



**UTE INDIAN TRIBE**  
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June 11, 2012

Thank you for the opportunity to participate in the Secretarial Commission on Indian Trust Administration and Reform ("ITC") efforts to provide advice and recommendation to the United States Secretary of Interior regarding Indian trust management. I commend President Obama's administration, Secretary Ken Salazar, and the Commissioners for undertaking this vitally important task.

Creating a system for the fair management of tribal trust assets has been a challenge for the United States for over 100 years. Indian trust assets are vital as tribes move toward economic self-sufficiency and self-determination, thus, the reform of the Federal trust management system is a crucial issue for Indian country and for the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe"). Litigation over the Government's trust responsibilities regarding tribal assets is costly for both tribes and the Federal Government and is detrimental to the government-to-government relationship between the United States and sovereign Indian nations. Thus, the opportunity to clarify and improve the United States' trust management practices vis-à-vis tribal resources is a welcome and necessary endeavor.

The Tribe recently settled a case, *Ute Indian Tribe v. United States*, Court of Federal Claims No. 06-866L-MCW, against the United States for its mismanagement of the Tribe's monetary and non-monetary trust assets. The Tribe has extensive experience with the Government's management of tribal trust assets and therefore offers its comments herein based on experience. I welcome any questions the Commissioners may have for me and I look forward to a continuing relationship with the Commission and to more opportunities for dialogue as this process moves forward.

Sincerely,

Irene C. Cuch,  
Chairperson  
Ute Tribal Business Committee

# Indian Rangeland Management Task Force Charter



Developed For:  
The Indian Rangeland Management Task Force  
U.S. Department of Interior  
Washington, D.C. 20240

Developed by:  
Fredericks Peebles & Morgan LLP  
October 2007

## **1. PURPOSE**

This charter establishes the "Indian Rangeland Management Task Force" (IRMTF). It is established as an advisory committee to assist the Bureau of Indian Affairs (BIA) and Office of Special Trustee for American Indians (OST) in formulating uniform appraisal and grazing rate setting standards and to address other federal Indian rangeland management issues. The Assistant Secretary of Indian Affairs is responsible for preparing the following charter under Section 9 (c) of the Federal Advisory Committee Act, amended December 21, 1982. The IRMTF is established as a collaborative effort with representatives from the Office of the Assistant Secretary for Indian Affairs; the Office of Special Trustee for American Indians, the Bureau of Indian Affairs and tribal, rancher and allottee representatives from the Great Plains and Rocky Mountain BIA Regional Service Areas. Other representatives and/or Departments may join the collaboration in the future. Upon completion of the work of this Task Force, the BIA and OST will adopt and implement the recommendations and proposed standards submitted to it by issuing a revised set of grazing permit regulations and via executing a Memorandum of Understanding (MOU) between the BIA, OST, Tribes, individual Indian ranchers and individual Indian allottees. Each participating Tribe may then, in its sole discretion, choose to adopt a grazing appraisal and rate setting regulatory system that is consistent with the proposed appraisal and rate setting formula. A number of appeals, filed by individual Indian ranchers, are currently pending with the Interior Board of Indian Appeals (IBIA) that are the subject of the work of this Task Force. The Assistant Secretary for Indian Affairs shall exercise his authority under 25 C.F.R. 2.20(c)(a) and in accordance with the provisions of § 4.332(b) of title 43 of the Code of Federal Regulations to retain jurisdiction in the office of the Assistant Secretary in issuing a decision in appeals that have been filed by individual Indian ranchers with the Interior Board of Indian Appeals challenging the grazing permit rate and rate setting process for grazing periods 2007-2008 and 2008-2009. It will be incumbent upon the individual Indian Ranchers to file a motion staying any appeals relating to grazing periods prior to 2007-2008 that are currently pending before the IBIA.

## **2. BACKGROUND**

The Department of Interior is authorized to regulate grazing activities on Indian allotments pursuant to the Taylor Grazing Act of 1934, the Indian Reorganization Act of 1934, and the American Indian Agricultural Resource Management Act (AIARMA) of 1990. Regulations issued in 2001 implement AIARMA by authorizing the Secretary of the Interior to establish range units consolidating individual, tribal, and federal land, issue grazing permits controlling use, and to set grazing permit rates for land that is held by individual allottees. The Office of the Special Trustee for American Indians (OST) is authorized to manage income generated from Indian-owned allottee land by undertaking appraisals of all land held by allottees that will be subject to outside grazing. The current regulations are the subject of much controversy, in part because they do not clarify how appraisal data is to be utilized or require that such data be applied pursuant to a uniform practice of valuation. Recent price adjustments implemented by the BIA have led to a marked increase in the grazing permit rate that is charged to the individual Indian Ranchers. As a result of these increases, it is estimated that ranchers in the Great Plains and Rocky Mountain BIA Service Areas will now have to pay the highest grazing rate in the regional area, a rate that is higher than the average grazing fee associated with state-owned land, federal Bureau of Land Management property, or private land.

The grazing permit rate has been challenged in a series of appeals filed by these Indian ranchers over the past several years. This task force is being established in order to avoid ongoing litigation of this matter and to establish a rate setting process that is acceptable to all parties. A number of studies recently conducted by rangeland specialists and economists indicate that the grazing rate setting process is fundamentally unfair to the individual rancher permittees in that the rate setting process is not based upon a uniform or accurate system of appraising individual allotments. These studies indicate that the problem primarily stems from the fact that the appraisal process does not assign proper economic inputs to the correct beneficiary. For instance, if a rancher/permittee makes permanent improvements to the land, the benefit of these improvements does not accrue to the permittee but instead is conferred to the landowner once the permit expires.

Moreover, these studies have found numerous inconsistencies in the application

of the rate setting process, in that the appraisals conducted on these lands do not accurately reflect the value of each individual allotment. This is due in large part to the fact that rather than conduct detailed field studies to appraise the land, all economic inputs are factored in to the grazing rate, an average value of land for a large regional area is utilized. It has been demonstrated that because many of these appraisals are often based on erroneous or otherwise inaccurate data, and because the grazing permit process does not properly assign economic inputs to the proper designated party, the current regulatory system is in need of substantial reform. Establishing a uniform and accurate system of appraisal and valuation of Indian lands is therefore critically important to ensure that the interests of the individual Indian allottees and individual Indian ranchers are protected and maintained.

The IRMTF's goal is to establish a mechanism for ensuring that grazing permit rates accurately reflect the true market value of an individual allottee's land. To this end, the Task Force will conduct further research to determine the true extent to which the appraisal methodology currently in place is inaccurate and to determine cost-effective ways in which an open and accurate appraisal system can be implemented. The Task Force will also review research in range management issues and processes in order to recommend how to best ensure good husbandry and sound range management techniques are employed that promote inter-departmental cooperation in future regulation of this activity by the Bureau of Indian Affairs.

This will entail further review of potential solutions that can be utilized to address some of the more pressing issues that pose an immediate threat to the continued viability of allottee land, such as the explosive population of prairie dogs and the increased spread of noxious and invasive weeds on allottee owned land. In South Dakota alone, there are now over 625,000 acres of land inundated by prairie dog populations. Most of the prairie dog populations primarily lie on land that is tribal or government owed land, which over time have come to extend over to individual allottee lands. The prairie dog population has had a detrimental impact on allottee land in that these populations damage the soil so that lands impacted by prairie dogs are completely inundated and no longer able to support crops or livestock. The spread of noxious and invasive weeds has had a similar impact. For example, South Dakota's 2006 Weed and Pest report shows there are almost

30,000 acres of one particular type of noxious weed, Yellow toadflax, in the state whereas five years ago, there were only 350 acres impacted by this particular species. Toadflax and other noxious weeds are especially hard to control as cattle don't eat these weeds and they serve as direct competition for the grass cattle do eat. These weeds choke out surrounding plant life and also cause soil erosion. Many of these weeds don't readily respond to herbicides or efforts to stop them from spreading, and their seed can remain viable in the soil for more than ten years. These problems require that a comprehensive solution be developed and implemented which will resolve these issues by reducing the number of prairie dogs and invasive weeds while at the same time repairing the damaged soil.

### **3. SPECIAL INSTRUCTIONS**

- a. The name of this Task Force is the "Indian Rangeland Management Task Force" (IRMTF).
- b. The IRMTF will be terminated two years from the date on which this Task Force is first established by the Assistant Secretary of the Bureau of Indian Affairs, unless renewed.

### **4. OFFICERS AND MEMBERSHIP**

- a. The Principal Deputy Assistant Secretary of the Bureau of Indian Affairs will serve as chair of the IRMTF. The Task Force will report to the Principal Deputy Assistant Secretary, who will present Task Force recommendations to the Assistant Secretary of the Bureau of Indian Affairs.
- b. The IRMTF's membership is composed of a representative of the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians and, so as to ensure that the recommendations of the Task Force have taken into account the needs of the diverse groups served by the Department, membership will also include, to the extent practicable, an individual representative from within each of the following groups: Tribal governments in the Great Plains BIA Service Region, Tribal governments in the Rocky Mountain BIA Service Region, allottees in the Great Plains BIA Service

Region, allottees in the Rocky Mountain BIA Service Region, Indian ranchers in the Great Plains BIA Service Region, Indian ranchers in the Rocky Mountain BIA Service Region. Inclusion of these representatives is essential to the work of this Task Force in that it will allow the Task Force to undertake a more thorough analysis of how the ranching industry operates in practice by including input from a wide spectrum of individuals involved in the day to day management of the allottees' land. The number of members who may serve on IRMTF is limited to ten. Special and regular government employees may also be appointed because they are BIA and OST employees whom the IRMTF is advising and whose expertise is required. Equal opportunity practices, consistent with DOI policies, will be followed in all appointments to the IRMTF.

