BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Ranking Minority Member Select Committee On Indian Affairs United States Senate

Examination Of Funds Received By The Federal Government Under Leases Of Mineral Rights On The Bullhook Gas Unit

Uncertainties existed in the past as to ownership of mineral rights on certain lands within the Chippewa Cree Indian Reservation in Montana. Clarifying legislation was passed in 1974, but some revenues due the tribe were paid late. GAO examined the payments made under the act and concluded that the tribe was entitled to approximately $107,000 more in revenues--$19,000 in inadvertent nonpayments, which the Department of the Interior has already repaid, and $88,000 in interest on the late payments, which GAO is also recommending be paid.

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MAY 3, 1985

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

RESOURCES, COMMUNITY,
AND ECONOMIC DEVELOPMENT
DIVISION

B-215126

The Honorable John Melcher
Ranking Minority Member
Select Committee on Indian Affairs
United States Senate

Dear Senator Melcher:

Your July 19, 1983 letter (app. I), requested that we determine if the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana had received funds collected by the Department of the Interior from leases of mineral rights on the Bullhook Gas Unit, as specified by the Act of May 21, 1974, Public Law 93-285, 88 Stat. 142. The Bullhook Gas Unit[1] is located in north-central Montana and includes tribal land as well as federal, state, and private land. At issue are five leases of tribal mineral rights issued by the Bureau of Land Management (BLM) based on its interpretation of legislation passed in 1939.

Interior has now transferred to the tribe all royalties it received from BLM leases since the 1974 act was passed. Royalties collected from four leases were transferred in 1980; royalties from a fifth lease were transferred in 1983. In computing the royalty payments, however, Interior, through a combination of errors, withheld a net amount of $19,000 from the tribe. These errors were corrected after we pointed them out to Interior officials.

We also believe that Interior should pay the tribe interest that would have accrued on the royalties collected since 1974 but not paid to the tribe until 1980 and 1983. We estimated this amount at $88,431 as of January 1985.

However, we believe that any claim the tribe had to revenues generated by the BLM leases prior to May 1974--approximately $30,000--is now barred by the statute of limitation. At this point, the only remedy available to the tribe would appear to be private relief legislation.

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[1]A unit, or unit agreement, is a fairly common arrangement in the oil and gas industry wherein two or more lessees or owners combine their tracts of land for production under a single operator.

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objective was to determine whether all funds due the tribe under Public Law 93-285 have been received from BLM-leased tribal mineral rights on the Bullhook Gas Unit including moneys held in special deposits at the time the act was passed. As part of this analysis, we also addressed the questions of whether (1) the tribe is entitled to interest on the late payments made on the BLM leases and (2) the tribe is also entitled to the revenues, including interest, generated by the BLM leases prior to the act's passage.

We conducted our review primarily at the Bureau of Indian Affairs (BIA) Area Office, Billings, Montana; the BLM State Office, Billings, Montana; and the Minerals Management Service (MMS) Royalty Management Office, Casper, Wyoming. Our review covered the period September 1983 to November 1984.

Both BLM and BIA leased different portions of the land to private parties for mineral exploration and development. To determine if the tribe has received the royalties collected on the BLM leases, we examined documents prepared by the unit operator that accompanied the unit operator's monthly royalty payments to MMS. These documents specified the royalty being paid for each of the BLM leases. Using these source documents, we verified the royalties received by the federal government since 1974, which amounted to about $316,900. To then determine that the tribe received these royalties, we compared the $316,900 with amounts recorded in tribal trust account records maintained by BIA. The records we examined covered the period from January 1973--the effective date of unit operation--through December 1982, the period covered by the last lump-sum payment.

We also attempted to determine if the tribe had received funds obtained from BIA's mineral leases from a special BIA account. Because available records were not complete, we were unable to trace each transaction. However, we did trace key transactions and discussed the account with tribal and BIA officials to determine whether the tribe did indeed receive the funds.

As agreed with your office, we did not audit the books and records of the unit operator to determine if the amounts received by the federal government were accurate. The tribe has requested such an audit by the appropriate MMS office and, according to an MMS official responsible for operator audits, the Bullhook Gas Unit is scheduled for audit in 1985.

In order to address the questions of whether the tribe is entitled to pre-1974 revenues and any interest, we reviewed the 1974 act and the March 28, 1939 act, and their legislative histories; a November 26, 1947, Proclamation of the Assistant

Secretary of the Interior; and appropriate case law. We also discussed the legal issues with tribal representatives.

Except for not auditing the unit operator's books and records, we performed our review in accordance with generally accepted government auditing standards.

BACKGROUND

Unlike many other reservations, Rocky Boy's was not created by treaty. Rather, it was created in 1916 and then enlarged several times by legislation. Some of these expansions, however, created uncertainty as to who owned the mineral rights on some of the land being added to the reservation. Public Law 76-13, dated March 28, 1939, added to the reservation all public domain lands in 11 townships that abutted the reservation. The surface rights of some of the land in these townships was previously transferred by the United States to private hands. The United States, however, still owned the subsurface mineral rights. The United States later reacquired some of these surface rights, and by Proclamation of the Assistant Secretary of the Interior on November 26, 1947, transferred these acres to the reservation.[2] However, varying interpretations of the effect of the 1939 act and the 1947 proclamation created doubt over the legal status of these lands. Three interpretations were possible: the 1939 act added to the reservation the mineral rights of lands where the United States had previously transferred the surface rights; the mineral rights were merged with the surface rights upon the United States' reacquisition of the surface rights and were transferred to the tribe by the 1947 proclamation; or the mineral rights remained the property of the United States.

Because the ownership of the mineral rights was uncertain, BLM, on behalf of the United States, and BIA, on behalf of the tribe, each leased different portions of this land to private parties for mineral exploration and development. Determination of mineral ownership became crucial after successful exploration activity in the area led to the creation of the Bullhook Gas Unit. This unit, established in January 1973 and covering tribal and nontribal lands, includes five parcels of land that BLM had leased.

Legislation clarified ownership

Legislation was sought to clarify the uncertainties concerning mineral rights ownership. Intended to settle this issue, the 1974 act declared that:

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[2]13 Fed. Reg. 1589 (1948).

> ". . . all right, title, and interest of the United States in minerals, including coal, oil, and gas, underlying lands held in trust by the United States for the Chippewa and Cree Indians of the Rocky Boy's Reservation and lands located within the legal subdivision described in the [1939 Act] are hereby declared to be held by the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana."

The legislation provided that all existing mineral leases would remain in force but that BLM would reject all applications for additional leases and return advance rental payments to the applicants. It also specified that

> ". . . [a]ll bonuses, rents, and royalties received by the Secretary of the Interior, or his authorized representative, from leases of [these] lands that were issued and approved by him and are now held in special deposits, and all such proceeds received from and after the effective date of this Act . . . be deposited to the credit of the Chippewa Cree Tribe of Rocky Boy's Reservation."

BLM action since passage of 1974 act

The U.S. Geological Survey (USGS)--which was then responsible for royalty collections--did not transfer royalty payments collected from the five BLM leases to the tribe. BLM had failed to instruct USGS to do so. In 1979 the tribe discovered that it was not receiving royalties collected on four of these leases. The tribe, through BIA, brought this to BLM's attention and in 1980, USGS made a lump-sum payment to the tribe of about $147,800, covering royalties collected on the four leases from 1974 to 1980. Later, the tribe found that it was not receiving royalties collected from the fifth lease, and in 1983 another lump-sum payment of about $50,800 was made to the tribe.

After each lump-sum payment, the USGS (and later MMS) began making routine monthly payments to BIA for credit to the tribe's account. The lump-sum payments, however, did not include any interest on the royalties that would have accrued between 1974--when the royalties should have been credited to the tribe's account as directed by the 1974 act and invested as other Indian moneys were--and the date of the lump-sum payments.

Essentially then, a determination of any amounts due the tribe centers around the following three questions:

--Has the tribe received all revenues generated since the 1974 act's passage?

--Is the tribe entitled to interest on the late payments of the post-1974 revenues?

--Is the tribe entitled to the pre-1974 revenues derived from the five BLM leases, with interest?

A discussion of these three questions follows.

POST-1974 REVENUES

MMS collects and processes royalties from both BLM (federally owned) leases and BIA (Indian-owned) leases. It deposits and distributes the federal funds as appropriate and, for Indian royalties, receives the royalty check from the oil or gas producer and passes the check to either BIA or the tribe. These duties were carried out by the USGS prior to MMS' establishment in January 1982.

