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Management Division

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Congressional Committees

The purpose of this letter is to provide draft legislation, "American Indian Tribal Trust Fund Reconciliation Act of 1995," for your consideration. In March 1995, we testified¹ before the House Committee on Appropriations Subcommittee on Interior and Related Agencies on the status of the Interior Department's Bureau of Indian Affairs' (BIA) efforts to reconcile Indian trust fund accounts. We discussed reconciliation problems, including missing records, that will prevent BIA from fully reconciling the accounts and suggested that the time had come for the Congress to consider legislating a settlement process to resolve disputes over tribal trust fund account balances. To date, BIA has spent over 4 years and about \$20 million attempting to reconcile tribal trust fund accounts from 1973 through 1992.

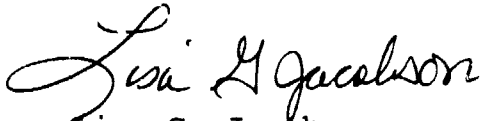
In response to our testimony, the Senate Committee on Indian Affairs and the House Committee on Resources, Subcommittee on Native American and Insular Affairs asked us to prepare draft legislation for discussion purposes. As you know, the American Indian Trust Fund Management Reform Act of 1994 requires the Secretary of the Interior to submit a report to these Committees by May 31, 1996, on the results of the reconciliation. This report is to include, among other things, attestations by account holders that they accept the balances in the reconciled account statements or that they dispute the balances along with the reasons for their dispute, and an explanation of the efforts the Secretary plans to take to resolve the disputes.

The draft legislation that we have enclosed would establish a process for resolving disputed account balances, including mediated negotiation and binding arbitration. In drafting this legislation, we referred to guidance from the Federal Mediation and Conciliation Service and rules of the American Arbitration Association.

¹Financial Management: Indian Trust Fund Accounts Cannot Be Fully Reconciled (GAO/AIMD-T-95-94, March 8, 1995).

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We are sending copies of this letter to the Director of the Office of Management and Budget, the Secretary of the Interior, and other interested parties. If you have any questions on the draft legislation, please contact Thomas H. Armstrong, Assistant General Counsel, at (202) 512-8257.



Lisa G. Jacobson
Director, Civil Audits

Enclosure

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List of Committees

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The Honorable Eni Faleomavaega
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The Honorable Sidney R. Yates
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Committee on Appropriations
House of Representatives

AMERICAN INDIAN TRIBAL TRUST FUND RECONCILIATION ACT OF 1995

SECTION 1. SHORT TITLE; TABLE OF CONTENTS

(a) **SHORT TITLE.** This Act may be cited as the "American Indian Tribal Trust Fund Reconciliation Act of 1995".

(b) **TABLE OF CONTENTS.** The table of contents for this Act is as follows:

Sec. 1. Short Title; Table of Contents

Sec. 2. Findings

Sec. 3. Definitions

Sec. 4. Reconciliation Report

Sec. 5. Mediated Settlement

Sec. 6. Authorization of Arbitration

Sec. 7. Arbitrators

Sec. 8. Authority of Arbitration Panel

Sec. 9. Arbitration Proceedings

Sec. 10. Arbitration Awards

Sec. 11. Judicial Review

Sec. 12. Fees and Expenses

SECTION 2. FINDINGS

The Congress finds that --

- (1) the efforts of the Department of the Interior to reconcile balances of tribal and individual Indian trust fund accounts have become increasingly costly and lengthy, resulting in wasteful expenditures of time, with little likelihood of achieving a consensual resolution of account balances;
- (2) an alternative means of resolving account balances, including negotiated settlements between the government and account holders and binding arbitration, will yield faster, less expensive, and less contentious decisions; and
- (3) such alternative means can lead to more creative, efficient, and sensible outcomes.

SECTION 3. DEFINITIONS

For the purposes of this Act:

- (1) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation

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as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

- (2) The term "Secretary" means the Secretary of the Interior.
- (3) The term "Department" means the Department of the Interior.
- (4) The term "Bureau" means the Bureau of Indian Affairs within the Department of the Interior.
- (5) The term "Special Trustee" means the Special Trustee for American Indians appointed under section 302 of Public Law 103 - 412, 108 Stat. 4239, 4244 (1994).
- (6) The term "Office" means the Office of Special Trustee for American Indians established by section 302 of Public Law 103 - 412, 108 Stat. 4239, 4244 (1994).
- (7) The term "panel" means a panel of arbitrators appointed under section 7 of this Act.