## **5. DUTIES**

The task force will conduct a national-level review and analysis of the current grazing permit regulatory process that documents the economic effects of the grazing regulations as they have been applied in Indian country. At the completion of a detailed review of these issues, the IRMTF shall advise the Assistant Secretary of Indian Affairs regarding potential solutions that should be implemented so as to improve upon the current system and resolve any problems that are identified in the most coordinated and comprehensive way possible. If necessary, whole-scale revisions to the current BIA grazing permit system and regulations may need to be instituted so that the system and regulations will produce a fair and equitable process that is acceptable to all of the interested parties affected by it. The specific goals of the Task Force are as follows:

- a. Review inconsistencies and other issues involved in the current practice of appraising range units in Indian Country based on the use of comparable economic inputs and strengthen the appraisal and grazing permit rate setting methodology related to Indian allotments;
- b. Review range management issues including fencing, cross-fencing, water

- development, maintenance of range improvements, mitigation of detrimental impacts associated with invasive plants and animals, and any other husbandry issues that are relevant to range management;
- c. Provide research-based information about how the grazing permit rate system can be improved upon generally so as to provide for a more open and fair process that accounts for the needs and interests of all interested parties including the BIA, OST, Tribes, allottees and individual Indian ranchers;
  - d. Determine strategies to be utilized in establishing a uniform methodology that is acceptable to all the parties in appraising individual allottee land in Indian Country and setting and readjusting grazing permit rates;
  - e. Advise the Secretary with respect to his role and obligation for providing oversight and coordination related to the appraisal and grazing rate setting process.

The Task Force will produce the following work products in fulfillment of the above duties:

- a. **Indian Rangeland Management Task Force Plan:** The Task Force Plan will outline the details regarding specific activities and tasks to be undertaken by the IRMTF, including details relating to logistics, number and frequency of meetings, and other specific activities that will be undertaken by the Task Force in fulfillment of its mandate;
- b. **Indian Rangeland Appraisal Process:** This document will set forth a comprehensive and uniform process for appraising Indian allotments and revising the associated rate setting process to account for this revised appraisal system;
- c. **Indian Rangeland BIA and OST Task Lists:** These documents will provide a list of tasks that shall be implemented by the BIA and OST upon completion of the work of the IRMTF so as to improve and coordinate inter-departmental cooperation on appraisal and permit setting

activities related to individual Indian allotments, to insure data quality and sound interpretation of economic factors and comparables that assign the proper economic inputs to the proper individual, and to promote range management techniques that are based upon sound husbandry so as to allow for the continued sustainability and economic viability of the allottees' land.

## **6. ADMINISTRATIVE PROVISION**

- a. Members shall serve without compensation, but may receive reimbursement for travel expenses and per diem in accordance with DOI travel regulations for attendance at board functions.
- b. Estimated annual operating cost of the IRMTF is not expected to exceed \$250,000.

## **7. NUMBER AND FREQUENCY OF MEETINGS**

The IRMTF is estimated to meet approximately three to four times annually, with at least one meeting each quarter and at such other times as necessary to meet the obligations and duties of the Task Force.

## **8. REPORT/STAFF SUPPORT**

The Principal Deputy Assistant Secretary, Bureau of Indian Affairs shall be the designated federal officer to provide committee management as outlined in sections 10(e) and 10(f) of the Federal Advisory Committee Act (5 U.S.C. App.). The Office of the Assistant Secretary for Indian Affairs will provide the primary administrative support for the IRMTF. The complex issues involved in the work of the Task Force are extremely broad in scope and include providing recommended solutions that will allow for centralizing the administration of the grazing permit rate setting system, administering grazing permit rate changes to reflect changing market and industry conditions so that all individual ranchers and allottees will be similarly affected by a single system administration change, and monitoring appraisal and valuation data to ensure that appraisals are a true reflection of fair market value of individual allottee land. It is essential that the Task Force ensure that any policy recommendations that may be issued to the BIA and OST to address these

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problems should be based on sound findings that are subject to adequate peer review and which take into account all relevant economic factors. Given the breadth and complexity of these issues, it is therefore necessary that the IRMTF have full and complete access to knowledgeable and well qualified experts (appraisers, economists, range management experts, etc) that have the requisite skill sets from both within and outside the Department of the Interior.

I hereby order and certify as the Assistant Secretary of Indian Affairs that this Charter has been duly adopted on this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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**Carl Artman**  
Assistant Secretary for Indian Affairs

# **Indian Rangeland Management Working Group Charter**



Developed For:  
The Indian Rangeland Management Working Group

Developed by:  
Fredericks Peebles & Morgan LLP  
March 2008

## **1. PURPOSE**

This charter establishes the "Indian Rangeland Management Working Group" (IRMWG). It is established as an informal advisory group to assist the Bureau of Indian Affairs (BIA) and Office of Special Trustee for American Indians (OST) in formulating uniform appraisal and grazing rate setting standards and to address other federal Indian rangeland management issues. The IRMWG is established as a collaborative effort with representatives from the Office of the Assistant Secretary for Indian Affairs; the Office of Special Trustee for American Indians, the Bureau of Indian Affairs and tribal, rancher and allottee representatives from the Great Plains and Rocky Mountain BIA Regional Service Areas. Other representatives and/or Departments may join the collaboration in the future. Upon completion of the work of this Working Group, the BIA and OST will have the option of adopting and implementing the recommendations and proposed standards submitted to it by issuing a revised set of grazing permit regulations and by executing a Memorandum of Understanding (MOU) between the BIA, OST, Tribes, individual Indian ranchers and individual Indian allottees. Each participating Tribe may then, in its sole discretion, choose to adopt a grazing appraisal and rate setting regulatory system that is consistent with the proposed appraisal and rate setting formula. A number of appeals, filed by individual Indian ranchers, are currently pending with the Interior Board of Indian Appeals (IBIA) that are the subject of the work of this Working Group. The Assistant Secretary for Indian Affairs may agree to stay these appeals during the course of the Working Group's review and determination of these issues. If the Assistant Secretary for Indian Affairs agrees to stay these Appeals, the individual Indian Ranchers and the Department of Interior will file a joint-motion staying any appeals relating to grazing periods prior to 2007-2008 that are currently pending before the IBIA.

## **2. BACKGROUND**

The Department of Interior is authorized to regulate grazing activities on Indian allotments pursuant to the Taylor Grazing Act of 1934, the Indian Reorganization Act of 1934, and the American Indian Agricultural Resource Management Act (AIARMA) of 1990. Regulations issued in 2001 implement AIARMA by authorizing the Secretary of

the Interior to establish range units consolidating individual, tribal, and federal land, issue grazing permits controlling use, and to set grazing permit rates for land that is held by individual allottees. The Office of the Special Trustee for American Indians (OST) is authorized to manage income generated from Indian-owned allottee land by undertaking appraisals of all land held by allottees that will be subject to outside grazing. The current regulations are the subject of much controversy, in part because they do not clarify how appraisal data is to be utilized or require that such data be applied pursuant to a uniform practice of valuation. Recent price adjustments implemented by the BIA have led to a marked increase in the grazing permit rate that is charged to the individual Indian Ranchers. As a result of these increases, it is estimated that ranchers in the Great Plains and Rocky Mountain BIA Service Areas will now have to pay the highest grazing rate in the regional area, a rate that is higher than the average grazing fee associated with state-owned land, federal Bureau of Land Management property, or private land.

The grazing permit rate has been challenged in a series of appeals filed by these Indian ranchers over the past several years. This Working Group is being established in order to avoid ongoing litigation of this matter and to establish a rate setting process that is acceptable to all parties. A number of studies recently conducted by rangeland specialists and economists indicate that the grazing rate setting process is fundamentally unfair to the individual rancher permittees in that the rate setting process is not based upon a uniform or accurate system of appraising individual allotments. These studies indicate that the problem primarily stems from the fact that the appraisal process does not assign proper economic inputs to the correct beneficiary. For instance, if a rancher/permittee makes permanent improvements to the land, the benefit of these improvements does not accrue to the permittee but instead is conferred to the landowner once the permit expires.

Moreover, these studies have found numerous inconsistencies in the application of the rate setting process, in that the appraisals conducted on these lands do not accurately reflect the value of each individual allotment. This is due in large part to the fact that rather than conduct detailed field studies to appraise the land, all economic inputs are factored in to the grazing rate, an average value of land for a large regional area is utilized. It has been demonstrated that because many of these appraisals are often

based on erroneous or otherwise inaccurate data, and because the grazing permit process does not properly assign economic inputs to the proper designated party, the current regulatory system is in need of substantial reform. Establishing a uniform and accurate system of appraisal and valuation of Indian lands is therefore critically important to ensure that the interests of the individual Indian allottees and individual Indian ranchers are protected and maintained.

The IRMWG's goal is to establish a mechanism for ensuring that grazing permit rates accurately reflect the true market value of an individual allottee's land. To this end, the Working Group will conduct further research to determine the true extent to which the appraisal methodology currently in place is inaccurate and to determine cost-effective ways in which an open and accurate appraisal system can be implemented. The Working Group will also review research in range management issues and processes in order to recommend how to best ensure good husbandry and sound range management techniques are employed that promote inter-departmental cooperation in future regulation of this activity by the Bureau of Indian Affairs.

