



Delaware Tribe of Indians

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**DELAWARE TRIBE OF INDIANS MEMORANDUM ON TRUST FUND LITIGATION
REGARDING TRUST FUND ADMINISTRATION. PRESENTED TO THE
SECRETARIAL COMMISSION FOR CONSIDERATION AND ACTION IN SUPPORT
OF THE DELAWARE TRIBE.**

**Submitted to Commissioner Stacy Leeds at the Consultation Meeting in Oklahoma City,
OK on June 7, 2013**

Trust Fund Background

- The management of trust funds and assets held by the United States on behalf of Indian tribes has been a longstanding concern, dating back to the early 1800s. In the 1980s, Congress began to pay particular attention and ordered the Department of the Interior to conduct an accounting of each trust fund.
- In 1996, Interior and its contractor, Arthur Andersen LLP, issued reports to each tribe. These reports were deficient in a number of serious respects. The Tribe retained the Nordhaus Law Firm to assess its claims, which led to the filing of a lawsuit in the federal court in New Mexico only to get the documentation necessary to assess those claims.
- That assessment, conducted by and with the Archambo accounting firm, showed conclusively that the Tribe had valid claims. The Tribal Council authorized filing the current case in the United States Court of Federal Claims in Washington DC, the only court that can award money damages against the United States.
- This case was filed on January 8, 2002.

The Tribe's Court of Federal Claims Case—Claims and Early History

- The Tribe's claims arise from three acts of Congress. Pursuant to the 1946 Indian Claims Commission Act, the Tribe filed suit against the United States for violations of the many treaties signed with the Tribe as Delawares were forced relentlessly westward. The Tribe won a number of it cases, or "dockets", sometimes in combination with one or more other Delaware entities.
- Those different awards were combined in three judgment fund acts passed by Congress, one each in 1968, 1972, and 1980.
- Without going into too much detail, the United States failed to:
 - distribute all of the funds to individual tribal members
 - to follow statutory requirements to distribute residual funds to the Tribe; and
 - to properly invest funds while held in trust by the United States
- After initial briefing of issues by the parties to Settlement Judge Eric Bruggink, the United States acknowledged its failures early in the litigation. A settlement in principle followed quickly, and by November 2003, the United States agreed to sponsor legislation that would settle the case by:
 - Distributing all funds owing to the Tribe (and to the Delaware Nation and Idaho and Kansas Delawares)
 - Awarding \$437,165 to the Tribe for damages relating to mismanagement of the trust funds while held by the United States
- By the fall of 2004, draft legislation implementing the settlement agreement was ready for consideration by Congress.

The Period of Recognition Through the Cherokee Nation

- On November 16, 2004, the Tenth Circuit issued its opinion stating that the Delaware Tribe had been merged into the Cherokee Nation.
- The Tenth Circuit's decision cast doubt on the Tribe's legal standing to continue the trust fund litigation and effectively left the legislation on hold.
- The Supreme Court denied the Tribe's request to hear an appeal in October 2005, and the Tribe was effectively removed from the list of recognized tribes.
- The Tribal Council elected to try to include congressional recognition of the Delaware Tribe in the trust legislation.
- Initially, the United States, through Jim Cason, agreed to sponsor such legislation but then did an abrupt about face, saying that any legislation restoring the separate recognition of the Tribe had to have the approval of the Cherokee Nation. The Oklahoma congressional delegation stated the same requirement.

- The Tribe negotiated legislation with the Cherokee Nation that, although it contained a number of very unfair limitations on the Tribe similar to those imposed on Shawnee, would have restored separate recognition.
- It proved impossible to move recognition legislation in Congress. Other tribes were seeking similar legislation, and none of the bills were moving.
- With the assistance of Senator Coburn's office and friends within the Department of the Interior, we were able to convince the Department to recognize the Tribe separately through the Oklahoma Indian Welfare Act, a method that had not been used for 30 years. Again, however, the department stated that Cherokee would have to state that it was not opposed.
 - During 2008, the MOA with the Cherokee Nation was negotiated, again including unfair restrictions on the Tribe, some of which were actually added during the final Cherokee Council meeting.
 - We also worked with Congressman Sullivan's office to have him introduce the legislation. Interior wanted the legislation introduced as a sign of congressional support for its efforts to move forward under the OIWA, but everyone knew that the legislation would not be enacted. In fact, Senator Coburn stated his express opposition to certain provisions that would have given the Tribe preferential treatment in trust land acquisition outside the Fourteen Counties.
- In late May 2009, the Tribe held its OIWA election, and the Tribe's membership voted overwhelmingly to reorganize under the OIWA, restoring its separate federal recognition.
- On August 11, 2009, the Tribe again appeared on the list of federally recognized tribes. The preamble to the *Federal Register* notice made it clear that the recognition was subject to the MOA with Cherokee, as Cherokee had required.

