



**"Taking A Stand On Our Native Lands"**

ILWG Officers/Regional Contacts

Austin Nunez – Chair, *Tohono O'odham*  
2018 W. San Xavier Rd.  
Tucson, AZ 85746  
Tel: 520-294-5727  
Fax: 520-294-0613

Helen Sanders - Vice-Chair, *Quinault*  
53 Howanut Road  
Oakville, WA 98568  
Tel: 360-273-7137  
Fax: 360-273-5548

Marcella Giles, Secretary *Muskogee-Creek*  
11400 S. 129<sup>th</sup> E. Ave.  
Broken Arrow, OK 74001  
Tel: 703-623-8360  
Fax: 703-8270086

The Indian Land Working Group (ILWG) is chaired by Austin Nuñez, who also serves as Tribal Chair for the San Xavier District of the Tohono O'odham Nation in southern Arizona. Additionally, 3 ILWG officers, including Helen Sanders, and regional contacts from tribes and landowner associations from across the country comprise the ILWG Board. Helen Sanders is currently the Indian Land Working Group's official representative.

Over the past two decades, the ILWG has built a network of experts consisting of BIA employees, Indian land managers, tribal officials, and individual landowners who are knowledgeable about minerals, timber, agriculture, and the laws governing Indian lands and resources. Currently the Indian Land Working Group members operate from within tribal or landowner association offices across Indian Country. In 2013, the ILWG will hold it's 23<sup>rd</sup> Annual Indian Land Consolidation Symposium. As in years past, this symposium will attract 100-250 people, and will—also as in years past—represent the only national land symposium devoted to educating and empowering individual Indian landowners in the management of their own lands. The Indian Land Working Group's efforts are dedicated to the restoration and recovery of the native land base; and the control, use, and management of this land base by tribal communities. Preservation of our homelands assures the continuation of our nations and culture now and for future generations.

February 6, 2013

**Secretary Salazar anticipates Cobell payments by end of year  
Tuesday, October 23, 2012**



Interior Secretary Ken Salazar (r) and Assistant Secretary for Indian Affairs Kevin Washburn (l) discuss Indian issues prior to their speeches at the National Congress of American Indians 69th annual convention in Sacramento, CA. 10-22-2012. Photo © Indianz.Com

Payments from the \$3.4 billion Cobell settlement could go out by the end of the year, Interior Secretary Ken Salazar said in an interview on Monday.

Four Indian beneficiaries are asking the U.S. Supreme Court to review the settlement. But Salazar expected their petitions for certiorari to be rejected.

"We'll wait for the Supreme Court denial of cert, which we expect, and we'll be able to deploy that program fully by the end of the year," Salazar said before his address at the National Congress of American Indian 69th annual conference in Sacramento, California.

One petition, filed by Sisseton-Wahpeton Oyate member Kimberly Craven, is up for consideration this Friday, according to Docket No. 12-134. The justices could deny it outright or they might wait to consider it along with a petition filed by three other beneficiaries.

The second petition is not yet up for consideration, according to Docket No. 12-355.

If both petitions are rejected, as Salazar expects, the Interior Department will be able to distribute \$1.412 billion in payments to Indian beneficiaries. Most will receive \$1,800, but many could see even more, depending on the type of activity in their trust account.

Denial of cert also means the department can move forward with a \$1.9 billion program to consolidate fractionated interests. Indian landowners will be paid, on a voluntary basis, for their small land holdings, which will then be returned to tribal governments.

"We're going to be ready to hit the ground running as soon as the Supreme Court makes a decision," Salazar said.

In addition to the cash component, the settlement created the National Commission on Indian Trust Administration and Reform to make recommendations for trust reform efforts. The panel has been meeting since March.

"We wanted to make sure we had Indian Country very involved with us as we move forward," Salazar said. Under the American Indian Trust Fund Management Reform Act of 1994, the Office of the Special Trustee for American Indians oversees trust reform at the department. But the Obama administration has left the post vacant since January 2009.

"The Office of Special Trustee was supposed to be temporary and not forever," Salazar noted.

In August, President Barack Obama nominated Vincent Logan, a member of the Osage Nation of Oklahoma, to serve as Special Trustee. The position requires Senate confirmation.

Salazar said he will look to Kevin Washburn, the new leader of the Bureau of Indian Affairs, to help guide trust reform efforts. Tribal leaders have complained about budget cuts to the BIA during the Bush administration, when the OST's size and scope were dramatically increased.

"This administration is getting close to the finish line with the Cobell settlement," Washburn said in an interview yesterday.

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## H.R.4833

### American Indian Trust Fund Management Reform Act of 1994 (Enrolled Bill (Sent to President))

#### TITLE III--SPECIAL TRUSTEE FOR AMERICAN INDIANS

##### SEC. 301. PURPOSES.

The purposes of this title are--

- (1) to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians by establishing in the Department of the Interior an Office of Special Trustee for American Indians to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities;
- (2) to ensure that reform of such practices in the Department is carried out in a unified manner and that reforms of the policies, practices, procedures and systems of the Bureau, Minerals Management Service, and Bureau of Land Management, which carry out such trust responsibilities, are effective, consistent, and integrated; and
- (3) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians.

##### SEC. 302. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

(a) ESTABLISHMENT- There is hereby established within the Department of the Interior the Office of Special Trustee for American Indians. The Office shall be headed by the Special Trustee who shall report directly to the Secretary.

##### (b) SPECIAL TRUSTEE-

- (1) APPOINTMENT- The Special Trustee shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.
- (2) COMPENSATION- The Special Trustee shall be paid at a rate determined by the Secretary to be appropriate for the position, but not less than the rate of basic pay payable at Level II of the Executive Schedule under section 5313 of title 5, United States Code.

account holder outlining efforts the Secretary will undertake to resolve the dispute.

**SEC. 305. STAFF AND CONSULTANTS.**

(a) STAFF- The Special Trustee may employ such staff as the Special Trustee deems necessary. The Special Trustee may request staff assistance from within the Department and any office or Bureau thereof as the Special Trustee deems necessary.

(b) CONTRACTS- To the extent and in such amounts as may be provided in advance by appropriations Acts, the Special Trustee may enter into contracts and other arrangements with public agencies and with private persons and organizations for consulting services and make such payments as necessary to carry out the provisions of this title.

**SEC. 306. ADVISORY BOARD.**

(a) ESTABLISHMENT AND MEMBERSHIP- Notwithstanding any other provision of law, the Special Trustee shall establish an advisory board to provide advice on all matters within the jurisdiction of the Special Trustee. The advisory board shall consist of nine members, appointed by the Special Trustee after consultation with Indian tribes and appropriate Indian organizations, of which--

- (1) five members shall represent trust fund account holders, including both tribal and Individual Indian Money accounts;
- (2) two members shall have practical experience in trust fund and financial management;
- (3) one member shall have practical experience in fiduciary investment management; and
- (4) one member, from academia, shall have knowledge of general management of large organizations.

(b) TERM- Each member shall serve a term of two years.

(c) FACA- The advisory board shall not be subject to the Federal Advisory Committee Act.

(d) TERMINATION- The Advisory Board shall terminate upon termination of the Office of Special Trustee.

**TITLE IV--AUTHORIZATION OF APPROPRIATIONS**

**SEC. 401. AUTHORIZATION OF APPROPRIATIONS.**

There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

"The Office of Special Trustee was supposed to be temporary and not forever," Salazar noted.

In August, President Barack Obama nominated Vincent Logan, a member of the Osage Nation of Oklahoma, to serve as Special Trustee. The position requires Senate confirmation.

Salazar said he will look to Kevin Washburn, the new leader of the Bureau of Indian Affairs, to help guide trust reform efforts. **Tribal leaders have complained about budget cuts to the BIA during the Bush administration, when the OST's size and scope were dramatically increased.**

"This administration is getting close to the finish line with the Cobell settlement," Washburn said in an interview yesterday.

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### **Comment:**

The funding information for both the BIA budgets from FY 1977 through the current fiscal year (see attached chart) illustrate the level of funds appropriated.

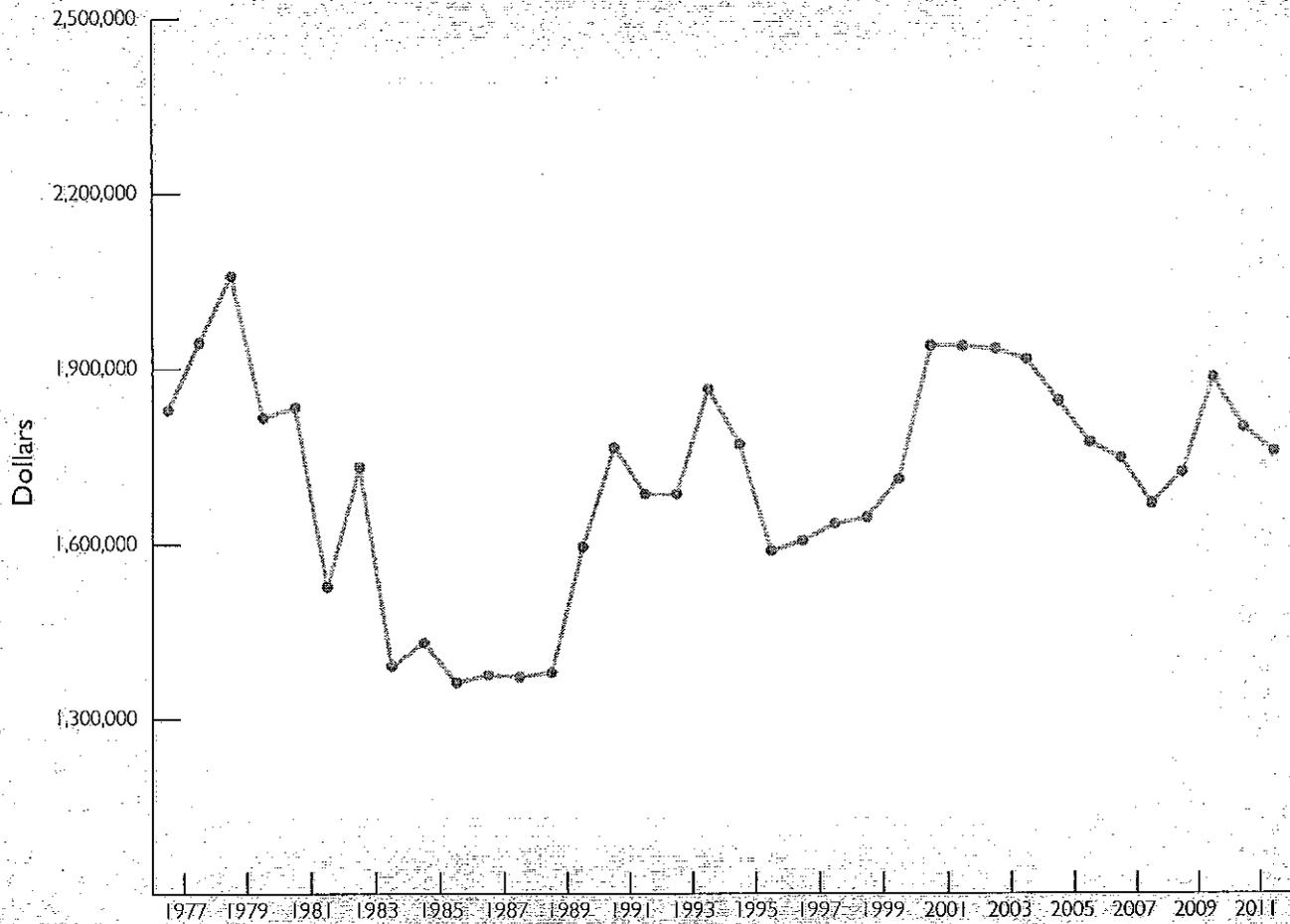
The establishment of the OST was with specific funding appropriated by Congress to begin to implement the mandate. The initial funding established the infrastructure for the OST and the funding has decreased since the first couple of years of operations by the OST.

The OST funds were separate from the BIA operating budgets. (See attached chart)

The OST's size and scope is completely independent from the BIA budgets for each fiscal year.

The OST continues to provide a specific service to both the tribes and many individual Indians throughout Indian Country and should continue into the future. The Cobell settlement demonstrates that there are approximately 500,000 individual Indians with trust assets that rely upon the OST for the distribution of funds. The 500+ tribes have the option of either contracting with the BIA through the PL 93-638 process or for some, the Self-Governance Compacts. However, the federal trust obligations to the individual Indians remains and the valuable service through the OST should remain intact.

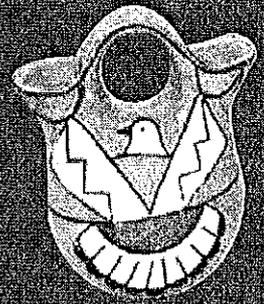
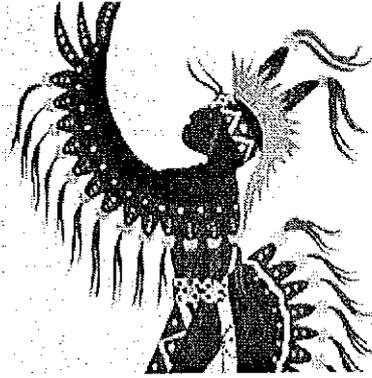
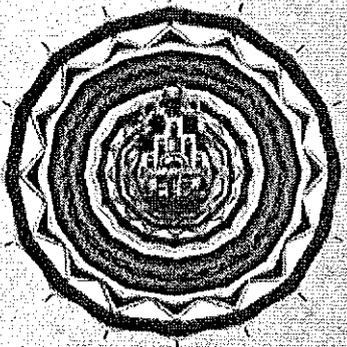
**Figure 2: BIA Funding, FY 1977-2012**  
(In Constant 1996 Dollars)



SOURCE: Walke, R. (1998). *Indian-Related Federal Spending Trends, FY 1975-FY 1999*. Washington, DC: Congressional Research Service and U.S. Department of the Interior (updated 1/06/2012). Retrieved on December 20, 2011, from [www.doi.gov/budget/budget\\_general/data/pdf/tenyear.pdf](http://www.doi.gov/budget/budget_general/data/pdf/tenyear.pdf).

# Meeting the Challenge

2008 Annual Report to Congress



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United States Department of the Interior  
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS  
Washington, DC 20240



April 20, 2009

Dear Member of Congress:

The Office of the Special Trustee for American Indians (OST) was established by the *American Indian Trust Fund Management Reform Act of 1994*. This annual report is provided pursuant to the requirements as stated in 25 U.S.C. § 4043 (f).

Several important events occurred in fiscal year 2008. These included OST's resumed use of the Internet (after a court-ordered hiatus dating back to December 2001) and the opportunity for beneficiaries to receive trust income disbursements via a debit card option. This report also provides information and updates on significant accomplishments and reforms in process.

I hope you find this report helpful. Please do not hesitate to contact my office at 202-208-4866 for more information.

Sincerely,

Donna Erwin  
Acting Special Trustee for American Indians



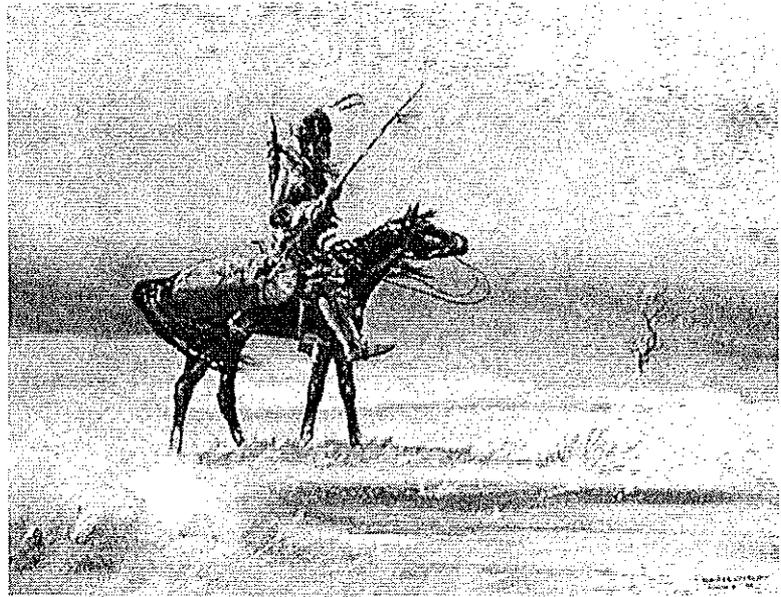
*“...not only has the present and future reliability of the Indian trust system greatly increased, but the repository at Lenexa and the technological tools that have been developed to examine historical transactions have created a wellspring of information from which scholars will continue to learn about the history of the Indian trusts, Indian lands, and Federal-Indian relations.”*

Judge James Robertson, United States District Court for the District of Columbia  
August 7, 2008, Memorandum on the Elouise Cobell, et al., vs. Dirk Kempthorne,  
Secretary of the Interior, et al., class action lawsuit

The Indian trust is the largest land trust in the United States. The Department of the Interior (the Department) has managed this trust for more than a century in fulfillment of the Department's fiduciary responsibilities to American Indians and Alaska Natives.

The Office of the Special Trustee for American Indians (OST) has administered the financial assets of this trust for more than a decade. Significant portions of the people OST serves depend on trust disbursements to meet their basic needs. Failure to receive a trust payment timely is not merely an inconvenience for beneficiaries; it can mean no money for rent, food, clothes, shelter and medical needs. Each OST employee knows his or her professionalism and commitment to duty can make the difference in preventing a personal disaster somewhere in Indian country.

The Special Trustee submits to Congress an annual report detailing significant progress of trust reform. In 2007, the Special Trustee submitted a more comprehensive report chronicling progress since 1994, entitled *Restoring Trust: The Reformation of Indian Trust Management (1994-2007)*. This 2008 report updates Congressional members on OST's progress toward comprehensive, effective management of the Indian trust.



## Responding to a History of Concerns

American Indians and others had long raised concerns about the management of the Indian trust, which was established as a result of the General Allotment Act of 1887, also known as the Dawes Act. Over the decades, through the courts and legislation, a body of laws, regulations and policies was developed to address these concerns. But it was the 1992 report, *Misplaced Trust*, from the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations that galvanized Congress to pass the American Indian Trust Fund Management Reform Act (Reform Act) in 1994.<sup>1</sup>

OST, established by the Reform Act, was charged with effective management of trust responsibilities to Indian tribes and individual Indians. Initially, OST was to oversee and coordinate reforms within the Department ensuring that trust responsibilities of the Bureau of Indian Affairs

<sup>1</sup> For a succinct, comprehensive history of the Indian trust from 1887 through the passage of the 1994 Act, see *Restoring Trust: The Reformation of Indian Trust Management*, published by OST in 2007.

