COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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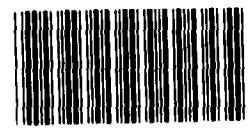
JULY 28, 1980



The Honorable Morris K. Udall
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

Dear Mr. Chairman:

Subject: Need To Clarify IHS Responsibilities for Maintaining Indian Water and Sanitation Facilities (HRD-80-14)

In a June 19, 1980, briefing, we advised your office that our survey of the Indian Health Service (IHS) water and sanitation facilities construction program had shown IHS to be in a dilemma. As requested by your office, in order for your Committee to consider our observations during deliberation of proposed amendments to the Indian Health Care Improvement Act (Public Law 94-437), this letter summarizes the information provided during the briefing.

THE DILEMMA

Since 1959, when the Indian Sanitation Facilities Act (42 U.S.C. 2004a) was enacted, IHS has spent about $490 million to construct or improve Indian water and sanitation facilities. New and improved sanitation facilities have been constructed primarily to support Indian housing programs administered by other Federal agencies. The act authorized IHS to transfer operating and maintenance responsibility of these facilities to Indian tribes or communities.

As part of our survey, we visited seven Indian reservations and nine Alaska Native communities and observed water and sanitation systems or system components that were not operating effectively because of inadequate maintenance. The tribes or communities had agreed to assume operating and maintenance responsibilities before construction of the facilities and had accepted ownership responsibilities after construction; however, many of them were not willing or financially able to fulfill their agreements. Inadequate operation

and maintenance of water and sanitation facilities not only presents a potential health hazard, but also shortens the lifespan of the facilities and increases repair costs, which probably will ultimately have to be borne by IHS.

Until 1976, IHS assisted the Indians in operating and maintaining water and sanitation systems that it had transferred to them. However, in April 1976, the Department of Health and Human Service's (HHS') 1/ Assistant General Counsel for Public Health issued an opinion which concluded that IHS lacked legislative authority to maintain water and sanitation systems tranferred to tribes and communities. 2/

This opinion, coupled with the need to use appropriated funds to support new Indian housing programs, has resulted in IHS reducing its assistance to tribes and communities in maintaining water and sanitation systems. IHS' maintenance efforts are limited to emergency repairs and repair or replacement of components of existing systems in conjunction with construction of new or expanded systems that tie into these existing systems.

These circumstances pose a dilemma. On the one hand, IHS is responsible for ensuring that adequate health care is provided to Indians and has invested heavily in the construction and improvement of Indian water and sanitation facilities. (It is generally believed that these improvements have helped significantly to reduce the demands on the IHS health care system.) On the other hand, IHS has been told by its General Counsel that it has no authority to maintain the water and sanitation facilities after the Indians accept ownership responsibilities. The potential ramifications of this position are that (1) IHS' significant capital investment could be lost because of a lack of maintenance and (2) the overall health of the Indians could deteriorate, thereby placing a greater burden on the IHS health care system. As existing systems age and the number of systems increases, the dilemma increases.

1/On May 4, 1980, a separate Department of Education commenced operating. Before that date, activities discussed in this letter were the responsibility of the Department of Health, Education, and Welfare.

2/The full text of the legal opinion is included as enclosure II.

We understand the basis for HHS' Assistant General Counsel's opinion and believe that it may be a reasonable interpretation of the congressional intent. However, in our view, an equally convincing case can be made that the Congress intended IHS to maintain the sanitation facilities if, in the Secretary's judgment, such maintenance was necessary to keep the facilities in effective operating condition. Since, based on existing legislation, reasonable arguments can be made on both sides of the issue, we believe that IHS authorities and responsibilities for maintaining transferred sanitation facilities should be clarified.

RECOMMENDATION

We recommend that IHS authorities and responsibilities for maintaining transferred sanitation facilities under the Indian Sanitation Facilities Act (42 U.S.C. 2004a) be specifically addressed.

The Committee should be aware that, if it is determined that IHS should help maintain water and sanitation systems after they are transferred to the tribes or communities, significant funding will be required. In addition, the tribes and communities currently fulfilling their operation and maintenance agreements may want IHS to begin funding their operating and maintenance costs, in which case the cost to the Federal Government would be even greater.

