

**TESTIMONY OF THE INTERTRIBAL TIMBER COUNCIL
REGARDING NATIVE AMERICAN TRUST REFORM
WITHIN THE U.S. DEPARTMENT OF THE INTERIOR
PRESENTED FEBRUARY 26, 2002
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**

Mr. Chairman, members of the Committee, it is my pleasure to appear before you today. My name is Gary S. Morishima. I am here on behalf of the Intertribal Timber Council (ITC) at the request of our President, Nolan Colegrove, Sr. I have served as a Technical Advisor in natural resource management to the Quinault Indian Nation for over thirty years and as a member of the ITC Executive Board since its inception some 27 years ago. I have also been recently appointed as ITC's designated advisor to the Tribal-Interior Trust Reform Task Force (Task Force).

The central message I wish to bring to the Committee is that trust reform is serious stuff. A great deal of money is involved, but at its heart, trust reform goes to the capacity of the United States to properly discharge its fiduciary obligations as trustee for the Indian estate within an evolving, unique government-to-government relationship between Indian tribes and the United States.

We must not permit the debate about trust reform to become trivialized as an exercise of shuffling around boxes in an organization chart. Trust reform must be a commitment, akin to a covenant, to establish accountability in the management of trust funds and in the programs that manage trust resources and provide trust services throughout Indian country. Trust reform must be built, piece-by-piece, in accordance with a thoughtfully developed strategic plan and measurable performance standards which are developed in concert by the trustee and the beneficiaries of the trust.

We are convinced that Indian beneficiaries must have a substantive role in trust reform, now and in the future. Long-lasting and effective solutions to the problems confronting the BIA's administration of its trust responsibilities must be developed collaboratively with the tribal beneficiaries of the trust. The Task Force, which includes tribal and Interior participants, and which has the capacity to draw upon support and outside assistance as needed, presents a rare, and valuable opportunity for methodical evaluation and reform of the federal trust. It is vitally important to the future of Indian country that this opportunity not be squandered.

I would like to share with the Committee a few thoughts and perspectives that may differ significantly from those presented by the other witnesses at this hearing. Our views reflect the lessons learned from nearly three decades of experience in working to improve the management of some of the most important trust resources in Indian country, forests.

The ITC is a nation-wide consortium of over 70 Indian Tribes and Alaska Native Corporations which is devoted to improving the management of natural resources of importance to Native American communities. The 17 million acres of Indian forestland held and managed in trust are a primary renewable natural resource for Indian tribes and individual allottees. This resource is of extreme economic value to tribal communities, both from the standpoint of the millions of dollars in annual income generated from the harvest of forest products and the thousands of jobs it supports, but also because it protects soils and water, produces foods and medicines, materials for housing and artistic expression, habitat for fish and wildlife, and provides opportunities for recreation and

spiritual sanctuaries. Since Indian forests affect tribal communities in so many ways, it is critical that they be managed in accordance with tribal values and needs. Those to whom we entrust the management of our forests, must bear a profound moral and fiduciary obligation to protect the interests of both the present and future generations.

Mr. Chairman, I wish to bring to this hearing the perspective of a tribal organization that has been dedicated to improving the management, utilization, and preservation of this trust resource for over 27 years. Our organization was founded in response to increasing concerns regarding the management of Indian forests by the Bureau of Indian Affairs (BIA). It was born in the muck of conflict and controversy, not unlike that we see surrounding these hearings today – the lack of tribal consultation, timber sales at below fair market value, management practices that paid little heed to tribal values and responded less to concerns for impacts on fish, wildlife, and water. In managing Indian forests, the BIA was following the ultimate model of paternalism, doing what it thought was best for Indians regardless of the views of the beneficiaries of the trust.

To be sure, we did more than our share of complaining and breast beating about the failure of the BIA to fulfill its trust responsibilities and fiduciary obligations. But, Mr. Chairman, we chose a different path to try to shape our collective future. For nearly three decades, the ITC has worked collaboratively in partnership with the BIA, private industry, and academia to explore issues and identify practical strategies and initiatives to promote social, economic and ecological values while protecting and utilizing forests, soil, water, and wildlife. In our view, the wisdom of pursuing this type of collaborative approach has been amply demonstrated. It has made a huge difference in improving accountability for the management of Indian forests. We believe that forestry is by far and away the best resource management program within the BIA because of tribal involvement. Management is not perfect by any means, but it has changed substantially to better meet financial and social needs of tribal communities. Today, many tribal governments are operating their own forestry programs and working relationships between the BIA as trustee and Indian beneficiaries of the trust have improved dramatically. This is because the ITC, the BIA, and others who have joined us in partnership kept the focus on the issues, jointly identifying problems and jointly crafting solutions.

One of the principal initiatives that we successfully undertook was the development of an extremely important piece of legislation. It was the ITC's pleasure to work with this Committee and the U.S. Congress in the consideration and enactment of the National Indian Forest Resources Management Act (NIFRMA), now Title III of Public Law 101-630, signed into law November 28, 1990. NIFRMA affirmed the trust responsibility of the United States and codified management requirements while providing for increased involvement of tribal governments in operating their own forestry programs and development of a professional cadre for management of Indian natural resources.

The ITC Executive Board, and indeed, all our members, have been watching, and to one degree or another participating in, the Interior Department's initiative, announced November 14, 2001, to pursue trust reform, primarily through restructuring (BITAM). For a host of reasons, the ITC Board determined that while BITAM would not effectuate trust reform, the active and high-level attention directed at trust reform issues represented an important opportunity for positive change.

I previously cited NIFRMA because Section 312 requires a comprehensive, independent assessment of the management of Indian forests to be completed every ten years. The

first such assessment, conducted by a blue-ribbon team of forestry professionals and referred to as IFMAT 1, was completed in November, 1993 and distributed to Congress, the Interior Department, and the tribes. Today, with so much attention focused on trust reform, the IFMAT report, and its findings and recommendations ring more true than ever. The IFMAT panel identified strengths and weaknesses of Indian forest management at the national level in its report, and also provided specific observations and recommendations to improve management at the individual reservations visited during its investigations. But it was the Major Recommendation of the report that came immediately to mind when news of Interior's BITAM proposal surfaced: *"redefine the U.S. government's role in discharging its trust responsibility"*. IFMAT concluded that *"BIA forestry should be reorganized to separate technical assistance from trust oversight. The BIA should retain technical assistance, but trust oversight should be delegated to an independent commission."*

Convinced that independent oversight is an essential element for effectuating meaningful reform, the ITC Board developed and distributed a proposal entitled *"Accountability in Trust Reform – A Conceptual Outline for Consideration by the Trust Reform Task Force"* (attached) for consideration by the Task Force.

In a nutshell, three elements lie at the core of the ITC proposal:

1. An independent, Presidentially appointed American Indian Trust Oversight Commission. The Commission would be comprised of individuals nominated by tribal governments and experts in fiscal and resource management, with ex-officio representation from the Interior Department. The Commission would be responsible for formally certifying the functionality and accountability of trust fund management and reporting systems, and evaluating issues and management performance on both topical and reservation-specific levels. Certification would be required whether those functions are performed by the BIA or Indian tribes as they increasingly exercise self-determination. Once certification occurs, periodic audits would be conducted to ensure that performance continues to meet operational standards.

Topical investigations would be selected from suggestions provided by tribal governments and individuals. Performance would be evaluated against a set of fundamental criteria for management of trust resources. Reservation-specific studies would examine management performance against standards and criteria that are embodied in tribally developed and Departmentally-approved management plans.