(BIA), the Minerals Management Service (MMS) and the Bureau of Land Management (BLM) were “effective, consistent and integrated.”

Within two years of passage of the Reform Act, financial functions of the trust were assigned to OST by a 1996 Secretarial Order that reflected the will of Congress, as expressed in fiscal year 1996 appropriations report language. The Office of Trust Funds Management (OTFM) was moved from BIA to OST. This move brought financial accounting, investing, reporting and disbursing functions to OST.

As reform plans moved forward, other functions were transferred to OST through Secretarial Orders. The Office of Appraisal Services was moved to OST in 2002. The Office of Historical Trust Accounting (OHTA) was realigned in 2007 to report directly to the Special Trustee. OHTA was created to plan, organize and execute the historical trust accounting of Individual Indian Money (IIM) accounts. In addition to its historical accounting activities, OHTA is heavily engaged in providing litigation support to the Office of the Solicitor and the Department of Justice for more than 96 tribal lawsuits.

The process of reforming Indian trust management has been long and challenging and required a comprehensive examination and analysis of existing business practices. In 2002, the bureaus and offices in the Department with fiduciary responsibilities underwent a rigorous reengineering effort. This resulted in the Comprehensive Trust Management (CTM) plan, which provides the overall trust business goals and objectives for the Department

to achieve its fiduciary trust responsibilities. The CTM plan defines a collaborative approach among BIA, BLM, MMS, the Office of Hearings and Appeals and OST for improving performance and accountability in managing the Indian trust.

The reengineered business model for the Department, which aligns existing business processes with requirements of the CTM, is the Fiduciary Trust Model (FTM). When fully implemented, the FTM will transform the trust’s business processes into more efficient, consistent, integrated and fiscally responsible processes that meet the needs and priorities of beneficiaries and improve the working

environment of OST employees. Objectives of the FTM include: business process automation, standardization, accountability, safeguarding assets and resources and streamlined beneficiary services through a call center and the primary local point of contact.

Prior to the Reform Act, Indian trust management had been treated like any other government program. The FTM addresses this deficiency with programs and policies designed to ensure that the fiduciary responsibility is effectively and efficiently met and that

beneficiary needs are addressed.

OST follows a risk based approach in meeting fiduciary obligations and has a three pronged risk management program: 1) manager self-assessments, 2) the OST Office of Trust Review and Audit internal reviews and 3) an independent third-party annual audit. OST implemented an automated risk management tool to track reviews and test results to comply with more stringent government reporting requirements. OST participates as a member of an inter-bureau test team to address issues that have the potential to impact trust financial statements.

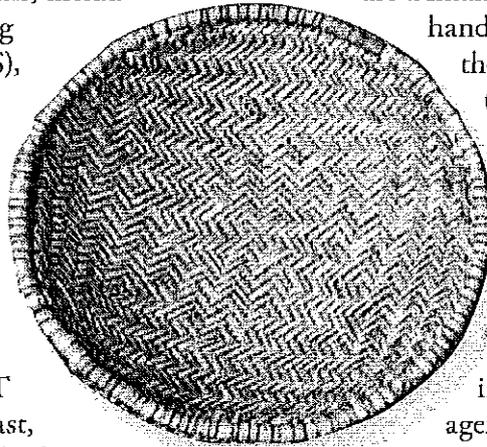


<sup>2</sup> The *Cobell, et al., v. Salazar, Secretary of the Interior, et. al.*, lawsuit, filed in 1996, seeks an historical accounting of monies held in the IIM accounts of a class of individual Indian beneficiaries.

## Accomplishing Major Reform

The reforms implemented under OST leadership have resulted in a radical transformation of Indian trust management, as noted by both the Government Accountability Office and Judge Robertson, the presiding judge in the *Cobell*<sup>2</sup> case. In accordance with the authority granted to the Special Trustee, the following trust reforms have been implemented:

- ◆ Trust Funds Accounting System (TFAS) – Early in the reform effort, OST adopted TFAS as its trust accounting system model. This is the same off-the-shelf software used by eight of the top fifteen major private sector trust institutions across the nation. This comprehensive system is able to interface with other trust systems, including Trust Asset and Accounting Management System (TAAMS), the Lockbox facility and financial asset pricing services. This interface supports automated collections and disbursements. TFAS allows the scheduling of periodic statements of performance for individual Indians and tribal account holders for whom OST has current addresses. In the past, recurring payments (including budgeted payments for restricted access accounts) required manual encoding. Daily balances are also available to beneficiaries through TFAS. The system facilitates the investing of collected funds and the daily pricing of securities to ensure beneficiary funds are quickly made productive. On a monthly basis, OST reconciles financial investment holdings on TFAS with the custodian of the securities. TFAS also provides tools to reconcile daily financial activity with the Treasury.
- ◆ Trust Asset and Accounting Management System (TAAMS) – The conversion of all BIA regions from the Trust Fund Receivable module to the new TAAMS invoicing and distribution module was completed in partnership and collaboration with BIA in fiscal year 2008. The system is designed to support reengineered business processes. It enables employees to track leasing



activity, ownership and income distribution electronically to ensure efficiency and accountability.

- ◆ Certification and Accreditation of Information Technology (IT) Systems – OST's IT system is certified and accredited in accordance with the Federal Information Security Management Act and the Technology Management Reform Act of 1996, which allows for much more decentralized acquisition of data processing equipment and services. OST resumed Internet connectivity per Judge Robertson's order dated May 14, 2008.
- ◆ Lockbox – The commercial lockbox is centralized at a secure location for the receipt, processing and depositing of payments. Lockboxes are a financial industry best practice for handling check remittances because they have proven to be efficient and timely while minimizing the risk of loss, theft or fraud. Under the OST lockbox system, companies or individuals who remit payments for the use of Indian trust resources forward payments to a designated United States Post Office box in Arizona, instead of 100 plus agencies and offices throughout the country. The lockbox contractor captures and sends receipt information electronically to OST for posting directly to the beneficiary accounts. This eliminates the past practices of receiving and holding checks in suspense accounts until ownership is updated. It also eliminates the potential of misplacing a check or mailing a check for deposit to a Treasury General Account at a designated bank. During fiscal year 2008, in excess of \$560 million was processed through the lockbox and over \$440 million (78%) was posted to beneficiaries' accounts within two days of receipt into the lockbox. Since inception in 2005, the lockbox has received approximately \$1,489 billion.
- ◆ Debit Cards – In collaboration with the Treasury, a national roll-out of OST's debit card program is underway. The target audience for the use of debit cards is those beneficiaries who



do not have regular banking relationships. An independent survey (conducted during the third quarter of fiscal year 2008) of the debit card pilot program revealed an overall satisfaction rating of 77 percent among users. By the end of fiscal year 2008, over \$1.7 million had been disbursed through debit cards to Indian trust beneficiaries.

- ◆ Direct Deposit – Automation gained through the use of TFAS has increased, and continues to increase, the use of direct deposit for trust beneficiary disbursements that are faster, safer and more cost effective than issuing payments by paper checks. OST has tripled the use of direct deposits since December 2006.
- ◆ Statements of Performance – Since 2000, OST has been providing tribal and IIM account holders with periodic scheduled statements. In 2005, because of new trust technology and procedures, OST began distributing account statements that include enhanced information regarding sources of funds, encumbrance information (who is leasing the account holder's trust property, duration of the lease) and a listing of the trust property owned (with the locations of those properties). Today, IIM account statements also describe the impact of realized gains and losses on interest rates. In fiscal year 2008, OST delivered over 700,000 statements of performance to IIM and tribal beneficiaries.

Tribes can now receive their statements of performance electronically via CD. Cur-

rently, 97 tribes do so, which enables them to conveniently view and search financial data on their computers. CDs reduce the amount of paper statements tribes must manage.

In addition to the statements of performance provided to beneficiaries, OST currently prepares monthly financial statements pursuant to the Department's requirement. The reports are reviewed by management on a quarterly basis and annually audited. OST also provides periodic reports of current activity to the Treasury, OMB, BIA and the courts.

- ◆ Trust Beneficiary Call Center (TBCC) – In December 2004, OST established a centralized call center at its headquarters office in Albuquerque, New Mexico. The TBCC provides a central resource for beneficiary questions and provides prompt, consistent information in response to trust inquiries. Beneficiary contacts, including calls and referrals are tracked in an automated tracking system. The TBCC receives thousands of calls annually and provides first line resolution for more than 90 percent of these calls. First-line resolution signifies that TBCC representatives were able to resolve inquiries without delay, referral or escalation. When calls are resolved immediately, OST and BIA staff can work on other program-specific functions, which results in higher productivity. The TBCC hours of operation are Monday through Friday 7:00 a.m. to 6:00 p.m. and Saturdays 8:00 a.m. to noon,

Mountain Time. Since its inception through September 30, 2008, the call center has received approximately 400,000 calls from beneficiaries.

- ◆ **Fiduciary Trust Officers (FTO)** – A major fiduciary trust initiative was the addition of 52 FTOs, who are the primary local points of contact for trust beneficiaries at the agency level. The addition of FTOs allows BIA staff to devote more time to processing transactions, leasing land, ensuring lease compliance, preparing probates for adjudication and partnering with tribal governments to address and resolve local issues. OST also employs six (6) Regional Trust Administrators (RTAs) with extensive backgrounds in fiduciary trust management to manage the FTOs.

FTOs conduct extensive outreach events across Indian country during the day, evening and weekends. Outreach events are held at powwows, rodeos, senior centers, tribal headquarters, community centers and federal buildings, just to name a few. Beneficiaries are provided information on such items as their accounts, statements of performance, estate planning, financial planning, leasing, probates, Whereabouts Unknown (WAU) account holders, the American Indian Probate Reform Act, direct deposit and debit cards. During fiscal year 2008, FTOs and RTAs, in collaboration with BIA and other federal agencies that play roles in managing Indian trust assets, conducted over 5,200 outreach events.

- ◆ **Annual Audit** – Since fiscal year 1995, an independent annual audit of the Trust Funds

Financial Statements for both the *Tribal and Other Trust Funds and Individual Indian Trust Funds* has been completed. The audit includes a Report on Internal Controls and a Report on Compliance with Laws and Regulations. As of fiscal year 2008, there is no material weakness reported for *Tribal and Other Trust Funds* and only one historical material weakness remains for *Individual Indian Trust Funds*. This item is not within the control of OST.

- ◆ **Records Management** – Millions of Indian trust records are safeguarded and protected for future use at the American Indian Records Repository (AIRR) in Lenexa, Kansas. Early in 2000, OST established a partnership with the National Archives Records Administration (NARA) for Indian trust records storage. AIRR was opened in May 2004. Today, more than 180,000 boxes containing approximately 450 million pages of records are stored at AIRR and information from each box is entered into an electronic, searchable database. A box tracking system was created that allows any box in the facility to be located within five minutes. The facility continues to receive boxes at the Annex (where they are indexed) from BIA agencies and OST offices in the field as the offices clear out their inactive records. The only BIA

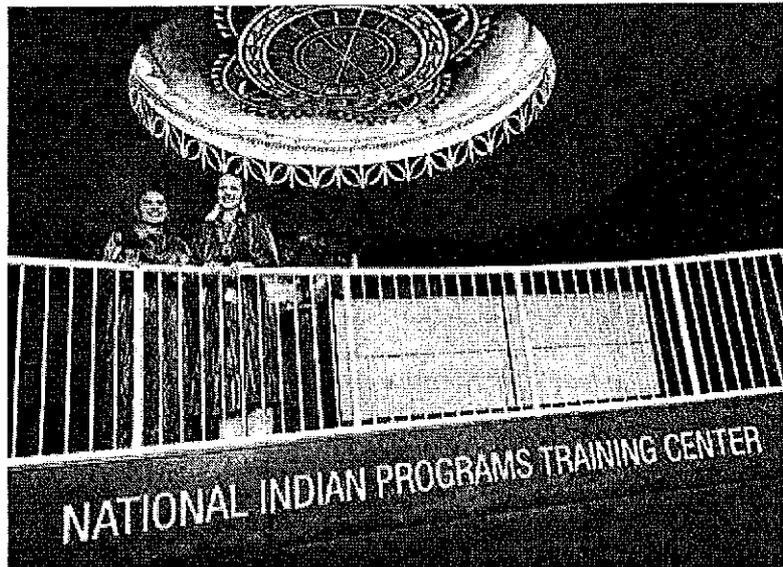
and OST Indian records that are not stored at AIRR are those that have become legal property of NARA, and active records at Departmental offices or records retained at BIA agency offices. Preservation and storage of records at AIRR is considered by NARA to be the best available. OST has provided Vital Records training to more than 1,600 BIA, OST and tribal employees as of the end of fiscal year 2008.



- ◆ Certified Federal Surveyors (CFedS) Program - The FTM supported a federal surveyor certification program. The CFedS program was developed to expand the cadre of qualified surveyors and address the survey backlog in Indian country. The program teaches state licensed surveyors to survey or resurvey federal boundaries under the jurisdiction of the BLM. Since May 2007, a total of 203 surveyors have been certified in 40 states, with 65 surveyors graduating in fiscal year 2008.

- ◆ BLM Indian Lands Surveyors (BILS) - The FTM cadastral survey team recommended that the BLM recruit and place a cadastral surveyor in each of the 12 BIA regions. The primary responsibility of BILS is consultation and guidance for BIA and tribal real estate programs regarding boundaries, surveys, land ownership and other legal and technical survey issues. They ensure survey work complies with cadastral survey laws and regulations and are available to provide oversight and monitoring for cadastral surveys performed by graduates of the CFedS program.

- ◆ Training – Indian Affairs and OST opened, and continue to expand training at, the state-of-the-art National Indian Programs Training Center in Albuquerque, New Mexico. The Department now has a training program for trust functions, including training conducted by the Cannon Financial Institute, which is the leading trust trainer in the nation for the private sector fiduciary industry. Implementation of Cannon training marked the first training program developed specifically to focus on fiduciary Indian trust. In fiscal year 2008, the Cannon Financial Institute *Certified Indian Fiduciary Trust Specialist* (CIFTS) designation was awarded to 16 OST and 2 BIA employees bringing the total of federal employees with the CIFTS designation to 98, as of the close of fiscal year 2008. The *Certified Indian Trust Examiner* designation was awarded to 22 OST employees in fiscal year 2008. This group constitutes the first federal employees with this designation.



## Meeting Ongoing Challenges

Reforming Indian trust management has taken more than a decade, primarily due to the unique nature of the Indian trust, which produced a complex set of management challenges. Many of those challenges have been overcome, as chronicled in the preceding section. Other challenges, however, are structural in nature and are likely to persist as long as the Indian trust exists.

**Challenge:** Resolve the fractionation issue in Indian country. Fractionation is numerous undivided interests in a tract of trust property. Fractionation makes it difficult to maintain title, manage probates in a cost effective manner and prudently manage the trust property as expected of a fiduciary. Nearly two-thirds of account holders receive less than \$100 per year.

**Benefit of Overcoming Challenge:** Consolidated ownership in fractionated interests will result in fewer accounts to manage and property having more potential to be leased and generate income. It should also result in beneficiaries taking a more active role in managing their trust assets. Cost savings could reasonably be expected to reach \$100 million annually.

**Challenge:** Improve beneficiary account income and liquidity without incurring unnecessary risk by obtaining approval from the Treasury to provide a Par Value Specials fund to Indian trust accounts.

Indian trust funds are invested in the Treasury Overnighter Fund and in longer term Treasury and agency fixed-income securities. Longer maturity securities currently yield three to five percent, but they are subject to potential loss of deposited value.

**Benefit of Overcoming Challenge:** The Treasury offers “par value specials” to certain agencies including the Social Security Administration, the Thrift Savings Fund and the Railroad Retirement Fund. A par value special is issued by the Treasury with an interest rate that reflects longer maturity Treasuries, but it is purchased and redeemed at par so that its redemption value is insulated from future market conditions. It offers the safety of the Treasury Overnight Fund with interest rates reflective of longer maturity securities. Investing in par value specials may also mitigate many of the investment-related litigation issues raised by Indian trust beneficiaries.

**Challenge:** Maintain a long-term institutional commitment to the continuous reform of Indian trust management, even in the absence of controversy or pending litigation.

**Benefit of Overcoming Challenge:** Continuous reform of Indian trust management will minimize the risk of future litigation by tribes and individual Indians, which will reduce appropriated dollars diverted to costly litigation. A long-term institutional commitment to reform will focus on managing trust assets.

**Challenge:** Ensure that all Indian Affairs staff and tribal users consistently use newly implemented trust systems and do not revert to older systems, which are more familiar but less reliable.

**Benefit of Overcoming Challenge:** Ensuring that newly implemented trust systems are consistently used will minimize the risk of future litigation by improving accuracy, timeliness and accountability. Standardized trust systems have the added benefit of reducing the need and cost of staff to conduct manual processes, which add risk to the processes.

**Challenge:** Standardize management processes and procedures across all federal agencies and tribes involved in managing Indian trust assets.

**Benefit of Overcoming Challenge:** Standardizing processes and procedures for managing Indian

trust assets through consistent federal and tribal management and accounting will minimize risks and the potential for future litigation claims.

**Challenge:** Implement an imaging system and build the necessary infrastructure to support the paperless exchange of documents among agencies.

**Benefit of Overcoming Challenge:** Reducing the physical management of hard copy documents will result in the Department being a more efficient organization and also bring Indian Affairs in closer compliance with the Paperwork Reduction Act and the E-Gov initiative. The use of electronic forms will result in data having to be entered only once. Trust systems will be populated automatically from the one entry, thus mitigating the risk of errors due to multiple entries made in multiple systems.

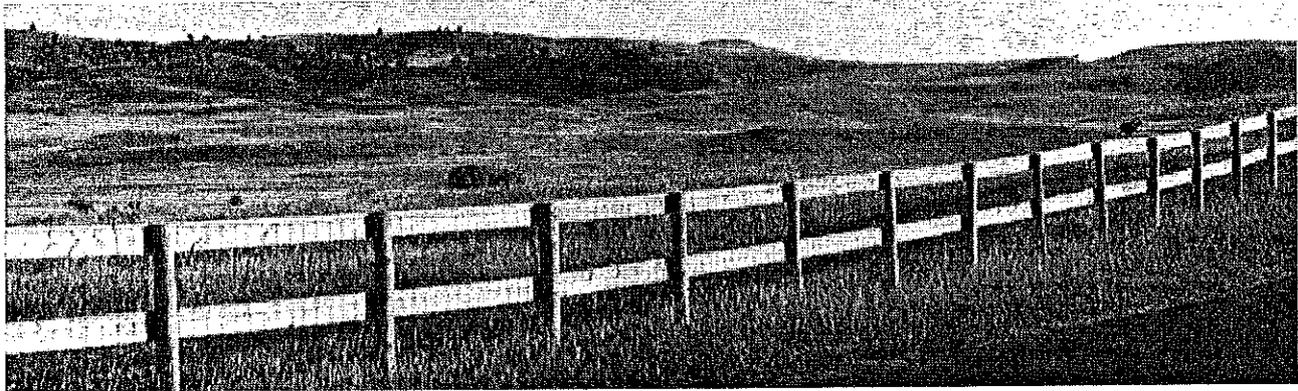
**Challenge:** Support the Department’s response to ongoing tribal and individual Indian litigation with limited financial and personnel resources.

