

MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND

SEVENTEENTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS



APRIL 22, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, April 22, 1992.

HON. THOMAS S. FOLEY,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's 17th report to the 102d Congress. The committee's report is based on a study made by its Environment, Energy, and Natural Resources Subcommittee.

JOHN CONYERS, Jr., *Chairman.*

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HOUSE OF REPRESENTATIVES

REPORT
102-499

MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND

APRIL 22, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on Government Operations, submitted the following

SEVENTEENTH REPORT

BASED ON A STUDY BY THE ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE

On April 1, 1992, the Committee on Government Operations approved and adopted a report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." The chairman was directed to transmit a copy to the Speaker of the House.

I. ABSTRACT

The Bureau of Indian Affairs [BIA] was created as a part of the War Department in 1824¹ and transferred to the Department of the Interior at the time of that Department's creation in 1849.² The Snyder Act of 1921³ provided authority to carry out the government's relationship with and responsibilities toward native Americans. The scope and character of the BIA's activities were broadened by the Indian Reorganization Act of 1934,⁴ the Indian Self-Determination and Education Assistance Act of 1975⁵ and title XI of the Education Amendments of 1978.⁶

The Bureau of Indian Affairs has a duty to actively encourage and train native Americans and Alaska Natives to manage their

¹ 19th Congress, first session, House document 146, at 6.

² Act of Mar. 3, 1849, c. 108 § 1, 43 U.S.C. 1451, 9 Stat. 395.

³ 25 U.S.C. 13, 42 Stat. 208.

⁴ 25 U.S.C. 461 et seq., 48 Stat. 984.

⁵ 25 U.S.C. 450, 88 Stat. 2203.

⁶ 20 U.S.C. 270, Public Law 89-10, 92 Stat. 2153.

own affairs; to seek adequate educational opportunities in public education systems; to promote and improve the social welfare of native Americans and Alaska Natives and provide needed social and community development; and to work with native Americans in the development and implementation of programs for their economic advancement and for full utilization of their natural resources consistent with the principles of resource conservation. Additionally, the Bureau acts as trustee for federally recognized tribes and their enrolled members. As trustee for lands and money held in trust by the United States, the BIA is responsible for managing and investing almost \$2 billion in tribal and individual Indian funds.

The Bureau of Indian Affairs' [BIA] management of Indian trust funds is the subject of this report. These trust funds include the tribal trust fund and the individual Indian money [IIM] trust fund. As of September 30, 1991, approximately 330 tribes have an interest in the tribal trust fund; however, some tribes have multiple accounts. As a result, approximately 2,965 separate accounts comprise the tribal trust fund. The tribes do not participate equally in the fund. In fact, according to Bureau of Indian Affairs' Office of Trust Fund Management, 77 percent of the Fund assets are held by 8 percent of the tribes.⁷

The IIM trust fund is a deposit fund, usually not voluntary, for individual participants and tribes. It was originally intended to provide banking services for legally incompetent Indian adults and Indian minors without legal guardians. In addition to these fiduciary accounts, the IIM trust fund now contains deposit accounts for certain tribal operations and for some tribal enterprises. Approximately 300,000 accounts are held in the IIM trust fund.

Scores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

During the subcommittee's four oversight hearings on this subject, subcommittee members expressed serious concern over the Bureau's inexcusable slowness in resolving the persistent management deficiencies that have plagued the trust fund program. Now, over 2 years after the subcommittee's first oversight hearing, our continuing review suggests that only marginal progress has been made by the Bureau of Indian Affairs in recognizing and correcting these problems.

The committee is particularly troubled by BIA's efforts—undertaken only grudgingly—to implement repeated congressional directives designed to provide a full and accurate accounting of the individual and tribal account funds. Over the course of the Environment, Energy, and Natural Resources Subcommittee's 3-year investigation, only minimal progress on this effort has been made, and BIA continues to move at a snail's pace. The committee is equally

⁷ Arthur Andersen & Co., "Tribal and Individual Indian Moneys Trust Funds Managed by the U.S. Department of the Interior, Bureau of Indian Affairs, Financial Statements as of Sept. 30, 1988, Together With Report of Independent Public Accountants." Mar. 23, 1989, at 6.

concerned over the BIA's failure to implement numerous inspector general recommendations regarding establishment of a trust fund loss policy; failure to prepare and implement a strategic management plan as urged by the Office of Management and Budget,⁸ the Comptroller General of the United States,⁹ the House Committee on Appropriations,¹⁰ and the subcommittee; its failure to comply with the Brooks Act, governing acquisition of automatic data processing equipment and services; and, its failure to implement past recommendations of the Committee on Government Operations. In short, the Bureau of Indian Affairs has repeatedly failed to take resolute corrective action to reform its longstanding financial management problems.

Additionally, the Bureau wasted more than 2 years and as much as \$1 million of taxpayer money attempting—inappropriately and unsuccessfully—to privatize its financial management responsibilities over the Indian trust fund. In fact, despite the contractor's repeated failures to deliver anything of value in return for substantial monthly payments for services, the Bureau never even bothered to demand performance by the contractor. Moreover, the Bureau persisted in its attempts to transfer financial management services for the Indian trust to a commercial bank even after Congress had directed it not to do so—five times. And in its ultimate affront to Congress and the accountholders of the Indian trust fund, the Bureau gave a \$5,000 cash award for management excellence to the headquarters employee who helped design and oversee this privatization fiasco.

The Bureau has repeatedly ignored directives to undertake needed management reform measures. For example, in September 1989, the inspector general of the Department of the Interior recommended that the Bureau establish written procedures that describe when the Bureau is liable for losses of Indian trust funds and how Indian accountholders will be reimbursed in those cases for which the Bureau is liable and to prepare and implement a Bureau procedure that recognizes investment losses of trust funds and ensures that reimbursement of the losses plus interest will be made, where appropriate, within a reasonable time after sustaining the losses. Two and one-half years later, little has been done. Although a loss policy statement was distributed sometime after October 16, 1991, it fails to make anyone at the Bureau of Indian Affairs accountable for its implementation or enforcement. Significantly, this so-called loss policy developed by the Bureau—apparently without the assistance and concurrence of the Office of Solicitor at the Department of the Interior—misstates the Federal Government's legal and ethical responsibility to pay interest on individual Indian money accounts that are invested. This so-called loss policy confuses examples in which the fiduciary—the Bureau of Indian Affairs—is clearly responsible to repay interest earned in

⁸ Letter from Executive Associate Director, Office of Management and Budget to Under Secretary of the Interior, Oct. 4, 1989, attachment B.

⁹ Letter from Director of Civil Audits, U.S. General Accounting Office to Assistant Secretary of the Interior for Indian Affairs, May 6, 1991.

¹⁰ House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations Report, 1992, House Report 102-116, 102d Congress, 1st session, June 19, 1991, at 62.

instances in which IIM account proceeds are either not invested or underinvested. Moreover, no accountholders, who suffered losses which were discovered prior to BIA's recent effort to audit and reconcile tribal and IIM accounts, have been notified of losses as a result of the policy and no funds have been requested from Congress for reimbursements and no reimbursements for losses resulting from Bureau errors have been made. This so-called loss policy is superficial at best, and is unlikely to correct well-documented deficiencies and long overdue reforms.

The Bureau has been slow to implement other reform directives. For example, in October 1989, the President's Office of Management and Budget identified the Bureau of Indian Affairs' management of the Indian trust fund as a high risk activity and directed the Department "to identify its weaknesses in the Department's budget and operating plans to assure that appropriate resources were allocated to correct the problems."¹¹ In other words, the Bureau needed to amend its plans for correcting longstanding financial management deficiencies in BIA's management of the Indian trust fund. At the subcommittee's May 20, 1991, hearing, the Bureau stated that it had not developed a comprehensive plan to correct all control weaknesses. In fact, there still is no plan.

In November 1990, President Bush signed the Chief Financial Officers [CFO] Act.¹² Among other things, that act required 23 executive agencies to reorganize their financial management systems, organization, and staffing to remedy longstanding financial management problems. This was another opportunity for the Bureau to address its longstanding financial management problems fully and forthrightly. However, BIA has not yet selected its Bureau CFO, who would be responsible for Indian trust funds and financial management, among other duties.

On May 6, 1991, the Comptroller General of the U.S. General Accounting Office [GAO] wrote Secretary of the Interior Manuel Lujan, Jr., and the Bureau directing the Department and BIA to prepare a written statement of actions to be taken to complete and to correct the management deficiencies plaguing the Bureau; to develop plans and timetables for completing the audit and reconciliation of Indian trust accounts; and to develop policies and procedures to ensure that Indian trust fund balances remain accurate after the accounts are reconciled. Under Federal law the Department of the Interior was obligated to respond to the Comptroller General's recommendations by July 7, 1991. It failed to do so. In fact, the Department of the Interior's August 1, 1991, response failed to adequately address any of the Comptroller General's recommendations.

Finally, at the subcommittee's May 20, 1991, oversight hearing, Chairman Synar asked the Bureau about progress on a BIA strategic plan as well as the Bureau's efforts to implement the Committee on Government Operations' July 1985 report addressing the persistent problems in implementing a comprehensive program to

¹¹ Letter from Executive Associate Director, Office of Management and Budget to Under Secretary of the Interior, Oct. 4, 1989, attachment B. See also: Secretary of the Interior, "Annual Statement and Report, Federal Managers' Financial Integrity Act," Dec. 21, 1989, at 2.

¹² 5 U.S.C. §§ 5313, 5315; 31 U.S.C. §§ 501, 502-506, 901, 902, 903, 1105, 3511, 3512, 3515, 3521, 9105, 9106; 38 U.S.C. 201; 42 U.S.C. § 3533; Public Law 101-576, 104 Stat. 2044.

assure fair and timely payment of Indian oil and gas royalty payments—management and accounting problems related to those confronting the Indian trust funds. The Bureau reported at that time—6 years later—that no such plan exists. In fact, the Bureau admitted that no interest from royalty income has been distributed to an accountholder since 1985. Indeed, most of the problems noted by the committee's 1985 report persist unabated.

The subcommittee's review of the Bureau's various management improvement initiatives revealed that comprehensive corrective actions were rarely undertaken and almost never carried through to a successful conclusion. Instead, the Bureau has routinely compiled running inventories of projects and initiatives without even attempting to knit these efforts together into a cohesive framework. Although the Bureau is chronically behind schedule—even on self-imposed deadlines—it rarely bothers to justify or even explain its delays in implementing corrective actions. Indeed, the only thing that seems to stimulate a flurry of activity at the Bureau is an impending appearance by the Assistant Secretary of Indian Affairs before a congressional committee. Afterward, all reform activities appear to suspend until shortly before the next oversight session.

As a result of this dismal history of inaction and incompetence, there is no assurance that the Bureau actually desires to, or will, make any substantial advancement toward rectifying the basic financial management failures brought to their attention. Despite a decade of initiatives, the Bureau's headquarters leadership and accountability continue to be woefully inadequate. Although many significant problems continue to be cited by the inspector general, GAO, OMB, by independent accounting firms, and the Subcommittee on Environment, Energy and Natural Resources, the Bureau's top officials remain quick to promise, but slow to perform. Only marginal and grudging progress has been made by the Bureau since the subcommittee began its oversight efforts in 1989. As a result, on the whole, the subcommittee is unable to report a positive picture of the Bureau's headquarters' concern over the management of this program.

This absence of interest and attention by the Bureau's top officials also undermines the ability of many dedicated, hard-working Bureau employees—especially at area and agency offices—to effect improvements in service to Indian trust fund accountholders. It is apparent that top officials at the Bureau of Indian Affairs have utterly failed to grasp the human impact of its financial management of the Indian trust fund. The Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans.

To the extent the Bureau has made any progress in this area, it appears that the subcommittee's continuing oversight hearings have been virtually the only reason. It can only be hoped that the Committee on Government Operations' report and recommendations will have a still greater effect on the Bureau of Indian Affairs' management of the Indian trust funds.

II. BACKGROUND

The system of trusteeship and Federal management of Indian funds is deeply rooted in Indian-U.S. history. Treaties are the first and probably most important means by which trust funds were held by the United States for the benefit of individual Indians or tribes. While the earliest treaties did not provide that the United States retain funds in trust for the tribes, in 1820 the Federal Government adopted the policy of holding tribal funds in trust.¹³

The various Indian trust fund account balances now total about \$2 billion. Federal law¹⁴ requires that these moneys be deposited in the U.S. Treasury or managed in trust by the United States.¹⁵ Since 1918,¹⁶ the Interior Department's Bureau of Indian Affairs has had the legal authority to invest Indian funds held in trust. However, it was not until 1966 that the Bureau exercised its full range of investment authority authorized by statute.¹⁷ Until 1984, these funds on deposit in the Treasury earned simple interest at 4 percent per year. After 1984, the Secretary of the Treasury was permitted to pay a variable rate of interest on these funds, taking into consideration current market yields on U.S. obligations of comparable maturities.¹⁸ Now, BIA is authorized to withdraw tribal and individual Indian money trust funds from the Treasury and deposit the funds in financial institutions yielding higher rates of return. To ensure the safety of these funds, such investments must be unconditionally secured either through Government deposit insurance or through pledging collateral guaranteed by the U.S. Government.

Historically, the trust fund comprised three types of funds held by the United States: (1) Indian moneys, proceeds of labor [IMPL], including all proceeds of "pasturage and sales of timber, coal or other product of any Indian Reservation * * * and not the result of labor of any member of such tribe"; (2) tribal and individual Indian money [IIM] accounts; and (3) tribal trust funds, often containing payments for cession of land. Today, IMPL accounts are being phased out and replaced by tribal and individual accounts pursuant to a 1981 act of Congress.¹⁹ Accordingly, the \$2 billion in trust

¹³ Letter to Treaty Commissioners, October 18, 1820, reprinted in "American State Papers, Indian Affairs," vol. 2 at 233.

¹⁴ 25 U.S.C. 152, Act of Jan. 9, 1837, c. 1, § 1, 5 Stat. 135; 25 U.S.C. 162a, 52 Stat. 1037.

¹⁵ 25 U.S.C. 162a, 52 Stat. 1037.

¹⁶ Act of May 25, 1918, c. 86 § 28, 40 Stat. 591; repealed by section 2 of act of June 24, 1938, 25 U.S.C. 162a, 53 Stat. 1037.

¹⁷ From the 1920's to the mid 1960's, most tribal funds were maintained in the Treasury and paid interest under the authority of 25 U.S.C. 161a, act of Feb. 12, 1929, c. 178, § 1, 45 Stat. 1164, which provides "that all funds with account balances exceeding \$500 held in trust by the United States and carried in principal accounts on the books of the Treasury Department to the credit of Indian tribes, upon which interest is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum." This occurred because a return of 4 percent per year was considered adequate by BIA and because there were very few investment opportunities within the confines of 25 U.S.C. 162a, that is, unconditional security. However, in the early 1960's some BIA area offices began to withdraw balances from the Treasury and invested in bank certificates of deposit (CD's) at whatever rates were available. BIA headquarters adopted its first formal investment program and policy in 1966. Subsequently, responsibility for investments was moved from area offices to centralized location at Albuquerque, NM. For discussion, see: American Indian Policy Review Commission, Task Force No. 9, "Financial Management of Indian Funds by the Bureau of Indian Affairs," Aug. 18, 1976, at 306.

¹⁸ 25 U.S.C. 161a, as amended Oct. 4, 1984, Public Law 98-451 § 1, 98 Stat. 1729.

¹⁹ 25 U.S.C. 155b, 96 Stat. 839, Public Law 97-257; 95 Stat. 1400, Public Law 97-100.

funds now consists chiefly of tribal and individual accounts. These funds are derived from a variety of sources, including: judgments awards; oil and gas royalty income; land leases; timber stumpage; and investment income. One of the largest sources of income to the tribal trust funds consists of judgments from Indian Claims Commission cases.²⁰

Congress has carefully regulated the disbursement of Indian trust funds. In 1916, Congress prohibited expenditures from tribal funds without specific appropriation by Congress except for the following categories: equalization allotments; education of Indian children; and per capita and other payments.²¹ Over the years, these limitations have been broadened to include use of trust funds to purchase insurance for protection of tribal property, travel and other expenses of tribal councils and other organizations to any purpose designated by the governing body of the particular tribe, provided that the Secretary of the Interior approves.²²

The Federal courts have held that the Government's fiduciary duties to native Americans are determined first by Federal statutes and, in the absence of particular authority, by the "relationships between the Government and the particular tribe."²³ The most fundamental fiduciary responsibility of the government, and the Bureau, is the duty to make a full accounting of the property and funds held in trust for the 300,000 beneficiaries of Indian trust funds. This function includes the continuing obligation to report to the tribes and individual accountholders about the Federal Government's management of the trust funds. The standard for this reporting as set down by the courts is to inform the tribe "in clear terms the specific investments made with the Band's [that is, tribe's] money, the rate of interest, and the amount earned on each investment."²⁴

The Government's obligation to account for Indian trust funds requires it to "affirmatively establish that it [has] properly discharged its trust."²⁵ Indeed, the Government's failure to demonstrate the accuracy of its accounting of trust funds could be adjudged sufficient to establish the Government's liability to the tribes for a breach of its fiduciary duties.

Apart from the duty to account, the Federal Government has a fiduciary duty to "maximize the trust income by prudent investment," and the burden to justify less than a maximum return.²⁶ This responsibility requires the Government to stay well-informed about the rates of return and investment opportunities and to intelligently choose from among authorized investment opportunities to obtain the highest rate of return to make the trust funds productive.

²⁰ 25 U.S.C. § 70, act of Aug. 13, 1946, c. 959, § 1, 60 Stat. 1049, the Indian Claims Commission jurisdiction over claims accruing prior to Aug. 13, 1946, was terminated on Sept. 30, 1978. The U.S. Claims Court now has jurisdiction, 28 U.S.C. 1505, Federal Courts Improvements Act of 1982, Public Law 97-164, 96 Stat. 252.

²¹ 25 U.S.C. 123, act of May 18, 1916, c. 125, §27, 39 Stat. 158.

²² 25 U.S.C. 123 a, act of Apr. 13, 1926, c. 118, 44 Stat.; act of Aug. 2, 1946, c. 754, 60 Stat. 852; 25 U.S.C. 123 b, act of May 9, 1938, c. 187, 1, 52 Stat. 315.

²³ *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980).

²⁴ *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238, 1248 (N. D. Cal. 1973).

²⁵ *Navajo Tribe*, *supra* at 988.

²⁶ *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975).

The Federal Government's duty to make the Indian trust funds productive also extends to the collection and disbursement processes. Tribal income deposited in the Treasury must be invested in interest-bearing accounts within 30 days after receipt by Government agents.²⁷ Moreover, the Federal Government is responsible for interest lost by delays beyond 30 days in depositing funds,²⁸ and it is liable for lost interest caused by an inordinate delay between the date of withdrawal from the Treasury, when the funds stop earning interest, and the date of actual disbursement.²⁹

Thus, the role of the Bureau in management and supervision of the Indian trust funds is the result of a complex set of responsibilities imposed by treaties, statutes, and court decisions. However, the Bureau's fiduciary responsibilities are not dissimilar to the duties performed by many private trustees.

The challenge for the Bureau is to provide competent and reliable trust services. To fulfill these important obligations it is necessary for the agency to fully understand both its fiduciary duties and the financial marketplace. Stated simply these fundamental assignments are: To accurately account to the beneficiary; to make accounts productive for the beneficiaries; and to maximize the trust income through prudent investment. To successfully perform these tasks, the Bureau of Indian Affairs, as any fiduciary, must conduct itself as a sophisticated investor, a smart shopper, and a highly diligent and resourceful manager.

Unfortunately, as discussed more fully in the next section, the Bureau has not succeeded at any of these tasks. It has not efficiently and effectively managed the Indian trust fund. Moreover, the Bureau of Indian Affairs has failed to perform responsibilities as a sophisticated trustee. In sum, the Bureau has failed to fulfill its fiduciary responsibilities.

III. TRUST FUND MANAGEMENT PROBLEMS ARE NOT NEW

On October 26, 1989, April 24, 1990, September 25, 1990, and May 20, 1991, the Environment, Energy, and Natural Resources Subcommittee held public hearings to review the problems surrounding BIA's management of the \$2 billion Indian trust fund. Evidence gathered and testimony presented to the subcommittee during this on-going investigation demonstrate that despite clear guidance on its fiduciary duties contained in treaties, law, and court decisions, the BIA's indifferent supervision and control of the Indian trust funds has consistently resulted in a failure to exercise its responsibility and any reasonable expectations of the tribal and individual accountholders, Congress, and taxpayers.

Few of these BIA management problems are new. For example, in 1828—just 4 years after its creation—H.R. Schoolcraft described the Bureau's financial management as follows:

The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appro-

²⁷ *Menominee Tribe v. United States*, 107 Ct. Cl. 23, 32-33 (1946).

²⁸ *Southern Ute Tribe v. United States*, 17 Ct. Cl. 28, 41 (1966).

²⁹ *Te-Moak Band of Western Shosone v. United States*, 23 Ind. Cl. Comm. 70, 80 (1970).

priations had been handled with a pitchfork * * * there is a screw loose in the public machinery somewhere.³⁰

One hundred sixty-three years later, Schoolcraft's assessment of the BIA's financial management still rings true. BIA's administration of the Indian trust fund continues to make the accounts look as though they had been handled with a pitchfork. Undoubtedly, there is a screw loose in the public machinery at the Bureau. Indeed, while mismanagement of the Indian trust fund has been reported for more than a century, there is no evidence that either the Bureau or the Department of the Interior has undertaken any sustained or comprehensive effort to resolve glaring deficiencies.

Today, BIA has serious financial management problems permeating almost every aspect of its five trust principal accounting systems, as well as, other systems which provide financial information to those systems including the Mineral Management Service's royalty management systems. While tribes, individual Indians and Congress have long been concerned about the accuracy of BIA's accounting for trust receipts and disbursements, the Bureau and the Interior Department have simply failed to undertake effective, corrective actions.