This will entail further review of potential solutions that can be utilized to address some of the more pressing issues that pose an immediate threat to the continued viability of allottee land, such as the explosive population of prairie dogs and the increased spread of noxious and invasive weeds on allottee owned land. In South Dakota alone, there are now over 625,000 acres of land inundated by prairie dog populations. Most of the prairie dog populations primarily lie on land that is tribal or government owed land, which over time have come to extend over to individual allottee lands. The prairie dog population has had a detrimental impact on allottee land in that these populations damage the soil so that lands impacted by prairie dogs are completely inundated and no longer able to support crops or livestock. The spread of noxious and invasive weeds has had a similar impact. For example, South Dakota's 2006 Weed and Pest report shows there are almost 30,000 acres of one particular type of noxious weed, Yellow toadflax, in the state whereas five years ago, there were only 350 acres impacted by this particular species. Toadflax and other noxious weeds are especially hard to control as cattle don't eat these weeds and they serve as direct competition for the grass cattle do eat. These weeds choke out surrounding plant life and also cause soil erosion. Many of these weeds don't readily

respond to herbicides or efforts to stop them from spreading, and their seed can remain viable in the soil for more than ten years. These problems require that a comprehensive solution be developed and implemented which will resolve these issues by reducing the number of prairie dogs and invasive weeds while at the same time repairing the damaged soil.

### **3. SPECIAL INSTRUCTIONS**

- a. The name of this Working Group is the "Indian Rangeland Management Working Group" (IRMWG).
- b. The IRMWG will be terminated two years from the date on which this Working Group is first established, unless renewed.

### **4. OFFICERS AND MEMBERSHIP**

- a. The Principal Deputy Assistant Secretary of the Bureau of Indian Affairs will serve as chair of the IRMWG. The Working Group will report to the Principal Deputy Assistant Secretary, who will present Working Group recommendations to the Assistant Secretary of the Bureau of Indian Affairs.
- b. The IRMWG's membership is composed of a representative of the Bureau of Indian Affairs and a representative of the Office of the Special Trustee for American Indians. So as to ensure that the recommendations of the Working Group have taken into account the needs of the diverse groups served by the Department, membership will also include, to the extent practicable, an individual representative from within each of the following groups: Tribal governments in the Great Plains BIA Service Region, Tribal governments in the Rocky Mountain BIA Service Region, allottees in the Great Plains BIA Service Region, allottees in the Rocky Mountain BIA Service Region, Indian ranchers in the Great Plains BIA Service Region, Indian ranchers in the Rocky Mountain BIA Service Region. Inclusion of these representatives is essential to the work of this Working Group in that it will allow the Working Group to undertake a more thorough analysis of how the ranching industry operates in practice by including input from a

wide spectrum of individuals involved in the day to day management of the allottees' land. The number of members who may serve on IRMWG is limited to ten. Special and regular government employees may also be appointed because they are BIA and OST employees whom the IRMWG is advising and whose expertise is required. Equal opportunity practices, consistent with DOI policies, will be followed in all appointments to the IRMWG.

## **5. DUTIES**

The Working Group will conduct a national-level review and analysis of the current grazing permit regulatory process that documents the economic effects of the grazing regulations as they have been applied in Indian country. At the completion of a detailed review of these issues, the IRMWG shall advise the Assistant Secretary of Indian Affairs regarding potential solutions that should be implemented so as to improve upon the current system and resolve any problems that are identified in the most coordinated and comprehensive way possible. If necessary, whole-scale revisions to the current BIA grazing permit system and regulations may need to be instituted so that the system and regulations will produce a fair and equitable process that is acceptable to all of the interested parties affected by it. The specific goals of the Working Group are as follows:

- a. Review inconsistencies and other issues involved in the current practice of appraising range units in Indian Country based on the use of comparable economic inputs and strengthen the appraisal and grazing permit rate setting methodology related to Indian allotments;
- b. Review range management issues including fencing, cross-fencing, water development, maintenance of range improvements, mitigation of detrimental impacts associated with invasive plants and animals, and any other husbandry issues that are relevant to range management;
- c. Provide research-based information about how the grazing permit rate system can be improved upon generally so as to provide for a more open

- and fair process that accounts for the needs and interests of all interested parties including the BIA, OST, Tribes, allottees and individual Indian ranchers;
- d. Determine strategies to be utilized in establishing a uniform methodology that is acceptable to all the parties in appraising individual allottee land in Indian Country and setting and readjusting grazing permit rates;
  - e. Advise the Secretary with respect to his role and obligation for providing oversight and coordination related to the appraisal and grazing rate setting process.

The Working Group will produce the following work products in fulfillment of the above duties:

- a. **Indian Rangeland Management Plan:** The Working Group Plan will outline the details regarding specific activities and tasks to be undertaken by the IRMWG, including number and frequency of meetings, and other specific activities that will be undertaken by the Working Group in fulfillment of its mandate;
- b. **Indian Rangeland Appraisal Process:** This document will set forth a comprehensive and uniform process for appraising Indian allotments and revising the associated rate setting process to account for this revised appraisal system;
- c. **Indian Rangeland BIA and OST Task Lists:** These documents will provide a list of tasks that may be implemented by the BIA and OST upon completion of the work of the IRMWG so as to improve and coordinate inter-departmental cooperation on appraisal and permit setting activities related to individual Indian allotments, to insure data quality and sound interpretation of economic factors and comparables that assign the proper economic inputs to the proper individual, and to promote range management techniques that are based upon sound husbandry so as to allow for the continued sustainability and economic viability of the

allottees' land.

**6. ADMINISTRATIVE PROVISION**

- a. Members shall serve without compensation, but may receive reimbursement for travel expenses and per diem in accordance with DOI travel regulations for attendance at board functions.

**7. NUMBER AND FREQUENCY OF MEETINGS**

The IRMWG is estimated to meet approximately three to four times annually, with at least one meeting each quarter and at such other times as necessary to meet the obligations and duties of the Working Group.

**8. REPORT/STAFF SUPPORT**

The complex issues involved in the work of the Working Group are extremely broad in scope and include providing recommended solutions that will allow for centralizing the administration of the grazing permit rate setting system, administering grazing permit rate changes to reflect changing market and industry conditions so that all individual ranchers and allottees will be similarly affected by a single system administration change, and monitoring appraisal and valuation data to ensure that appraisals are a true reflection of fair market value of individual allottee land. It is essential that the Working Group ensure that any policy recommendations that may be issued to the BIA and OST to address these problems should be based on sound findings that are subject to adequate peer review and which take into account all relevant economic factors. Given the breadth and complexity of these issues, IRMWG should have full and complete access to knowledgeable and well qualified experts (appraisers, economists, range management experts, etc) that have the requisite skill sets from both within and outside the Department of the Interior, to the extent that available resources make it practicable to do so.

I hereby certify that this Charter has been duly adopted on this \_\_\_\_\_ day  
of \_\_\_\_\_, 2008.

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Principle Deputy Assistant Secretary Majel Russell

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Deputy Director for Trust Services Vicki Forrest

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Cheyenne River Sioux Tribe Indian Ranchers Representative

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Rosebud Indian Land and Grazing Association

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Standing Rock Grazing Association

**A Call to Action: Establishing a Joint Task Force to Review Issues Relating to the Setting of Minimum Annual Grazing Rental Rates by the Bureau of Indian Affairs and to Develop an Initiative that Will Create Substantial Economic Benefits for the Indian Rancher and Allottee by Enhancing Management of Range Units in Indian Country**

The following report outlines issues associated with the setting of minimum annual grazing rental rates by the Bureau of Indian Affairs (BIA) and calls for the establishment of a Joint-Task Force (Task Force) to review these issues in greater depth and propose recommended solutions so as to address the problem in the most coordinated and comprehensive way possible.

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The current controversies surrounding the grazing permit system in Indian Country cannot be fully understood without knowledge of the specific history behind them. This history is grounded in the early statutory authority of grazing on federal lands, where federal authority for the regulation of grazing on federal lands was established pursuant to the passage of the Taylor Grazing Act of 1934.<sup>1</sup> The Act authorizes the Department of Interior to allocate grazing privileges by a preference permit system. This statute provides that the privilege to graze on federal lands be afforded through the issuance of a permit, which does not give the permittee "any right, title, or interest or estate in or to" the permitted lands.<sup>2</sup> The Supreme Court, in a decision addressing the nature of grazing property rights as they applied to federal lands managed by the Bureau of Land Management (BLM) and the Forest Service, affirmed the limited

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<sup>1</sup> 43 U.S.C. §§ 315-315.

<sup>2</sup> 43 U.S.C. §§ 315-315b.

scope of this right, finding that Congress intended that “no compensable property right be created in the permit lands themselves as a result of the permit.”<sup>3</sup> This decision clarified that ranchers holding grazing permits for Forest Service or BLM lands have only a revocable license to use the federal lands. This principle was solidified by Congress in the Federal Land Policy Management Act (FLPMA) of 1976, but in that Act, Congress also provided that when a permit is canceled for public purposes, the permittee is entitled to compensation for the adjusted value of permanent improvements constructed in the federal allotment, up to the value of the terminated portion of the permit.<sup>4</sup>

Federal statutory authority to regulate grazing activity on Indian reservations also stems from the Taylor Grazing Act of 1934, but in addition such regulation is authorized by another statute, the Indian Reorganization Act of 1934.<sup>5</sup> Although federal statutory authority relating to grazing regulation in Indian Country stems from the same primary source as regulations for grazing on federal lands managed by the BLM and Forest Service, the subsequent development of the two sets of regulations did not always follow a parallel path. Most notably, the passage of FLPMA in 1976, which was the watershed event for public livestock grazing on BLM and Forest Service lands, had no analogous counterpart in statutes and regulations relating to grazing permits in Indian Country. As a result, the two regulatory systems took divergent paths and have come to affect ranchers in different ways. Many of the issues and problems inherent in the grazing permitting process in Indian Country are limited or even nonexistent under the grazing

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<sup>3</sup> See *United States v. Fuller* 409 U.S. 488, 93 S. Ct. 801, 35 L.Ed.2d 16 (1973).