The independence of the Commission is critical to both credibility and accountability. Legislation may be required to provide necessary powers and authorities while protecting the beneficiaries of the trust from public access to private and sensitive information.

2. Responsibility for the development of fiscal accounting systems would be centralized within the Office of the Special Trustee as provided in Section 303(b) of the American Indian Trust Fund Management Reform Act of 1994 (TRA). While the TRA limits the responsibility of that office to the preparation of a plan to be submitted to Congress, we are concerned that the development and

implementation will be attempted in a piecemeal fashion. A single entity must be vested with necessary authority and responsibility for developing and deploying fiscal management systems to ensure accountability. Once the functionality of these fiscal management systems is certified, operational responsibility would be transferred to the BIA and the Office of the Special Trustee would sunset as envisioned by Section 302(c) of the TRA.

3. The BIA would retain ultimate responsibility for management of trust fund accounting, trust resource management, and the delivery of trust services to tribal communities. This will maximize potential flexibility and efficiency available to tribal governments as they elect to exercise self-determination by designing and operating their own programs. The Commission would provide continuing evaluation and oversight of both BIA and tribal programs with respect to the performance of trust responsibilities.

In offering our proposal, we fully appreciate that it is only one among many. Over the course of the past few weeks, several worthy proposals have come forward from the tribal community as alternatives to BITAM and undoubtedly, more will be forthcoming in the future. We are concerned that the focus of trust reform efforts may be limited to the selection of preferred organizational structures among competing alternatives. Should that happen, a grave disservice would be done to Indian country because trust reform would focus on the means, the “who,” rather than where it belongs – on requirements, the “what, why, how, and when” of trust reform.

Mr. Chairman, in our view, trust reform must not be locked into the tyranny of shifting organization charts. It must be approached with sound information, careful insight, and a clear vision of what can and must be accomplished. It must not be rushed to any predetermined or prepackaged conclusion. Unfortunately, that is exactly what appears to be taking place. Interior’s BITAM proposal is clearly a hasty response to the developments in the Cobell trust fund case, and the Task Force is feeling pressured by Interior’s determination to unveil some “reform” before the Court reaches an adverse determination in Cobell and calls for the removal of the IIM accounts to an outside receiver. As a result, the Task Force is being pressed to reach a quick decision on how to change the organizational structure for trust management. But change, and particularly hasty change, does not equate to reform.

Trust reform must respond to a diverse set of requirements. When a natural resource trust asset is converted to money, and that money is then handled by the Interior Department, the Department must abide by a form of financial commercial or common law trust. However, trust reform must also reflect responsibilities toward Indian tribes. Tribal governments are sovereigns, yet their scope and powers are described in the context of a political relationship with the Congress and the Executive, and within a legal framework subject to on-going definition by the federal courts. Interior as trustee must reflect this unique government-to-government relationship, fostering and honoring tribal sovereign authority while also functioning as a trustee. In some aspects, and particularly with regard to land and natural resources, this trust is a flexible arrangement. Within an overarching requirement to protect and preserve the resource for the benefit of its owners, the trust must reflect the fact that those benefits take many forms, that Indian tribes and individuals live on and enjoy the benefits derived from the land subject to the trust, and that a myriad of day-to-day management decisions rest with the beneficiary. The federal trust must accommodate tribal self-determination, in which tribes assume an increasing role in

directly managing their own affairs. This will require the federal trust to phase from directly managing the Indian trust estate to more of an audit and oversight function.

The Interior Department must understand and reconcile these diverse responsibilities. The Department is continually challenged to work to fulfill its duties as trustee within an environment fraught with conflicts of interest. These conflicts arise in a variety of ways. They exist when the goals and desires of the Department's other agencies are at odds with the mission of the BIA, for instance, when protecting a tribal water right from a competing interest in the Bureau of Reclamation. Conflicts can be more subtle, such as the allocation of financial resources within the Department's budget, or in trying to maximize income to individual allottees while respecting tribal sovereign rights and authorities to constrain the latitude of management actions that can adversely affect communal resources like fish and wildlife. Because of these inherent conflicts, the trustee should not and cannot be relied upon to provide credible oversight for itself.

When considering the subject of trust reform, these varied aspects of the trust must be recognized and understood. Some of the proposals that have been advanced fail in this regard. Certain interests involved in the trust reform process have been steadfast in advocating for the removal of the responsibility for managing trust funds and resources from the BIA. The Courts and Congress have become increasingly frustrated with the seeming inability of the Department of the Interior to rectify admitted deficiencies in its fiscal management systems. Concerns raised by individual Indians in the Cobell litigation have increased awareness of deeply-rooted problems in the administration of the trust by the BIA. Removing responsibility for trust fund management from the BIA may serve the interests of a few individuals and perhaps it may be useful to consider an amendment to the TRA to provide individuals with the capacity to transfer responsibility for administering their trust fund account to an outside trustee as an option similar to that provided to tribes under Section 202. However, even though the BIA may have a fiduciary responsibility to properly account for the funds held for individual Indians, the very nature of the trust responsibility of the United States must be principally concerned with fulfilling treaty, statutory, moral, and other obligations toward tribal governments. We believe that the transfer of responsibility for trust fund and trust resource management to an entity outside the BIA would be foolhardy and ill-advised. Such an action would undermine the very basis of the unique legal-political-economic relationships between the United States and tribal governments.

We must retain our focus on accountability in order to effectuate trust reform. The Task Force must be given the opportunity to do its job, allowing leadership from the tribal community and the Interior Department to work together to craft a mutually acceptable and effective approach to accomplish trust reform. A common, comprehensive understanding of requirements and objectives will be needed to move the process forward. Attached to my testimony is an outline that attempts to separate requirements into categories of trust fund management, trust resource management, organizational objectives, principles, characteristics, and mechanisms to achieve them. I believe that such a structured approach would provide a solid and necessary foundation for moving forward on meaningful trust reform.

True trust reform cannot be accomplished overnight. It must be approached in a comprehensive and cohesive fashion, with care and diligence. And it must incorporate measures to ensure accountability over time.

Mr. Chairman, that concludes my testimony. Thank you for the opportunity to appear before your Committee. The ITC is pleased to be involved in the deliberations of trust reform by leadership within the tribal community and the Department of the Interior. We hope our proposal and our contributions as technical support to the Task Force will help shape the course and eventual result of trust reform for the ultimate benefit of all of Indian country.

Attachments:

Accountability in Trust Reform

Functional Requirements for Trust Reform

Intertribal Timber Council
1112 NE 21st Ave
Portland, OR 97232
Ph: (503) 282-4296, Fax: (503) 282-1274

Accountability in Trust Reform A Conceptual Outline for Consideration by the Trust Reform Task Force

Synopsis of proposal: Establish an Independent American Indian Trust Oversight Commission to certify the functionality of financial accounting systems and evaluate the management of the resources that comprise the tribal estate. Establish an organizational structure within the Department of the Interior which: (1) separates development of financial management systems from responsibilities for daily operations; (2) maintains working relationships between tribes and the BIA; and (3) recognizes the increasing involvement of tribal governments in operating their own programs.

The Commission would be appointed by the President, operate outside the Department of the Interior, and include members nominated by tribal governments as well as subject area expertise. The Commission would be responsible for:

- o Certifying that financial management systems are fully operational; and
- o Evaluating the performance of tribal and BIA programs in managing both the trust fund accounts and the resources that constitute the trust corpus.

