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**Comptroller General
of the United States**

Washington, D.C. 20548

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B-236146

March 13, 1990

The Honorable Mike Synar
Chairman, Subcommittee on Environment,
Energy and Natural Resources
House of Representatives

Dear Mr. Chairman:

This opinion responds to your letter, dated July 10, 1989, in which you raised several questions concerning a contract awarded by the Bureau of Indian Affairs (BIA) to the Security Pacific National Bank (Security Pacific), for various accounting and financial trust services.^{1/} Specifically, you asked whether BIA has authority to contract out for such services as cash collection and concentration, investment advice and assistance, and certain disbursement services. For the reasons set forth in this letter, it is our view that BIA has authority, as a general matter, to contract for such assistance, so long as it retains its managerial and fiduciary responsibilities with regard to the Indian trust funds.

BACKGROUND

The Secretary of the Interior is responsible for the management of Indian affairs. See 43 U.S.C. § 1457. See also 25 U.S.C. §§ 1a and 2. As such, the Secretary is the designated trustee on behalf of the tribal and individual beneficiaries of all Indian trust funds for which the United States is responsible. The Secretary has in turn delegated authority for management of the Indian trust funds to the Assistant Secretary-Indian Affairs, who carries out his trust management responsibilities through BIA. According to BIA, as of October 31, 1987, BIA was managing more than \$1.8

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billion in trust funds^{2/} belonging to Indian tribes, individual Indians, Alaska natives and Native Corporations, and irrigation and power projects. See table 1 of BIA's request for proposals (RFP) for financial trust services, dated February 18, 1988. The primary sources of money in the various Indian trust funds are court judgments, income generated from the sale or lease of trust resources such as timber, oil, gas, rangeland, and water rights, and collections from irrigation and power projects.

As trustee and manager of the Indian trust funds, BIA historically has performed, in house, all of the trust management functions including receipt, control, investment, and disbursement of trust funds, with some assistance from the Department of Treasury. However, BIA recently determined that it could achieve monetary savings and operate more efficiently by procuring certain financial services from the private sector.^{3/} After soliciting proposals, BIA decided to contract with Security Pacific. BIA expects Security Pacific to provide "integrated external services encompassing cash collection and concentration . . . , investment services . . . , disbursement services, custody of trust fund accounts (recording, accounting for, maintaining), distributing earnings, depositing funds into the Treasury, and reporting." See RFP § C.1.1, p. C-1.

BIA's Fiduciary Responsibilities as Trustee

The Supreme Court has held that in managing Indian trust funds the United States has charged itself with "moral obligations of the highest responsibility and trust" and that its conduct in dealing with Indians should be judged by the most "exacting fiduciary standards." See Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

^{2/} Since the bulk of the \$1.8 billion in trust fund monies is contained in tribal trust fund accounts and individual Indian money accounts, our examination of the issues you raise focused primarily on these trust funds.

^{3/} BIA reached this conclusion after a study of its trust fund operations in accordance with Office of Management and Budget (OMB) Circular A-76. OMB Circular A-76 allows agencies to procure services from the private sector if, after a competition between private sector contractors and in-house resources and employees, the agency determines procurement to be the most cost-effective method of obtaining the service.

Moreover, the courts have held that if the federal government has control or supervision over tribal monies or properties, the government's fiduciary responsibility for such tribal assets would normally exist even though nothing is said expressly in the underlying statute about trust funds or a fiduciary relationship. See Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980).

Ordinarily, trustees cannot delegate any fiduciary responsibilities involving the exercise of judgment and discretion. See G. Bogert, The Law of Trusts and Trustees § 555, at 115 (rev. 2d ed. 1980). In this regard, OMB Circular A-76 specifically provides that the "administration of public trusts is an inherently Governmental function that should only be performed by Federal employees."