In our review of Interior's records, we found that the Chippewa Cree Tribe was entitled to an additional $19,000 in royalties: $12,300 from MMS and $6,700 from BIA. MMS, in paying monthly royalties from May 1981 through January 1982, withheld about $14,400 for windfall profit taxes. Because Indian royalties are not subject to the windfall profit tax, these funds should not have been withheld. On the other hand, MMS overpaid the tribe $2,100 when it used February 1973 instead of May 1974 as the base month in computing the second lump-sum payment. After we pointed out these errors, MMS corrected the tribe's account in January and February 1984.

Also, MMS transferred about $6,700 to BIA for October and November 1982 tribal royalties; however, BIA did not make the necessary entries on the tribe's accounting records. After we discussed this error with BIA officials, they corrected their accounting records in November 1983 and notified the tribe that the additional money was available.

We believe that with these corrections, the tribe has now received the full $316,900 collected by the federal government, as provided by Public Law 93-285.

INTEREST ON POST-1974 ROYALTIES

Although the tribe has received all post-1974 revenues, neither the 1980 nor the 1983 lump-sum payments included any interest that would have accrued between the date of the lump-sum payments and the dates the royalties would have been routinely credited to the tribe's account since 1974.

Funds produced from tribal property or activities are kept in the Treasury and held in trust for the Indians.[3] Explicit language stating that a trust or fiduciary relationship exists with respect to tribal funds or property is not necessary. Unless the Congress provides otherwise, a trust relationship will normally be inferred from the government's control or supervision of tribal funds or property.[4]

Had the royalties collected from the five BLM leases been routinely credited to the tribe's account since 1974 as directed by the 1974 act, the royalties, like other tribal funds, would have earned interest at the prevailing rate. The Congress has directed that all tribal funds held in trust in the Treasury with an account balance exceeding $500 bear simple interest at 4-percent per year. Further, the Secretary of the Interior is authorized, at his discretion, to invest tribal funds in certain other investment obligations. The courts have clearly established that the government, as a fiduciary, has a duty to maximize the return on its investment of tribal funds. Hence, the 4-percent rate paid on accounts held in the Treasury is viewed as a minimum only.[5]

The Court of Claims has held that the government's investment decisions concerning tribal funds (where to invest and for how long) should be judged against a standard of a man of ordinary prudence dealing with his own property.[6] By applying to the royalties the average annual interest rates earned by tribal trust funds invested by BIA's central investment office in Albuquerque, New Mexico (which ranged from 6.5 to 14.5 percent), and compounding the interest monthly, we determined that the tribe would have earned $88,431 in interest on the delinquent royalties through January 31, 1985.

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[3]Cheyenne-Arapaho Tribes of Indians v. United States, 512 F.2d 1390 (Ct. Cl. 1975).

[4]Moose v. United States, 674 F.2d 1277 (9th Cir. 1982); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980), quoted with approval in United States v. Mitchell, ___ U.S. ___, 77 L. Ed. 2d 580 (1983); contra, Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979).

[5]See, e.g., Cheyenne-Arapaho, 512 F.2d 1390; Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). See also F. Cohen, Handbook of Federal Indian Law, 553-557 (1982 ed.).

[6]Cheyenne-Arapaho, 512 F.2d at 1395.

We also considered whether the tribe's claim for interest is barred by operation of the statute of limitations, and concluded that it is not. A claim or demand against the government that may be settled by the General Accounting Office must be received in our office within 6 years after the date it first accrued. In such cases as this, where the government holds money in trust for another, the generally accepted rule is that a statute of limitation does not begin to run against the beneficiary in favor of the government until the trust is repudiated,[7] that is, until the government rejects the validity of the trust. Further, courts have found that the statute of limitation does not begin to run until the beneficiary has knowledge of the factual basis of its claim.[8] In Manchester Band of Pomo Indians, 363 F. Supp. at 1249, the federal district court held that the 6-year statute of limitation for filing civil actions against the United States, 28 U.S.C. § 2401, did not begin to run on the band's claim for interest on trust funds until the band discovered of the government's breach of its fiduciary duty to properly manage the band's funds.

The band's claim for interest arose out of BIA's management of revenues generated by the band's dairy enterprise and by leases of some of the band's land. From 1938 to 1956, the band operated a dairy enterprise on its rancheria in Manchester, California. BIA deposited revenues from this enterprise in an account at BIA's Sacramento Area Office. Between 1946 and 1956, BIA made only two payments of interest to this account. Beginning in 1963, the band began leasing certain portions of its land. BIA deposited money from the leases in the Treasury, where it earned 4-percent simple interest per year. On one occasion, $500 was deposited 10 months late. No payment of interest for the 10-month period was credited to the band.

The band brought an action against the United States on November 8, 1968, charging that the government failed to manage the band's funds properly. The government argued that the band's claim for damages was barred by the statute of limitation as to damages accruing before November 8, 1962. The court rejected the government's argument and held that the statute of limitation did not bar any portion of the band's claim. The court found that BIA did not, as a general practice, regularly pay out income from the trust accounts to the band or give periodic accountings to the band. Therefore, the absence of payments or information to the band did not put it on notice that its funds were being improperly

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[7]United States v. Taylor, 104 U.S. 216, 221-22 (1881); Capoeman v. United States, 440 F.2d 1002, 1003 (Ct. Cl. 1971); and Manchester Band of Pomo Indians, 363 F. Supp. at 1249 and cases cited therein.

[8]Id.

managed. Under the circumstances, the band could reasonably rely on the good faith of its fiduciaries.

As noted earlier, the Chippewa Cree Tribe discovered in 1979 that it was not receiving royalties collected on the BLM leases, at which time it demanded payment. It is not clear whether the tribe, at the same time, demanded payment of the interest. In 1980 and 1983, the tribe received lump-sum payments of royalties but did not receive interest thereon. It asserted a claim specifically for the interest in 1983. While it would appear that the government, by not paying the interest as it was required, effectively repudiated its obligation to pay interest, the statute of limitation, as the court held in Manchester, does not begin to run against the beneficiary of a trust until the beneficiary has knowledge of the factual basis of its claim. At least until 1979, the tribe had relied on the good faith of its fiduciaries--agents of the United States--and had no knowledge, as far as we can determine, that interest payments would not be included in the payments it did receive. If the tribe were held to have a factual basis in 1979 for claiming interest, then the statute of limitation began to run in 1979. If not, the statute began to run in 1980 and 1983 when the tribe received the lump-sum payments without interest. Regardless, the tribe's claim for interest, presented to us in 1983, is timely.

PRE-1974 REVENUES

We also considered whether the tribe is entitled to the approximately $30,000 in revenues generated by the BLM leases prior to the 1974 act. Consistent with the 1974 act, Interior transferred all revenues held in special deposits to the tribe. These deposits contained BIA lease revenues but no BLM lease revenues. Furthermore, the tribe's contention it is entitled to the BLM pre-1974 revenues is now barred by the applicable statute of limitation. Thus, at this point, the only remedy available to the tribe would appear to be private relief legislation.

Interior did not transfer to the tribe any revenues generated by the BLM leases prior to enactment of the 1974 act. Interior's Field Solicitor, Billings, Montana, determined that only revenues held in special deposits as of the date of enactment of the 1974 act should be transferred to the tribe. (923.1) M 1402 et al., November 29, 1982. He stated that

> ". . . [i]f bonuses, rents, and royalties from existing leases [those entered into prior to enactment of the 1974 Act], were not held in special deposits on May 21, 1974, [the date of enactment], then revenues from existing leases cannot be credited to the benefit of the Tribes."

This opinion relied on section 2 of the 1974 act, which provides that

> ". . . [a]ll bonuses, rents, and royalties received by the Secretary of Interior, or his authorized representative, from leases of land identified in section 1 [Rocky Boy's Reservation] that were issued or approved by him [BLM leases issued pursuant to the Mineral Leasing Act and BIA leases issued pursuant to the Act of May 11, 1938, 52 Stat. 347] and are now held in special deposits, . . . shall be deposited to the credit of the Chippewa Cree Tribe of Rocky Boy's Reservation . . . ." [Emphasis added.]

Pursuant to the Field Solicitor's 1982 opinion, none of this money has been transferred to the tribe. The revenues collected from the BIA leases prior to the 1974 act were held in a special account in the BIA's Billings Area Office, and were then appropriately credited to the tribe's account on June 4, 1974. However, the revenues collected prior to 1974 from the BLM leases had not been deposited in any special account, a fact reflected in the legislative history of the 1974 act. Accordingly, while the reason for the distinction is not stated in the 1974 act or its legislation history, we can only conclude that the 1974 act does not require that such revenues be transferred to the tribe or that any interest be paid on such revenues.

