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PART 1200—AMERICAN INDIAN TRUST FUND MANAGEMENT REFORM ACT

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Subpart A—General Provisions

§ 1200.1 Purpose of this regulation.

This part describes the processes by which Indian tribes can manage tribal funds currently held in trust by the United States. It defines how tribes may withdraw their funds from trust status; how they may return funds to trust; and how they may request technical assistance or grants to help prepare plans to manage funds or to ensure the capability to manage those funds.

§ 1200.2 Definitions.

As used in this part:

Act means the American Indian Trust Fund Management Reform Act of 1994 (Pub. L. 103–412, 108 Stat. 4239, 25 U.S.C. 4001).

Agency Superintendent means the official in charge of a Bureau of Indian Affairs Agency.

Area Director means the official in charge of a Bureau of Indian Affairs area office.

Bureau or *BIA* means the Bureau of Indian Affairs, Department of the Interior.

Department or *DOI* means the Department of the Interior.

General Counsel means the attorney for the tribe.

OST means the Office of the Special Trustee for American Indians, Department of the Interior.

OTFM means the Office of Trust Funds Management, Department of the Interior.

Resolution means the formal manner in which a tribal government expresses its legislative will.

Secretary means the Secretary of the Interior or his/her designee.

Solicitor means the Office of the Solicitor, Department of the Interior.

Special Trustee means the Special Trustee for American Indians appointed under Title III of the Act.

Tribal council means the elected or appointed governing officials of any tribe which is recognized by the Secretary.

Tribe means any Indian tribe, band, nation, rancheria, pueblo, colony or community, including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act which is federally recognized by the U.S. Government for special programs and services provided by the Secretary to Indians because of their status as Indians. For this purpose, it also means two or more tribes joined for any purpose, the joint assets of which include funds held in trust by the Secretary. An example of this would be the KCA (consisting of the Kiowa, Comanche and Apache Tribes).

Us means the Department of the Interior, i.e., the Secretary of the Interior or his/her designee.

We means the Department of the Interior, i.e., the Secretary of the Interior or his/her designee.

§ 1200.3 What is the Department's policy on tribal management of trust funds?

(a) We will give tribes as much responsibility as they desire for the management of their tribal funds that we currently hold in trust.

(b) Title II of the American Indian Trust Fund Management Reform Act, implemented by these regulations, offers tribes one approach for assuming increased management of their funds that we now hold in trust and administer. Under Title II, a tribe may completely remove its funds from Federal trust status and manage them as it wishes, subject to the requirements and conditions in this part. When a tribe withdraws its funds under this part, it may invest those funds in equities or other investment vehicles that are statutorily unavailable to us.

§ 1200.4 May tribes exercise increased direction over their trust funds and retain the protections of Federal trust status?

Yes. The Tribal Self-Governance Act (25 U.S.C. 458) and the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) provide other options for trust funds management. A tribe may choose to manage its trust funds under the provisions of these Acts if it wishes. These options are covered by 25 CFR part 900 (the "Indian Self-Determination and Education Assistance Act Program") and 25 CFR part 1000 (the "Self-Governance Program").

§ 1200.5 What are the advantages and disadvantages of managing trust funds under the options in § 1200.4?

Under these other options, the funds remain in Federal trust status and the tribe can exercise a range of control over their management. However, the tribe has fewer investment options than it has when it withdraws its funds completely from trust status. If a tribe chooses to keep its funds in trust status, the tribe is subject to the same statutory investment restrictions that bind us. That means that the tribe's investments are limited to bank deposits and securities guaranteed by the United States. (See 25 U.S.C. 162a for specific statutory investment restrictions.)

§ 1200.6 Do these regulations tell tribes how to receive future income directly rather than have the government continue to collect it?

No. These regulations apply only to the withdrawal of funds which are in trust. Some of these funds come from the sale or lease of trust resources. Even if a tribe withdraws its funds, we will collect and manage future income. If a tribe wishes to receive future income directly, it should contact the OST/OTFM staff at its agency or area office to find out how to do this.

§ 1200.7 Information collection.