<sup>4</sup> See 43 U.S.C. §1752

<sup>5</sup> 43 U.S.C. §§ 315-315r; 25 U.S.C. § 466.

process utilized for BLM and Forest Service lands, which offers far more protections for the individual rancher permittee pursuant to FLPMA and the BLM Range Code.<sup>6</sup>

Federal regulations governing grazing in Indian Country are different from regulations governing other on-reservation agricultural uses in that they provide for grazing to be conducted pursuant to a permit, as opposed to other agricultural use and development in Indian Country which is conducted through a lease. As indicated above, the use of this permit system merely affords the permittee a “revocable privilege to use the land”, in contrast to a lease, which provides for a “right of possession” for a specified duration.<sup>7</sup> Many Indian ranchers have objected to the grazing system’s use of a permit in that a permit does not afford any vested rights in the property to the rancher. This is troublesome to the ranchers for a number of reasons, not least of which is the fact that under the current regulations, the value of improvements made to the land by the permit holder may pass to the landowner after the permit expires.<sup>8</sup>

In addition, because a permit system is utilized for on-reservation grazing privileges, (as opposed to other land use and development in Indian Country which is authorized through a lease), additional requirements are imposed upon the permittees. For instance, permittees are required to pay their annual grazing fee in full in advance of the grazing season (off-reservation lessees typically have more flexible payment options). Where comparable privileges have been granted off-reservation through a lease, the resulting difficulties that stem from the use of a permit system are

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<sup>6</sup> 43 C.F.R. §§ 4110-4170. Over 260 million acres of BLM and Forest Service land are used for livestock grazing. In sharp contrast to the grazing allocation system in Indian Country, the public land grazing system has been characterized as a heavily subsidized allocation system that not only accounts for but also strongly protects and promotes the interests of the permittee rancher.

<sup>7</sup> See 25 C.F.R. §§ 162.101, 166.4.

<sup>8</sup> See 25 C.F.R. § 166.317.

nonexistent. Because on-reservation permittees are required to pay their fees in full in advance, they often have to secure private loans to cover these fees, and are thus subject to additional finance charges in covering these expenses. These finance charges are often quite significant, it has been reported that private lenders often charge as much as 11% for loans of this type.

The main problem associated with the continued use of a grazing permit system is that it is perceived as propagating a situation whereby the interests of the permittee holders (herein ranchers) are eclipsed by that of the landowners. The basis for this perception, stems from the current policy of the Department of the Interior, whereby the Bureau of Indian Affairs is obligated to promote the interests of the landowner allottees to the furthest extent it is practicably feasible to do so.<sup>9</sup> Specifically, the Office of the Special Trustee for American Indians (OST) manages income generated from Indian-owned land and has been designated as having a responsibility for determining appraisals of land held by allottees. The governing mandate for the OST is to act on behalf of the allottees to get the highest rates possible for their land. This mandate has resulted in increased pressure on the Department of Interior to generate more income for allottees, which has come at the expense of the Indian ranchers. Regardless of the underlying cause, these rate increases are real and they present a very real problem for these Indian ranchers. It is estimated that these ranchers will now have to pay the highest grazing rate in each of their respective regional areas, a rate that is higher than the average grazing fee associated with BLM and Forest Service land, state-owned land, or privately held land.

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<sup>9</sup> See, e.g., *Johnson v. Acting Phoenix Area Director*, 25 IBIA 18 (1993) (BIA's trust responsibility as to tribal land is owed to the tribe and allottee, not to an individual doing business on tribal land, even though that individual is a tribal member).

As indicated above, The Office of the Special Trustee for American Indians is charged with the responsibility for determining appraisals of land held by allottees. In contrast to the methodology used in setting the grazing permit rate for BLM and Forest Service lands, which are determined by a formula established by Congress in 1978 that continues under a 1986 Presidential Executive Order, the formula that is utilized in determining the reservation grazing rates is complex and is subject to a great deal of regional variance and adjustment by the BIA. Nothing in the federal regulations relating to grazing rates in Indian Country mandates a process or formula which the Bureau is required to follow in determining the rental rate, other than that an appraisal "can be used to determine the rental value of real property."<sup>10</sup> Moreover the regulations do not explain how appraisal data is to be utilized or require that such data be applied pursuant to a uniform practice of valuation.

This is troublesome to the Indian Ranchers in that the formula that is utilized by the BIA to set the on-reservation rate is based on economic inputs that are drawn from off-reservation private ranches and farms. Virtually all of the costs associated with contracts for livestock grazing in the private sector, such as costs of fence maintenance, maintenance of physical facilities, water resource maintenance, and other cattle care costs are incurred by the landowner as lessor of the property. These maintenance services are calculated as costs

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<sup>10</sup> 25 C.F.R. §166.401 The regulations only specify that the development and reporting of the valuation is to be completed in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP) and that if an appraisal is not desired, "competitive bids, negotiations, advertisements, or any other method can be used in conjunction with a market study, rent survey, or feasibility analysis developed in accordance with the USPAP." The regulations do define the "Uniform Standards of Professional Appraisal Practices (USPAP)" as "the standards promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice." 25 C.F.R. §166.4

and factored into the final rental rate that is established for the reservation market area.

When the baseline comparables that are used to establish this market rental rate are drawn from non-comparable economic inputs associated with surrounding non-Indian farms and ranches, the rate setting process becomes flawed. This is because private sector grazing lands available in the off-reservation market do not require grazing permittees to incur these costs in the course of utilizing the grazing resource. Where such costs are incurred by a grazing permittee, they are almost always substantially less than similar costs incurred for maintenance of on-reservation ranges, in that the private sector ranges typically have more extensive and better developed infrastructure already in place.

In contrast to the maintenance service costs that are covered by the landowner lessor in the private sector, in grazing permits issued for on-reservation range units, these management and livestock services are almost never provided by the Indian landowner, but instead these services, and the costs associated with them, are passed on to the Indian cattle operator. Because these services are factored into the final rental rate that is used to establish the grazing rate for permits on Indian reservations, the final rate that is utilized for on-reservation grazing is inequitable in that it is based on inflated values that are not being allocated to the proper interest. As a result, the Indian ranchers have to essentially pay twice for all necessary costs incurred

in the course of utilizing the grazing resource. As one expert has observed in reviewing this problem:

The process for determining the fair or equitable rental rate for Indian range unit forage is obvious as well as simple. First, real comparables must be found and listed. The same type of lands with the same type of productivity and capacity are required. Second, the contract services provided for – or not provided for in the private sector should be determined. Third, as there are, almost uniformly, no services provided by the Indian landowners, the actual costs paid by the Indian cattleman to make up for these missing services must be deducted from comparables as non-fee costs to arrive at a fair and equitable rental value for forage in Indian range units.<sup>11</sup>

Many of the Indian ranchers that hold grazing permits are also concerned that the latitude afforded to the BIA under the current regulations has allowed the BIA to set grazing permit rates that are not necessarily based on or reflective of the actual fair market value of the land in that the BIA has often arbitrarily manipulated appraisal data to increase the rate so as to advance the interests of the allottees. They are concerned that this underlying policy has resulted in a practice by which that Bureau estimates specific rates based on an average reservation rate instead of setting the rate on the range quality of each tract of land. This is problematic, from the Indian rancher's point of view, in that the use of this average reservation rate typically results in their being over-charged for the use of rangeland on the reservation which is in comparatively poor condition when compared to the appraised land.<sup>12</sup> The ranchers feel that this system is fundamentally unfair in that through both design and application, it has come to prioritize obtaining a

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<sup>11</sup> McLaughlin, Robert, *The American Indian Livestock Association's Recommendations for Establishing Indian Range Unit Grazing Rates in North and South Dakota*, a supplement to the Association's briefing paper entitled *Indian Range Units in North and South Dakota*, submitted to the Bureau of Indian Affairs on April 15, 1994.

<sup>12</sup> Potentially, the use of this formula could also lead to an under-charge for the use of good rangeland, however given the fact that the aggregate amount of land on the reservation is typically of lesser quality than the appraised land, this problem is not as commonplace.

high rate of return on allottee land at the expense of the ranchers and without considering their interests.

At least two agricultural economists who have reviewed this issue have substantiated that this concern is valid. These experts have found gross inconsistencies in the application of the rate setting process, in that the appraisals conducted on these lands do not accurately reflect the value of each individual allotment.<sup>13</sup> This is due to the fact that all economic inputs associated with a particular range unit do not have an assigned value that can be applied in a uniform manner. Rather than conduct detailed field studies to appraise the land, whereby the BIA must consider all economic inputs in setting the grazing rates, an average value of land for a large regional area is utilized. The aggregate value of this large regional grazing unit then forms the basis from which the individual grazing permit rate is established. This process wrongly assumes that all land within this contiguous regional area has shared geographic and economic factors.

More often than not, this is not the case, and the land that is being used to set this comparable value is usually land that contains small farms that incorporate pasture leases and have well developed and extensive water and grazing infrastructure already in place. Without having a more detailed cost-accounting in place to accurately appraise the land, such as that utilized in the rate setting process for BLM and Forest Service lands, the BIA rate setting system will never be reflective of the actual value of the land, and will continue to be the subject of ongoing litigation.

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<sup>13</sup> See Sedicec, Kevin Ph.D, *WesDak Appraisals Services, Inc. Review—2007 Range Unit Grazing Rates for Standing Rock Reservation*, North Dakota State University Animal & Range Unit Sciences, November 8, 2006; McLaughlin, Robert, *The American Indian Livestock Association's Recommendations for Establishing Indian Range Unit Grazing Rates in North and South Dakota*, a supplement to the Association's briefing paper entitled *Indian Range Units in North and South Dakota*, submitted to the Bureau of Indian Affairs on April 15, 1994.