For example, in 1982, the General Accounting Office [GAO] reported³¹ that BIA's appropriation and trust fund accounting systems needed major improvements. At that time GAO found that the information produced by BIA's accounting system was unreliable; that trust accounts had not been reconciled with the agency's general ledger to ensure correct account balances; and that controls over cash receipts and disbursements were inadequate.

These 1982 findings were not new. Essentially, the same findings were embodied in the GAO's 1928, 1952, and 1955 audits of the Indian trust fund:

* * * deficiencies include disbursements of individual Indian moneys without adequate support, deficiencies in accounting for cash and bonds and in the computation and distribution of interest income, and other weaknesses in internal procedures.³²

At the subcommittee's May 20, 1991, oversight hearing, the General Accounting Office provided the following summary of the long-term problems in the Bureau of Indian Affairs' administration and management of the \$2 billion Indian trust fund:

³⁰Schoolcraft, personal memoirs, at 319, reprinted in "The Office of Indian Affairs, Service Monographs of the United States Government No. 48," Institute for Government Research, the Johns Hopkins Press, 1927, at 27.

³¹U.S. General Accounting Office, "Major Improvement Needed in the Bureau of Indian Affairs' Accounting System," Report No. GAO/AFMD-82-71, Sept. 8, 1982, at 5, 11, 13, 14, 15, and 17. See also: U.S. General Accounting Office, "Indian Funds, a Report of the Amount of the Funds of the Indians, the Investment Thereof, the Rate of Interest Thereon Together With Comments Pertinent to the Use Made of Such Funds," U.S. Senate Document No. 263, 70th Cong. 2d Sess., Feb. 25 (calendar day, Mar. 1), 1929. U.S. General Accounting Office, Study and Investigation for the Purpose of Ascertaining the Amounts of the Funds and Securities of the Several Indian Tribes, Including Those of Tribal Organizations, Whether Held in the Treasury of The United States, in Private Banks or Elsewhere," Report No. I-17218, Apr. 1, 1952. U.S. General Accounting Office, "Audit Report to the Congress of the United States, Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," Report No. B-114868, November 1955.

³²U.S. General Accounting Office, "Administration of Individual Indian Moneys by Bureau of Indian Affairs," B-114868, November 1955, at 1.

- (1) Inadequate systems for accounting for and reporting trust fund balances;
- (2) Inadequate controls over receipts and disbursements;
- (3) Absence of periodic, timely reconciliations to assure accuracy of accounts;
- (4) Inability to determine accurate cash balances;
- (5) Failure to consistently and prudently invest trust funds and/or pay interest to account holders;
- (6) Inability to prepare and supply accountholders with meaningful periodic statements of their account balances;
- (7) Absence of consistent, written policies and procedures for trust fund management and accounting; and
- (8) Inadequate staffing, supervision, and training.

Just since 1982, more than 30 audits have been performed by the Office of Inspector General [OIG] of the Department of the Interior and public accounting firms hired by BIA.³³ Each of these reports have noted serious accounting and financial management problems and weak internal controls throughout BIA. Following is a summary of the OIG findings:

Individual Indian money accounts.³⁴—The BIA does not have a centralized managerial operation with responsibility and control over all aspects of the individual Indian money operation. Many BIA agency offices did not reconcile their account balances with BIA's control account balances, did not meet their trust responsibilities relating to funds held in supervised accounts, and made significant errors in computing interest payable on IIM's. The BIA agency offices have numerous accounting errors and other internal control weaknesses.

Oil and gas royalty payments.³⁵—Royalties were not distributed to Indian mineral owners in a timely manner. Interest earned on oil and gas revenues deposited in special accounts and U.S. Treasury accounts were not distributed to tribes and individual Indians. Oil and gas collections were not deposited on time.

Judgment award funds.³⁶—Improper accounting entries and inadequate internal controls resulted in overdisbursements of judgment award funds and negative account balances. Permanent investment accounts were reduced below authorized levels. Funds were not distributed to IIM accountholders.

Leasing and realty operations.³⁷ Agricultural lands remained unleased for extended periods, and leases were not

³³See, for example: Office of Inspector General, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, Sept. 29, 1989; Price-Waterhouse, "Task Reports," 1983 and 1984; Arthur Andersen & Co., "Tribal and Individual Indian Monies Trust Funds, Report of Independent Auditors," Financial Statements as of Sept. 30, 1989 and 1988, May 11, 1990.

³⁴Nine OIG audits from 1983 to 1988. See: Inspector general, U.S. Department of the Interior, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, September 1989, appendix 2, at 22.

³⁵Four OIG audits from 1983 to 1986, *Id.* at 23.

³⁶Ten OIG audits in 1988, *Id.* at 23-24.

³⁷Five OIG audits from 1982 to 1984, *Id.* at 24-25.

reissued in a timely manner. Fair market rental rates and grazing fees were not charged. Delinquent rents were not collected, and interest was not collected on late rental payments. Rents were not properly allocated to landowners and concerns about the accuracy of land ownership records were raised, particularly in relation to handling of estate transactions.

Extensive as they may seem, the inspector general reports present a short list of the financial management and accounting failures of BIA. Indeed, these difficulties are symptomatic of the chronic problems of BIA management—problems magnified by an accounting system that cannot tell the tribes and individual Indians or IIM accountholders how much money they have in their accounts.

In 1982, Congress passed the Federal Managers' Financial Integrity Act [FMFIA]³⁸ directing each executive agency to review and evaluate its systems of management and accounting controls in order to enhance the integrity and effectiveness of Government operations. In its first report under FMFIA in 1983, and for each year thereafter, the Department of the Interior has reported serious, longstanding financial management problems at BIA. In fact, in its 1990 FMFIA report, the Department of the Interior characterized the entire Bureau as a material internal control weakness.³⁹

In its most recent FMFIA report, the Department again cited the BIA for inadequate management of trust funds:

The Bureau's management of Individual Indian Monies (IIM) and Tribal trust funds is inadequate to properly maintain and administer the \$2 billion fund for which it has responsibility. The BIA's management of Tribal and Individual Indian Trust Funds lacks effective management/internal controls, reliable systems, and management information. Tribal and individual accounts lack credibility and have never been reconciled in the entire history of the trust fund.⁴⁰

Despite its candor in outlining the complete absence of effective financial management and control at the BIA, the FMFIA report supplies little evidence that the Bureau has actively pursued corrective actions of previously identified material internal control weaknesses. In its December 17, 1990, audit report,⁴¹ the Office of Inspector General [OIG] raised serious concerns about the Bureau of Indian Affairs' compliance with the act. The OIG evaluated actions taken by the Bureau: (1) To correct previously reported material internal control weaknesses; (2) to assess component risk; and

³⁸ 31 U.S.C. §§ 1105, 1113, Public Law 97-452, 96 Stat. 2467.

³⁹ Letter of the Secretary of the Interior to the President, Dec. 12, 1990, at 4. See also: Inspector general, U.S. Department of the Interior, "Bureau of Indian Affairs Compliance With the Federal Managers' Financial Integrity Act of 1982 for Fiscal Year 1990," Report No. 91-I-220, Dec. 20, 1990, at 4, 6, 9, and 11.

⁴⁰ The Federal Managers' Financial Integrity Act, "Secretary's Annual Statement and Report to the President and the Congress," U.S. Department of the Interior, Dec. 13, 1991, at D-3.

⁴¹ Inspector general, U.S. Department of the Interior, "Final Audit Report on the Bureau of Indian Affairs Compliance With the Federal Managers' Financial Integrity Act of 1982 for Fiscal Year 1990," Report No. 91-I-220, Dec. 17, 1990.

(3) to document actions to correct weaknesses identified by current control evaluations. The OIG found that:

* * * the management control evaluation process implemented by the Bureau did not fully comply with the requirements of the Act. Specifically, we found that the Bureau had not effectively corrected 11 previously reported weaknesses that were deleted from its corrective action tracking system, updated the component inventory, conducted adequate risk assessments, conducted evaluations or tests in accordance with guidelines, and maintained an effective tracking system to verify that corrective actions were completed. Accordingly, there was no assurance that all weaknesses were identified or that control systems were operating as intended.⁴²

The most recent FMFIA report provides little evidence that actions completed in 1991 corrected previously identified material internal control weaknesses and the planned action cited in the report for 1992 would not correct all of the fundamental control weaknesses, which include longstanding financial management deficiencies.⁴³

In 1983, the accounting firm of Price Waterhouse reported to BIA that its accounting systems and control procedures were inadequate.⁴⁴ Among the deficiencies noted, Price Waterhouse found that:

Many control systems lack clear assignment of responsibility or are not properly assigned. For example, control to assure that reconciliations between agency and accounting system records are performed and that [unreconciled]

⁴² *Id.* at memorandum, 4, 9, 11, and 12.

⁴³ *Supra* at D-3 and D-4. The FMFIA report identifies six corrective actions completed during 1991: (1) Established investment oversight advisory committee that includes tribal accountant representatives; (2) developed custodial position for physical securities and collection of investment income; (3) established and staffed managerial positions and organizational units for trust fund management; (4) requested OIG to certify that reconciliation procedures are sufficient to comply with Appropriations Committees [sic] requirements; (5) collected and identified all available records for three agencies and reconciled IIM accounts; and (6) requested OIG to certify that the audit plan meets the requirements of the Appropriations Committees [sic].

One of these accomplishments [No. 5 above] appears to be overstated: Arthur Andersen has completed a full-scale reconciliation for fiscal year 1990 transactions at the Olympic Peninsula Agency only; no other IIM accounts had been reconciled. See: Arthur Andersen & Co., "Bureau of Indian Affairs, Trust Funds Reconciliation Project Overview Presentation," Jan. 28, 1992, at 15-16, 19, 20, and 21 (document available in subcommittee offices).

None of the tasks identified in the FMFIA report addresses the previously reported material internal control weaknesses including the following longstanding deficiencies: (1) Inadequate systems for accounting for and reporting trust fund balances; (2) Inadequate controls over receipts and disbursements; (3) Absence of periodic, timely reconciliations to assure accuracy of accounts; (4) Inability to determine accurate cash balances; (5) Inability to prepare and supply accountholders with meaningful periodic statements of their account balances; and (6) Absence of consistent, written policies and procedures for trust fund management and accounting.

Establishment of an investment oversight advisory committee could prove helpful for future investment activity, but its establishment will not correct greater investment difficulties identified by Price Waterhouse, the American Indian Policy Review Committee, the OIG, GAO, Arthur Andersen, and others. The two personnel initiatives could prove helpful, but longstanding staffing, supervision, and training problems remain.

For 1992, the FMFIA report promises to: "establish/implement automated system enhancements for Bureau's investment and IIM systems." Meanwhile, development of a new accounting system (the single most important previously reported material internal control weakness which is one of the Bureau's paramount needs according to GAO, OIG, and independent public accountants) is not scheduled for completion until October 1993.

⁴⁴ Price Waterhouse, "Task IV: Cash Management, Accounting System and Control-Related Issues," Dec. 29, 1983, at II-20. Price Waterhouse was retained by the Bureau to complete an in-depth review of the Bureau's financial management of the Indian trust fund.

items are identified and corrected on a timely basis has not been clearly defined.

The Arthur Andersen & Co.'s fiscal year 1988 and 1989 financial audits of the trust funds confirmed the historic weaknesses of BIA's accounting controls. Indeed, those reports found that the "accounting systems and internal control procedures utilized by the Bureau suffer from a wide variety of procedural weaknesses and other problems * * * some of these weaknesses are so pervasive and fundamental as to render the accounting systems unreliable."⁴⁵ As a result of these problems, Arthur Andersen was unable to confirm cash balances for individual or tribal accounts, highlighted major inadequacies in accounting records and related systems, and found numerous accounting errors during its audit. Moreover, the report identified 16 material accounting system and internal control weaknesses that Arthur Andersen & Co. said required immediate attention.

In 1989, in response to the long-term nature of BIA's mismanagement of the Indian trust fund and BIA's other persistent management failures and deficiencies, the President's Office of Management and Budget [OMB] identified BIA as a "high-risk" agency requiring priority attention.⁴⁶ At that time, OMB directed the BIA to prepare a strategic plan for corrective action on these problems.⁴⁷ At the subcommittee's May 20, 1991, oversight hearing, the Assistant Secretary of the Interior for Indian Affairs confirmed that the Bureau had not complied with the OMB directive. The President's budget for fiscal year 1993 expressed "reservations about the adequacy of progress and/or plans."⁴⁸ The President's fiscal year 1993 budget proposal requests an additional 40 full-time employees for the Office of Trust Management and an additional appropriation of \$5 million "to enhance management oversight, improve accounting and investment services and establish a cadre of systems experts to work on identified long range improvements to trust fund operations, systems and clientele services."⁴⁹

IV. COMMITTEE INVESTIGATION

In the spring of 1989, the Environment, Energy and Natural Resources Subcommittee initiated an investigation of problems associated with the Bureau of Indian Affairs' management of the Indian trust fund.

⁴⁵ Arthur Andersen & Co., "Financial Statements as of Sept. 30, 1989 and 1988, together with Report of Independent Public Accountants," May 11, 1990, at 8. Arthur Andersen & Co. was retained by the Bureau to conduct an audit of trust fund financial statements as of Sept. 30, 1988, and Sept. 30, 1990. See description of Arthur Andersen's scope of engagement in Oct. 26, 1989, hearing at 152.

⁴⁶ Budget of the United States Government, Fiscal Year 1992, 102d Congress, 1st session, Feb. 4, 1991, House Document 102-3, part 2, at 306; Letter from the Secretary of the Interior to the President, Dec. 21, 1989, Secretary's Annual Statement and Report, Federal Managers' Financial Integrity Act.

⁴⁷ Letter from the Secretary of the Interior to the President, Dec. 21, 1989, Secretary's Annual Statement and Report, Federal Managers' Financial Integrity Act; Office of Management and Budget, "High Risk Areas Requiring Priority Attention" [title], November 1989, all agencies required to prepare and submit strategic plan to correct identified weaknesses.

⁴⁸ "Budget of the United States Government, Fiscal Year 1993," Jan. 29, 1992, part 1, at 334, 345; President's "progress report" described the status of BIA's efforts to correct high risk mismanagement of the Indian trust fund.

⁴⁹ U.S. Department of the Interior, "Justification for Appropriations, Fiscal Year 1993," February 1992.

The investigation was prompted by frustration over BIA's failure to adequately respond to previous committee reviews and recommendations for corrective action, and by large number of complaints about the Bureau's efforts to procure financial management services for management and administration of the Indian trust fund. The subcommittee was assisted in the investigation by the General Accounting Office [GAO].

The purpose of the subcommittee investigation was to review and evaluate the Bureau's efforts to correct chronic management deficiencies that have plagued the trust fund program as well as its efforts to implement repeated congressional directives designed to provide a full and accurate accounting of the individual Indian and tribal account funds.

During the Subcommittee's inquiry, the Subcommittee staff and GAO collected and reviewed extensive data and interviewed numerous Bureau and Department of the Interior headquarters, regional, area, and agency officials and employees.⁵⁰

During the course of the investigation, the Subcommittee held public hearings on October 26, 1989, April 24, 1990, September 25, 1990, and May 20, 1991, in Washington, DC, and received testimony from the following witnesses:

(1) Hon. Eddie F. Brown, Assistant Secretary of Indian Affairs, U.S. Department of the Interior, accompanied by Walter Mills, Deputy, Operations; Linda Richardson, Assistant Director for Administration, Financial Management; William P.

⁵⁰During the Subcommittee's investigation, Subcommittee staff interviewed officials representing the following locations: Bureau of Indian Affairs: Washington, D.C.; Anadarko Agency Office; Albuquerque, New Mexico, Western Headquarters; Fort Peck Agency Office, Uintah & Ouray Agency Office, Olympic Peninsula Agency Office. Office of Inspector General: Washington, D.C. Office of the Solicitor: Washington, D.C.

During the Subcommittee's investigation, the General Accounting Office collected and reviewed data and interviewed the following personnel: Department of the Interior, Washington, DC: David Moran, Office of Solicitor, attorney for BIA Indian issues and Jerry Feily, Office of Inspector General, auditor BIA reviews. Bureau of Indian Affairs, Headquarters, Washington, DC: William Bettenberg, Deputy Assistant Secretary; Linda Richardson, Budget Director; Tom Thompson, Special Assistant to the Deputy Assistant Secretary; Dave Matheson, Deputy Commissioner; Antony Howard, Chief, Division of Contracting and Grants Administration; Peter Markey, Contracting Officer; Sam Adams, Division of Personnel Management; Ronal Eden, former Acting Assistant Secretary; Steve Gleason, former Special Assistant to the Assistant Secretary; Stan Speaks, former Acting Deputy Commissioner; Walter Mills, Former Deputy to the Assistant Secretary; Betty Wilkinson, former Chief, Division of Accounting Management; Arlene Brown, former Project Manager for the Trust Fund's Security Pacific National Bank contract. Bureau of Indian Affairs, Western Area Headquarters, Albuquerque, N.M., Office of Trust Funds Management: Jim Parris, Director; Don Gray, project leader, Trust Fund Reconciliation Project; Barton Wright, staff member, Trust Fund Reconciliation Project; Joe Weller, staff member, Trust Fund Reconciliation Project; Sara Yepa, section chief, Tribal Trust Fund Accounting; Kathleen Ramirez, acting section chief, IIM Accounts; George Gover, former Acting Director. Bureau of Indian Affairs, Western Area Headquarters, Division of Accounting Management: Rodney Young, former Division Chief; Terry Garrett, project leader, Financial Management Improvement Program. Bureau of Indian Affairs, Uintah and Ouray Agency Office: Violet Schildt, Uintah & Ouray administrative officer; Sylvia Carter, personnel assistant and acting IIM supervisor; Kathy Appawoo, IIM clerk; Carlean Kurip, IIM clerk (temporary); Sharon Novanick, IIM clerk (temporary); Shanna Wopsock, IIM clerk (temporary); Roland McCook, supervisor, Real Property Management; Diane Mitchell, Oil and Gas Section, clerk. Bureau of Indian Affairs, Fort Peck Agency Office: Jay Daniels, realty specialist and IIM reconciliation project coordinator. Bureau of Indian Affairs, Olympic Peninsula Agency Office: Barbara Fairchild, Indian self-determination specialist. Bureau of Indian Affairs, Portland Area Office, Portland Oregon: Petra Hatch, assistant area financial officer. Bureau of Indian Affairs, Office of Data Systems: Jim Roubidoux, Director, National Technical Service Center; Dave Henderson, Branch Chief, Applications Support Branch. Office of Management and Budget, Washington, DC: Kathleen Turco, Financial Management Division, management examiner; Ron Cogswell, Financial Management Division, Interior branch; Frank Stedman, Financial Management Division, Interior branch; Bob Tuccillo, Budget Division, budget examiner; Rich Kodl, program evaluation and economic development specialist.

Ragsdale, Acting Assistant Secretary; Ron Crammer, contracting officer; Betty Wilkinson, Division Chief, Accounting Management; Arlene Brown, trust fund contract project leader; Joseph Weller, Chief, Division of Trust Fund Management; Fred Kellerup, investments officer; George T. Skibine, attorney, Division of Indian Affairs, Solicitor's Office; Jim Parris, Chief, Branch of Trust Fund Accounting; and George Gover, implementation manager, Office of Trust Fund Management;

(2) Lou Gallegos, Assistant Secretary for Policy, Management and Budget, U.S. Department of the Interior;

(3) James R. Richards, inspector general, U.S. Department of the Interior;

(4) Robert Hunter, Associate General Counsel, Office of the General Counsel, U.S. General Accounting Office; accompanied by Alan Belkin, and John Carter, senior attorneys; and Jerrold D. Cohen, Assistant General Counsel;

(5) Jeffrey C. Steinhoff, Director, Civil Audits, Accounting and Financial Management Division, U.S. General Accounting Office, accompanied by Gayle Condon, Assistant Director; Robert Wagner, audit manager; Tom Armstrong, Office of General Counsel;

(6) George E. Tallchief, principal chief, Osage Tribe of Oklahoma Indians, and president, National Tribal Chairmen's Association, accompanied by Clarence W. Skye, executive director, United Sioux Tribes of South Dakota Development Corp.;

(7) Jo Lynn Gentry, Navajo Nation, policy specialist, First Nations financial management project, accompanied by Marcella Giles, Creek Tribe, research director;

(8) Elouise Cobell, controller, Blackfeet Nation, representing the Ad Hoc Tribal Advisory Committee on BIA Trust Fund Management, accompanied by Mary Ann Antone, legislative counsel member, Tohono O'odham Nation; Sue Lara, controller for the Jicarilla Apache Tribe; Lonnie Points, certified public accountant, Bland, Batesman & Associates, Turtle Mountain Tribe; D. Michael Petersen, certified public accountant, financial management specialist for the Red Lake Band of Chippewa Indians; and Dan Press, of counsel, Van Ness, Feldman & Curtis; and

(9) Tanya Parker, First Nations financial project.

Representative Sidney R. Yates (D-IL), chairman, House Subcommittee on Interior Appropriations, submitted testimony for the record.

Although the subcommittee's investigation identified some limited effort to improve BIA's management of the Indian trust fund, clearly a great number of serious problems continue to exist. These problems were explored in-depth at the subcommittee's four hearings and are discussed in the following sections.

A. BIA'S FAILURE TO COMPLY WITH CONGRESSIONAL DIRECTIVES

Historically, BIA has performed virtually all trust management functions in-house. These functions include the receipt, control, investment, and disbursement of trust funds.

As noted earlier, scores of reviews of the Bureau's management since 1982 confirm that BIA's financial management system has failed to provide adequate accounting and other information needed for proper control over the trust fund investment program. For example, the Bureau does not—and cannot—conduct periodic or timely reconciliations of the approximately 300,000 accounts in the Indian trust fund to assure they are accurate. The Bureau does not—and cannot—provide accountholders with accurate periodic statements of account balances. These deficiencies have been exacerbated by the fact there has been virtually no oversight of trust fund administration from BIA headquarters.⁵¹

The following exchange between Chairman Synar and Department of the Interior Inspector General James R. Richards during the subcommittee's May 20, 1991, hearing illustrates the dilemma of dealing with these BIA problems:

Mr. SYNAR. Mr. Richards, what is Congress to do [about these continuing problems]?