Tribal representatives assert that the tribe is entitled to those revenues, and that the 1974 act requires transfer of those revenues to the tribe. However, as the Field Solicitor, Billings, pointed out in his 1982 opinion, the 1974 act only provides for the payment to the tribe of those pre-1974 royalties held in special deposits on the date of enactment of the 1974 act. The tribe also bases its claim to pre-1974 royalties on its asserted ownership of the leased mineral estate since 1939. We believe that any claim based on the government's failure to pay pre-1974 royalties accrued for purposes of applicable statutes of limitation no later than the date of enactment of the 1974 act, May 1974, and is now time-barred. See Manchester Band of Pomo Indians, 363 F. Supp. at 1249.

Our observations on the ownership of the mineral estates underlying lands transferred in trust to the Indians by the 1939 act and the 1947 proclamation and the relationship of the 1974 act thereto are contained in appendix II.

CONCLUSIONS AND RECOMMENDATION

Because BLM overlooked certain leases affected by the 1974 legislation, the royalties collected from five BLM leases were treated as federal rather than Indian funds. When the royalties

were appropriately identified and processed as Indian royalties, MMS incorrectly computed the amount due to the tribe, and BIA did not properly recognize some royalties in the tribe's accounting records. However, because the federal agencies involved took the necessary corrective action, we believe the tribe has now received all lease royalties collected by BLM since 1974.

The tribe has not received any interest on royalties collected by BLM between 1974 and 1980 from four BLM leases, and between 1974 and 1983 from the fifth BLM lease. We believe the tribe is entitled to the interest that might have accrued had the royalties been credited to the tribe's account since 1974, as directed by the 1974 act, and had Interior carried out its investment duties as the tribe's fiduciary. Accordingly, we recommend that the Secretary of the Interior pay the Chippewa Cree Tribe this interest, which we estimate to be $88,431 through January 31, 1985.

The tribe has not received the revenues--approximately $30,000--collected by the United States between 1968 and 1974 from BLM leases. The 1974 act, consistent with its legislative history, provided for the payment of only pre-1974 royalties held in special deposits on the date of the enactment of the 1974 act. Moreover, any claim of entitlement the tribe may have had to such revenues, on the basis of its asserted ownership since 1939 of the leased mineral estate, is now time-barred. At this time, the only remedy available to the tribe is private relief legislation.

AGENCY AND TRIBAL COMMENTS AND OUR EVALUATION

A draft of this report was provided to the Department of the Interior and the Chippewa Cree Tribe for their review and comment. Interior agreed with our findings, and we were told by its liaison staff that the Department is awaiting our final report prior to reimbursing the tribe. (See app. III.)

The tribe's attorneys agreed with our position on post-1974 revenues and related interest, although they are withholding concurrence on the amounts involved until they have a chance to review our supporting documentation. At their request, we have made copies of such documentation available to them.

The tribe's attorneys, however, did not agree with our position on the pre-1974 BLM lease revenues, contending (1) that the United States had not repudiated its obligation to the tribe, and (2) that even if it had, the tribe could have had no knowledge of the repudiation until 1979 at the earliest, thus the tribe's claim would not be time-barred. While disagreeing, they did not introduce any factors or argument which we had not considered in our analysis in appendix II. Thus, we remain convinced that the

claim is now time-barred. The attorneys' comments on this matter are quite lengthy and are reprinted in their entirety as appendix IV. Our more detailed analysis of their comments is contained in appendix V.

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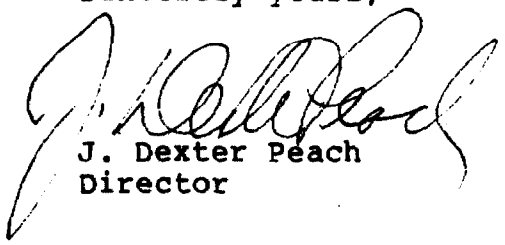
As arranged with your office, we are sending copies of this report to the Chippewa Cree Tribe, the tribe's legal counsel, and the Department of the Interior. Copies will also be made available to other interested parties upon request.

Sincerely yours,



J. Dexter Peach
Director

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United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

July 19, 1983

The Honorable Charles A. Bowsher
Comptroller General of the
United States
General Accounting Office
General Accounting Office Building
441 G Street
Washington, D.C. 20548

Dear Mr. Bowsher:

Enclosed is a file of materials concerning the Act of May 21, 1974, 88 Stat. 124, providing for the transfer of funds received by the Federal government on the Bullhook Gas Unit to the Chippewa Cree Tribe.

I will appreciate a GAO analysis and accounting to be sure that the Tribes have received all funds due under this Act. If you have any questions about this request, please contact Virginia Boylan, Staff Attorney for the Senate Select Committee on Indian Affairs at 224-2644.

Thank you and best regards.

Sincerely,

John Melcher

John Melcher
Ranking Minority Member

Enclosures

[GAO note: the enclosures to this letter are not included in this report.]

LEGAL ANALYSIS OF PRE-1974 REVENUES

THE TRIBE'S CONTENTION

Representatives of the tribe assert that the tribe is entitled to the pre-1974 revenues generated by the BLM leases plus interest. The tribe advances essentially two arguments in support of the claim. First, the tribe asserts that the legislative history of the 1974 act clearly indicates that the Congress intended it to receive the pre-1974 revenues from the BLM leases. Second, the tribe contends that because the tribe owned the minerals which BLM leased, BLM's failure to escrow the BLM lease revenues constitutes a breach of Interior's fiduciary duty owed the tribe.

The language and legislative history of the 1974 act do not indicate that the act was intended to transfer to the tribe the pre-1974 revenues derived from the BLM leases. Consistent with the language, the legislative history indicates that the Congress intended to transfer only pre-1974 revenues derived from BIA leases and held in special desposits on the date of enactment of the 1974 act.

Alternatively, the tribe's claim of entitlement which was based on its ownership since 1939 of the BLM-leased mineral estate, although not without merit, is time-barred. Any action the tribe might have had against the United States for breach of fiduciary duty now appears to be barred by the statute of limitation. To pay the tribe these revenues would require private relief legislation. Accordingly, we do not now need to resolve the complex issues surrounding ownership prior to 1974 of the BLM leased mineral estates.

TRANSFER OF MINERAL ESTATES TO RESERVATION

The 1939 act

The 1939 act added to the reservation all public domain lands within a described area. The United States at the time owned the mineral estates at issue, which were located in the described area, but did not own the corresponding surface estates that were in private hands. The tribe argues that the Congress intended to add these mineral estates to the reservation. However, Interior's Field Solicitor, Billings, relying on the legislative history of the 1939 act, construed the act as transferring to the reservation only about 2,000 acres of vacant public domain land within the described area as to which the government owned both surface and mineral estates. (See discussion of Field Solicitor's opinion on p. 4 of this app.) The mineral estates leased by BLM were not a part of these 2,000 acres of vacant public domain land.

Although the language of the 1939 act does not distinguish surface from mineral estates, ". . . add[ing] to the Rocky Boy Indian Reservation . . . all public domain land in the described area," the legislative history of the 1939 act indicates that the purpose of the act was to transfer to the reservation only the 2,000 acres of vacant public domain land as to which the government owned both surface and mineral estates. A letter from the Secretary of the Interior to the Senate Committee on Indian Affairs explained that Interior was in the process of acquiring lands pursuant to the Indian Reorganization Act[1] in a "maximum purchase area" of 156,000 acres for addition to Rocky Boy's Reservation (S. Rep. No. 105, 76th Cong., 1st Sess. (1939)). In the course of acquiring these lands, Interior had identified approximately 2,000 acres of small, scattered tracts of vacant public domain lands in the area. To protect the investment in the lands being purchased for the tribe, Interior suggested that these vacant public domain lands be withdrawn and added to the reservation. The Senate Committee agreed with Interior's recommendation.

1947 proclamation

The 1947 proclamation added to Rocky Boy's Reservation certain described lands ". . . acquired by purchase under the provisions of section 5 of [the Indian Reorganization Act of 1934]." As we noted above, at least before 1939 the mineral estates at issue here were owned by the United States and underlay surface estates that were in private hands. Pursuant to section 5 of the Indian Reorganization Act of 1934, the Secretary of the Interior reacquired the surface estates for subsequent transfer to the reservation. It has been argued that when the United States acquired the surface estates, the surface and mineral estates merged and accordingly that the 1947 proclamation transferred both estates to the reservation.