With regard to Indian trusts, in particular, the Attorney General, in 1929, addressed the question whether the Secretary of the Interior had the authority to approve the creation of a private trust for Indian trust funds. The Attorney General said that Congress had vested authority over Indian trust funds with the Secretary of Interior who could not lawfully transfer such authority to a private trustee. See 36 Op. Atty. Gen. 98 (1929).

This does not mean that the government is prohibited from hiring private contractors to assist it in discharging its fiduciary responsibilities. See G. Bogert, above, § 555, at 113. Indeed, it is BIA's position, as set forth in its letter of July 31, 1989, that its contract with Security Pacific does not involve "any management functions of its Indian trust fund program." BIA maintains that the services it contracted for "are transactional or advisory in nature" and that "[M]anagement or decision-making functions will continue to be a BIA responsibility." Thus, the issue in this case is whether Security Pacific is required contractually to perform any functions or activities that BIA cannot lawfully contract out, either because they involve BIA's fiduciary responsibility to manage the Indian trust funds or because they must otherwise be performed by government officials.

ANALYSIS

BIA anticipates that Security Pacific will perform services that fall primarily into the following categories:

- 1) Maintaining trust fund accounts, including cash collection and concentration;

- 2) Record-keeping and reporting on trust fund accounts;
- 3) Providing investment advice and executing investment transactions as directed by BIA; and
- 4) Disbursement services in accordance with BIA instructions.

We do not question BIA's authority, as a general matter, to contract for these services. With regard to disbursement services, however, we are unable to judge the propriety of BIA's Security Pacific contract; the contract documents furnished to us do not clearly outline the respective roles of the parties, and we, thus, cannot be sure that BIA has adequately protected its fiduciary responsibility in this regard.

Maintaining Trust Fund Accounts

Federal law provides that the Secretary of the Interior may deposit in banks he selects funds he holds in trust for Indian tribes and individual Indians. 25 U.S.C. § 162a.^{4/} See also 25 U.S.C. § 151. Moreover, the law authorizes the Secretary of the Treasury to designate insured banks to serve as "depositories of public money of the United States . . ." 12 U.S.C. § 265. Accordingly, BIA may contract with a private banking institution, such as Security Pacific, to serve as a depository for trust fund monies. (The contract specifically provides that the contractor must be a Treasury depository in accordance with 12 U.S.C. § 265.)

Record-keeping and Reporting on Trust Fund Accounts

As a necessary corollary of the above authority, the Secretary of Interior may require any bank selected as a depository for trust fund monies to keep accurate records of all trust fund transactions and make reports to BIA and/or the trust fund account holders. Of course, as trustee, BIA ultimately is responsible for ensuring that the trustee's fiduciary obligation to provide the account holders with a complete and accurate accounting of all trust fund monies is satisfied, although BIA retains some flexibility in deciding

^{4/} Under 25 U.S.C. § 162a, trust funds cannot be deposited in any bank until the bank has satisfied certain bonding and interest rate requirements.

how to discharge this function. See American Indians Residing on the Maricopa-AK Chin Reservation v. United States, 667 F.2d 980, 1002 (Ct.Cl. 1981); and Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1248 (N.D. Cal. 1973).

Investment Services

Federal law provides that:

" . . . the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States"

25 U.S.C. § 162a.

The Secretary of the Interior cannot contractually delegate to a non-governmental third party his fiduciary responsibility to determine whether and in what manner to invest trust funds in public debt obligations of the United States or other federally guaranteed obligations. The Secretary, however, can contract for investment advice and assistance. So long as BIA retains full responsibility for making all trust fund investment decisions, and imposes adequate controls and safeguards to ensure that Security Pacific invests trust fund monies only as instructed by BIA, we have no objection to BIA contracting for investment advice and services. In this regard, see sections C.3.3 and C.4.2 of RFP.