Mr. RICHARDS. I am not a Congressman and I am not Chairman of the Subcommittee, but I would be tearing my hair out, I think.

Mr. SYNAR. The Subcommittee is holding its fourth hearing since October of 1989, on the Bureau's mismanagement of the Indian Trust Fund. I know you are well aware we have worked hard and long to force the Bureau to clean up its act.

After all this time and inaction by BIA, are you convinced that the Bureau is truly receptive to doing the things that must be done to get this house in order?

Mr. RICHARDS. I think it is. Let me tell you why I say that. The Bureau is a multifaceted monster. It is an organizational nightmare.

Mr. SYNAR. That may be the understatement of the year.

Mr. RICHARDS. I have been familiar with the Bureau of Indian Affairs and Indian programs for 30 years, having grown up in the West and worked for a Western Senator and worked with the Department of Interior.

I think the Bureau of Indian Affairs will not change until there is some political consensus in that it must change. It is the favorite * * * target of everyone who is shocked by its ineptitude and its insensitivity.

Yet, when we try to restructure it either from a Congressional sense or from an Executive Branch sense, there are always naysayers and there never develops a political sense for positive change.

Mr. SYNAR. But there is political consensus that we [must] have a basic accounting for the tribes and individuals?

Mr. RICHARDS. No question about that.

Mr. SYNAR. You don't need change to do that?

⁵¹ Oct. 26, 1989, hearing at 42.

Mr. RICHARDS. No question about that. The BIA is a tinder box simply waiting for a spark.⁵²

Despite decades of criticism about these manifest management deficiencies, the BIA has failed to take adequate measures to correct its shortcomings or to implement the advice of its own experts. For example, a 1984 Price Waterhouse report on trust fund operations recommended that the BIA: (1) Define responsibilities of trust fund financial management officials; (2) prepare an up-to-date policy and procedures manual for the central office and agency offices; (3) segregate the tasks of investment and management and security custody; (4) establish an on-going audit function; (5) implement a single trust accounting system; (6) implement an improved system for tracking expected income; (7) implement a deposit reporting service; (8) modify cash deposit procedures by establishing more local depositories; establishing fund concentration accounts in a major commercial bank; and, using a balance reporting service with a major commercial bank; and (9) consider a shift of BIA disbursement activities to a commercial bank.⁵³

That Price Waterhouse report, more than any other, gave upper level BIA management the basis for considering a financial services contract with a major commercial bank. Ironically, few of the Price Waterhouse recommendations have actually been implemented by the BIA. Instead of correcting its own management and accounting problems, BIA seized upon the Price Waterhouse recommendations—particularly establishing fund concentration accounts in a major commercial bank; using a balance reporting service with a major commercial bank; and, shifting BIA disbursement activities to a commercial bank—as justification for attempting to privatize financial management of the Indian trust funds. Between 1987 and 1989, the Bureau of Indian Affairs spent enormous amounts of time, energy, and taxpayer money attempting—inappropriately and unsuccessfully—to transfer the Indian trust fund financial management to the private sector.

The attraction of privatization among Bureau headquarters personnel was heightened by a report issued by Arthur Andersen in December 1985, summarizing responses from private industry (banks, investment and accounting firms) to a Bureau request for information [RFI].⁵⁴ When more than 100 responses came in from the RFI, it reinforced the Bureau managers' belief that there was significant private sector interest in the BIA trust fund program. Further, the Bureau's managers assumed that there were accounting and management systems—hardware and software—already available on the market to meet BIA's highly specialized needs. With respect to the Security Pacific National Bank contract, discussed in detail below, both of these assumptions were proven wrong.⁵⁵

These assumptions about the private sector supported the already strong belief by then-Assistant Secretary for Indian Affairs

⁵² May 20, 1991, hearing at 82.

⁵³ Price Waterhouse "In-Depth Review of the Indian Trust Funds for the Bureau of Indian Affairs, Task V Recommendations," Jan. 11, 1984, at 5.

⁵⁴ Federal Register notice, Apr. 15, 1987.

⁵⁵ Apr. 24, 1990, hearing at 13-15, Sept. 25, 1990, hearing at 62-63.

Ross Swimmer that privatization of financial management was the answer to most of the Bureau's longstanding trust fund problems. Swimmer's plan called for a commercial bank to take over the processing of cash receipts, through the use of lockbox services and to use an accounts receivable system⁵⁶ for trust income that would feed the lockboxes, and disbursements, investment and trust accounting for the trust fund. In September 1986, BIA awarded a contract for these services to Mellon Bank of Pittsburgh, PA.

Many tribes and beneficiaries objected to the Mellon Bank contract, because tribal representatives were not consulted in the development of the contract.⁵⁷ Moreover, the banking and investment community objected to the lack of open competition for the contract (only six banks with lockbox contracts already in place with the Treasury were even allowed to bid). Finally, serious legal questions were raised about the Bureau's authority to delegate inherently governmental functions such as collection, disbursement, and investment to a third party, and over certain privacy act requirements.⁵⁸ As a result of these questions and concerns, in April 1987, the Mellon Bank agreement was terminated.

Concerned that the Bureau's efforts to execute a financial services contract with a private commercial bank might result in the BIA merely passing off a set of unbalanced books to another party, Congress added a proviso to the fiscal year 1987 Supplemental Appropriations Act prohibiting the Bureau from transferring funds under contract to any private institution until Indian trust fund accounts were audited and reconciled. Subsequently, the fiscal year 1988 Interior and related agencies appropriations conference report included language that prohibited BIA from contracting out trust fund services until an accounting of the funds had been provided to the tribe(s) involved, the proposed contractual agreements had been submitted to and approved by the appropriations committees, and the Bureau had adequately consulted with the affected tribes.

Indeed, the 1987 Supplemental Appropriations Act conference report contained only the first of six successive congressional directives regarding the BIA's responsibility to audit and reconcile all Indian trust fund accounts:

* * * none of the funds in this Act shall be used by the Bureau of Indian Affairs to transfer funds under a contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for such tribe or individual have been audited and reconciled, and the tribe or individual has been provided with an accounting of such funds, and the appropriate committees of Congress and the tribes have been consulted with as to the terms of the proposed contract or agreement.⁵⁹

⁵⁶Under the original contract, the accounts receivable system was to be developed later by BIA.

⁵⁷Oct. 26, 1989, hearing at 49 to 51.

⁵⁸Statement of George Tallchief, principal chief of the Osage Tribe and president of the National Tribal Chairmen's Association, Oct. 26, 1989, hearing at 47-52; See also: additional information supplied for the record, Oct. 26, 1989, at 91-94.

⁵⁹Public Law 100-202, Dec. 22, 1987. See also: Public Law 100-446, Sept. 27, 1988, House Report 100-862 (conference committee). Public Law 101-121, Oct. 23, 1989, House Report 101-121 (conference committee). Public Law 101-512, Nov. 5, 1990, House Report 101-789 (conference committee). Public law 102-154, Nov. 13, 1991, House Report 102-256 (conference committee).

In short, each of these directives clearly specified that Congress fully intended to direct the Bureau to reconcile and audit all Indian trust fund accounts prior to any transfer to a third party. In this respect, it is important to note that the BIA's efforts to privatize the financial management of the Indian trust fund were specifically designed to transfer these funds to a third party even though the Bureau was making no effort whatsoever to begin—much less complete—the auditing and reconciliation process repeatedly directed by Congress.

At the subcommittee's first oversight hearing on October 26, 1989, Chairman Synar asked the BIA whether it had complied with the three separate congressional directives to audit and reconcile Indian trust fund accounts enacted up to that point:

Mr. SYNAR. My question to you is * * * did the Bureau of Indian Affairs comply with * * * [those] Congressional directives?

Mr. EDDIE BROWN. Mr. Chairman, let me state what we are currently doing and then we can back up, if you would like. * * *

Mr. SYNAR. No, I need an answer to that question. Did you comply with those directives?

Mr. EDDIE BROWN. Okay. Let me refer to Mr. Walt Mills, who has a little longer historical [knowledge] as to what took place specifically with those years. * * *

Mr. SYNAR. Mr. Mills.

Mr. MILLS. We have complied with the language to a point. There are some problems that we are having, that it's almost an impossibility for us to reconcile all of the accounts * * * but no funds have been transferred, and in that respect, we have complied with the language by not transferring any funds. * * *

Mr. SYNAR. So you did not comply with the directives, did you?

Mr. MILLS. No funds have been transferred * * *

Mr. SYNAR. Did you audit and reconcile them, as required by the directives?

Mr. MILLS. No, we have not at this time.⁶⁰

The position expressed by BIA officials is disingenuous, at best. For, as noted above, the BIA's effort to privatize the Indian trust fund was premised on an assumption that tribal and individual Indian accountholders' funds would be transferred to a third party prior to audit and reconciliation—even though the Congress expressly prohibited such transfer until after audit and reconciliation. Accordingly, the Bureau's suggestion that it had complied with the congressional directives "to a point," (that is, that it had not yet actually transferred any funds) is, at best, disingenuous.

The BIA contracted with Arthur Andersen & Company to prepare a report on an audit of the trust funds managed by the BIA during the year ending September 30, 1988.⁶¹ And, for a time, the

⁶⁰ Oct. 26, 1989, hearing, at 150.

⁶¹ Arthur Andersen & Co., "Tribal and Individual Indian Monies Trust Funds, Report of Independent Auditors," Financial statements as of Sept. 30, 1989, and 1988; May 11, 1990.

Bureau tried to pass off its arrangement with Arthur Andersen as a full audit and reconciliation as required by law. However, Arthur Andersen informed the subcommittee and the BIA that its work was not intended to meet the audit and reconciliation requirements of the congressional directives. Rather, its work was an "audit of the trust funds (not each of the individual accounts with the funds) and did not result in verification of each individual transaction in each of the approximately 300,000 trust accounts managed by the BIA" as contemplated by Congress. Moreover, the firm's 1988 report noted that "this was the first known financial audit by independent public accountants of the Tribal and Individual Indian Monies [IIM] Trust Funds managed by the Bureau, and the scope of [Arthur Andersen's] engagement was not sufficient with respect to financial statements for preceding periods (from inception through September 30, 1987) to enable us to determine the propriety of trust fund balances resulting from prior activity * * * This scope limitation is a direct result of the BIA not having audits conducted in periods prior to the year ended September 30, 1988."⁶²

Nevertheless, BIA chose to interpret Arthur Andersen's 1988 report as confirmation of the notion that compliance with the congressional directives was simply "impossible." Chairman Synar pursued this argument in the following exchanges at the subcommittee October 26, 1989, oversight hearing:

Mr. SYNAR. The Subcommittee has been in contact with Arthur Andersen & Company * * * This is a letter from Arthur Andersen & Company to the subcommittee. [Exhibit introduced into record.]⁶³ It states that Arthur Andersen did not advise the BIA that it was impossible to audit and reconcile the accounts. Rather, [they] told us that such a task could not be accomplished looking at one year's transactions, which is what Arthur Andersen did. The Arthur Andersen audit was not intended to meet the requirements of the Congressional directive.

Now, in light of this, Mr. Mills, can you explain why the BIA has refused to undertake this [audit and reconciliation] effort, they say it is not impossible. * * *

Mr. MILLS. We feel like it's not impossible. There are some accounts that we feel cannot be reconciled because of the records. At this particular time, we do not know what the scope of the work would be to audit and reconcile all 288,000 accounts. That is what we are trying to get a handle on as far as what resources and how long that would take.

Mr. SYNAR. Did you tell the Appropriations Committee this year that to accomplish this task was impossible?

Ms. LINDA RICHARDSON.⁶⁴ Mr. Chairman, we have on several occasions told the Appropriation Committee that we believed it would be impossible to audit all accounts, yes, sir.⁶⁵

⁶² *Id.* at 8.

⁶³ Oct. 26, 1989, hearing, at 151, exhibit 1, letter to Chairman Synar from Raymond E. Ziler, dated Oct. 2, 1989.

⁶⁴ Director, Bureau of Indian Affairs' Office of Administration.

⁶⁵ Oct. 26, 1989, hearing at 159.

At the close of the subcommittee's October 26, 1989, hearing Chairman Synar sought a promise from Dr. Eddie Brown, Assistant Secretary of the Interior for Indian Affairs, that the BIA would undertake immediate efforts to comply with congressional directives to audit and reconcile all Indian trust fund accounts.

Mr. SYNAR. * * * I have one question and one question only, that I have your commitment and your promise that we are not going to move one penny [to a commercial bank] until these accounts are reconciled and audited; is that your promise to me today?

Mr. EDDIE BROWN. My promise to you today is that we will abide by the language that's in the appropriation and that we will move forward with the Committee.

Mr. SYNAR. That is not what I asked you, because [your] interpretation of that language is not the same as Congress'. I'm asking you again, do you promise me that you will not move one penny of [trust fund] money until those accounts are reconciled and audited?

Mr. EDDIE BROWN. I think the language—and it's important that I be here, because I'm not going to give you my word on something I'm unclear about. I will give you my word on exactly what we agree on here today. The language leaves, appears to leave, some negotiation on how we can legitimately go about, in a realistic manner, and reconcile those accounts. We intend to propose a draft, to sit down with the Committee and work out an agreement on how we can do that. Yes, I am committed to do that and I am committed to carry out that and to ensure that it happens.

Mr. SYNAR. Well, that's disappointing, Dr. Brown, because I'm going to tell you, speaking on behalf of myself and Mr. Yates⁶⁶ and four Congresses, it is our clear intention—and let the Record show—it is our clear intention that these accounts will be reconciled and audited before there is any movement or transfer. If you interpret that any other way, or if your lawyers or your personnel do, you're interpreting it wrong.

Mr. EDDIE BROWN. If that is the case in meeting with the Committee, sir, then I will absolutely carry that out. Let there be no question about it.⁶⁷

Unfortunately, the BIA waited almost 6 months before taking any action to begin to implement the congressional audit and reconciliation directive. In fact, the BIA did not meet with any congressional representative on this matter until the Environment, Energy and Natural Resources Subcommittee staff insisted on such a meeting with BIA on March 12, 1990, almost 5 months after the October 26, 1989 hearing, as discussed with Dr. Brown during the subcommittee's April 24, 1990 hearing:

⁶⁶Hon. Sidney R. Yates, chairman of the House Subcommittee on Interior Appropriations, submitted a statement for the record at the Oct. 26, 1989, hearing. That panel is responsible for the Bureau of Indian Affairs' annual appropriations.

⁶⁷Oct. 26, 1989, hearing at 460-461.

Mr. SYNAR. You were wrong in not following the Congressional intent?

Mr. EDDIE BROWN. As I understand Congressional intent now, clearly I was.

Mr. SYNAR. You were wrong. What assurances do we have that you are not going to be wrong again?

Mr. EDDIE BROWN. The assurances, sir, that myself, as well as Secretary Lujan, have committed ourselves to sit down and to discuss, based on the interpretation, as well as our willingness to put right up front that we want—

Mr. SYNAR. But you didn't do that until after March 12, [1990], did you, Dr. Brown? Sit down with the Committees and staff?

Mr. EDDIE BROWN. No, sir. We—let's see, that is right, sir.

Mr. SYNAR. That is five months after our last meeting, isn't it, Dr. Brown?

Mr. EDDIE BROWN. Yes, sir.

Mr. SYNAR. * * * Dr. Brown, on October 26, 1989, you personally promised, under oath, this subcommittee that the BIA would abide by that language [the Congressional directive] and that the BIA would work with the Committees to see it was implemented. Now what action did the BIA do to initiate, to keep these various Committees informed?

Mr. EDDIE BROWN. It is my understanding, sir that as we began to take a look at methods in which we could transfer those funds, that we contacted—

Mr. SYNAR. Is it not true that you did not contact the Committees until after March 12th, five months after the last hearing?

Mr. EDDIE BROWN. In a formal contact, yes, sir.

Mr. SYNAR. That is correct. Isn't it a fact that the meetings with Congressional Committees were initiated by the Committees and not by the BIA?

Mr. EDDIE BROWN. That is correct sir, we met with them.⁶⁸

BIA's annual appropriation for fiscal year 1990 again included language that prohibited transferring Indian trust funds until certain conditions had been satisfied:

Provided further, that none of the funds in this Act shall be used by the Bureau of Indian Affairs to transfer funds under contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for such tribe or individual have been audited and reconciled to the earliest possible date, the results of such reconciliation have been certified by an independent party as the most complete reconciliation of such funds possible, and the tribe or individual has been provided with an accounting of such funds * * *⁶⁹

⁶⁸ Apr. 24, 1990, hearing at 10-11.

⁶⁹ Interior and related agencies appropriations for fiscal year 1990. Public Law 101-121, Oct. 23, 1989, House Report 101-120 (conference committee).

To prevent the BIA from passing off a set of unbalanced accounts to a third party, the fiscal year 1990 proviso further refined the congressional directive that no funds could be transferred unless and until all of these funds had been audited, reconciled and certified.

The subcommittee solicited and received an opinion by the General Accounting Office concerning the requirement of the congressional directive regarding audit, reconciliation and certification of Indian trust fund accounts. In its March 20, 1990, opinion,⁷⁰ GAO concluded that the BIA would not satisfy the statutory requirements if the same contractor that audits and reconciles the accounts also certifies the reconciliation to be the most complete reconciliation possible. The GAO opinion emphasized that the statutory language explicitly requires that an "independent party" certify the results of the reconciliation. In fact, the very structure of the proviso makes it clear that Congress used the term "independent" to mean a party that is independent of whoever performed the initial audit and reconciliation.⁷¹ To construe "independent" otherwise would, in GAO's opinion, render largely meaningless the purpose of the requirement for a certification by an independent party. The GAO stated that Congress's evident purpose was to obtain, to the greatest extent possible, reliable baseline balances in the various accounts. Finally, GAO stated "Accordingly, unless and until a party independent of the party performing the initial audit and reconciliation certifies that the reconciliation is as complete as possible, no trust fund monies can be transferred to Security Pacific [National Bank]."⁷²

At the subcommittee's September 25, 1990 oversight hearing, Chairman Synar asked Mr. Lou Gallegos, then-Assistant Secretary of the Interior for Policy, Management and Budget representing Interior Secretary Manuel Lujan, Jr., how many of the approximately 300,000 accounts within the Indian trust fund had actually been audited or reconciled during fiscal year 1990: Mr. Gallegos responded: "* * * to my knowledge, none."⁷³ In fact, the BIA still has not implemented the clear intent of these congressional directives.⁷⁴

After Chairman Synar noted that it had been more than 1,000 days since Congress authorized and directed the Department of the Interior and the Bureau of Indian Affairs to audit and reconcile the Indian trust funds accounts, the following exchange took place:

Mr. SYNAR. * * * When, Mr. Gallegos, will the 300,000 trust accounts be audited, reconciled and certified?

Mr. GALLEGOS. Mr. Chairman, it would be my desire to give you a specific date. I do not have a confidence level at this time that I would be straightforward with you if I

⁷⁰ Apr. 24, 1990, hearing at 19.

⁷¹ U.S. General Accounting Office, opinion letter, B-236146.2, Mar. 20, 1990; exhibit 1, Apr. 24, 1990, hearing at 19.

⁷² Apr. 24, 1990, hearing at 21. Security Pacific National Bank was awarded a financial service contract by BIA on Sept. 14, 1988.

⁷³ Sept. 25, 1990, hearing at 81.

⁷⁴ Public Law 100-202, Dec. 22, 1987. See also: Public Law 100-446, Sept. 27, 1988, House Report 100-862 (conference committee). Public Law 101-121, Oct. 23, 1989, House Report 101-121 (conference committee). Public Law 101-512, Nov. 5, 1990, House Report 101-789 (conference committee). Public Law 102-154, Nov. 13, 1991, House Report 102-256 (conference committee).

gave you a specific date. What we're engaged in here is developing a process and a system to get at that.

I have also suggested it is amongst the highest priorities of the Secretary of Interior to pursue this course of action, and we will.

Mr. SYNAR. Let me ask you if you think current priorities are reasonable. Do you think it's reasonable to ask the beneficiaries of this trust fund, or the Congress, or the taxpayers, to wait 7 years for the BIA to complete this reconciliation process?

Mr. GALLEGOS. Mr. Chairman, it is my personal belief that none of what has occurred here over a long period of time—and certainly not just the last thousand days—but over a long period of time is totally unreasonable.

Mr. SYNAR. Where do these efforts, Mr. Gallegos, rank in terms of the Department's priorities?

Mr. GALLEGOS. Mr. Chairman, I can state unequivocally that these particular issues rank at the highest priority of the Department at this time.

Mr. SYNAR. Well, that doesn't say much for the other priorities does it—if this one's failing and it's one of the highest.

Mr. GALLEGOS. Mr. Chairman, it hasn't always been the highest.

Mr. SYNAR. When did it get to be the highest?

Mr. GALLEGOS. It has gotten to be the highest, I believe, within the last 2 or 3 months when we came to the realization—

Mr. SYNAR. It is like Mr. Clinger said in his opening statement that there's always a flurry of activity and high priority-setting every time this subcommittee schedules a hearing?

Mr. GALLEGOS. Mr. Chairman, no doubt that is true in the normal course if things, but I think beyond that we share with you the realization that it is totally unsatisfactory that these account holders, be they tribal or individuals, should wait much longer for a true accounting of what their real assets in this trust are.⁷⁵

In response to the subcommittee's persistent pressure to comply with the congressional directives, the Bureau finally undertook efforts to begin a meaningful audit and reconciliation process. On December 28, 1990, 3 months after the subcommittee's third oversight hearing on this subject, the BIA issued a request for proposals [RFP] for phase I of the trust fund reconciliation project. Phase I was designed to cover 500 tribal accounts belonging to 37 of the 254 tribes. BIA selected the larger tribal accounts for phase I, because they make up over 87 percent of the tribal trust fund balance. In addition, phase I will cover about 17,000 individual Indian accounts that make up over 17 percent of the individual Indian money trust funds balances. BIA selected IIM accounts that are maintained at 3 of its 93 agency offices—Uintah and Ouray, Fort Peck, and Olym-

⁷⁵Sept. 25, 1990, hearing at 83-84.

pic Peninsula—because these accounts represent a cross-section of income types (that is, oil and gas royalties, timber, fishing, and land lease revenues) and because reconciliations of the last 3 years' transactions had been completed for most of these accounts, so that those results should serve as a useful starting point.

