Trust Fund to Subsidize BIA Activities. B-114868, May, 1980.

General Accounting Office, Report to the Congress: Major Improvements Needed in the Bureau of Indian Affairs' Accounting System. GAO/AFMD 82-71, September 8, 1982.

Price Waterhouse, In Depth Review of Indian Trust Funds for the Bureau of Indian Affairs, Task V: Recommendations. January 11, 1984.

## MISCELLANEOUS:

American Indian National Bank, "An Investment Proposal for Indian Tribal Trust Funds," undated.

-----, Internal Memorandum: "Briefing on Tribal Trust Fund Investment Program," March 26, 1985.

-----, Internal Memorandum: "Status of Trust Fund Proposal with the Federal Government," March 8, 1985.

# BIBLIOGRAPHY

## BOOKS:


Bogert, George T., Trusts, Sixth Edition. St. Paul: West Publishing Company, 1987.

Cohen, Felix S., Handbook of Federal Indian Law. Albuquerque: University of New Mexico Press, 1982.

Scott, Austin, Reporter, Restatement of the Law of Trusts, Second. Washington D.C.: American Law Institute Publishers, 1959.

Code of Federal Regulations, Title 25. Washington D.C.: U.S. Government Printing Office, 1987.


## LAW REVIEW ARTICLES:


Barsh, Russell Lawrence, "The BIA Organization Follies of 1978: A Lesson in Bureaucratic Self-Defense." American Indian Law Review, Vol. 7, 1979.

Casenote: "Indians May Sue for Breach of Federal Trust Relationship: United States v. Mitchell." Boston College Law Review, May 1985.

Chambers, Reid Peyton, "Judicial Enforcement of the Federal Trust Responsibility to Indians." Stanford Law Review, Vol. 27: 1213, May 1975.

Newton, Nell Jessup, "Enforcing the Federal - Indian Trust Relationship After Mitchell." Catholic University Law Review, Vol. 31:635, 1982.

Note: "Rethinking the Trust Doctrine in Federal Indian Law." Harvard Law Review, Vol. 98:422, 1984.

## PAPERS:


Baekey, Carole A., "A Summary Review of the Department of Interior's 'Report of the Task Force on Indian Economic Development'." Prittle, Morisset, Schlosser & Ayer, Seattle, Washington, January 20, 1987.

Berkey, Curtis, "Historical and Legal Analysis of the Federal Government's Fiduciary Duties Regarding American Indian Trust Funds." Indian Law Resource Center, Washington D.C., November 1986.

Nelson, Robert H., "Native Americans and the Bureaucracy: A Brief History of the Theory and the Practice of the Federal Trust Responsibility for American Indians." Prepared for the conference on "The American Indian: Culture, Property Rights and Liberty" directed by the Public Research Institute for Public Policy, Alexandria, Virginia, May 20, 1987.

Rankel, Gary L. "Management of the Nation's Indian Fish, Wildlife and Outdoor Recreation Resources From a Trust Responsibility and Rights Protection Perspective." Bureau of Indian Affairs, Washington D.C., prepared for the Justice Department Retreat, Annapolis, Maryland, February 20, 1986.

Murray, James M., Wheelock, Charles F., "An Economic Development Plan for the Saginaw Chippewa Community, Mount Pleasant, Michigan."

"Summary, Issues and Comments: Price Waterhouse In-Depth Review of Indian Trust Funds for the Bureau of Indian Affairs." 1985.


## PERIODICALS / PUBLICATIONS:


"BIA Management of Indian Trust Funds," First Nations Financial Project Business Alert, Vol. 2, First Quarter, 1987.

"Indian Tribes Emerge as Investors with Cautious, Skillful Approach," Wall Street Journal, Nov. 10, 1986.

"Maine's Million-Dollar Indians," Boston Globe, June 21, 1981.

"National Conference of American Indians Testimony on the Administration's FY 1988 Budget Proposals: Transfer of Trust Funds Financial and Investment Management," NCAI Sentinel, March 4, 1987.

"Off Wall Street: What Can A Beneficiary Expect From The Trustee of a Trust Fund?" First Nations Financial Project Business Alert, Vol. 2, 2nd Quarter, 1987.

"Report and Recommendations: The President's Commission on Indian Reservation Economies Took a Long Hard Look at the Facts...But Did It Underrate the Ability of Tribes to Initiate Their Own Alternatives?" Indian Truth, No. 261; February, 1985.

"Saginaw Tribe of Michigan - Special Legislation," First Nations Financial Project Business Alert, Vol. 1, No. 2, Winter 1986.

"Tribal Trust Funds - the Quest for Tribal Involvement," First Nations Financial Project's Business Alert, Vol. 1, No. 3, Summer, 1986.