This is in fact the argument endorsed by the Assistant Secretary of the Interior in 1973 in bill comments to the House and Senate Committees on Interior and Insular Affairs (H.R. Rep. No. 905, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 817, 93d Cong., 2d Sess. 3 (1974)). In his report to the committees on H.R. 5525, the bill which became the 1974 act, the Assistant Secretary told the committees that there was no reason to suppose that the 1947 proclamation intended to reserve the mineral estates in the United States. He explained that a transfer of the federal land to trust status would automatically transfer all that the federal

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[1]The Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934), authorized the Secretary of the Interior to acquire lands for the purpose of providing land for Indians. The Secretary was authorized to add such lands to existing reservations by proclamation.

government owned. The Assistant Secretary advised the committees that

> ". . . the customary legal interpretation should have prevailed as to this land: i.e., the failure of the proclamation to differentiate or even to mention minerals meant that both surface and mineral estates passed as one fee estate into trust status."

The 1974 act

In an April 7, 1967, memorandum to the Chief of BLM's Minerals Adjudication Section in Billings, Montana, Interior's Field Solicitor, Billings, citing the Senate report on the 1939 act, concluded that the 1939 act withdrew only 2465.12 acres of public domain lands for transfer to Rocky Boy's Reservation. The Chief of the Minerals Adjudication Section had asked the Field Solicitor whether certain mineral estates, which were not part of the vacant public domain land addressed by the Senate report, were available for leasing by BLM. The Field Solicitor advised that they were, since the 1939 act did not affect these mineral estates. Two months later, the Field Solicitor, Billings, reviewed the status of the mineral estates and concluded that ownership of the mineral estates in lands originally patented by the United States with a reservation of minerals, but where the surface estate had not been reacquired, was unclear. The Field Solicitor suggested legislation as the only means of clarifying the ownership of the mineral estates within the reservation boundaries. See July 13, 1967, letter to Billings Area Director, Indian Affairs. However, in 1968, BLM, an agency within Interior, proceeded to lease the minerals underlying the reservation lands.

To resolve the uncertainty surrounding mineral ownership, Representative John Melcher introduced H.R. 5525, 93d Cong., 2d Sess., to quiet title in the tribe to the mineral interests underlying the lands held in trust for the tribe, including lands located within the legal subdivision described in the 1939 act. Accordingly, section 1 of the 1974 act declared mineral ownership in the tribe as follows:

> "That all right, title and interest of the United States in minerals, including coal, oil, and gas, underlying lands held in trust by the United States for the Chippewa Cree Indians of the Rocky Boy's Reservation and lands located within the legal subdivision described in the Act of March 28, 1939 (53 Stat. 552), are hereby declared to be held by the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana . . . ."

In addition to declaring the tribe's mineral ownership, section 1 of the 1974 act ratified all then-existing leases, whether issued by BLM under the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 181, or by BIA under the act of May 11, 1938, 25 U.S.C. §§ 396a-396g, governing the leasing of tribal lands for mining purposes. Section 2 of the 1974 act provided for the disposition of the proceeds from mineral leasing activities on the reservation as follows:

> "All bonuses, rents, and royalties received by the Secretary of the Interior, or his authorized representative from leases of lands identified in section 1 [quoted above] that were issued or approved by him and are now held in special deposits, and all such proceeds received from and after the effective date of this Act shall be deposited to the credit of the Chippewa Cree Tribe of the Rocky Boy's Reservation . . . ."

ANALYSIS AND DISCUSSION OF ISSUES

Congress did not intend that the 1974 act transfer to the tribe pre-1974 revenues collected from the BLM leases

Contrary to the tribe's first argument, the available legislative history of the 1974 act does not indicate that the Congress actually intended to transfer to the tribe the pre-1974 revenues collected from the BLM leases. As noted by BLM's Field Solicitor in a 1982 opinion, (923.1) M 1402 et al, November 29, 1982, the language of the 1974 act directs the Secretary of the Interior to pay to the tribe's credit only those pre-1974 royalties that at the time of enactment were held in special deposits. Pub. L. No. 93-285, § 2, 88 Stat. 142 (1974).

We found that the only funds held in special deposits at the time the 1974 act was passed were revenues generated by the BIA leases. It appears that the Congress was aware that this money represented revenues collected from BIA leases only, not the BLM leases.

Both the House and Senate Committees on Interior and Insular Affairs state in their reports that the 1974 act would require that

> ". . . certain funds deposited into a special account which were derived from mineral leases on the original reservation that were consummated by the tribe with the approval of the Secretary, be paid over to the tribe." [Emphasis added.] (H.R. Rep. No. 905, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 817, 93d Cong., 2d Sess. 2 (1974)).

This statement could not describe the BLM leases, because the mineral estates leased by BLM were not on the original reservation, and because the BLM leases were not consummated by the tribe; rather they were consummated by BLM. The Committees identified the funds to be transferred as $69,850.49 being held by BIA's Billings Area Office. Id.

Moreover, a review of a September 14, 1973, hearing held by the Subcommittee on Indian Affairs of the House Committee and of the Subcommittee's markup session with the full Committee indicates that while there was initially some confusion concerning what funds were being held by the Billings office, the Committee members ultimately understood that only revenues collected from BIA leases would be transferred by the legislation.[2] The Chairman of the Subcommittee explained to the full Committee that since 1968, some revenues collected from leases on reservation land were deposited in a BIA trust fund; however, revenues from leases where the subsurface title was not in the tribe were collected by BLM and deposited in the Treasury. The Subcommittee Chairman pointed out that the 1974 act would require transfer of only those funds held by the Secretary of the Interior in trust in the Billings Area Office, not funds that had been deposited into the Treasury. Also, a tribal representative testified before the House Subcommittee that the tribe, by resolution, had decided not to request the Congress to transfer payments previously made to BLM; rather it would only ask the Congress to direct allocation to the

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[2]Unpublished transcripts of the Sept. 14, 1973, Subcommittee hearing, Oct. 11, 1973, Subcommittee markup session, and Jan. 24, 1974, Committee markup session are located in the Committee's files. We understand from Committee staff that these files are available for public review in the Committee's offices.

The Senate Committee report indicates that its Subcommittee on Indian Affairs held hearings on this legislation on Jan. 25, 1974. S. Rep. No. 817, 93d Cong., 2d Sess. 1 (1974). Neither the Senate Select Committee on Indian Affairs, Senate Committee on Energy and Natural Resources (successors to the Senate Committee on Interior and Insular Affairs), nor the National Archives can locate a transcript of those hearings.

tribe of payments made following the effective date of the statute.[3]

To support its argument that the Congress actually intended to transfer the pre-1974 revenues from the BLM leases, the tribe relies on an identical passage in the "Background" sections of the House and Senate Committee reports:

> "The revenues from mineral leases on such lands [the land transferred by the 1939 Act] have been retained in a special account because of the cloud on the title pending final determination." (H.R. Rep. No. 905, 93d Cong., 2d. Sess. 3 (1974); S. Rep. No. 817, 93d Cong., 2d. Sess. 2 (1974)).

The quoted sentence follows immediately after sentences referring to the BIA leases and the BLM actions. Although it could be read as referring to revenues from the BLM leases, it would then have to be considered factually incorrect since neither we nor the tribe have been able to identify a special account which held the pre-1974 revenues from the BLM leases. Moreover, it may be read as referring to the BIA leases.

Also, the tribe's argument ignores the background established by the Subcommittee at its hearing and its markup session with the full Committee, and what we feel is the more pertinent language of the Committee's report. The language the tribe relies on is found in a general background section in the Committee reports; the more specific and therefore more persuasive language, which we quoted on page 4 of this appendix, is found in a section of the reports explaining the bill's requirements and describes the special account to be transferred as containing "funds . . . derived from mineral leases on the original reservation that were consummated by the tribe," i.e., revenues collected from the BIA leases, specifically identifying the special account held in BIA's Billings office.

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[3]Although the Chairman of the Tribal Council testified before the House Subcommittee that "as far as [he knew]," the tribe was satisfied with the BLM leases, and that the tribe had decided, by resolution, not to seek recovery of payments previously made by lessees to BLM, the Subcommittee did not explore the matter further, nor did it obtain a copy of the resolution for its records. Our efforts to obtain more detailed information about the resolution and a copy of the resolution have been unsuccessful. The tribe advises that a search of its records for 1 year preceding the hearing date did not uncover such a resolution.