On April 26, 1991, BIA requested best and final offers from six firms in response to that RFP. The contract for phase I was awarded to Arthur Andersen & Co. on May 10, 1991.

Phase II of the Bureau's reconciliation and auditing process was designed to cover the remaining 1,500 tribal and approximately 283,000 IIM accounts. BIA intends to use the phase I results to develop its plans for moving this project into phase II. In fact, the phase I contract will require Arthur Andersen & Co. to develop a plan for BIA's consideration for conducting phase II.⁷⁶

The BIA budgeted about \$2.3 million for phase I of the trust fund reconciliation project through the end of fiscal year 1992.⁷⁷ At the subcommittee's May 20, 1991, hearing the subcommittee learned that completion of phase II, including certification of all trust fund balances by an independent third party, is not expected before fiscal year 1997,⁷⁸ and that the overall project was estimated to cost \$12 million over 5 years.⁷⁹ The Department of the Interior's 1991 Federal Managers' Financial Integrity Act Report estimated that the audit and reconciliation effort could be completed by April 1996.⁸⁰

However, the Subcommittee learned from October 23, 1991, and January 28, 1992, briefings by Arthur Andersen & Co. that the accounting firm has encountered substantial difficulties in completing any IIM account phase I reconciliations. For example, Arthur Andersen estimated that audit of the 17,000 IIM trust accounts originally associated with phase I of the IIM trust reconciliation and audit project could cost as much as \$12.6 million compared to the original estimate of \$12 million for full audits of 37 larger tribal accounts and the IIM accounts at three agencies. Accordingly, the company recommended that alternatives be considered.⁸¹

⁷⁶ Arthur Andersen & Co., "Bureau of Indian Affairs, Trust Funds Reconciliation Project Overview Presentation," Jan. 28, 1992, at 9, 14, 20, 30, and 31 (document available in subcommittee offices). Arthur Andersen & Co. reported that the project had not yet reconciled all tribal accounts for fiscal year 1990 and had found that approximately 10 percent of the necessary source documents had not yet been located and that none of the 17,000 IIM accounts at three area offices in phase I had been audited and reconciled. As a result of these unanticipated difficulties completion of phases I and II would take longer and cost more.

⁷⁷ According to the Arthur Andersen, it had billed the BIA \$1,775,576 through Jan. 15, 1992. See: Arthur Andersen & Co., "Bureau of Indian Affairs, Trust Funds Reconciliation Project Overview Presentation," Jan. 28, 1992, at 32 (document available in subcommittee offices).

⁷⁸ May 20, 1991, hearing at 126.

⁷⁹ Arthur Andersen & Co.'s 5-year, \$12,046,505.94 bid for the audit and reconciliation project would be spread over 5 years as follows: Year 1: \$1,322,080.34; year 2: \$2,298,277.60; year 3: \$2,431,645.60; year 4: \$2,441,716.40; and year 5: \$2,552,786.00.

⁸⁰ The Federal Managers' Financial Integrity Act, "Secretary's Annual Statement and Report To The President And The Congress," U.S. Department of the Interior, Dec. 13, 1991, at D-3, D-4, and D-5.

⁸¹ Arthur Andersen & Co., "Bureau of Indian Affairs, Trust Funds Reconciliation Project Overview Presentation," Jan. 28, 1992, at 9, 14, 20, 30, and 31 (document available in subcommittee offices). The subcommittee has reviewed Arthur Andersen's recommendations and is concerned by the enormity of its cost estimates to complete the IIM reconciliations. However, it is apparent that there may be alternatives. See also: U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing a Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

At the rate of \$12.6 million for three agencies, it might cost as much as \$281 million to \$390 million to audit the IIM accounts at all 93 BIA agency offices. Obviously, it makes little sense to spend so much when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991.⁸² Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Another obstacle raised by Arthur Andersen and recently confirmed by the General Accounting Office concerns the accuracy of the Bureau's Indian land ownership records. Arthur Andersen is also required under its contract with BIA to reconcile BIA's financial system to its integrated resources management system [IRMS]. As part of this reconstruction work, Arthur Andersen agreed to perform a very limited review of Indian allottee ownership records and found a number of potential discrepancies.⁸³ These are not the first instance in which concerns about the accuracy of the BIA's land ownership records have been raised.⁸⁴ For example, in a series of reports on lease administration completed by the inspector general of the Department during the 1980's,⁸⁵ the OIG found instances in which ownership records were not being properly updated or the records contained inaccurate information. As a result, revenue distributions were being made to closed IIM estate accounts, lease payments were not being collected in a timely manner, and revenues were being posted to the wrong accounts. Moreover, GAO has advised the subcommittee that BIA's IRMS system, which includes land title and ownership information, currently operates independently at six different BIA offices. In addi-

⁸² *Id.* at 20.

⁸³ *Id.* at 25 through 29. Arthur Andersen reviewed and recalculated selected allotment ownership and lease distributions and noted several potential discrepancies. In addition, each of the three agency offices involved in phase I use a different procedure and source document to calculate revenue distributions to IIM accounts: Uintah and Ouray use the royalty distribution and reporting system [RDRS] and manual distributions from allotment cards; Fort Peck uses RDRS and IRMS lease records; and Olympic Peninsula uses manually updated title status reports [TSR]. See also: Arthur Andersen & Co., "Bureau of Indian Affairs Trust Funds Reconciliation Phase I Assessment Summary," Oct. 23, 1991, at 6 (document available at subcommittee office).

⁸⁴ U.S. General Accounting Office, "Indian Programs: Profile of Land Ownership at 12 Reservations," GAO/RCED-92-96BR, Feb. 10, 1992. "Trust Funds Managed By The U.S. Department of Interior Bureau of Indian Affairs—Area and Agency Office Specific Findings and Recommendations, as of Sept. 30, 1991," Mar. 15, 1991 "Draft," at 15, 20, 29, 38, 39, 44, 52, and 56. "Review of Indian Trust Fund Management, Task II: Documentation of Current Operations and Procedures," Sept. 26, 1983, "Draft Report," at II-3. Executive Resources Associates, Inc., Study of the BIA Trust Fund Services, "Draft Management Study," Nov. 24, 1987, at 3-4, 3-35, 3-36, and 4-5. Inspector general, Department of the Interior, "Review of Lease Administration of Indian Trust Lands: Billings Area Office, Bureau of Indian Affairs," Report No. C-I-BIA-47-84, July 1987. Inspector general, Department of the Interior, "Review of Individual Indian Money Accounts (IIM) Administered by the Bureau of Indian Affairs," (consolidated report), Mar. 31, 1986. Inspector general, Department of the Interior, "Review of Individual Indian Money Accounts (IIM) Administered by the Bureau of Indian Affairs—Concho Agency," Report No. C-IA-BIA-22p-84(b), July 1985. U.S. General Accounting Office, "Administration of Individual Indian Moneys Administered by the Bureau of Indian Affairs, Department of the Interior," GAO B-114868, Nov. 1955.

⁸⁵ Five audits from 1982, Inspector General Audit Report, Report No. 89-117, September 1989, appendix 2, at 24-25.

tion, BIA has not assigned a systems manager to be responsible for IRMS overall, so the problems remain uncorrected.⁸⁶

The Intertribal Monitoring Association⁸⁷ [ITMA], among others, has also raised concerns about the accuracy of Bureau's ownership records. ITMA and other critics recognize that if the land ownership records are inaccurate or out of date, they can produce errors that can have a direct effect on revenue distributions to tribal and IIM accountholders. Moreover, any account reconciliation that is not based on accurate ownership records for income distribution will be a waste of time and taxpayer money.

The Arthur Andersen briefings pointed out problems that are similar to those in past audit findings reporting significant deficiencies in the accuracy and use of the Bureau's ownership records and undivided fractional interests⁸⁸ in real estate and income. Undivided fractional interests have been a serious problem for the Bureau for years, but no corrective action has been taken. Moreover, these difficulties have been worsened as the number of IIM accounts has continued to grow steadily as account holders pass away and additional IIM accounts have been opened for their heirs. The GAO recognized the problems presented by the explosive growth of undivided fractional interests in its 1955 audit of BIA's administration of IIM accounts,⁸⁹ noting that while BIA maintains IIM accounts for successive rounds of heirs, the income stream actually distributed often becomes relatively small (as revenues are spread to more and more accounts with each succeeding generation). In its 1955 audit report, GAO recommended a number of solutions to solve this problem including, eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to private commercial banks, or imposing a fee for BIA services to IIM accountholders.⁹⁰ More recently, several tribes have expressed interest in establishing a system by which smaller fractional interests would escheat⁹¹ to the tribes for the benefit of

⁸⁶ Arthur Andersen & Co., "Bureau of Indian Affairs. Trust Funds Reconciliation Project Overview Presentation," Jan. 28, 1992 (document available at subcommittee office).

⁸⁷ To ensure effective consultation with the BIA, the tribes and IIM accountholders representatives established the Intertribal Monitoring Association [ITMA] on Indian trust funds to serve as a national tribal and allottee association membership organization. While the BIA should continue to consult other Indian organizations on a broad range of issues, the ITMA has served as the primary contact for monitoring, directing, and corresponding with BIA management over Indian trust fund financial management and reform efforts.

⁸⁸ Undivided fractional interests in real property refers to multiple owners sharing ownership of a tract of land without dividing the actual land among the owners. Undivided ownership interests in a parcel of land, royalty and rental collections and disbursements, and restricted lands constitute significant land consolidation problems for tribes and for the Indian trust fund. Congress has authorized the Secretary of the Interior to facilitate land consolidation activities and planning that promote fair value exchanges, 25 U.S.C. § 2201 et seq., Public Law 97-459, 96 Stat. 2517, for legislative history and purpose see: 1982 U.S. Code Cong. and Admin. News, at 4415. See also: U.S. General Accounting Office, "Indian Programs: Profile of Land Ownership at 12 Reservations," GAO/RCED-92-96BR, Feb. 10, 1992, at 7.

⁸⁹ U.S. General Accounting Office, "Indian Programs: Profile of Land Ownership at 12 Reservations," GAO/RCED-92-96BR, Feb. 10, 1992. U.S. General Accounting Office, "Audit Report to the Congress of the United States, Administration of Individual Indian Moneys by Bureau of Indian Affairs. Department of the Interior," Report No. B-114868, November 1955 at 25-26.

⁹⁰ *Id.* at 27.

⁹¹ In 1983, the Congress enacted the Indian Land Consolidation Act, 25 U.S.C. 2201, et seq., Public Law 97-459, 96 Stat. 2517. One purpose of the act was to reduce extensive fractionation of individual Indian ownership. The act authorized any tribe to establish inheritance codes to govern the inheritance of real property and develop plans to consolidate the ownership of Indian

Continued

and congressional reviews. At the top of the list of those problems has been not only trust fund accounting, but the complete absence of any kind of financial accounting by the Bureau of Indian Affairs.

After its 1987 retreat from the Mellon contract fiasco, BIA's goal appeared to be to get another privatization effort underway as soon as possible. Toward that end, a new request for proposals⁹⁷ was advertised on February 18, 1988. However, only two bids were received. BIA concluded that the Security Pacific had submitted the best offer and it was awarded the contract.⁹⁸

At the same time as BIA was evaluating these bids, it was completing an Office of Management and Budget A-76 cost comparison study.⁹⁹ In July 1988, Assistant Secretary for Indian Affairs Ross Swimmer wrote tribal leaders with the results of BIA's cost comparison study stating that BIA had demonstrated that the cost studies supported another effort to privatize the financial management of the Indian Trust Fund.¹⁰⁰ By September 18, 1988, BIA was claiming that its cost comparison studies showed that almost \$3 million could be saved over a 5-year period (about \$550,000 per year) by using a private contractor for services to strengthen internal management and administration of the Indian trust funds.¹⁰¹

As result of the RFP, on September 14, 1988, BIA signed a 1-year contract, with four yearly options, valued between \$15 million and \$22 million overall, for services to strengthen internal management and administration of the Indian trust fund. The contractor, Security Pacific National Bank of Los Angeles was responsible for providing financial services and its subcontractor, Computer Data Systems, Inc. [CDSI], of Rockville, MD, was responsible for providing accounting and computer services.

According to the provisions of the contract, Security Pacific was required to meet a series of timeliness standards and performance milestones marking its progress toward completion of its responsibilities to the Government. In all, five tasks were identified in the contract: Systems analysis (3 months after award); investment services; collection and disbursement services (5 months); accounting services fully operational (6 months); and, account conversion (6 months).¹⁰²

However, the accounting system that the Bureau contracted for was never delivered or developed.¹⁰³ In fact, Security Pacific's subcontractor, Computer Data Systems, could not even get its own computer system and software to operate properly during the acceptance testing phase of the contract, which was originally sched-

⁹⁷ Letter from then-Assistant Secretary of Indian Affairs, Ross Swimmer, to tribal chairmen, July 25, 1988, additional information supplied for the record by the Bureau of Indian Affairs, Oct. 26, 1989, hearing at 169 and 186.

⁹⁸ Statement of Robert Hunter, U.S. General Accounting Office, associate general counsel, Office of General Counsel, Oct. 26, 1989, hearing at 9, 10, 25, and 26.

⁹⁹ *Id.* at 24.

¹⁰⁰ Oct. 26, 1989, hearing at 186.

¹⁰¹ Oct. 26, 1989, hearing at 205-206.

¹⁰² Account conversion would have required the transfer of all tribal and IIM accounts to Security Pacific National Bank. Even though, as discussed fully above, such transfer was expressly prohibited by law unless and until all tribal and IIM accounts had been audited and reconciled and, at that time, BIA had no plans to audit or reconcile any accounts prior to transferring the assets to Security Pacific National Bank for account conversion.

¹⁰³ Numerous cites, see: Oct. 26, 1989, hearing at 417, Apr. 24, 1990, hearing at 13, Sept. 25, 1990, hearing at 62-63.

uled for the summer of 1989. In addition to failing to deliver the accounting system it was to develop for the Bureau, Security Pacific National Bank failed to deliver any product or service required by the contract. Pressed by the subcommittee to name the deliverables¹⁰⁴ supplied by Security Pacific or its subcontractor, Computer Data Systems, the Bureau admitted that none of the five original tasks only a plan for conversion of the trust funds accounts have been delivered.¹⁰⁵

Despite its manifest failure to obtain the benefit of its bargain with Security Pacific, the Bureau failed to even demand that the contractor perform.¹⁰⁶ Nevertheless, the Bureau continued to make progress payments to Security Pacific National Bank on invoices submitted monthly for undefined and unmeasured services.¹⁰⁷

The contract and contracting process failures had begun almost immediately. For example, during the contract evaluation process that preceded the award of the contract to Security Pacific, the bidders had been required to successfully perform an operational capabilities demonstration. The purpose of the demonstration was to provide bidders an opportunity to display the functionality, efficiency, and technical merit of the proposed system and services in meeting the mandatory requirements of the request for proposal. Security Pacific and the unsuccessful bidder were advised that, in addition to meeting the other mandatory requirements, the demonstration was intended to illustrate specific capabilities of the proposed software. The operational capabilities demonstration was not intended to serve as a basis for marketing presentations. Since only two bids were received, and one was considered inadequate, only Security Pacific National Bank performed the operational capabilities demonstration.

At the subcommittee's request, GAO performed an analysis of the operational capabilities demonstration performed by Security Pacific National Bank and its subcontractor, Computer Data Services. GAO asked two questions about the demonstration: First, what was the substance of the operational capabilities demonstration; and second, did the contractor's system clearly demonstrate the mandatory capabilities during the operational capabilities demonstration.¹⁰⁸ Results of GAO's analysis revealed that only 50 percent of the tasks identified for testing during the operational capabilities demonstration were performed; a third of the tasks did not demonstrate what they were designed to show; and no criteria for evaluation were specified for 11 of 76 tasks completed. GAO also discovered that 14 irregularities were observed during the oper-

¹⁰⁴ Apr. 24, 1990, hearing at 12, 13, and 25, see also: additional information supplied for the record at 26.

¹⁰⁵ Apr. 24, 1990, hearing at 23-24, 26. Account conversion would have required the transfer of all tribal and IIM accounts to Security Pacific National Bank. Even though, as discussed fully above, such transfer that was expressly prohibited by law unless and until all tribal and IIM accounts had been audited and reconciled and, at that time, BIA had no plans to audit or reconcile any accounts prior to transferring the assets to Security Pacific National Bank for account conversion.

¹⁰⁶ Oct. 26, 1989, hearing at 416-417, Apr. 24, 1990, hearing at 62-63.

¹⁰⁷ Apr. 24, 1990, hearing at 29.

¹⁰⁸ U.S. General Accounting Office, opinion letter, B-235644, Aug. 22, 1989. See also: Statement of Robert Hunter, U.S. General Accounting Office, associate general counsel, Oct. 26, 1989, hearing at 9; and U.S. General Accounting Office, "Policy and Procedures Manual for Guidance of Federal Agencies," title 2, appendix III requirements, chapter 4.

ational capabilities demonstration. Considering the results of this demonstration of software performance and development, it is not surprising that Security Pacific's subcontractor, Computer Data Systems, was unable to deliver a software package for accounting service for the trust fund.

During the first 6 months of the contract, September 14, 1988, through March 30, 1989, Security Pacific National Bank was to develop and implement an investment system. Even though no contracted deliverables were supplied, Security Pacific National Bank was paid \$330,000 for this segment of the contract. For reasons that BIA could not adequately explain under subcommittee questioning, no demand letter was sent to Security Pacific National Bank demanding performance during this first 6-month segment or at any other time.¹⁰⁹

During the next 6-month segment, April through October 1989, Security Pacific completed no tasks in fulfillment of the contract and provided no deliverables. During this time, the contract required Security Pacific to provide maintenance and operation of the implemented accounting system, account custodial services for the individual Indian money accounts and tribal accounts, and investment services for BIA. The original cost for this segment of the contract was \$300,000 for support services, \$298,596 for custodial services, \$720,000 for investment services, and \$190,800 for other accounts for a total of \$1,509,396.

According to the subcommittee's review, the total cost of the first year for both segments of the Security Pacific National Bank contract could have been \$1,839,396, had the Security Pacific National Bank contract been fully implemented. According to BIA testimony at the subcommittee's April 24, 1990, hearing, the Security Pacific contract could have cost the BIA more than \$3 million a year.¹¹⁰ BIA eventually paid Security Pacific \$934,512, but according to the Assistant Secretary for Indian Affairs, did not obtain any benefits for the Government.¹¹¹ While BIA continued to assert that some deliverables were received, the testimony and evidence suggests that little of value resulted from this million-dollar expenditure.¹¹²

Indeed, trying to pin down the BIA on matters pertaining to the Security Pacific National Bank contract was difficult for the subcommittee. Consider this exchange between the ranking minority member of the subcommittee and Mr. George Gover, then-Acting Director of the Office of Trust Fund Management, on April 24, 1990:

Mr. CLINGER. What deliverables were to be provided by Security Pacific National Bank under the original contract?

Mr. GOVER. The contract was to provide the collection, the accounting, investment and disbursement of trust funds. It was to provide a tribal and a trust fund management system, an integrated system for how we go about managing those funds.

¹⁰⁹ Oct. 26, 1989, hearing at 417, and Sept. 25, 1990, hearing at 63.

¹¹⁰ Apr. 24, 1990, hearing at 14.

¹¹¹ Apr. 24, 1990, hearing at 24-27.

¹¹² See for example: Oct. 26, 1989, hearing at 417, and Sept. 25, 1990, hearing at 63 and 69.

Mr. CLINGER. When was that work to have been completed under the original contract?

Mr. GOVER. Under the original contract, within the first 6 months.

Mr. CLINGER. Was any of that accomplished?

Mr. GOVER. No sir * * *

* * *
Mr. CLINGER. What was the cost for the original contract * * *

Mr. GOVER. The original cost—the original payment was \$330,000 for the first 6 months * * *

* * *
Mr. CLINGER. What did we get for that?

Mr. GOVER. The \$330,000 was for developmental cost paid to the contractor for the development of their base system.

Mr. CLINGER. But basically we really didn't get anything for that money, did we?

Mr. GOVER. Nothing tangible because this is a service contract. Under a service contract, you don't receive anything tangible. It is like—if I can use the expression, if you buy an airplane ticket from here to Los Angeles, you don't buy the plane, you just buy the ride.

Mr. CLINGER. I think we got taken for a ride, but I am not sure that we [got anything else.] [Laughter.]¹¹³

BIA's rationale for neglecting to demand full performance was that there was no need to send a letter because the requirements package for services to be performed under the contract were still being developed by BIA.¹¹⁴

BIA paid Security Pacific National Bank for the first 1-year period, even though few, if any, deliverables were provided; no investment system was implemented; the accounting services were not developed or in operation; no account custodial services were provided for the individual Indian money [IIM] accounts; and no support services were provided.¹¹⁵

From September 14, 1988, until April 1990, there were continual problems and delays in developing, testing, and implementing the computerized accounting system being developed by Computer Data Services.¹¹⁶ The plan was to run the new system in parallel with the existing BIA systems to compare the outputs. If the results of this operation were satisfactory, the system would be installed as the newly developed computerized accounting system. However, during the second day of acceptance testing of the automated accounting system, the subcontractor, Computer Data Services, requested that the acceptance test be terminated.¹¹⁷ Stated simply, Computer Data Services could not get its computer system

¹¹³ Apr. 24, 1990, hearing at 14-5.

¹¹⁴ Oct. 26, 1989, hearing at 431.

¹¹⁵ Sept. 25, 1990, hearing at 62.

¹¹⁶ Oct. 26, 1990, hearing at 420-482, Apr. 24, 1990, hearing at 13.