**Benefit of Overcoming Challenge:** OST will maximize the efficient use of financial and personnel resources to carry out OST’s core mission.

**Challenge:** Resolve historical accounting issues so OST can obtain an unqualified opinion for its financial statements. There are a handful of historical accounting discrepancies that have been identified and isolated, but cannot be corrected without Congressional or other external assistance.

**Benefit of Overcoming Challenge:** An unqualified opinion would improve public trust in the accounting and management of Indian trust funds





## Looking Forward

Under OST's oversight, the Indian trust is no longer operated as an ordinary government program; it is a fiduciary trust managed by experts in trust matters. Integral to this new mode of operation is a commitment to continual improvement: constantly analyzing what we are doing and finding better ways to do it.

Looking toward 2009, OST will scrutinize current reforms for better performance and look over the horizon to future reforms that will enhance services to beneficiaries.

- ◆ Although many of the core problems associated with Indian trust management have been addressed and corrected, the Department continues its efforts to resolve legacy issues: addressing the backlogs of probates and appraisals, continuing the ongoing regulatory update initiative to improve and streamline probate processes and reducing the number of WAUs.
- ◆ OST will create a performance officer position to ensure that skill/competency modeling is produced on reformed business processes and that performance metrics are developed and aligned to actual productivity. This position also will be responsible for ensuring consistent statistics are used throughout the organization.
- ◆ Information technology (IT) innovations will play a very large role in the future of Indian trust management. OST is aggressively exploiting IT improvements in order to make trust management more efficient and expeditious in getting money to individual and tribal beneficiaries. IT reforms that had been stymied or halted by

the court-ordered Internet disconnection are now moving forward again thanks to reconnection, which the court allowed in May 2008.

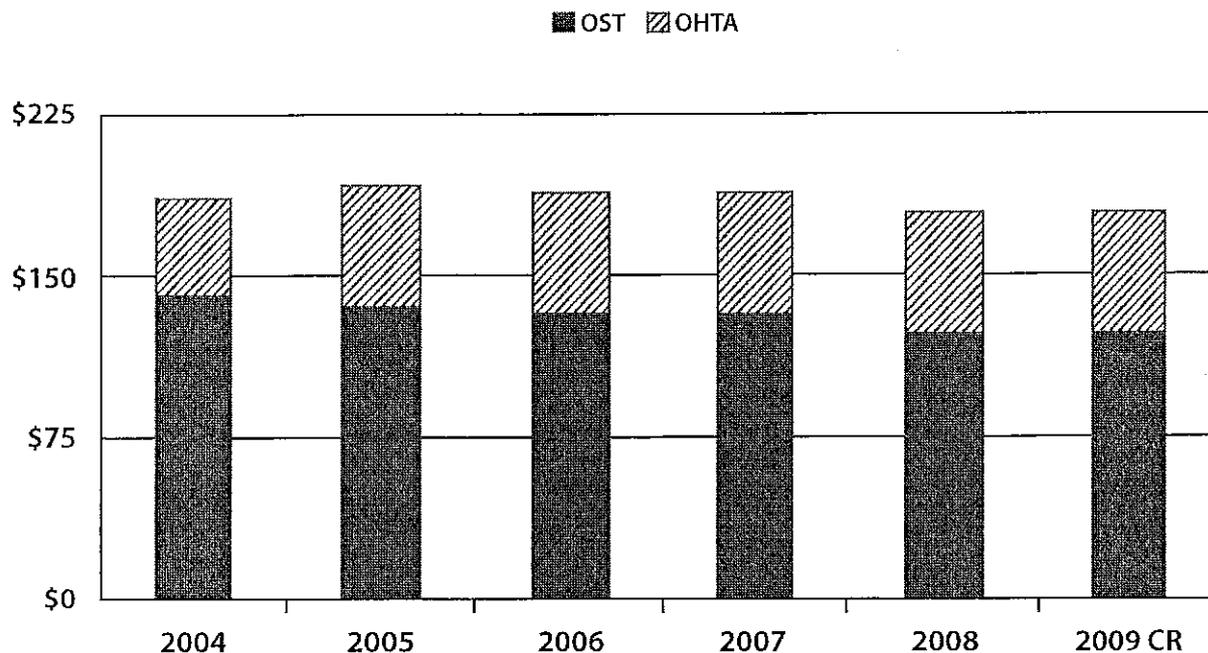
A primary focus of OST's IT reform is to replace paper documents with electronic documents wherever possible. OST is working toward implementing a system that will expedite the clearing of checks received from lessees. OST also plans to pilot PayGov, an online payment option for lessees. OST will encourage greater use of direct deposit and debit cards by beneficiaries to alleviate printing and mailing paper checks and will provide tribal account holders online access to their statements of performance.

Other future projects involve integrating existing data with Geographic Information System (GIS) technology and leveraging this combination. The Spatial Project Team has reviewed existing spatial data residing on various Departmental databases. Their goal is to provide GIS capabilities for mapping and tract data. This project is expected to be expanded to assist with enforcing lease compliance.

- ◆ OST has long encouraged greater tribal involvement in trust asset management. In the future, OST hopes to make even greater strides in this direction. OST will support the Department's efforts to improve land management for tribes and individuals, including the use of advanced technologies; will extend to tribes access to reformed Department information systems to build tribal capacities for operating trust programs under P.L. 93-638 agreements; and will expand training opportunities for Indian Affairs employees and tribal employees to provide more effective program management.

# Federal Trust Programs 2004 - 2009 Budget

(Dollars in Millions)



## Funding Changes

**2009 vs. 2008: -\$0**

**2008 vs. 2007: -\$9.7 million**

Key Changes:

\$2.8 million – Rescission

\$1.5 million – Data Quality & Integrity

\$1.1 million – Probate Clean Up

\$1.1 million – Appraisal Services

**2007 vs. 2006: -\$477k – fixed costs**

**2006 vs. 2005: -\$4.8 million**

Key Changes:

- \$2.8 million – Rescission

- \$3 million – Information Technology/Trust Records

- \$1.1 million – Appraisal Services

+\$1.9 million – Budget, Finance, & Administration

**2005 vs. 2004: +\$6.2 million**

Key Changes:

-\$16 million – IT/TAAMS/Realty (to BIA)

+10.8 million – Appraisal Services (from BIA)

+12.7 million – OHTA



Office of the Special Trustee for American Indians

[www.ost.doi.gov/ost](http://www.ost.doi.gov/ost)

*Washington, D.C.*  
*1849 C Street NW*  
*Mail Stop 5140*  
*Washington, D.C. 20240*  
*(202) 208-4866*

*Albuquerque, NM*  
*4400 Masthead Street NE*  
*Albuquerque, NM 87109*  
*(505) 816-1000*

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## H.R.4833

American Indian Trust Fund Management Reform Act of 1994 (Enrolled Bill (Sent to President))

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### TITLE III--SPECIAL TRUSTEE FOR AMERICAN INDIANS

#### SEC. 301. PURPOSES.

The purposes of this title are--

- (1) to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians by establishing in the Department of the Interior an Office of Special Trustee for American Indians to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities;
- (2) to ensure that reform of such practices in the Department is carried out in a unified manner and that reforms of the policies, practices, procedures and systems of the Bureau, Minerals Management Service, and Bureau of Land Management, which carry out such trust responsibilities, are effective, consistent, and integrated; and
- (3) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians.

#### SEC. 302. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

(a) ESTABLISHMENT- There is hereby established within the Department of the Interior the Office of Special Trustee for American Indians. The Office shall be headed by the Special Trustee who shall report directly to the Secretary.

(b) SPECIAL TRUSTEE-

(1) APPOINTMENT- The Special Trustee shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.

(2) COMPENSATION- The Special Trustee shall be paid at a rate determined by the Secretary to be appropriate for the position, but not less than the rate of basic pay payable at Level II of the Executive Schedule under section 5313 of title 5, United States Code.

(c) TERMINATION OF OFFICE-

(1) **CONDITIONED UPON IMPLEMENTATION OF REFORMS-** The Special Trustee, in proposing a termination date under section 303(a)(2)(C), shall ensure continuation of the Office until all reforms identified in the strategic plan have been implemented to the satisfaction of the Special Trustee.

(2) **30-DAY NOTICE-** Thirty days prior to the termination date proposed in the plan submitted under this section, the Special Trustee shall notify the Secretary and the Congress in writing of the progress in implementing the reforms identified in the plan. The Special Trustee, at that time, may recommend the continuation, or the permanent establishment, of the Office if the Special Trustee concludes that continuation or permanent establishment is necessary for the efficient discharge of the Secretary's trust responsibilities.

(3) **TERMINATION DATE-** The Office shall terminate 180 legislative days after the date on which the notice to the Congress under paragraph (2) is provided, unless the Congress extends the authorities of the Special Trustee. For the purposes of this section, a legislative day is a day on which either House of the Congress is in session.

**SEC. 303. AUTHORITIES AND FUNCTIONS OF THE SPECIAL TRUSTEE.**

(a) **COMPREHENSIVE STRATEGIC PLAN-**

(1) **IN GENERAL-** The Special Trustee shall prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, within one year after the initial appointment is made under section 302(b), a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with this Act.

(2) **PLAN REQUIREMENTS-** The plan prepared under paragraph (1) shall include the following:

(A) Identification of all reforms to the policies, procedures, practices and systems of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service necessary to ensure the proper and efficient discharge of the Secretary's trust responsibilities in compliance with this Act.

(B) Provisions for opportunities for Indian tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities.

(C) A timetable for implementing the reforms identified in the plan, including a date for the proposed termination of the Office.

(b) **DUTIES-**

(1) **GENERAL OVERSIGHT OF REFORM EFFORTS-** The Special Trustee shall oversee all reform efforts within the Bureau, the Bureau of Land Management, and the

Minerals Management Service relating to the trust responsibilities of the Secretary to ensure the establishment of policies, procedures, systems and practices to allow the Secretary to discharge his trust responsibilities in compliance with this Act.

(2) BUREAU OF INDIAN AFFAIRS-

(A) MONITOR RECONCILIATION OF TRUST ACCOUNTS- The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts.

(B) INVESTMENTS- The Special Trustee shall ensure that the Bureau establishes appropriate policies and procedures, and develops necessary systems, that will allow it--

(i) properly to account for and invest, as well as maximize, in a manner consistent with the statutory restrictions imposed on the Secretary's investment options, the return on the investment of all trust fund monies, and

(ii) to prepare accurate and timely reports to account holders (and others, as required) on a periodic basis regarding all collections, disbursements, investments, and return on investments related to their accounts.

(C) OWNERSHIP AND LEASE DATA- The Special Trustee shall ensure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands.

(3) BUREAU OF LAND MANAGEMENT- The Special Trustee shall ensure that the Bureau of Land Management establishes policies and practices adequate to enforce compliance with Federal requirements for drilling, production, accountability, environmental protection, and safety with respect to the lease of Indian lands.

(4) MINERALS MANAGEMENT SERVICE- The Special Trustee shall ensure that the Minerals Management Service establishes policies and practices to enforce compliance by lessees of Indian lands with all requirements for timely and accurate reporting of production and payment of lease royalties and other revenues, including the audit of leases to ensure that lessees are accurately reporting production levels and calculating royalty payments.

(c) COORDINATION OF POLICIES-

(1) IN GENERAL- The Special Trustee shall ensure that--

(A) the policies, procedures, practices, and systems of the Bureau, the Bureau of Land Management, and the Minerals Management Service related to the discharge of the Secretary's trust responsibilities are coordinated, consistent, and integrated, and

(B) the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.

(2) STANDARDIZED PROCEDURES- The Special Trustee shall ensure that the Bureau imposes standardized trust fund accounting procedures throughout the Bureau.

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(3) INTEGRATION OF LEDGER WITH INVESTMENT SYSTEM- The Special Trustee shall ensure that the trust fund investment, general ledger, and subsidiary accounting systems of the Bureau are integrated and that they are adequate to support the trust fund investment needs of the Bureau.

(4) INTEGRATION OF LAND RECORDS, TRUST FUNDS ACCOUNTING, AND ASSET MANAGEMENT SYSTEMS AMONG AGENCIES- The Special Trustee shall ensure that--

(A) the land records system of the Bureau interfaces with the trust fund accounting system, and

(B) the asset management systems of the Minerals Management Service and the Bureau of Land Management interface with the appropriate asset management and accounting systems of the Bureau, including ensuring that--

(i) the Minerals Management Service establishes policies and procedures that will allow it to properly collect, account for, and disburse to the Bureau all royalties and other revenues generated by production from leases on Indian lands; and

(ii) the Bureau of Land Management and the Bureau provide Indian landholders with accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources.

(5) TRUST MANAGEMENT PROGRAM BUDGET-

(A) DEVELOPMENT AND SUBMISSION- The Special Trustee shall develop for each fiscal year, with the advice of program managers of each office within the Bureau of Indian Affairs, Bureau of Land Management and Minerals Management Service that participates in trust management, including the management of trust funds or natural resources, or which is charged with any responsibility under the comprehensive strategic plan prepared under subsection (a) of this section, a consolidated Trust Management program budget proposal that would enable the Secretary to efficiently and effectively discharge his trust responsibilities and to implement the comprehensive strategic plan, and shall submit such budget proposal to the Secretary, the Director of the Office of Management and Budget, and to the Congress.

(B) DUTY OF CERTAIN PROGRAM MANAGERS- Each program manager participating in trust management or charged with responsibilities under the comprehensive strategic plans shall transmit his office's budget request to the Special Trustee at the same time as such request is submitted to his superiors (and before submission to the Office of Management and Budget) in the preparation of the budget of the President submitted to the Congress under section 1105(a) of title 31, United States Code.

(C) CERTIFICATION OF ADEQUACY OF BUDGET REQUEST- The Special Trustee shall--

(i) review each budget request submitted under subparagraph (B);

(ii) certify in writing as to the adequacy of such request to discharge,

effectively and efficiently, the Secretary's trust responsibilities and to implement the comprehensive strategic plan; and

(iii) notify the program manager of the Special Trustee's certification under clause (ii).

(D) MAINTENANCE OF RECORDS- The Special Trustee shall maintain records of certifications made under paragraph (3)(B).

(E) LIMITATION ON REPROGRAMMING OR TRANSFER- No program manager shall submit, and no official of the Department of the Interior may approve or otherwise authorize, a reprogramming or transfer request with respect to any funds appropriated for trust management which is included in the Trust Management Program Budget unless such request has been approved by the Special Trustee.

(d) PROBLEM RESOLUTION- The Special Trustee shall provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems, and in implementing reforms to Department, Bureau, Bureau of Land Management, and Minerals Management Service policies, procedures, systems and practices.

(e) SPECIAL TRUSTEE ACCESS- The Special Trustee, and his staff, shall have access to all records, reports, audits, reviews, documents, papers, recommendations, files and other material, as well as to any officer and employee, of the Department and any office or bureau thereof, as the Special Trustee deems necessary for the accomplishment of his duties under this Act.

(f) ANNUAL REPORT- The Special Trustee shall report to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate each year on the progress of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service in implementing the reforms identified in the comprehensive strategic plan under subsection (a)(1) and in meeting the timetable established in the strategic plan under subsection (a)(2)(C).

## SEC. 304. RECONCILIATION REPORT.

The Secretary shall transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995. In carrying out this section, the Secretary shall consult with the Special Trustee. The report shall include--

(1) a description of the Secretary's methodology in reconciling trust fund accounts;

(2) attestations by each account holder that--

(A) the Secretary has provided the account holder with as full and complete accounting as possible of the account holder's funds to the earliest possible date, and that the account holder accepts the balance as reconciled by the Secretary; or

(B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance; and

(3) a statement by the Secretary with regard to each account balance disputed by the

account holder outlining efforts the Secretary will undertake to resolve the dispute.

### SEC. 305. STAFF AND CONSULTANTS.

(a) STAFF- The Special Trustee may employ such staff as the Special Trustee deems necessary. The Special Trustee may request staff assistance from within the Department and any office or Bureau thereof as the Special Trustee deems necessary.

(b) CONTRACTS- To the extent and in such amounts as may be provided in advance by appropriations Acts, the Special Trustee may enter into contracts and other arrangements with public agencies and with private persons and organizations for consulting services and make such payments as necessary to carry out the provisions of this title.

### SEC. 306. ADVISORY BOARD.

(a) ESTABLISHMENT AND MEMBERSHIP- Notwithstanding any other provision of law, the Special Trustee shall establish an advisory board to provide advice on all matters within the jurisdiction of the Special Trustee. The advisory board shall consist of nine members, appointed by the Special Trustee after consultation with Indian tribes and appropriate Indian organizations, of which--

(1) five members shall represent trust fund account holders, including both tribal and Individual Indian Money accounts;

(2) two members shall have practical experience in trust fund and financial management;

(3) one member shall have practical experience in fiduciary investment management; and

(4) one member, from academia, shall have knowledge of general management of large organizations.

(b) TERM- Each member shall serve a term of two years.

(c) FACCA- The advisory board shall not be subject to the Federal Advisory Committee Act.

(d) TERMINATION- The Advisory Board shall terminate upon termination of the Office of Special Trustee.

## TITLE IV--AUTHORIZATION OF APPROPRIATIONS

### SEC. 401. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

**Statement of Helen Sanders, Vice Chairman**

**Indian Land Working Group (ILWG)**

To

**Affiliated Tribes of Northwest Indians**

**2013 Winter Convention**

**Great Wolf Lodge**

Regarding the

**Indian Trust Asset Reform Act of 2013 - 113<sup>th</sup> Congress**

Recognition of Trust Responsibilities

We agree that:

- The United States Government has federal obligations that have been tested and remain law of the Trust Responsibility to **individual** Indians. (*Mitchell v. U.S.*)
- Enforceable fiduciary duties necessarily arise when the United States assumes control or supervision over tribal or **individual** trust assets.
- The Secretary's trust responsibility extends to the two trusts, tribal and **individual**.

2.D.1 – Indian Tribes would contract or compact functions or activities that are being performed by the tribe may differ from any such systems, practices, and procedures used by the Secretary in managing the trust assets...