Under the proposed organizational structure,

- o Responsibility for day-to-day management to ensure that trust standards are being met would rest with the Bureau of Indian Affairs;
- o Responsibility for the development of the financial accounting systems would fall under the authority of the Office of the Special Trustee. Once the Commission certifies that financial accounting systems are fully operational, responsibility for day-to-day management would be transferred to the BIA.

What is the Intertribal Timber Council?

The Intertribal Timber Council (ITC) is a nation-wide consortium of Indian Tribes, Alaska Native Corporations, and individuals dedicated to improving the management of natural resources of importance to Native American communities. The ITC works cooperatively with the Bureau of Indian Affairs, private industry, and academia to explore issues and identify practical strategies and initiatives to promote social, economic and ecological values while protecting and utilizing forests, soil, water, and wildlife. The members of the ITC currently include over 70 tribal governments and Alaskan Native Corporations.

For further information regarding this proposal, please contact ITC's advisor to the Trust Reform Task Force:

Gary S. Morishima, ITC Executive Board Member
Quinault Indian Nation, Quinault Management Center
3010-77th S.E., Suite 104
Mercer Island, WA 98040
Ph: (206) 236-1406, FAX: (206) 236-5842
email: morikog@aol.com

ACCOUNTABILITY IN TRUST REFORM

ITC's Proposed Alternative to BITAM

Submitted for Consideration by the Trust Reform Task Force

BACKGROUND:

In mid-November 2001, Secretary Norton announced a plan to create a new Bureau of Indian Trust Asset Management (BITAM) within the Department of the Interior (DoI). BITAM would have responsibility for both for managing the funds held in various trust accounts and the resources that generate income for Indian beneficiaries. The Plan was crafted in response to increasing legal and political pressure flowing from the Cobell litigation. Tribes have almost universally criticized the Secretary's Plan because of its lack of substantive detail and her failure to engage in meaningful tribal consultation.

BIA Regional Directors have also expressed serious concerns with the BITAM Plan announced by Secretary Norton (see January 8, 2002 memo from the Northwest Regional Director of the BIA). An Advisory Group of BIA Regional Directors concluded that:

*“The BIA is at its core a land managing agency. Thus, removing all of the BIA’s resource management responsibilities would be the equivalent of removing administration of the public domain from the Bureau of Land Management, or removing administration of the National Parks from the National Park Service, or removing administration of the National Forests from the Forest Service. *** Completely eliminating the BIA’s responsibility for the management of natural resources would essentially eliminate the BIA at the operational level (i.e., Regions and Agencies) since there is simply insufficient manpower to split the BIA into two new stand alone organizations. In many cases once the trust functions are removed from the Regions or Agencies there would be essentially no ‘BIA’ organization left behind.”*

This Advisory Group then crafted an alternative to Secretary Norton's proposal that would transfer all responsibility for functions that directly relate to the administration of cash assets to an Assistant Secretary for BITAM while leaving the BIA's existing line authority to manage programs and functions which primarily concern government-to-government relationships intact.

At the core, both the Secretary's and the Regional Directors plans appear to represent little more than a shuffling of boxes on a paper organizational chart. Secretary Norton and Assistant Secretary Neal McCaleb are currently on trial in the Cobell Court for contempt stemming from allegations that they have provided misleading information regarding efforts to correct deficiencies in the BIA's accounting systems. A substantial part of the testimony involved in the case centers around the failure to institute adequate controls to ensure that necessary reforms were being made. It is clear that both Secretary Norton's and the Regional Director's Plans fail to address the key issue: *How can the Secretary of the Interior, the Courts, and the beneficiaries of the trust be assured that operations of the Department are organized and operated so as to ensure that fiduciary obligations of the United States will be met?*

MANAGING THE INDIAN ESTATE

EDS was contracted by the Office of the Special Trustee to evaluate progress on various aspects of DoI's efforts relating to trust reform. EDS's first report, entitled "Interim Report on TAAMS and BIA Data Cleanup", dated Nov. 12, 2001 (EDS1) describes the task of managing the Indian trust estate as follows:

“extensive and varied nature of the DOI land and trust fund management responsibilities. This includes some 56 million acres of Indian trust lands and approximately 110,000 surface and mineral leases on these trust lands. OST (Office of the Special Trustee, ed.) has the responsibility for managing the trust funds or revenue that flow from Indian trust assets. OST maintains approximately 1,400 Tribal trust accounts for 315 Tribal entities and about 285,000 Individual Indian Monies (IIM) accounts. Each year over \$800 million passes through the Tribal trust fund accounts and over \$300 million passes through the IIM accounts.

This workload exists against a backdrop of differing and at times complex situations related to land ownership, treaty obligations, lease agreements, state and federal laws, and other factors. Further, the BIA has had a 130-year history of decentralized program execution, meaning that roles, business procedures and even terminology vary among the 12 regions and their field offices.” EDS1, p9.

The second report issued by EDS, “Report on Trust Reform, Observations and Recommendations”, dated Dec. 6, 2001 (EDS2), further describes the complexities and constraints of managing Indian assets held in trust by the United States:

“These complexities need to be considered in performing the fiduciary responsibilities mandated of a Trust. Some examples of the complexities that apply to Indian Trust but not to commercial Trust are listed below:

- The Trust is unique in the size of land under management, titling and probate requirements, and the sovereignty of the beneficiary community.*
- The US Government formed the Trust by mandate instead of the Trust being formed by the beneficiaries or their ancestors.*
- The cultural heritage associated with the land held in Trust is sometimes more valuable than the monetary worth.*
- Trust agreements or Trust documents do not exist for each tribal account or each Individual Indian Monies (IIM) Account, which in a commercial Trust would provide specific guidance in management of the Trust assets.*
- A large number of small accounts, below the threshold normally managed in the commercial Trust environment, exist within the Indian Trust. In some cases, the value of a Trust account may be less than the cost of its administration.*
- The Indian Trust does not charge for services and there is no mandate to make a profit.*
- By law, the Trust is limited to investments in Government or Government-backed Securities.” EDS2, p 5.*

EDS PRINCIPLES FOR TRUST REFORM

Within this context, EDS2 describes the primary tasks confronting trust reform efforts in terms of the following principles:

“1. Fulfill Fiduciary and Legal Responsibilities

The primary focus of Trust Reform is to fulfill the fiduciary and legal responsibilities defined by law. These fiduciary responsibilities as outlined in the Trust Reform Act include;

- Properly account for and manage Indian Trust Fund assets.*
- Prepare accurate and timely reports to account holders which identify source, type, and status of funds, beginning balance, gains and losses, receipts and disbursements, and ending balance.*
- Maintaining complete, accurate, and timely data regarding the ownership and lease of Indian lands.*

In addition to the responsibilities outlined in the Trust Reform Act, the DOI must also fulfill the fiduciary imperatives outlined in the general standard of prudent investment;

- The trustee is under a duty to the beneficiaries to invest and manage the funds of the Trust as a prudent investor.*
- The trustee must exercise reasonable care, skill and caution, and apply it to investments in the context of the Trust portfolio and as a part of an overall investment strategy.*
- The trustee must adhere to the fundamental fiduciary duties of loyalty and impartiality*

2. Ensure the integrity of Trust business processes and data

A principle goal of Trust Reform is to ensure the integrity of Trust business processes and data. All stakeholders must have confidence that the Department is capable of meeting its responsibility to establish and maintain a complete, accurate accounting of Trust assets, the ownership and financial interest in those assets, the use of Trust lands and the income and distributions resulting from that use. This accounting requires the definition and deployment of consistent, reliable business processes that can rely on complete, accurate data.