¹¹⁷ Oct. 26, 1989, hearing at 415-416.

to do what they said it could—to provide accounting services support.

As of April 24, 1990, Computer Data Services was unable to develop, test, and implement the computerized accounting services system for the Indian trust fund. Yet even at this late date, Security Pacific National Bank had not been put on notice for nonperformance. Instead, BIA suspended the Security Pacific National Bank contract shortly before the subcommittee's April 24, 1990, hearing:

Mr. SYNAR. During the last hearing, Dr. Brown, BIA witnesses indicated that no demand letters had been sent to the contractor for nonperformance because the Bureau was working closely with them to try to get the program up and running.

Isn't it true, Dr. Brown, that one reason we haven't sent any demand letters is because 18 months after the contract was awarded, the Bureau still * * * doesn't know what its final requirements are and that, in fact, the BIA was discussing provisions with Security Pacific as recently as late March [1990], just days before you put this whole contract on hold?

Mr. EDDIE BROWN. That is correct, sir.

Mr. SYNAR. So even if you didn't have the constraints imposed by the appropriations requirement [transferring funds to the contractor], Dr. Brown, in order to first audit and reconcile the accounts, you still wouldn't be ready to go, would you?

Mr. EDDIE BROWN. At this point in time, it is my opinion—no sir.

Mr. SYNAR. Isn't it true also, Dr. Brown, that if you hadn't put the contract on hold because of the auditing requirement, you would have probably had to make even further modifications to the contract?

Mr. EDDIE BROWN. Yes, sir.¹¹⁸

BIA finally terminated the Security Pacific contract on September 30, 1990. However, the Bureau was hesitant to admit that it has failed:

Mr. SYNAR. Did the Bureau get what it paid for in the \$934,512, Mr. Gover?

Mr. GOVER. According to the terms of the contract, yes.

Mr. SYNAR. Excuse me?

Mr. GOVER. According to the terms of the contract, we did get what we paid for?

Mr. SYNAR. Did the Security Pacific [National Bank] implement the collection?

Mr. GOVER. No, sir.

Mr. SYNAR. Accounting?

Mr. GOVER. No, sir.

Mr. SYNAR. Investment, and disbursement services for the trust fund, or the tribal, or trust fund management?

¹¹⁸ Apr. 24, 1990, hearing at 28.

Mr. GOVER. No, sir.

* * * * *

Mr. SYNAR. Isn't it true that the Bureau's A-76 report, which was prepared in compliance with the Office of Management and Budget Contracting Policies, before the Security Pacific contract was executed, claimed that the Bureau would actually save money—more like \$3 million—through this contract?

Mr. GOVER. Yes, sir.

Mr. SYNAR. Has the Bureau reduced staff as result of the contract, Mr. Gover?

Mr. GOVER. No, sir.

Mr. SYNAR. Would the Bureau ever have been able to reduce the staff as a result of this contract?

Mr. GOVER. No, sir.

Mr. SYNAR. Has the contract saved the Bureau anything, Mr. Gover?

Mr. GOVER. Savings? No, sir.¹¹⁹

In short, BIA wasted nearly \$1 million of taxpayers' money pursuing the Security Pacific National Bank contract for financial services. The BIA failed to exercise reasonable care in its administration of the contract. The BIA headquarters failed to provide adequate leadership and virtually no oversight supervision with regard to the Security Pacific National Bank contract.

Despite clear evidence of its failures with respect to the Security Pacific contract the Bureau did award one of its headquarters employees a \$5,000 cash award for her "outstanding performance * * * in this high visibility * * * major privatization effort."¹²⁰ Arlene Brown was given the cash award on October 6, 1989 for "Special Achievement" even though no performance standards were established, nor was a performance rating given for serving as the BIA project manager for the first 16 months of the Security Pacific National Bank contract. Moreover, Ms. Brown had no previous training or experience in trust fund operations and investments or cash management and, in fact, had negotiated a contract, of which the principal features, were prohibited by law and were impossible to perform because of the congressional directives discussed above.

Criticism directed toward Security Pacific's nondelivery of contract services is well earned. However, an equal share of the blame for this continuing disaster must be laid at the feet of the Bureau and specifically the Bureau's top officials. Evidence and testimony gathered during the course of the subcommittee's review indicates that the BIA's headquarters did not have a sufficient grasp or understanding of the agency's own needs prior to the advertisement and award of the Security Pacific contract. Moreover, this failure to grasp the Bureau's responsibilities and obligations continued throughout the period that the contract was in effect.¹²¹ As a

¹¹⁹ Sept. 25, 1990, hearing at 61-63.

¹²⁰ Sept. 25, 1990, hearing at 64-69.

¹²¹ Sept. 25, 1990, hearing at 68.

result, the Bureau repeatedly changed contract requirements which, in turn, caused problems and delays and resulted in additional expense. Far from excusing the waste of almost \$1 million in tax dollars, the Bureau's inept handling of the Security Pacific contract simply underscores the reasons why it should not have been awarded in the first place. Ms. Brown's large cash award is even more ironic and troublesome in view of the undeniable mismanagement of the entire contract.

C. BIA'S FAILURE TO COMPLY WITH THE BROOKS ACT

During its investigation, the subcommittee, in 1989, asked the General Accounting Office [GAO] for an opinion on several questions regarding the BIA's contract with Security Pacific National Bank. Specifically, the subcommittee asked whether the Federal regulations and guidance pertaining to procurement for automated data processing equipment and services applied to the accounting services procured by the BIA under the Security Pacific contract, and whether the accounting services should have been procured separately from the cash management services or the financial trust and investment advisory services.

The subcommittee was concerned that this acquisition was subject to, and should have been conducted by BIA pursuant to, the provisions of section 11 of the Federal Property and Administrative Services Act,¹²² known as the Brooks Act. The Brooks Act places authority for supervision and coordination of automatic data processing equipment and services acquisition by Federal agencies with the Administrator of General Services. The General Services Administration, in turn, has issued regulations governing acquisition of automated data processing equipment and services in the Federal information resources management regulation, and requires that contracts for automated data processing equipment and services acquisition subject to the Brooks Act be accomplished in accordance with these regulations. The Federal information resources management regulation requires, among other things, that agencies use the method of acquisition that represents the lowest overall system life cost to the Government.

During the subcommittee's investigation, two significant issues arose concerning BIA's contract with Security Pacific National Bank. The first was whether the acquisition of computer accounting services should have been conducted under the rule applicable to the acquisition of automated data processing—including the Brooks Act. The other issue involved BIA's legal authority to contract with the private sector for these services, and in particular, whether BIA may contract for the disbursement of Indian trust fund moneys.

In its testimony, GAO pointed out that the Brooks Act covers acquisition of services which make "significant use of automated data processing."¹²³ In their decision, GAO concluded that this particular acquisition—the Security Pacific contract—required the significant use of such equipment and services and, therefore should have

¹²² As amended 40 U.S.C. 759, Public Laws 99-500 and 99-591.

¹²³ Oct. 26, 1989, hearing at 9.

been conducted under the Brooks Act. Further, GAO ruled that BIA's failure to obtain a delegation of procurement authority¹²⁴ now left it in the position of holding a contract for which it lacked the appropriate authority.¹²⁵

BIA continued to claim that a delegation of procurement authority was not needed because the automated data processing application was incidental to the services contracted for, although in later testimony BIA disclosed that because the software for the computers running the accounting system had not been developed by Computer Data Services, there had been no progress in developing the services contracted for from Security Pacific National Bank.¹²⁶

When asked if BIA would take action to obtain a delegation of procurement authority, BIA responded that further discussions with General Accounting Office would precede a final decision. Based on these discussions, BIA decided that it would not seek a delegation of procurement authority from the General Services Administration.¹²⁷

In sum, at the subcommittee's October 26, 1989, oversight hearing, GAO testified that the Brooks Act did apply to the automated data processing equipment and services acquisition included in the Security Pacific contract and that the BIA failed to comply with the act,¹²⁸ because it failed to obtain a delegation of procurement authority from the General Services Administration.¹²⁹

On the second question, GAO issued a decision in March 1990 stating that so long as a Federal disbursing office exercises managerial responsibility for reviewing and overseeing disbursement operations and discharges other judgmental tasks set for it in Federal law,¹³⁰ the agency is not precluded from contracting for the ministerial and operational aspects of fund disbursement.¹³¹

D. BIA'S FAILURE TO ESTABLISH A COMPREHENSIVE LOSS POLICY

In his September 29, 1989, audit¹³² the inspector general of the Department of the Interior reported that BIA has neither properly recognized investment losses in its official accounting records nor reimbursed accounts, when appropriate, for losses on invested Indian trust funds. The act of June 24, 1938,¹³³ authorizes the funds of any Indian or tribe held in trust by the United States to be invested only in public debt obligations of the United States and in bonds, notes, or other obligations that are unconditionally guaranteed as to both principal and interest by the United States. Inherent in this act is the responsibility to properly account for the trust funds. For more than 26 months after the inspector general recommendations, the BIA did not fulfill this obligation, because it re-

¹²⁴ U.S. General Accounting Office, opinion letter, B-235999, Sept. 28, 1989.

¹²⁵ Oct. 26, 1989, hearing at 10.

¹²⁶ *Id.* at 110.

¹²⁷ *Id.* at 110.

¹²⁸ Statement of Robert Hunter, U.S. General Accounting Office, associate general counsel, Oct. 26, 1989, hearing at 16.

¹²⁹ *Id.* at 17.

¹³⁰ 31 U.S.C. §§ 3321 and 3325.

¹³¹ U.S. General Accounting Office, opinion letter, B-236146, Mar. 13, 1990.

¹³² Inspector general, U.S. Department of the Interior, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, Sept. 29, 1989.

¹³³ 16 U.S.C. 162a, June 24, 1938, c. 648, § 1, 52 Stat. 1037.

fused to adopt a formal policy or related procedures for recognizing losses of invested trust funds.

As a result of this failure, Indian trust fund accounts were not reimbursed for investment losses of at least \$12 million. The OIG summarized his view of these losses as follows:

We believe this loss of trust funds is inconsistent with the fiduciary and trust responsibility the Bureau has over Indian resources and with the restrictive investment operating parameters which Congress has instituted to ensure the safety of Indian trust funds.¹³⁴

The OIG's September 1989 audit report also revealed specific instances of Indian trust fund losses. Significantly, the report notes that BIA had failed to recognize losses of invested Indian trust funds in its official accounting system or to reimburse accounts or accountholders for such losses (when appropriate), noting that "Indian trust funds were not reimbursed for investment losses and accumulated interest of about \$12 million."¹³⁵

BIA's response to these losses has been simple indifference. The BIA agreed with the inspector general's recommendation to prepare and implement a procedure that recognizes investment losses of the trust, but refused to establish procedures to effect reimbursement of such losses.¹³⁶

BIA's view that it is not obligated to inform trust fund beneficiaries of losses is clearly without merit. Moreover, the suggestion that the BIA is not obligated to reimburse beneficiaries for losses when BIA is at fault is nothing short of disgraceful and constitutes a serious misconception of the duties of the Federal Government. Mr. James R. Richards, inspector general of the U.S. Department of the Interior explained to the subcommittee how BIA approached losses of Indian trust funds:

Mr. SYNAR. On page 13 of your report it reads—and let me quote it: "We believe that the primary reason why Indian account holders were not reimbursed for the losses they sustained is because the Bureau did not have a formal policy to reimburse account holders for losses." You go on to say, "From our review, we determined that the Bureau's practice regarding known losses of trust funds was not to disclose the losses and wait for the account holders to become aware of the losses (if they ever do) and to file a claim or sue the Government for recovery of the funds."

Now, if the Bureau, Mr. Richards has no policy on how to identify the losses, did it (BIA) indicate to you that they had no policy?

Mr. RICHARDS. Well, it evolves through a series of circumstances, which led to that inevitable conclusion. The Bureau didn't tell us what their policy was or wasn't, but

¹³⁴ *Supra* at 13.

¹³⁵ " * * * reimbursement of * * * unrecovered principal plus applicable interest has been delayed for periods up to 5 years." *Supra* at 11-15.

¹³⁶ *Supra* at 14-15. See also: Statement of James R. Richards, inspector general, U.S. Department of the Interior, May 20, 1991, hearing at 64-65.

we found the losses discussed in the report and in reviewing correspondence files and interviewing Bureau employees, we inquired as to whether these losses were accurate—and they were. When we identified a loss, we followed the trail to determine how the Bureau disposed of it. In no case did we find the Bureau had notified the affected parties, or reimbursed the trust fund account that had experienced the loss.

Once legal attempts to recover the losses from principals or insurers had been exhausted, the Bureau did not pursue the matter further. We therefore concluded that it was the Bureau's practice not to disclose investment losses to Tribes or individual Indians.¹³⁷

At the October 26, 1989, hearing, Mr. Walt Mills, Deputy Assistant Secretary of Interior for Indian Affairs, was asked to explain whether BIA had a policy on notice and reimbursement of Indian trust funds losses:

Mr. SYNAR. * * * Has it been the BIA's practice not to inform Tribes and Indians of [trust fund] losses * * *?

Mr. MILLS. On the losses of the IIM [Individual Indian Money] accounts, we have not notified all accounts.

Mr. SYNAR. Is that the policy of the BIA?

Mr. MILLS. The BIA has no policy, so I guess you could say that could be.

Mr. SYNAR. * * * Where do you do your banking, Mr. Mills?

Mr. MILLS. Right now, in Oklahoma.

Mr. SYNAR. In Anadarko?

Mr. MILLS. At Chickasha.

Mr. SYNAR. If the bank at Chickasha or your investment advisor there lost your money, would you be mad if they didn't inform you?

Mr. MILLS. I definitely would.¹³⁸

Despite BIA's limited concurrence with the inspector general's recommendation to implement procedures to correct the deficiencies in trust loss procedures identified by the OIG's September 1989 report, BIA again delayed corrective actions for more than 2 years,¹³⁹ an unconscionable abrogation of the BIA's fiduciary responsibilities.¹⁴⁰

Moreover, BIA's failure to implement the inspector general's recommendations coupled with its long delay in auditing and reconciling all Indian trust fund accounts constitute a liability risk to the

¹³⁷ Oct. 26, 1989, hearing at 34-35.

¹³⁸ Oct. 26, 1989, hearing at 449.

¹³⁹ Statement of James R. Richards, inspector general, U.S. Department of the Interior, May 20, 1991 hearing at 64-65; letter to Chairman Synar from Dr. Eddie Brown, Assistant Secretary for Indian Affairs, October 31, 1991, May 20, 1991, hearing appendix, at 301.

¹⁴⁰ May 20, 1991 hearing at 64-65; See also: Inspector general, U.S. Department of the Interior, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, Sept. 29, 1989, 15.

American taxpayer,¹⁴¹ and could eventually result in costly litigation.¹⁴²

Indeed, the Bureau has repeatedly failed to even notify account-holders when such losses have occurred.¹⁴³ The loss of trust funds is inconsistent with the Bureau's fiduciary and trust responsibilities.¹⁴⁴

Ironically, although the Bureau delayed implementing the inspector general's recommendations, it has never been constricted in its ability or authority to collect overpayments. Existing law authorizes the Secretary to collect claims of the U.S. Government for any overpayment to an Indian trust fund accountholder without resort to litigation, including actions taken through administrative offsets.¹⁴⁵ In fact, the Bureau has exercised its authority to redeem overpayments, even in some instances, where the tribal account-holder had not been overpaid.

It is a fundamental rule of law that persons who receive money erroneously paid by a Government agency or official acquire no right to such money, and the courts consistently have held that such persons are bound in equity and good conscience to make restitution. For example, in *DiSilvestro v. United States*,¹⁴⁶ the court said,

It is, of course, well established that parties receiving monies from the Government under mistake of fact or law are liable *ex aequo et bono* to refund them, and no specific statutory authorization upon which to base a claimed right or set-off or an affirmative action for recovery of these monies is necessary.

¹⁴¹ "The Budget of the United States Government, Fiscal Year 1993," Jan. 29, 1992, part 1, at 345, estimates potential losses due to mismanagement at \$25 to \$30 million. As of Nov. 14, 1991, the Bureau and the Solicitor of the Department of the Interior had been informed that losses of at least \$3,923,012 plus interest had occurred because the Bureau had invested trust funds in at least three financial institutions (credit unions) which subsequently failed. Both the Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) have denied BIA's requests for reconsideration of initial insurance determinations, which denied coverage for funds invested in excess of insurance limitations. In its letter of Jan. 3, 1992 (letter available at subcommittee office), FDIC was unable to reconsider its original determination denying insurance coverage, because BIA and the Department of the Interior had waited "almost 2 years" after the initial determinations denying coverage even though requests for reconsideration must be filed within 60 days of the original determination as required by 12 C.F.R. § 564.1(d)(3). Although, the Bureau has, albeit belatedly, sought recovery from the insuring organization it has not requested congressional authorization and appropriations to reimburse the injured tribal or individual Indian accountholders for losses plus interest which occurred between Mar. 1984 and July 1985. For full discussion of Bureau investments in failed financial institutions, see: Inspector general, U.S. Department of the Interior, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, Sept. 29, 1989, at 12, 13, 14, and 15.

¹⁴² May 20, 1991, hearing at 45-49. It is clear that the BIA has not made a full accounting of the property and funds held in trust for 300,000 native Americans; that it has not provided reports to those accountholders that state in clear terms the specific investments made with their money, the rate of interest, and the amount earned on each investment; and that it has not acted properly to maximize the trust income by prudent investments. Because of these breaches of fiduciary duties the Federal Government cannot affirmatively establish that it has properly discharged its trust; losses as a result of BIA's failures must be repaid from the general funds of the United States—that is, paid from taxpayer dollars. See also: U.S. General Accounting Office, "Financial Management: BIA Has Made Little Progress in Reconciling Trust Accounts and Strategic Planning," Draft Report GAO-AFMD-92-38, March 1992.

¹⁴³ Inspector general, U.S. Department of the Interior, "Final Audit Report on Selected Aspects of Indian Trust Fund Activities, Bureau of Indian Affairs," Report No. 89-117, Sept. 29, 1989, at 13.

¹⁴⁴ *Supra* at 15.

¹⁴⁵ 31 U.S.C. 3711, 3713, 3716

¹⁴⁶ 405 F.2d 150, 155 (2d Cir. 1968), *cert. denied*, 396 U.S. 964 (1969).

General trust principles are in accord. If a trustee makes an overpayment to a trust beneficiary, the beneficiary would be unjustly enriched if permitted to retain the amount overpaid.¹⁴⁷ Thus, in most circumstances, a trustee is authorized to set off against the sums due a beneficiary a debt of the beneficiary to the trustee.¹⁴⁸

Without comprehensive loss policies and procedures, individual Indians and tribes may be without an effective or timely avenue of recourse for losses caused by BIA errors. Among other things, the Bureau can simply withhold disbursements from trust funds until an alleged overpayment is satisfied. As the subcommittee's hearing clearly demonstrated, tribes and individual Indians have been far less successful in obtaining restitution from the BIA. Consider the case of the Red Lake Band of Chippewa Indians. It took more than 9 years, from 1982 to 1991, for the band, headquartered at Red Lake, MN, to receive restitution for BIA's errors in accounting for Red Lake's tribal trust accounts.¹⁴⁹

Until 1981, the BIA maintained a separate accounting station at the Red Lake agency office. This accounting system was responsible for daily management and accounting of cash activities for the various trust funds owned by the Red Lake Band. However in 1981, when the band learned that BIA was deducting the costs of managing the trust funds from the tribal trust accounts, Red Lake demanded that the practice be stopped and that the BIA provide a full accounting of Red Lake's tribal trust funds. The matter was examined by the OIG, who found that tribal balances were incorrect, that undocumented adjustments had been made to the Red Lake's tribal balances, and that the Red Lake Band had several hundred thousand dollars more than BIA showed on its records.¹⁵⁰ The OIG directed BIA to respond to its findings by September 1982. However, BIA never responded. In 1983, Red Lake sued the BIA, in Federal district court, and ordered BIA to have all Red Lake trust accounts audited. The audit found that BIA's financial statements understated Red Lake's balance by more than \$800,000. But, BIA refused to make restitution arguing that the audit was merely a "management tool." Instead, while the litigation was still active, in January 1989, BIA unilaterally transferred approximately \$1.25 million out of Red Lake accounts after determining that the tribes' trust fund investments were overstated.¹⁵¹ It was not until shortly after an April 24, 1990, hearing that Red Lake received \$362,000 as partial payment of its claims against the BIA.¹⁵²

At the subcommittee's September 25, 1990, hearing then-Assistant Secretary of the Interior Lou Gallegos was asked whether there was any justification for the Government to have a double standard treating losses and overpayments differently:

Mr. SNYAR. Mr. Gallegos, if an audit of [tribal or IIM] accounts reveals * * * that money was owed by the ac-

¹⁴⁷ III Scott, "Law of Trusts," § 254 (3d. Ed. 1967); "Restatement (Second) of Trusts" § 254 (1959).

¹⁴⁸ Bogert, "Law of Trusts and Trustees," § 814 (Rev. 2d ed. 1981).

¹⁴⁹ Sept. 25, 1990, hearing at 75.

¹⁵⁰ Inspector general, U.S. Department of the Interior, "Memorandum Audit Report, Accounting for Red Lake Trust Funds," C-IA-BIA-20-82(e), June 22, 1982.

¹⁵¹ Oct. 26, 1989, hearing at 78-84.

¹⁵² Sept. 25, 1990, hearing at 75.

count holder to the trust fund, isn't it safe to assume that the department would notify the account holder and attempt to recover that money fairly quickly?

Mr. GALLEGOS. Mr. Chairman, that is something that definitely should result. I'm not prepared to state that it does, however.

Mr. SYNAR. Isn't that precisely what happened with the Red Lake Band of Chippewa Indians? Didn't BIA find a mistake in the Red Lake Indian Mill trust operating account, which the BIA decided was an error in favor of the Federal Government and, the BIA unilaterally acted to remove the money from Red Lake's * * * account?

* * * * *

Mr. GALLEGOS. Mr. Chairman, I am just now informed that is correct.