(*Authority: Indian Self Determination and Education Assistance Act 25 USC 450 et seq?*)

### 3. TRUST RESPONSIBILITY

(*Finally mentions Individual Indians*) So their intent is to remove individual IIM accounts from OST to transfer to Tribes via BIA.

BIA does not have the expertise to manage trust funds for individuals. (*Cobell v Salazar*)

Experience has been that implementing Compacts and Contracts takes the funds out of BIA to participating tribes, leaving a skeleton of staff and a

reduced funding level for the remaining BIA functions and services to non-participating tribes.

We would support the tribes transferring their **own** trust funds from OST to BIA, providing the individual members trust funds remain under OST.

If this **Trust Reform Commission** does what the tribes are asking, there will be another “Cobell” case in a few years.

**Sec 205 Effect of title (C) Trust Responsibility...Nothing in this title diminishes or otherwise effect the Trust Responsibility of the United States to Indian tribes or individual Indians.**

### **Famous last words!**

If tribes do not waive tribal sovereign immunity where they can be sued in this plan, the individual is ‘up the creek without a paddle’ to fairly resolve any issue. The plan **cannot** work and protect the **individual**.

### **Title III Restructuring**

Supervise any activity carried out by the Department of Interior including but not limited to:

- (A) To the extent that the activities relate to Indian Affairs, activities carried out by
  1. The Commissioner of Reclamation.
  2. The Director of the Bureau of Land Management
  3. The Director of the U.S. Fish and Wildlife Service

Take steps to protect the security of data relating to individual Indians and Indian tribal trust accounts.

### **DREAM ON.....**

OST is not burdened with procedures such as those listed above and should not be. As OST was established by legislation, it has avoided the pitfalls that are making the BIA a failure.

In general – the act proposes that except as otherwise provided by law – (A) any officer or employee described in Paragraph (1) **shall be appointed in accordance with the civil service laws!** If they want this provision included

in a shift of Tribal funds to the BIA, there would be no objection; however, leave the individual trust funds in OST where they are not subject to Civil Service laws. Civil Service law is one factor that makes the Bureau of Indian Affairs incompetent.

That part of the Budget at OST that manages the Tribal funds could be transferred to BIA to manage the Tribal funds; however, the Budget that supports the IIM Accounts should remain in OST.

Consider the Full Service Tribes; how would their funds be managed, by BIA? Or ??

There is only a small group of Tribes that would Compact or Contract. Each tribe that does so will also expect money to administer the contract(?) Plus, money to purchase fractionated lands(?) Now, picture the several funded tribes opting to complete the Secretary's job, instead of allowing OST to continue to keep records as they are today. **This is a very bad idea.**

Tribes that do not Compact or Contract would be left in the Bureau of Indian Affairs with no added funds for the Bureau to administer.

Tribes recommend sun setting the OST. Prior to the '94 act creating the OST, the BIA was in such shambles that additional set up funds were necessary to get the OST equipped and operating.

Now, their suggestion is to move OST to BIA.

**Good grief, what are they thinking?**

A Bill – **Draft for Discussion purposes only.** This document finally puts into writing what we have assumed they wished to do all along since we heard the tribes wish to move OST to BIA.

ALBUQUERQUE INDIAN SCHOOL ACT Public Law 110-453 – Dec. 2, 2008

The technical amendment to the Indian Land Consolidation Act 25 USC 2201 as amended was designed to damage the trust identity of trust property.

We point out that the description of land in ILCA # (7) “land” **means any real property, and includes within its meaning for purposes of this Act improvements permanently affixed to real property.** This was changed by technical amendment to Albuquerque without consultation, in fact sneaked in.

This language reflects realty law that identifies permanent improvements affixed to real property as a part of that property and maintains the same identity – in this case **trust property.**

There is great concern about how the probate judges are interpreting fractionated lands upon the death of the owner of the trust property with a home located on it. In the absence of a will it becomes fractionated with complicated decisions about rent being paid by the descendent living in the house.

If the Commission on trust reform will do its’ job in order to improve services to Indian individuals this is most important to legally change the language identifying permanent improvements as non trust.

Tribes are concerned and are asking for a Clean Carccieri fix, meanwhile the Regional Office of the Bureau of Indian Affairs is implementing permanent improvements by way of denying fee to trust transactions that have a permanent improvement on it because they call it non trust. In case of a permanent improvement located on property lease agreements it will not be approved.

TITLE 25. INDIANS  
CHAPTER 24. INDIAN LAND CONSOLIDATION

§ 2201. Definitions

For the purpose of this title [25 USCS §§ 2201 et seq.]--

(1) "Indian tribe" or "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trusts;

(2) "Indian" means--

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of the date of enactment of the American Indian Probate Reform Act of 2004 [enacted Oct. 27, 2004]) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 207 [25 USCS § 2206], any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.

(3) "Secretary" means the Secretary of the Interior;

(4) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, title to which is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

(5) "heirs of the first or second degree" means parents, children, grandchildren, grandparents, brothers and sisters of a decedent.

(6) "parcel of highly fractionated Indian land" means a parcel of land that the Secretary, pursuant to authority under a provision of this Act, determines to have, as evidenced by the Secretary's records at the time of the determination--

(A) 50 or more but less than 100 co-owners of undivided trust or restricted interests, and no 1 of such co-owners holds a total undivided trust or restricted interest in the parcel that is greater than 10 percent of the entire undivided ownership of the parcel; or

(B) 100 or more co-owners of undivided trust or restricted interests;

(7) "land" means any real property, and includes within its meaning for purposes of this Act improvements permanently affixed to real property;

(8) "person" or "individual" means a natural person;

(9) "eligible heirs" means, for purposes of section 207 (25 U.S.C. 2206), any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are--

(A) Indian; or

(B) lineal descendants within 2 degrees of consanguinity of an Indian; or

(C) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement under section 207 (25 U.S.C. 2206), another trust or restricted interest in such parcel from the decedent; and

(10) "without regard to waste" means, with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen.

§ 2202. Other applicable provisions

The provisions of section 5 of the Act of June 18, 1934 (48 Stat. 985) [25 USCS § 465], shall apply to all tribes notwithstanding the provisions of section 18 of such Act [25 USCS § 478]: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

§ 2203. Adoption of land consolidation plan with approval of Secretary

(a) Statement of purpose; sales or exchanges; terms and conditions. Notwithstanding any other provision of law, any tribe, acting through its governing body, is authorized, with the approval of the Secretary to adopt a land consolidation

Public Law 110-453  
110th Congress

An Act

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes.

Dec. 2, 2008  
[S. 11043]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TTITLE I—ALBUQUERQUE INDIAN  
SCHOOL ACT

Albuquerque  
Indian School  
Act.

SEC. 101. SHORT TITLE.

This title may be cited as the "Albuquerque Indian School Act".

SEC. 102. DEFINITIONS.

In this title:

(1) 19 PUEBLOS.—The term "19 Pueblos" means the New Mexico Indian Pueblos of—

- (A) Acorn;
- (B) Cochiti;
- (C) Isleta;
- (D) Jemez;
- (E) Laguna;
- (F) Nambe;
- (G) Ohkay Owingeh (San Juan);
- (H) Picuris;
- (I) Pajarito;
- (J) San Felipe;
- (K) San Ildefonso;
- (L) Sandia;
- (M) Santa Ana;
- (N) Santa Clara;
- (O) Santo Domingo;
- (P) Taos;
- (Q) Tesuque;
- (R) Zia; and
- (S) Zuni.

(2) SECRETARY.—The term "Secretary" means the Secretary of the Interior (or a designee).

(3) SURVEY.—The term "survey" means the survey plat entitled "Department of the Interior, Bureau of Indian Affairs, Southern Pueblos Agency, BIA Property Survey" (prepared by

John Paisano, Jr., Registered Land Surveyor Certificate No. 5708), and dated March 7, 1977.

**SEC. 103. LAND TAKEN INTO TRUST FOR BENEFIT OF 19 PUEBLOS.**

(a) **ACTION BY SECRETARY.**—

(1) **IN GENERAL.**—The Secretary shall take into trust all right, title, and interest of the United States in and to the land described in subsection (b) for the benefit of the 19 Pueblos immediately after the Secretary has confirmed that the National Environmental Policy Act of 1969 has been complied with regarding the trust acquisition of these Federal lands.

(2) **ADMINISTRATION.**—The Secretary shall—

(A) take such action as the Secretary determines to be necessary to document the transfer under paragraph (1); and

(B) appropriately assign each applicable private and municipal utility and service right or agreement.

(b) **DESCRIPTION OF LAND.**—The land referred to in subsection (a)(1) is the 2 tracts of Federal land, the combined acreage of which is approximately 8.4759 acres, that were historically part of the Albuquerque Indian School, more particularly described as follows:

(1) **EASTERN PART TRACT B.**—The approximately 2.2699 acres located in sec. 7 and sec. 8 of T. 10 N., R. 3 E., of the New Mexico Principal Meridian in the city of Albuquerque, New Mexico, as identified on the survey and does not include the Western Part of Tract B containing 3.6512 acres.

(2) **NORTHERN PART TRACT D.**—The approximately 6.2060 acres located in sec. 7 and sec. 8 of T. 10 N., R. 3 E., of the New Mexico Principal Meridian in the city of Albuquerque, New Mexico, as identified on the survey and does not include the Southern Part of Tract D containing 6.1775 acres.

(c) **SURVEY.**—The Secretary shall perform a survey of the land to be transferred consistent with subsection (b), and may make minor corrections to the survey and legal description of the Federal land described in subsection (b) as the Secretary determines to be necessary to correct clerical, typographical, and surveying errors.

(d) **USE OF LAND.**—The land taken into trust under subsection (a) shall be used for the educational, health, cultural, business, and economic development of the 19 Pueblos.

(e) **LIMITATIONS AND CONDITIONS.**—The land taken into trust under subsection (a) shall remain subject to any private or municipal encumbrance, right-of-way, restriction, easement of record, or utility service agreement in effect on the date of enactment of this Act.

**SEC. 104. EFFECT OF OTHER LAWS.**

(a) **IN GENERAL.**—Except as otherwise provided in this section, land taken into trust under section 103(a) shall be subject to Federal laws relating to Indian land.

(b) **GAMING.**—No gaming activity (within the meaning of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)) shall be carried out on land taken into trust under section 103(a).

## TITLE II—NATIVE AMERICAN TECHNICAL CORRECTIONS

### SEC. 201. COLORADO RIVER INDIAN TRIBES.

The Secretary of the Interior may make, subject to amounts provided in subsequent appropriations Acts, an annual disbursement to the Colorado River Indian Tribes. Funds disbursed under this section shall be used to fund the Office of the Colorado River Indian Tribes Reservation Energy Development and shall not be less than \$200,000 and not to exceed \$350,000 annually.

### SEC. 202. GILA RIVER INDIAN COMMUNITY CONTRACTS.

Subsection (f) of the first section of the Act of August 9, 1955 (25 U.S.C. 415(f)), is amended by striking "lease, affecting" and inserting "lease or construction contract, affecting".

### SEC. 203. LAND AND INTERESTS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICHIGAN.

(a) IN GENERAL.—Subject to subsections (b) and (c), notwithstanding any other provision of law (including regulations), the Sault Ste. Marie Tribe of Chippewa Indians of Michigan (including any agent or instrumentality of the Tribe) (referred to in this section as the "Tribe"), may transfer, lease, encumber, or otherwise convey, without further authorization or approval, all or any part of the Tribe's interest in any real property that is not held in trust by the United States for the benefit of the Tribe.

(b) EFFECT OF SECTION.—Nothing in this section is intended to authorize the Tribe to transfer, lease, encumber, or otherwise convey, any lands, or any interest in any lands, that are held in trust by the United States for the benefit of the Tribe.

(c) LIABILITY.—The United States shall not be held liable to any party (including the Tribe or any agent or instrumentality of the Tribe) for any term of, or any loss resulting from the term of any transfer, lease, encumbrance, or conveyance of land made pursuant to this Act unless the United States or an agent or instrumentality of the United States is a party to the transaction or the United States would be liable pursuant to any other provision of law. This subsection shall not apply to land transferred or conveyed by the Tribe to the United States to be held in trust for the benefit of the Tribe.

(d) EFFECTIVE DATE.—This section shall be deemed to have taken effect on January 1, 2005.

### SEC. 204. MORONGO BAND OF MISSION INDIANS LEASE EXTENSION.

Subsection (a) of the first section of the Act of August 9, 1955 (25 U.S.C. 415(a)) is amended in the second sentence by inserting "and except leases of land held in trust for the Morongo Band of Mission Indians which may be for a term of not to exceed 50 years," before "and except leases of land for grazing purposes which may be for a term of not to exceed ten years".

### SEC. 205. COW CREEK BAND OF UMPQUA TRIBE OF INDIANS LEASING AUTHORITY.

(a) AUTHORIZATION FOR 99-YEAR LEASES.—Subsection (a) of the first section of the Act of August 9, 1955 (25 U.S.C. 415(a)), is amended in the second sentence by inserting "and lands held in trust for the Cow Creek Band of Umpqua Tribe of Indians,"

after “lands held in trust for the Confederated Tribes of the Warm Springs Reservation of Oregon,”.

25 USC 415 note.

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a) shall apply to any lease entered into or renewed after the date of the enactment of this Act.

**SEC. 206. NEW SETTLEMENT COMMON STOCK ISSUED TO DESCENDANTS, LEFT-OUTS, AND ELDERS.**

Section 7(g)(1)(B) of the Alaska Native Claims Settlement Act (43 U.S.C. 1606(g)(1)(B)) is amended by striking clause (iii) and inserting the following:

“(iii) **CONDITIONS ON CERTAIN STOCK.**—

“(I) **IN GENERAL.**—An amendment under clause (i) may provide that Settlement Common Stock issued to a Native pursuant to the amendment (or stock issued in exchange for that Settlement Common Stock pursuant to subsection (h)(3) or section 29(c)(3)(D)) shall be subject to 1 or more of the conditions described in subclause (II).

“(II) **CONDITIONS.**—A condition referred to in subclause (I) is a condition that—

“(aa) the stock described in that subclause shall be deemed to be canceled on the death of the Native to whom the stock is issued, and no compensation for the cancellation shall be paid to the estate of the deceased Native or any person holding the stock;

“(bb) the stock shall carry limited or no voting rights; and

“(cc) the stock shall not be transferred by gift under subsection (h)(1)(C)(iii).”.

**SEC. 207. INDIAN LAND CONSOLIDATION ACT.**

(a) **DEFINITIONS.**—Section 202 of the Indian Land Consolidation Act (25 U.S.C. 2201) is amended—

(1) in paragraph (4)—

(A) by inserting “(i)” after “(4)”;

(B) by striking “ ‘trust or restricted interest in land’ or” and inserting the following: “(ii) ‘trust or restricted interest in land’ or”; and

(C) in clause (ii) (as designated by sub paragraph (B)), by striking “an interest in land, title to which” and inserting “an interest in land, the title to which interest”; and

(2) by striking paragraph (7) and inserting the following:

“(7) the term ‘land’ means any real property;”.

(b) **PARTITION OF HIGHLY FRACTIONATED INDIAN LANDS.**—Section 205(c)(2)(D)(i) of the Indian Land Consolidation Act (25 U.S.C. 2204(c)(2)(D)(i)) is amended in the matter following subclause (III) by striking “by Secretary” and inserting “by the Secretary”.

(c) **DESCENT AND DISTRIBUTION.**—Section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) is amended—

(1) in subsection (a)—

(A) in paragraph (2)(D)—

(i) in clause (i), by striking “clauses (ii) through (iv)” and inserting “clauses (ii) through (v)”;

(ii) in clause (iv)(II), by striking “decendent” and inserting “descent”; and

(iii) by striking clause (v) and inserting the following:

“(v) EFFECT OF SUBPARAGRAPH.—Nothing in this subparagraph limits the right of any person to devise any trust or restricted interest pursuant to a valid will in accordance with subsection (b).”; and  
(B) by adding at the end the following:

“(2) TESTATE DESCENT OF PERMANENT IMPROVEMENTS.—

“(A) DEFINITION OF COVERED PERMANENT IMPROVEMENT.—In this paragraph, the term ‘covered permanent improvement’ means a permanent improvement (including an interest in such an improvement) that is—

“(i) included in the estate of a decedent; and

“(ii) attached to a parcel of trust or restricted land that is also, in whole or in part, included in the estate of that decedent.

“(B) RULE OF DESCENT.—Except as otherwise provided in a tribal probate code approved under section 206 or a consolidation agreement approved under subsection (j)(9), a covered permanent improvement in the estate of a decedent shall—

“(i) descend to each eligible heir to whom the trust or restricted interest in land in the estate descends pursuant to this subsection; or

“(ii) pass to the recipient of the trust or restricted interest in land in the estate pursuant to a renunciation under subsection (j)(8).

“(C) APPLICATION AND EFFECT.—The provisions of this paragraph apply to a covered permanent improvement—

“(i) even though that covered permanent improvement is not held in trust; and

“(ii) without altering or otherwise affecting the non-trust status of such a covered permanent improvement.”;

(2) in subsection (b)(2)(B)—

(A) by redesignating clauses (i) through (iii) as subclauses (I) through (III), respectively, and indenting the subclauses appropriately;

(B) by striking “Any interest” and inserting the following:

“(i) IN GENERAL.—Subject to clauses (ii) and (iii), any interest”;

(C) in subclause (III) of clause (i) (as designated by subparagraphs (A) and (B)), by striking the semicolon and inserting a period;

(D) by striking “provided that nothing” and inserting the following:

“(iii) EFFECT.—Except as provided in clause (ii), nothing; and”.

(E) by inserting after clause (i) (as designated by subparagraph (B)) the following:

“(ii) EXCEPTION.—

“(I) IN GENERAL.—Notwithstanding clause (i), in any case in which a resolution, law, or other duly adopted enactment of the Indian tribe with jurisdiction over the land of which an interest

described in clause (i) is a part requests the Secretary to apply subparagraph (A)(ii) to devises of trust or restricted land under the jurisdiction of the Indian tribe, the interest may be devised in fee in accordance with subparagraph (A)(ii).

“(II) EFFECT.—Subclause (I) shall apply with respect to a devise of a trust or restricted interest in land by any decedent who dies on or after the date on which the applicable Indian tribe adopts the resolution, law, or other enactment described in subclause (I), regardless of the date on which the devise is made.

