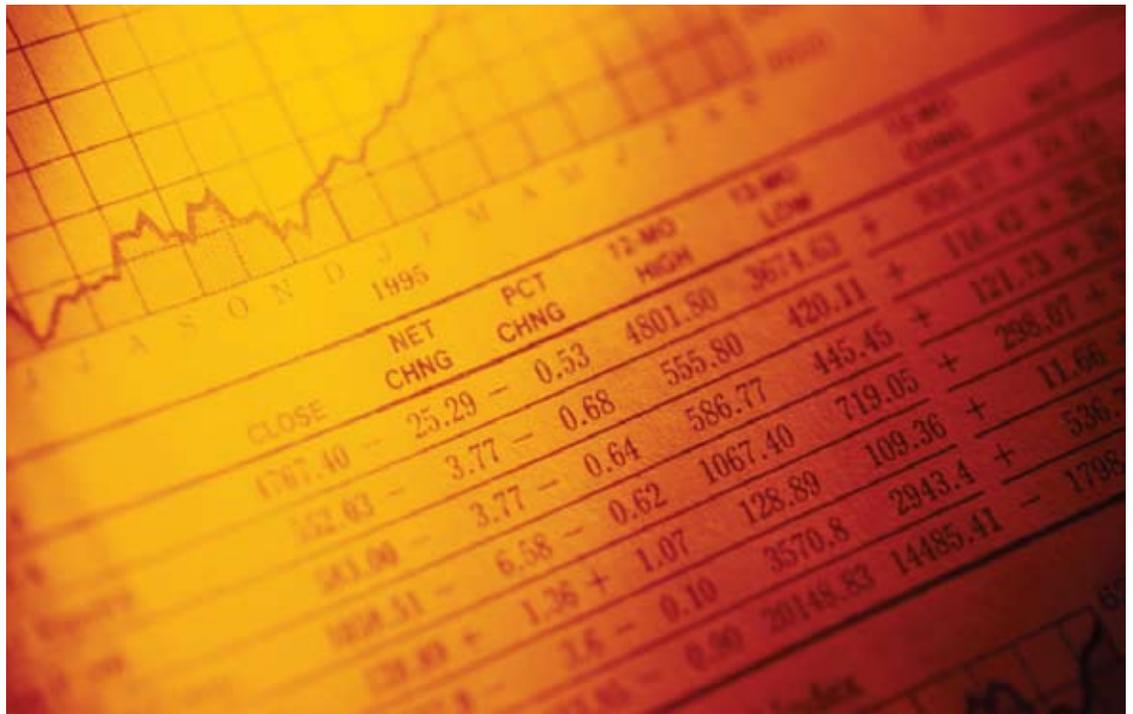


A Tribal Guide to Trust Fund Management

By Paul G. Moorehead

IN JANUARY 1997, 25 CFR, Part 1200 went into effect authorizing Indian tribes, for the first time, to remove from federal trust status certain tribal funds held in accounts by the U.S. government. The regulation does not authorize similar action for individual Indian accounts. The goal is to encourage tribal fund management, liberalize investment options available to tribes and, in the process, maximize returns on investments by having the tribes directly manage the investments of their accounts or by using a commercial fund manager.



This tribal management authority was enacted as part of the comprehensive American Indian Trust Fund Management Reform Act of 1994. Since the regulation was implemented, the U.S. Department of the Interior has held some \$1.5 billion in trust for 240 tribes. To date, no more than 10 have made use of this authority.

History teaches that tribes are skeptical of changes to federal law and policy that bring about a diminishment of the trust responsibility of the U.S. government. Federal statutes now on the books were once viewed as abdications of the federal government's obligation to provide services and programs to tribal governments and Native people, such as the Indian Self-Determination and Education Assistance Act and the Tribal Self-Governance Act. These statutes do not require tribal participation. Rather, they provide a voluntary alternative to the continued provision of services and programs by the U.S. government. Over the past 30 years, tribes have embraced these statutes and now manage more than one-half of the budgets and functions of the Bureau of Indian Affairs and the Indian Health Service.