The information collection requirements contained in subpart B of this part, Application to Withdraw Tribal Funds from Trust Status and subpart D

of this part, Application to Withdraw Tribal Funds from Trust Status-General and Specific Budget Technical Assistance, have been approved by the Office of Management and Budget under 44 U.S.C. 3507 *et seq.* and assigned clearance numbers 1035-001 (subpart B), and 1035-002 and 1035-003 (subpart D). Information collected in § 1200.13 (How does a tribe apply to withdraw funds?) will be used to determine the eligibility of applicants, and the capability of tribes or their contractors to manage and invest large blocks of funds. Information collected in § 1200.43, (How can a tribe apply for technical assistance?) will be used to determine the eligibility of applicants, as well as the level of need for technical assistance, in order for tribes to develop Management Plans and to complete the application for withdrawal process.

Subpart B—Withdrawing Tribal Funds From Trust

§ 1200.10 Who is eligible to withdraw their tribal funds from trust?

Any tribe for whom we manage funds in trust.

§ 1200.11 What funds may be withdrawn?

A tribe may withdraw some or all funds that we hold in trust if we approve a plan that it submits under this part.

§ 1200.12 What limitations and restrictions apply to withdrawn funds?

(a) A tribe may withdraw funds appropriated to satisfy judgments of the Indian Claims Commission (ICC) and the Court of Federal Claims and that we hold under the Indian Judgment Funds Use and Distributions Act (25 U.S.C. 1401) or another act of Congress if:

(1) The tribe uses the funds as specified in the previously approved judgment fund plan, and;

(2) The tribe withdraws only funds held for Indian tribes and does not include any funds held for individual tribal members.

(b) A tribe may withdraw funds appropriated to satisfy settlement agreements relating to certain tribal claims and that we hold and manage for the tribe pursuant to an act of Congress if:

(1) The tribe uses the funds as specified in the previously approved settlement act plan;

(2) The tribe withdraws only funds held for Indian tribes and does not include any funds held for individual tribal members; and

(3) It is determined that there is no provision in the act or settlement agreement requiring that the funds remain in trust to implement the act or agreement that cannot be waived.

(c) Tribal funds commonly known as "Proceeds of Labor" funds, usually income to trust resources, are generally withdrawn under normal tribal budgeting procedures, but may also be withdrawn from trust under this part. These funds may be returned to trust under the provisions of subpart C of this part.

§ 1200.13 How does a tribe apply to withdraw funds?

The tribe must submit four copies of its application and the attachments listed below to: Director, Office of Trust Funds Management, Department of the Interior, 505 Marquette NW, Suite 1000, Albuquerque, NM 87102. We will notify the tribe if the application is incomplete and will help the tribe complete the application if requested. When we determine that the application is complete, we will send copies to the appropriate agency superintendent and area director, the Special Trustee and the Solicitor. Each application package must contain the items listed below.

(a) Proof that the tribe has notified its members of its intent to remove funds from trust and that, when the request is approved, the tribe and not the United States Government will be liable for funds management. Notification must be by the method(s) that the tribe customarily uses to notify its members of significant tribal actions. The notification must identify the specific funds to be withdrawn.

(b) A tribal resolution that:

(1) Expressly authorizes the withdrawal of the funds and indicates the (approximate) dollar amount of the funds to be withdrawn;

(2) Expressly acknowledges that the funds, once withdrawn in accordance with the Act, will no longer be held in trust status by the United States, and that we have no further liability or responsibility for the funds; and

(3) Acknowledges that:

(i) Neither we nor the tribe necessarily accept the account balances at the time of withdrawal as accurate; and

(ii) Neither we nor the tribe have waived any rights regarding the balances, including the right to seek compensation for incorrect balances.

(c) A copy of a formal agreement between the tribe and the manager of the funds to be withdrawn, in which the manager agrees to:

(1) Comply with the terms of the plan we approve under §1200.15 and make only those changes that conform to revision procedures in the approved plan and the requirements of §1200.19; and

(2) Transfer funds to the tribe or another manager only after receiving a valid tribal resolution calling for this transfer and proof that the tribe has notified its members of intent to transfer the funds. The resolution must clearly state that:

(i) The funds are being withdrawn to be reinvested by the tribe in a manner consistent with the goals and strategies of the approved plan; and

(ii) The fund managers will continue to follow any previously approved distribution plan conditions.

