

THE PROPOSED SPECIAL TREASURY ACCOUNT  
FOR AMERICAN INDIAN TRUST FUNDS

The United States' Trust Responsibility

The federal courts have held over and over again that the United States has a special obligation to American Indians -- an obligation different from, and in addition to, the obligations it owes to its other citizens. This unique obligation generally is discussed in the context of the United States' trust relationship to American Indians. This relationship imposes on the United States "moral obligations of the highest responsibility and trust" and requires it to observe "the most exacting fiduciary standards" in its dealings with the Indians.<sup>1</sup>

Well established case law makes clear that the United States' trust responsibility to tribes rests not only on the Department of the Interior, but on the entire Federal Government.<sup>2</sup> The President's recent Executive Order sets out how the Executive Branch is to meet that responsibility. In articulating the appropriate role of the federal agencies in fulfilling the trust responsibility, the President stated that "[each department ... shall ... design solutions and tailor Federal programs, in

<sup>1</sup> United States v. Payne, 264 U.S. 446, 448 (1924).

<sup>2</sup> Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy, 898 F.2d 1410 (9th Cir. 1990) (Navy); Covelo Indian Community v. FERC, 895 F.2d 581 (9th Cir. 1989) (FERC); Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986) (BLM); Nance v. EPA, 645 F.2d 701, 710-711 (9th Cir. 1981) (EPA); Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 512 F.2d 1390, 1395 n.8 (Ct. Cl. 1975) (Treasury and OMB).

appropriate circumstances, to address specific or unique needs of tribal communities."<sup>3</sup>

The federal courts repeatedly have found that the Federal Government's unique relationship justifies, even requires, special treatment for American Indians. See, e.g., United States v. Antelope, 430 U.S. 641 (1977) (different criminal laws can be made applicable to an Indian defendant than would apply to a non-Indian defendant committing the same crime in the same place); Morton v. Mancari, 417 U.S. 535 (1974) (the Federal Government may give hiring preferences to members of Indian tribes); Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992) (upholding regulations by the Fish and Wildlife Service making eagle feathers available to Indians, but not to non-Indians); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (upholding an exemption from federal drug laws for religious use of peyote by Indians even though the exemption was not extended to religious use by non-Indians).

One of the United States' most important obligations to American Indians is the investment of funds held for them in trust by the Federal Government. These funds are derived from payments required by treaties and in satisfaction of judgments against the United States, as well as from income earned from natural

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<sup>3</sup> "Government-to-Government Relations with Native American Tribal Governments," Presidential Memorandum for the Heads of Executive Departments and Agencies, May 3, 1994.

resource trust assets (e.g., agriculture, timber, mineral, and oil and gas leases). The United States has a legal obligation to ensure both that tribal trust funds are invested safely, and that returns from the funds are maximized. These obligations have been confirmed in relevant case law.<sup>4</sup>

Currently, the Bureau of Indian Affairs (BIA) invests over two billion dollars of Indian trust funds under statutory provisions requiring that investments be made "for the best interest of the Indians" in "any public-debt obligations of the United States or in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."<sup>5</sup> BIA has had serious problems in carrying out these responsibilities. As a result, the Federal Government has been held accountable for failing to meet the trust

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<sup>4</sup> Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) (the Federal Government has a duty to maximize return on its investments of tribal funds as part of the federal trust responsibility in administering tribal property). Failure to maximize return on investment can occur in a number of ways. An example is expenditures paid out of an interest-bearing account bearing a higher rate of interest although tribal funds deposited at a lower rate of interest were legally available. See, e.g., Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944). Furthermore, failure to deposit funds in the highest interest-bearing Treasury account in which they legally may be deposited also violates the Federal Government's fiduciary responsibilities. See, e.g., Menominee Tribe v. United States, 59 F. Supp. 137 (Ct. Cl. 1945). However, no breach of fiduciary obligation is involved if tribal funds are deposited in an account earning a lower rate of interest than other Treasury accounts, so long as the account yields the highest interest available by law for such accounts.

<sup>5</sup> 25 U.S.C. § 162a.

responsibility that underlies those statutory provisions. E.g., Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) (the United States held liable for its failure to maximize return as required by the government's role as trustee). See also Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). Indeed, numerous Congressional and General Accounting Office reports have recommended that the investment function should be moved outside of the Department of the Interior, so that the Bureau should concentrate on related non-investment activities (e.g. accounting, reconciliation and systems development).