Any claim the tribe might have had to the pre-1974 revenues, that was based on its asserted ownership since 1939 of the mineral estates leased by BLM, is now time-barred

The tribe's second argument is predicated upon its asserted ownership since 1939 of the mineral estates leased by BLM in 1968. The tribe contends in effect that since it owned the mineral estates leased by BLM, BLM's failure to escrow the BLM lease revenues constituted a breach of Interior's fiduciary duty owed the tribe.

We have already noted the uncertainties surrounding mineral ownership within the reservation resulting from the 1939 act and the 1947 proclamation. And, as we view the available legislative record of the 1974 act, it was an appreciation of these uncertainties that prompted the Congress to attempt to provide, short of litigation, a solution to the mineral ownership issue by enacting the 1974 act.

What legal effect should be given the 1974 act in any examination of the tribe's ownership of the BLM leased mineral estate? As a declaratory statute, the 1974 act can be viewed at a minimum as enacting into law a confirmation of the tribe's ownership of the disputed mineral estate. Koshkonong v. Burton, 104 U.S. 668 (1882); Stockdale v. Insurance Co., 87 U.S. 323 (1874). In this respect, the 1974 act would prospectively bind the courts on all issues, arising after the date of passage of the 1974 act, affecting mineral ownership underlying all lands held by the United States in trust for the tribe and all lands located within the legal subdivision described in the 1939 act. Id.

The retrospective effect of the 1974 act is less clear. On the one hand, Congress' purpose was to "declare" and "confirm" the tribe's mineral ownership ". . . including those interests which are seriously in doubt." (H.R. Rep. No. 905 at 2, 3.) The operative statutory language of the 1974 act--"are hereby declared"--clearly reflects this purpose. The absence from the 1974 act of any words of transfer or grant suggests that the Congress viewed the 1974 act as quieting the tribe's title to the

mineral estates previously transferred by the 1939 act and the 1947 proclamation.[4]

On the other hand, the 1974 act can also be viewed as operating only prospectively. The absence of any indication in the 1974 act's legislative history that the Congress intended the act to operate retrospectively when coupled with Congress' choice to pay to the tribe only the future proceeds from the BLM leases belies a retrospective construction of the 1974 act. However, because we conclude that any claim to pre-1974 revenues from the BLM leases is now time-barred, we do not think that it is necessary to resolve the issue.

The United States Claims Court has jurisdiction over Indian claims. 28 U.S.C. § 1505. Claims brought before the Claims Court are barred unless the petition is filed within 6 years after the claim first accrues. 28 U.S.C. § 2501. See also 28 U.S.C. § 2401(a). The Comptroller General is authorized to settle claims against the United States Government; but, like the Claims Court, he can settle the claim only if the claim is received by him within 6 years after the claim accrues. 31 U.S.C. § 3702.

As we discussed earlier, statutes of limitation do not begin to run, in instances such as here, against a beneficiary of the trust in favor of the government in its capacity as trustee until the trust is repudiated. The tribe probably should have known that BLM was acting adverse to the government's fiduciary obligation to the tribe as early as 1968 when BLM leased the rights to what the tribe believed were its mineral rights and did not

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[4]To the extent the 1974 act would be viewed by a court as declaring the intent of the earlier 1939 act, the Supreme Court has recognized that such subsequent legislation declaring the intent of an earlier statute, although not dispositive of the issue, is entitled to "great" or "significant" weight. Red Lion Broadcasting Co. v. Federal Communications Com'n, 395 U.S. 367 (1969); NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974). Such a formal expression of Congress' view is to be contrasted with the less formal types of subsequent legislative history such as post-enactment statements in committee reports or of individual legislators. Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 119 n. 13 (1980). These latter types of post-enactment legislative history "form a hazardous basis for inferring the intent of an earlier [law]," United States v. Price, 361 U.S. 304 (1960), and will rarely, if ever, override a reasonable interpretation of a statute that can be gleaned from its language and pre-enactment legislative history. Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. at 119 n. 13.

transfer the proceeds to the tribe's account. Even if the tribe was not aware at that time of the government's failure to credit revenues from BLM leases to the tribe's account, it surely knew by the date of passage of the 1974 act that pre-1974 lease revenues other than those held in special deposits would not be paid to them. The statutory limitations period with respect to any claim for pre-1974 lease revenues had run, then, by 1980, at the latest.

CONCLUSION

The 1974 act reflected a congressional desire only to pay the proceeds from some leasing activities, namely the BIA leases, to the tribe. Furthermore, the tribe's claim for pre-1974 revenues collected by the United States from BLM's 1968 gas leases is now barred by the applicable statute of limitation. At this point, the only remedy available to the tribe would appear to be private relief legislation.

APPENDIX III

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR - 7 1985

Mr. J. Dexter Peach
Director, Resources, Community and
Economic Development Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Peach:

We appreciate the opportunity to review your draft report on the payments to the Chippewa Cree Tribe of funds from oil and gas activities on their lands. The Department of the Interior agrees with the draft report.

Sincerely,

Deputy Assistant Secretary - Land and
Minerals Management

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March 6, 1985

Mr. J. Dexter Peach
Director
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Re: Draft Report B-215126 on revenues from Mineral Leases in Bullhook Unit

Dear Mr. Peach:

We appreciate the opportunity to comment on your draft report on behalf of the Chippewa-Cree Tribe of the Rocky Boy's Reservation.

Our comments are necessarily limited to the legal issues raised in your report, as we have not yet examined the underlying documents relied upon for the financial audit. Your office has generously consented to furnish these documents so we may review the figures.

While we agree with your legal analysis of the Tribe's entitlement to the prevailing rate of interest on the late payments from BLM leases in the Bullhook Unit, we cannot concur with the analysis by which the Tribe would be deprived of its right to recover BLM lease proceeds generated prior to the 1974 Act. We do not depend only on the language of the 1974 Act in support of our position, but base it on the history of

legislation affecting the Tribe, as well as on principles of Indian law and the law of trusts.

This letter contains our analysis of the Tribe's claim of entitlement to pre-1974 revenues generated by BLM's management of the mineral rights to the land in question. First, the claim is not time-barred because a "repudiation" of the trust relationship between the Tribe and the United States has not occurred; rather, the matter of these pre-1974 revenues has been and still is under consideration by the United States. If there were a repudiation, by operation of the 1974 Act or otherwise, the Tribe did not discover such repudiation longer than six years ago. It is not at all clear from the language and legislative history of the 1974 Act that these pre-1974 revenues were not to be paid to the Tribe.

Further, the Tribe's claim to pre-1974 revenues is not prohibited by the 1974 Act. Even if the Act had not mentioned any retrospective monetary relief, the Tribe would still be entitled to all pre-1974 revenues from mineral leasing on its land. Congress' mention of special deposits does not necessarily imply that revenues not so held should not be paid to the Tribe.

Additionally, because the Tribe owned the mineral rights in the lands in question long before any of such mineral interests produced monetary revenues, the United States had a fiduciary duty to manage those mineral interests to the maximum benefit of the Tribe. BLM seems to have done everything possible to subvert that duty. The question of ownership having been

finally put to rest by the 1974 Act, which was in the nature of a legislative declaration in lieu of quiet title litigation, the Tribe was and is entitled to all the revenues collected by the United States, together with interest thereon.

1. THE TRIBE'S CLAIM IS NOT TIME-BARRED.

Your draft report at p. 10 correctly states the law with regard to accrual of a cause of action by an Indian tribe against the government which holds the tribe's money in trust. A statute of limitation does not begin to run against the beneficiary until the government has repudiated the trust and the fiduciary relationship has been terminated. Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238 (N.D.Cal. 1973), at p. 1249. The Manchester court cites United States v. Taylor, 104 U.S. 216 (1881) in which the Supreme Court refused to find a claim for surplus proceeds from a tax sale time-barred.

> It was [the Secretary of the Treasury's] duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.
>
> * * *
>
> The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the cestui que trust in such manner that he is called

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> upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before.

U.S. v. Taylor, 104 U.S. at 221-222.

In Bogert, Law of Trusts (5th Ed. 1973), it is stated,

> During the continuance and recognition of the trust the possession of the trustee is the possession of the beneficiary. There is no adverse or hostile holding.

Id. at 643 (citations omitted). In speaking of constructive trusts, Bogert says,

> If the person who can be made a constructive trustee admits to the wronged party that there is an equitable obligation and states by words or other conduct that he intends to fulfill that obligation, the statute does not run against the cause of action until the title-holder changes his attitude to one of hostility and this becomes known to the beneficiary. [citations omitted].

Id. at 646. In this case, the government has not demonstrated an attitude of hostility to its obligation to credit the Tribe with pre-1974 BLM lease proceeds. The legal question of ownership of mineral and surface estates has been clarified, and the Tribe's claim for pre-1974 lease proceeds should be honored.