“(III) NOTICE OF REQUEST.—An Indian tribe shall provide to the Secretary a copy of any resolution, law, or other enactment of the Indian tribe that requests the Secretary to apply subparagraph (A)(ii) to devises of trust or restricted land under the jurisdiction of the Indian tribe.”;

(3) in subsection (h)(1)—

(A) by striking “A will” and inserting the following:

“(A) IN GENERAL.—A will”; and

(B) by adding at the end the following:

“(B) PERMANENT IMPROVEMENTS.—Except as otherwise expressly provided in the will, a devise of a trust or restricted interest in a parcel of land shall be presumed to include the interest of the testator in any permanent improvements attached to the parcel of land.

“(C) APPLICATION AND EFFECT.—The provisions of this paragraph apply to a covered permanent improvement—

“(i) even though that covered permanent improvement is not held in trust; and

“(ii) without altering or otherwise affecting the non-trust status of such a covered permanent improvement.”;

(4) in subsection (i)(4)(C), by striking “interest land” and inserting “interest in land”;

(5) in subsection (j)(2)(A)(ii), by striking “interest land” and inserting “interest in land”;

(6) in subsection (k), in the matter preceding paragraph (1), by inserting “a” after “receiving”; and

(7) in subsection (o)—

(A) in paragraph (3)—

(i) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii) and indenting the clauses appropriately;

(ii) by striking “(3)” and all that follows through “No sale” and inserting the following:

“(3) REQUEST TO PURCHASE; CONSENT REQUIREMENTS; MULTIPLE REQUESTS TO PURCHASE.—

“(A) IN GENERAL.—No sale”;

(iii) by striking the last sentence and inserting the following:

“(B) MULTIPLE REQUESTS TO PURCHASE.—Except for interests purchased pursuant to paragraph (5), if the Secretary receives a request with respect to an interest from more than 1 eligible purchaser under paragraph (2), the Secretary shall sell the interest to the eligible purchaser

that is selected by the applicable heir, devisee, or surviving spouse.”;

(B) in paragraph (4)—

(i) in subparagraph (A), by adding “and” at the end;

(ii) in subparagraph (B), by striking “; and” and inserting a period; and

(iii) by striking subparagraph (C); and

(C) in paragraph (5)—

(i) in subparagraph (A)—

(I) in the matter preceding clause (i)—

(aa) by inserting “or surviving spouse” after “heir”;

(bb) by striking “paragraph (3)(B)” and inserting “paragraph (3)(A)(ii)”; and

(cc) by striking “auction and”;

(II) in clause (i), by striking “and” at the end;

(III) in clause (ii)—

(aa) by striking “auction” and inserting “sale”;

(bb) by striking “the interest passing to such heir represents” and inserting “, at the time of death of the applicable decedent, the interest of the decedent in the land represented”; and

(cc) by striking the period at the end and inserting “; and”;

(IV) by adding at the end the following:

“(iii)(I) the Secretary is purchasing the interest under the program authorized under section 213(a)(1); or

“(II) after receiving a notice under paragraph (4)(B), the Indian tribe with jurisdiction over the interest is proposing to purchase the interest from an heir or surviving spouse who is not residing on the property in accordance with clause (i), and who is not a member, and is not eligible to become a member, of that Indian tribe.”; and

(ii) in subparagraph (B)—

(I) by inserting “or surviving spouse” after “heir” each place it appears; and

(II) by striking “heir’s interest” and inserting “interest of the heir or surviving spouse”.

(d) CONFORMING AMENDMENT.—Section 213(a)(1) of the Indian Land Consolidation Act (25 U.S.C. 2212(a)(1)) is amended by striking “section 207(p)” and inserting “section 207(o)”.

(e) OWNER-MANAGED INTERESTS.—Section 221(a) of the Indian Land Consolidation Act (25 U.S.C. 2220(a)) is amended by inserting “owner or” before “co-owners”.

(f) EFFECTIVE DATES.—

(1) TESTAMENTARY DISPOSITION.—The amendments made by subsection (c)(2) of this section to section 207(b) of the Indian Land Consolidation Act (25 U.S.C. 2206(b)) shall not apply to any will executed before the date that is 1 year after the date of enactment of this Act.

(2) SMALL UNDIVIDED INTERESTS IN INDIAN LANDS.—The amendments made by subsection (c)(7)(C) of this section to

25 USC 2206  
note.

subsection (o)(5) of section 207 of the Indian Land Consolidation Act (25 U.S.C. 2206) shall not apply to or affect any sale of an interest under subsection (o)(5) of that section that was completed before the date of enactment of this Act.

### **TITLE III—REAUTHORIZATION OF MEMORIAL TO MARTIN LUTHER KING, JR.**

#### **SEC. 301. REAUTHORIZATION.**

Section 508(b)(2) of the Omnibus Parks and Public Lands Management Act of 1996 (40 U.S.C. 8903 note; 110 Stat. 4157, 114 Stat. 26, 117 Stat. 1347, 119 Stat. 527) is amended by striking “November 12, 2008” and inserting “November 12, 2009”.

Approved December 2, 2008.

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#### **LEGISLATIVE HISTORY—S. 1193:**

**SENATE REPORTS:** No. 110-494 (Comm. on Indian Affairs).

**CONGRESSIONAL RECORD,** Vol. 154 (2008):

Sept. 22, considered and passed Senate.

Sept. 29, considered and passed House, amended.

Nov. 19, Senate concurred in House amendment.



## Calendar No. 925

110TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
110-434

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TO DIRECT THE SECRETARY OF THE INTERIOR TO TAKE INTO TRUST 2  
PARCELS OF FEDERAL LAND FOR THE BENEFIT OF CERTAIN INDIAN  
PUEBLOS IN THE STATE OF NEW MEXICO

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JULY 31, 2008.—Ordered to be printed

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Mr. DORGAN, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 1193]

The Committee on Indian Affairs, to which was referred the bill, S. 1193, to direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

#### PURPOSE

S. 1193 would direct the Secretary of the Interior to place into trust two parcels totaling 18.3 acres of Federal land for the educational, health, cultural, and economic benefit of the 19 Indian Pueblos in the State of New Mexico (Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Felipe, San Ildefonso, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni—all federally recognized Indian Tribes). The 19 Pueblos will manage the land through the All Indian Pueblo Council and the Indian Pueblos Federal Development Corporation. One parcel is located adjacent to two existing tracts of land held in trust by the United States for the Pueblos, and the other parcel is located across a highway from the first parcel.

#### BACKGROUND

The Albuquerque Indian School was established in 1881 as part of the Federal Government's policy on Indian affairs at the time that encouraged the assimilation of Native Americans, promoted placing American Indian children in off-reservation boarding schools, and suppressed tribal culture, language, and religion.

Federal policies shifted over the following century from Indian Reorganization (1928–1942) (which sought to strengthen tribal governments and restore tribal land bases) to Termination (1943–1961) (which sought to extinguish the government-to-government relationship with Indian Tribes, extinguish their land base, and delegate Federal responsibilities to State governments). However, on July 8, 1970, President Nixon, in a Special Message to Congress, formally repudiated the Termination policy and announced a new federal policy that supports Indian self-determination and economic self-sufficiency. Support of Indian self-determination remains the Indian affairs policy of the United States.

Soon after Congress enacted the Indian Self-Determination and Education Assistance Act, (Public Law 93–638, Jan. 4, 1975), the All Indian Pueblo Council, contracted with the Bureau of Indian Affairs for the operation of the Albuquerque Indian School campus pursuant to that Act. The Albuquerque school program was moved to Santa Fe, New Mexico in July of 1979.

In 1981, the New Mexico Pueblos petitioned the United States for the transfer of approximately 44 acres of land located on the former Albuquerque Indian school site for the purpose of economic development. In 1984, the Department of the Interior's Assistant Secretary for Indian Affairs approved the request and conveyed the 44 acres of Federal land to the 19 pueblos for their use and benefit pursuant to regulations in effect at the time.

The Pueblos have used the land to erect and establish the Indian Pueblo Cultural Center, and government and business office centers, which have been a proven economic success. The Pueblos have also formed the Indian Pueblos Federal Development Corporation, which operates as a business council for the 19 pueblos.

The Department of the Interior has since revised its fee-to-trust regulations. The current regulations, revised in 1995, are located at 25 CFR Part 151. They do not contemplate a trust acquisition for the benefit of multiple Indian Tribes, and that is the reason for this legislation.

In 2003, the 19 Pueblos requested conveyance of two additional tracts of land from the former Albuquerque Indian School site, which total approximately 18.3 acres. The land contains various metal buildings that have deteriorated to the point that they have no usable value.

The transfer is supported by the southwestern regional office of the Bureau of Indian Affairs, and the local community. With the addition of the two tracts, the 19 pueblos plan to expand into other economic development projects for the benefit of their citizens and the neighboring community.

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1*

The short title of the Act is the "Albuquerque Indian School Act".

##### *Section 2. Definitions*

Section 2 defines the "19 Pueblos" to mean the New Mexico Indian Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh (San Juan), Picuris, Pojoaque, San Felipe, San

Ildefonso, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni.

*Section 3. Land taken into trust for benefit of 19 Pueblos*

Section 3 directs the Secretary of the Interior to place into trust all right, title, and interest of the United States in and to the two parcels of land (including any improvements and appurtenances to the land) for the educational, health, cultural, business, and economic development of the 19 Pueblos. Section 3(b) describes the land as Tracts B and D of a Bureau of Indian Affairs survey. Section 3(e) provides that the land shall remain subject to any private or municipal encumbrance, right-of-way, restriction, easement of record, or utility service agreement in effect on the date of enactment of this Act.

*Section 4. Effect of other laws*

Section 4 makes clear that the land shall be subject to other Federal laws relating to Indian land. However, this section prohibits gaming activity (within the meaning of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)) from being carried out on the lands placed in trust pursuant to the Act.

LEGISLATIVE HISTORY

In the 109th Congress, S. 3635 was introduced by Senator Domenici on July 11, 2006. The bill was referred to the Committee on Indian Affairs. No further action was taken on this measure.

S. 1193 was introduced in the 110th Congress on April 24, 2007, by Senators Domenici and Bingaman and was referred to the Committee on Indian Affairs.

The following letter was submitted by the President of the Indian Pueblos Federal Development Corporation to Senator Bingaman:



Indian Pueblos Federal Development Corporation  
2412 Comanche Rd. NE  
Albuquerque, NM 87107  
Phone: (505)881-2273  
Fax : (505)341-4467

June 11, 2008

Senator Jeff Bingaman  
625 Silver Ave. SW  
Albuquerque, NM 87102

Dear Senator Bingaman:

Thank you for your favorable consideration of the Senate bill considering the transfer of a portion of the Old Albuquerque Indian School property to the Indian Pueblos Federal Development Corporation (IPFDC).

I understand that you have concerns about the installation of a smoke shop on the transferred property; however, I want to dispel your unease by explaining to you that IPFDC does not intend to ever include such an enterprise on the property. Our main focus is on expanding into other economic development projects that benefit the 19 Pueblos of New Mexico and, to the extent possible, the neighborhood in which we live and work.

Our primary concern is with the time factor for moving the bill through the Congress for final approval.

Thank you again for your support.

Bruce Sanchez

President/IPFDC

## COMMITTEE RECOMMENDATION

On April 24, 2008, the Committee on Indian Affairs convened a business meeting to consider S. 1193, and other measures. During the meeting, the Committee voted, by voice vote, to report S. 1193 favorably to the full Senate with the recommendation that it do pass.

## COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated April 29, 2008, was prepared for S. 1193:

*S. 1193—Albuquerque Indian Schools Act*

CBO estimates that implementing S. 1193 would have no significant impact on the federal budget. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 1193 would authorize the Secretary of the Interior to take a total of 18 acres of federal land in Albuquerque, New Mexico, into trust for the benefit of 19 Indian Pueblos in the state. The land is part of the former site of the Albuquerque Indian School, which provided training for Indians until 1982. The Pueblos acquired a 44-acre portion of that site in 1984 for economic development purposes. Under the bill, the newly acquired land would be used for similar activities; gaming activities would be prohibited.

According to the Bureau of Indian Affairs, the federal land currently generates no receipts and is not expected to do so during the next 10 years. Therefore, CBO estimates that transferring the lands into trust for the Pueblos would not affect offsetting receipts (a credit against direct spending). In addition, we estimate that the administrative costs of the transfer would be negligible.

The CBO staff contact for this estimate is Leigh Angres. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that the regulatory and paperwork impacts of S. 1193 should be de minimis.

## EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 1193.

## CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law were made by S. 1193.

lessee will be distributed to the trust and restricted landowners and life estate holders on trust and restricted land only. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(c) We may treat any provision of a lease, sublease, amendment, assignment, or leasehold mortgage that is in violation of Federal law as a violation of the lease.

**§ 162.314 May improvements be made under a residential lease?**

(a) The lessee may construct improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any major improvements not generally described in the lease. We will treat any attempt by the lessee to construct major improvements, without the necessary notice, as a lease violation.

**§ 162.315 How must a residential lease address ownership of improvements?**

(a) A residential lease must specify who will own any improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific improvement the lessee constructs will, upon the expiration or termination of the lease:

(1) Remain on the leased premises, in a condition satisfactory to the Indian landowners and become the property of the Indian landowner;

(2) Be removed immediately or within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as close as possible to their condition before construction of such improvements; or

(3) Be disposed of by other means.

(b) A lease that requires the lessee to remove the improvements must also provide the Indian landowners with an option to take possession of and title to the improvements if the improvements are not removed within the specified time period.

(c) Any permanent improvements on the leased land shall be subject to 25 CFR 1.4 and, in addition, shall not be subject to any fee, tax, assessment, levy, or other such charge imposed by any State or political subdivision of a State, without regard to ownership of those improvements. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

**§ 162.316 How will BIA enforce removal requirements in a residential lease?**

We may take appropriate enforcement action in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, to ensure removal of the improvements or restoration of the premises at the lessee's expense. We may take such enforcement action after termination or expiration of the lease. We may collect and hold the performance bond until removal and restoration are completed.

**§ 162.317 How must a residential lease describe the land?**

(a) A residential lease must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include a legal description or other description that is sufficient to identify the leased premises, subject to our approval.

(b) If the tract is fractionated, we will describe the undivided trust or restricted interest in the leased premises.

**Rental Requirements**

**§ 162.320 How much rent must be paid under a residential lease?**

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, if the tribe submits a signed certification stating that it has determined the negotiated amount to be in its best interest. The tribe may request, in writing, that we require fair market rental, in which case we will determine fair market rental in accordance with § 162.322 and will approve the lease only if it requires payment of not less than fair market rental. Unless the tribe makes such a request, BIA will not require a valuation or appraisal or determine fair market rental, but instead will defer to the tribe's determination that the negotiated compensation is in its best interest.

(b) A residential lease of individually owned Indian land must require payment of not less than fair market rental except that we may approve a lease of individually owned Indian land that provides for the payment of nominal rent, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including but not limited to:

(i) The lessee is a member of the Indian landowner's immediate family as defined in § 162.003;

(ii) The lessee is a co-owner of the leased tract; or

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease.

(c) Where the owners of the applicable percentage of interests consent to a residential lease on behalf of all the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners and those on whose behalf we have consented receive fair market rental.

**§ 162.321 Will BIA require a valuation to determine fair market rental for a residential lease?**

(a) We will not require valuations for negotiated residential leases of tribal land, or of any undivided tribal interest in a fractionated tract, if the tribe submits a signed certification. The tribe may request, in writing, that we require a valuation, in which case we will determine fair market rental in accordance with § 162.322.

(b) We will require valuations for individually owned Indian land, except that we may waive the valuation requirement when:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; and

(2) We determine that the waiver is in the best interest of the Indian landowners, taking into consideration the landowners' written request.

(c) We have 30 days from receipt of the waiver request in paragraph (b) of this section to make a determination. Our determination whether to approve the request will be in writing and will state the basis for our approval or disapproval. If we fail to meet the 30-day deadline, the lessee or Indian landowners may take appropriate action under part 2 of this chapter.

**§ 162.322 What type of valuation may be used to determine fair market rental for a residential lease?**

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental for residential leases of individually owned Indian land, or at the request of the tribe for tribal land.

(b) We will either:

(1) Prepare a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowner or lessee.

(c) We will approve a market analysis, appraisal, or other appropriate valuation method for use only if it:

PERMANENT IMPROVEMENTS, CONSTRUCTION, INCOMPETENCE, LEASE AND LACK OF KNOWLEDGE

DISCUSSION OF ADMINISTRATIVE LAW JUDGE

Question? Is the house located on a trust allotment - trust realty or trust personality?

"Outside of Indian Country, permanent fixed improvements are normally considered to be a part of the underlying realty - the improvements in essence become realty."

If the home is determined to be trust realty, the Tribe would have to purchase all of the decedent's interests in the allotment. If the BIA determines that the home is trust personality, there is no statutory authority for the Tribe to purchase the home in probate. The only interest available for purchase by the Tribe would be land.

Questions were - Was the spouse required to obtain a lease and be responsible to pay rent? If so, when? From the time of the landowner's death or when the heirs were determined seven years later.

When you read the discussion of this case the confusion and unknown factors are apparent. If the house was considered non trust the BIA had no authority to demand a lease.

They determined that fair annual rental of the interest in the house was \$660.00 per month or \$7,920.00 per year.

The co-owners of the now fractionated interests do not know or understand fractionated land.

Apparently the status of the house was determined to be held in trust or the BIA would not have had authority to lease and require payment of rent?

There appears to be a huge guessing game going on by Regional and the Board of Indian Appeals.

Do you see trouble coming down the track for Secretarial Purchase because of the Permanent Improvement factor?

Next Case just as complicated

BIA assessed trespass damages amounting to \$193,270.00 for a period of 6 years with not all the heirs involved. Board of Indian Appeals reverses the amount of trespass damages.

MAY 24 2011 PM 3:50



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

Probate Hearings Division

1201 Lloyd Blvd., Room 290

Portland, Oregon 97232

Telephone (503) 736-4490 Facsimile (503) 736-4495



IN THE MATTER OF THE ESTATE OF )	<b>PROBATE P000050010IP</b>
)	)
<b>CLARENCE PERRY MOFFETT</b> )	<b>ORDER GRANTING THE REGION</b>
)	<b>AN OPPORTUNITY TO AMEND ITS</b>
DECEASED NEZ PERCE INDIAN )	<b>EARLIER RESPONSE</b>
<b>182U001075</b> )	)

The Northwest Regional Office, Bureau of Indian Affairs, hereinafter the Region, has requested an opportunity to amend its earlier response to this forum that the home located on Nez Perce Allotment 1455-B should be considered to be a trust asset. The Region, after further review and consideration, including consultation with BIA Central Office, has apparently determined that the home should not be included as a part of the decedent's trust inventory.

The Region's request is granted. The Region shall provide its amended response within 14 calendar days of the date of this Order. The amended response should include a rationale for the Region's conclusions.