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These matters are detailed in enclosure I. As requested by your office, we did not obtain written HHS comments on this report. We did, however, discuss the contents with IHS officials.

As agreed with your office, we are sending copies of this report to the Director, Office of Management and Budget; the Secretary of HHS; and others who may request it.

Sincerely yours,

Comptroller General
of the United States

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ABBREVIATIONS

HHS	Department of Health and Human Services
IHS	Indian Health Service

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NEED TO CLARIFY IHS RESPONSIBILITIES FOR MAINTAINING INDIAN WATER AND SANITATION FACILITIES

BACKGROUND

Since passage of the Indian Sanitation Facilities Act (42 U.S.C. 2004a) in 1959, the Indian Health Service (IHS) has administered its water and sanitation facility construction program as part of its environmental health services. Under the program, domestic water supply and distribution systems, waste disposal facilities, and other essential sanitation facilities are constructed or provided for Indian communities, homes, and lands. Since initiating the program, IHS has expended about $490 million. Program funds have been appropriated to construct or expand sanitation systems to support existing Indian housing programs administered by other Federal agencies. No funds are specifically appropriated for operating and maintaining sanitation systems.

The sanitation facilities installed at the Indian reservations in the lower 48 States are, according to IHS officials, generally very basic and should operate trouble free with normal maintenance. For example, IHS efforts for a single home are generally limited to drilling a well and installing a septic tank. In community housing projects, however, IHS usually establishes more complex water and sanitation systems. The most complex system components, according to IHS personnel, are the water pumps and sewage lift stations. Other components include sewage lagoons, water storage tanks, pumphouses, and pipes for the flow of water to, and the flow of sewage away from, the project boundary.

Sanitation facilities in Alaska Native communities are more complex and maintenance requirements are more extensive. Because of the State's severe climatic conditions and unique geographic features, each system is somewhat different, and many are complex arctic sanitation facilities.

Facilities installed by IHS in Alaska range from central community watering points and washhouses, which include a faucet for filling water buckets, a dumping bin for human waste, clothes washers and dryers, showers, and restrooms, to piped distribution and collection systems, including sewage treatment plants. In arctic regions, heated circulating water systems are required to prevent service lines from freezing.

Regardless of the sophistication of their mechanical and other physical components, the systems need to be effectively operated and maintained. Inadequate operation and maintenance not only presents a potential health hazard, but also shortens the lifespan of facilities and equipment and increases maintenance and repair costs.

Before constructing or installing a water sanitation project for a tribe or Alaska Native community, IHS meets with tribal or community officials, explains the project, estimates the required maintenance and related costs, and negotiates a memorandum of agreement. When the project is completed, IHS enters into a transfer agreement under which the tribe, community, or appropriate authority accepts the facilities and agrees to operate, maintain, and repair them in order to keep them in effective operating condition.

We visited nine Alaska Native communities 1/ and selected projects on seven Indian reservations in three of the eight IHS area offices. 2/ We noted systems or system components that were inoperable or not operating effectively. IHS officials stated that, although each tribe or community has established organizations responsible for operating and maintaining the systems, for the most part the tribes and communities we visited were not willing or financially able to provide all of the maintenance required. Tribal and community officials generally said they lacked the financial resources to provide the required maintenance.

The Department of the Interior's Bureau of Indian Affairs, the Economic Development Administration, the Environmental Protection Agency, and the Department of Agriculture's Farmers Home Administration have also provided Federal funds to construct water and sanitation projects that serve Indians and Alaska Natives. We did not make detailed inquiries about the operation and maintenance activities of these agencies, but we did note that the Bureau of Indian Affairs' systems, which were originally to serve its schools and non-Indian homes on reservations, in some cases serve existing Indian homes. Also, the Bureau provides all operation and maintenance services for the systems it funds.

1/Angoon, Grayling, Hoonah, Kalskag, Kalzebue, Kwethluk, Nome, Noorvik, and Unalakeet.

2/Rosebud and Pine Ridge in the Aberdeen area; Blackfeet, Flathead, Northern Cheyenne, and Crow in the Billings area; and Navajo in the Navajo area.

