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[Notices]

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DEPARTMENT OF THE INTERIOR

Office of the Secretary

Final Decisions Regarding Self-Determination and Self-Governance
Funding Agreement Language on Fiduciary Trust Records Management

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of final decision.

SUMMARY: This notice announces the final decision regarding Self-Determination and Self-Governance language to be negotiated into funding agreements for 2006 regarding fiduciary trust records management. The Federal Register notice published on February 2, 2005 (70 FR 5457) presented a proposed policy on fiduciary trust records management for Self-Determination (Title I) and Self-Governance (Title IV) Tribes/Consortia and language to be negotiated into 2006 Title I and Title IV funding agreements. The February 2, 2005, notice also announced three consultation meetings and an invitation to submit written comments on the proposed policy and funding agreement language.

Final Decision: After reviewing numerous comments and suggestions, both written and oral, the Department decided not to institute the proposed policy on fiduciary trust records management for Title I and Title IV Tribes/Consortia; rather, the Department will negotiate with each Tribe/Consortium a specific section in the funding agreement that addresses Tribe's/Consortium's and the Secretary's respective responsibilities regarding the management of fiduciary trust records. This specific section will include the definition of "fiduciary trust records," "Indian trust assets," and "management." The language to be negotiated into the 2006 Title I and Title IV funding agreements regarding fiduciary trust records management is the following and will replace the three options used in the past.

The Tribe/Consortium and Secretary agree to the following:

The Tribe/Consortium agrees to:

(a) Preserve, protect and manage all fiduciary trust records, created and/or maintained by the Tribes/Consortia during their management of trust programs in their Title IV agreements. (A fiduciary trust record is any document that reflects the existence of an Indian trust asset and was used in the management of an Indian trust asset. An Indian trust asset refers to lands, natural resources, monies or other assets held in trust at a particular time by the Federal Government for a Tribe, Alaska natives

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or that are or were at a particular time restricted against alienation, for individual Indians. Management includes actions that influence,

affect, govern, or control an Indian trust asset. The following are examples not considered to be fiduciary trust records: General administrative, personnel or travel records; education records; law enforcement records; health records; law making unrelated to Indian trust assets; tribal council resolutions and laws unrelated to Indian trust assets; and tribal elections.)

(b) Make available to the Secretary all fiduciary trust records maintained by the Tribe/Consortium, provided that the Secretary gives reasonable oral or written advance request to the Tribe/Consortium. Access shall include visual inspection and, at the expense of the Secretary, the production of copies (as agreed upon between the parties), and shall not include the removal of the records without tribal approval; and

(c) Store and permanently retain all inactive fiduciary trust records at the Tribe/Consortium or allow such records to be removed and stored at the American Indian Records Repository (AIRR) in Lenexa, Kansas, at no cost to the Tribe/Consortium.

The Secretary agrees to:

(a) Allow the Tribe/Consortium to determine what records it creates to implement the trust programs assumed under its Title IV agreement, except that the Tribe/Consortium must create and maintain the information required by statute and regulation. No additional record keeping requirements are required by this agreement.

(b) Store all inactive fiduciary trust records at the American Indian Records Repository (AIRR) at no cost to the Tribe/Consortium when the Tribe/Consortium no longer wishes to keep the records. Further, the Tribe/Consortium will retain legal custody and determine access to these records. Such records shall not be treated as Federal records for purposes of chapter 5 of Title 5 of the United States Code unless expressly agreed to by the Tribe;

(c) Create and manage a single tribal storage and retrieval system for all fiduciary trust records stored at AIRR (No records will be accepted at AIRR until such a retrieval system exists); and

(d) Provide filing equipment and technical assistance for Tribes/Consortia in preserving, protecting and managing their fiduciary trust records from available funds appropriated for this purpose.