Another perceived problem that the Indian ranchers have with the BIA grazing rate formula is that they are concerned that the rate itself is subject to periodic and potentially arbitrary readjustment by the BIA. Past federal grazing regulations address this issue by limiting the authority of the BIA to increase grazing rates during the term of a five year grazing permit, and the BIA could therefore only adjust reservation grazing rates every five years.<sup>14</sup> The new regulations allow for the BIA to review the grazing rental rate prior to each anniversary date of the permit and adjust the grazing rental rate 60 days prior to each anniversary date or as allowed by the permit.<sup>15</sup> Therefore, certain rates will be locked in for the full term of the permit and will be valid until the permit expires, but if the permit allows for periodic reevaluation and adjustment, the rate is not locked in during the period for which the permit is in place. This has led to a situation whereby the rate that is set for a same parcel of land has changed by as much as 68% in a single year, despite the fact that there had been no significant changes to the improvements or other economic inputs associated with that tract of land.

In the final analysis, these ongoing rate increases will eventually be detrimental to the allottees themselves. If the ranchers are forced out of business as a result of the increased rates, the economic consequences of their withdrawal will eventually affect the allottees, because much of the allotted lands will not be utilized and will sit idle. The perceived shortcomings in the current system, where the ranchers are under the impression that their interests and rights continue to be marginalized, will result in vacant lands being created on the reservation in that the continued cost of doing business will no longer be affordable to all but those with the highest operational budgets. Unless the

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<sup>14</sup> See, e.g., *Long Turkey v. Great Plains Regional Director*, 35 IBIA 279 (2000) (Secretary has no authority to increase grazing rates during the grazing period).

<sup>15</sup> See 25 C.F.R. 166.408.

valuation methodology used to set the rate is either revised or abandoned so that the grazing permit rate is no longer based on the highest-priced lands in a given regional market area, the BIA will eventually reach an impasse that will be detrimental to the interests of all the parties involved.

Given the level of perceived flaws that are present within the overall BIA grazing permit system, it is clear that whole-scale revisions to the current regulations need to be instituted before the system will produce a process that is acceptable to all of the interested parties involved. It is therefore recommended that a Joint-Task Force be established consisting of representatives the OST, the DOI, the BIA, the Indian Ranchers, the Allottees, and the Tribes to further review these issues and recommend potential solutions to resolve this conflict by negotiated settlement. The task force would conduct a national-level analysis that documents the economic effects of the grazing regulations as they have been applied in Indian country. At the completion of a detailed review of these issues, the Task Force would be charged with formulating recommendations to address the issue in the most coordinated and comprehensive way possible. The goals of the Task Force would be as follows:

- **Review inconsistencies and other issues involved in the current practice of appraisers of assessing range units in Indian Country based on comparable economic inputs;**
- **Offer recommendations on strategies to be utilized in establishing a uniform methodology that is acceptable to all the parties to be used in appraising allottee land in Indian Country and setting and readjusting grazing permit rates;**
- **Provide research-based information about how the grazing permit rate system can be improved upon generally so as to provide for a more open and fair process that accounts for the needs and interests of all interested**

parties including the BIA, OST, Tribes, allottees and individual Indian ranchers.<sup>16</sup>

- **Review range management issues including fencing, cross-fencing, water development, maintenance of range improvements, and any other husbandry issues that are relevant to range management.**

The establishment of this Task-Force would allow both the Department of the Interior and the individual Indian ranchers to avoid the costs and burden presented by pursuing ongoing litigation of this matter. It should be mentioned that these costs are significant to both parties, Indian ranchers from across the Nation have appealed this matter to the IBIA for over a decade now, and they will likely continue to appeal this matter indefinitely until this issue has finally been resolved. At a minimum, the establishment of a Joint-Task Force would be beneficial in allowing the ranchers to have some forum whereby their concerns can be identified and considered by the Department by allowing the ranchers an opportunity to provide input on improving a process that they perceive as being arbitrary and capricious. In this way, a uniform valuation methodology could be developed that would account for and address concerns and issues that are of importance to all parties, obviating the need for further litigation of this matter in the courts.

### **Conclusion**

It is the position of the Indian ranchers that a single, reservation wide grazing appraisal is inadequate in that such a system of appraisal and rate setting does not account for the interests of the ranchers. Because of the perceived deficiencies in the

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<sup>16</sup> To this end, the Task Force would conduct a comprehensive review of the issues identified above in this report, and also consider and address other issues that would be identified pursuant to a process of soliciting comment from the public.

current grazing rate process, the current regulatory system is untenable, and will eventually fail to meet the Bureau's obligation, pursuant to the trust responsibility, to protect the interests of the allottee by ensuring that a fair and reasonable rate for grazing permits is provided under law. It is the position of the Indian ranchers that future appraisals of allotments must assess the actual economic inputs associated with particular grazing permits or groups of permits in specific areas. This can be accomplished by ensuring that the appraisals contain site-specific information about water resource development, fence construction, and other property maintenance, that the costs for such services be properly allocated between the allottee and the Indian rancher, and that a uniform valuation methodology be applied and factored into the setting of grazing permit rates for Indian range units.

1. **Do you have any recommendations to improve or streamline the delivery of services to trust beneficiaries? This includes matters related to financial management and accounting functions as well as natural resource management functions.**

### **Recommendations**

Generally, establishing and enforcing more efficient communication between the Government and tribes will improve services to tribes. For example, BIA regulations establishing a formal procedure for processing tribal concerns about trust asset mismanagement and timelines within which the Government must respond to a tribe's concerns about its trust resources will facilitate communication between tribes and the Government regarding its trust assets. Such procedure should be strictly voluntary and should toll any statute of limitations applicable to the tribe's concern. As a voluntary procedure, the tribes should have the choice, but not the obligation, to use this procedure and should not waive or lose any of its rights to sue over any related claim if the tribe does not use the procedure.

- a. **Streamlining and Improving Services Regarding Tribal Trust Funds**
  - i. **Financial Management**

The United States should be held to the same trustee obligations as a conventional trustee for management of tribal trust funds. The Government's trustee responsibilities should not be limited to those expressly articulated in statutes or regulations.

- ii. **Accounting**

The United States should establish a system whereby trust account reports are understandable and readily accessible online. Information about tribal trust accounts should be available online and should include an understandable comparison between the investment instruments for tribal trust funds and investment instruments for private trust accounts, so that tribal members can compare the performance of their trust funds to that of private trust beneficiaries.

- b. **Streamlining and Improving Services Regarding Tribal Natural Resources**
  - i. **Natural Resource Management**

The United States should train more federal personnel or provide grant funds to train tribal personnel to inspect leases for diligent development, environmental sustainability and compliance, and other issues that arise in mineral exploitation. The Government should require larger bonds for environmental clean-up of mineral development sites and should enforce such bonds or be fully liable for (i) valuation of the damages and/or clean-up costs and (ii) paying for clean-up costs or damages if such costs go beyond the posted bond.

- ii. **Natural Resource Accounting**

The United States should provide online information identifying the royalty, lease, and permit rates currently being collected for Indian resources and include a comparison of the rate collected for the Indian resource to the "market rate" for similar resources. The online information should include the source of the market rates.

The United States should provide monthly online accounting for tribal resources. Like an online bank-account where deposits and withdrawals are recorded daily, the United States could create online accounts for leases of tribal resources.

2. **Are there any other trust administration models the Commission should examine as it looks towards improving the Department of Interior's trust administration and management?**

### **Current Status**

The primary underlying issue with DOI's management of both monetary and non-monetary tribal trust assets is that DOI and BIA personnel lack the knowledge and practical experience to manage tribal trust assets according to the fiduciary standards required in the modern trust environment.<sup>1</sup> To overcome DOI and BIA personnel lack of expertise, the Tribe recommends that the DOI (a) outsource management of tribal monetary assets to more knowledgeable organizations and (b) engage tribal members in an advisory role regarding management of the non-monetary tribal assets.

### **Recommendations**

#### **a. Outsource Monetary Trust Asset Management**

Assist in calculating Banks and private trust management services specialize in investment and managing trust assets. Such entities have developed computerized customer interfaces which facilitate trust beneficiary's easy access to information about their trust assets. Further, such entities are familiar with performance standards for trustees and are experts at professionally managing the investment of trust monies and managing trust assets.

Alternatively, the Government could allow tribes to voluntarily enter into self-governance compacts for management of its own monetary and non-monetary trust resources. Voluntary self-governance compacts have been successfully implemented by tribes desiring to manage their own health-care systems and law-enforcement entities. Similar self-governance compacts could be offered to tribes desiring to manage their own trust resources, which would

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<sup>1</sup> See Christopher Barrett Bowman, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 Cath. U. L. Rev. 543, 562 (2004) (citing *The Role of the Special Trustee Within the Department of the Interior: Hearing Before the Senate Committee on Indian Affairs* (Sept. 24, 2002) (statement of Paul M. Homan, Former Special Trustee for American Indians)).

relieve the United States of any trustee obligations for the tribes' resources and would vest full management and responsibility of such resources with the tribes themselves.

**b. Establish Tribal Advisory Boards for Management of Non-Monetary Trust Resources**

Tribes should be given more input into management of non-monetary tribal trust assets.<sup>2</sup> Stakeholder advisory panels are not a novel concept and are currently utilized to improve governmental management of public natural resources. Pursuant to the Federal Land Policy and Management Act, codified at 43 U.S.C. Ch. 35, 1739, the United States Bureau of Land Management ("BLM") convenes citizen advisory councils ("Regional Advisory Councils" or "RACs") who have input into the BLM's land policy and management decisions in local regions. The RACs furnish advice to the BLM about land-use plans, classification, retention, management, and disposal of public lands in the area for which the RAC is established. The RAC members are local citizens. The RAC model can be replicated and the BIA can convene regional tribal advisory committees whereby regional tribes provide advice, guidance, recommendations to the BIA in its management of non-monetary tribal assets. The tribal advisory committee should also have the authority to highlight the needs and problems tribes identify with the BIA's management of specific non-monetary assets.