Further, the question of repudiation requires a fuller factual analysis than is contained in your draft report. You state that the Tribe should have known in 1968 that BLM was acting adverse to the government's fiduciary obligation to the Tribe because BLM leased the Tribe's mineral rights without

crediting the Tribe's account with the proceeds. No factual evidence is offered to support this assertion, and in fact the evidence would indicate the Tribe was not aware of BLM's adverse position. We provided you with copies of the Field Solicitor's opinions of April 7, 1967 and July 13, 1967 which do not mention any notice to the Tribe of BLM's intention to assert jurisdiction over the leasing of the tracts in question. These opinions are contained in internal memoranda apparently not discussed with or disclosed to the Tribe.

As an alternative theory, your draft report goes on to reason that the 1974 Act itself informed the Tribe that pre-1974 lease revenues other than those held in special deposits would not be paid to it. This reasoning also fails to establish that a "repudiation" took place.

According to the authoritative treatise on Indian law, Cohen's Handbook of Federal Indian Law, 222 (1982 ed.), Congress can abrogate a treaty provision unilaterally, even to the point of terminating entirely the trust obligation. The same is true in the case of non-treaty tribes. But a court will not assume that Congress abdicated its powers over a tribe or its property without a clear expression of that intent. Chippewa Indians v. United States, 307 U.S. 1 (1939); United States v. Boylan, 265 F.2d 165 (2d Cir. 1920). Such intent must be found from clear and convincing evidence in the legislative history of a statute, and the 1974 Act and its history simply do not amount to a repudiation.

Prior to passage of the 1974 Act there was considerable

confusion about whether BLM lease proceeds were in "special deposits." In fact, at the House Subcommittee hearing on Septemer 14, 1973 (the unedited, unpublished transcript of which we have reviewed in Washington, but a copy of which is not available), statements were made that BLM lease money had gone into accounts in the USGS in Casper. The chairman of the Chippewa-Cree Tribe, John Windy Boy, testified at this hearing. In answer to a question by Mr. Meeds, he agreed that the Tribe was satisfied with the terms of the existing mineral leases on the tracts in question. However, contrary to your assertion in footnote 4 on page 8 of "Enclosure II" of your draft report, Mr. Windy Boy did not testify that the Tribe had decided, by resolution, not to seek recovery of payments previously made by lessees to the BLM. That statement was made by the attorney for one of the oil & gas companies, and the Tribe's attorney actually testified he knew nothing of such a resolution. The Tribe has been unable to locate such a resolution. One can only speculate about the oil company attorney's motive in stating such a resolution existed, especially because his remark was a complete non sequitur in the context of the discussion in that hearing. Because this phantom resolution does not exist and because the mention of it by the oil company representative was out of context, the Tribe cannot be charged with actual knowledge that Congress intended to repudiate its trust duty to pay all revenues to the Tribe.

At the markup session on October 11, 1973, it appears there was clarification regarding the pre-Act BLM lease proceeds

for the congressmen present. However, the Tribe was not represented at that session, nor has the transcript previously been available to the Tribe or readily available to anyone else. Thus, in the absence of clear and convincing factual proof, the Tribe cannot be held to have known of a repudiation.

Nor are the subsequent identical committee reports by the House and Senate, dated March 13, 1974 and May 6, 1974 respectively, (which are readily available) so clear on the issue of special deposits as to give notice to the Tribe of a repudiation. At one point the reports state:

> The Bureau of Indian Affairs contends that the mineral interest underlying lands patented to the private parties was in the public domain and was transferred to the tribe in trust by the 1939 Act. The Bureau of Land Management has proceeded upon the basis that such interest did not constitute public domain and that title remained in the United States. The revenues from mineral leases on such lands have been retained in a special account because of the cloud on the title pending final determination.

The clear implication is that the BLM lease revenues are in a special account, or at least that both BLM and BIA lease revenues are in a special account.

It is true that later on in the same reports, reference is made to "a special account" in which funds were deposited which had been "derived from mineral leases on the original reservation that were consummated by the tribe with the approval of the Secretary." Your analysis of this language is logical in its conclusion that the special account referred to must contain only the BIA lease revenues, but nowhere in the reports is this

spelled out in a clear and unequivocal fashion. Thus the Tribe cannot have been put on notice of a repudiation by the legislative history of the 1974 Act.

Further, the language of section 2 of the 1974 Act, which also is readily available, can be read as clarifying that Congress intended its declaration of tribal ownership of all interests in the land in question, including mineral interests, to have retrospective effect. To emphasize this retrospectivity, the Act specifically mentions what must happen to pre-Act revenues. The Act does not say that only money held in special deposits is to be paid to the Tribe - it is not restrictive language, merely descriptive.

As your draft report points out in its analysis of post-Act interest, the relevant date for statute of limitation purposes is either the date of repudiation of the trust, or the date of the Tribe's discovery of the government's mismanagement. It is not the time legislation was passed to clarify ownership interests of the mineral estates. Since repudiation has never occurred, and 1979 is the earliest possible "discovery" date, the six year limitation is no bar in this case. Therefore, the Tribe should be paid the money due it from the pre-1974 BLM leases, with interest.[1/]

1/ In this respect it is interesting to note that BIM actually credited the Tribe's account in 1983 with lease proceeds dating back to February, 1973, the time when the Bullhook Unit was defined and began producing revenues. This indicates even BIM finally recognized the Tribe's entitlement to pre-Act lease proceeds.

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2. THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION HAS HAD RIGHTS TO BOTH SURFACE AND MINERAL ESTATES SINCE LONG BEFORE ANY MINERAL LEASES WERE AWARDED.

In 1974 Congress enacted P.L. 93-285. The Act was designed to declare that "all right, title and interest of the United States in minerals...underlying lands held in trust by the United States for the Chippewa-Cree Indians of the Rocky Boy's Reservation..." was "...held by the United States in trust for the Chippewa-Cree Tribe of the Rocky Boy's Reservation... ." The act goes on to provide that monies received by the Secretary of Interior and held in special deposits should be deposited to the credit of the Tribe.

Conflict within the Department of Interior had been created by BLM as to the status of the mineral estate underlying portions of Rocky Boy's Reservation in 1974. The situation was presented to Congress as follows:

> The Bureau of Indian Affairs contends that the mineral interest underlying lands patented to the private parties was in the public domain and was transferred to the Tribe in trust by the 1939 Act. The Bureau of Land Management has proceeded upon the basis that such interest did not constitute public domain and that title remained in the United States. The revenues from mineral leases on such lands have been retained in a special account because of the cloud on the title pending final determination.

Senate Report No. 93-817, page 2; House Report No. 93-905, pages 2-3. What Congress was presented with, then, were two conflicting views as to the mineral rights underlying the reservation, and the assurance that the revenues derived from the

leases were therefore held in a special account.

A history of the legislation concerning this land should help to clarify this issue. On March 28, 1939, Congress passed Public Law 76-13, which withdrew from the public domain all public domain land in a certain area, and which added that land to the Rocky Boy's Reservation. 53 Stat. 552 (1939). The public domain consisted of lands to which the United States held both the surface and mineral estates, as well as lands to which the United States held only the mineral estates. The surface estates of the lands to which the United States held only the mineral estates had been patented to private individuals under one or another homestead act. In our view, there should never have been any doubt that all the public domain estates held by the United States in that area passed to the Tribe in 1939, including, of course, the just-mentioned mineral estates. The Act is quite clear. It is not necessary to analyze its legislative history to determine its meaning. It added "all public domain land in the ...described area...." to Rocky Boy's Reservation. (53 Stat. 552 (1939) emphasis added.) There is no distinction made between kinds of estates, surface and mineral. Therefore, the mineral estates at issue passed to the Tribe in 1939.

In 1955, the Interior Department Deputy Solicitor rendered an opinion in the case of Devearl W. Dimond on facts virtually identical to ours. Congress had, in 1933, added to the Navajo Indian Reservation "all vacant, unreserved, and undisposed of public lands" within certain areas in southern Utah. The

issue raised was whether oil and gas deposits on lands whose surface rights had been patented under the Stockraising Homestead Act, with minerals reserved to the U.S., passed to the Tribe under the 1933 Act. The Deputy Solicitor concluded:

> [T]he fact that one estate-the surface-has been carved out of the public domain by either an entry or a patent under the Stockraising Homestead Act does not make that which is left--the mineral estate--any the less "land." British-American Oil Producing Co. v. Board of Equalization of Montana et al., 299 U.S. 159 (1936); Solicitor's opinion, 59 I.D. 393 91947).
>
> The act of March 1, 1933, withdraws from all forms of entry or disposal "all vacant, unreserved and undisposed of public lands" in a described area and sets these lands aside for the benefit of the Indians. While it may be admitted that the surface estates in the lands embraced in Mr. Dimond's offers were not vacant, unreserved, or undisposed of when the 1933 act was passed, the mineral estates in those lands meet the test of the act. . .
>
> As the mineral estates in those lands were vacant, unreserved and undisposed of when the 1933 act was passed, it must be held that those estates are within the scope of the act and that the oil and gas deposits in those lands are not subject to disposition under the terms of the Mineral Leasing Act. Cf. United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938).