SECTION 4. RECONCILIATION REPORT.

(a) Section 304(3) of Public Law 103 - 412, 108 Stat. 4239, 4248 (1994) is hereby repealed, and replaced with the following:

"(3) identification of the date, for each account in which the account holder disputes the balance as reconciled by the Secretary under this section, on which the Special Trustee, on behalf of the Secretary, will submit the dispute to mediation under section 5 of the American Indian Tribal Trust Fund Reconciliation Act attempting to resolve the account holder's dispute."

(b) Section 304 of Public Law 103 - 412, 108 Stat. 4239, 4248 (1994) is amended with the addition of the following language at the end thereof:

"For accounts for which the account holders have accepted the balances as noted in the report required herein, the Secretary shall record such balances as the accurate balances of those accounts as of September 30, 1992."

SECTION 5. MEDIATED SETTLEMENT.

(a) Upon notification from the Special Trustee, the Director of the Federal Mediation and Conciliation Service shall appoint a mediator to mediate the dispute identified in the

Secretary's reconciliation report to the Congress under section 304(2)(B) of Public Law 103 - 412, 108 Stat. 4239, 4248 (1994).

(b) The Special Trustee, on behalf of the Secretary, shall enter into mediation with any account holder who disputes the balance of the account holder's account as reconciled and reported in such reconciliation report. The Special Trustee shall negotiate in good faith with the account holder to reach agreement on the balance of the account holder's account.

(c) Mediation shall commence on the date identified in the reconciliation report under section 304(3) of Public Law 103 - 412, as amended by section 4 of this Act. Negotiating sessions may take place at any site agreed upon by both the Special Trustee, the account holder, and the mediator. The time and frequency of negotiating sessions shall be determined by agreement of the Special Trustee, the account holder, and the mediator.

(d) (1) The Special Trustee may delegate authority to negotiate any particular dispute to any employee of the Office of Special Trustee.

(2) The Special Trustee, or his delegatee, shall negotiate with any agent or representative of the account holder so designated by resolution of the tribal council of the account holder.

(e) Six months from the date mediation commences, the Secretary shall record, and the account holder and any other party of interest shall accept, as the balance accurate as of September 30, 1992, for any account submitted to negotiations under subsection (a) of this section, the account balance reported by the Secretary to the Congress in the reconciliation report under section 304 of Public Law 103 - 412, 108 Stat. 4239, 4248 (1994), unless --

(1) the Special Trustee and the account holder enter into an agreement, prior to that date, stipulating the correct balance of the account; or

(2) the account holder or his agent, prior to or on that date, notifies the Special Trustee and the mediator that he has decided to submit the dispute, under section 6 of this Act, to binding arbitration for resolution.

(f) The Secretary shall record, and the account holder and any interested party shall accept, as the balance accurate as of September 30, 1992, for any account submitted to mediation under subsection (a) of this section, the balance agreed to by the Special Trustee and the account holder in any agreement negotiated under this section stipulating the correct balance for such account.

(g) Any amounts owed to the account holder by the United States as a result of the Secretary's action under subsection (e) or (f) of this section shall be paid from the Judgment Fund, established by 31 U.S.C. § 1304. The Secretary shall deposit into the

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miscellaneous receipts of the Treasury any amounts owed to the United States by account holders as a result of the Secretary's actions under subsection (d) and (e) of this section.

(h) Notwithstanding any other provision of law, the Secretary, the Special Trustee, the account holder, and any other person affected by an agreement negotiated under this section may bring an action in federal district court for review of such agreement only to enforce the provisions of the agreement. Except as provided in this subsection, any action taken by the Secretary, the Special Trustee or an account holder under subsections (e) and (f) of this section, and under section 304 of Public Law 103 - 412, 108 Stat. 4239, 4248 (1994), shall not be subject to judicial review.

SECTION 6. AUTHORIZATION OF ARBITRATION.