The advisory panel model, which facilitates tribal input into the management of non-monetary trust resources, has been explored to help the BIA improve its appraisal of Indian-owned agricultural land. The BIA uses a flawed methodology to appraise Indian rangeland and the result is that Indian ranchers are charged higher prices for permits to use Indian rangeland than other permittees in the same region. To address the problems with the BIA's appraisal system, and Indian Rangeland Management Task Force was proposed. The IRMTF could be established pursuant to BIA regulation and would facilitate tribal input into improving the appraisal and permitting process used by the BIA for Indian rangeland. *See* IRMTF Charter and Report attached hereto as Exhibit A.

The Tribe proposes that the Commission study our own Ute Water Settlement as a practical model for exploring what inefficiencies and problems exist with the systems, regulations, standards and other practices the Government relies on when managing tribal trust assets – in this case, the Tribe's water rights.

**3. Given that the sunset provision in the American Indian Trust Fund Management Reform Act of 1994 was predicated on OST's oversight and reform responsibilities and the OST now has additional operational duties should the Commission recommend sun-setting the OST?**

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<sup>2</sup> See, e.g., Thomas V. Panoff, *Legislative Reform of the Indian Trust Fund System*, 41 Harv. J. on Legis. 517 (2004).

## Current Status

The Office of the Special Trustee for American Indians ("OST") was established pursuant to the Indian Trust Fund Management Reform Act of 1994<sup>3</sup>, and was tasked with oversight of all reform efforts within the BIA, BLM, and MMS with respect to managing Indian trust monies.<sup>4</sup> The Office of Trust Funds Management ("OFTM") was created shortly thereafter to manage the investment of trust funds.<sup>5</sup> Thus, the management of monetary trust assets is vested with one entity, and is governed by one set of regulations, and the management of non-monetary trust assets is vested with another entity and governed by another set of regulations.<sup>6</sup> Discussing the OST and OFTM impact on tribal trust resources, Tex Hall, president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation in Fort Berthold, North Dakota stated in a Senate Committee hearing:

We did not want a bureaucracy that separates the management of our lands from all of the activities that take place on our lands. What has instead evolved is a two-headed bureaucracy that would never make any decision and would take resources from other important program of the BIA and really limit services to Indian recipients.<sup>7</sup>

Because the *Cobell* litigation focused on the DOI's mismanagement of monetary tribal trust assets, the DOI's resources have shifted to funding better management of tribal monetary assets. Shifting resources to manage tribal monies took substantial resources away from DOI management of tribal non-monetary resources, like grazing permits, oil and gas leases, and timber management. As a result, the DOI's management of non-monetary tribal assets is sorely underfunded and understaffed. The OST drains resources from the BIA's budget for managing non-monetary resources and from other Indian programs<sup>8</sup>. Further, tribes have to deal with two different bureaucracies depending on what trust resource is at issue.

To compensate for fewer resources, the BIA has pushed responsibility for managing tribal resources to other federal agencies who are not statutorily authorized to manage tribal resources. One example is that the BIA has handed responsibility for managing tribal oil and gas

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<sup>3</sup> Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. § 4001 (2004)).

<sup>4</sup> Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1, 153-60 (2004) (discussing the history of OST and OFTM).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of the Funds and Natural Resources, Might be Reformed, Before the Sen. Comm. on Indian Affairs*, 109<sup>th</sup> Cong., 11 (2005) (statement of Tex Hall, president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation in Fort Berthold, N.D.).

<sup>8</sup> Robert McCarthy, *supra* note 2, at 153-60.

leases, and land-surface use leases to the United States Bureau of Land Management (“BLM”)<sup>9</sup>, an agency tasked with managing federal public lands, not Indian lands.

### Recommendation

The Tribe is in favor of re-centralizing management of tribal trust assets within the BIA by dissolving the OST and the OFTM and reverting the oversight and management of tribal trust funds back into a BIA department. Further, the Tribe favors the BIA re-assuming management responsibilities for non-monetary Indian resources, and relieving other federal agencies, like the BLM, from such managements. Not only will this consolidation remove one layer of Government bureaucracy from the management system for tribal trust assets, but it will allow more resources to be focused on management of non-monetary tribal assets.

- 4. Do you have any recommendations and/or suggestions that would improve the nation-to-nation relationship between the DOI and the Tribes with respect to trust administration.**

### Recommendations

In its role as trustee for Indian lands, the United States should manage Indian lands like private sovereign lands and not like the public domain. As discussed *supra*, the BIA has shifted management responsibilities for tribal resources to federal agencies experienced with managing federal public resources, and such agencies, accustomed to managing public lands, manage Indian lands in the same manner.<sup>10</sup> However, Indian lands are not federal public lands and should not be managed as such.

One example of imposing regulations intended for federal public lands onto Indian lands is when the Government approves any major action on Indian land, the Government opens the action to comment and response from organizations around the nation pursuant to the National Environmental Policy Act. Through this process, organizations from areas away from tribal lands and who are accustomed to commenting on federal public land policy can limit a tribes' ability to manage and utilize its own tribal resources. That is, a tribe in rural Utah can be prevented from using its own resources by opposition from an organization located in New York City.

Generally, our recommendations in answer to Question 1 above and Question 5 below would improve the nation-to-nation relationship between the DOI and the Tribes with respect to trust administration because it would clarify the role and responsibility of the United States government for Indian trust assets.

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<sup>9</sup> Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands?: The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 Energy L.J. 119 (2012).

<sup>10</sup> *Id.*

5. Do you have any recommendations to improve or strengthen trust management and/or administration based on information gathered in the course of litigation and settlement or the recent tribal breach of trust cases announced in early April of this year?

a. Management and Administration of Tribal Money

The Tribe filed *Ute Indian Tribe* primarily because the Government's characterization of monies appropriated to the Tribe changed from trust to non-trust funds, triggering different responsibilities and liability for the United States' management of such monies. Agencies should not have the authority to re-characterize monies as tribal trust or non-trust monies. Allowing an agency to do so not only gives the Agency the discretion to change the United States' responsibilities vis-à-vis such funds, but it changes the ownership of such monies, threatens to allow reversion of the funds to the United States' general account for re-distribution to non-tribal purposes, presents obstacles regarding what process a tribe must follow to access such funds, and causes costly litigation. With our recent litigation experience in mind, we make the following recommendations regarding trust management and administration of tribal monies:

i. Clarify what money is tribally-owned trust money

**Current Law**

Judicial analysis of whether funds held by the United States for tribes are trust funds is an exercise in interpreting congressional intent and, as such, is inconsistent and uncertain. Most courts find that no express legislative language is necessary to characterize funds held by the United States on behalf of tribes as tribal trust funds<sup>11</sup>. However, some courts hold that absent express language that funds are "tribal trust funds," then such funds are not tribal trust funds<sup>12</sup>.

When federally-held funds are not expressly characterized as trust funds by Congress, court can find such funds are trust funds by operation of law where the money is appropriated to fulfill an obligation of the United States to a tribe<sup>13</sup>, and where such monies are deposited in a United States Treasury account for the tribe<sup>14</sup>. Courts go through a lengthy analysis, examining legislative language, context and purpose, to determine whether Congress intended appropriated monies to be trust funds.<sup>15</sup>

Courts also characterize appropriations as trust funds if the appropriation is of "a trust fund nature" by relying on various statutes, like the Permanent Appropriation Repeal Act of

<sup>11</sup> E.g., *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*); *Loudner v. United States*, 108 F.3d 896, 900-01 (8th Cir. 1997); *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); *Moose v. United States*, 674 F.2d 1277, 1281 (9th Cir. 1982).

<sup>12</sup> E.g., *Whiskers v. United States*, 600 F.2d 1332, 1335-36 (10th Cir. 1979).

<sup>13</sup> e.g., *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942),

<sup>14</sup> e.g., *Moose*, 674 F.2d at 1281; 25 C.F.R. § 115.702.

<sup>15</sup> E.g., *Wolfchild v. United States*, 96 Fed. Cl. 302, 333-335 (Fed. Cl. 2010) (*Wolfchild II*).

1934, 48 Stat. 1224, ch. 756, §§ 66, 67 (codified as amended at 31 U.S.C. § 1321(2000)) ("PAR Act"), and regulations, such as 25 C.F.R. § 115.002.<sup>16</sup> The judicial analysis of whether funds are of a trust fund nature turns on interpreting congressional intent and the purpose of the funds, examining agency treatment of funds, and interpreting ambiguous legislative language.<sup>17</sup>

Agencies also play a role in characterizing funds as tribal trust funds depending on whether they treat funds as trust funds by depositing them into certain types of accounts.<sup>18</sup> Pursuant to the Appropriations Clause of the United States Constitution, only Congress can authorize money to be paid out of the United States treasury and appropriations can only be applied for the purposes for which they were appropriated.<sup>19</sup>

Where there is no legislative language expressly designating appropriated money as "tribal trust money," courts and agencies are often left to determine whether funds are tribally-owned trust funds. Leaving the characterization of funds as trust funds open to judicial or agency interpretation results in: (1) uncertainty about the ownership of the funds; (2) uncertainty about the federal responsibilities for the funds; (3) uncertainty about the procedure for accessing funds; (4) uncertainty about the tax status of the funds; (5) federal executive agencies exercising Unconstitutional power to funnel funds away from the Congressional purpose for which the funds were intended; (6) federal executive agencies having the ability to shield themselves from trustee responsibilities by treating funds as non-trust funds. This uncertainty leads to litigation.