3. Create an Accountable Organization that Communicates Reform Progress

In order to achieve Reform objectives, the Department must establish accountability throughout all organizations contributing to reform. Combining responsibility can only do this and authority for Reform-related activities in individuals at all levels in the organization.

The future state organization must be simplified in terms of lines of authority. The workflows and communication from one group to another must be less complicated. The Trust functions and services should be managed by objectives with specific performance metrics to measure the effort, resources and time that will be required to achieve Reform-related objectives. The Department must also be able to consistently predict and communicate the impact that performance shortfalls, or surpluses, will have on related activities.

The stakeholders must be involved in establishing those objectives and corresponding metrics. Employees must be well trained in Trust concepts. Adequate staffing to perform Trust responsibilities must be in place.

4. Increase Stakeholder Ownership and Support

The key to assuring the support of stakeholders is to invite and encourage their participation in activities that affect the direction and priority of Reform initiatives. Incorporating the objectives of Regional, Agency and Tribal leaders – and other representatives of the Native American beneficiaries – will increase their support for those initiatives and foster a sense of ownership in Trust Reform efforts.

5. Provide Reliable Consistent Business Services

In order to successfully deliver reform; the DOI needs to define and adopt business services that are consistent to the greatest extent appropriate while continuing to consider the tribal needs and the ramifications of local statutes. Standardizing common processes is required across all regions.” EDS2, p12.

SELF-DETERMINATION & SELF-GOVERNANCE COMPACTING:

These principles must be implemented in the unique legal-political environment that characterizes tribal-federal relations. The DoI "Status Report to the Court Number Eight", dated Jan. 16, 2002 (8th Status Report), describes the context for trust reform as follows:

"A major objective of the Department is blending private trust standards with the guiding principle that tribes have a government-to-government relationship with the United States.

The Indian Self-Determination and Education Assistance Act of 1975 (the "Act") allows the tribes to contract Trust functions. The Act contemplated that "the Federal Bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs." Section 203, Pub. L. 103-413. On the other hand, Congress specifically affirmed that the Federal Government's trust relationship and obligation will remain. Pursuant to the Constitution, Congress alone has the authority to define or alter the Trust relationship.

The Department believes that the government's Trust responsibility and tribal sovereignty are positive, complimentary forces. Even so, the Federal government has an overriding duty as trustee to formulate reasonable improvements in and standards for ensuring the proper discharge of the Department's fiduciary Trust functions. The need to achieve a responsive and efficient discharge of the trust responsibility while balancing the Department's commitment to administering the government-to-government relationship with Indian tribes by supporting tribal sovereignty, tribal self-governance and tribal self-determination, as expressed by Congress is a tremendous challenge. It is thus necessary to consider the unique relationship between the Tribes and the Federal Government as the Department proceeds with trust reform and the reorganization process and the adoption of appropriate policies and procedures that address the sometimes competing principles." 8th Status Report, p19.

PROBLEMS EXPERIENCED BY THE DoI

The 8th Status Report contains several observations of high level personnel within the DoI with respect to the experience to date with trust reform efforts:

The Special Trustee

"Overall progress on trust reform cannot be assured or confirmed, however, because of the apparent inadequate planning and execution to date of some subprojects and other important remedies for Indian trust." p14.

The Director, Office of Indian Trust Transition

"...subproject managers were willing to state certain progress was made but when challenged could not always defend their position. ...

It is very alarming to read and hear reports of progress being made and, in some instances, projects completed without having this work fit into an overall context of trust management. It is apparent that some projects could be completed or "under control" yet not add substantively to the requirements of a person receiving income from assets held in trust for them. ...

It is obvious also that trust asset management for individual Indians is spread throughout DOI and even indirectly to other agencies of the federal government, such as the Department of the Treasury. There are many instances where work is being done by one agency or bureau and is simply “thrown over the fence” to the next work group without the normal follow-up that would insure a beneficiary receives his/her income or other responsive information due from a trustee. It is essential that trust management reform and the on-going business of trust operations be managed by an organizational structure that has accountability from top to bottom. ...

During this Report’s development, it also became obvious that information related to the “asset” portion of trust asset management primarily focused on financial assets. While that is important in an income-producing asset, it also is critical that we know how all assets are being managed, and that future reports should present the status of land and natural resource management, both by the tribes and DOI. For instance, grazing leases produce revenue for Indian individuals and Tribes, but if overgrazing occurs, the income in future years maybe seriously affected. Minerals Management Services does a good job of collecting royalty revenue, but are we managing the initial leasing process to be certain we are performing our trust duties appropriately?

Another serious problem is illustrated by the refusal of some tribes to allow for the collection of documents and other information necessary to complete actions on behalf of beneficiaries.” p15-16.

In 1993, a distinguished group of scientists comprising the Independent Forest Management Assessment Team (IFMAT) identified another fundamental problem - conflict of interest. In its report entitled “An Assessment of Indian Forests and Forest Management in the United States”, IFMAT observed that the BIA had a fundamental conflict of interest since the Trustee was responsible for both program operations and trust oversight. IFMAT recommended that oversight and operational responsibilities be separated. The OST also identified conflict of interest as an important issue that affects trust reform:

“During the month of September an additional issue was identified by the Special Trustee regarding OST simultaneously performing both operational responsibilities and providing oversight. The Special Trustee indicated that such dual responsibilities represented an inherent conflict.” 8th Status Report p18.

With this backdrop, the Secretary of the Interior set forth four objectives for trust reform effort and affirmed her commitment to engage in meaningful consultation with Indian beneficiaries:

“Our objectives are (1) to plan and conduct a valid, cost-effective and timely accounting of the IIM trust in a manner that satisfies the Department’s fiduciary duty to account to IIM beneficiaries, (2) to develop a beneficiary approach to trust management and service delivery, (3) to record and maintain comprehensive, up-to-date and accurate land and natural resource ownership records, and (4) to develop a workforce plan and associated activities to attract and maintain a qualified, effective workforce.

As we move forward, we will place high priority on consulting with the tribes. Not only is this required by Executive Order and Departmental regulations (Executive Order No. 13175 (November 6, 2000) and BIA Consultation Guidelines (December 13, 2000)), it is the right way to conduct affairs of government that affect tribes.” 8th Status Report, p8.

ITC's PROPOSED APPROACH

Examination of the history of trust reform efforts within the DoI has led the Executive Board of the Intertribal Timber Council to the following conclusions:

1. DoI's BITAM approach as well as the alternatives proposed by BIA Regional Directors represent organizational chart shuffle and fail to incorporate measures necessary to effectuate trust reform.
2. Trust reform cannot be assured unless Indian beneficiaries are provided with independent verification of full accountability for the funds and assets held in trust by the United States. This requires third-party certification by an entity outside the DoI.
3. The beneficiaries of the trust must play a substantive role in effectuating trust reform.
4. Trust reform must preserve government-to-government political relationships at the regional and agency levels of the BIA.
5. Trust reform must ultimately provide for the centralization of responsibility for administering the fiduciary obligations of the trustee.
6. Trust reform must accommodate increasing interest by Indian tribes in assuming greater responsibility for managing their own affairs through self-determination and self-governance compacting.