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EXAMPLES OF CONDITIONS NOTED DURING VISITS TO RESERVATIONS AND COMMUNITIES

During our visits to the Indian reservations and Alaska Native communities, we observed sanitation systems or system components that were not operating effectively because of inadequate maintenance by the tribes or communities. Examples of conditions observed follow:

--A 1973 project that cost about $407,000 was not operable because, according to village officials, the village lacked funds to properly maintain the system and it was unable to obtain funds from other Government agencies. At the time of our visit, most of the equipment had been removed from the pumphouse, and the village was planning to convert the building into a store.

--Another 1973 project that cost about $203,000 to construct was also inoperable. The pumphouse was damaged, later vandalized, and not repaired. Also, track haul vehicles to dispose of waste were not operational.

--A sewage lift station IHS constructed in 1968 was inoperable due to a clogged filtration system. This resulted in untreated sewage being discharged into a stream for 18 months.

--A community septic tank that IHS transferred in 1973 was crushed but repaired improperly. As a result, untreated sewage was surfacing through manhole covers.

We also noted instances in which tribes or communities may not be able to provide adequate operation and maintenance for their sanitation systems because of financial limitations. For example, a community water and sanitation system was constructed through a series of projects, the most recent of which was completed in April 1978, and included a mechanical sewage treatment plant. IHS estimated that the average user fee for sanitary services would be $12 per month. However, we estimated that the actual fee, based on operating costs being incurred, exclusive of necessary capital replacement, would be about $45 per month. The village council expressed the opinion that the facilities would be too expensive for the village to operate and maintain.

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IHS POLICY ON PARTICIPATION IN ROUTINE MAINTENANCE ACTIVITIES

Until 1976, IHS assisted the Indians in operating and maintaining water and sanitation systems that it had transferred to them. However, in April 1976, the Department of Health and Human Service's (HHS') Assistant General Counsel for Public Health issued an opinion which concluded that IHS lacked legislative authority to maintain water and sanitation systems transferred to tribes and communities.

Public Law 86-121, enacted in 1959, authorizes the Secretary of HHS to carry out programs relating to Indian sanitation facilities. In particular, it authorizes the Secretary

> "(1) to construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities, including domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities, together with necessary appurtenances and fixtures, for Indian homes, communities, and lands;
>
> "(2) to acquire lands, or rights or interests therein, including sites, rights-of-way, and easements, and to acquire rights to the use of water, by purchase, lease, gift, exchange, or otherwise, when necessary for the purposes of this section except that no lands or rights or interests therein may be acquired from an Indian tribe, band, group, community, or individual other than by gift or for nominal consideration, if the facility for which such lands or rights or interests therein are acquired is for the exclusive benefit of such tribe, band, group, community, or individual, respectively;
>
> "(3) to make such arrangements and agreements with appropriate public authorities and nonprofit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in

his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition; and

"(4) to transfer any facilities provided under this section, together with appurtenant interests in land, with or without a money consideration, and under such terms and conditions as in his judgment are appropriate, having regard to the contributions made and the maintenance responsibilities undertaken, and the special health needs of the Indians concerned, to any State or Territory or Subdivision or public authority thereof, or to any Indian tribe, group, band, or community or, in the case of domestic appurtenances and fixtures, to any one or more of the occupants of the Indian home served thereby." 42 U.S.C. 2004(a)

By April 9, 1976, memorandum (see enc. II), the Assistant General Counsel for Public Health, HHS Office of General Counsel, interpreted the above law as limiting maintenance responsibilities to the period before facilities are transferred. He contends that subsections (3) and (4), which advise the Secretary to assure the future maintenance of facilities and, when transferring the facilities, to have regard for the maintenance responsibilities undertaken, evidence a congressional intent to limit these responsibilities to the period before transfer. He quotes the following language in committee reports as support for his interpretation:

"[The bill] would permit the making of arrangements for participation in the projects by Indian groups, and by other public or nonprofit agencies and organizations, both in the construction costs and in maintenance and operating responsibilities after completion. It would authorize acquisition of the necessary interests in lands (including acquisition through transfer from the Department of the Interior), the acceptance of contributions, and the ultimate transfer of the completed facilities upon appropriate terms and conditions to local or State authorities or to the Indians themselves. 1/"

1/Senate Report No. 1876, 85 Cong., 2nd Sess. p. 2-3; House Report No. 2637, 85 Cong., 2nd Sess. p. 2.