Devearl W. Dimond, 62 I.D. 260, 262 (1955).

The Solicitor rendered a somewhat similar opinion in 1947 in response to a question raised by BLM's predecessor, the General Land Office. In 1945, the Secretary of the Interior ordered restoration to tribal ownership of "all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation." The question was whether

this order restored to tribal ownership minerals underlying the lands within an area the surface of which had already been disposed of under other laws. Ownership of Minerals in Patented Lands Within the Unitah and Ouray Indian Reservation, Utah, 59 I.D. 393 (1947). The issue had been raised because the description of the lands, in the order, was "approximately 217,000 acres of unallotted lands" and "a limited additional acreage of land of similar character" which "may later be included within this class of undisposed-of opened land." 59 I.D. at 395.

> [I]t is contended [by the General Land Office] that, literally construed, the order restored only the 217,000 acres of unallotted lands mentioned therein and such other lands as might later be included as undisposed-of lands by relinquishment and cancellation of homestead entries, particularly since the order makes no mention of minerals or mineral lands.
>
> I do not believe that the order of August 25, 1945, is susceptible of the construction mentioned in the preceding paragraph. . . The order restores "all lands which are now or may hereafter be classified as undisposed-of opened lands" of the reservation. The minerals in place are a part of the land. The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less "lands." British-American Oil Producing Co. v. Board of Equalization of Montana et al., 299 U.S. 159 (1936).

59 I.D. at 395-96. It is particularly noteworthy that the Secretary's 1933 order described the land in terms very similar to those used, in Rocky Boy's instance, in the 1939 Act.

Interior's 1947 and 1955 opinions, described above, leave

no room to doubt that the "public domain land" conveyed to Rocky Boy's in 1939 included the minerals remaining in the public domain at that time. See also General Crude Oil Company, 19 IBLA 245 (1975) and Solicitor's opinions M-36745 (April 19, 1968) and M-36776 (May 7, 1969).

It is ironic that when the Bureau of Land Management decided in 1967 to question Indian title and proceeded to enter into oil and gas leases ignoring that title, it did so under the Mineral Lands Leasing Act of 1920, 30 U.S.C. 181 et seq. The Mineral Lands Leasing Act is, in the words of Congress itself, "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." 41 Stat. 437, ch. 85 (emphasis added). See also McKenna v. Wallis, 200 F.Supp. 468, 474 n.21 (E.D.La. 1961). Also, the Stock-Raising Homestead Act of 1916, under which the surface patents had probably been issued, reserves minerals subject to disposal under the coal and mineral land laws in effect at the time of disposal and hence explicitly retains them in the public domain. 43 U.S.C. §299. Hence, by definition, the mineral rights in question were public domain lands subject to the 1939 Act, and they were therefore added to the reservation by operation of the 1939 Act.

As an historical matter, by 1939 mineral rights were considered as useful as surface rights to the Indian tribes. The United States no longer envisioned Indians solely as farmers and ranchers assimilated into the dominant society. The Indian Reorganization Act, 25 U.S.C. Sections 461-479, was passed in

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1934 and laws for the leasing of tribal lands for mining purposes were enacted in 1938. 25 U.S.C. Section 396a-g. Hence, by 1939, Congress was well aware of the value of tribal natural resources, including mineral resources, for purposes of tribal economic development. See also the discussion in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended on other grounds, reh. den. 665 F.2d 1390.

After 1939, lands were acquired for Rocky Boy's Reservation, pursuant to Section 5 of the Indian Reorganization Act of 1934, by the Secretary of Interior. In 1947, these lands were added to the Reservation by proclamation. The lands added by that proclamation included the surface estates which matched the mineral estates which had been added to the reservation by the 1939 Act. Therefore, by 1947, complete title to the lands at issue here was being held in trust for the Tribe by the United States. Even if the 1939 Act had not transferred the mineral estates to the Tribe, the 1947 proclamation alone would have done so. The BLM erred in thinking that the estates were not merged by virtue of the 1947 Proclamation. As the Assistant Secretary of the Interior advised the House and Senate Committees considering H.R. 5525 in 1973:

> We are convinced that the customary legal interpretation should have prevailed as to this land: i.e., the failure of the proclamation to differentiate or even to mention minerals meant that both surface and mineral estates passed as one fee estate into trust status. Enactment of this legislation will insure that such an interpretation does prevail.

Senate Report No. 93-817, page 4; House Report No. 93-905, page 5.

In other words, in 1973, Interior was suggesting to Congress that it should, once and for all, fix the Bureau of Land Management's error about the effect of the 1947 Proclamation.

3. THE TRIBE HAS A TRUST RELATIONSHIP WITH THE UNITED STATES WHICH HAS BEEN BREACHED BY THE GOVERNMENT

The Chippewa-Cree Tribe, like all recognized American Indian tribes, has a fiduciary relationship with the United States. The United States has fiduciary obligations to Indian tribes. Despite the plain meaning of the 1939 Act, the 1947 Proclamation, which clearly placed the mineral rights in the Tribe, and despite the canon of statutory construction in Indian cases that any ambiguity must be resolved in favor of the Indian tribe especially where the legislation was designed to benefit the Tribe (Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918), the BLM proceeded in 1967 to lease the minerals in question under the Mineral Land Leasing Act of 1920 to the benefit of the United States alone. The Tribe was not notified of the BLM's actions.

Federal officials are held to "moral obligations of the highest responsibility and trust" and "the most exacting fidicuary standards" and the United States is "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." Cohen, Handbook of Federal Indian Law,

APPENDIX IV

1982 Ed., p. 266. See also Seminole Nation v. United States, 316 U.S. 286, 297 (1942); United States v. Payne, 264 U.S. 446, 448 (1924). The United States must adhere to the standards of a private fiduciary in administering Indian property, Navajo Tribe v. United States, 364 F.2d 320, 332-324 (Ct.Cl. 1966), and Manchester Band of Pomo Indians, 363 F.Supp. at 1245, and is held to a strict standard of compliance with its fiduciary duties. United States v. Creek Nation, 295 U.S. 103, 110 (1935). These include a duty of loyalty and the corollary principle that a trustee should subordinate its own interests to those of its beneficiary. Cohen, supra at 227. Cf. Navajo Tribe v. United States, 364 F.2d at 322-24.

Cohen's Handbook of Federal Indian Law could have been addressing this very situation:

> Application of a duty of loyalty to administrative officials in their dealings with Indians is of particular importance because conflicts of interest between Indian claims to natural resources and the programs and policies of agencies not directly responsible for Indian affairs frequently impede the faithful discharge of trust obligations to Indians by federal officials.... This is particularly a problem in the Interior Department, where both the Bureau of Indian Affairs and other agencies with different interests are located.

Cohen, at 227-28.

This case is also very similar to that of Navajo Tribe v. United States, 364 F.2d 320 (Ct.Cl. 1966). In 1942 an oil company leased tribal land for oil and gas purposes. When the company discovered helium, which it had no desire to produce, it

notified the United States Bureau of Mines, an agency of the Department of the Interior, of its intent to surrender the lease to the tribe. At the government's suggestion, it instead assigned the lease to the United States Bureau of Mines. The Navajo Tribe sued, contending that the government should have informed it of the discovery and let the lease be surrendered to the tribe so that the tribe could negotiate a new lease, conceivably with the Bureau of Mines. Despite the government's need for helium during wartime, the Court of Claims agreed. The court stated that "[t]he case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." 364 F.2d at 324. The Navajo Tribe was awarded damages for the government's wrongful conduct. Likewise, Rocky Boy's should be repaid the money the United States has wrongfully withheld from it.