Based on these conclusions, the Executive Board of the ITC has developed a proposed approach to provide greater accountability in trust reform. This proposal is intended to provide information and perspectives for the deliberations of the Tribal Trust Reform Task Force.

Accountability in Trust Reform

Conceptual Outline of ITC's Proposed Alternative

INDEPENDENT AMERICAN INDIAN TRUST OVERSIGHT COMMISSION

- Established by legislation
- Independent, outside the DoI
- Members appointed by the President Appointment
- FACA exempt
- Information collated by Commission exempt from FOIA
- The Commission would have a statutory duty to protect privacy of sensitive information

Functions:

1. Certification
 - Certify the development of financial accounting systems (including land records) to ensure that they satisfy standards and are fully operational prior to adoption and implementation by the BIA
 - Certify systems maintained by Indian tribes under compacting or contracting arrangements, since tribal systems would need the capacity to fully interface with BIA systems.
 - Conduct periodic reviews after initial certification to assure continuing compliance with performance standards and beneficiary requirements.
2. Audit performance of trust functions
 - Trust corpus
 - i. Statistically valid sampling to spot check for compliance with general standards (How much of the resource is there and how much was sold [management planning and sustainability]?; Was the beneficiary of the trust fairly compensated for the use/extraction of trust assets?; Were the proceeds from the sale, use or extraction of trust resources properly accounted for, wisely invested, and appropriately distributed?)
 - ii. Topical investigations (e.g., timber sales, leasing). The beneficiaries of the trust, tribal governments and intertribal organizations (e.g., ITMA, ITC, IAC, NAFWS, NCAI, etc.) would provide recommendations for issues and priorities to focus the Commission's efforts. The Commission would prepare and publish annual work plans for its investigations, including its rationale in prioritizing issues.
 - iii. Reservation evaluations – periodic, using specific performance standards that are derived from management plans and agreements approved by the Secretary of the Interior and tribal governments. Commission to issue certificates of compliance issued upon finding of satisfactory performance. Certification would reduce/eliminate requirements for Secretarial approval of individual actions taken by tribes under approved management plans or agreements (BIA actions would still require tribal approval). This function would incorporate annual trust reviews of performance under Self-Governance Compact Agreements.
 - Once responsibilities for financial accounting systems are transferred from the OST to the BIA, the Commission would conduct statistical sampling to evaluate the functionality of financial accounting systems (tribal & individual).

Reporting Requirements:

- The Commission would prepare Annual Reports on Audit Functions:

- Draft provided to Assistant Secretary for Indian Affairs & Office of Special Trustee. Required to comment within time certain. Failure to comment constitutes tacit acceptance of findings and recommendations of Commission.
- Final Report provided to: Secretary of the Interior, Senate Select Committee on Indian Affairs; House Natural Resource Committee; Trust Beneficiaries
- The Commission would prepare Site-Specific Audits Reports on the management of trust resources and provide them to:
 - Trust Beneficiaries
 - Assistant Secretary of Interior for Indian Affairs
- The Commission would prepare an Annual Report on its operations containing:
 - Disclosure of Expenditures
 - Statement of Accomplishments
 - Impediments to effective discharge of Commission's responsibilities
 - Work Plan for future efforts
- The Secretary of the Interior would be required to prepare an annual report to the Commission, Senate Select Committee on Indian Affairs, and the Trust Beneficiaries describing the status of efforts by the DoI to implement the recommendations of the Commission.

Composition of the Commission:

- ___ Appointed Members (five year terms)
- ___ Members selected from a list of individuals nominated by Indian tribes
- ___ Independent expertise (specify skills?)

Ex-Officio Members

- Office of American Indian Trust
- Assistant Secretary of Interior for Indian Affairs
- Office of the Special Trustee (involvement would be eliminated once accountable financial accounting systems are in place, in accordance with provisions of the American Indian Trust Reform Act of 1994)

Non-Federal members would receive daily compensation at a rate equivalent to GS14?

Powers of the Commission:

- Investigative
- Subpoena powers to compel production of requested information
- Secure required expertise
- Hire & retain staff & expertise as required to discharge its responsibilities (compile monitoring information, provide support for Commission)
- Create task forces (standing or as needed) reporting to the Commission, to evaluate selected aspects of management of the trust corpus. Task force members may include:
 - Tribal expertise (appointed representatives from relevant Intertribal Entities?)
 - Office of American Indian Trust
 - Office of Audit & Evaluation
 - Office of Self-Governance
 - Independent expertise

PROPOSED ORGANIZATIONAL STRUCTURE FOR INDIAN AFFAIRS

The proposed organizational structure would be comprised of two basic elements: The Office of the Special Trustee (OST) and the Bureau of Indian Affairs (BIA). Three staff offices, presently authorized within the Departmental Manual would report to the Secretary: The Office of Self-Governance; the Office of Audit & Evaluation; and the Office of American Indian Trust. **(Chart A)**

OST (Chart B)

The functions of the OST would be limited to the development of operational financial systems required to ensure accountability for funds held in trust for tribal governments and individual Indians.

The primary functions would include:

- A Division of Financial Management. This Division would be responsible for developing operational systems to handle receivables, investments, accounting and disbursements.
- A Records Management Division that would be responsible for developing management systems to ensure that beneficial ownership of trust assets is properly determined (probate, title records, etc).
- A Historical Accounting Division would be responsible for reconciling historical accounts to establish a firm basis for the accounts to be maintained by the Division of Financial Management.

The Commission would be responsible for certifying that required elements of the financial systems are operational. When the financial systems are certified by the Commission, operational responsibility would be transferred to the BIA and the OST would cease to exist. This eventuality was anticipated in the American Indian Trust Reform Act of 1994.

BIA (Chart C)

The BIA would retain responsibility for management of the trust corpus (e.g., land, water, minerals, etc held in trust for Indian beneficiaries by the United States).

The Operations of the BIA would contain three divisions, one for BIA operations, one for education, and the other for Self-Governance compacts.

BIA Operations Regional & Agency Structure (Chart D)

At the regional and agency levels, the organizational structure would depend upon local needs. Generally, the primary divisions/functions of the BIA would include:

- Administration that would handle personnel, budgeting, finance, & contracting
- Trust Support that would handle responsibilities for land and attendant resources
- Transportation
- Tribal Services

The BIA would assume responsibility for financial records management upon certification by the Oversight Commission.

Until such time as the financial operations are transferred to the BIA, the BIA would interface with the OST in the following manner:

The BIA would access land records maintained by the OST as required to perform its management responsibilities. The BIA would notify the OST as trust assets are sold or removed. This notice

would generate a financial tracking record that would establish a tracking requirement. The OST would be responsible for collection or receivables and for investing and disbursing funds to the beneficiaries.

Once responsibility for operation and maintenance of the financial management system is assumed by the BIA, the Commission would perform periodic audits to ensure continued accountability.

Title 1, Self Governance

Tribal governments have expressed increasing interest in assuming more responsibility for management of their own affairs through self-governance compacting. As noted by the 8th Status Report, there is a *“need to achieve a responsive and efficient discharge of the trust responsibility while balancing the Department’s commitment to administering the government-to-government relationship with Indian tribes by supporting tribal sovereignty, tribal self-governance and tribal self-determination, as expressed by Congress.”* This tension creates a special challenge for trust reform as each tribal government can select those elements of the programs operated for the benefit of Indians, leaving the rest to federal agencies to perform. Consequently, there are many alternative organizational structures involving tribal and BIA operations.