(a) At any time prior to the expiration of negotiations under section 5(e) of this Act, an account holder, by notifying the Special Trustee, may elect to submit his dispute over his account's balance to arbitration. Upon receipt of such notification, the Special Trustee, on behalf of the Secretary, shall enter into the following agreement to arbitrate:

"We, the undersigned parties, hereby agree to submit to arbitration under the American Indian Trust Fund Reconciliation Act of 1995 the following dispute [cite briefly]. We

further agree that we will faithfully observe this agreement and the rules set out in the American Indian Trust Fund Reconciliation Act, that we will abide by and perform any award rendered by the panel of arbitrators thereunder, and that a judgment of the federal district court having jurisdiction may be entered upon the award."

(b) Notwithstanding any other provision of law, an agreement to arbitrate entered into under subsection (a) of this section is enforceable in federal district court, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States.

SECTION 7. ARBITRATORS

(a) Any arbitration proceeding under this Act shall be conducted by a panel of three arbitrators.

(b)(1) At the time the account holder notifies the Special Trustee, under section 6(a) of this Act, of his decision to submit his dispute to arbitration, the account holder shall appoint one arbitrator to the panel of arbitrators. Within five days of receipt of such notification, the Special Trustee shall appoint a second arbitrator to the panel. Within five days after the Special Trustee has appointed the second arbitrator, the first and

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second arbitrators, jointly, shall appoint the third arbitrator from the registry established by subsection (c) of this section. The third arbitrator shall chair the panel.

(2)(A) In the event that either party fails to appoint an arbitrator in accordance with subparagraph (1) of this subsection, the other party shall notify the Director of the Federal Mediation and Conciliation Service. The Director shall advise the party who failed to appoint an arbitrator of his responsibility to make such appointment. If the party notified by the Director has not appointed an arbitrator within five days of such notification, the Director shall appoint the arbitrator from the registry established by subsection (c) of this section.

(B) In the event that the first and second arbitrators are unable to agree on the appointment of the third arbitrator, they shall notify the Director of the Federal Mediation and Conciliation Service, who shall appoint the third arbitrator from the registry established by subsection (c) of this section.

(c) The Director of the Federal Mediation and Conciliation Service shall maintain a registry of individuals who satisfy the criteria for arbitrators set forth in subsection (d) of this section. The chair of each arbitration panel must be selected from this registry.

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(d) An arbitrator may be a permanent or temporary officer or employee of the federal government or any other individual –

(1) who is acceptable to the party appointing the arbitrator, or to the Director of the Federal Mediation and Conciliation Service if the appointment is made under subsection (b)(2) of this section; and

(2) who is a certified public accountant, attorney at law, academician, or executive (or former executive) of a financial institution and who has knowledge of trust fund management.

(e) The appointment of an arbitrator is not subject to judicial review.

(f)(1) An arbitrator may be disqualified by unanimous agreement of the other two arbitrators to the panel if found to have engaged in any ex parte communication, in violation of section 9(d)(2) of this Act, with either party to the dispute before the arbitration panel.

(2) If any arbitrator shall resign, die, withdraw, refuse, be disqualified, or otherwise unable to perform the duties of his office, the vacancy shall be filled in accordance with subsection (b) of this section.

SECTION 8. AUTHORITY OF ARBITRATION PANEL

(a) The panel of arbitrators to whom a dispute is referred under this Act may --

(1) regulate the course and conduct of arbitration hearings;

(2) administer oaths and affirmations;

(3) compel the attendance of witnesses and production of evidence at the hearing by subpoena enforceable by a federal district court; and

(4) make awards.

(b) All procedural and other decisions committed by this Act to the panel of arbitrators, and any award or other resolution under section 10 of this Act of the dispute submitted to the panel for arbitration, shall be made by a majority of the panel members.

SECTION 9. ARBITRATION PROCEEDINGS

(a) Within 15 days after the third arbitrator is appointed under section 7(b) of this Act, the panel of arbitrators shall set a time and place for the hearing on the dispute and shall notify the parties.

(b) Any party wishing a record of the hearing shall –

(1) be responsible for the preparation of such record;

(2) notify the other party and the panel of the preparation of such record;

(3) furnish copies to the other party and the panel; and

(4) pay all costs for such record, unless the parties agree otherwise or the panel determines that the costs should be apportioned.

(c)(1) Both parties to the arbitration are entitled to be heard, to present evidence material to the dispute, and to cross-examine witnesses appearing at the hearing.