Issued at Portland, Oregon on **MAY 20 2011**

**THOMAS F. GORDON**  
Administrative Law Judge



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

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Portland, Oregon 97232

Telephone (503) 736-4490 Facsimile (503) 736-4495



IN THE MATTER OF THE ESTATE OF )	<b>PROBATE P00050010IP</b>
)	)
<b>CLARENCE PERRY MOFFETT</b> )	<b>ORDER REQUESTING</b>
)	<b>STATUS ON TRUST HOME</b>
DECEASED NEZ PERCE INDIAN )	<b>AS REALTY OR PERSONALTY</b>
<b>182U001075</b> )	)

On March 24, 2011, this forum issued an Order Requesting Information on Trust Status of Home, directing the Northwest Regional Office, BIA, to determine whether the home located on Nez Perce Allotment 1455-B is considered by BIA to be trust property, and whether said home is part of the decedent's Indian trust estate.

On March 28, 2011, the Regional Director responded, stating:

The Bureau of Indian Affairs (BIA) considers this home to be a trust asset that should be included in the trust estate. However, the BIA also considers the administration of the home to be a bare trust asset.

The Nez Perce Tribe has a right to purchase decedent's Nez Perce *land* interests pursuant to Pub. L. No. 92-443 (1972), which states as follows:

*\* \* \*That a person who is not an enrolled member of the Nez Perce Tribe \* \* \*shall not be entitled to receive by devise or inheritance any interest in trust or restricted land within the Nez Perce Indian Reservation or within the area ceded by the Treaty of June 11, 1855 (12 Stat. 957), if, while the decedent's estate is pending before the Examiner of Inheritance, the Nez Perce Tribe of Idaho pays to the Secretary of the Interior, on behalf of such person, the fair market value of such interest as determined by the Secretary of the Interior after appraisal. The interest for which such payment is made shall be held by the Secretary in trust for the Nez Perce Tribe of Idaho. (Emphasis added).*

43 C.F.R. §30.261(b) provides that "A tribe may purchase all or part of the available interests specified in the probate decision. *A tribe may not, however, claim an interest less than decedent's total interest in any one individual tract.*" (Emphasis added).

The Agency reviewed and approved an appraisal for Nez Perce allotment 1455-B, which appraised the market value of the land and improvements situated thereon at \$220,000.00. The land was given a value of \$152,237, and the improvements were given a value of \$66,792, which totaled \$219,029, and was rounded upward to \$220,000.00. A copy of the appraisal and review are attached for the parties' consideration.

## Estate of Clarence Perry Moffett

In view of the foregoing, this forum is confronted with the issue of whether the Tribe has a statutory right to purchase the decedent's home located on Nez Perce Allotment 1455-B. The resolution of this issue depends on whether the home, already determined by the Bureau of Indian Affairs to constitute trust property, is considered by BIA to be trust realty or trust personalty. If the home is trust realty, then to the extent the Tribe desires to exercise its purchase option rights, the Tribe must purchase both the land and the home. If, however, the home is trust personalty, the Tribe has a statutory right to purchase only the land.

Consideration has been given by this forum as to whether this issue is appropriately addressed and decided by the undersigned as a question of law. However, the undersigned is of the opinion that because the management of trust assets is primarily within the purview of BIA<sup>1</sup>, and given that BIA has already determined that the house in question is a trust asset and has already apparently exercised some discretion in defining and limiting the extent of the Department's trust obligations concerning the house by categorizing it as a "bare trust asset," it is appropriate to require BIA to further determine whether BIA considers the house to be trust realty or trust personalty.

Moreover, it is not altogether clear how this issue could be resolved without policy input from BIA. Outside of Indian country, permanent fixed improvements are normally considered to be a part of the underlying realty—the improvements in essence become realty. Within Indian country, however, it is not clear whether permanent fixed improvements are also considered part of the underlying realty. As the Interior Board of Appeals has noted, "there have been and continue to be questions concerning the status of particular houses built on trust property." Anna Chapman Smartlowit v. Northwest Regional Director, BIA, 50 IBIA 98, 107 (2009), citing Olson V. Portland Area Director, 31 IBIA 44, 51 (1997), wherein the Board observed that BIA "did not know if the house was trust real property, trust personal property, or non-trust property." Moreover, Congressional consideration of the issue has not necessarily yielded clarity. Specifically, when the American Indian Probate Reform Act<sup>2</sup> was first enacted, "land" was defined as meaning "any real property, and includes within its meaning for purposes of this Act improvements permanently affixed to real property." 25 U.S.C. §2201(7)(2004). This definition was later amended, however, so as to delete the reference to permanently affixed improvements— "the term 'land' means any real property." 25 U.S.C. §2201(7)(2008). This deletion arguably precludes a determination that permanently fixed improvements can be considered to be "land," at least where AIPRA is applicable.

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<sup>1</sup>Consistent with this view is the fact that issues concerning whether property should be included as part of a decedent's estate are clearly within the purview of the Bureau of Indian Affairs and not the Office of Hearings and Appeals. See 43 C.F.R. §30.128(b)—inventory issues must be referred by an OHA deciding official to BIA for resolution under 25 C.F.R. parts 150, 151, or 152 and the appeal procedures at 25 C.F.R. part 2.

<sup>2</sup>It is acknowledged that AIPRA does not apply to this estate because the decedent died before June 20, 2006. However, given the apparent lack of definitive precedent on the issue of homes on trust lands, it is helpful to consider Congressional pronouncements on said issue.

**Estate of Clarence Perry Moffett**

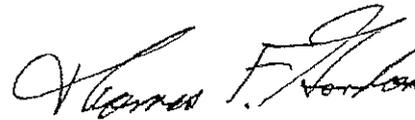
In any event, it is crucial that BIA inform this forum as to whether the home at issue is trust realty or trust personalty. If BIA determines that the home is trust realty, the Nez Perce Tribe would have to purchase all of the decedent's interest in Nez Perce Allotment 1455-B, i.e., the land and improvements valued at \$220,000.00. Stated another way, the Tribe could not choose to purchase just the land and not the home, nor could it forego purchasing the land and instead choose to purchase just the home. See 43 C.F.R. §30.261(b), cited above.

If BIA determines that the home is trust personalty, there is no statutory authority for the Tribe to purchase the home in these probate proceedings, and the only interest available for purchase by the Tribe in these probate proceedings would be the land, at a purchase price of \$152,237.00.

Wherefore, the Northwest Regional Office, BIA, is ordered to answer in writing whether the home located on Nez Perce Allotment 1455-B is considered by BIA to be trust realty or trust personalty, within 14 calendar days of this Order. The Regional Office shall ensure that its response is served on all interested parties.

All interested parties are invited to submit any comments they may have in response to the issues raised by this Order within 28 calendar days of this Order.

Issued at Portland, Oregon on APR 28 2011



THOMAS F. GORDON  
Administrative Law Judge



INTERIOR BOARD OF INDIAN APPEALS

Anna Chapman Smartlowit v. Northwest Regional Director, Bureau of Indian Affairs

50 IBIA 98 (08/06/2009)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ANNA CHAPMAN SMARTLOWIT,	)	Order Affirming Decision in Part,
Appellant,	)	Vacating in Part, and Remanding
	)	
	)	
v.	)	Docket No. IBIA 08-24-A
	)	
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	August 6, 2009

Anna Chapman Smartlowit (Appellant) has appealed the October 9, 2007, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), determining that (1) following the September 20, 2000, death of her husband, Peter Smartlowit (Peter), Appellant was required to obtain a lease for her residential use of a 5-acre portion (Homesite)<sup>1</sup> of Yakama Allotment No. 926 (Allotment)<sup>2</sup> and (2) beginning on the date of Peter's death, Appellant, who inherited one-half undivided interest in the Allotment, owed the pro rata rental value of the house located on the property to Peter's six children, who collectively inherited the other one-half undivided interest in the Allotment. Appellant concedes that she is required to have a lease, and is liable for rent, after July 11, 2006, when an Order Determining Heirs was issued in Peter's Indian trust estate. She contends, however, that the obligation in BIA's leasing regulations for an "Indian landowner" to obtain a lease does not apply to undetermined heirs because they are not yet "landowners," and therefore no lease was required, nor rent due, for the period between Peter's death in 2000 and issuance of the probate order in 2006.

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<sup>1</sup> The parcel at issue is described as the "North 330 feet of the West 660 feet o[f] the Southeast Quarter of the Northwest Quarter of Section 18, Township 12 North, Range 18 East, [Willamette Meridian (W.M.), Washington], containing 5 acres, more or less." Letter from Acting Superintendent (Superintendent), Yakama Agency, BIA, to Appellant, Oct. 30, 2006. Administrative Record (AR) 12.

<sup>2</sup> The Allotment consists of a total of 80 acres.

We affirm the Regional Director's conclusion that Appellant did not have an unqualified right, as she contends, to occupy the Homesite prior to the determination of Peter's heirs. Appellant is wrong that an undetermined heir is not an "Indian *landowner*" under the leasing regulations, because ownership vests on the date of death, even if heirship is adjudicated later. But even if she were not an Indian landowner under the regulations, *see* 25 C.F.R. Part 162, Subpart F, she would still be required to obtain a lease as an "other person," to whom the obligation to have a lease attaches under another subsection of those same regulations. Because Appellant does not contend that she had permission from her co-owners to occupy the Homesite rent-free, we affirm the Regional Director's conclusion that Appellant is liable to them, beginning on the date of Peter's death, for their share of the rental value of the trust property that she continued to occupy. Appellant's status as an Indian landowner of the Homesite means that BIA has some discretion and is not *required* to treat her unauthorized use as a trespass and take action to recover possession; it does not mean that she is not technically in trespass, within the meaning of the regulations, or that she is not liable for rent.

However, we vacate the portion of the Regional Director's decision impliedly finding that BIA has jurisdiction over the house located on the Homesite, and therefore has authority to demand rent for, and require and grant a lease for, the house as trust property pursuant to BIA's leasing regulations. The record includes allegations and evidence suggesting that title to the house may not be held by BIA as part of its trust ownership of the Allotment, and the record is insufficient for the Board to make a determination one way or the other regarding the trust or non-trust status of the ownership of the house. Unless BIA provides additional explanation and evidence to support a conclusion that the house is held in trust by the United States as part of the trust land, so that BIA's regulations for leasing Indian land apply to the house, BIA's jurisdiction is limited to assessing the rental value of the 5 acres of land constituting the Homesite, excluding the rental value of the house.

### Statutory and Regulatory Background

With limited exception, a lease<sup>3</sup> is required before taking possession of Indian lands. 25 C.F.R. § 162.104; *Goodwin v. Pacific Regional Director*, 44 IBIA 25, 29 (2006). Unlike an Indian landowner who owns 100% of the trust or restricted interests in a tract and may

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<sup>3</sup> The regulations define a *lease* as "a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land for a specified purpose and duration." 25 C.F.R. § 162.101.

take possession of the tract without a lease, 25 C.F.R. § 162.104(a), “[a]n Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given the landowner’s permission to take or continue in possession without a lease.” *Id.* § 162.104(b). In addition, “[a]ny other person” — i.e., not otherwise described in section 162.104 — “must obtain a lease . . . before taking possession.” *Id.* § 162.104(d). Possession of Indian land without a required lease by a party other than an Indian landowner of the tract “will” be treated as a trespass, and, unless the party using the land without authorization is engaged in negotiations with the Indian landowners to obtain a lease, BIA “will” take action to recover possession on the Indian landowners’ behalf and to pursue any additional remedies available under applicable law. *Id.* § 162.106.

While section 162.104 governs who is required to *obtain* a lease for Indian land, sections 162.601 and 162.602 govern who has authority to *grant* the lease. Section 162.601 defines the circumstances under which the Secretary (i.e., BIA) may grant leases of individually owned Indian land, and section 162.602 governs grants of leases by landowners or their representatives. Relevant to arguments raised in this appeal, BIA has the statutory and regulatory authority to grant nonagricultural leases on individually owned trust or restricted allotments of deceased Indians on behalf of the undetermined heirs of a decedent’s estate. 25 U.S.C. §§ 380 and 2218(c); 25 U.S.C. § 162.601(a)(3). In addition, section 162.601(a)(4) authorizes BIA to grant leases on individually owned lands on behalf of heirs or devisees who have not been able to agree upon a lease during a specified 3-month period “*provided that the land is not in use by any of the heirs or devisees*” (emphasis added). With limited exceptions, the Secretary will not grant or approve a lease for nonagricultural lands for less than the present fair annual rental of the land. 25 C.F.R. § 162.604(b).<sup>4</sup>

### Factual and Procedural Background

Appellant, who married Peter on January 7, 1999, lived with him in a house on the Homesite beginning in 1995. Peter died intestate on September 20, 2000, survived by Appellant and his six children from his first marriage. Appellant continued to live on the Homesite after his death, and, in response to a dispute between Appellant and Elkay

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<sup>4</sup> The exceptions to this directive include, *inter alia*, leases granted by an adult owner of trust or restricted land (and approved by the Secretary) to members of the owner’s immediate family with or without rental consideration (subsection (b)(1)) and leases granted or approved by the Secretary at less than fair annual rental when such action would be in the best interest of the landowners (subsection (b)(3)).

Lamebull (Elkay), one of Peter's daughters, the Yakama Tribal Court issued an order on July 2, 2003, allowing Appellant to continue to reside in the home with her son and another individual. AR 1. Appellant did not enter into a residential lease for her continued use of the Homesite, nor did she pay any rental for that use.

In October of 2003, Elkay visited the Yakama Agency (Agency) office complaining about the condition of the house located on the Homesite and wanting to know if BIA could do anything about the house, "since it's on trust land." AR 2. The next documentation in the record concerning BIA's involvement is a November 11, 2005, letter from the Superintendent to Appellant, stating that BIA had received a complaint from one of the potential landowners of the Allotment about the use of their land, which the letter describes as a 1-acre area. The Superintendent advised Appellant that she needed to contact the Agency regarding a residential lease for the Homesite. AR 3. He also indicated that BIA would order an appraisal to determine the fair rental amount due for "the unit." *Id.* In an undated follow-up letter responding to a telephone call from Appellant, the Superintendent informed her that she and Peter's children from his previous marriage were probable heirs to Peter's estate; stated — incorrectly — that Peter had not held the full undivided interest in the tract but shared the undivided interest in "the allotment" with the children from his previous marriage;<sup>5</sup> and noted that the Yakama Tribal Court Order allowing her to stay in the house had contained no statement concerning the payment of rent. AR 4.

On July 11, 2006, an Order Determining Heirs was issued in Peter's trust property probate. *Estate of Peter Smartlowit*, Probate No. NW-124-0318. AR 7. In the order, the administrative law judge (ALJ) determined that Appellant inherited a one-half interest in Peter's trust estate and each of Peter's six children held a one-twelfth interest in that estate. Appellant continued to reside at the Homesite.<sup>6</sup> Documents in the record indicate that Appellant informed BIA that she was interested in pursuing a conveyance by purchase or

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<sup>5</sup> The Title Status Report included with BIA's inventory for Peter's trust estate indicates that Peter held 100% ownership in the Allotment. As we note later, however, Elkay contends that Peter and his children shared ownership of the house during his lifetime.

<sup>6</sup> The record contains a letter from Elkay to the ALJ, dated July 20, 2006, purporting to "appeal" the probate and asserting, *inter alia*, that Appellant should have to pay back rent for the 6 years that she had been living on the property and that if Appellant refused to cooperate with BIA and obtain a lease, she should be removed from the house so that either one of the other heirs or someone willing to pay rent could move into the house. *See* AR 8. No ruling on or other response from the ALJ to this "appeal" appears in the record.

land exchange and that she was willing to convey all her other lands in exchange for the house and tract on the Allotment. AR 10, 11.

By letter dated October 30, 2006, the Superintendent informed Appellant that she needed to immediately enter into a lease agreement for the Homesite portion of the Allotment, which the letter noted “includes a residence.” AR 12. The letter stated that she could be assessed damages and subjected to increased costs if she did not contact the Yakama Nation Trust Real Estate Services to begin the lease process. *Id.* Appellant, now represented by counsel, responded by letter dated November 9, 2006, declining the request for a lease application. AR 13. Appellant stated that BIA had no authority to lease the property without the consent of the heirs, including herself, and that any attempt to assess damages against her for trespass would amount to a gross violation of BIA’s fiduciary trust responsibility to her.

On January 23, 2007, BIA completed a restricted appraisal report determining the fair annual rental for the residential use of the house on the Allotment. AR 14.<sup>7</sup> The report concluded that, based on a direct comparison with rental rates paid for similar properties, the estimated fair annual rental for 100% of the interest in the house was \$660 per month, or \$7,920 per year, as of July 27, 2006.

In anticipation of issuing a residential lease to Appellant, BIA sent “Acceptance of Lessor” forms for the Allotment to Peter’s six children as the heirs to a collective one-half interest in the Allotment. *See* AR 16-21. The acceptance forms described the property to be leased as the heirs’ one-half interest in the 5-acre Homesite, and proposed \$330/month rent for that one-half interest. Only two heirs returned the forms, both of whom refused to sign the acceptance. Elkay refused to sign because she wanted Appellant both to pay the full amount of the \$660 monthly rental, not just the \$330 per month reflecting Appellant’s ownership of a one-half interest in the allotment, and to pay back rent for the 7 years she had occupied the property (AR 20); Renee Elwell, another one of Peter’s daughters, similarly refused to sign because of the omission of back rent and because the rental amount was inadequate (AR 21).

By letter dated April 30, 2007, Appellant agreed to lease the Homesite and asked BIA to forward a copy of the proposed lease terms and conditions to her so she and BIA could discuss the lease. AR 23. She also informed BIA that she was interested in entering

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<sup>7</sup> The restricted appraisal report described the appraised property as the “NE4NW4SE4NW4, Sec. 18, T. 12 N., R. 18 E., W.M., WA., containing 1.00 acre, more or less.”

into an agricultural lease and asked for information about the time involved in obtaining such a lease.

On May 10, 2007, the Superintendent issued his decision assessing Appellant \$31,680 for her occupancy of the Homesite for the past 7 years and the current year (2007).<sup>8</sup> AR 24. He also advised her that, pursuant to 25 C.F.R. §§ 166.800 - 166.819 (trespass on Indian agricultural lands), she had to immediately cease her use of the Allotment and that, if she did not do so, she could be subject to additional penalties, damages, and costs. He added that BIA would refuse to issue Appellant a permit or lease for any other use, development, or occupancy of trust land until the matter was resolved.