Summary of Comments: The final decision above is the result of a nearly 2-year consultation process by the Department with some Title I and IV Tribes/Consortia. This process included: Conducting pre-scoping telephone conversations with tribal leaders, staff and consultants; holding a scoping meeting as part of a 2-day conference on Indian trust records management at Haskell Indian Nations University; forming a Tribal Fiduciary Trust Records Management Workgroup; conducting four workgroup meetings; transmitting a tribal leader letter soliciting comments on the proposed policy language to be presented for consultation; and engaging in discussions with Tribal leaders and staff at the Fall 2004, Self-Governance Conference. This process culminated with three consultation meetings held in Nashville, Tennessee; Portland, Oregon; and Phoenix, Arizona that were attended by approximately 60 tribal leaders, staff and consultants. In addition, written comments were received from 14 tribes, tribal organizations or tribal consultants some of whom attended the consultation meetings.

The comments received can be grouped into the following four major categories:

Category 1: New funding agreement language is not needed because existing compact and funding agreement language sufficiently provides for the maintenance of records of trust programs managed by the Tribes/Consortia, and Tribes/Consortia should not be required to implement a Federal policy on fiduciary trust records management through their funding agreements. The Department respectfully disagrees. The

Department believed that the three options available to Tribes/Consortia in the past are too vague and do not specifically address the Secretary's primary concerns that fiduciary trust records not be destroyed and that the Secretary have the right to access those records if needed in her capacity as trustee delegate. The Department does agree with the comments that a Federal policy does not need to be instituted through the Departmental Manual. Instead the Department has chosen to negotiate language with each Tribe/Consortium into its funding agreement to address fiduciary trust records management.

Category 2: The definition of ``fiduciary trust records'' is too broad and vague and the Department should produce a specific list of what fiduciary trust records should be maintained and preserved by the Tribe/Consortium. The definition is purposely broad in recognition of tribal sovereignty. It allows Tribes/Consortia the flexibility to create those records they believe are necessary to properly manage their trust assets through their Title I or Title IV funding agreements. For the Department to create a list of fiduciary trust records would have been both overly restrictive for some Tribes/Consortia and overly expansive for others. A Department-generated list to be used by all Tribes/Consortia would have been restrictive in that it could deter tribes from creating certain records they feel were appropriate and at the same time it could be expansive by ``requiring'' Tribes/Consortia to create fiduciary trust records they did not believe were necessary for effective management of their trust assets. The Department's concern is that whatever trust records are created be properly protected and available to the Secretary.

Category 3: The funding agreement language creates an unfunded mandate because no funding is being provided, and the language requires Tribes/Consortia to maintain record facilities and administer and monitor a records policy. The Department believes that the language proposed for negotiation does not require Tribes/Consortia to create and keep any additional records beyond those they now keep; namely, those that are required by statute or regulation or those records the Tribe/Consortium chooses to create in the management of its own trust resources. The language does not require a tribe to have any other kind of record keeping system other than the ones they currently operate. Before becoming a Title I or Title IV Tribe/Consortium, a Tribe/Consortium had to demonstrate that it had a functional record keeping system and this language does not expand that requirement. Further, while the language does indicate that Tribes/Consortia are to preserve, protect and manage all fiduciary trust records and that all fiduciary trust records are to be kept permanently, once the Tribe/Consortium chooses that it no longer wants to house their inactive fiduciary trust records at their facility, the Secretary has offered to store those records, at the Secretary's expense, at the American Indian Records Repository. Finally, the Secretary is willing to provide to the Tribes/Consortia equipment, training and technical assistance, subject to availability of appropriated funds for that purpose.

Category 4: A potential problem exists for Tribes/Consortia in storing records at AIRR in that outside interests might gain access to Tribal/Consortium trust records through the Freedom of Information Act because the Tribal/Consortium trust records are held on the Tribe's/Consortium's behalf by the Department in a Federal facility. To

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accommodate this concern, language was inserted stating that the Tribe/Consortium retains legal custody and determines access to those records. Further, language was inserted stating that such records shall not be treated as Federal records for purposes of chapter 5 of Title 5

of the United States Code, unless expressly agreed to by the Tribe.

Dated: August 19, 2005.

Abraham E. Haspel,

Assistant Deputy Secretary--Office of the Secretary.

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