There are, however, certain general factors that can be taken into account:

First, it can be safely presumed that future organizational structures within BIA and tribal programs will evolve in response to tribal initiatives. The BIA will have to fulfill its fiduciary obligations to tribal governments and individual Indians, as required by treaties, executive orders, agreements, statutes, regulations, and judicial decisions. Tribes will assume greater responsibility for carrying out trust related activities in the field, seeking the greatest degree of flexibility at the reservation level.

Second, there will be a need for fundamental standards to evaluate the performance of management of trust assets, regardless of whether or not responsibility for conducting field operations lies with the BIA or a tribal government. Consequently, standards will need to apply to both tribal and BIA systems to ensure compatibility and functionality. The BIA will need to monitor and approve activities that affect its capacity to meet its statutory obligations and fiduciary responsibilities as trustee. Tribes will be able to establish priorities by redesigning budgets and functions so resource management standards will need to include beneficial use standards of individual tribes as well as appropriate regulations contained in 25 CFR, applicable Federal statutes, and regulations. Tribes operating field level programs will need to provide relevant information and records to the BIA. In the 8th Status Report, the Director of the Office of Indian Trust Transitions noted a problem with *“the refusal of some tribes to allow for the collection of documents and other information necessary to complete actions on behalf of beneficiaries.”* p16. There will be a need to establish policy direction to address this issue, perhaps something along the following: *all records maintained by a tribal government which are not required for BIA approval of a trust transaction are the sole property of the tribe; all records and documents developed and submitted by the tribe to the BIA for approval of a trust transaction are the property of the BIA.* Under this policy, tribes would be free to develop internal, centralized records for BIA and non-BIA activities while the BIA would have the records (and the responsibility to ensure adequate security) required to satisfy its fiduciary obligations.

HOW ITC'S APPROACH ADDRESSES EDS PRINCIPLES FOR TRUST REFORM

ITC's proposed approach addresses the principles identified in EDS2 for trust reform efforts in the following manner:

“1. Fulfill Fiduciary and Legal Responsibilities

The ITC proposal provides a mechanism to insure that the fiduciary obligations set forth in the American Indian Trust Reform Act become operational. Independent certification would require the development of a strategic plan and measurable performance criteria.

2. Ensure the integrity of Trust business processes and data

The involvement of tribally-nominated members of the Commission increases the likelihood that Indian beneficiaries will have confidence that the Department is capable of meeting its responsibility to establish and maintain a complete, accurate accounting of Trust assets, the ownership and financial interest in those assets, the use of Trust lands and the income and distributions resulting from that use.

3. Create an Accountable Organization that Communicates Reform Progress

The ITC proposal relies upon formal certification as the means to verify that interfaces between the various entities that may be involved in trust reform are functional and operational. The Commission would maintain records regarding progress and identify obstacles to implementation of reform efforts.

The separation of developmental from operational responsibility as proposed by ITC is consistent with the organizational structure anticipated by the American Indian Trust Reform Act. The transfer of responsibility for financial accounting systems upon certification that they are fully operational maintains a familiar tribal-agency-regional relationship for government-to-government relations.

Certification would require that Trust functions and services be managed by objectives with specific performance metrics to measure the effort, resources and time that will be required to achieve Trust Reform-related objectives. Providing tribally-nominated members on the Commission would increase stakeholder involvement in establishing those objectives and corresponding metrics.

The ITC proposal provides for the Commission to investigate topical areas of concern to Indian beneficiaries and to evaluate the performance of fiduciary obligations at the reservation level, using criteria and standards that are tailored to the circumstances of individual tribes.

The ITC proposal would require the Secretary of the Interior to issue a report on the status of efforts to implement recommendations of the Commission. The report is to include identification of obstacles to implementation, e.g., staffing, budget.

4. Increase Stakeholder Ownership and Support

The ITC proposal provides for stakeholder involvement at several levels. First, tribes would be invited to submit nominations for members to serve on the Commission. Second, Indian beneficiaries (tribal and individual) would be invited to suggest topical issues and priorities

for the Commission to investigate. Third, the Commission would be engaged in reservation-specific reviews. Last, the ITC proposal would require that Indian beneficiaries receive formal reports that provide information on the operations of the Commission and its findings and recommendations.

5. Provide Reliable Consistent Business Services

Under the ITC proposal, the Commission would conduct periodic performance reviews to ensure that financial accounting (including land title and use/management records) and resource management systems remain functional and operational.

Synopsis of Pros and Cons of ITC’s Proposal:

Pros	Cons
<ul style="list-style-type: none"> • Provides for increased tribal involvement in ensuring accountability for the systems that maintain financial records and management of the land and resources that comprise the trust corpus. • Requires formal, independent certification that financial management and support systems are operational. • Provides for periodic evaluation of management performance by the BIA and independent certification that the trust corpus is properly managed. • Minimizes potential confusion and problems by clearly dividing responsibility for development of financial management systems and day-to-day management of the trust corpus. • Consistent with requirements of the Trust Reform Act of 1994 to establish a Special Trustee to develop adequate financial accounting systems. • Addresses issues raised in Cobell litigation. • Provides mechanisms for making IIM account holders “whole” by reconciling historical records and establishing an office to establish a firm basis for financial accounting. • Maintains strong, familiar BIA relationship with tribes (political acceptability) • Much less costly to implement than proposed BITAM structure with increased likelihood to effectuate necessary reforms and improvements. • Ultimately centralizes responsibility for management of the trust corpus and financial records under the BIA. • Employees are not displaced. • Preserves capacity of tribal governments to pursue compacting and assumption of greater responsibilities for self-management while ensuring that fiduciary obligations of the United States are satisfied. 	<ul style="list-style-type: none"> • Requires legislative action and Congressional appropriation of necessary funds. • Degree to which the proposed plan may satisfy the requirements of the courts is uncertain. • Increases need for coordination between developing systems for financial management and day-to-day management responsibilities of the BIA