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As a result of this General Counsel opinion, coupled with the need to use appropriated funds to support new Indian housing programs, IHS has reduced its assistance to tribes and communities to maintain water and sanitation systems. IHS' maintenance efforts are limited to emergency repairs and repair or replacement of system components in conjunction with construction of new or expanded systems that tie into exisiting systems.

Based on the conditions we observed during our visits to various reservations and communities, IHS' efforts have been insufficient to assure the effective operation of Indian water and sanitation systems. We found, and IHS concurs, that many tribes or communities are not willing or financially able to maintain these systems in accordance with their original agreements.

These circumstances pose a dilemma. On the one hand, IHS is responsible for ensuring that adequate health care is provided to Indians and has invested heavily in the construction and improvement of Indian water and sanitation facilities. (It is generally believed that these improvements have helped significantly to reduce the demands on the IHS health care system.) On the other hand, IHS has been told by its General Counsel that it has no authority to maintain the water and sanitation facilities after the Indians accept ownership responsibilities. The potential ramifications of this position are that (1) IHS' significant capital investment could be lost because of a lack of maintenance and (2) the overall health of the Indians could deteriorate, thereby placing a greater burden on the IHS health care system.

Furthermore, as (1) existing systems age and require more maintenance, (2) inflation increases overall operating and maintenance costs, and (3) new and expanded systems place additional financial burdens for operation and maintenance on tribes and communities, additional maintenance costs will be required to keep constructed facilities operating effectively.

We understand the basis for HHS' Assistant General Counsel's opinion and believe that it may be a reasonable interpretation of the congressional intent. However, in our view, an equally convincing case can be made that the Congress intended IHS to maintain the sanitation facilities if, in the Secretary's judgment, such maintenance was necessary to keep the facilities in effective operating condition.

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Subsection (1) of the act authorizes the Secretary "to construct, improve, extend or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities, * * * for Indian homes, communities, and lands." (Underscoring added.) Therefore, it can be argued that this subsection authorizes the Secretary to take actions to assure essential sanitation facilities are available for Indian homes, communities, and lands and that the authority includes their continual availability through maintenance. In this subsection, the Congress stated that the Secretary could provide or maintain the facilities by contract or otherwise. Therefore, it could be argued that this language authorized the Secretary to use Federal funds, if necessary, in providing and maintaining such facilities.

Furthermore, subsection (3) of the act also supports this argument. Nothing in this subsection precludes the Secretary from maintaining sanitation facilities. This subsection requires the Secretary to use judgment in making arrangements or entering into agreements for maintenance that are equitable and will best assure future maintenance of the facilities in an effective operating condition.

CONCLUSIONS

Many Indian tribes and Alaska Native communities are not adequately maintaining IHS-constructed water and sanitation systems. Until 1976, IHS assisted these tribes in fulfilling these responsibilities, but because of the HHS General Counsel's opinion and the need to use appropriated funds to support new or improved Indian housing programs, IHS has decreased its assistance and an increasing number of systems are not operating effectively. The Committee needs to clarify the extent to which IHS is responsible for assuring that water and sanitation systems it constructs are adequately operated and maintained, including providing or financing such operation and maintenance services itself, when warranted, so as to protect the Federal investment in such systems and ensure the environmental health of the Indians and Alaska Natives.

Since, based on existing legislation, reasonable arguments can be made on both sides of the issue, we believe that IHS authorities and responsibilities for maintaining transferred sanitation facilities should be clarified.

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RECOMMENDATION

We recommend that IHS authorities and responsibilities for maintaining transferred sanitation facilities under the Indian Sanitation Facilities Act (42 U.S.C. 2004a) be specifically addressed.

The Committee should be aware that, if it is determined that IHS should help maintain water and sanitation systems after they are transferred to the tribes or communities, significant funding will be required. In addition, the tribes and communities currently fulfilling their operation and maintenance agreements may want IHS to begin funding their operating and maintenance costs, in which case the cost to the Federal Government would be even greater.

