



# United States Department of the Interior

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## Memorandum

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To: Assistant Secretary - Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

BUREAU OF INDIAN AFFAIRS  
TRUST FUNDS MANAGEMENT

Subject: Contractability of Investment of Tribal Trust  
Funds under Title I of Pub. L. 93-638, the Indian Self-Determination Act

This is in response to your request for an opinion concerning the authority of the Bureau of Indian Affairs (BIA) to contract, upon the request of an Indian tribe, the investment of tribal trust funds to tribal organizations under the provisions of Title I of Pub. L. 93-638, the Indian Self-Determination Act, 25 U.S.C. § 450f.<sup>1</sup> For the following reasons, it is our opinion that although certain statutory obligations of the Secretary relating to the deposit and investment of tribal trust funds are non-delegable trust duties which may not be contracted under Pub. L. 93-638, other portions of the tribal trust funds investment program are contractable under the Act.

Our first inquiry is whether the investment of tribal trust funds is a contractable program under the Indian Self-Determination Act. Section 102 of the Indian Self-Determination Act, 25 U.S.C. § 450f, directs the Secretary of the Interior to enter into contracts with tribal organizations to, inter alia, plan, conduct, and administer programs or portions thereof which he is authorized to administer for the benefit of Indians under the Snyder Act, 25 U.S.C. § 13, and any Act subsequent thereto. There is no question that the Secretary is authorized to administer this program (investment of tribal trust funds) for the benefit of Indians under the Act of June 24, 1938, 52 Stat.

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This opinion only addresses the legality of Pub. L. 93-638 contracts between the BIA and tribal organizations relating to the investment of tribal trust funds. Nothing herein addresses the contractability under Pub. L. 93-638 of other Indian trust funds, such as trust funds of Individual Indians, under the control of the BIA.

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1037, 25 U.S.C. § 162a. Therefore, the activity contemplated here is encompassed within the scope of contractable programs under 25 U.S.C. § 450f.

Next, we turn to the issue of whether the proviso in 25 U.S.C. § 450j(f) which states that "the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals," prohibits the BIA from contracting the investment of tribal trust funds under Pub. L. 93-638.

The Act of June 24, 1938, 25 U.S.C. § 162a, creates a statutory trust governing the investment of Indian trust funds. With respect to the investment of tribal trust funds, it provides as follows:

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates that can be procured from the banks .... Provided further, That the Secretary of the Interior, if he deems it advisable and in the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States...

The statute clearly vests the Secretary with the discretionary authority to deposit tribal trust funds in selected banks, or to invest such trust funds in authorized obligations. Once the Secretary exercises this discretionary authority, nothing in 25 U.S.C. § 162a authorizes him to relieve himself of his statutory obligation to determine where and under what conditions tribal trust funds will be deposited, or how they will be invested. Therefore, in the absence of any other statutory authority to the contrary, these obligations are non-delegable statutory trust duties.

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2 Congress' imposition of this statutory trust duty on the Secretary is consistent with the common law trust duty owed by a private trustee to the trust beneficiaries not to delegate to others the administration of the trust or the performance of acts in the administration of the trust that he ought personally to perform. See, generally, Restatement 2d Trusts, §§ 171, 227. In pertinent part, § 227, Comment 2, states that "[i]n making

There is nothing in the Indian Self-Determination Act, as amended, or in its legislative history, which expressly or by necessary implication relieves the Secretary of his discretionary statutory duty under 25 U.S.C. § 162a. The Indian Self-Determination Act specifically provides that "[n]othing in this Act shall be construed as authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. § 450n(2). The Senate Report accompanying the 1988 Amendments to the Indian Self-Determination Act, Pub. L. 100-472, 102 Stat. 2285, contains the following statement concerning the scope of contractable trust programs:

The Committee intends for section 102(a)(2) as amended to authorize tribes to enter into contracts with the Secretary to carry out trust related functions. Clearly, the Secretary of the Interior continues to maintain a trust responsibility for tribal resources when the tribe operates a program under a self-determination contract. Section 102(a)(2) allows tribes to contract for trust functions including .... trust fund investment and accounting services .... The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources. S. REP. NO. 100-274, 100th Cong., 2nd Sess. 25 (1988), reprinted in 1988 U.S. CODE CONG. & AD. NEWS 2644.

It is clear from this statement that although Congress contemplates the technical functions relating to trust funds investment services to be contractable under Pub. L. 93-638, it did not intend to alter the Secretary's trust responsibility under 25 U.S.C. § 162a to make the ultimate decision with respect to investment selection. Therefore, whereas statutory trust obligations vested in the Secretary by Congress remain non-delegable functions which cannot be contracted to a tribal organization under Pub. L. 93-638, it is permissible for the Secretary to contract other aspects of the tribal trust funds investment program. The contractability of technical functions relating to the investment of tribal trust funds is consistent with the common law trust principle that although a trustee cannot delegate his discretionary powers to a third party, he may, in the course of his administration of the trust, where he

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investments, as in other matters relating to the administration of the trust, the trustee is under a duty not to delegate to others the doings of acts which the trustee can reasonably be required personally to perform. He cannot properly delegate to another the power to select investments."

retains full responsibility, employ labor or obtain services, including professional and skilled assistance, where necessary, at least in matters in which he is not experienced. See Restatement, Trusts 2d § 168, Comment C, and § 171, Comment F ("[a]lthough a trustee cannot properly delegate to another, he can properly consult with and take advice from others provided he personally makes the final decision in the matter").

In your request, you state that "the Secretary would lose the benefits associated with cash concentration and economies of scale if he were to enter into self-determination contracts with tribes as the total available in one pool for investment of trust funds would decline." Although that may be true, there is no statutory requirement that Indian trust funds be invested on a pooled basis. In fact, as we advised you by memoranda dated January 24, 1978, and February 10, 1986, we believe that although the practice of pooling tribal trust funds is legally defensible, the state of the law on this question with respect to private trustees is not crystal clear. Therefore, in the absence of any statutory requirement mandating the pooling of tribal trust funds for investment purposes, the Secretary must follow the Congressional directive in Section 102 of the Indian Self-Determination Act, and, upon the request of an Indian tribe, contract to a tribal organization that portion of the tribal trust funds investment program that is contractable, provided there are no declination issues,<sup>3</sup> and subject to the availability of appropriations.

  
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<sup>3</sup> The BIA should advise an Indian tribe seeking to enter into a Pub. L. 93-638 contract for technical functions relating to the investment of its tribal trust funds that it will lose the benefits associated with cash concentration and economy of scales such funds enjoy when invested by the BIA on a pooled basis. It is a common law trust principle that the trustee is not liable for breach of trust for any act taken with the consent of the beneficiary, if the beneficiary is made aware of all material facts relevant to the act taken. See Restatement, Trusts 2d § 216.

<sup>4</sup> Under Section 102(a)(2)(B) of the Indian Self-Determination Act, the Secretary is authorized to decline to enter into a contract if a specific finding is made that "adequate protection of trust resources is not assured." 25 U.S.C. § 450(a)(2)(B). It is essential that any contract proposal for tribal trust funds investment advisory services be carefully evaluated to assure that trust resources are fully protected in light of the continuing trust responsibility of the Secretary under the Indian Self-Determination Act.