Mr. SYNAR. Can you give this Subcommittee, Mr. Gallegos, any legitimate reason why the same standard should not apply in the reverse situation; and why it would be the Department of the Interior's position not to notify the account holders when you find that the BIA owes them money?

Mr. GALLEGOS. Mr. Chairman, I would not attempt to find a reason why the Department should not be held to the same standard.¹⁵³

After acknowledging the double standard argument for a comprehensive loss policy and procedures, Mr. Gallegos affirmed that the Department had not complied with the OIG recommendations, had not requested a Solicitor's opinion, or established a policy of notifying account holders of Indian trust fund losses:

Mr. SYNAR. Mr. Gallegos, the Inspector General told this subcommittee * * * that the primary reason why the Indian account holders were not reimbursed for the losses that they sustained as a result of BIA mismanagement is—let me quote [the OIG] again—"because the Bureau does not have a formal policy to reimburse account holders for losses."

Has the Bureau yet established a formal procedure to reimburse Indian Trust Fund losses on these investments, Mr. Gallegos?

Mr. GALLEGOS. Mr. Chairman, I am advised that the Bureau has made a commitment to establish a process by which individual account holders—

Mr. SYNAR. That is not the question, Mr. Gallegos.

Have they established the formal procedures?

Mr. GALLEGOS. Not at this point, Mr. Chairman.

Mr. SYNAR. Mr. Gallegos, what steps has the Department of the Interior taken to direct the Bureau to comply with the Inspector General's recommendation?

Mr. GALLEGOS. Mr. Chairman, the department has taken numerous steps across a broad range of initiatives that

¹⁵³ Sept. 25, 1990, hearing at 74-75.

have to do with the overall improvement of Bureau's performance.

Mr. SYNAR. Could you tell us one, Mr. Gallegos?

Mr. GALLEGOS. Yes, sir. The Department in fact has been very interactive with the Bureau of Indian Affairs in the analysis of this particular trust fund management problem for several months, trying to find the best methodology to address the larger question to remedy for the longer term the question of how to manage the trust; how to account for the trust; and how to inform the account holders as to what that status is.

Mr. SYNAR. But there has been no notice to account holders, has there, Mr. Gallegos?

Mr. GALLEGOS. Not that I am aware of, Mr. Chairman.

Mr. SYNAR. Mr. Gallegos, the Inspector General has stated that the Bureau and the Department's response to this problem has been inadequate. And based upon the evidence before the Subcommittee, I've got to tell you, I agree with that. Moreover, I am certain that the courts would agree, too. Now remember that the standard set by the courts is that the government must—and let me quote again—"affirmatively establish that it has properly discharged its trust."

Has the Department, Mr. Gallegos, consulted with the Solicitor to determine whether the Bureau should seek specific authorization and appropriations to reimburse account holders for losses attributable to BIA's mismanagement?

Mr. GALLEGOS. Mr. Chairman, I am not personally aware—I do not have direct personal knowledge that has been done; but I am told that it has been done.¹⁵⁴

* * * * *

Mr. SYNAR. Mr. Gallegos, on what basis do you believe the BIA and the Department of the Interior, acting as trustees, are justified in sitting back and hoping that account holders will not discover losses on their accounts?

Mr. GALLEGOS. Mr. Chairman, the Department and the Bureau of Indian Affairs are not justified in sitting back and awaiting for the individual account holders to discover that.

We believe that the department and the BIA are proceeding in a proactive way to establish factually what an account holder may be due, and make payments accordingly.¹⁵⁵

At the close of the September 25, 1990, oversight hearing, Chairman Synar directed the Interior Department to prepare a policy for notifying accountholders of Indian trust fund losses. For more than 1 year nothing happened. At the close of the May 20, 1991 oversight hearing, Chairman Synar reiterated his instruction. How-

¹⁵⁴ Despite repeated requests for documentation, the Bureau has provided the subcommittee with no evidence that such a request of the Solicitor's Office was ever made.

¹⁵⁵ Sept. 25, 1990, hearing at 73-75.

ever, it was not until September 13, 1991, that the BIA provided a copy of its draft policy to the Intertribal Monitoring Association¹⁵⁶ for comment. A final document entitled "Policies Regarding Notification and Reimbursement to Indian Trust Fund Account Holders for Losses Attributable to Bureau Errors" was submitted to the Assistant Secretary for approval on October 16, 1991. It was subsequently signed by the Assistant Secretary and transmitted to Chairman Synar on October 31, 1991.¹⁵⁷

The Department's October 31, 1991, transmittal letter to Chairman Synar erroneously states that General Accounting Office comments were considered.¹⁵⁸ The loss policy was, in fact, finalized without General Accounting Office comments. Moreover, the policy was finalized without addressing comments by the Interior Solicitor's Office and without review by the Inspector General's Office. Under these conditions it is reasonable for the subcommittee to question whether Bureau's loss policy is sufficient and appropriate.

Nevertheless, the development of any loss policy must be considered a step forward. The apparent intent of the document was to codify the Bureau's legal responsibility to both tribes and individual Indians for losses incurred as a result of errors made by the Bureau or any other Federal agency in the course of administering accounts held by the Bureau in their behalf. For the first time, the Bureau has endorsed a policy statement that defines "loss" and identifies Government errors that may result in losses. It attempts to prescribe a procedure for (1) determining whether a loss has occurred and the amount of the loss, and (2) reimbursing account holders for losses established in application of this procedure.

The committee recognizes that the Bureau's loss policy is an important acknowledgement of the Bureau's trust responsibilities to tribal and individual Indian account holders, and supports the Bureau's imposition of timeframes on the documentation, notification and reimbursement procedures. However, the committee is concerned that the policy is deficient in several important respects. For example, the policy statement fails to articulate a mechanism through which the Bureau will identify and correct errors that may result in losses as they occur, or to implement routine checks that will actually uncover losses. Rather than relying on account holders or Bureau staff to identify losses as they come to their attention, the Bureau should implement systems and procedures that will seek out losses.¹⁵⁹

The policy statement also fails to define the documentation the Bureau will need to establish the existence of and amount of losses. In defining losses to IIM account holders, the Bureau neglects to in-

¹⁵⁶The Intertribal Monitoring Association [ITMA] has served as the primary contact for monitoring, directing and corresponding with BIA management over Indian trust fund financial management and reform efforts.

¹⁵⁷Letter to Chairman Synar from Dr. Eddie F. Brown, Assistant Secretary for Indian Affairs, dated Oct. 31, 1991, May 20, 1991, hearing, appendix, at 301.

¹⁵⁸*Id.* at 301.

¹⁵⁹The ongoing audit and reconciliation project may uncover additional errors, some of which may favor the Federal Government and others which may favor the beneficiaries. For its part, the BIA has agreed not to proceed on the collections of alleged overpayments, except those already in process prior to July 26, 1991, until account holders have had an opportunity to review and provide input into the reconciliation and audit conclusions reported by Arthur Andersen & Co., See: Letter from Deputy Assistant Secretary Indian Affairs, Aug. 30, 1991, in the May 20, 1991, hearing appendix at 194, 198.

clude interest that was earned, but not credited to the appropriate account. The Comptroller General's decision of March 25, 1991, applies only to interest lost when the Bureau fails to invest IIM funds.

Before the loss reimbursement policy was completed and adopted, it was necessary for the Bureau to direct the contractor for the trust reconciliation and audit project on how such questions should be reported during phase 1 of the project.¹⁶⁰ Consequently, Stanley M. Speaks, former Acting Deputy Commissioner of Indian Affairs, requested that the Comptroller General issue an advance determination¹⁶¹ on the propriety of paying IIM accountholders interest income that would have, but did not, accrue because of the Bureau's management of those accounts.

On March 25, 1991, the Comptroller General concluded¹⁶² that the Bureau is not legally required to pay interest on individual Indian moneys because current law¹⁶³ governing the investment of individual Indian moneys does not require the investment of IIM funds. As a result, GAO determined that the BIA is not liable to IIM accountholders for interest on uninvested IIM funds. The decision applies only to interest lost when the Bureau fails to invest IIM funds, not to the distribution of interest actually earned.

Notably, this outcome is contrary to the statutory requirements governing tribal funds, which the Secretary is not only authorized but directed to invest. To correct this inconsistency and equitable deficiency, on April 11, 1991, Representative Synar, chairman of the subcommittee introduced the Native American Trust Fund Equity Act of 1991, H.R. 1756, legislation to require the Secretary of the Interior to invest and pay interest on IIM funds held in trust by the Federal Government. Enactment of H.R. 1756 would eliminate the inconsistency between investment of tribal and IIM funds and fill a gap in the Secretary's authority by requiring him to do what any private sector fiduciary would otherwise be required to do.

As documented by Interior's inspector general and others, there have been many instances where the Bureau has, either by neglect or by deliberate action, failed to invest some IIM moneys, and deprived accountholders of the opportunities to earn interest income by failing to record interest income properly or to credit an accountholder with interest earned. For example, the BIA has not calculated—or paid—interest on oil and gas royalties since 1985, al-

¹⁶⁰ Without a full and accurate accounting of the account balances in the Indian trust fund, neither the BIA, the Congress, nor the IIM accountholders are in a position to calculate with any certainty an estimated total of lost interest, or even to identify, for example, those accounts or portions of accounts that have not been invested, over what period of time BIA may have failed to invest particular IIM funds, or when interest may not have been posted properly. See: May 20, 1991, hearing at 45-49.

¹⁶¹ The Comptroller General's Decision has the force of law. Title 31 of the United States Code authorizes the Comptroller General to advise agencies on how they may spend their appropriations and, to settle claims against the Government. While technically this decision was merely an advance determination advising the BIA that it would be in violation of appropriations laws to pay imputed, unearned interest on IIM accounts, in effect, the decision also advises the BIA on how the General Accounting Office would settle claims filed against BIA for imputed interest in IIM accounts. See: 31 U.S.C. §§ 3711(b), Public Law, 89-508 § 3, 80 Stat. 309.

¹⁶² U.S. General Accounting Office Opinion, B-243029, Mar. 25, 1991.

¹⁶³ 25 U.S.C. 162a, June 24, 1938, c. 648, § 1, 52 Stat. 1037.

though such funds are invested as part of the IIM pool of funds.¹⁶⁴ Moreover, BIA's October 1991 loss policy fails to recognize that it is obligated to pay interest on IIM funds that it did invest.

While the Bureau has now undertaken this task, its longstanding failure to develop and implement a sound loss and reimbursement policy, including notification to accountholders that such losses had occurred, was inexcusable. Moreover, as noted above, the policy which ultimately was developed is still deficient in several important respects—deficiencies the committee expects will be addressed and resolved by the Bureau. Additionally, the committee expects the Bureau to implement all appropriate controls and training requirements necessary to prevent or at the very least minimize the occurrence of such losses in the first place.

The Native American Trust Fund Equity Act of 1991 will correct and reinforce the Federal Government's legal, moral, and ethical obligations to individual Indian moneys account holders. By its enactment, Congress would create the authority for the Secretary of the Interior to honor our fiduciary responsibilities to native Americans. Any expenditures under such authority will be subject to the annual appropriations process.

Clearly, the responsibilities imposed by treaties, statutes and the courts have established a complex set of responsibilities for the BIA. However, accounting for the daily and annual balances of the trust fund has been a continuing point of controversy and rightful criticism of BIA management. There are hundreds of thousands of native Americans who look to the BIA for assistance and cooperation. They deserve a fiduciary who is required to do what any private sector fiduciary would otherwise be required to do, and have a right to expect that BIA will meet its fiduciary responsibilities.

E. BIA'S FAILURE TO IMPLEMENT THE RECOMMENDATIONS OF THE GOVERNMENT OPERATIONS COMMITTEE

Accounting and financial management problems elsewhere in the Department of the Interior also plague the BIA's efforts to accurately account for trust funds. These problems have been the subject of previous committee and congressional investigations.

On July 19, 1985, the Committee on Government Operations approved and adopted a report entitled "Indian Oil and Gas Royalty Payments: Problems Persist." In that report the committee found that the Department of the Interior, the Minerals Management Service [MMS] and the Bureau of Indian Affairs had failed to eliminate certain impediments to a workable program for administration of Indian oil and gas royalties. Notably the committee found that the Department, MMS, and BIA had failed to provide a timely explanation of payments to allottees, and failed to establish a comprehensive system for identifying underpayments, overpayments, and nonpayments of oil and gas royalties. In turn, these failures diminish the BIA's efforts to accurately account for funds held in trust.

¹⁶⁴ May 20, 1991, hearing at 167-168. See also: U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Fund Management, "Fiscal Year 1992 Short Term Projects," November 1991, at 6-7 (document available in subcommittee office).

The Federal Oil and Gas Royalty Management Act of 1982 [FOGRMA] requires that the Secretary deposit royalties related to production of oil and gas on Indian lands to the appropriate Indian account no later than the last day of the month in which the funds are received.¹⁶⁵ FOGRMA also requires that there shall be provided with such payment, a description of the type of payment being made, the period covered, the source, production amounts, royalty rate, unit value and other information agreed to by the Secretary and the Indian allottee.¹⁶⁶ Another purpose of the Act was to cure abuses which resulted from "allowing industry to operate essentially on an honor system."¹⁶⁷

Unfortunately, these problems continue to persist. In the report on its hearing on the Interior and related agencies appropriations for 1987, the House Appropriations Subcommittee included the results of its investigative study, which disclosed that MMS operated its Royalty Management Program on the honor system because MMS has no means of verification.¹⁶⁸ As recently as its June 1991 Compliance Task Force Report, MMS openly acknowledged that its "Royalty Management Program [still] operates on an honor system."¹⁶⁹

Numerous inspector general and GAO reports have noted that the Minerals Management Service's systems for collection, payment and reporting of royalties do not ensure accurate and timely revenue collection and distribution to States, tribes, and Indian allottees. MMS' priority is to process payments within 30 days—not to ensure that the payments are accurate. In fact, the Minerals Management Service reduced its royalty accounting system edit controls¹⁷⁰ from 839 in May of 1983 to 159 in October 1984. In 1990, after 5 years of effort to improve its systems, MMS had 161 edit controls of which 107 were critical to payment processing, but not necessarily payment accuracy. A July 1990 inspector general report¹⁷¹ to Representative Morris K. Udall¹⁷² noted that the Minerals Management Service implemented and continued to operate the interagency data base verification system on lease information without testing it to determine if it produced accurate reports,

¹⁶⁵ 30 U.S.C. 1714, Public Law 97-451, title I, § 104(b), 96 Stat. 2452.

¹⁶⁶ 30 U.S.C. 1715, Public Law 97-451, title I, § 195, 96 Stat. 2452.

¹⁶⁷ House Committee on Interior and Insular Affairs, H. Report No. 97-859, 97th Congress, 1st sess., at 15.

¹⁶⁸ Committee on Appropriations, 99th Congress, 2d sess., part 12, "Royalty Management," at 16.

¹⁶⁹ Office of the Assistant Secretary for Land and Minerals and Mineral Management Service, U.S. Department of the Interior, "Report on the Task Force on Royalty Compliance," June 1991, "Foreword" at 1, 2, 4, 5, 6, 7, and 8; "Compliance Task Force Report," at 6, 7, 9, 11, 16, and 20.

¹⁷⁰ Throughout the 1980's, numerous studies and audits reported data reliability problems with MMS' automated royalty management systems. A key component of this program is verification of self-reported mineral production data. Edit controls are a means of identifying poor production or royalty documentation within the automated royalty management system. In short, edit controls are the red flags that alert Federal managers to the problems that may require additional documentation to verify the accuracy of any report. By reducing the number of edit controls, it is possible to make the process run more swiftly. However, reducing the number of edit controls will also reduce the system's ability to verify the accuracy of data. See: U.S. General Accounting Office, "Mineral Management Service: Improvements Planned for Automated Royalty Management System," GAO/IMTEC-90-85, July 27, 1990; U.S. General Accounting Office, "Mineral Revenues: Shortcomings in Onshore Federal Oil and Gas Production Verification," GAO/RCED-90-99, June 26, 1990; U.S. General Accounting Office, "Interior Has Not Solved Indian Oil and Gas Royalty Payment Problems," GAO-IMTEC-86-13, Mar. 31, 1986.

¹⁷¹ Minerals Management Service, U.S. Department of the Interior, "Interagency Data Base Verification System," Report No. 90-75, June 1990, at 11.

¹⁷² Former chairman of the House Committee on Interior and Insular Affairs.

without obtaining acceptance from the Bureau of Land Management, and without correcting major programming errors. The inspector general concluded that, as a result, Minerals Management Service implemented and has continued to operate a system that generates reports that contain an astounding 26 percent error rate. The Minerals Management Service also has not implemented royalty system improvements as promised to Chairman Synar during the subcommittee's 1985 hearing.¹⁷³ These systems include: (1) auditing and financial system [AFS] (1983); production accounting and auditing system [PAAS] (1984); bonus rental accounting support system [BRASS] (1984); and, business system planning implementation [BSPI] (1986).

During a 1987 Appropriations Subcommittee hearing on uncollected royalties, the questioner is Chairman Yates, the witness is William Bettenberg, then-Director of MMS and now Deputy Assistant Secretary of the Interior for Indian Affairs about these continuing problems:

Mr. YATES. So you know that there is a big amount that is uncollected, a huge amount that is uncollected. In the hundreds of millions.

Mr. BETTENBERG. Some place, certainly, in the hundreds of millions since we have collected \$320 million. The suggestion of \$30 to \$50—

Mr. YATES. Here is the Linowes report.¹⁷⁴ Has this been changed?

Audits conducted by the private oil and gas companies show that royalties due are normally understated by 7 to 10 percent. In its 1981 report, GAO said: "[H]undreds of millions of dollars owed the Government may be going uncollected each year."

Let me go back to the hearing where you and I were kind of fencing with each other about how well you were doing. On page 726 of part 10 of our hearings, Mr. Bettenberg on the Indians and their rights, [reading]:

"We are exercising the secretary's trust responsibility so far as collecting the money is concerned."

Mr. Yates: "Wait a minute. You are collecting the money, but you don't know whether the collections are adequate" and you don't. "The allottees don't know whether the collections are adequate and BIA does not know whether the collections are adequate", and it does not, "and BIA has the responsibility on behalf of the allottees to determine whether the collections are adequate, doesn't it? Are you saying you have that responsibility."

¹⁷³ See: Committee on Government Operations, "Indian Oil and Gas Royalty Payments: Problems Persist," House Report 99-414, and related hearings.

¹⁷⁴ Report of the Commission, "Fiscal Accountability of the Nation's Energy Resources." David F. Linowes, Chairman, Jan. 21, 1982.

Mr. Bettenberg [said,]: "I think we [MMS] have the responsibility and we have that responsibility with other Federal lands."

Mr. Yates said, "Then for heaven's sake, you are opening up the United States for a tremendous lawsuit because, on the basis of your testimony here this morning, you are saying that you are not really doing an adequate job of knowing whether or not the amounts you have collected are the correct amounts."

Mr. Bettenberg says, "I think what I said is we are getting better and better at that."

Mr. Yates says, "Sure you are, Sure you are getting better and better. It has been four years since the Linowes Commission issued its report. FOGRMA was passed two years ago and you are still struggling to try to get * * * regulations approved." You still don't have product value regulation. There is no way you are going to get—

Mr. BETTENBERG. Actually we have product value regulation.

Mr. YATES. That isn't what your advisory committee tells us * * * 175

To date, the Bureau of Indian Affairs continues to have problems with the Minerals Management Service royalty payment and reporting practices.¹⁷⁶ Those problems stem from the Bureau's inability to obtain sufficient data from MMS to prove that the payments received are accurate.¹⁷⁷ Because Minerals Management Service is the Interior Department agency with responsibility for managing the Royalty Management Program and ensuring that mineral revenues are fully and fairly collected, the BIA's performance of its fiduciary duties is dependent upon MMS's performance. BIA relies completely on MMS to monitor royalty and production accounting¹⁷⁸ and on the Bureau of Land Management to monitor actual production in the field.

¹⁷⁶Committee on Appropriations, hearing on Department of the Interior and related agencies appropriations for 1987, 99th Congress, 2d sess., part 12, royalty management, at 120. See also: Inspector general, U.S. Department of the Interior, "Mission Accomplishment, Fiscal Accounting Division, Royalty Management Program, Minerals Management Service, No. E-LM-MMS-07-87B," report No. 88-61, Apr. 1, 1988, at 3, 4, 9, and 10.

¹⁷⁶After a discussion of the June 1991 "Compliance Task Force Report," the State and Tribal Royalty Audit Committee [STRAC] concluded its September 1991 quarterly meeting with MMS by noting that the MMS report is evidence that "nothing has changed since the Linowes Commission" in 1982. State and Tribal Royalty Audit Committee, Washington, DC, Sept. 26, 1991. (Confirmed in GAO notes.) For related information: Arthur Andersen & Co., "Tribal and Individual Indian Moneys Trust Funds Managed By The U.S. Department of the Interior, Bureau of Indian Affairs, Financial Statements as of Sept. 30, 1989 and 1988, Together With Report of Independent Public Accountants," May 11, 1990, at 12, 13, and 15.

¹⁷⁷Committee on Interior and Insular Affairs, staff report, "Federal Minerals Royalty Management: An Analysis of Problem Areas Related to the Department of the Interior's Minerals Management Service with Recommended Solutions," Feb. 19, 1992, at 4, 29, 39, and 42.

