



# A RESOLUTION OF THE TRIBAL COUNCIL OF THE DELAWARE TRIBE OF INDIANS REGARDING LEGISLATION RELATING TO CERTAIN TRUST FUNDS STILL HELD BY THE UNITED STATES IN WHICH THE TRIBE AND ITS MEMBERS HAVE AN INTEREST

## RESOLUTION 2022-02

**WHEREAS**, the Delaware Tribal Council is authorized by Article V of the Constitution and Bylaws of the Delaware Tribe of Indians to represent and act in all matters that concern the general welfare of the Tribe; and,

**WHEREAS**, the Tribe filed a number of claims against the United States under the Indian Claims Commission Act of 1946, and awards from those claims were made by Congress under three judgment fund acts, one in 1968, one in 1972, and the final one in 1980, Pub.L. 96-318, 94 Stat. 968 (Aug. 1, 1980) ("1980 Act"); and

**WHEREAS**, because the Tribe was fractured as it was forced west from its original homelands, several other Delaware entities were ultimately included in those awards, namely the Western Delaware Tribe, now the Delaware Nation, and two non-federally recognized groups, the Kansas Delaware Tribe of Indians, Inc. (Kansas Delawares) and the Delawares of Idaho, Inc. ("Idaho Delaware"); and

**WHEREAS**, on January 8, 2002, the Tribe and the Trust Board filed suit against the United States in the United States Court of Federal Claims in Washington, DC, *Delaware Tribe of Indians and Delaware Trust Board v. United States*, No. 02-26L ("Trust Fund Action"), regarding distribution and mismanagement of judgment funds awarded to the Tribe and held in trust by the United States pursuant to the 1968, 1972, and 1980 judgment fund acts; and

**WHEREAS**, progress toward a favorable settlement was made quickly, and it appeared that the Tribe's case might be the first of the many tribal trust cases to be concluded; and

**WHEREAS**, resolution of the litigation was delayed by the Tenth Circuit decision on November 16, 2004 in *Cherokee Nation of Oklahoma v. Norton*, Case No. 03-5055, which directed that the Tribe be removed from the list of federally recognized tribes and after which the Supreme Court denied the Tribe's petition for certiorari seeking review of that decision; and

**WHEREAS**, the Tribe's status as a separately recognized Indian tribe was resolved on May 26, 2009 when the members of the Delaware Tribe approved the 1982 Constitution, as amended by the Tribe and as acknowledged by the Department of the Interior during a Secretarial Election held to reorganize the Tribe under the Oklahoma Indian Welfare Act ("OIWA"), thereby restoring the Tribe's separate federal recognition and leading to publication of the restoration in the Federal Register on August 11, 2010 and to the inclusion of the Tribe on the list of recognized tribes; and

**WHEREAS**, during the process of pursuing OIWA reorganization, the Tribe worked closely with the Department of the Interior and ultimately the Oklahoma delegation to develop legislation addressing the Tribe's federal status and the trust funds involved in the litigation, which legislation was introduced in 2009 as a part of the plan to enable the Department of the Interior to proceed with OIWA reorganization; and

**WHEREAS**, following the reorganization, the Tribe and the Oklahoma delegation attempted to advance legislation revised with the Department of the Interior to resolve the trust fund issues and the litigation, but were informed that the legislation could not move in the House because the required trust fund distributions would be deemed "earmarks," notwithstanding the fact that all funds would have come from clearly identified Indian trust accounts and the Judgment Fund; and

**WHEREAS**, the Tribe over the next several years worked with the Department of the Interior to release to the Tribe all funds that could be released either administratively or under 25 U.S.C § 164; and

**WHEREAS**, in 2017, the Tribe settled its trust fund claims against the United States and received a substantial payment; and

**WHEREAS**, the administrative distributions and the settlement resolved all issues related to the 1968 and 1972 judgment funds acts; and

**WHEREAS**, the administrative distributions and the settlement could not and did not resolve either (1) the so-called "afterborn" underpayments under the jurisdiction of the United States District Court for the District of Idaho or (2) certain comingled trust funds held in accounts under the names of the Idaho or Kansas Delaware groups in which the Tribe and its members have an interest under the 1980 Act; and

**WHEREAS**, more specifically, in 1984 the United States District Court of Idaho entered a judgment in favor of certain "afterborns," members of the Tribe and enrollees of the Idaho and Kansas Delawares born after October 3, 1972 but on or before August 1, 1980 who were entitled to special computation of per capita payments due under the 1980 Act; and

**WHEREAS**, pursuant to an October 31, 2006 order of the Court, the United States paid \$1,186,964.08 into the Court's registry to pay the pro rata share of the judgment to some 1,372 afterborn members of the Tribe who appeared on the 1980 Act roll prepared by the United States; and

**WHEREAS**, over 1,100 Tribal "afterborns" received payments between 2007 and 2012, and

**WHEREAS**, the Tribe obtained the release of the remaining "afterborn" funds from the federal court in Idaho and in 2021 made distributions to those as-yet-unpaid afterborns who could be found, with the remaining funds to be used by the Tribe for elder care and scholarships under the agreement with the United States and the federal court; and