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MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

OFFICE OF THE GENERAL COUNSEL

TO : Mr. John C. Tilson
Deputy Director, OEH, IHS

DATE: APR 9 1976

FROM : Sidney Edelman
Assistant General Counsel
for Public Health

SUBJECT: Standing Rock Sioux Reservation--Tribal Relinquishment of Sanitation Facilities Ownership

This is in response to your memoranda of January 15 and 21 on the above subject. As we understand the situation, resolution no. 235-76 of the Standing Rock Sioux Tribal Council dated January 9, 1976 declared an emergency with respect to the maintenance of a water and sewer system on the Standing Rock Sioux Reservation, and asked the Public Health Service to assume responsibility for restoring the units to working order. The resolution also granted the Chairman of the Standing Rock Sioux Tribal Council the authority to declare an emergency when the occasion necessitates and the Council is not in session. The IHS did send a team to the community which had the problem identified in the resolution as an emergency and upon arrival found the Indian residents had already corrected the problem. However, further problems with the functioning of community water and sewer systems may be anticipated in absence of continuing maintenance of the systems by the Tribal Utilities Commission, which we understand has recently been dissolved by the Tribe. Under resolution no. 235-76, the IHS may be asked to do repair work on such systems should problems develop and to assume responsibility for the operation of the systems.

In your memorandum of January 21, 1976 you indicate that pursuant to previously executed agreements, the IHS has constructed a number of community water and sewer systems on the Standing Rock Sioux Reservation which were transferred to the Tribe and have been operated and maintained by the Tribe. The project and transfer agreements have provided for IHS construction and transfer of the facilities and

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Tribal agreement to accept transfer of the facilities and to operate, maintain and repair the facilities as Tribal property. 1/ You indicate that the IHS is willing to do what it can to assist the Tribe in correcting problems with such facilities. However, you question the responsibility of the IHS to maintain and operate such facilities. Our opinion is requested on four underlying issues.

(1) Is the authority set forth in P.L. 86-121 mandatory or discretionary?

(2) Does the IHS have a trust responsibility to operate and maintain sanitation facilities for Indians?

(3) Does the IHS have authority to accept the ownership of sanitation facilities which it previously constructed in cooperation with Tribes and transferred to them?

(4) In the event that a Tribe refuses to live up to a project agreement to accept facilities ownership and operation and maintenance responsibilities, is the IHS then legally responsible to operate and maintain such facilities?

For the reasons discussed below, it is our opinion that the Indian Health Service is under no legal obligation, and is not authorized, to assume responsibility for the operation of the facilities transferred to the tribe.

1. Authority to "maintain and operate".

The sanitation facilities at issue were provided under the authority of section 7 of P.L. 83-568 as amended by P.L. 86-121 (42 U.S.C. 2004a).

1/ We understand that all the agreements contain a standard provision to the following effect:

> "That the Authority hereby agrees to accept the transfer of the community facilities and to properly operate, maintain, and repair these facilities as the property of the Authority so as to keep these in an effective and operating condition."

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At the outset, it is clear that section 7(a)(1) does not require or authorize the Secretary to "operate" sanitation facilities for Indians. The Secretary 2/ is authorized to "construct, improve, extend, or otherwise provide and maintain, by contract or otherwise, essential sanitation facilities . . . . for Indian houses, communities and lands." (emphasis added). Section 7(a)(2) authorizes the Secretary to acquire lands and rights and interests in lands and to acquire rights to use water where necessary for purposes of that section 3/.

Section 7(a)(3) confers authority:

> To make such arrangements and agreements . . . with the Indians to be served by such sanitation facilities . . . regarding contributions toward the construction, improvement, extension and provision thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition (emphasis added).

Finally, section 7(a)(4) authorizes the Secretary

> To transfer any facilities provided under this section, together with appurtenant interests in land, with or without a money consideration, and under such terms and conditions as in his judgment are appropriate, having regard to the contributions made and the maintenance responsibilities undertaken,

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2/ Section 1 of Reorganization Plan No. 3 of 1966 transferred all functions of the Surgeon General to the Secretary, HEW.

3/ Section 7(b) authorizes the Secretary of the Interior to transfer to the Secretary, HEW certain interests in lands for section 7 purposes. Furthermore, interests in lands so transferred by the Secretary of the Interior shall be subject to disposition by the Secretary, HEW in accordance with section 7(a)(4), which authorizes transfer of sanitation facilities and appurtenant interests in land to the Indians served or State or local authorities.