¹⁷⁸Such reliance may not be wise. For example, the Department's inspector general has reported that MMS spent \$400,000 developing and implementing the interagency data base verification system "without analyzing alternative systems and without performing a cost-benefit analysis for each alternative." This produced a system that the inspector general described as "[containing] significant errors in logic"; "not completely tested for accuracy"; "not supported by over half of the * * * users"; "not completely [fulfilling] the objectives of accurately compar-

Continued

If the Bureau cannot prove that the royalties received from MMS are accurate, it cannot adequately protect account holders. But the Bureau of Indian Affairs has acknowledged that neither Minerals Mineral Service nor the Bureau of Land Management completes up-front monitoring and data collection processes necessary to ensure that royalty payments and reports are accurate. For example, MMS allows producers to unilaterally assess tribes and BIA's Indian allottee account holders negative royalty adjustments for alleged overpayments without any verification that the recoupments are valid.¹⁷⁹ These negative royalty payments assessed against BIA's allottees affect the tribal and IIM investment pool, reducing interest earned. Because BIA disburses payments to allottees monthly, negative royalty adjustments can result in an insufficient balance in an allottee account to cover the negative royalty payments. However, since BIA policy precludes posting a negative adjustment to an account which is greater than the balance in the account, these negative payments can only be posted to the investment pool reducing the amount available for investment across the pool and, therefore, adversely affecting a number of different account holders' funds.

Deficiencies in MMS data collection have caused other problems for the investment pool as testimony from the subcommittee May 20, 1991 hearing indicates:

Mr. SYNAR. Isn't it true that the last time BIA distributed interest earned on oil and gas royalty collections to the allottees and tribal accounts was 1985?

Mr. EDDIE BROWN. Yes, I am told.

Mr. SYNAR. You don't expect us to have another 6-year gap for the interest payments, do you?

Mr. PARRIS.¹⁸⁰ No. The interest related to oil and gas royalties is going to be distributed as a result of the petition.¹⁸¹

Mr. SYNAR. When?

Mr. PARRIS. We at this time are in the final—

Mr. SYNAR. When? When?

Mr. PARRIS. By October.

Mr. SYNAR. Of this year.

Mr. PARRIS. Correct.

Mr. SYNAR. Have you consulted the tribes on this matter?

ing and verifying common data elements"; and, "neither efficient nor effective in resolving differences among . . . data bases." Inspector general. U.S. Department of the Interior, "Final Audit Report—Interagency Data Base Verification System, Mineral Management Service," report to the Secretary of the Interior No. 90-75, June 1990, notes added. [Cited at Sept. 25, 1990, hearing at 71.]

¹⁷⁹ This policy appears to be wholly inconsistent with the Federal Oil and Gas Royalty Management Act of 1982 [FOGRMA], 30 U.S.C. 1701, 1714, 1715, and 1721. Public Law 97-451, 96 Stat 2452. This royalty management system appears to depend solely on allowing the industry to operate on an honor system—an abuse which Congress specifically sought to curtail when it passed FOGRMA. House Committee on Interior and Insular Affairs, House Report No. 97-859, 97th Cong., 1st sess., reprinted in 1982 United States Code and Cong. and Admin. News at 4269.

¹⁸⁰ Director of the Bureau of Indian Affairs' Office of Trust Fund Management.

¹⁸¹ Account holders had to petition the Federal Government for distribution of their funds.

Mr. PARRIS. This is mainly involving—this particular situation involves mainly allottees' accounts.¹⁸²

On February 19, 1992, the House Committee on Interior and Insular Affairs issued at report of its recent investigation of MMS' Royalty Management Program. The committee found that despite MMS' continued promises that longstanding issues were being addressed, serious program and systems deficiencies continue to exist. The report notes that there has been little progress since the 1982 Linowes report; that AFS system implementation is dismal and that system does not calculate interest owed to Indians on insufficient royalty estimates, which are later adjusted in favor of Indians; and, that 25 to 30 percent of all data submitted to MMS are erroneous and most of these errors go uncorrected.¹⁸³

Unless corrections are made in the serious, longstanding weaknesses in the Minerals Management Service and Bureau of Land Management systems and operations supporting the Royalty Management Program, the Bureau of Indian Affairs cannot accurately maintain the accounts in the Indian trust fund, even if all Indian ownership records are verified and accurately maintained and all trust accounts are reconciled, audited, and certified.

F. BIA'S FAILURE TO PREPARE A STRATEGIC PLAN

Developing a comprehensive strategic management plan describing the elements of specific action necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades is the logical first step the Bureau of Indian Affairs must undertake to assure Congress, the public, and the native American community that the Department and the Bureau are committed to, and will be successful in, professional, competent financial management of the Indian trust fund and restoring the Bureau's administrative credibility.

At the close of the subcommittee's May 20, 1991 oversight hearing, Chairman Synar directed the Bureau to submit a strategic plan for improved financial management of the Indian trust fund by June 30, 1991. However, he noted that additional time would be granted, if BIA demonstrated it was working effectively with the tribes and account holders representatives¹⁸⁴ to develop the plan.

In response to long-term deficiencies in BIA's management of the Indian trust fund and BIA's other persistent management failures and deficiencies, the President's Office of Management and Budget [OMB] designated BIA as a high risk agency requiring priority attention in October 1989, stating that "dates for correcting weaknesses are continually extended * * * [and] controls are inad-

¹⁸² May 20, 1991, hearing at 167-168. As of Feb. 21, 1992, no interest had been distributed. See also: U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Fund Management, "Fiscal Year 1992 Short Term Projects," November 1991, at 6-7 (document available at the subcommittee office).

¹⁸³ Committee on Interior and Insular Affairs, "Federal Mineral Royalty Management: An Analysis of Problem Areas Related to the Department of the Interior's Minerals Management Service with Recommended Solutions," a report prepared by the staff of the committee, Feb. 19, 1992, at 3, 4, 14, 21, and 24.

¹⁸⁴ May 20, 1991, hearing at 168-169.

equate.”¹⁸⁵ This action was followed in June, 1991, when OMB formally designated the BIA trust funds a high risk area. OMB continues to report BIA’s Indian trust fund management as a high risk activity of the Federal Government in its fiscal year 1993, adding that the taxpayers are at risk for \$25 to \$30 million in potential losses due to mismanagement.¹⁸⁶

During the time that OMB has listed BIA’s trust fund operations on its list of high risk areas of the Federal Government,¹⁸⁷ BIA failed to undertake corrective actions to address internal material control weaknesses in the operation of the Indian trust fund. For example, in November 1990, OMB reported that the BIA was “not addressing the high risk area constructively nor solving any problems.” That report found that the BIA’s plans for correcting material weaknesses in trust fund management “are not acceptable because events are out of sequence, milestones don’t support corrective action necessary to decrease risks and results indicators are not clear.”¹⁸⁸ BIA had no strategic plan in May 1991.¹⁸⁹ Inexplicably, however, BIA still does not have a comprehensive strategic management plan.¹⁹⁰

Additionally, in November 1990, President Bush signed the Chief Financial Officers [CFO] Act,¹⁹¹ which required 23 executive agencies to reorganize their financial management to remedy longstanding financial management problems. This act is the most comprehensive financial reform package in 40 years. It calls for the establishment of a chief financial officer structure and a cadre of trained accounting professionals in each Department, the development of a comprehensive 5-year plan to guide the implementation of modern financial systems and the building of first-rate financial management operations, and the preparation and audit of financial statements that include all trust funds and the issuance of an annual management report, designed to explain precisely where the agency stands financially.¹⁹² The Bureau of Indian Affairs has

¹⁸⁵ Letter from Executive Associate Director, Office of Management and Budget to Under Secretary of the Interior, Oct. 4, 1989, attachment B. See also: Secretary of the Interior, “Annual Statement and Report, Federal Managers’ Financial Integrity Act,” Dec. 21, 1989, at 2. “Budget of the United States Government, Fiscal Year 1992,” 102d Cong., 1st sess., Feb. 4, 1991, House Document 102-3, part 2, at 306. “Budget of the United States Government, Fiscal Year 1993,” Jan. 29, 1992, part 1, at 345.

¹⁸⁶ “Budget of the United States Government, Fiscal Year 1993,” January 29, 1992, part 1, at 345.

¹⁸⁷ *Supra* at attachment C, “* * * a program/review process to establish priority actions to address material weaknesses and audit followup should be established by program managers and monitored by the Deputy Secretary * * * the correction of major weaknesses should be identified in Department budget and operating plans to assure appropriate allocation of resources to correct the problems. See also: Letter from the Secretary of the Interior to the President, Dec. 21, 1989, Secretary’s annual statement and report, Federal Managers’ Financial Integrity Act; Office of Management and Budget, “OMB’s High Risk Initiative, Areas Requiring Priority Attention,” November 1990.

¹⁸⁸ Office of Management and Budget, “Report on Status of Progress In Interior Department’s High Risk Areas,” November, 1990.

¹⁸⁹ Exhibit 1, May 20, 1991 hearing at 50-53. Letter from Chairman Synar to OMB Director Richard Darman, May 9, 1991, asking for a summary of the Bureau’s actions to implement the OMB directive. Letter from Associate Director of OMB Robert E. Grady, May 17, 1991, explaining that “OMB was never provided a strategic plan.”

¹⁹⁰ U.S. General Accounting Office, “Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Strategic Planning,” GAO-AFMD-92-38, March 1992, at 13-15.

¹⁹¹ 5 U.S.C. §§ 5313, 5315; 31 U.S.C. §§ 501, 502-506, 901, 902, 903, 1105, 3511, 3512, 3515, 3521, 9105, 9106; 38 U.S.C. 201; 42 U.S.C. 3533; Public Law 101-576, 104 Stat. 2044.

¹⁹² Statement of Jeffrey Steinhoff, Director of Civil Audits, U.S. General Accounting Office, Accounting and Financial Management Division, May 20, 1991 hearing transcript at 6, 8.

not yet selected its Bureau CFO, who would be responsible for Indian trust funds and financial management, among other duties.¹⁹³

On May 6, 1991, the Comptroller General wrote the Secretary of the Interior Manuel Lujan, Jr. and the Bureau directing the Department and BIA to prepare a written statement of actions to be taken to correct longstanding management deficiencies at the Bureau; to develop plans and timetables for completing the audit and reconciliation of Indian trust accounts; to develop policies and procedures to ensure that Indian trust fund balances remain accurate after the accounts are reconciled; and, to direct the Department's CFO to ensure that the Bureau's management improvement initiatives tie into and support the CFO's objectives.¹⁹⁴ This request was underscored at the subcommittee's May 20, 1991, oversight hearing when GAO discussed the need for BIA to prepare a strategic management plan for trust fund financial management improvements.¹⁹⁵

Under Federal law,¹⁹⁶ when the Comptroller General makes a report that include a recommendation to the head of an agency, the head of the agency shall submit a written statement on action to be taken on the recommendation within 60 days from receipt of the GAO letter. This report in response to the Comptroller General's recommendation must be forwarded to the House Committee on Government Operations and its Senate counterpart, the Committee on Governmental Affairs, as well as to the House and Senate Appropriations Committees. Under OMB regulations, the agency must also notify OMB. The Secretary's August 1, 1991, response to the Comptroller General concurred with GAO's recommended recommendations, but reported no concrete corrective actions to implement the reforms.¹⁹⁷

The House Appropriations Committee report¹⁹⁸ for the Department of the Interior's fiscal year 1992 appropriations required the Bureau of Indian Affairs to develop a strategic plan for tribal and IIM trust fund management. As part of the planning process the Bureau was instructed to look at alternatives, including a determination as to whether portions of the trust operation could be performed under contract, or by tribes themselves, in a more efficient manner than by the Bureau.

In response to these directives, in early July 1991, BIA developed an interim plan for improving trust fund financial management and presented it to the Intertribal Monitoring Association. After a review of the plan, ITMA representatives informed the Deputy As-

¹⁹³ U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing A Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

¹⁹⁴ Under the authority of 31 U.S.C. 720, Public Law 97-258, 96 Stat. 896, "when the Comptroller General makes report that includes a recommendation to the head of an agency, the head of the agency shall submit a written statement on action taken on the recommendation by the head of the agency. The statement shall be submitted to: (1) the Committee on Governmental Affairs and the Committee on Government Operations of the House of Representatives before the 61st day after the date of the report * * *"

¹⁹⁵ May 20, 1991, hearing transcript at 16.

¹⁹⁶ 31 U.S.C. 720, Public Law 97-258, 96 Stat. 896.

¹⁹⁷ U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing a Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

¹⁹⁸ House Report 102-116 (H.R. 2686), June 19, 1991, at 62.

sistant Secretary for Indian Affairs and the subcommittee that they would not, in any way, endorse an interim plan because, among other things: (1) it was not a strategic plan; (2) it was another attempt at listing partial solutions without a comprehensive approach to problemsolving; (3) it failed to consider necessary organizational changes, staffing and training requirements; and (4) its determination of priorities and target dates for accomplishments was arbitrary and overly optimistic.¹⁹⁹

The Deputy Assistant Secretary responded that while he understood ITMA's position, he wanted to be able to respond to Chairman Synar's request for a plan by the end of July 1991. However, in response to criticism from both the General Accounting Office and ITMA about the trust fund interim plan, the Bureau decided to put together a separate document, entitled: "Strategic Planning Framework." On September 17, 1991, BIA provided a draft copy of the strategic framework paper to the ITMA and requested comments by September 30. Finally, on September 25, 1991, the Bureau of Indian Affairs forwarded its "Strategic Planning Framework" to the subcommittee.²⁰⁰ That date was 117 days after the June 30, 1991, deadline that Chairman Synar had set to be met "without extensions and without excuses."²⁰¹

Later versions were submitted to GAO and ITMA on February 7, 1992.²⁰² The Intertribal Monitoring Association is still concerned that BIA's draft "Strategic Planning Framework" does not address staffing and organization issues as a basis for developing its strategic plan. As an example, BIA filled vacant positions and hired additional staff to support the trust fund account reconciliation project without first analyzing how these staffing changes might impact on an overall strategic plan.²⁰³ The Association and the GAO have also expressed concern that BIA was moving forward to implement its interim plan for trust funds. As with staffing, it is unclear how the interim plan relates to the strategic plan, or whether the short-term corrective actions will be consistent with short- and long-term corrective actions developed for the strategic plan.²⁰⁴

BIA's initial draft of the "Strategic Planning Framework" lacked some of the key elements of a strategic plan. This framework did not provide for an analysis of the Bureau of Indian Affairs' mission and goals and it did not contain an assessment of how best to orga-

¹⁹⁹ Letter from ITMA project director to Deputy Assistant Secretary of the Interior for Indian Affairs, Sept. 30, 1991, with attached "Comments on Draft Copy of Strategic Planning Framework," (documents available in subcommittee offices).

²⁰⁰ Letter to Chairman Synar from Assistant Secretary-Indian Affairs, Sept. 25, 1991, Appendix, May 20, 1991 hearing, at 182-186.

²⁰¹ May 20, 1991, hearing at 168-169.

²⁰² U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing A Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

²⁰³ Staffing and training have been a significant problem at BIA throughout the past decade. See: Subcommittee's May 20, 1991, hearing at 165-169. These problems continue to be met with makeshift, short-term remedies. Unfortunately, it is not apparent how BIA can make intelligent staffing decisions without addressing the underlying causes of its continuing financial management crisis and without a comprehensive plan including a staffing and organizational plan. In fact, as of Jan. 28, 1992, according to Mr. Jim Parris, Director of the BIA's Office of Trust Fund Management (OTFM), only 37 of OTFM's 51 authorized staff positions in the fiscal year 1992 appropriation were actually filled with full-time BIA employees.

²⁰⁴ U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing A Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

nize and staff the Bureau to carry out trust fund operations. In addition, the framework did not discuss key factors, which are outside the control of the Office of Trust Fund Management, but which have consequences that directly effect trust fund accounting.²⁰⁵ Finally, the initial draft did not articulate BIA's plan for reviewing the current trust financial management systems and procedures even though such studies are necessary to support appropriate action to correct BIA's longstanding financial management deficiencies.

After consultation with GAO and ITMA, BIA submitted a revised version of its "Strategic Planning Framework" to GAO, ITMA and the subcommittee on February 7, 1992. The revised framework is an improvement over earlier versions, because it addresses the need for (1) an analysis of the Bureau's mission and goals; (2) an assessment of the factors within the Bureau and outside the Bureau that affect trust fund accounting; (3) an organizational framework across the Bureau to support trust fund management; and, (4) a review of BIA's current trust fund financial management systems and procedures.²⁰⁶

While the revised framework is an improvement over the September 1991 version, it fails to address other problems outside the control of the Office of Trust Fund Management that directly effect trust fund accounting, including fractionation of Indian land ownership interests. The continued fractionation of land ownership complicates BIA's recordkeeping, puts undue stress on trust accounting, and the cost of maintaining voluminous records may be excessive.²⁰⁷

In summary, BIA's "Strategic Planning Framework" demonstrates a lack of understanding by BIA management that an assessment of organization, staffing, and operations should come first, to provide a basis for planning. For example, to develop a resolute action plan necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades and provide a meaningful blueprint for hard-nosed application of sound management practices, all elements of BIA's trust fund financial systems should be considered, including investment and disbursement. To assure Congress, the public, and the native American community that the Department and the Bureau are committed to, and will be successful in, professional and competent financial management of the Indian trust fund and restoring the Bureau's administrative credibility, all trust fund policies and procedures should be reviewed and revised, as appropriate. To show demonstrable improvement in the financial management of the Indian trust fund, records management—including ownership records maintenance—should be included in a comprehensive strategic plan. Moreover, the framework and a strategic plan need to fully address actions necessary to ensure that BIA has a reliable trust fund accounting system.

²⁰⁵ These factors include: MMS's royalty payment and reporting problems and BLM's oversight of Indian minerals leases, which are discussed above.

²⁰⁶ Letter from Assistant Secretary for Indian Affairs to ITMA, Feb. 7, 1992 (document available in subcommittee office).

²⁰⁷ U.S. General Accounting Office, "Indian Programs: Profile of Land Ownership at 12 Reservations," GAO-RCED-92-96BR, Feb. 10, 1992.

The committee believes that Bureau management needs a better understanding of the purpose of a strategic plan and how to develop one. Its draft "Strategic Planning Framework" falls far short of what is needed. Moreover, it was prepared without adequate consideration of input from the Intertribal Monitoring Association, as evidenced by the association's comments.

Under an agreement with BIA, the association has begun efforts to prepare a conceptual paper for developing a strategic plan. The association is in the process of identifying organizational issues as well as program and process issues. The association is seeking input from the tribes and IIM accountholders, as well as professionals, in the areas of investments, systems, royalty accounting, as well as overall strategic planning. BIA would do well to consider these areas, as well as performance of an organizational study, before presuming to develop a framework for strategic planning.

The committee's continuing review reveals that BIA has not prepared a bona fide strategic action plan—notwithstanding the clear direction to do so by the Office of Management and Budget, the Comptroller General of the United States, the House Appropriations Committee and the Environment, Energy and Natural Resources Subcommittee. In fact, there is no indication that BIA has prepared any comprehensive action plan for correcting its long-standing management problems.

For example, despite the preparation of the "Strategic Framework" the Bureau has no plan for achieving reliable, timely trust fund financial management and reporting. There is no consistent or comprehensive compilation of specific initiatives, within a strategic plan, for correcting identified weaknesses. The Bureau has not compiled a list of the managers responsible for implementing its initiatives. As noted above, the Bureau has not identified, committed or prepared to train the necessary staff.²⁰⁸ And, the Bureau has not established any milestone dates for completing identified corrective actions.²⁰⁹

Over the course of the subcommittee's investigation and four oversight hearings, perhaps there was one statement that best summarizes the Bureau's indifference to the plight of Indian trust fund accountholders. Representative Bustamante best said it on April 24, 1990, in the following comments to the Assistant Secretary for Indian Affairs:

We have 300,000 accounts. We have about 350 tribes in the United States. It is really sad that these people have been misrepresented by BIA. The BIA should look after these people. They have no real representation in Congress.

I have a tribe that I represent in my district, but throughout the years, most of these people have been used, abused by many, and you in the BIA, ought to be the ones that really look after them.

²⁰⁸ See: Statement of Jeffrey Steinhoff, U.S. General Accounting Office, Director of Civil Audits, Accounting and Financial Management Division, May 20, 1991, hearing, at 6.

²⁰⁹ U.S. General Accounting Office, "Financial Management: BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing A Strategic Plan," Draft Report GAO-AFMD-92-38, March 1992.

If this happened in Social Security, I will tell you, there would be a war. If we can manage Social Security, we ought to be able to manage this. I understand that it is going to take time and we want to help you, but you are going to have to take a more aggressive posture in this area.²¹⁰

Sadly, almost 2 years later, very little has changed. Nor is it likely to change in any meaningful respect without full implementation of the changes recommended below.

IV. SUMMARY

The Bureau of Indian Affairs [BIA] has failed to fulfill its fiduciary duties to the beneficiaries of the Indian trust fund. The Bureau's management of the Indian trust fund has been grossly inadequate in numerous important respects. The Bureau has failed to accurately account for trust fund moneys. Indeed, it cannot even provide accountholders with meaningful periodic statements on their account balances. It cannot consistently and prudently invest trust funds and pay interest to accountholders. It does not have consistent written policies or procedures that cover all of its trust fund accounting practices. Under the management of the Bureau of Indian Affairs, the Indian trust fund is equivalent to a bank that doesn't know how much money it has.

Financial management problems in the Bureau of Indian Affairs' management of the Indian trust fund have been neglected for decades. There is a continuing crisis in the management of the Bureau of Indian Affairs that can only be cured by radical changes in leadership, organization, accountability, and communication by the Bureau of Indian Affairs and the Department of the Interior.

The real losers in the mismanagement of the Indian trust fund are the Tribes and the individual Indian accountholders. These accountholders are being misrepresented by the Federal Government. Yet victims of this nonfeasance have had no recourse except to the very agency that is responsible for their predicament.

As noted by Representative Bustamante, had this type of mismanagement taken place in any other trust arrangements such as Social Security, there would be war. Instead, some of those most responsible for the recent failures within the management of the Indian trust fund received cash awards from the Department of the Interior for management excellence.

The scope and severity of the gross mismanagement by the BIA headquarters staff is made worse by the inattentive and indifferent leadership within the Bureau of Indian Affairs and the Department of the Interior. This type of trust fund mismanagement would never be tolerated in other, similar trust activities. That it has taken place in the administration of the Federal Government's sacred trust for native Americans can only be described as a national disgrace.

The trust of the Congress, the taxpayers—and most importantly—the tribes and individual Indian money accountholders has

²¹⁰Apr. 24, 1990, hearing at 27.

been misplaced in the Bureau of Indian Affairs. BIA has failed in the performance of its duties to us all.