#### Proposed Role for Treasury in the Investment of Trust Funds

We believe the Department of the Treasury is in a better position to meet the United States' Indian trust fund investment obligations. More specifically, Treasury should provide BIA with the ability to invest Indian trust funds in non-marketable securities with preferential interest rates and par value redemption. Provision of this sort of investment opportunity would give Indian account holders a very secure investment with favorable rates of return.

Treasury already provides this type of investment to Federal employees and retirees in the Federal Employee Thrift Savings Plan "G" Fund, the Social Security Trust Fund, and the Civil

Service Retirement System.<sup>6</sup> Yet the United States' judicially recognized obligations to manage American Indian funds are paramount to its obligations to these Federal employees and retirees. In fact, there is no other group within the United States to whom the Federal Government owes such a high fiduciary duty. Accordingly, Treasury should support legislation to provide Indians with the same quality of investment opportunity.

The Department of the Treasury is better able to provide this type of investment option than the Bureau of Indian Affairs. First, because of Tribal conservatism and resistance to change, the acceptance of a Treasury structured pooled fund will be far greater than one created entirely by BIA. Many individuals that are decision makers within Indian country have either worked for the government, or have family members and friends now working for the government, and are familiar with the Thrift Savings Plan "G" fund (TSP) and how it works. To be able to offer a pooled fund similar in make-up of that fund and with Treasury sponsorship will be easily identified and understood by the Tribal leadership. Conversely, while BIA could pool funds and through laddering theoretically could approximate Treasury rates of return, there is little confidence in BIA's overall management performance record. Consequently, tribes will adopt a "wait and

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<sup>6</sup> The enabling legislation for the Social Security Trust Fund, the Thrift Savings Board, and the Civil Service Retirement System effectively provide for both preferential interest rates and par value redemption.

see" attitude, which will inhibit the pooling of funds and laddering of investments. If enough funds are not available for pooling, then the ultimate success of the concept is at best delayed, or at worst, will fail and the effort will be a costly waste of time. The Treasury involvement greatly enhances the potential for success by placing investment professionals in charge of investments.

Second, because of the sheer size of the total Treasury-issued debt, Treasury's investment universe is far more efficient than anything BIA can create with \$2 billion. For practical purposes, Treasury is the market, and a rate paid on a formula based on the total outstanding debt would always assure the Indian Tribes and individuals a return representative of the current marketplace. Furthermore, since Treasury currently manages several trillion dollars in trust funds, giving Treasury another \$2 billion in BIA funds to manage probably would not result in any real additional costs to Treasury's budget. Conversely, by eliminating BIA's investment functions, the Federal Government would save approximately \$1.1 million per year from BIA's budget.

Finally, Treasury's ability to provide par redemption is important because it provides a buffer against unforeseen early redemption requirements caused by frequent changes in tribal leadership and realignment of priorities. Given these uncertainties, the ability to redeem at par is not only

desirable, but proper planning for a likely occurrence. In other words, the government is responsible for losses of principal in trust. This is the responsibility of the entire government, not just of BIA. If we redeem and lose principal in open market transactions, the Tribes will sue to have the Federal Government compensate them for any loss. There is legal precedent for this. The par value redemption will just eliminate the need for the litigation process. In either case, the Federal Government may have the responsibility of covering any loss of principal experienced from early redemption.

The impact of par value redemption over time should balance out. Redemptions will occur as often when there are gains in specific securities as when there are losses in specific securities unless there is a planned effort by BIA to take advantage of the situation. (We are willing to discuss with Treasury ways to limit early par value redemptions to help limit Treasury's exposure in a given year.)

### Conclusion

In sum, the United States' legal and moral obligations to American Indians are greater than those owed to other citizens already receiving the benefits of par value accounts. Moreover, Congress and the General Accounting Office have recommended that investment services be moved out the Bureau of Indian Affairs so that BIA can concentrate on related non-investment activities

such as account reconciliation and development of related data systems. Provision of a special account by Treasury is the best way to implement these recommendations.