**WHEREAS**, the only remaining unresolved issue from the universe of funds encompassed by the 2002 litigation are the Idaho and Kansas Delaware accounts; and

**WHEREAS**, those funds are primarily related to the 1980 Act's process under which people who



were not yet members of the Tribe or enrollees in the Idaho or Kansas Delawares applied to be on the lists for per capita distributions prepared by the Department of the Interior soon after the 1980 Act was enacted; and

**WHEREAS**, the process involved escrow of per capita shares attributable to unsuccessful applicants for membership or enrollment pending an appeal process, but under the Act's terms, the primary per capita distributions were made to some 10,519 people (9,119 Tribal members) before the appeals were decided; and

**WHEREAS**, the bottom line is that there were a number of unsuccessful appeals for enrollment in the Kansas Delawares and even more for enrollment in the Idaho Delawares; and

**WHEREAS**, those monies should have been distributed pro rata in accordance with Section 7(f) of the 1980 act to Tribe members, Kansas and Idaho Delaware enrollees, and the Delaware Nation, but those distributions never occurred, and instead the monies have sat for some 40 years; and

**WHEREAS**, the Idaho and Kansas accounts in which the Tribe and its members have an interest have a current value of roughly \$1.25 million, in which the Tribe and its members have a 73.32% interest, or more than \$900,000; the Kansas Delaware enrollees have a 9.37% interest, or roughly \$120,000; and the Delaware Nation has a 17.31% interest (which percentages are adjusted because Idaho Delaware enrollees have no remaining interest because all Idaho Delaware funds were distributed through the federal case in Idaho); and

**WHEREAS**, under the 1980 Act as written, the Tribe's share of the funds would be distributed per capita to over 9,000 Tribal members on the 1980 Act list, meaning each per capita payment would be only about \$100 per member; and

**WHEREAS**, the Department of the Interior in the past has raised two primary concerns about such distributions, concerns the Tribal Council shares: (1) the logistics of attempting to distribute more than 9,000 payments are complex and could take years; and (2) the logistics are particularly complex, and cost-prohibitive, with respect to deceased Tribal members on the 1980 Act list; and

**WHEREAS**, because the 1980 Act list is now more than 40 years old, the Tribal Council understands that many members on that list will have passed away in the interim and that probating or otherwise distributing \$100 payments to one or more heirs would be a profound waste of federal and Tribal resources; and

**WHEREAS**, the Tribal Council therefore believes that the Tribe's members and the Tribe as a whole would benefit more from securing from Congress a lump sum release of the Tribe's share of the remaining Idaho and Kansas Delaware accounts directly to the Tribe rather than waiting for Interior to go through a lengthy and very expensive per capita distribution process for payments of only some \$100; and

**WHEREAS**, the Tribal Council understands that the Kansas Delaware will seek a similar lump sum distribution and that the 1980 Act already provides for a lump sum distribution of the Delaware Nation share; and

**WHEREAS**, the Tribal Council therefore concludes that it is in the Tribe's and Tribal members' best interest to pursue legislation allowing distribution of the remaining 1980 Act Idaho and Kansas

Delaware account trust funds directly to the Tribe for governmental purposes, including but not limited to scholarships, medical care, land acquisition, and elder assistance, and providing any additional benefits to the Tribe that may be identified as available during the legislative process.

**NOW THEREFORE BE IT RESOLVED THAT** the Tribal Council authorizes the Chief, other Tribal officers and representatives, and Tom Peckham of the Nordhaus Law Firm LLC to work with the Department of the Interior and, as appropriate, the Kansas Delaware to develop a revised and streamlined version of the legislation consistent to the extent possible with this Resolution; and

**BE IT FURTHER RESOLVED THAT** the Chief, other tribal officers and representatives, and Mr. Peckham are authorized and directed to take such actions as are necessary to develop that legislative draft; and


**BE IT FURTHER RESOLVED THAT** the Tribal Council shall be kept informed regularly as these efforts move forward and retains the authority to review and approve legislation before or promptly after its introduction; and

**BE IT FURTHER RESOLVED THAT** the Tribal Council recognizes as valid and in force between the Tribe and Nordhaus Law Firm LLC that 1996 contract between the "Delaware Trust Board" and "Nordhaus, Haltom, Taylor, Taradash, and Frye, LLP" until terminated by either party or until renegotiated, and provided that the Tribe waives approval by the Secretary of the Interior, which is no longer required by federal law.

#### CERTIFICATION

I hereby certify that the foregoing was considered by the Delaware Tribal Council of the Delaware Tribe of Indians and adopted this 19 day of FEBRUARY 2022 with a vote of 7 yes, 0 no, and 0 abstaining.

  
Brad KillsCrow, Chief

  
Attested by: Nicky Kay Michael, Secretary

