GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-272979

August 23, 1996

The Honorable Kent Conrad
United States Senate

Dear Senator Conrad:

This letter responds to a telephone inquiry from your staff regarding a claim by the Three Affiliated Tribes of Fort Berthold Indian Reservation. The Tribe claims lost interest earnings on a payment made by the United States into the Three Affiliated Tribes Economic Recovery Fund pursuant to the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Public Law 102-575. According to the Tribe, the loss resulted from a delay by the United States in depositing the payment into the Economic Recovery Fund. The Tribe argues that the payment, which was deposited into the Fund on January 29, 1996, could have been deposited on December 13, 1995. Your staff asked us for our opinion on the Tribe's claim. Because federal law authorizes the Secretary of the Treasury to pay interest only on amounts held in the Fund, we conclude that the Tribe is not entitled to any interest that the Fund might have earned, but did not, had the payment been deposited earlier.

As you know, the Compensation Act required the Secretary of the Treasury, beginning with fiscal year 1993, to deposit into the Economic Recovery Fund each year an amount equal to 25-percent of the receipts of the previous fiscal year of the Eastern Division of the Pick-Sloan Missouri River Basin Project, a project administered by the Western Area Power Administration of the Department of Energy. Pub. L. 102-575, sec. 3504(a)(2), 106 Stat. 4731, 4732 (1992). The Act specified that the aggregate of those annual payments, together with certain other amounts appropriated to the Fund, not exceed $149.2 million. Id. Interest that accrues on the amounts in the Fund is held in a separate account and is available for the Tribe's use for "educational, social welfare, economic development, and

other programs."[1] Id., sec. 3504(a)(4), 106 Stat. at 4733. This arrangement was to compensate the Tribe for the taking by the United States of reservation land used as the site for certain dams and reservoirs that are part of the Pick-Sloan Project. Id., sec. 3503(a), 106 Stat. at 4732. We understand that the January 1996 payment into the Fund represents the final payment by the United States under the Compensation Act.

To reconstruct the facts of this payment, we spoke with officials of the Department of the Treasury, including Treasury's Financial Management Service (FMS), the Bureau of Indian Affairs' (BIA) Budget Execution Branch, and the Office of Trust Funds Management (OTFM), formerly part of BIA but now part of the Department of the Interior's Office of the Special Trustee for American Indians. Documentation provided us shows that BIA's Division of Program Development and Implementation initiated the action that resulted in the January 1996 payment by mailing a letter, dated December 13, 1995, to FMS requesting a warrant in the amount of $13.6 million. Federal law requires that the Secretary of the Treasury may pay money out of the general fund of the Treasury only against a warrant specifying the appropriation to which the payment is to be charged. 31 U.S.C. § 3323. The Pick-Sloan Project receipts are held in the general fund; the Compensation Act stands as permanent appropriation authority, up to $149.2 million. According to Treasury and BIA officials, BIA, annually since fiscal year 1993, has calculated the amount due under the Compensation Act and requested a warrant from Treasury to make payment of that amount into the Fund. FMS records show receipt of BIA's December 13 letter on December 18.

According to FMS officials, because the letter indicated no urgency or other reason for priority processing, FMS staff processed the warrant request in turn along with other pending requests from other agencies. An FMS official approved the request and signed the warrant on December 26, 1995. FMS mailed the warrant to BIA on January 4, 1996.

BIA's Budget Execution Branch recorded receipt of the warrant on January 29, 1996, and on the same date, notified OTFM of the availability of the warranted amount for credit to the Fund. OTFM records show that OTFM credited the Fund on January 29, at which time the $13.6 million began earning interest. None of the officials with whom we spoke could explain what transpired between January 4, when FMS mailed the warrant to BIA, and January 29, when the Budget Execution Branch received the warrant and OTFM credited the amount to the Fund.

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[1]The principal of the Fund is not available to the Tribe. Pub. L. 102-575, sec. 3504(a)(4), 106 Stat. at 4733.

Tribal officials have contacted your office asserting a claim to the amount of interest that the Economic Recovery Fund might have earned, but did not, had the $13.6 million payment been deposited into the Fund on December 13, 1996, when BIA requested the warrant, instead of January 29, 1996, when OTFM credited the Fund with the payment and it began earning interest. Underlying the Tribe's claim is a concern about the length of time, approximately 6 weeks, that it took the government to effect transfer of the $13.6 million payment from the general fund of the Treasury for deposit into the Economic Recovery Fund.