(d) A legal opinion by the tribe's attorney or its general counsel that:

(1) The resolution referred to in paragraph (b) of this section was enacted under procedures established by the tribe's organic documents or oral tradition;

(2) The tribal governing body has the legal authority to withdraw funds from trust status and that the withdrawal does not require a referendum vote or other procedure beyond a tribal council resolution; and

(3) If the funds to be withdrawn are judgment or settlement funds, that the tribe's plan for managing the funds meets the requirements of any applicable judgment fund use and distribution plan or settlement act.

(e) The results of a tribal referendum, if one was held.

(f) If the funds to be withdrawn are judgment or settlement funds, a copy of the act and/or plan that sets out the conditions for the uses of the funds or income from them.

(g) A management plan as provided for in §1200.14.

§ 1200.14 What must the Tribal Management Plan contain?

The Tribal Management Plan required by §1200.13 must include each of the following:

(a) Tribal investment goals and the strategy for achieving them.

(b) A description of the protection against the substantial loss of principal, as set forth in §1200.16.

(c) A copy of the tribe's ordinances and procedures for managing or overseeing the management of the funds to be withdrawn. These must include adequate protections against fraud, abuse, and violations of the management plan.

(d) A description of the tribe's previous experience managing or overseeing the management of invested funds. This should include factual data of past performance of tribally-managed funds (i.e., audited reports) and the identity and qualifications of the tribe's investment officer.

(e) A description of the capability of all of the individuals or investment institutions that will be involved in managing and investing the funds for the tribe. Provide copies of State or Federal security applications for account executive(s).

(1) Investment entities named must submit:

(i) Ownership information (including Central Registry Depository (CRD) numbers);

(ii) Asset size and capitalization;

(iii) Assets under management;

(iv) Performance statistics on managed accounts for the past 5 years; and

(v) Any adverse actions by licensing and/or regulatory bodies within the past 5 years.

(2) In addition, we may ask about:

(i) Soft dollar arrangements;

(ii) Affiliation with broker dealers, banks, insurance and/or investment companies;

(iii) Research done in house;

(iv) Recent changes in active portfolio managers; and

(v) Any other information necessary to make an adequate evaluation of the proposed plan.

(f) A description of how the plan will ensure that the fund manager will comply with any conditions established in judgment fund plans or settlement acts.

(g) Proof of liability insurance of the investment firm.

(h) Proof of liability insurance that protects against fraud for those Tribal Council members with authority to disburse funds. In many tribes the chairperson, and the comptroller and/or the tribal treasurer, for example, would be the positions having this authority.

(i) A plan for custodianship of investment securities that includes:

(1) Name of persons in the tribe who can direct the custodian;

(2) Name of the custodian;

(3) Copy of intended custodian agreement;

(4) Size of custodian operation;

(5) Disclosure of any security lending provisions; and

(6) Insurance coverage.

(j) A tribal council agreement to provide an annual audit and report on performance of withdrawn funds to the tribal membership, with a copy to: Office of the Special Trustee for American Indians, Department of the Interior, MS-5140, 1849 C Street NW, Washington, DC, 20240. This agreement must include:

(1) A statement that the copy to the Special Trustee is for information only, and infers no liability on our part regarding the audit results, nor does it infer a requirement for us to take any action whatsoever; and

(2) A description of the steps (including audit performance and reporting) the tribe will take to ensure its membership that the tribe is continuing to comply with the terms of the plan submitted and approved pursuant to judgment fund limitations (if any) and/or the terms of the Act.

(k) The proposed date for transfer of funds.

(l) A statement as to whether the tribe chooses to receive the withdrawal as a cash balance transfer, as a transfer of marketable investments that we own for the tribe, or as a combination of the two.

(1) A cash balance transfer may require us to sell bonds, notes, or other investments that we purchased when investing the tribe's monies.

(2) We cannot transfer non-marketable securities to a tribe. We can only purchase and hold them and must sell them back to the U.S. Treasury.

(3) If we sell a tribe's security at a loss (i.e., when market value is less than book value or carrying value) we will first notify the tribe. The tribe must instruct us to proceed with the sale and must agree not to hold us responsible for the loss before we will make the sale.