Efforts in Congress on the Trust Litigation after Restoration of Separate Recognition

- After separate recognition was restored, we worked with Interior to again prepare legislation that would resolve the Court of Federal Claims litigation.
- Congressman Sullivan and Senator Coburn both worked with us to have that legislation introduced.
- However, the intense budget battles in the House of Representatives affected the Tribe's efforts. The Republican majority in the House declared that the legislation was an "earmark" because it directed that funds be paid to the Tribe (and other Delaware entities). They maintained this position even after we (and our local Congressman's office) explained that it could not be an earmark because the funds are already held in trust. Congressional authorization was only necessary to release the funds pursuant to earlier acts of Congress, but this was not an expenditure of appropriated funds. The

matter went all the way to Speaker John Boehner's office, but the House Republicans would not budge.

Current Efforts to Resolve the Litigation

- Given that there was no practical way to resolve the litigation through Congress as originally insisted upon by, and agreed upon with, the Departments of Justice and Interior, we developed an alternative strategy to resolve as much of the case as possible through administrative means.
- That strategy involved dividing the transfer of funds to the Tribe into four categories:
 - Category 1: Funds that could be transferred to the Tribe (or paid to Tribal members) administratively.
 - Category 2: Funds that could be transferred to the Tribe under a statute that allows Interior to transfer unclaimed per capita payments to a Tribe if six years have elapsed from when the payment should have been made and certain other conditions are met, including submission of notice to Congress. The statute is 25 U.S.C. §§ 164-165, and so these funds have been called "Section 164 Funds".
 - Category 3: Settlement funds to be paid through the Court of Federal Claims to compensate the Tribe for mismanagement of the Tribe's trust funds.
 - Category 4: Funds to be paid as per capita payments to Tribal members (and other Delaware entities) pursuant to the 1980 Delaware Judgment Act, Pub. L. 96-318. Note that, as discussed below, legislation is still preferred for these payments.
- Category 1 funds have now been completely resolved. These payments involved funds that had been set aside for per capita payments to individuals who later have been determined to be ineligible for payments. The Office of the Special Trustee transferred roughly \$448,000 to the Tribe in June and July 2010. OST transferred another roughly \$50,000 to the Tribe in March 2012.
- The Section 164 Funds, or Category 2, are now almost complete. OST and the BIA Regional Office tried to contact Tribal members who should have received payments in the early 1980s but did not. Where a Tribal member was located, payment was made. The remainder (with a current value of a little more than \$300,000) is now the subject of a report to Congress. Unless we intervene successfully, that request must sit for 60 "congressional days" before the money can be disbursed to the Tribe.
- **Current Status**
- The Tribe is quite confident that it can resolve the remaining trust claims that do not involve per capita payments on an honorable basis with Justice and Interior.
- Legislation will still be necessary to deal with the per capita payments.

- For example, because 30 years have passed, many of the intended payees will have died. The United States does not want to have to probate thousands of estates to distribute payments of less than \$100.
- The Tribe and its members should not have to wait for the BIA to do so.
- Having already waited for 30 years, the Tribe should not have to wait another six years under 25 U.S.C. § 164 for the restoration of funds to the Tribe of any payments that cannot be made.
- Because of the “lobbying” rules, the United States is insisting that the Tribe has to carry the legislation despite the fact that the United States, not the Tribe, will be the major beneficiary of the legislation because of the avoidance of the administrative burden of probating estates of deceased per capita recipients. (The legislation will provide that such funds go directly to the Tribe under the 1980 Act rather than to the heirs.)

Pending Actions

1. Section 164 Funds

Currently, the package necessary to release roughly \$300,000 to the Tribe under 25 U.S.C. § 164 is before two congressional committees (Senate Indian Affairs and House Resources). The statute requires that Congress have “sixty calendar days (exclusive of days on which either the Senate or the House of Representatives is not in session because of an adjournment of more than three days to a day certain)” to take action on the proposal. If Congress expressly approves the proposal or does nothing, then Interior may distribute the funds to the Tribe.