**Chart A
Proposed Organizational Structure**

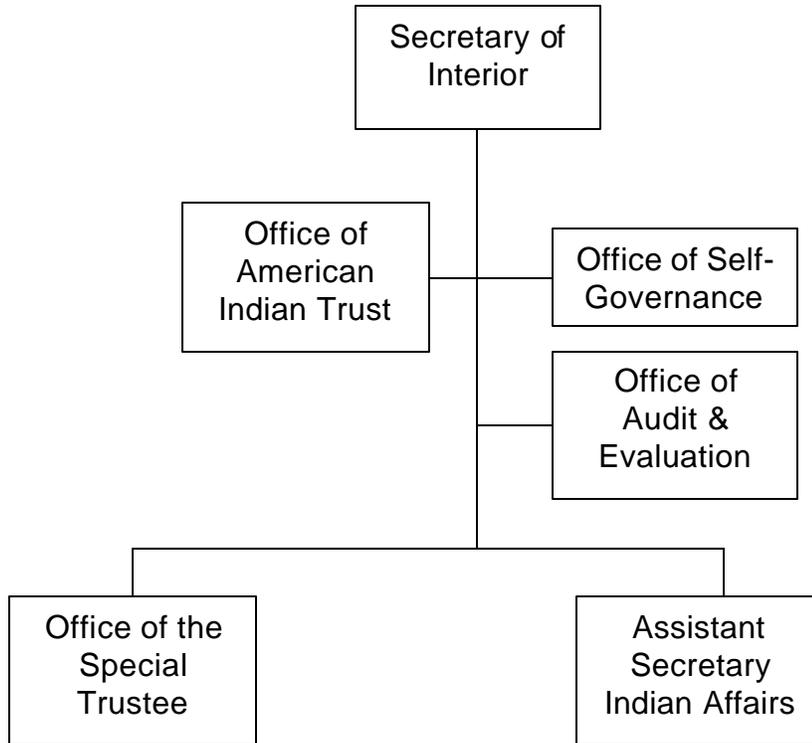


Chart B Office of the Special Trustee

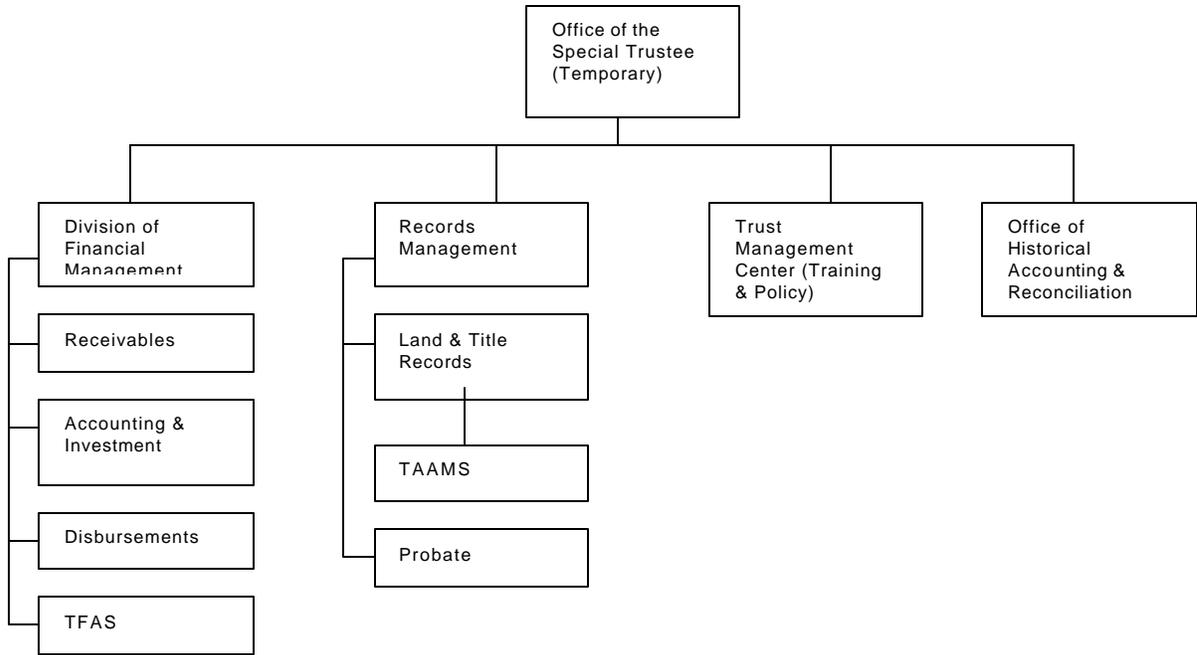


Chart C Bureau of Indian Affairs

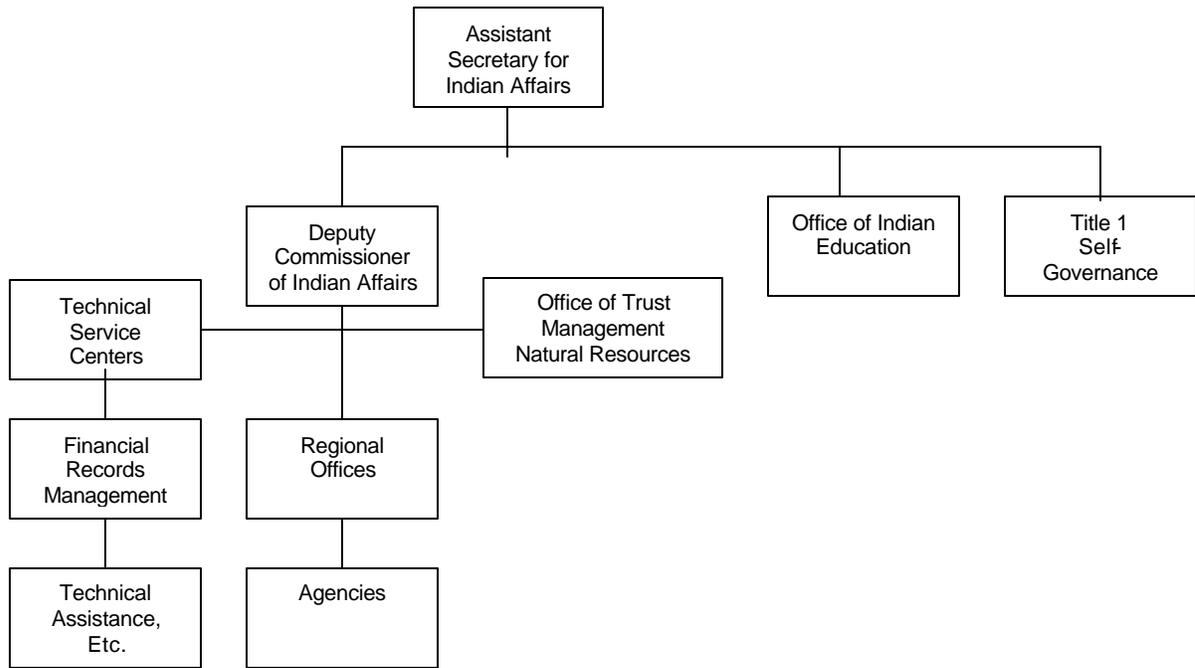
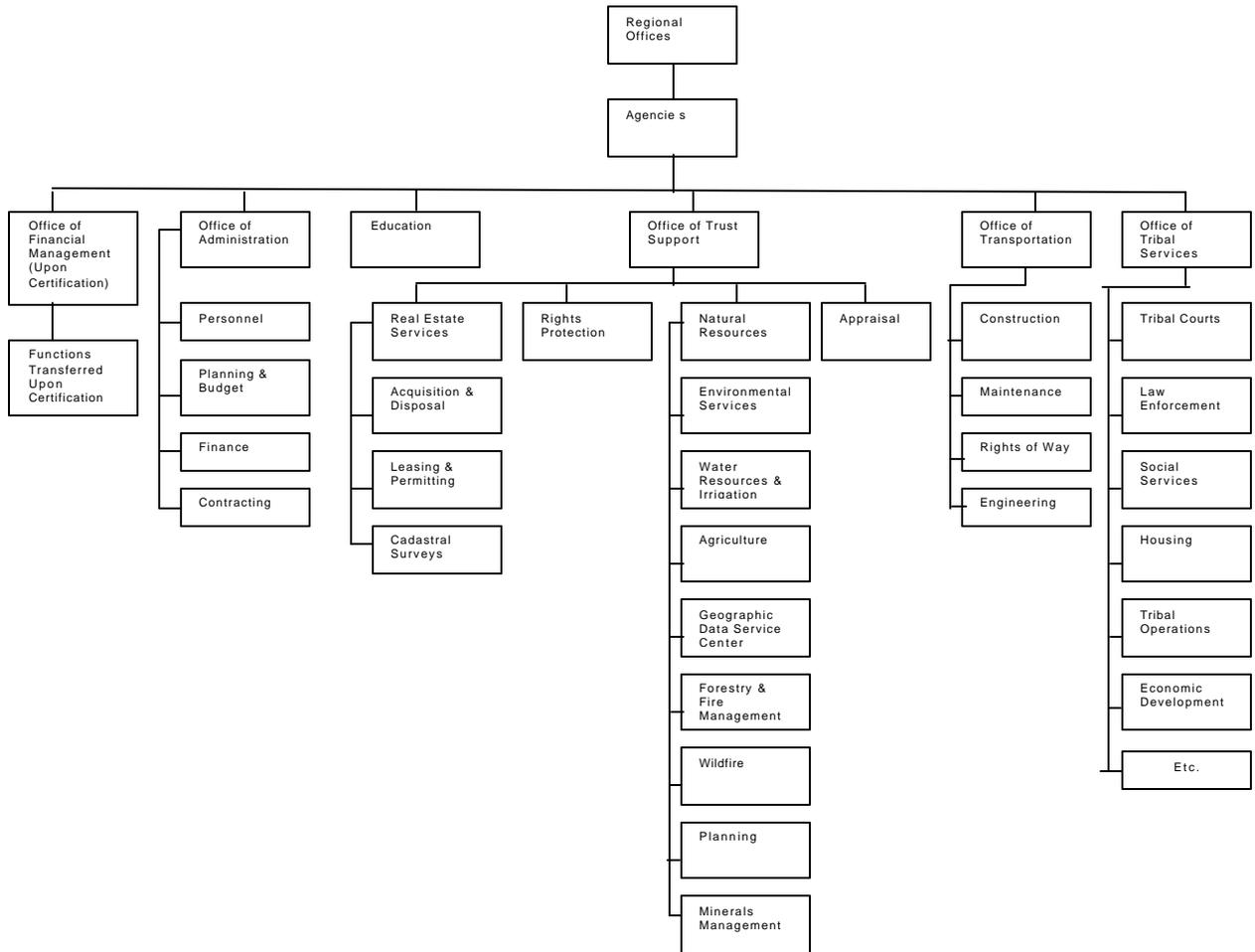


