

# Memorandum

June 17, 1983

**B-207047-O.M.**

TO : Acting Director, AFMD - Wilbur D. Campbell

FROM : *for* Acting General Counsel - *F. H. Barclay* Harry R. Van Cleave

SUBJECT: Application of Antideficiency Act to Overinvestment of Indian Trust Funds (B-207047-O.M.)

This responds to a request by Associate Director John F. Simonette for an opinion as to whether the overinvestment of Indian trust funds by the Bureau of Indian Affairs (BIA) violated the Antideficiency Act or other statutory provisions. As discussed below, while we conclude that the Antideficiency Act is generally applicable to the obligation and expenditure of Indian trust funds, we do not consider the investments in question to be obligations or expenditures within the meaning of the Act. In addition we do not consider overinvestments to come within the prohibition of Article I, section 9, clause 7 of the United States Constitution, which states that no money shall be drawn from the Treasury except in consequence of appropriations made by law.

## BACKGROUND

According to your recent audit report entitled "Major Improvements Needed in the Bureau of Indian Affairs' Accounting System," GAO/AFMD 82-71, September 8, 1982, the Bureau, because of poor accounting practices, frequently overestimates the actual amount of Indian trust fund assets available for investment at any given time. Investment decisions based on such unreliable information often result in trust fund investments that actually exceed available trust assets. This practice is possible, we understand, because investments are made with checks drawn on the United States Treasury, which makes funds available based upon cash reserve estimates by the Bureau. Overinvestments have therefore been covered by other funds of the Treasury.

DISCUSSION

The Antideficiency Act provides, in pertinent part:

"An officer or employee of the United States Government or of the District of Columbia government may not--

"(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation \* \* \*." 31 U.S.C. § 1341 (recodified from 31 U.S.C. § 665(a) by Act of September 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 866, 923).

Its application to the present situation requires the consideration of two separate questions: first, whether Indian trust funds are appropriations or funds as those terms are used in the Act; second, whether trust fund investments constitute expenditures or obligations subject to the Antideficiency Act.

Application of Antideficiency Act to trust funds. Although the Antideficiency Act applies by its own terms to any "fund," this Office has recognized that the term "fund" was not intended to cover all moneys handled by the Government. Instead, we have interpreted the Antideficiency Act in light of the purposes it was intended to achieve, principally to keep Government obligations and expenditures within the monetary limits established by the Congress. See 55 Comp. Gen. 812, 823-26 (1976). In addition, we have given substantial weight to guidelines established by the Office of Management and Budget (OMB) to implement the Act. Those guidelines, contained in OMB Circular No. A-34 (revised), "Instructions on Budget Execution," dated July 15, 1976, specifically apply the requirements of the Antideficiency Act to trust funds. Section 11.2 of the Circular states that "appropriations, funds and other authorization, except deposit funds, are subject to the instructions contained in this Circular." Under section 21.1, the term "funds" is defined to include four types of fund accounts: Federal, Trust, Deposit and Foreign Currency. "Trust funds" are those "credited with collections that are used by the Federal Government to carry out specific purposes and programs according to the terms of a trust agreement or a statute." OMB Circular No. A-34, § 21.1 (July 15, 1976).

There are reasons, apart from the inclusion of trust funds in OMB Circular A-34, for considering Indian trust funds to be subject to the Antideficiency Act. As a technical matter, such funds are generally subject to the control of the Congress:

"Congress has, in general, reserved complete power over the disposition of these funds [moneys held in the Treasury of the United States in trust for Indian tribes], requiring that each expenditure of such funds be made pursuant to an appropriation act, although this strict rule has been relaxed for certain favored purposes. Thus it has developed that administrative authority for any disbursement of 'tribal funds,' in the strict sense, must be derived from the language of some annual appropriation act or from those statutes which are, in effect, permanent appropriations of tribal funds for specified purposes." F. Cohen, Handbook of Federal Indian Law (1945) (footnotes omitted).

While many expenditures from trust fund accounts are made upon the authority of such permanent appropriations statutes as 31 U.S.C. § 1321(a)(20) (recodified from 31 U.S.C. § 725s(20) by Act of September 13, 1982, Pub. L. No. 97-257, § 1, 96 Stat. 877, 920), others are made available through the annual appropriations process. See, e.g., Act of December 23, 1981, Pub. L. No. 97-100, title I, 95 Stat. 1391, 1400 (making appropriations from tribal trust funds for various purposes for fiscal year 1982). In any event, ultimate control over the availability of Indian trust funds lies with the Congress.

We conclude, therefore, that the Antideficiency Act's prohibition against the expenditure or obligation of funds in excess of amounts available should, as a general rule, be applicable to Indian trust funds. This, in fact, would not be the first time that we have applied the Act to trust funds. In a recent letter to the Secretary of the Interior, we stated that poor accounting practices in the Cooperating Association Fund, a trust fund of the National Park Service, had led to the incurring of obligations in excess of available trust funds. We specifically characterized such practices as violating the Antideficiency Act and stated that they should be reported to the Congress as such. See B-206173.2, August 3, 1982. 1/

1/ Both the Department of the Interior and the Treasury, responding to our request for comments, agree that Indian trust funds are generally subject to the Antideficiency Act.