V. FINDINGS

1. The Federal Government is obligated by statute and treaty to properly discharge all its fiduciary responsibilities to native Americans, including accounting for Indian trust funds and accurately maintaining the trust corpus through prudent management and investment of the funds, as appropriate, to maximize income to the extent possible.

2. Bureau of Indian Affairs supervision and control of Indian trust funds is not adequate to fulfill the Government's fiduciary duties to the native American beneficiaries of the trust.

3. Over the past 10 years, scores of reports by the U.S. Department of the Interior's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, the Committee of Government Operations, independent public accounting firms, as well as this subcommittee's oversight investigation have disclosed an appalling array of management and accountability failures by the Bureau of Indian Affairs.

4. BIA's poor performance of its fiduciary duties is pervasive. Moreover, there is little assurance based on past experience that profound and persistent problems will ever be corrected by the Bureau, so that the Indian trust fund will be properly managed in the future.

5. These continuing management and accounting problems are so severe that the President's Office of Management and Budget has included BIA's mismanagement of the Indian Trust on its list of high risk areas in the Federal Government in need of immediate and substantial management and accountability improvements.

6. The Assistant Secretary of Indian Affairs has failed to provide either the leadership or supervision necessary to correct longstanding management problems at the Bureau of Indian Affairs.

7. The decentralized and antiquated organizational and staffing structure of the Bureau of Indian Affairs has contributed to an absence of accountability within the Bureau and its failure to correct longstanding financial management problems in its administration of the Indian trust fund.

8. The BIA has failed to implement numerous inspector general recommendations; failed to implement Office of Management and Budget directives and recommendations; failed to implement Comptroller General recommendations; failed to comply with the Brooks Act governing acquisition of automatic data processing equipment and services; refused—for 4 years—to comply with Appropriations directives to audit and reconcile Indian trust fund accounts; and, failed to implement the recommendations of the Committee on Government operations.

9. The Department of the Interior has tolerated the deepening crisis in Indian trust fund management, acquiescing to inconsistent and inadequate performance of trust responsibilities to native Americans. In fact, despite longstanding recognition and condemnation of BIA's poor performance by the Department's Office of Inspector General, the Department of the Interior has taken few

steps to make BIA headquarters accountable to the account holders for shoddy administration or to implement these corrective action recommendations.

10. The Bureau of Indian Affairs has not yet selected its Bureau CFO, who would be responsible for Indian trust funds and financial management, among other duties

11. The Bureau of Indian Affairs' headquarters management failed to present to this committee a workable plan of activities necessary to solve BIA's long-term financial management problems as directed by the Subcommittee on Environment, Energy, and Natural Resources on May 20, 1991. Despite efforts to prepare an interim improvement plan, there is no evidence that the Bureau has made substantial progress in correcting longstanding financial management deficiencies.

12. The Department of the Interior has failed to establish an overall departmental strategy for solving the Bureau of Indian Affairs' financial and program management problems.

13. The absence of an adequate organization plan and staffing and training programs for agency personnel has greatly reduced the efficiency of Bureau of Indian Affairs' headquarters and the Office of Trust Fund and area and agency offices. As a result the many dedicated and capable Bureau of Indian Affairs' employees throughout the Nation are being poorly served by the isolated and ineffectual leadership of the BIA headquarters.

14. The Bureau's grudging and irregular efforts to include tribes and beneficiaries in Indian trust fund decisions have been wholly inadequate in substance and totally inconsistent with efforts to promote greater native American self-sufficiency.

15. The Bureau wasted more than 2 years and \$1 million of taxpayer money in an aborted effort to contract out significant trust fund functions to Security Pacific National Bank. Indeed, BIA seriously mismanaged the contract from the outset. In its bid solicitation BIA mistakenly bundled together several diverse financial services so broad that only one firm qualified for the contract award. Then BIA failed to perform adequate supervision of the contractor; failed to demand performance by the contractor; failed to demand delivery of services or contract deliverables by the contractor and subcontractor; and, failed to protect the interests of the individual Indians, tribes or the taxpayers.

16. The BIA's continuing refusal to reconcile audit and certify all Indian trust fund accounts was arbitrary, capricious unreasonable and contrary to the clear congressional intent as expressed in five successive Federal laws governing the BIA's annual appropriations from 1987 to 1991. The Bureau initiated such audit and reconciliation effort only after concerted pressure by the subcommittee. Had the Bureau complied with the congressional directives in a timely and responsible fashion, it could have saved taxpayer money and prevented additional hardships among Indian trust fund account-holders.

17. Despite the May 10, 1991, award to Arthur Andersen & Co. of a contract to reconstruct and reconcile 17,000 IIM accounts and the various accounts of 37 larger tribes and the expenditure of more than \$1.7 million in tax dollars, little progress has been made in reconstructing and reconciling the books of the Indian trust funds.

18. If the Bureau's longstanding financial management, staffing, and organizational problems are not corrected, no substantial benefits derived from reconciling and auditing all 300,000 Indian trust fund accounts will be realized.

19. If longstanding data collection and management problems at the Minerals Management Service and the Bureau of Land Management are not corrected, no substantial benefits derived from reconciling and auditing the 300,000 Indian trust fund accounts will be realized.

20. Continuing mismanagement and incompetence in the supervision and control of Indian trust funds present a clear danger to the American taxpayer, who must bear the financial burden of compensating trust fund account holders for BIA's breach of fiduciary duties.

21. Current law authorizes, but does not appear to require BIA to invest and earn interest on IIM account moneys held in trust; nor, therefore, would current law appear to require BIA to compensate IIM accountholders for interest lost because funds were not invested by BIA. Accordingly, current law inappropriately distinguishes between BIA's fiduciary responsibilities to tribal accountholders and IIM accountholders with respect investment of funds held in trust.

VI. RECOMMENDATIONS

On the basis of the subcommittee's indepth investigation and the foregoing report, the Committee on Government Operations makes the following recommendations.

A. SOLVING BIA'S FINANCIAL MANAGEMENT DEFICIENCIES

Recommended administrative actions by BIA.—The Bureau of Indian Affairs, acting in close consultation with tribal and individual Indian money accountholders' representatives, must prepare and implement a comprehensive strategy for correcting well-documented, longstanding financial management deficiencies in the administration of the Indian trust fund. To achieve substantive improvements, the Bureau of Indian Affairs must replace its piecemeal, and often, unaccountable management-by-initiative style with a comprehensive financial management plan, including a financial systems plan and a financial management organization structure supported by a cadre of trained accounting professionals.

The deficiencies that BIA must correct include: (1) inadequate systems for accounting for and reporting trust fund balances; (2) inadequate controls over receipts and disbursements; (3) absence of periodic, timely reconciliations to assure accuracy of accounts; (4) inability to determine accurate cash balances; failure to consistently and prudently invest trust funds and/or pay interest to accountholders; (5) inability to prepare and supply accountholders with meaningful periodic statements of their account balances; (6) absence of consistent, written policies and procedures for trust fund management and accounting; and (7) inadequate staffing, supervision, and training.

Accordingly, in correcting its longstanding management deficiencies the Bureau of Indian Affairs must implement the following

corrective actions to assure that it exercises proper control and accountability for each trust fund and each account therein and to overcome the cumulative effects of years of poor financial management systems and practices:

(1) BIA must develop and implement, in consultation with tribal and IIM accountholders, a comprehensive strategic management reform package to: Reform organizational and structural weaknesses that thwart the Bureau's effectiveness and mission; BIA must develop and implement a comprehensive organization, staffing, and training plan that will ensure that the Bureau of Indian Affairs has a cadre of qualified and trained accounting professionals that has the capacity to carry out the broad authorities envisioned by the Chief Financial Officers Act; adopt and enforce strict priorities for financial and management improvements; adopt and adhere to planning and implementation milestones; and support the Department's 5-year financial management plan required by the Chief Financial Officers Act.

(2) BIA must prepare a financial management systems plan as a basis for implementing modern, integrated accounting, budget, and financial systems.

(3) BIA must implement strong material internal controls.

(4) BIA must prepare and have audited financial statements, which can pass the test of relevance, usefulness and accountability as required by the Chief Financial Officers Act.

(5) BIA must prepare financial information on costs and performance measurement, which tie into financial reports, as well as program operations.

(6) The Bureau's chief financial officer must be qualified according to the requirements of the Chief Financial Officers' Act and must be charged with the responsibility of preparing annual reports required by the Chief Financial Officers Act that present the results of the Bureau's financial operations.

Recommended administrative actions by the Department of the Interior.—The Department of the Interior, acting in consultation with tribal and individual Indian money accountholders representatives, must prepare and implement a comprehensive strategy for correcting well-documented, longstanding management deficiencies outside the control of Office of Trust Fund Management in the MMS, BLM and BIA Realty Office operations, including collection and distribution of royalties and other income, leasing of land and mineral rights and maintenance of ownership records. Deficiencies in these operations outside the control of BIA's Office of Trust Fund Management needlessly complicate the administration, management, investment and distribution of trust fund income and interest on behalf of accountholders and has failed to reduce the proliferation of fractionated realty and royalty interests in Indian lands.

To correct these deficiencies the Department of the Interior must require the Bureau of Indian Affairs, the Minerals Management Service, and the Bureau of Land Management to design and implement remedial actions to assure that the Department exercises proper control and accountability for each trust fund and overcomes the cumulative effects of decades of poor financial manage-

ment practices. Unless the problems created by these elements of the Department are confronted and corrected adequately through significant changes where necessary, BIA will not be able to adequately resolve its longstanding trust fund financial management problems.

The Department of the Interior, working with the appropriate BIA, MMS, and BLM staff and in consultation with tribal and individual Indian money accountholders representatives, must develop a comprehensive strategic management reform package that will ensure: Maintenance of accurate and up-to-date tribal and individual land ownership records; development of an accounts receivable system for all trust fund billings and collections; prompt and accurate collection of all lease and royalty income; accurate and timely distribution of all lease payments; and production of accurate periodic account statements that contain clear and concise information on royalty and lease payments.

B. SOLVING BIA'S ACCOUNTABILITY AND FINANCIAL REPORTING PROBLEMS

Recommended administrative actions by the Bureau of Indian Affairs.—The Bureau of Indian Affairs, acting in consultation with tribal and individual Indian money accountholders representative, must prepare and implement a comprehensive strategy for correcting well-documented problems in financial reporting. Accordingly, the Bureau of Indian Affairs must design and implement the following corrective actions to assure that it exercises proper control and accountability for each trust fund and to overcome the cumulative effects of years of poor financial management systems and practices:

BIA must ensure that a complete set of policy and procedural manuals are prepared for trust fund management to provide appropriate accounting guidance for the Office of Trust Fund Management, area offices and agency offices. These manuals should address the following structural, organizational, staffing, and training inadequacies, including: (1) maintenance of ownership records and allocations for income distributions; closing inactive accounts; (2) proper transaction posting for receipts, investments, and payments and income distributions; (3) adequacy of accounting documentation for transactions and adjustments; (4) periodic, timely account reconciliations between financial systems and account balances; (5) investment management, posting interest accruals, proper transaction recording, and accurate and timely recording of maturities, premiums and discounts; (6) financial records management; (7) financial reporting on trust fund balances, financial statements to accountholders, and required Treasury and agency management reports; and (8) adequate internal controls to ensure trust funds are safeguarded against loss.

BIA must take immediate action to address systems inadequacies and to complete reconciliations between the trust fund financial accounting system and the IRMS system; ensure consistent management and operation of the IRMS system, which currently operates independently at five different Bureau offices; ensure that staff inputting data to the trust fund accounting system are properly

trained and supervised; eliminate the maintenance of manual records outside the automated systems, or ensure that appropriate summaries of manual records are entered in the automated systems; and assess trust fund financial systems needs and current capabilities as a basis for developing and acquiring modern, integrated trust fund financial systems in order to provide proper accounting and reliable financial reporting of trust fund, tribal account, and individual Indian account balances.

C. COMPENSATING LOSSES DUE TO BIA'S MISMANAGEMENT

Recommended administrative actions by the Bureau of Indian Affairs.—The Bureau of Indian Affairs, acting in consultation with tribal and individual Indian money accountholders representatives, must prepare and implement a comprehensive written policy that accurately defines trust fund losses for which the Bureau of Indian Affairs is liable, fully describes the documentation necessary to establish a loss and clearly explains how and when accountholders will be reimbursed for losses. The Bureau of Indian Affairs must also articulate actions it will undertake to implement routine checks in trust fund accounting and management systems to uncover losses, to identify errors that might result in losses as they occur, and to train Bureau of Indian Affairs staff so as to minimize losses in the future. Similarly, BIA should develop policies and procedures, including notice procedures, for circumstances in which the Bureau believes that accountholders may have received overpayments from trust funds.

D. REPORTING ON EFFORTS TO RESOLVE BIA'S PROBLEMS

Recommended administrative actions by the Bureau of Indian Affairs.—Bureau of Indian Affairs, acting in consultation with tribal and individual Indian money accountholders, should report to the House Committee on Government Operations and Senate Committee on Governmental Affairs within 60 days after the publication of this report on progress toward implementing the recommendations contained herein. Thereafter, the Bureau should report to these committees every 6 months until all recommendations have been implemented and it is in full compliance with congressional directives; accounting standards of the U.S. General Accounting Office; Office of Management and Budget regulations; and recommendations of the inspector general of the Department of the Interior.

E. SOLVING BIA'S ACCOUNTABILITY PROBLEMS

Recommended legislative actions by House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs.—The House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should continue vigorous oversight of the Bureau of Indian Affairs' management of the \$2 billion Indian trust fund. The committee believes that the committees should consider the following reform of the laws governing the Department of the Interior's responsibilities for managing, administering, and investing tribal and individual Indian funds to assure that the Department of the Interior and the Bureau of Indian Affairs exercise proper control and accountability for each

trust fund and to overcome the cumulative effects of many years of poor financial management systems and practices.

The Native American Trust Fund Equity Act.—The committee believes the House Committee on Interior and Insular Affairs and Senate Select Committee on Indian Affairs should favorably report H.R. 1756, the Native American Trust Fund Equity Act of 1991, which would require the Secretary of Interior to invest in a productive manner and to pay interest to accountholders for failure to invest prudently funds held in trust for individual native Americans.

On March 25, 1991, the Comptroller General concluded that the Bureau of Indian Affairs is not legally required to pay interest on individual Indian moneys [IIM] accounts because current law, 25 U.S.C. 162a, governing the investment of funds does not require the payment of interest on these accounts. Consequently, the BIA may not be liable to IIM account holders for loss of interest, even those losses resulting from the Bureau's failure to manage IIM investments properly.

The Comptroller General's Decision, B-243029, has the force of law. Title 31 authorizes the Comptroller General to advise agencies on how they may spend their appropriations (31 U.S.C. 3529) and, to settle claims against the Government. Technically, this decision was an advance determination advising the Bureau of Indian Affairs that it would be in violation of appropriations laws to pay imputed, unearned interest on IIM accounts. In effect, the decision also advises the Bureau on how the General Accounting Office would settle claims filed against the Bureau for imputed interest in IIM accounts.

The Comptroller General's decision turns on the wording of 25 U.S.C. 162a, which authorizes the Secretary to invest IIM moneys, but does not require him to do so. Clearly, the Bureau should be required to invest these funds and to make them as productive as possible for the beneficiaries. H.R. 1756 will do just that and it will require the Secretary of the Interior to pay lost interest resulting from past BIA failures to properly manage IIM investments. H.R. 1756 reinforces the Nation's moral and ethical obligations to individual Indian moneys accountholders. By its enactment, Congress will fill the gap in the authority of the Secretary of the Interior by requiring the Secretary to do what any fiduciary in the private sector would otherwise do; however, any expenditures under such authority will be subject to the annual appropriations process.

Greater accountholder control over their funds.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should conduct a thorough review of proposals by tribes and the first nations financial project to provide greater local participation, control, and decisionmaking in the administration of the Indian trust fund, including proposals that allow tribes to withdraw lands, natural resources and moneys from trust management by redirecting Indian trust fund investments into local financial institutions to maximize the tribal and individual Indian accountholders economic leverage.

For example, the committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should carefully consider alternatives that would

allow tribes and individual Indians greater control and flexibility in the management of their trust funds, without eliminating the trust responsibility. These alternatives could include: Authorizing tribes to manage their own funds within the trust status with management plans and actual management subject to trustee approval and monitoring; authorizing tribes to direct the trustee on how to manage tribal funds, such as investing tribal trust funds in local banks to allow the tribes to realize greater economic leverage from their funds; and authorizing tribes and other representatives of IIM accountholders to manage IIM accounts subject to appropriate controls and trustee supervision and monitoring.

Other examples of alternatives to the present management structure include self-determination and out-of-trust models, these alternatives are well worth extensive review, including authorization of demonstration projects to test management results and test acceptance among accountholders. Authorizing a series of tribal demonstration programs to test various tribal-trustee joint management efforts may be the most efficient method of introducing voluntary alternatives to BIA management. In the short term such demonstrations may not drastically alter the manner in which tribal and IIM accountholders' funds are managed, but over the next decade successful demonstrations could lead the way toward greater accountholder control and management of their own funds.

Greater management flexibility.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should conduct a thorough review of a wide range of financial management alternatives, contracting with a third party for certain specified account maintenance services, leasing an accounting system that BIA would operate itself, entering into a cross-servicing arrangement for accounting services with another Federal agency, or transferring trust fund accounting and investment activities. Each of these alternatives should be carefully weighed as the committees search for a least-cost, best-service alternative to BIA's continuing management. However, the committee believes that any contracting effort must follow rather than proceed BIA's completion of a strategic plan as outlined in recommendations above. Twice over the past decade, BIA has attempted to privatize the financial management of Indian trust with disastrous and wasteful results, because BIA did not know its own management needs. Therefore, it is of paramount concern that any future contracting effort be undertaken only in implementation of a strategic plan to correct the BIA's longstanding financial management deficiencies.

Require tribal and IIM accountholder consultation.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should consider a statutory requirement that the Bureau of Indian Affairs formally consult with tribes and beneficiaries of the Indian trust fund prior to the issuance and publication of any request for proposals for any contract for investment services or financial management services; development of a comprehensive strategic management plan; loss notification and indemnification policy; and program or functional reorganizations.

Clarify trust responsibility.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should consider a reorganization of the Department of the Interior to clarify its Indian trust responsibilities and duties as a fiduciary; specify its obligation to act as a sophisticated trustee to accurately account to the beneficiaries of the Indian trust fund; to make accounts productive for the beneficiaries; to maximize the trust income through prudent investment; to perform as a highly diligent and resourceful manager.

Reduce burden of fractionated interests.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should consider proposals to authorize tribes to consolidate or acquire fractionated interests in lands, moneys and natural resources to maximize tribal economic leverage and to reduce the taxpayers' cost of administering and managing thousands of minuscule ownership interests.

Strengthen accountholder control over resources.—The committee believes that the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs should consider proposals to strengthen tribal and individual Indian accountholders control over oil and gas leasing, contracting, lease compliance, supervision of development, production, operating activities, fiscal accounting and auditing by consolidating the responsibilities imposed on the Secretary of the Interior under existing law and providing to the tribes an opportunity to play a greater role in carrying out these responsibilities.

Recommended legislative actions by the Committees on Appropriations.—The committee believes the Committees on Appropriations should continue to include the following proviso in its annual appropriations act until a full and fair accounting of all accounts in the Indian trust has been completed:

That none of the funds in this act shall be used by the Bureau of Indian Affairs to transfer funds under contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for such tribe or individual have been audited and reconciled to the earliest possible date, the results of such reconciliation have been audited and certified by an independent party as the most complete reconciliation of such funds possible, and the tribe or individual has been provided with an accounting of such funds.

F. RESOLVING BIA'S PROBLEMS BY TRANSFERRING THE INDIAN TRUST FUND

Recommended legislative actions by Congress.—The committee believes that, to date, close congressional oversight and supervision of the Bureau of Indian Affairs and the Department of the Interior have failed to effect fundamental improvements in the Bureau's management of the \$2 billion Indian trust fund. The committee is skeptical that either the Bureau of Indian Affairs or the Department of the Interior will take the resolute action necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades; that they will undertake the hard-nosed application of sound management practices; or, that

they will even develop a thorough understanding of and commitment to fulfilling their statutory role as a competent fiduciary and sophisticated trustee. Indeed the committee is skeptical that any reform package developed by Bureau personnel will be adequate to assure Congress, the public, or the native American community that the Department and the Bureau are committed to, and will be successful in, professionally competent financial management of the Indian trust fund or restoring the Bureau's administrative credibility.

Nevertheless, because of the Bureau's recent—long overdue—efforts to consult and cooperate with tribal and individual Indian account holders in managing their own funds and to name a qualified director of a unified Office of Trust Fund Management, the committee is willing to allow a reasonable period of time for the Bureau of Indian Affairs and the Department of the Interior to show demonstrable improvement in the financial management of the Indian trust fund. Should no demonstrable improvement be shown within 6 to 9 months, the committee recommends that Congress consider transferring administration and control of the Indian trust fund from the Department of the Interior to another appropriate agency such as the Federal Reserve Board to serve as fiscal agent for the trust fund.

However, the Government's obligation to account for Indian trust funds requires it to "affirmatively establish that it [has] properly discharged its trust" and it is no longer prudent to constantly extend the BIA's deadline for implementing corrective actions. Moreover, since the BIA has thus far been unable to demonstrate the accuracy of its accounting of trust funds, BIA's continuing failure to correct longstanding financial management deficiencies may result in the Government's liability to the tribes for a breach of its fiduciary duties and should not be tolerated. Designating a new fiscal agent—a role for which the Federal Reserve seems best equipped—will not, in itself, solve many of the BIA's longstanding financial management that have plagued the management of the Indian trust fund; however, it will assure that the Federal Government's fiduciary responsibilities to Indian trust fund account holders are being fulfilled—an assurance that cannot be realized in the BIA or the Department of the Interior without radical changes in the management and operation of the Indian trust fund.