### **Recommendation**

Either Congress should enact legislation or the BIA should promulgate binding regulations that clarify that tribal trust funds are any monies (1) appropriated to fulfill any federal obligation to a tribe – whether the obligation arises from treaty, statute, compact, settlement, judgment, or otherwise - and (2) which are not general programmatic funds given to agencies to fulfill their function. The statute should also clarify at what point the funds become tribal property – upon passage of the appropriation bill or upon transfer into the U.S. Treasury either to hold in a federal account for the tribe or to disburse to the tribe. Legislatively clarifying these two matters would decrease uncertainty for tribes and would decrease litigation over characterizing of funds.

### **ii. Clarify the monetary and non-monetary assets for which the United States has trustee obligations and compensable liability**

### **Current Law**

<sup>16</sup> *E.g., Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 650-53 (Fed. Cl. 2006).

<sup>17</sup> *See id.*

<sup>18</sup> *See, e.g., id.; Wolfchild*, 96 Fed. Cl. at 329.

<sup>19</sup> *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

Tribes must identify a treaty, statute, or regulation that imposes comprehensive management duties and supervision on the United States for tribal monies or property to trigger the United States' trustee obligations for the tribal resource.<sup>20</sup> Alternatively, where the Government exercise control over a tribal trust asset, Federal common-law trustee duties may be imposed on the Government.<sup>21</sup> Courts have different interpretations of what comprehensive management duties consist of. Where a court finds that an agency does not have comprehensive management of a tribal asset, the court considers that only a "limited" or "bare" trust is created and the United States has no compensable trustee obligations to the tribe for management of the assets in a bare trust.<sup>22</sup> Judicial interpretation of what constitutes "comprehensive management" varies – some courts finding that it entails daily supervision of the tribal resource<sup>23</sup>, while others find that regulations or guidelines for federal agency decisions about the resource establishes comprehensive management responsibility<sup>24</sup>.

Determining when trustee duties arise for non-monetary tribal resources is particularly complex because courts look to statutes and regulations related to the particular resource at issue. Not only are some statutes ambiguous, but some resources are governed by numerous statutes and regulations. For example, for one tribal mineral resource (coal), the Court reviewed "a network" of different statutes to determine whether the United States has a trustee obligation for the mineral resource.<sup>25</sup> Courts have analyzed various regulations and statutes governing the most common non-monetary tribal resources to determine whether the United States has trustee obligations for such resources, which include: water<sup>26</sup>, oil and gas<sup>27</sup>, land<sup>28</sup>, timber<sup>29</sup>, gravel and sand<sup>30</sup>, and coal<sup>31</sup>. For a more extensive list of statutes and cases regarding various tribal trust assets, see research index attached hereto as Exhibit B.

Tribes consistently and successfully rely on the American Indian Trust Fund Management Reform Act of 1994 (the "Trust Reform Act"), the PAR Act, and various federal

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<sup>20</sup> See, e.g., *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2323 (2011); *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009); *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001) (quoting *Mitchell II*, 463 U.S. at 225).

<sup>21</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

<sup>22</sup> E.g., *Navajo Nation*, 129 S.Ct. at 1552-54; *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*).

<sup>23</sup> e.g., *Mitchell II*, 463 U.S. 206

<sup>24</sup> *Navajo Nation*, 129 S.Ct. at 1552-54; *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004).

<sup>25</sup> *Navajo Nation*, 129 S.Ct. at 1554.

<sup>26</sup> See, e.g., *Nevada v. United States*, 463 U.S. 110.

<sup>27</sup> E.g., *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 646 (Fed. Cl. 2003).

<sup>28</sup> E.g., *Cobell v. Babbitt*, 91 F.Supp. 2d 1, 9 – 12 (D.D.C. 1999); *Brown v. United States*, 86 F.3d 1554.

<sup>29</sup> *Mitchell II*, 463 U.S. at 218; 25 U.S.C. § 406.

<sup>30</sup> *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004).

<sup>31</sup> *Navajo Nation*, 129 S.Ct. at 1554

regulations to establish the United States' trustee responsibility for tribal trust monies, once the tribe has overcome the obstacle of characterizing monies as tribal trust funds.

### **Recommendation**

Either Congress should enact legislation or the BIA should promulgate binding regulations that clarify that the United States is the trustee for any money appropriated to or for a tribe to fulfill a specific purpose and that is not a general appropriation.

#### **iii. Clarify the scope of the United States' trustee duties**

### **Current Law**

Courts and the Executive Agencies have recently trended towards narrowing federal trustee obligations for monetary and non-monetary Indian assets. Early Indian trust cases suggested that the United States had trustee responsibilities of the "most exacting fiduciary standards" for tribal assets.<sup>32</sup> Early cases suggest that the federal trustee liability applied even after trust funds were distributed to tribes, where the federal government did not distribute such monies to tribal officials who were acting in the best interest of the tribe.<sup>33</sup> Many courts recognize that the United States should be held to the highest standards when acting as trustee for tribal assets.<sup>34</sup>

A recent trend, however, is to narrow *the scope* of the United States' trust responsibility vis-à-vis Indian assets thereby depriving tribes of monetary remedies for mismanagement of tribal trust assets; that is, courts are requiring tribes to point to duties expressly prescribed by statute to find that the United States' trustee obligations include such duties.<sup>35</sup>

The narrowing scope of the United States' trustee duties releases the United States from many conventional trustee obligations and affords tribes fewer remedies where the United States mismanages tribal assets. United States Supreme Court Justice Sotomayor expressed her concern with this trend towards narrowing the federal trustee responsibilities in her dissent in *Jicarilla*, stating:

[E]ven more troubling that the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the [tribe's] claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively . . . rejects the role of common-law principles altogether in the Indian trust context. Its decision. . . risks

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<sup>32</sup> *Seminole*, 316 U.S. at 297.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *Mitchell II*, 463 U.S. at 226; *Loudner*, 108 F.3d 896; *Rogers*, 697 F.2d at 890.

<sup>35</sup> E.g., *Jicarilla*, 131 S.Ct. at 2323. See *Navajo Nation*, 129 S.Ct. at 1552

further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.<sup>36</sup>

This narrowing exacerbates the difficult task of identifying exactly *what duties* the United States is responsible for in its role as trustee for tribal assets.<sup>37</sup>

### **Recommendation**

Disagreement about what particular duties the Government is responsible for in its role as trustee is a main point of contention of litigation between Indian tribes and the United States. Both scholars and courts support the recommendation that the BIA or Congress should explicitly define the trust obligations of the Government for tribal trust assets.<sup>38</sup>

The Tribe recommends that Congress should enact legislation or the BIA should promulgate binding regulations re-affirming the scope of the United States' trustee obligations, clarifying that while a statute may be a starting point for defining the scope of the United States' trustee duties, the United States also has the same trustee obligations that a conventional trustee has, as set forth in the Restatement (Third) or (Second) of Trusts and in common-law cases regarding private trustees. The statute or regulation should further clarify that the exceptions to the Government's comprehensive trustee duties should be rare and courts should begin with a presumption that any conventional trustee duty falls within the scope of the Government's trustee obligations.

One formulation of such a statute or regulation could take the form of a governing document for tribal trusts. Private trusts are governed by documents which set-forth and clearly identify the trustee's responsibilities for the trust assets and what obligations he owes the trust beneficiaries. The BIA could adopt by regulation a governing document for tribal trust assets akin to a governing document for a private trust, which sets forth the Government's obligations and responsibilities for tribal trust assets.

#### **iv. Clarify how to calculate damages from mismanagement**

##### **Current Law**

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<sup>36</sup> *Jicarilla*, 131 S.Ct. at 2343.

<sup>37</sup> *See, Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1039-40 (Fed. Cir. 2012)(remanding case to lower court to determine whether specific act is included in Government's trustee duties for managing Indian oil and gas leases).

<sup>38</sup> *See, e.g., Cobell v. Norton*, 283 F.Supp. 66, 267 -72 (D.C. Cir. 2003)(listing the common-law trustee duties of the Government for tribal trust monies), *vacated in part on other grounds by* 392 F.3d 461 D.C.Cir. (2004) ; Thomas V. Panoff, *Legislative Reform of the India Trust Fund System*, 41 Harv. J. on Legis. 517 (2004).

Courts typically find that when an agency has management duties for an asset and therefore fiduciary responsibility for a tribal asset, damage claims for that asset are compensable.<sup>39</sup> However, *how to value* damages and losses caused by the Government's mismanagement of tribal trust resources is unclear and oftentimes, when Government records are sparse, based on estimates.

### **Recommendation**

Either Congress should enact legislation or the BIA should promulgate binding regulations that clarify how to calculate damages for mismanagement of tribal monies and non-monetary resources.

#### **a. Damage Calculations for Tribal Money**

The statute or regulation should identify default standards to be used when documentation is unavailable or too costly to gather for calculating monetary damages for: unauthorized distributions, underperformance of investments, under-collection of royalties, non-collection of royalties, deposits not deposited in a timely manner ("deposit lag"), and deposits released in an untimely manner ("receipt lag"). Specifically, the statute or regulation should:

- Assist in identifying the extent of harm to tribal assets by stating what percentage of tribal accounts can be presumed to have suffered from unauthorized distributions, undercollection or non-collection, deposit lag, and other types of harm to monetary assets;
- Assist in calculating unauthorized distribution, underinvestment, deposit lag, and receipt lag damages by stating which investment method, index, or portfolio will be used to measure and compare the United States' investment performance; and
- Assist in calculating uncollected royalty damages by stating how to derive the royalty rates that the United States should have collected for a certain asset.

#### **b. Damage Calculation for Non-Monetary Trust Assets**

The statute or regulation should identify default standards and assumptions to be used when documentation is unavailable or too costly to gather for calculating non-monetary resource damages for: environmental degradation or harm, unsustainable use or overuse of a resource, non-diligent development of a resource, under-collection on leases, non-collection on leases. Specifically, the regulation should clarify:

- Assist in identifying the extent of harm to tribal assets by stating what percentage of non-monetary resources can be presumed to have suffered each harm; and

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<sup>39</sup> See, e.g., *Mitchell II*, 463 U.S. at 224.

