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Memorandum

JAN 23 1978

To: Deputy Assistant Secretary--Indian Affairs
(Program Operations)
From: Associate Solicitor, Indian Affairs
Subject: Pooling of Tribal Funds for Investment Purposes

This is in response to your request for our views on a proposal to change the procedure for the investment of tribal funds.

Currently, tribal funds are invested on a tribe-by-tribe basis, with investments being made of a tribe's trust funds for the period of time which the tribe authorizes. It is proposed to put all the tribal funds together for investment purposes, and invest them without obtaining specific tribal approval for each investment of funds. Instead, a tribe would have the option of having its funds placed in a short-term or long-term investment pool.

Five reasons have been advanced for pooling tribal funds for investment. The given reasons are that the pooling will (1) increase earnings by extending the term of the investments; (2) reduce the mechanical workload for the staff of the Branch of Investments, Area Offices, agencies, and tribes; (3) increase the time the investment staff will have to reevaluate investment opportunities; (4) reduce collateral requirements; and (5) insure greater equitableness in the distribution of investments.

Authorization for the investment of tribal funds is found in 25 U.S.C. § 162(a). That statute specifies the types of investments which the Secretary of the Interior may make of tribal funds. No guidance is found in the statute with respect to the present question. In general, the standards which govern private trustees govern the Secretary when he invests Indian trust funds. See Cheyenne-Atapahoe Tribe v. United States, 512 F.2d 1340 (Cl. Ct. 1975); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Calif. 1973). We have therefore looked to general trust law with respect to the permissibility of combining tribal trust funds in making investments.

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Although a trustee has the duty not to mingle funds of separate trusts, as set out in Restatement (Second) of Trusts § 179 (1959), in § 227(a), Comment j of the Restatement, the following statement is made:

"Combining trust funds in making investments. The fact that in making investments trust funds of one trust are combined with funds of other trusts administered by the trustee does not make the investment improper, provided that it is in other respects proper"

On the other hand, A. W. Scott, reporter for the Restatement of the Law of Trusts quoted above, in Section 227.9 of his The Law of Trusts (Third edition 1967) comments on combining trust funds for investment purposes as follows:

". . . A somewhat similar problem [to investing trust funds in a single mortgage] arises where the trustee invests the funds of several trusts in a group of securities, each estate having a fractional interest in the whole group of securities. There is undoubtedly an advantage to the beneficiaries of the trust in thus commingling trust funds. In this way, they obtain the advantage of diversification which it is difficult if not impossible to obtain where the trust estate is small. Moreover there is an advantage to the trustee, since it is easier to make and to supervise investments in this way than it is where separate investments are made for many small

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trust estates. The difficulty is, however, that it is at best doubtful whether the trustee can properly commingle the funds of several estates in making investments unless this is authorized by the terms of the trust. This is true even though all the securities held in the common fund are in themselves proper trust investments; and certainly if they are not all proper trust investments under the law of the state which governs the administration of the trusts, the investment is improper unless authorized by the terms of the trusts . . ."

American Jurisprudence discusses the objections to combining a trust fund with other trust funds in an investment or a group of investments in 76 Am. Jur. 2d Trusts, § 400 (1975). Then in 76 Am. Jur. 2d Trusts, § 401 (1975), it is stated:

"Trust funds have been, from time to time, combined for investment, with satisfactory results, and the practice is generally recognized as proper for a trustee. Thus, the investment of trust funds in a share or part of a single security or pool of securities, where the trustee holds the security or securities and assigns participations therein to a trust or trusts being administered by the trustee, has been upheld in a number of cases, even in the absence of express authoriza-

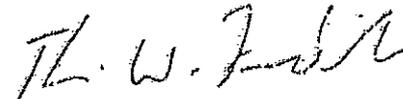
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tion by statute or the terms of the trust. Cases approving trust investments in participations have been, in some jurisdictions, forerunners of statutes authorizing the practice. Indeed, the practice, antedating statutes approving it, was extensive and followed by well-conducted trust companies or departments, especially in states where trust investments have been of considerable volume. But the view has been taken that the practice should be validated, if at all, at least where it involves the trustee's taking the securities in his own name without disclosure of the trust on the face of the securities, only by carefully considered legislation. Also it has been held that a trustee administering plural trusts cannot invest them together, prorating the income, since it is only by keeping them separate that losses and charges can be allocated properly. [Footnotes omitted and underscoring supplied]

As you can see from the foregoing, the state of the law on the question is not crystal clear. Congress could, of course, enact legislation expressly authorizing the combination of tribal funds for investment purposes. Absent such legislation, it appears that the combination of tribal funds for that purpose is subject to challenge. If challenged, however, I

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believe that the chances are good that the pooling of tribal funds for investment purposes even in the absence of express statutory authority may be successfully defended.


Thomas W. Fredericks