Appellant appealed the Superintendent's decision to the Regional Director, asserting that she was not in trespass on the Allotment from her husband's death until the determination of heirs because she was not required to obtain a residential lease for the Allotment during the period when the heirs to the property were undetermined and that the Superintendent, therefore, had no regulatory authority to evict her from the Homesite. AR 27. She asked that the Regional Director (1) vacate the assessment of occupancy for the period from September 2000 through July 2006 and remand the issue for a revised calculation at fair annual rental for a period of 1 year and (2) declare null and void the Superintendent's order demanding that she cease her residential use of the Allotment and allow her to remain on the Homesite until she could arrange a move from the area.

The Regional Director issued his decision on October 9, 2007. AR 28. As an initial matter, he determined that Appellant was not in trespass because she had resided on the property first as Peter's spouse and, after his death, as a probable heir/co-owner of the property. He therefore concluded that she was not required to cease her use of the residence on the Allotment.

The Regional Director, however, rejected her claim that she was not required to obtain a residential lease until the determination of heirs was made. He reasoned that BIA had the authority to issue leases on behalf of undetermined heirs of a deceased landowner and that Appellant's right to inherit an undivided one-half interest in the property did not give her the right to occupy the property without paying rent to the estate on behalf of the remaining heirs. He also stated that the demand to enter into a lease and pay rent "would

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<sup>8</sup> He calculated the \$31,680 assessment using the rental rate established in the restricted appraisal report: \$7,920 annual rent multiplied by 8 years, or \$63,360, minus Appellant's 50% ownership interest.

harmonize with” the Tribal Court’s determination to allow her to remain in the house, concluding that BIA “cannot find a reason not to charge” Appellant rent. AR 20 at 5.

Finally, in response to Appellant’s challenge to the Superintendent’s “assessment of occupancy” for the Allotment for the period from 2000 to 2007, the Regional Director determined that Appellant was responsible, under the applicable regulations, for paying (and the co-owners were entitled to receive) fair annual rent for the Homesite for the entire period. He concluded, however, that the Superintendent had erroneously relied on the appraised value of the property as of July 27, 2006, in his calculation of the rent due for the earlier time periods and therefore the matter had to be remanded for recalculation of fair rental value prior to 2006. The Regional Director found that this determination did not conflict with the Tribal Court order because the order was silent as to the payment of rent, adding that, in any event, since the property was trust land, the Superintendent, not the Tribal Court, had the responsibility for managing and overseeing the property.

The Regional Director further concluded that, to remain on the property, Appellant was required to enter into a lease and pay rent, noting that the co-owners could either negotiate such a lease among themselves or, if negotiations were unsuccessful, BIA could grant a lease for the property. The Regional Director therefore vacated the Superintendent’s decision and remanded the matter to BIA for further resolution of the case. In so doing, he directed the Superintendent to (1) grant Appellant a residential lease for \$330 per month rent; (2) determine the amount of back rent due for the period from September 20, 2000, to July 26, 2006, based on the fair annual rent during that time period; (3) charge Appellant \$330 per month rent for the period from July 26, 2006; and (4) recalculate the total rent owed from September 20, 2000, through the present.

This appeal followed.

### Standard of Review

The only issues raised on appeal by Appellant are questions of law over which the Board exercises de novo review. See, e.g., *Rosebud Indian Land and Grazing Association and its Members v. Acting Great Plains Regional Director*, 50 IBIA 46, 52 (2009); *State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director*, 49 IBIA 129, 141 (2009). In addition, we review de novo the sufficiency of evidence to support a BIA decision. An appellant, of course, bears the burden of proving that BIA’s decision was in error or not supported by substantial evidence. *State of South Dakota and County of Charles Mix*, 49 IBIA at 141.

## Discussion

Appellant raises two issues on appeal: (1) whether she was required to obtain a residential lease for use of the house on a trust Allotment owned by her deceased husband while the heirs of the Allotment remained undetermined; and (2) whether the Superintendent is allowed to assess her for back rent for the 6 years that she occupied the home from the date of her husband's death until the heirs were determined by the ALJ. Appellant does not challenge the Regional Director's determination that she is required to enter into a residential lease and pay fair annual rent for the period beginning July 11, 2006, the date the heirs were determined.

Appellant maintains that she was not required to obtain a residential lease from BIA for use of the Allotment from the date of her husband's death until the heirs were finally determined because she was not an Indian "landowner" subject to the leasing requirement of 25 C.F.R. § 162.104(b) prior to the that determination. She bases her argument on the statutory and regulatory distinction between the ability of Indian "owners" to negotiate leases for themselves and the authority of the Secretary to grant leases on behalf of undetermined heirs. *Compare* 25 U.S.C. § 415(a) and 25 C.F.R. § 162.602 (leases by Indian "owners") *with* 25 U.S.C. § 415a and 25 C.F.R. § 162.601(a)(3) (leases by the Secretary on behalf of undetermined heirs). Appellant contends that this dichotomy in leasing authority necessarily means that undetermined heirs are not yet "Indian landowners" within the meaning of 25 C.F.R. § 162.104(b) and thus need not obtain leases to occupy Indian lands. This conclusion, she submits, also negates BIA's authority to require her to pay back rent for the period between her husband's death and the determination of heirs because she was not required to have a lease during that time period and, according to Appellant, BIA can only find trespass and assess trespass damages against Appellant if a lease is required.<sup>9</sup> We disagree.

The difference in the statutory and regulatory provisions addresses who can grant leases, not who is an "Indian landowner" for purposes of when a person occupying Indian land must obtain a lease. The statutes and regulations giving authority to the Secretary are designed to allow leases to be granted while probate proceeds so that the heirs do not lose

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<sup>9</sup> Appellant also claims that the exceptions to the requirement that fair annual rental be paid for a lease found in 25 C.F.R. § 162.604(b)(1) support her assertion that undetermined heirs need not obtain a lease or pay rent. Not only are the exceptions to the payment of fair annual rental, which presuppose the existence of a lease, irrelevant to the question of whether a lease is necessary, but she also has not shown that she qualifies for any of those exceptions.

income from their property during the pendency of the probate. The Secretary's authority, in relation to the authority of Indian owners, for purposes of *granting* leases, is simply not relevant or informative in interpreting the provisions of the regulations imposing the requirement on a party to *obtain* a lease. While there is some intuitive logic to Appellant's argument, because undetermined heirs are not yet *known* with certainty to be "owners," we nonetheless reject her argument that the term "Indian landowner" in section 162.104(b) must be so narrowly construed. When a person dies intestate, title vests in his or her heirs on the date of death, not the date of the probate order. *Estate of Ada Thompson*, 38 IBIA 164, 165 (2002); *Estates of Sam A. Simeon and Stephen (Steven) Aloysius Simeon*, 15 IBIA 135, 138 (1987); *see Estate of Rena Marie Edge*, 7 IBIA 53, 59 n.9 (1978). Appellant therefore was an owner of an undivided one-half interest in Peter's trust estate as of the date of his death in September 2000, and, as an Indian landowner, was required to obtain a lease for her use of her co-owners' interests in the Allotment, unless they had given her permission to continue her use without a lease.

Appellant's constrained reading of subsection 162.104(b) would not, even if accepted, have relieved her of the obligation to obtain a lease during the period when Peter's heirs were undetermined. If Appellant were not an "Indian landowner" under subsection 162.104(b), it would not follow that she did not need a lease. Instead, the catch-all provision contained in subsection 162.104(d) would apply: "*Any other person . . . must obtain a lease under these regulations before taking possession*" (emphasis added). Moreover, if Appellant were not an "Indian landowner" under section 162.104, then neither would she have been an Indian landowner under section 162.106, and BIA arguably would have had little or no discretion to allow her to remain on the property in the absence of negotiations with the other landowners. Subsection 162.106(a) provides that if possession of Indian land is taken without a lease by a party other than an Indian landowner, BIA "will" treat the unauthorized use as a trespass and "will take action to recover possession." In contrast, the Board has recognized that if possession is taken by an Indian landowner without a required lease, BIA retains some discretion, and is not required to seek immediate eviction. *See Goodwin*, 44 IBIA at 25 (BIA was not required to take immediate eviction action against an individual in unauthorized possession of trust property in which she owned an interest).

Although we affirm the Regional Director's decision with respect to the applicability of the law to the trust land at issue in this case, i.e., the Homesite occupied by Appellant, we must vacate the portion of his decision that assumed, or impliedly found — but without any discussion or acknowledgment of the issue — that the house located on the Homesite was trust property to which the trust land leasing regulations apply. BIA's jurisdiction over the house under BIA's leasing regulations necessarily depends on its status as part of the

trust land on which it is located. See 25 C.F.R. §§ 162.102 (regulations apply to Indian land owned by an individual Indian or tribe in trust or restricted status) and 162.101 (definition of “Indian land” as a tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status). But there is insufficient evidence in the record to support such a determination, and because the issue goes to the heart of BIA’s jurisdiction and authority to grant or approve a lease for the house, and to demand rent for the house, we address the issue sua sponte, even though it was not raised by any party.

In *Olson v. Portland Area Director*, 31 IBIA 44, 51 (1997), the Board noted that “there have been and continue to be questions concerning the status of particular houses built on trust property.” In that case, BIA first prepared and executed a lease that expressly covered a house located on trust land, then declined to be further involved in leasing the house, without stating the reasons. The occupant and the Indian landowner then executed a lease for the “house and yard,” which was not approved by BIA, but which BIA “recognized” as a lease for “personal property.” At one point, BIA noted that it “could not affirm ownership of the house,” in essence admitting “that it did not know if the house was trust real property, trust personal property, or non-trust property.” *Id.* at 45-47, 51. As the Board stated, “BIA either had authority to lease this house or it did not, based on whether the house was or was not trust real property.” *Id.* at 51.<sup>10</sup> In other Board cases, the status of a house located on trust land was determined by the terms of a lease. See, e.g., *Hardy v. Midwest Regional Director*, 46 IBIA 47, 54-55 (2007) (house became part of the leasehold interest of the lessee, rather than personalty); *Nix v. Acting Sacramento Area Director*, 18 IBIA 387, 390 (1990) (ownership of buildings vested in permittee, but if disposition of buildings not made within the allowable period after termination of permit, “ownership of said buildings shall merge with the land”); *Rhead v. Acting Portland Area Director*, 18 IBIA 257, 258 (1990) (lease provided that permanent improvements would be considered removable personal property). In *Estate of Arnold Ross*, 5 IBIA 277, 279 (1976), the Board found, with no discussion, “the two-bedroom frame house on post foundation, with composition roof[,] . . . constructed under the Housing Improvement Program, [and located on the decedent’s trust property,] to be non-trust personal property.”

In a recently enacted amendment to the American Indian Probate Reform Act, Congress provided rules applicable to the descent and devise of “covered permanent

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<sup>10</sup> In *Olson*, BIA sought trespass damages against the occupants of the house. The occupants had not appealed a prior finding of trespass, instead moving off the property. But when BIA sought to collect damages, they appealed, and the Board reversed BIA’s decision, concluding that the assessment of damages against the appellants would constitute a manifest injustice.

improvements” attached to trust or restricted land that is included in the estate of an Indian decedent. *See* 25 U.S.C.A. §§ 2206(a)[second](2)<sup>11</sup> and 2206(b)(2)(b)(1)(B)[\*] (West Supp. 2009).<sup>12</sup> The amendment stated, however, that the provisions “apply to a covered permanent improvement — (i) even though that covered permanent improvement is not held in trust; and (ii) without altering or otherwise affecting the non-trust status of such a covered permanent improvement.” *Id.* § 2206(a)[second](2)(C). We need not decide in this case the precise implications of this language because it is sufficient to illustrate the fact that a house located on trust land cannot simply be presumed to be trust property, as BIA apparently did in the present case.

The administrative record includes conflicting allegations regarding the ownership of the house, but no records of actual ownership. In Elkay’s 2006 “appeal” to the ALJ, she asserted that ownership of the house had been shared by her mother (Peter’s first wife), Peter, and their children, which suggests that ownership of and title to the house may have been separate from the ownership of the trust land on which it was located. There is, however, no evidence in the record to support Elkay’s assertion. But neither is there evidence to show that the house is held in trust by the United States, and the valuation of Peter’s trust estate seems to suggest that BIA did not consider it so because, in 2003, BIA valued the Allotment, consisting of 80 acres, at \$24,000. *See* Title Status Report (TSR), dated Nov. 13, 2003, AR 6 at 8. The TSR does not separately identify or appraise the 5-acre homesite portion of the Allotment, and does not indicate whether the appraised value of the trust property includes the value of the house (i.e., as part of the trust estate). BIA’s appraisal of the rental value of the house alone, however, in 2006, was for nearly \$8,000 *per year rental value*, which seems inconsistent with construing the \$24,000 valuation for the entire Allotment as including the value of the house.<sup>13</sup> We also note that the Tribal Court issued an order allowing Appellant to continue to reside in the house, which suggests that the Tribal Court may have believed it had jurisdiction over the house as non-trust property, even though it would not have had jurisdiction over the land. Before BIA may require a

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<sup>11</sup> Congress enacted two paragraphs “(2)” in subsection 2206(a).

<sup>12</sup> A “covered permanent improvement” is defined under the statute as “a permanent improvement (including an interest [therein]) that is (i) included in [a decedent’s] estate . . . ; and (ii) attached to a parcel of trust or restricted land that is also, in whole or in part, included in [the decedent’s] estate.” 25 U.S.C. § 2206(a)[second](2)(A).

<sup>13</sup> Of course, if the house is not part of the trust estate, then the valuation for purposes of a Homesite lease for the trust property should value the land in the absence of value attributable to the house.

[\*So in original Board decision. Should be 2206(h)(1)(B).]

lease for the house, and seek the rental value for past use of the house, BIA must first determine that the house is part of the trust land to which the BIA leasing regulations apply.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision in part, vacates it in part, and remands the matter for further proceedings consistent with this decision.

I concur:

          // original signed            
Sara B. Greenberg  
Administrative Judge\*

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.



INTERIOR BOARD OF INDIAN APPEALS

Walter and Susan Olson v. Portland Area Director, Bureau of Indian Affairs

31 IBIA 44 (06/25/1997)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

WALTER and SUSAN OLSON, Appellants	:	Order Reversing Assessment of Trespass Damages
v.	:	
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 95-109-A June 25, 1997

Appellants Walter and Susan Olson seek review of a May 23, 1995, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing trespass damages against them in the amount of \$193,270 for their use of a portion of Flathead Allotment 2020 over a six-year period. For the reasons discussed below, the Board of Indian Appeals (Board) reverses the assessment of trespass damages against Appellants.

Appellants submitted several documents with their Opening Brief. The Area Director has moved to strike all these documents, arguing that Appellants failed to file a timely objection to the administrative record under 43 C.F.R. § 4.336, which provides that "[a]ny objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing."

Under 43 C.F.R. § 4.335(a), the BIA deciding official is required to transmit the administrative record to the Board. The regulation provides that the administrative record "include[s], without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based." Section 4.335(b)(3) further requires the deciding official to certify "that the record contains all information and documents utilized by the deciding official in rendering the decision appealed."

Appellants do not contend that the Area Director failed to submit to the Board documents which he considered in reaching his decision, or submitted documents on which he did not rely. Either of these allegations would fall within 43 C.F.R. § 4.336. Instead, Appellants submitted additional documents which the Area Director apparently did not consider.

In a few cases in which attorneys have engaged in an extreme motions practice, the Board has used 43 C.F.R. § 4.336 in addressing the filing of additional documents. However, the Board's normal practice is to allow the parties to supplement the record provided by the deciding official as long as opposing parties have the opportunity to respond to any documents submitted. This practice includes allowing the BIA deciding official to submit

additional documents, even though this is arguably an admission that those documents should have been considered in reaching the decision.

The Area Director had the opportunity in his Answer Brief to respond to, or comment on, the documents Appellants submitted. The Area Director's motion to strike all of the documents submitted with Appellants' Opening Brief is denied.

The Area Director additionally contends that the Board should strike two specific documents which he alleges are privileged under the Freedom of Information Act, 5 U.S.C. § 552 (1994) (FOIA), and implementing regulations in 43 C.F.R. § 2.13. The Area Director argues that these documents are exempt from disclosure under FOIA exemption 5, as either attorney-client or deliberative process communications, and were improperly released to Appellants by someone associated with the Confederated Salish and Kootenai Tribes (Tribes). The Tribes had access to these documents pursuant to its performance of BIA realty functions under an Indian Self-Determination Act (ISDA) contract.

In reaching its decision in this appeal, the Board has not considered the two documents to which the Area Director objects. To the extent that this action constitutes a tacit granting of the Area Director's motion, the motion is granted.

The following discussion includes information drawn from the documents Appellants submitted with their Opening Brief, other than the two documents just discussed.

Allotment 2020 is located near the town of Elmo, Montana, and contains 74.87 acres, more or less. According to a 1993 appraisal report, the allotment is divided by a highway into a north section containing approximately 15.82 acres and a south section containing approximately 53 acres. The highway right-of-way encompasses approximately 6.05 acres. The north section of the allotment has a frontage of approximately 1,380 feet along Flathead Lake.

It appears that Appellants, or at least Walter Olson, first began renting a house on Allotment 2020 in 1975. The house was the sole property of Mary Caye, who also owned an undivided 3/4 interest in Allotment 2020. The remaining undivided 1/4 interest in Allotment 2020 was owned by approximately 38 individuals.

The first lease of the house was prepared and executed by the Acting Superintendent, Flathead Agency, BIA (Superintendent), on July 12, 1976, but took effect retroactively as of November 15, 1975. BIA Business Lease 4864 stated that it covered the house belonging to Mary. It did not mention the leasing of any part of the land comprising Allotment 2020. Rent was set at \$25 per month for the one year term of the lease.

Mary Caye died on October 5, 1976. Administrative Law Judge David J. McKee disapproved Mary's will on the grounds that the devisee, her husband Peter, had predeceased her. Judge McKee found that Mary had no surviving

lineal descendant who came within the anti-lapse provisions of 43 C.F.R. § 4.261, and therefore ordered her estate to be distributed to her niece, Jean Sistine Morigeau Mullen, under the Montana laws of intestate succession. Although that decision was appealed and was remanded for further consideration, Estate of Mary Martin Mataes Andrew Caye, 9 IBIA 196 (1982), no one involved with this case has disputed that Jean ultimately inherited Mary's 3/4 interest in Allotment 2020, and her full interest in the house.

On November 19, 1979, Jean's attorney wrote to the Superintendent, stating, inter alia: "Recently Mrs. Mullen received \* \* \* [a] lease from your agency for the rental of the house and yard." 1/ On November 27, 1979, the Agency Acting Natural Resource Officer (Natural Resource Officer) responded to the attorney's letter, stating: "Walter Olson leases an old house, which is in such shape that normally it would not be leaseable, on this property and pays \$25.00 per month, or yearly rental of \$300.00."

On December 10, 1979, the Natural Resource Officer wrote to Jean:

This is to notify you that the Superintendent of Flathead Agency, will no longer manage the leasing of your house in Elmo, Montana.