- Assist in calculating the damage incurred by each harmful act by stating what monetary value is placed on each type of harm.

v. **Establish rules for litigation over tribal trust assets**

**Recommendation**

Either Congress should enact legislation or the BIA should promulgate binding regulations that clarify that all funds paid to tribes in settlement or judgment of tribal trust litigation should be exempt from income tax. Because the United States is both a party paying a settlement and a taxing entity, imposing income tax on settlement or judgment funds effectively reduces the settlement amount that the a settling tribe agrees upon. Currently, settlement or judgment funds must be distributed pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. § 1401 *et seq.*, to have tax-exempt status. However, because settlements and judgments that are paid by the United States to a tribe are intended to compensate the tribe for damages caused by the United States, requiring the tribe to return a portion of the settlement or judgment to the United States through income tax is inequitable and does not honor the intent of the settlement or judgment to fully compensate the tribe for its injury.

vi. **Set-forth a roadmap of changes, including specific tasks, participating entities, and timelines for accomplishing goals**

Regardless of which reforms the BIA decides to undertake, it should set-forth a roadmap for implementing these changes. The roadmap should clearly identify reform goals, specific tasks required to implement such goals, the entities (tribal, federal, state, or other) that will be involved in each task, and the timeline for implementing the tasks.

## **Exhibit B**

### **Index: Statutes and Cases**

#### **Money**

Permanent Appropriation Repeal Act of 1994, 48 Stat. 1224, ch. 756, §§ 66, 67 (codified as amended at 31 U.S.C. § 1321(2000)) ("PAR Act") (statute used by courts to characterize appropriations as trust funds if the appropriation is of "a trust fund nature")

25 C.F.R. § 115.002 (regulation used by courts to characterize appropriations as trust funds if the appropriation is of "a trust fund nature")

*Cobell v. Norton*, 240 F.3d 1081 (D.D.C. 2001) (Secretary had fiduciary duty to perform accounting and breached that duty by failing to perform. The court may apply general trust law principles when statutory language is ambiguous)

*Cobell v. Norton*, 283 F.Supp.2d 66 (D.C. Dis. Ct. 2003) (Government had duty to administer IIM accounts in compliance with common law trust duties)

*Loudner v. United States*, 108 F.3d 896, 900-01 (8th Cir. 1997) (express legislative language not necessary to characterize funds held by the United States on behalf of tribes as tribal trust funds)

*Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983) (express legislative language not necessary to characterize funds held by the United States on behalf of tribes as tribal trust funds)

*Moose v. United States*, 674 F.2d 1277, 1281 (9th Cir. 1981) (express legislative language not necessary to characterize funds held by the United States on behalf of tribes as tribal trust funds)

*Whiskers v. United States*, 600 F.2d 1332, 1335-36 (10th Cir. 1979) (absent express language that funds are "tribal trust funds," then such funds are not tribal trust funds.)

*Seminole Nation v. United States*, 316 U.S. 28, 297 (1942) (When federally-held funds are not expressly characterized as trust funds by Congress, court can find such funds are trust funds by operation of law where the money is appropriated to fulfill an obligation of the United States to a tribe)

*Wolfchild v. U.S.*, 559 F.3d 1228 (Fed. Cir. 2009) (*Wolfchild I*) (Congressional Intent to create a trust is inferred)

*Wolfchild v. United States*, 96 Fed. Cl. 302, 333-335 (Fed. Cl. 2010) (*Wolfchild II*) (Courts go through a lengthy analysis, examining legislative language, context and purpose, to determine whether Congress intended appropriated monies to be trust funds)

*Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 650-53 (Fed. Cl. 2006) (Ct uses 25 C.F.R. § 115.002 to characterize appropriations as trust funds if the appropriation is of

"a trust fund nature". Analysis turns on interpreting congressional intent and the purpose of the funds, examining agency treatment of funds, and interpreting ambiguous legislative language.)

*Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (Per the Appropriations Clause, only Congress can authorize money to be paid out of the United States treasury and appropriations can only be applied for the purposes for which they were appropriated)

*United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011) (Tribe must identify a treaty, statute, or regulation that imposes comprehensive management duties and supervision on the United States for tribal monies or property to trigger the United States' trustee obligations for the tribal resource)

### **Non-Monetary Resources**

#### **Coal**

*U.S. v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo Nation I*) (Coal leasing provisions of IMLA do not create fiduciary duties under *Mitchell II*)

*United States v. Navajo Nation*, 129 S.Ct. 1547 (2009) (Tribe must identify a treaty, statute, or regulation that imposes comprehensive management duties and supervision on the United States for tribal monies or property to trigger the United States' trustee obligations for the tribal resource. Cannot rely on Govt's management of coal)

#### **Timber**

NIFRMA - 25 U.S.C. § 3120: maintains trust relationship

25 U.S.C. §§ 406-407, 466: timber management statutes found to establish comprehensive responsibilities for the U.S. in managing the harvesting of tribal timber

25 CFR Part 163 (1982) - timber management regulations found to establish comprehensive responsibilities for the U.S. in managing the harvesting of tribal timber

*U.S. v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*) (use of the terms "in trust" in section 5 of the GAA not enough to create a claim for timber resource mismanagement)

*U.S. v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*) (claim re: timber resource management was compensable because additional statutes and regulations revealed that the govt had a fiduciary duty and private trust law principles applied)

*Navajo Tribe of Indians v. U. S.*, 624 F.2d 981 (Ct. Cl. 1980) (compensable claim regarding government's mismanagement of timber. The application of private trust principles is limited by the particular relationship of the tribe and the government)

#### **Grazing**

## Agriculture

AIARMA - 25 U.S.C. § 3701: fed trust responsibility includes managing tribal lands and resources consistent w/tribal goals and priorities (§ 3702(1)). Expressly states that it does not expand or restrict fed trust responsibility re: tribal land and resources (§ 3742).

## Oil and Gas

Federal Oil and Gas Royalty Management Act of 1982: applied in *Wind River*

Indian Long-Term Leasing Act - 25 U.S.C. § 396: applied in *Pawnee*

Emergency Petroleum Allocation Act of 1973: applied in *Osage*

*Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. U.S.*, 56 Fed. Cl. 639 (Fed. Cl. 2003) (Government did not have fiduciary duty to maximize oil and gas revenue on Indian lands, but did have a fiduciary duty to collect royalties on correctly valued oil and gas)

*Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021 (Fed. Cir. 2012) (example of the difficult task of identifying exactly what duties the United States is responsible for in its role as trustee for tribal assets)

*Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986) (Secretary violated fiduciary duty to tribe regarding breach of gas leases. Court applied private trust law principles. Secretary must monitor lessees' performance, choose the method of determining royalties that results in the greatest return for the tribe, and choose the accounting method that best protects tribal interests)

*Cheyenne-Arapaho Tribes of Oklahoma v. U.S.*, 966 F.2d 583 (10th Cir. 1992) (Secretary must consider all factors relevant to whether approving a communization agreement is in a tribe's best interest)

*Navajo Tribe of Indians v. U. S.*, 364 F.2d 320 (Ct. Cl. 1966) (Court upheld damages awarded to tribe when the government engaged in self-dealing with the US Bureau of Mines)

*Youngbill*, No. 31-88 L, 1990 U.S. Cl. Ct. LEXIS 3 (Secretary must determine whether lease are in the best interest of tribes)

*Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987) (U.S. had a general fiduciary obligation toward Indians with respect to management of oil and gas leases, but not a fiduciary duty regarding the claims for "the highest price paid or offered for like quantity gas")

*The Osage Tribe of Indians of Okla. v. United States*, 93 Fed.Cl. 1 (Fed. Cl. 2010) (tribe's calculation of damages owed by the government for breach of trust by undercollecting royalties on oil and gas leases was reasonable)

## Rights of Way/Access

## Land

*U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (Claim for breach of trust regarding the government's failure to manage trust land and improvements was compensable. If statutory language is ambiguous, courts may apply general trust law principles)

*Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S.*, 21 Cl.Ct. 176 (Cl. Ct. 1990) (Government owed fiduciary duty in managing land consolidation program)

*Cherokee Nation of Oklahoma v. U.S.*, 23 Cl.Ct. 117 (Cl. Ct. 1991) (claim of the government's failure to survey and protect tribal land from 3rd party intrusion was compensable)

*Brown v. U.S.*, 86 F.3d 1554 (Fed. Cir. 1996) (25 U.S.C. § 415 imposes fiduciary duties re: surface leases but not commercial leases. But lessors can only recover for breach of specific statutory or regulatory rights)

#### Water

*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.C. Dis. Ct. 1972) (Secretary breached fiduciary duty to tribe by not preserving its water. Government cannot represent conflicting interests when it actually harms the tribe)

*Nevada v. U.S.*, 463 U.S. 110 (1983) (United States has trustee obligations for water)

#### Environmental

*Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (in violating RCRA, the govt also breached fiduciary duty to tribe)

#### Other

*Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339 (Fed. Cir. 2004) (Government mismanagement of sand and gravel resources constituted a valid claim regarding the government's failure to manage and timely collect proceeds)

*Navajo Tribe of Indians v. U. S.*, 9 Cl.Ct. 227 (Cl. Ct. 1985) (Government can represent conflicting interests if no harm to tribe)

IMDA - 25 U.S.C. § 2101: protects trust relationship for violations of terms of the Minerals agreement (25 U.S.C. § 2103(e)), but once the agreement has been approved in the best interests of the tribe, the govt isn't responsible if tribe doesn't profit.