Investments as obligations or expenditures. The second question to be considered is whether investment of Indian trust funds is an obligation or expenditure subject to the Antideficiency Act. The Department of the Interior views such investments as neither obligations nor expenditures, but instead as merely a different form of disposition of funds. The Department of the Treasury, on the other hand, cites to OMB Circular A-34, which includes "investments" as an example of obligations incurred or expenditures accrued. <sup>2/</sup>

Section 25.1(J) of OMB Circular A-34 states:

"Obligations incurred [i]nclude purchases of securities (other than the par value of U.S. Government securities) and other investments made during the period \* \* \*.

"Accrued expenditures and applied costs [i]nclude outlays for securities and other investments made during the period \* \* \*."

Section 63.1 of the Circular specifically excludes investments in public debt securities and securities of Government agencies (but not those of government-chartered enterprises not covered by the budget totals) from treatment as obligations and outlays.

In a memorandum to the Department of the Interior dated April 1, 1980, the Chief, Interior Branch, Office of Management and Budget, restated the general rule that investments in privately-issued securities must be reflected as budgetary outlays. In an apparent exception to this rule, the OMB Interior Branch Chief stated:

"Fund balances invested in certificates of deposit in private banks are not considered to have been withdrawn from the Treasury, and such transactions are not reflected as budgetary transactions (outlays and receipts). This is the case so long as such CD's are fully liquid and secure as to principal amount. As you know, the law requires that tribal trust funds deposited in banks must be fully secure. Interest or other earnings on such deposits are properly recorded as budgetary collections."

<sup>2/</sup> Treasury, however, states that there is some ambiguity as to the treatment of investments, as there is no clear requirement under 31 U.S.C. § 1501(a) (formerly 31 U.S.C. § 200(a)) for recording such transactions as obligations. In response to this point, we note that this Office has previously stated that application of the Antideficiency Act is not limited to transactions recorded as obligations under 31 U.S.C. § 1501. 55 Comp. Gen. 812, 824 (1976).

Although OMB Circular A-34 has not been amended to reflect this view, we agree with OMB's suggestion that not all investments should be treated as budgetary transactions. The investments in the present case consist primarily of time deposits in interest-bearing accounts of federally-insured banks under 25 U.S.C. § 162a, and are generally evidenced by certificates of deposit. All deposits or investments under 25 U.S.C. § 162a are required to be fully secured as to principal (by bond or collateral for any amount exceeding deposit-insurance coverage). In our view, these investments are not the types of liabilities that the Antideficiency Act was intended to control, and consequently, we consider the BIA to be justified in treating such investments as simply changing the form of the existing assets in order to provide an opportunity for growth.

Although we conclude that investments of Indian trust funds are not obligations or expenditures under the Antideficiency Act, where overinvestments have occurred for any reason, interest on such overinvestments would be attributable to funds from the Treasury and may not be retained as trust fund income. To the extent that interest income from overinvestments is retained by the BIA and later obligated or expended, such an obligation or expenditure would be in excess of available funding, and thus in violation of the Antideficiency Act.

Constitutional violation. Article I, section 9, clause 7 of the United States Constitution provides that no money shall be drawn from the Treasury except in consequence of appropriations made by law. As discussed above, overinvestments of Indian trust funds are covered with other funds within the Treasury. Consequently, while we do not consider overinvestments to violate the Antideficiency Act, it is arguable that, to the extent of the overinvestment, funds have been "drawn" from the Treasury without an appropriation, in violation of article I, section 9, clause 7.

In our view, however, it is significant that any assets overinvested remain available to the United States Government, and remain fully secured as to amount. As a practical matter, therefore, we do not think it useful to consider such an overinvestment to be in violation of the Constitution. <sup>3/</sup> A constitutional violation would occur only if overinvested funds or interest thereon are actually retained and expended by the BIA.

<sup>3/</sup> This change in the disposition of Treasury funds, however, may not be authorized under the laws and regulations applicable to the disposition of public moneys. For example, funds of the United States are generally required to be held by the Treasurer or in authorized public depositories. See 31 U.S.C. §§ 3302-1303 (recodified from 31 U.S.C. §§ 473, 495 (1976)).

CONCLUSION

For the reasons discussed above, we conclude that over-investments of Indian trust funds, although not necessarily authorized under laws and regulations regarding the disposition of public moneys, violate neither the Antideficiency Act nor the constitutional prohibition against drawing funds from the Treasury without an appropriation. The Act and the constitutional prohibition would, however, be violated if overinvested funds or any attributable interest income are obligated or expended by the BIA.