(4) If the tribe asks us to transfer marketable securities, upon proper instructions from the new tribal custodian, we will order our custodian to physically transfer the proper security to the new custodian on the agreed upon date.

(m) Agreement that judgment award funds will have segregated accounts.

(n) A description of the procedures for amending or revising the plan.

§ 1200.15 What is the approval process for management plans?

The Secretary will approve or disapprove each management plan, based in part upon our recommendation.

(a) We will determine the completeness of the application, provide for adequate professional review of the application and the management plan, and provide technical assistance as necessary to make an application complete.

(b) We will coordinate with area directors in confirming authority of tribal governments to make requests.

(c) We will approve or disapprove a request within 90 calendar days of receiving a completed application. This 90-day period does not include time that we spend awaiting a response from the tribe for additional information that we have requested. All determinations will be in writing, and all responses will be by certified mail.

(d) If we find that a plan does not meet the criteria in §1200.16, we will notify the tribe of shortcomings of the request, and allow the tribe to respond

before recommending formal disapproval.

(e) Before final approval, we will reach agreement with the tribe on how many days after final approval we will transfer the funds. We will transfer the funds as soon after final approval as the tribe or manager is ready to receive them, unless we need additional time to sell existing instruments.

§ 1200.16 What criteria will be used in evaluating the management plan?

Each plan must be approved by the appropriate tribal governing body, and must be accompanied by a resolution approving the plan. The plan must be reasonable in light of the trust responsibility and the principles of Indian self-determination, and other appropriate factors, including, but not limited to, the factors listed below:

(a) We will evaluate the individuals or entities that will manage the funds to be withdrawn, or that will advise the tribe on investing the funds to be withdrawn in order to determine if they have the capability and experience to manage the funds. Among the elements we will evaluate are: the number of years in business, the performance record for funds management, and the ability to compensate the tribe if the entity is found liable for failing to comply with the tribe's management plan (i.e., its assets, bonding, and insurance).

(b) We will review the tribe's experience in managing investments. We will compare this experience to the complexity of the proposed management plan to determine whether the tribe has the experience to manage its proposed plan or whether it should begin with a less complex approach.

(c) We will evaluate the tribe's internal audit and control systems for overseeing or monitoring its investment activity.

(d) We will evaluate the adequacy of protection against substantial loss of principal. Our determination will include a thorough evaluation of the tribe's investment plan including:

(1) The goals and objectives;

(2) The proposed uses of the fund in order to meet business objectives;

(3) The size and diversity of the investment portfolio (for example, the class of stocks and the mixture of types of investments);

(4) The financial condition of the tribe;

(5) The inherent riskiness of the proposed investments; and

(6) The tribe's projected need and proposed timeframes to draw down the funds being invested or the income from them.

(e) We will determine the likelihood that the plan will be followed. We will base this determination on the contents of the agreement between the tribe and the fund manager and other appropriate factors.

§ 1200.17 What special criteria will be used to evaluate management plans for judgment or settlement funds?

For judgment or settlement funds, in addition to the criteria in § 1200.16, we will determine if the plan adequately provides for compliance with any conditions, uses of funds, or other requirements established by the appropriate judgment fund plan or settlement act.

§ 1200.18 When does the Department's trust responsibility end?

Our trust responsibility for funds withdrawn under this part ends on the date that the funds are withdrawn. However at the time of withdrawal neither we nor the tribe may be deemed to have accepted the account balance at the time of withdrawal as accurate; or waived any rights regarding the balance and our ability to seek compensation.

§ 1200.19 How can the plan be revised?

Once a tribe has withdrawn its funds, the tribe may revise its plan without our approval. All revisions should conform to the procedures outlined in the approved management plan. The tribe should inform its members of all revisions to a plan through normal tribal procedures before the revisions are implemented.

§ 1200.20 How can a tribe withdraw additional funds?

(a) If a tribe has withdrawn funds under an approved tribal management plan and wishes to withdraw additional funds that will be managed under the

same plan, it need not submit a complete new application. The tribe must:

(1) Notify us of the additional amount it intends to withdraw and whether the funds to be withdrawn are in kind or cash. (Written notification should be provided to our address in § 1200.13);

(2) Send us a tribal resolution approving the new withdrawal and certifying that the funds are being withdrawn subject to the same conditions and that they will be managed under the plan in the original approved application;

(3) Send us a copy of the most recent compliance audit or investment report.