Disbursement Assistance

The question of BIA's authority to contract with a private bank for assistance in carrying out BIA's disbursement^{5/} responsibilities arises from the language of 31 U.S.C. § 3321. Under that provision, unless otherwise authorized by law, the disbursement of public money available for expenditure by an executive agency can only be made by officers and employees of the Department of Treasury or

5/ As explained by BIA in its letter to us of July 31, 1989, Security Pacific will provide disbursement services only for tribal and Individual Indian Monies (IIM) trust funds; the Treasury Department will continue to disburse the other types of Indian trust funds.

other executive agencies to whom the Secretary of Treasury delegates such authority.^{6/} See also 31 U.S.C. § 3325.

BIA argues that section 3321 does not apply to Indian trust fund monies because they are not "public money" for purposes of that statute. BIA's current position, as set forth in a letter to our Office dated July 31, 1989, from the Assistant Secretary-Indian Affairs, is that since amounts in the IIM and tribal trust funds are held in trust for either specific individuals or tribal entities, they are not public monies of the United States.^{7/} The Assistant Solicitor, Division of Indian Affairs, Department of the Interior and the Chief Counsel of the Financial Management Service, Department of the Treasury agree. In a memorandum dated January 24, 1989, the Assistant Solicitor cited various court opinions in support of BIA's conclusion. In a letter to us, dated November 8, 1989, the Chief Counsel referred to

6/ The requirement in 31 U.S.C. § 3321 derives from section 4 of Executive Order 6166 (June 10, 1933), as amended, 5 U.S.C. § 901 note.

7/ This has not always been BIA's position. In a memorandum to the Deputy Assistant Secretary-Indian Affairs, dated May 13, 1985, concerning the extent of BIA's authority to contract with private vendors, the Associate Solicitor, Division of Indian Affairs, said the following:

"With respect to the disbursement by the money center bank through checks or electronic funds transfers of Indian trust funds deposited with it, since the funds even though deposited with the bank would still be held in trust by the United States, their disbursement could only be made by an authorized disbursing agent of the United States. We assume that the money center bank would not so qualify."

In addition, a notice BIA published in the Federal Register on April 29, 1986, regarding its then planned procurement of trust management services, states that "Treasury responsibility . . . to disburse trust funds will not be affected."

"applicable case law" and "the statutory scheme" to reach the same result.^{8/}

For the most part, the cases cited in the Assistant Solicitor's memorandum and in the Chief Counsel's letter do not focus on issues concerning the control and handling of, and accountability for, Indian money. While those cases distinguish between public monies belonging to the government and trust fund monies that belong to individual Indians or Indian tribes, we do not find such distinctions persuasive where the issue involves, as here, the control over and disbursement of funds for which the government ultimately is responsible.

In that regard, we have consistently treated Indian money in the same manner and subject to the same rules and regulations as public money. See A-22880, December 7, 1928, concluding that the United States, as trustee, has title to and responsibility for all IIM funds entrusted to it, whether such funds are deposited in an account maintained by the Treasury Department, a BIA disbursing agent, or a private bank. See also 67 Comp. Gen. 342 (1988); 65 Comp. Gen. 533 (1986); B-192109, June 3, 1981; B-192109, Oct. 11, 1978, all treating a BIA accountable officer as personally liable for erroneous payments from an individual Indian trust fund account unless the Comptroller General relieves him of liability.^{9/} Since the United States is liable for any breach of its fiduciary duty as trustee, the responsibility of the government to ensure that the trust beneficiaries are fully reimbursed for any

^{8/} See, e.g., Quick Bear v. Leupp, 210 U.S. 50 (1908) (cited by the Assistant Solicitor), in which the Court, for purposes of applying a restriction on the use of appropriated funds, distinguished between "public moneys belonging to the government" and tribal trust fund money; United States v. Brindle, 110 U.S. 688 (1884) (cited by the Chief Counsel), in which the Court held that notwithstanding a statutory restriction on the salary of government employees, a receiver of public monies for a public land district who also held an appointment as agent for the sale of Indian lands could retain the sales commission he received from sales of the Indian land.