When an estate has been probated the Superintendent prefers to turn the leasing responsibility over to the new land owner, when they are competent and can manage their own affairs.

The lease that was prepared to Walter C. Olson by this office will be considered null and void. It will therefore be necessary for you to draw up a general lease agreement with Mr. Olson. You may prefer the assistance of your attorney to prepare a new lease contract with Mr. Olson.

A copy of this letter is being sent to Mr. Olson to advise him of the situation.

Pursuant to this letter, Jean negotiated a lease with Walter. The lease purports to rent the "house and yard" on Allotment 2020 for a term of five years, beginning January 1, 1980. The lease states that the low rental payment of \$25 per month was in consideration of Walter's maintenance, repair, and protection of the property. The lease was not approved by BIA. On January 30, 1980, Jean wrote to the Natural Resource Officer, stating:

I have already negotiated a lease with Mr. Olson on the small house in Elmo, and will be dealing with him directly, receiving the monthly rent directly. Regarding this negotiation you indicated to my daughter you would check on the fact that the small

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1/ Because the Board did not find a copy of this lease document in the materials before it, it was unable to verify the statement that it purported to lease the house "and yard."

house was owned by Mary Caye exclusively and that she alone received rental monies on said house. This is considered private property and therefore I understand the rental fee I am receiving from Mr. Olson is also exclusively mine.

In a February 14, 1980, letter to Jean, the Natural Resource Officer replied:

This office cannot officially affirm the ownership of the home. It has been a general understanding that the house did belong to Mary Caye: that she in fact sold some timber and had the home built in the fifties. You can write to Madeline P. Couture, Box 32, Elmo, Mr 39915, and she can verify this fact. [2/]

Apparently Susan Olson also wrote to the Agency with concerns about either the lease or the ownership of the house. The Board did not find a copy of Susan's letter in the materials before it. However, the Superintendent responded on May 23, 1980, stating:

In reply to your letter of May 9, we understand your concern. The [BIA] does recognize the lease you have with Mrs. Mullen even though it was negotiated outside this office. The house was considered personal property owned by Mary M. Caye at the time of her death and was passed on to her legal heir at law.

In May 1983, Jean authorized Appellants to move a trailer onto the leased premises. In March 1986, she entered into a second lease of the house and yard with Appellants. This lease, which increased the rent to \$40 per month, covered a 20-year period beginning on April 1, 1986. Neither of these documents was approved by BIA.

From information presented during this appeal, Jean died in April 1986. No party here has disputed the assertion that Jean's 3/4 interest in Allotment 2020 is now owned by Carolyn Jean Mullen O'Leary (2/3 of 3/4); Dorothy Jean O'Leary, (1/6 of 3/4); and Margaret Anne O'Leary Falck (1/6 of 3/4). Although it is not totally clear, it appears that the house is owned by Carolyn, Dorothy, and/or Margaret.

Apparently the first problem with the lease arrangement arose in late 1993, when one of the co-owners of Allotment 2020 approached the Tribes with an offer to sell an undivided interest in the allotment. A Tribal appraiser appraised the allotment under the Tribes' ISDA contract. During a physical examination of the allotment, the appraiser discovered Appellants' presence and improvements, and stated in his report that Appellants were using about 3.75 acres of the allotment as a homesite. The appraisal concluded that

[s]imilar properties, like the portion north of the highway, are used for waterfront recreation, homes, or investment properties.

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2/ Nothing in the materials before the Board indicates who Madeline Couture is or why she would have information that BIA did not have.

The land south of the highway would be a secondary consideration and could include a variety of uses such as farming, livestock grazing and a variety of recreation uses. A typical purchaser would view the north portion as the primary tract for investment with the south portion considered as excess acreage. After considering the subject and surrounding similar properties, the highest and best use is lakeshore investment with excess acreage.

Appraisal at 3. The appraiser determined that, as of October 18, 1993, the fair market value of the north portion of Allotment 2020 was \$684,940, the fair market value of the excess acreage in the south portion of the allotment was \$47,965, and the 6.05 acres comprising the highway right-of-way had no value. He thus determined a total fair market value of \$732,905, which he rounded to \$733,000.

On December 1, 1993, the Manager of the Tribes' Division of Lands wrote Appellants. He stated that the Tribes had just learned of Appellants' presence on the allotment and indicated that they should submit any evidence they had concerning their right of occupancy. He further stated that official action would be taken by the Superintendent.

Appellants responded on December 17, 1993, providing, inter alia, copies of the documents referenced above.

The Superintendent notified Appellants that their lease was invalid and they were therefore in trespass on the allotment. Appellants appealed this decision to the Area Director, who affirmed it on September 23, 1994. The Area Director stated:

Due to the workload experienced at the Agencies, and because of the desire to make Indian owners more knowledgeable about realty matters, owners are often encouraged to negotiate their own leases. However, such a lease is not valid unless all of the owners have consented (either directly or, after attempting to get all of the owners consent, through authority delegated to the Superintendent to approve on behalf of the non-consenting heirs; incompetent owners, minors, etc.) **and** approved by [BIA]. None of the "leases" you have furnished were approved by the BIA. Your 1986 "lease" was never submitted to the BIA for approval. The pertinent section is found in Title 25 of the Code of Federal Regulations, Part 162.5(a). This part states:

All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

The approval of the Secretary (delegated to the Superintendent) is necessary to ensure that adequate rent is paid, that the lease contains all of the provisions required by the regulations, and to ensure that all owners of the property are part of the lease agreement. The copies of the leases which you provided as part of your appeal only indicate Jean Mullen as the lessor, even

though she only held a 3/4 interest in the property. Apparently none of the other owners ever received any rental payments.

Sept. 23, 1994, Decision at 3-4. The Area Director continued:

We do not know the full intent of [the Natural Resource Officer's] December 10, 1979, letter advising that Ms. Mullen would have to draw up a general lease agreement. He does not indicate whether he believed that Secretarial approval was required. However, the regulations are clear that Secretarial approval of the lease document and of the lease itself is required. The March 17, 1986, document which you presented as a "lease" of Allotment 2020 has not been approved by the Secretary. Additionally, the "lease" was not negotiated with all 39 owners of the property, nor was it endorsed by them. The "lease" also does not provide any compensation to the undivided owners of the property other than Ms. Mullen. The record also does not reflect that a fair market rental value for the land was ever determined. Your previous attempt in 1979 at getting the approval would seem to acknowledge your understanding of the need for the approval. Apparently you made no effort to obtain BIA approval of the 1986 "lease."

Sept. 23, 1994, Decision at 4. Although advised of the right to do so, Appellants did not appeal from this decision. Instead, they moved off the property.

On August 1, 1994, the Tribal appraiser prepared an estimate of the fair annual rental for the 3.75 acres of Allotment 2020 which Appellants allegedly were using. The appraiser determined that the fair market value of this portion of the allotment was \$207,000 as of July 1, 1988, and was \$297,000 as of July 1, 1994. He applied a ten percent rate of return to the fair market value in determining that the fair annual rental was \$20,700 as of July 1, 1988, and \$29,700 as of July 1, 1994. From these starting points he prepared two options for determining the fair annual rental for the six-year period from 1988 through 1994. Option 1 applied the increase in the National Consumer Price Index-U to increase the value of the portion of the allotment each year. This option produced a total rental over the six-year period of \$185,612. Option 2 determined that the fair market value of the property increased an average \$15,000 each year between 1988 and 1994, and added this amount to the fair market value each intermediate year. This option produced a total rental of \$193,270.

On August 8, 1994, the Superintendent notified Appellants that they were being assessed trespass damages:

This letter constitutes my notice to you, on behalf of Indian owners of Allotment 2020, for damages resulting from your occupation of Allotment 2020. The determination of damages will be based upon the fair market rental value of the approximate four acres which you occupy/use. Under the federal statute of limitation, 28 U.S.C. Part 2415, damages may be collected for the last six years and 90 days of your occupancy. The fair market rental

value of the approximate 4 acre tract you have occupied for the last six years and 90 days amounts to \$193,270.00.

Appellants appealed to the Area Director, who issued the decision now under appeal on May 23, 1995. Concluding that most of Appellants' arguments attacked the September 23, 1994, trespass decision, the Area Director held that that decision was final for the Department based on Appellants' failure to appeal from it. The Area Director affirmed the Superintendent's assessment of trespass damages.

Appellants appealed this decision. After Appellants filed their Opening Brief, Carolyn, Dorothy, and Margaret sought to participate in this case as amicus curiae. Although the Area Director moved to limit their right to participate, in an order dated August 9, 1995, the Board held that, as co-owners of the property at issue, these individuals were already full parties to this proceeding.

Based upon an initial review of the administrative record; Appellants' Opening Brief; and the motion filed by Carolyn, Dorothy, and Margaret, the Board requested that the parties attempt to resolve this matter and stayed further proceedings before it pending settlement negotiations. The stay was continued several times before the Board concluded that no settlement would be reached. At that time, it allowed Appellants an opportunity to supplement their Opening Brief. Appellants did not do so. The Area Director filed an Answer Brief. Appellants did not file a reply brief. Carolyn, Dorothy, and Margaret did not file a brief.

As they did before the Area Director, Appellants devote much of their Opening Brief to a discussion of whether they were properly found to be in trespass on Allotment 2020. The Area Director has filed a motion to dismiss those portions of Appellants' appeal in which they seek to relitigate the trespass question. The Board treats this motion as an argument that it should not consider these portions of Appellants' argument.

Although they were notified of their right to appeal the trespass decision, Appellants failed to do so. Therefore, the decision that Appellants were in trespass on Allotment 2020 is final for the Department and will not be reconsidered here. See 25 C.F.R. § 2.6(b) ("Decisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed"); American Land Development Corp. v. Acting Phoenix Area Director, 26 IBIA 197 (1994).

Concerning the assessment of trespass damages, the Area Director argues that he properly based his decision on the appraisals, and that Appellants have failed to show any error in the appraisal methodology or to present a differing appraisal. In support of this argument, the Area Director cites White Mountain Apache Tribe v. Deputy Assistant Secretary--Indian Affairs, 17 IBIA 258, 267 (1989).

Appellants argue that: (1) although the Tribes' Division of Lands has indicated that 1.5 acres is a more realistic estimate of the amount of land

Appellants used, the assessment was based on 3.75 acres; (2) BIA has seldom realized more than a 1.5 to 2 percent return on Flathead Reservation lands and, other than the Kerr Dam Hydro site, there are no records of land leases on the Reservation valued at the amounts they are being assessed; (3) fair market value cannot be based on a straight percentage calculation, but must be based on the agreement between a willing buyer and a willing seller; and (4) some of Jean's heirs stated they would sign waivers relinquishing their interest in any past due rents.

The Board finds that, under the circumstances of this case, it is not necessary for it to determine whether the Area Director properly calculated the amount of damages, because it concludes that the assessment of damages against Appellants would constitute a manifest injustice. Under 43 C.F.R. § 4.318, "the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

As noted above, in February 1980, BIA notified Jean that it could not "officially affirm the ownership" of the house, but stated that it thought Mary had sold timber and had the house built. The letter gives no indication as to whether the timber sold was trust property or whether the house was built with the timber that was sold, with the proceeds of the timber sale, or perhaps with other monies. In essence, BIA admitted in this letter that it did not know if the house was trust real property, trust personal property, or non-trust property.

The Board is fully aware that there have been and continue to be questions concerning the status of particular houses built on trust property. However, BIA either had authority to lease this house or it did not, based on whether the house was or was not trust real property. In leasing the house in 1975/1976, BIA implicitly held that it was trust real property which BIA had authority to lease. In declining to be further involved in leasing the house in 1979, BIA did not discuss the status of the house or whether BIA had authority to lease it, but stated only that "the Superintendent prefers to turn the leasing responsibility over to the new land owner, when they are competent and can manage their own affairs." If the house was trust real property, BIA was required by statute to be involved in its leasing, regardless of whether the new owner was or was not "competent." Accordingly, BIA erred either in 1975/1976 by leasing personal or non-trust property, or in 1979 by declining to be involved in the leasing of trust real property.

Whether or not it had authority to lease the house in 1975/1976, BIA prepared and executed a document which purported to cover the "Rental of house belonging to Mary Mateas Caye located \* \* \* on Allotment No. 2020." Nothing in the BIA lease refers to the leasing of any land underlying or surrounding the house, or the granting of any access right-of-way to the house. There is no evidence that another lease existed covering lands within the allotment, and BIA has not suggested that such a lease existed. When it prepared and executed this lease, BIA knew or should have known

that the owner of the house held only an undivided interest in the allotment. The Board sincerely doubts that the intention in leasing the house was that the lessee would have access to the leased premises only by helicopter landing on the house's roof, would not be able to step outside without trespassing on Allotment 2020, and in fact would be in trespass at all times because the house was sitting on Allotment 2020. This, however, is precisely the situation which BIA created in preparing and executing the 1975/1976 lease.

Whether or not it had authority to decline to be involved in leasing the house, in 1979 BIA turned the leasing of the house over to Jean. Even though it had at least two clear opportunities to do so, BIA did not inform either Jean or Appellants that the house could not be leased without also leasing a portion of the allotment. Neither the Natural Resource Officer's December 10, 1979, letter to Jean, nor the Superintendent's May 23, 1980, letter to Susan, even intimated that there was a problem with leasing the house without also leasing the land in the allotment, or that BIA approval was required for any part of the transaction. Furthermore, nothing in the letters indicates that BIA had merely turned the "negotiation" of a lease over to Jean, while retaining authority to approve any resulting lease.

To add to the problem, Appellants have submitted documents which show Jean was seeking information and assistance from BIA precisely because she did not understand the ramifications of owning trust property. As an Indian owner of trust property, Jean was a person to whom BIA owed a trust responsibility in regard to her trust property. However, BIA, as Jean's trustee, essentially left her on her own. Jean's trustee told her that she was responsible for leasing the house, and said nothing that would alert her to any problems associated with the multiple ownership of the land on which the house was located.

Although a lawyer could argue that Appellants and/or Jean should have known the difference between leasing the house and leasing the land underlying and surrounding the house, there is no evidence that BIA understood this distinction when it prepared and executed the 1975/1976 lease. The Board declines to hold an individual to whom BIA owes a trust responsibility to a higher standard than that which BIA demonstrated when acting in its capacity as trustee.

The Board concludes that assessing trespass damages against Appellants under the circumstances of this case would constitute a manifest injustice because neither Appellants nor Jean were responsible for the situation that resulted in Appellants' trespass on Allotment 2020. That situation was created by BIA's initial preparation and execution of a lease of the house without a lease of the underlying and surrounding land, and its later failure to provide either Jean or Appellants with appropriate information concerning the leasing of the house vis-a-vis the leasing of the allotment. If such information had been provided when it was requested, the parties could have made an informed decision as to whether they wanted to continue to attempt to lease the house at a time when any trespass could have been avoided.

**COPY FOR YOUR  
INFORMATION**

**United States Department of the Interior**  
Bureau of Indian Affairs  
Olympic Peninsula Agency  
1216 Skyview Drive  
Aberdeen, WA 98520



IN REPLY TO:  
TR-4609-P5  
105 Land Area

December 7, 2012

CERTIFIED MAIL #70121010000225378807  
RETURN RECEIPT REQUESTED

Board of County Commissioners  
Grays Harbor County  
Grays Harbor County Courthouse  
100 West Broadway  
Montesano, Washington 98563-3614

Dear Commissioners:

This office has under consideration an application for acquisition of a 1.09 acre tract by the United States to be held in trust for the use and benefit of Helen Sanders, an enrolled member of the Confederated Tribes of the Chehalis Reservation. The proposed use of the property is to remain as a road.

The property is described as follows:

The West 30 feet of the south 470 feet of Government Lot 4; the West 30 feet of the Southwest Quarter of the Southwest Quarter north of the Black River; the Southwest Quarter of the Southwest Quarter lying South of the Black River AND a portion of Patented Government Lot 4 lying southerly and westerly of Fitzgerald County Road all in Section 32, all in Township 16 North, Range 4 West, Willamette Meridian.

Situate in Grays Harbor County, State of Washington, Parcel No. 160432330010 all within the boundaries of the Chehalis Reservation.

Containing 1.09 acres, more or less.

The determination to acquire or not to acquire this property in trust will be made in the exercise of the Secretary of the Interior's discretionary authority. To assist the Secretary in the exercise of that discretion, and pursuant to regulations in Title 25, Code of Federal Regulations, Part 151, entitled Land Acquisitions, we invite your comments on the proposed acquisition. In order for the Secretary to assess the impact of the removal of this property from the tax rolls, we also request the following information:

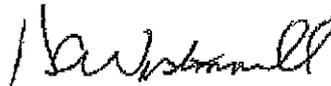
- (1) The annual amount of property taxes currently levied on the property.

- (2) Any special assessments, and amounts thereof, which are currently assessed against the property.
- (3) Any governmental services which are currently provided to the property by your jurisdiction.
- (4) If subject to zoning, how the property is currently zoned.

Please address the information and comments to the Superintendent, Bureau of Indian Affairs, 1216 Skyview Drive, Aberdeen, Washington 98520. Any comments received within 30 days of the date of receipt of this letter at the above address will be considered. You may be granted an extension of time to furnish comments, provided you submit written justification requesting such extension within 30 days of receipt of this letter. Your comments will be made available to the applicant. You will be notified of the decision to approve or deny the application.

A copy of the application, excluding any documentation exempted under the Freedom of Information Act, is available for review at the above-listed address. Please contact Mr. Keith Kramer, Realty Officer of the Chehalis Tribe at telephone number (360) 709-1858, to make an appointment to review the application.

Sincerely,

  
Herb Westmoreland  
Superintendent

cc: Helen Sanders, 53 Howanut Road, Oakville, WA. 98568  
Realty Officer, Confederated Tribes of the Chehalis Reservation, PO Box 536,  
Oakville, WA. 98568

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IN REPLY TO:  
TR-4609-P5  
105 Land Area

December 7, 2012

CERTIFIED MAIL #70121010000225378814  
RETURN RECEIPT REQUESTED

The Honorable Christine Gregoire  
Governor of Washington  
Post Office Box 40002  
Olympia, Washington 98504-0002

Dear Governor Gregoire:

This office has under consideration an application for acquisition of a 1.09 acre tract by the United States to be held in trust for the use and benefit of Helen Sanders, an enrolled member of the Confederated Tribes of the Chehalis Reservation. The proposed use of the property is to remain as a road.

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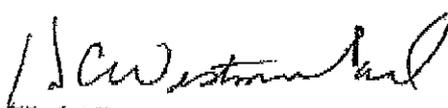
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Herb Westmoreland  
Superintendent

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