The funds in question are the proceeds of leases on Rocky Boy's property, and funds produced by tribal activities or from tribal property are, when kept in the Treasury, held in trust for the Indians. Cheyenne-Arapahoe Tribes of Indians v. United States, 512 F.2d 1390, 1392, 206 Ct.Cl. 340 (Ct.Cl. 1975), and cases cited therein. In the management of Indian trust funds, the United States "'has charged itself with moral obligations of the highest responsibility and trust. Its conduct .... should therefore be judged by the most exacting fiduciary standards.'" Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238, 1243, (N.D.Cal. 1973), quoting Seminole Nation v.

United States, 316 U.S. 286, 296-97 (1942). These obligations are "doubly strict when the defendant, by retaining Indian moneys in the Treasury, in effect borrows those funds." Cheyenne-Arapahoe Tribes, 512 F.2d at 1392. The possibility that an agency other than the Bureau of Indian Affairs may have been responsible for the failure to meet any such obligations in no way relieves the United States of the liability for that failure. Id. at 1395 n. 8. Furthermore, the control that the United States has over tribal property in no way permits it to appropriate the property for its own purposes even if the appropriation takes place by mistake. United States v. Creek Nation, 295 U.S. 103 (1935).

The Tribe should not suffer financially because the BLM, an agency of the United States government charged with responsibility for these funds, failed to meet the fiduciary standards imposed on it. The United States, because of its trust responsibility, must pay the Tribe money derived from tribal lands, with interest, no matter how it has been held by the Government. Therefore, regardless of any other argument which has been set forth in the draft report, the Tribe should receive revenues from pre-1974 BLM leases, with interest, because of the trust responsibility of the United States towards the Tribe.

CONCLUSION

In closing, we agree with your draft report's handling of the legal issues with respect to post-1974 revenues together with interest thereon. As previously stated, we must withhold comment

on the factual issues involved in your financial audit until we have had an opportunity to review the facts and figures that went into the audit.

We disagree with the draft report in its proposed resolution of the pre-1974 revenues, and assert that the statute of limitations has not run on the Tribe's claim. The Act of 1974 and its legislative history do not preclude payment to the Tribe. The trust relationship between the Tribe and the government must be taken into account because the land in question has always been trust land belonging to the Tribe, and a breach of trust would occur if the lease proceeds in question were not paid to the Tribe.

We appreciate your allowing us to comment on the draft report. We hope our discussion on the pre-1974 revenue issues will persuade you to take another look at the Tribe's entitlement to a full and meaningful accounting for such revenues. In any case we ask that you not finalize your draft report until after we have reviewed the underlying documents that were relied on in the audit.

As a final matter, we would like to receive the comments, if any, of the Department of Interior and Senator Melcher's office; we are sending copies of our comments to the Interior Department and to Senator Melcher.

Very truly yours,

Lynn Cianci Eby
Attorney at Law

cc: Chippewa-Cree Tribe of the Rocky Boy's Reservation
Senator John Melcher, Senate Comm. on Indian Affairs
Donald P. Hodel, Secretary of Interior

TRIBAL COMMENTS AND GAO EVALUATION

Luebben, Hughes and Tomita of Albuquerque, New Mexico, attorneys for the tribe, provided comments on behalf of the tribe. They limited their comments to the two legal issues we addressed in our report. The tribe agreed with our conclusion that it is entitled to interest on the royalties collected by the United States between 1974 and 1980 from four of the BLM leases, and between 1974 and 1983 from the fifth BLM lease. The tribe disagreed with our conclusion that its claim for the revenues generated between 1968 and 1974 by the BLM leases is barred by operation of the statute of limitation.

The tribe indicated that our conclusion that the statute has expired is based on an incomplete analysis of the facts. According to the tribe, a fuller factual analysis would show that the United States has not repudiated its obligation to the tribe with respect to the pre-1974 BLM lease revenues, and that even if it had, the tribe could have had no knowledge of such repudiation until 1979 at the earliest. Therefore, the tribe feels that its claim for the pre-1974 BLM lease revenues is timely and that the United States owes it these revenues, with interest, because the United States breached its fiduciary obligation to the tribe by retaining for its own use funds produced from tribal lands.

After evaluating the tribe's comments, we remain convinced that its claim for the pre-1974 revenues is time-barred. We fully analyzed this issue in appendix II. The tribe in its comments did not introduce any factor or argument which we did not consider in our analysis. As outlined on pages 5-7 of appendix II, we found that the language of the 1974 act did not provide for transfer of the pre-1974 BLM lease proceeds and that the legislative history indicates that the Congress specifically intended to transfer only the pre-1974 BIA lease revenues. We conclude that this constitutes a repudiation by the United States.

Although we do not know when the tribe became aware that BLM was acting adverse to tribal interests, one must assume the tribe was aware of BLM's actions when the tribe testified on September 14, 1973, before the Subcommittee on Indian Affairs, House Committee on Interior and Insular Affairs, regarding BLM's leasing of tribal mineral rights. The tribe asked for legislative clarification that the United States held those mineral estates in trust for the tribe.

Regardless of when the tribe became aware of BLM's leasing activities, the 1974 act constitutes notice to the tribe of a repudiation by the United States of any obligation to pay to the tribe the pre-1974 BLM lease revenues. The act itself directs the transfer of only funds held in special deposits on the date of enactment. The recorded legislative history--committee reports and hearing transcripts--indicates that this would result in a transfer of only pre-1974 BIA lease revenues, not pre-1974 BLM lease revenues. The committee reports specifically describe the special deposits and state that the money meant to be transferred was being held in BIA's Billings, Montana, office. The hearing transcripts also indicate that the legislation would transfer only pre-1974 BIA lease proceeds.

The tribe acknowledges in its comments that at the Committee markup session, the Subcommittee Chairman explained that the legislation would transfer only pre-1974 BIA lease proceeds held in the Billings Area Office, not pre-1974 BLM lease proceeds, which had been deposited in the Treasury. But the tribe asserted that that did not constitute notice because the tribe was not represented at that session and transcripts had not previously been available to the tribe or readily available to anyone else. Although the transcripts were not published, they are public documents, which are readily available, and which have always been available, for public review at the offices of the House Committee on Interior and Insular Affairs.[1] (See note 2 on p. 6 of app. II.)

The tribe disagreed, however, with our characterization of its testimony before the Subcommittee on September 14, 1973. On page 6 of appendix II, and in note 3 on page 7, we reported that the Chairman of the Tribal Council testified that the tribe, by resolution, had decided not to request the Congress to transfer payments previously made to BLM. The tribe says that this statement was not part of the Chairman's testimony, that it was made by an attorney for one of the oil and gas companies holding a lease from BLM, and that the tribe's own attorney testified that he knew nothing of the resolution. The tribe also said in its comments that such a resolution does not exist. For these reasons, according to the tribe, the September 14 hearing could not have put the tribe on notice that the legislation would not direct transfer of the pre-1974 BLM lease revenues.

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[1]According to the Committee's staff, Committee rules prohibit releasing unpublished copies of hearing transcripts. Thus, a copy of these transcripts could not be sent to the tribe.

We must disagree. Our review of the hearing transcript indicates that the Chairman of the Tribal Council initially mentioned the resolution himself in responding to a question from the Chairman of the Subcommittee. The Tribal Council Chairman asked the oil company attorney to explain the resolution to the Subcommittee. (When the Council Chairman rose to present his testimony, he had introduced the oil company attorney to the Subcommittee as a support witness accompanying him. The tribe's own attorney explained that the tribe had asked the oil company attorney to appear with the tribe because of the technical nature of the proposed legislation.) The transcript does not show that the Council Chairman disagreed with the oil company attorney's explanation of the resolution. We do not know why the tribe's attorney knew nothing of the resolution.

As we reported in note 3 on page 7 of appendix II, we were not able to find a copy of the resolution or obtain more detailed information about it. We also reported that the tribe advised us it was unable to locate a copy of the resolution. However, we cannot ignore testimony provided the Subcommittee; the fact remains that a representative of the tribe testified that the tribe was not asking for pre-1974 payments made to BLM. This, the other legislative history we recounted in our report, and the plain language of the 1974 act should have indicated to the tribe and its representatives that the tribe would not be paid pre-1974 lease revenues other than those in special deposits.

Because we conclude that the tribe's claim for pre-1974 revenues from the BLM leases is time-barred, we see no need to address the merits of the tribe's argument that the United States breached its fiduciary duty.

In addition to commenting on the legal analysis in our draft report, the tribe asked that we not finalize our report until it reviewed the documents we relied on in our financial audit. We have made those documents available and have explained how we calculated the interest. We recognize that the interest amount is an estimate based on what we consider to be appropriate and reasonable assumptions. However, if the tribe can offer evidence to establish a different estimate, we can reconsider the amount due the tribe. We do not feel it would be appropriate to delay our report for this reason.

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