(b) After we finish our review we will release the additional funds, unless the compliance audit or investment report indicates that the tribe is not complying with its management plan. In this case, we will not release the additional funds until the tribe demonstrates that it is complying with the management plan.

§ 1200.21 How may a tribe appeal denials under this part?

If we deny a request or do not approve an application within 90 days of a request, the tribe may address any problems that we identify and resubmit a revised request, seek technical assistance, or appeal the denial under 43 CFR part 4.

Subpart C—Returning Tribal Funds to Trust

§ 1200.30 How does a tribe notify the Department if it wishes to return withdrawn funds to Federal trust status?

If a tribe elects to return some or all of the funds it has withdrawn from Federal trust status pursuant to this Act, it must first notify us in writing at our address in § 1200.13. This notification must provide a proposed date for the return of the funds, as well as the amount of funds to be returned, or actual securities to be delivered to the appropriate custodian.

§ 1200.31 What part of withdrawn funds can be returned to trust?

A tribe may return all or a portion of the principal which was removed from trust under this Act along with earnings and profits. We will verify the amount declared for earnings before we accept a return. We will accept any amount less than the original principal amount as a principal amount.

§ 1200.32 How often can funds be returned?

Tribes may return all or part of withdrawn funds no more than twice a year, beginning no sooner than six months after date of withdrawal, except with approval of the Secretary.

§ 1200.33 How can funds be returned?

Funds may be returned either as cash or securities, which meet the requirements for investments in 25 U.S.C. 162a. Cash can be transferred to the US Treasury by Electronic Funds Transfers (EFT), or the Automated Clearing House (ACH) process. Tribes must coordinate the transfer of ownership in securities with us to ensure proper credit to the tribe. The securities must meet investment restrictions contained in 25 U.S.C. 162a.

§ 1200.34 Can a tribe withdraw redeposited funds?

Yes. If a tribe wishes to withdraw redeposited funds from Federal trust status, it must submit a written request to do so, accompanied by a new resolution and any revisions it wishes to make in its original management plan.

Subpart D—Technical Assistance

§ 1200.40 How will the Department provide technical assistance for tribes?

(a) We will provide direct or contract technical assistance, in accordance with appropriations availability to tribes for developing, implementing, and managing Indian trust fund investment plans. We will ensure that our legal, financial and other expertise is made fully available to advise tribes in developing, implementing, and managing investment plans.

(b) We may award grants to tribes for developing and implementing plans for investing Indian tribal trust funds.

(c) Tribes may also obtain technical assistance on their own.

§ 1200.41 What types of technical assistance are available?

The types of technical assistance include: investment planning; accounting; selection of investment managers; monitoring of investments; asset management; or other assistance appropriate to support funds withdrawal.

§ 1200.42 Who can provide technical assistance?

A sample of competent providers includes any of the following entities with the appropriate skills and capabilities: available DOI or OST staff; intertribal organizations; public agencies; and contracted private investment firms.

§ 1200.43 How can a tribe apply for technical assistance?

(a) Tribes wishing technical assistance may request it by sending us a letter along with a tribal resolution outlining the technical assistance required, tribal resources which may be applied to the need, and suggested provider, if known. The resolution must state clearly that the assistance is needed for developing, implementing, or managing an investment plan under the provisions of this authority.

(b) Tribes requesting funds for technical assistance must send a completed SF-424, APPLICATION FOR FEDERAL ASSISTANCE, and SF-424A, BUDGET INFORMATION, along with a tribal resolution, detailing the assistance specifically requested, and the suggested provider to our address in § 1200.13.

(c) We will make grants subject to funds availability. We will publish a notice in the FEDERAL REGISTER concerning the availability of funding, deadlines for grants, the application process, and approval criteria. If funding is limited, grants will be awarded based on criteria that we feel will best meet the intent of the Act. We will consult with tribes in determining annual criteria. Unsolicited grant requests will not be accepted.

§ 1200.44 What action will the Department take on requests for technical assistance?

We will respond in writing to all requests for technical assistance and grants, advising of decision, availability of appropriate expertise and funding, and anticipated delivery of the service.