(2) The panel, with the consent of both parties, may conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The panel shall conduct the hearing expeditiously and in an informal manner. The panel, if it chooses, may require, at the beginning of the hearing, statements from each party articulating the issues in dispute.

(4) The panel may receive any oral or documentary evidence, except that the panel may exclude evidence it deems irrelevant, immaterial, unduly repetitious, or privileged.

(A) The account holder shall present its claim first, with proof and witnesses who shall submit to questions or other examination by either party or the panel members. The Special Trustee, then, shall present his defense of the account balance reported to the Congress on May 31, 1996, with proof and witnesses who shall submit to questions or other examination by either party or the panel members.

(B) The panel, at its discretion upon the request of either of the parties, may order a prehearing exchange of information by the parties, but only of such documents and summaries of testimony of proposed witnesses included in the parties' requests for information exchange that the panel expects to be relevant and material to resolution of

the dispute before the panel. The panel may not order the deposition of parties or witnesses.

(i) The panel shall deny any request for an exchange of information received by the panel more than five days after notification of the parties of the time and place of the arbitration hearing.

(ii) Any exchange of information must be completed within five days of the date of commencement of the arbitration hearing.

(C) Parties may be represented by counsel.

(D) An arbitration hearing, at the discretion of the panel, may proceed in the absence of either party.

(E) The panel shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d)(1) No interested person shall make or knowingly cause to be made to the panel of arbitrators or any member thereof an ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in

violation of this subsection, the panel shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the panel, to the extent consistent with the interests of justice and the policies underlying this Act, may require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(2) No member of an arbitration panel may engage in an ex parte communication with either party, their agents, officers, employees and staff, including those of the party who appointed the member to the panel, that is relevant to the merits of the arbitration proceeding. Any panel member found in violation of this subsection is subject to disqualification by the other two members of the panel.

(e) The panel shall make its decision resolving the dispute before it within 30 days after the close of the hearing unless the parties agree to some other time limit.

SECTION 10. ARBITRATION AWARDS

(a) The panel of arbitrators, in resolving an account holder's dispute, shall decide the appropriate balance of the account holder's account, and shall award amounts to either

party as necessary to adjust the balance of the account holder's account. The panel may not award punitive or other damages.

(b) The decision of the panel shall be in writing and shall include a brief, informal discussion of the factual and legal bases for the decision and award. The decision shall be signed by a majority of the panel members; no dissenting opinion may be reported.

(c) Within 30 days after the date of the panel's decision under this section, the Secretary shall make any adjustments to the account of the account holder as required by the decision. Any payment to an account holder by the United States as a result of the decision shall be paid from the Judgment Fund established by 31 U.S.C. § 1304. The Secretary shall deposit into the miscellaneous receipts of the Treasury any amounts owed to the United States by account holders as a result of the decision.

(d) A decision made by a panel of arbitrators under this section is binding on both parties to the arbitration proceeding, and may be enforced by a federal district court. No action brought to enforce such a decision shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States.

SECTION 11. JUDICIAL REVIEW

Notwithstanding any other provision of law, any decision made by a panel of arbitrators under section 10 of this Act shall not be subject to judicial review except as provided in section 10(d).

SECTION 12. FEES AND EXPENSES

- (a) Each party to an arbitration under this Act shall bear its own costs and expenses.
- (b) Each arbitrator shall be paid \$3,000 in compensation for serving as a member of an arbitration panel under this Act. Permanent federal employees who serve as members of arbitration panels shall receive no additional compensation.
- (c) There is authorized to be appropriated such sums as may be necessary to the Special Trustee to pay arbitrator's fees, and any administrative costs associated with mediating a settlement and with the conduct of an arbitration hearing.
 - (1) Administrative costs include the rental of space and equipment, including communications equipment if an arbitration panel elects to conduct its hearing or deliberative meetings under section 9(c)(2) of this Act. Administrative costs do not

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include any costs incurred by the parties in representing their positions before the arbitration proceeding.

(2) Administrative costs also include the costs incurred by the Director, Federal Mediation and Conciliation Service, as reported by the Director, at the end of each fiscal year, to the Special Trustee, in carrying out the Director's responsibilities under this Act. Within 30 days after the beginning of each fiscal year, the Special Trustee shall transfer to the Director an amount equal to the total costs incurred by the Director as reported to the Special Trustee. The Director is authorized to retain that amount for expenditure without fiscal year limitation.

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