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> and the special health needs of the Indians concerned, to any State or Territory or subdivision or public authority thereof, or to any Indian Tribe, group, band or community . . . . (emphasis added).

While in section 7(a)(1) the Secretary is authorized to "maintain" facilities in conjunction with their provision, the reference in section 7(a)(3) to contributions which will best assure future maintenance "in an effective and operating condition" (emphasis added) and the authority in section 7(a)(4) to "transfer . . . facilities [and] . . . appurtenant interests in lands . . . having regard to the contributions made and the maintenance responsibilities undertaken," (emphasis added) to the Indians served, in our view indicates a Congressional intent to limit maintenance responsibilities to the period prior to transfer of the facilities. The legislative history to P.L. 86-121 supports this interpretation. Both committee reports state in identical language that enactment of the bill

> would permit the making of arrangements for participation in the projects by Indian groups, and by other public or nonprofit agencies and organizations, both in the construction costs and in maintenance and operating responsibilities after completion. It would authorize acquisition of the necessary interests in lands (including acquisition through transfer from the Department of the Interior), the acceptance of contributions, and the ultimate transfer of the completed facilities upon appropriate terms and conditions to local or State authorities or to the Indians themselves. (emphasis added) 4/

We find no provision in P.L. 86-121 imposing a continuing obligation to operate facilities once ownership has

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4/ Senate Report No. 1876, 85 Cong., 2nd Sess. p. 2-3; House Report No. 2637, 85 Cong., 2nd Sess. p. 2.

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been transferred pursuant to section 7(a)(4) 5/. Furthermore, to interpret the authorization to "maintain" in section 7(a)(1) so as to impose such an obligation under the agreement would be contrary to the terms of 31 U.S.C. 665(a), which provides:

> No officer or employee of the United States shall make or authorize the expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

A continuing responsibility to operate after transfer of ownership is clearly distinguishable from entertaining distinct projects to repair and/or improve transferred facilities, as necessary for maintenance in an "operating condition", such projects being discretionary and subject to priorities and availability of funds. The latter we view as coming within the authorization to improve facilities in section 7(a)(1) and as not contrary to the provisions of 31 U.S.C. 665(a), as no legally binding continuing obligation of an indefinite scope is incurred.

There would, however, be no point to section 7(a)(4) if, despite the transfer of the facilities and the assumption of responsibility for maintenance and operation by the transferee pursuant to agreement under which the facilities were provided, the IHS would still somehow retain responsibility for such maintenance and operation.

5/ In an earlier opinion on the scope of the authorizations in P.L. 86-121, we noted that:

> "Thus, an agreement regarding contributions, etc. to the provision of a facility and responsibilities for its future maintenance may include the terms and conditions upon which both Federal assistance is to be furnished and the facilities, if any, provided under the agreement are to be transferred.

Memorandum dated October 22, 1959 to Mr. Albert Stevenson on "Indian Sanitation Facilities--Scope of Authority--Provision of facilities--Participation in projects--Cooperative arrangements--Transfer of facilities" at pp. 10-11.

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2. The scope of IHS responsbility.

We do not view P.L. 86-121 as imposing a trust responsibility, in the sense of a legal entitlement to facilities or their maintenance in any individual Indian, tribe, group, band or community. Public Law 86-121 is merely a grant of certain authorities to the Secretary, to be exercised at his discretion within the confines of appropriated funds and resources. The courts have recognized an "overriding duty of our Federal Government to deal fairly with Indians wherever located" Morton v. Ruiz, 94 S. Ct. 1055, 1075 (1974), which constitutes a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" Seminole Nation v. United States, 62 S. Ct. 1049, 1054 (1942). However, a duty of fair dealing does not create a legal entitlement in any individual Indian or particular Tribe or Indian community for any specific service or benefit. Nor does it create a legal obligation to maintain and operate facilities which the IHS does not own under circumstances where the Tribe has assumed maintenance and operation responsibilities by agreement.