^{9/} See also Bramwell v. U.S. Fidelity & Guaranty Company, 269 U.S. 483 (1926). When a federal officer deposits in a private bank funds held in trust for individual Indians and Indian tribes, the amounts deposited represent a "debt due to the United States."

erroneous disbursement or other loss of trust fund monies is clear and unquestioned. See United States v. Mitchell, 463 U.S. 206, 226 (1983).

While we disagree, in this instance, with BIA's conclusion that Indian trust fund money is not "public money" for purposes of section 3321, we conclude that section 3321 does not preclude BIA from contracting for disbursement assistance.

The specific responsibilities of disbursing officers are set forth in 31 U.S.C. § 3325. Section 3325 provides that disbursing officers can only disburse funds on a voucher certified by a certifying officer or agency head. In addition, the disbursing officer must examine the voucher to determine that it is "in proper form" and has been "certified and approved, and is computed correctly on the facts certified."

We do not read section 3325 to require the disbursing officer to personally pay out public money. The control over public money that section 3325 is designed to enhance derives from the exercise of judgment and supervision necessary to ensure that only funds certified and approved by a certifying officer (or head of an agency) on a voucher correct in form and amount are paid out. So long as a BIA disbursing officer discharges this function, section 3325 is satisfied.

Whether the operational, ministerial acts involved in the discharge of the disbursement function are performed by contractor or agency employees is not a legal issue as much as it is a management policy issue. It remains nonetheless clear that the disbursing officer must be positioned to discharge the core judgmental functions required by section 3325. However, as the disbursing function becomes more complex and the volume and magnitude of transactions increase, the disbursing officer necessarily must rely less on direct personal supervision of the disbursing operations and more on sophisticated albeit indirect supervision of such functions.

In this regard, agencies increasingly use automated systems for the examination, certification, and disbursement of payments. In such cases, agencies must satisfy the following criteria:

- "(1) in automated systems, evidence that the payments are accurate and legal must relate to the system rather than to the individual transaction;
- (2) certifying and disbursing officials should be

provided with information showing that the system on which they are largely compelled to rely is functioning properly; and (3) reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated system is operating effectively and can be relied on to make accurate and legal payment."

B-234828, Nov. 14, 1989, 69 Comp. Gen. _____, citing audit report entitled New Methods Needed for Checking Payments Made by Computer, GAO/FGMSD-76-82, November 7, 1977. In a like manner, we see no reason to object to a contractual arrangement whereby a private contractor provides disbursement services, so long as a government disbursing officer remains responsible for reviewing and overseeing the disbursement operations through agency installed controls designed to assure accurate and proper disbursements.

However, since the contract documents furnished to us do not clearly delineate what role, if any, a BIA disbursing officer would have with respect to overseeing the contractor's disbursement operations, we are unable to express an opinion with respect to this aspect of BIA's contract with Security Pacific. So long as the contract provides, or is amended to provide, that a BIA disbursing officer will exercise managerial responsibility for disbursement and will discharge other judgmental tasks set forth in 31 U.S.C. § 3325, including reviewing the requested disbursement to assure that the expenditure has been certified and approved for payment, see 31 U.S.C. § 3528 (responsibilities of certifying officers), BIA may contract with a private bank to perform the ministerial, operational aspects of disbursement, such as printing checks, delivering checks to payees, and debiting amounts paid from accounts. See G. Bogert, above, § 555, at 113 (a fiduciary may procure assistance in discharging his fiduciary responsibilities).

In accordance with our general policy, we will furnish BIA a copy of this letter 3 days from today and will make the letter generally available to other interested parties at that time.

Sincerely yours,

Milton J. Fowler
for Comptroller General
of the United States

GAO

Release of GAO Legal Decision or Opinion

548055 • 141002

Subject: Issues concerning a contract awarded by the Bureau of Indian Affairs to the Security Pacific National Bank **Date:** 4/24/90
No.

B-Number: B-236146 **Date:** 3/13/90

Addressee: The Honorable Mike Synar
Chairman, Subcommittee on Environment, Energy and Natural Resources
House of Representatives

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