This article proposes that tribes seriously consider using the 1994 act to take the next step in the slow but steady evolution in tribal self-governance and self-sufficiency by assuming greater control over and deriving higher returns on investment from their tribal trust funds.

LIBERALIZING TRIBAL INVESTMENT OPTIONS

The ISDEAA and TSGA authorize greater degrees of tribal involvement in how tribal funds are managed. Under those statutes, however, the funds remain in federal trust status and, as a result, tribes enjoy fewer investment options than they would otherwise have under the 1994 act. Tribes opting for fund management under these authorities are limited to investing in bank deposits and securities guaranteed by the federal government with modest returns on investment.

Comparing an investment made in government-backed securities versus the same investment in more robust securities is illustrative. From 1997 to 2006, investing in the government credit index of a major investment house would have returned 5.4 percent to the investor on an annual basis, while the same investment in Standard & Poor's 500 would have returned 8.4 percent. By any measure, a 3 percent differential is significant and it is one of the rationales for tribes to consider alternative investment strategies.

FUNDS ELIGIBLE FOR TRIBAL MANAGEMENT

A tribe may withdraw and manage some or all funds that the Interior holds in trust if it submits a plan that meets the Interior's approval. The kinds of funds that may be withdrawn and managed include funds appropriated to satisfy judgments of the Indian Claims Commission and the Court of Federal Claims that are held under the Indian Tribal Judgment Funds Use or Distribution Act or another act of Congress. The tribe must use the funds as specified in the previously approved judgment fund plan. Similarly, the tribe is prohibited from withdrawing funds held for individual tribal members.

Also eligible are funds appropriated by Congress to satisfy settlement agreements related to certain tribal claims provided that the tribe uses the funds as specified in the previously approved judgment fund plan and if the tribe withdraws funds held

only for tribe, not those held for individual tribal members.

Last, a tribe may withdraw and manage the "proceeds of labor," (e.g., income from tribal trust resources) and manage them pursuant to the regulation. Proceeds of labor funds are quite common with nearly all tribes with at least one such account. It is also likely that the proceeds of labor accounts will include the vast majority of funds that are held and currently managed by the federal government. These facts are important, given certain restrictions on the use of withdrawn funds that are discussed below.

The Interior is obligated to provide technical assistance to tribes that do not have the financial resources and technical expertise necessary to develop, implement and manage trust investment plans. Subject to appropriations, it is authorized to make grants to tribes for these purposes. The term "technical assistance" is defined in the regulation to include investment planning, accounting, selection of investment managers, investment monitoring, asset management or other assistance appropriate to support funds withdrawal.

ELIGIBLE USES OF WITHDRAWN FUNDS

With regard to judgment funds or settlement funds approved by Congress, the 1994 act and the regulation make clear that in making withdrawals and managing tribal accounts, a tribe must use the funds as specified in previous judgments by the Indian Claims Commission or Federal Court of Claims or as specified in appropriations or other acts of Congress to satisfy settlement agreements related to tribal claims. These specifications, it must be said, are normally very broadly written to include most social, welfare and economic development activities a tribe may wish to pursue. Neither the 1994 act nor the regulation contain similar restrictions on the use, once withdrawn, of funds contained in proceeds of labor accounts.

WITHDRAWING AND MANAGING TRIBAL ACCOUNTS

To begin the process of managing its accounts, a tribe must submit an application

and various supporting documents to the Interior. These include:

- A notice to tribal members of the tribe's intent to withdraw certain tribal funds from trust and that, if the tribe's application is approved, the request will result in the tribe, not the U.S. government, being liable for funds management.
- A tribal resolution that (1) authorizes the funds to be withdrawn and specifies an approximate dollar value of the funds; (2) acknowledges that once the funds are withdrawn, they will cease to be in trust status and that the United States will not have liability or responsibility for the funds; (3) acknowledges that neither the tribe nor the United States necessarily accepts the account balances as accurate at the time of withdrawal; and (4) provides that neither the tribe nor the United States waives any rights regarding account balances.
- A copy of the agreement between the tribe and its commercial fund manager (if such a manager is involved) in which the fund manager agrees to (1) comply with the terms of the plan approved by the Secretary of the Interior; (2) transfer funds to the tribe or another manager only after receiving a valid tribal resolution, which must state that the withdrawn funds are to be reinvested according to the tribe's goals and strategies laid out in the approved plan; and (3) follow any previously approved fund distribution plan.
- A legal opinion by the tribe's attorney or general counsel that states (1) the resolution was enacted pursuant to the tribe's organic laws; (2) the tribe's governing body has authority to withdraw the specified funds from trust; and (3) the withdrawal does not require a referendum or other vote beyond a tribal council resolution. The opinion must also discuss whether the funds are judgment or settlement funds and how the tribe's plan for managing them meets the requirements of the judgment fund's use and distribution plan.
- The results of a tribal referendum on withdrawal, if one was held.

CREATING TRIBAL MANAGEMENT PLAN (TRIMP)

The regulation prescribes that a TRIMP must include:

- The tribe's investment goals and strategies for achieving them.
- A description of the protections against substantial loss of principal.
- A copy of the tribe's ordinance related to oversight of the withdrawn funds.
- Specific protections against fraud, abuse and violations of the management plan.
- A description of the tribe's previous experience, if any, in managing invested funds, including audited reports of tribally managed funds.
- A description of the capability of individuals or investment institutions that will be involved in managing and investing the tribe's funds.

SECRETARIAL REVIEW AND APPROVAL OF TRIMP

After reviewing the recommendations of the Office of Special Trustee for American Indians (OSTAI), the Secretary is required to approve or disapprove a TRIMP within 90 days of receiving a completed application. If a tribe submits an incomplete plan, the OSTAI will notify the tribe and afford it an opportunity to complete the plan and resubmit it to the Secretary. In reviewing the plan, the Secretary will determine if it is "reasonable in light of the trust responsibility and principles of Indian self-determination, and other appropriate factors." The touchstone of the Secretary's review, then, will be whether the TRIMP is "reasonable," which, in turn, will be judged by reference to: (1) the trust responsibility; (2) principles of Indian self-determination; and (3) other appropriate factors.

Other factors include an evaluation of the individuals managing the funds or advising the tribe on investments to gauge whether they have the necessary capabilities and experience, what their record of performance is and whether they have the ability to compensate the tribe for any failure to comply with the management plan.

The Secretary will review the tribe's experience in managing investments and juxtapose that experience against the "complexity of the proposed management plan" to determine whether the tribe can proceed with the plan or should "begin with a less

if such notice is accompanied by a tribal resolution certifying that the funds will be managed under the same previously approved TRIMP and the most recent audit or investment report. After a review of these documents by the Secretary, the funds may

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complex approach." The Secretary will also review the tribe's internal audit and control systems for overseeing management and investment activity and the adequacy of protection against substantial loss of principal, which will include "a thorough examination of the tribe's investment plan."

WITHDRAWN FUNDS AND THE FEDERAL TRUST RESPONSIBILITY

The regulation provides that "the trust responsibility ends" for withdrawn funds as of the date of withdrawal. This means that the United States will not be liable for decisions or losses as a result of mismanagement or investment decisions it would otherwise make as trustee for funds remaining under its tutelage. Once a tribe has withdrawn its funds, it may revise the plan without Secretarial approval. Under such circumstances, any change "should" conform to the approved TRIMP with an appropriate notice to tribal members.

Once the TRIMP is approved, a tribe may withdraw additional funds if it notifies the Secretary of the funds to be withdrawn and

be withdrawn. A tribe may elect to return some or all of its withdrawn funds, but it must first notify the Secretary of the date of the proposed return and specify the amount of funds to be returned. Further, the tribe may return all or a portion of the principal withdrawn, in addition to earnings and profits.

CONCLUSION

In an era when tribes are assuming ever-greater control over the programs and services for their members, their lands and their affairs, it makes sense for them to consider similarly aggressive management of tribal trust funds. The act and the regulation can serve to afford tribes wide latitude in how and under what circumstances they choose to manage their own funds. ■

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