3. Authority to rescind transfer agreement.

We also do not view P.L. 86-121 as providing authority to accept ownership of sanitation facilities which have been previously constructed by IHS in cooperation with Tribes and transferred to the Tribes under section 7(a) (4). There is no provision in section 7(a)(4) authorizing the IHS to accept ownership of facilities that have been transferred or for the transferee to rescind the agreement under which the facilities and the responsibility for their maintenance and operation were transferred. Such authority to rescind agreements and retrocede administrative and fiscal responsibility to the Secretary for the operation of programs and facilities transferred to Indians is specifically provided by section 106(d) of P.L. 93-638. In addition section 109 of P.L. 93-638 requires the inclusion in each grant or contract of a provision authorizing the Secretary upon a finding of specified conditions, to reassume "control or operation of the program, activity or service involved." Such authorities are not, however, applicable to agreements entered into under section 7 of P.L. 83-568 (42 U.S.C. 2004a).

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Furthermore, other statutory provisions relating to acceptance of gifts do not provide such authority to accept the facilities. Section 501(a) of the Public Health Service Act, 42 U.S.C. 219, authorizes the Secretary

> To accept on behalf of the United States gifts made unconditionally by will or otherwise for the benefit of the Service or for the carrying out of any of its functions. Conditional gifts may be so accepted if recommended by the Surgeon General, and the principal of and income from any such conditional gift shall be held, invested, reinvested, and used in accordance with its conditions, but no gift shall be accepted which is conditioned upon any expenditure not to be met therefrom or from income thereof unless such expenditure has been approved by Act of Congress. (emphasis added).

As acceptance of ownership of the transferred facilities would in this situation be conditioned upon acceptance of responsibilities for maintenance and operation of the facilities, it would involve expenditure of funds not derived from the income of the project. Accordingly, acceptance of the facilities is not authorized by section 501. Another statutory provision related to the acceptance of gifts is 25 U.S.C. 451. That section, as it read at the time of the effective date of P.L. 83-568, 6/ provides:

> The Secretary of the Interior is authorized in his discretion to accept contributions or donations of funds or other property, real, personal, or mixed, which may be tendered to, or for the benefit of, Federal Indian schools, hospitals, or other institutions conducted for the benefit of Indians, or for the advancement of the Indian race, and to apply or dispose of such donations for the use and benefit of such school, hospital, or institution or for the benefit of individual Indians.

6/ The existing "functions, responsibilities, authorities and duties of the Department of the Interior. . . [etc.]" were transferred to the Surgeon General by the statute effective July 1, 1955.

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This authority, insofar as it relates to the maintenance and operation of hospital and health facilities for Indians or the conservation of the health of Indians was transferred to the Secretary, HEW by P.L. 83-568, 42 U.S.C. 2001 et seq. However, this authority is more limited than that contained in section 501 of the Public Health Service Act in that it only authorizes acceptance of gifts for the benefit of hospitals or other institutions conducted for the benefit of Indians or advancement of the Indian race, and in our view has no application to the situation at issue here.

We conclude, therefore, that the Secretary has no authority to accept ownership of transferred sanitation facilities as a gift.

4. Effect of failure of transferee to comply with terms of transfer agreement.

We find no IHS obligation to maintain and operate sanitation facilities in the event that a Tribe or other transferee refuses or fails to carry out a project agreement providing for acceptance by the transferee of ownership of the facilities and maintenance and operation responsibilities. As we indicated above, we view P.L. 86-121 as imposing no legal obligation to provide sanitation facilities to any particular Indian Tribe, community or group.

In the situation where a facility provided to serve Indians was transferred to a State or other public body under 42 U.S.C. 2004(a) the failure of the transferee to comply with terms and conditions of the transfer would constitute a basis for the IHS to seek specific performance of the violated terms and conditions on behalf of the Indians who were the beneficiaries of the agreement. Where, as here, it is the Indian tribe which refuses to comply, the same remedy would theoretically be applicable. But apart from the legal issue of the jurisdictional problem such litigation would raise, such a course would not seem a practical one.

Given the existence of this right of the IHS and the obligation of the Tribe to maintain the facilities under the agreement which transferred ownership of the facilities to the tribe, we see no legal basis for the position that

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such a breach of the agreement places the IHS under an obligation to assume responsibility for operation of the system. To achieve this result, an amendment to 42 U.S.C. 2004(a) similar to the provision on retrocession contained in P.L. 93-638, discussed above, and applicable to agreements entered into under 42 U.S.C. 2004(a) prior to enactment of the amendment, would be required.

We attach the copies of agreements which you provided to us.

Attachment