Chart D Bureau of Indian Affairs Regional Offices & Agencies



ATTACHMENT

Functional Requirements For Trust Reform

Trust Reform must encompass all aspects and functions that the United States performs on behalf of Indians.

The Supreme Court, in defining the trust responsibility, has held that:

[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941).

The scope of the Federal Government's duties as trustee for the Indian estate can generally be described by two requirements: 1) preserve and protect the interests of the beneficiary by prudently managing trust property in utmost good faith and 2) ensure that the beneficiary is fully informed about matters pertaining to the management of trust resources.

FUNCTIONAL REQUIREMENTS FOR TRUST FUND MANAGEMENT

Adhere to principles of common trust, generally:

- Mutual understanding of services required by beneficiary and duties of the trustee
- Accuracy – ensure that trust funds, investment income, and disbursements are correctly and accurately maintained.
- Investment – ensure that funds held in trust are expeditiously and prudently invested at minimal expense to Indian beneficiaries
- Receivables – ensure timely collection of income due.
- Disbursements – ensure that funds are dispersed in accordance with desires of beneficiary, consistent with fiduciary obligations
- Security & privacy of information and records
- Account balances – reconciliation/establishment of trust fund balances
- Adequate resources must be made available to carry out these duties.

FUNCTIONAL REQUIREMENTS FOR TRUST RESOURCE MANAGEMENT

In *Blackfeet and Gros Ventre Tribes of Indians*, (32 Ind. Cl. Comm. 65, 77 (1973)), the Indian Claims Commission noted, "*the fiduciary obligations of the United States toward restricted Indian reservation land, including minerals and timber, are established by law and require no proof.*"

Generally, in managing natural resources held in trust, the United States must manage resources so as to ensure that beneficiaries receive fair value while protecting the trust corpus. The United States also has other trust duties to protect treaty rights. For example, the Western District Court of Washington found in *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. at 1510.

The United States has a fiduciary duty and "moral obligations of the highest responsibility and trust" to protect the Indians' treaty rights. *Seminole Nation v. United States*, . . .

-
- Accountability should be evaluated against objectives and performance criteria specified in tribally-developed and Departmentally-approved plans, wherever such plans exist.
 - For resources held in trust for individuals, maximize potential benefits (income or as specified by individual) within operational constraints established by tribal-Departmental plans, or where such plans do not exist, under principles of common law trust within constraints of applicable tribal and federal law.
 - Use best practices (consideration of state of the art and budgetary constraints) in managing trust resources.
 - Ensure that beneficiaries of the trust receive fair value for the use or extraction of trust resources (appraisal, sale procedures, legal instruments that are legally enforceable and otherwise protect the interests of the beneficiary)
 - Ensure that trust resources are adequately protected (trespass, disease, catastrophic loss, etc.)
 - Ensure that entities responsible for financial accounting are timely notified of:
 - contractual obligations for the sale or use of trust resources for which compensation is due.
 - quantity of resources involved and removed/used for each beneficial owner
 - Ensure full accountability for the quantity and value of trust resources utilized/removed
 - Maintain accurate records and inventories (cadastral surveys, title records, probate, etc)
 - Adequate resources must be made available to carry out these duties.

OBJECTIVES & ORGANIZATIONAL CHARACTERISTICS

- Fully involve tribal governments in the design, development, and implementation of organizational structures and measures to fulfill trust obligations of the United States.
- Design policies, procedures, and systems to faithfully discharge the trust duties of the United States set forth in treaties, statutes, Executive Orders and case law.
- Costs of trust reform or payment for damages must not reduce the quality or quantity of programs, services, or funding provided to tribal communities and individual Indians.
- Conduct business on a government-to-government basis.
- Consolidate Departmental functions and responsibilities involving trust resource management (BIA, MMS, USGS, BLM, BOR, etc.)
- Retain responsibility for trust funds, trust resources, and other trust services within the BIA.
- Provide efficient, effective services to Indian beneficiaries.
- Minimize necessity for additional bureaucracy and administrative expense
- Provide for tribal self-determination and self-government, recognizing that integration will be necessary to reflect the involvement of both BIA and tribes in operating programs. Adhere to federal regulations governing tribal contracting and compacting of BIA and other programs.
- Maintain government-to-government relationships at the regional/agency level of the BIA.
- Minimize transaction costs incurred by tribes in their relations with the BIA
- Provide full accountability for management of trust funds and resources
- Minimize potential for conflict of interest.
- Maintain records and establish reporting systems that provide required information at minimum cost.

MECHANISMS TO PROMOTE ACCOUNTABILITY

- Strategic Plan

- Properly designed systems that meet functional requirements and ensure accountability (analysis of business functions)
- Standards that reflect awareness of current state of the art practices
- Performance measures
- Record Keeping
- Information and reporting systems that integrate administrative responsibilities for trust fund accounting and trust resource management.
- Internal controls to ensure compliance with standards and procedures, provide quality control, maintain operational integrity of management systems, and correct deficiencies.
- Security
- Independent Auditing
- Independent external performance evaluations
- Effective personnel incentive systems to ensure that individuals are qualified to discharge the duties to which they are assigned, to reward outstanding performance, and to sanction acts of malfeasance or nonfeasance.