Federal courts have long held that the United States is not liable for interest unless it has consented to the payment of interest. E.g., Library of Congress v. Shaw, 478 U.S. 310, 314-17 (1986); White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 379 (1990). The Supreme Court has insisted that any such consent be express and clear:

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory terms."

United States v. New York Rayon Importing Co., 329 U.S. 654, 659 (1947). See also B-243029, Mar. 25, 1991, quoting United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323 (Ct. Cl. 1975):)(an award of interest cannot be made against the United States "[n]o matter how high the purpose or how benevolent the motive, . . . unless the requirements of the no-interest rule have been met." We are unable to find any statutory basis for paying the Three Affiliated Tribes interest on the $13.6 million at issue prior to January 29, 1996.

The payment of interest here is governed by the general requirement to pay interest on tribal trust funds, 25 U.S.C. § 161a(a), together with the Compensation Act. With section 161a(a), the United States has affirmatively consented to the payment of interest on tribal trust funds. Section 161a(a) requires that

> "[a]ll funds held in trust by the United States . . . to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities . . . bearing interest at rates determined by the Secretary of the Treasury . . . ."

For purposes of section 161a(a), the Economic Recovery Fund is a tribal trust fund, and amounts held in the Fund should be invested to earn interest. The Fund is not like most tribal trust funds in that under the Compensation Act, the Fund balance itself is not available to the Tribe. Pub. L. 102-575, sec. 3504(a)(4), 106 Stat. at 4733 ("No part of the principal . . . shall be available . . . .") Nevertheless, the

Compensation Act clearly establishes that the Fund balance is held for the benefit of the Tribe, a classic form of trust.[2] Section 3503(b)(1) characterizes the amounts in the Fund as compensation for the taking of reservation land, and states that they are available for use in accordance with the terms of the Act. Section 3504(a)(4) makes the income derived from the Fund available to the Tribe for educational, social welfare, and economic development programs.

During the period from December 13, 1995, until January 29, 1996, however, the period for which the Tribe claims interest, section 161a(a) did not apply because the $13.6 million was not being held in a trust capacity. At that time, the $13.6 million represented, at best, an unfulfilled payment by the United States. The United States, in the Compensation Act, had committed to making an annual payment but had not yet made its payment for fiscal year 1996. Until such time as payment into the Fund was effected and the amount achieved trust status, it did not fall within the scope of section 161a(a). Accordingly, section 161a(a) does not provide a basis to pay the claimed lost interest. Accord, the Compensation Act, Pub. L. 102-575, sec. 3504(a)(4), 106 Stat. at 4733, which refers only to interest "on deposits to" the Fund.

We share the Tribe's concerns about the length of time taken to accomplish deposit of the $13.6 million payment into the Fund, especially the 3-week period from January 4 until January 29 that remains unexplained. Nevertheless, unless the United States has expressly consented to the payment of interest, interest is not payable notwithstanding the fact that the opportunity to earn interest was lost as a result of the government's action or inaction.

I trust that you will find this letter useful. As you may know, the Legislative Branch Appropriations Act for Fiscal Year 1996 transferred to the Director of the Office of Management and Budget the Comptroller General's authority under 31 U.S.C. § 3702 to settle claims against the United States. Pub. L. 104-53, sec. 211, 109 Stat. 514, 535 (1995). Accordingly, the opinion expressed in this letter is advisory only. Please contact Tom Armstrong of my staff, at (202) 512-8257, if we might be of further assistance to you.

Sincerely yours,

Robert P. Murphy
General Counsel

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[2]Restatement (Second) of Trusts § 2 (1957).

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DIGEST

Three Affiliated Tribes of Fort Berthold Indian Reservation, North Dakota, is not entitled to interest on amounts deposited into the Three Affiliated Tribes Economic Recovery Fund pursuant to the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Pub. L. 102-575, 106 Stat. 4731 (1992), that might have been earned but was not earned as a result of possible delay by the United States in making the deposit under the Act. Federal law permits the United States to pay interest only on amounts on deposit to the Fund.