Given the current congressional calendar and depending on the interpretation given the statute and whether Congress sticks to its schedule, the funds will be released to the Tribe sometime between late June and late July. There is some minimal danger that a combination of an unfavorable interpretation of the statutory language and unscheduled congressional breaks could push the release of funds to the Tribe passed the August recess and into September. **We want to make sure that Interior and the two committees agree on a calendar calculation method under the statute that would allow distribution near the end of June or early July.** This involves making sure that everyone counts the weekend days when Congress breaks for two or three (but not four or more days).

2. Settlement in Court of Federal Claims

With the Section 164 Funds in the process of being released, we are now in a position to settle the mismanagement claims through the Court of Federal Claims. Ten years ago, we agreed on a settlement figure of \$437,165. Much has changed since then, including

another ten years of lost interest and a significant amount of effort by the Tribe (which means attorney's fees) to implement the agreed-upon settlement.

The "line" attorneys at the Departments of Interior and Justice recognize that the settlement figure must be "updated". Within the Departments, however, "updating" likely means applying a relatively low interest rate to adjust that figure to present. Such a calculation likely would lead to a revised settlement amount in the \$550,000 to \$600,000 range.

3. Preparation of Legislation

The final phase of the trust fund litigation in the Court of Federal Claims involves per capita distributions of a little less than \$1 million to all Tribal members on the roll in 1980 (as well as an additional amount to Kansas Delaware members and a distribution under the 1980 Act to the Delaware Nation). The United States has insisted on legislation for this part of the case for two reasons:

- (1) funds of multiple tribal entities are involved, and
- (2) the passage of time means that many Tribal members will have passed away. The anticipated per capita payments are less than \$100. Interior would rather have the money for those payments go to the Tribe rather than probating the estates of deceased members, which would delay the process considerably.

Legislation will also benefit the Tribe. The Tribe will likely receive at least several hundred thousand dollars that otherwise would go out in very small per capita payments to Tribal members and only after several years. Legislation will also (we would propose) shorten the time for turning over returned per capita amounts to the Tribe (from six years to one). Finally, Interior has been willing to consider including at least limited language that would help the Tribe with ongoing legal obstacles (obtaining trust land; the Supreme Court's *Carcieri* decision, etc.). We might be able to include language helpful to the Tribe, even in the pared down legislation intended to avoid the "earmark" barrier we ran into in 2010.

Broader Issues for Commission Consideration

4. Undistributed Per Capita Funds

The Tribe has reason to believe that other tribes have undistributed per capita funds dating back to the Indian Claims Commission era. If that is in fact the case, the Commission should consider supporting a broader legislative fix, similar to the

legislation the Tribe intends to advance, to streamline the process of distribution to individuals and tribes. A process should be established to set a minimum amount that must be distributed per capita, rather than directly to the tribe. Time periods should be imposed for Interior first to identify such funds and then to finish distribution. Tribes should be allowed, at their discretion, to 638 the task of locating members and/or distributing the funds to individuals.

5. Section 164 Funds

On a related matter, OST engaged in a more thorough search for per capita payees than the Tribe believes is required of Interior under 25 U.S.C. § 164. This both delayed the restoration of significant funds to the Tribe and decreased the amount restored. If this is happening to other tribes, clarification of the due diligence required of Interior under the statute is important.

6. Loss of Funding During Period of “Non-Recognition”

While the Tribe’s situation is unusual, there should be a mechanism for the restoration of funding lost during a period of “non-recognition.” The Tribe cannot afford to litigate the matter and would likely lose under existing law. Is there anything the Commission can do?

In summary, The Delaware Tribe respectfully requests the Secretarial Commission give attention to the claims of the Delaware Tribe and ensure action by appropriate staff within Interior to resolve these claims and distribute funds to tribal members who deserve them. We also ask for Secretarial Commission oversight to ensure completion of tribal settlement administrative actions and litigation that will provide funds to the tribal government including payment of damages for previous mismanagement.

We thank Commissioner Stacy Leeds for the privilege of presenting our issues to the Secretary of the Interior for resolution.

Respectfully,

Paula Pechonick, Chief
Delaware Tribe of Indians
Bartlesville, Oklahoma