

S. HRG. 112-637

**FULLFILLING THE FEDERAL TRUST RESPONSIBILITY:
THE FOUNDATION OF THE GOVERNMENT-TO-
GOVERNMENT RELATIONSHIP**

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

MAY 17, 2012

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**FULFILLING THE FEDERAL TRUST
RESPONSIBILITY: THE FOUNDATION OF
THE GOVERNMENT-TO-GOVERNMENT
RELATIONSHIP**

THURSDAY, MAY 17, 2012

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. The Committee will come to order.

Aloha and welcome to all of you. Today, the Committee will hold an oversight hearing to examine the Federal trust responsibility.

The Federal trust relationship that exists between the Federal Government and the Indian Tribe goes back to the very first days of this Country. All branches of the Government, the Congress, Administration and the courts acknowledge the uniqueness of the Federal trust relationship. It is a relationship that has its origins in international law, colonial and U.S. treaties and agreements, Federal statutes and Federal legal decisions. A trust relationship carries with it legal, moral and fiduciary obligations that is incumbent upon the Federal Government to uphold.

When the trust responsibility is acknowledged and upheld by the Federal Government, a true government-to-government relationship can exist and thrive. When the trust responsibility is not upheld, Tribal sovereignty is eroded and undermined.

I have been pleased by the actions of the Obama Administration settling long-standing litigation brought by Tribes against the U.S. Government. Some of these cases involve claims that go back over 100 years. It is only in acknowledging the lapses in the trust relationship that we can move forward in a way that is beneficial to the Government, Tribes and Tribal Indians.

Today, we hear from legal scholars and practices to discuss the trust relationship, its formation, how it has changed throughout the years and where it stands now. I am also pleased to have the Tribal leaders with us who can share their perspective of what the trust relationship looks like on the ground and what it means to your Tribal members.

The hearing record for today's hearing will remain open for two weeks from today. I know this a topic of great interest to many Tribes and other stakeholders. So, please submit any written comments to be included in the hearing record.

Senator Barrasso, for any remarks that you may have.

**STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman. Thanks for holding this hearing on this very important topic.

I just want to thank you for your continued leadership in this area. You do a magnificent job and, as you stated, there is a long history between the United States Government and Indian nations. And I appreciate your willingness to look in, and look back to the past and then to provide leadership into the future.

While much of the history has not been good, the relationship, I believe, and under your leadership, has certainly improved. In the past few decades, we have seen much improvement. And I think it has been a direct result of the Federal policy of Indian self determination, to which you are very, very well committed.

Now, that policy has led to unprecedented Tribal participation in decisions that affect the future of Indian communities. Greater participation has in turn led to greater accountability. Greater participation and accountability has been good for Indian Country in so many different ways. Tribal governments have become far more sophisticated and more capable and better able to serve their people.

That is why I have introduced my Indian Energy Bill, S. 1684, which is co-sponsored by the Chairman. Our bill recognizes the undeniable fact that no one can better manage Tribal energy resources than the Tribes themselves. If nothing else, the Cobell litigation and many of these Tribal trust mismanagement cases illustrate an important point. The point is that the United States has not been a very effective manager of Indian trust assets and, in fact, I do not believe that the Federal Government will ever be able to manage these assets better than the Tribes themselves. I am convinced of that and I think an ever growing number of Tribes are convinced of that as well.

So, I want to thank all of the witnesses for being here today and for providing the Committee with your thoughtful testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Vice Chairman Barrasso.

Now, I call on Senator Tom Udall for any remarks he might have.

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Senator Akaka, and thank you, Senator Barrasso. I think it is important to hold this hearing, a very important hearing for Indian Country. And this hearing is a historic event that is vital to establishing an official record describing the responsibilities of the Federal Government to the Tribes.

I hope that this Oversight Hearing on the Federal trust responsibility will help reiterate the extent of this long-standing obligation in every branch of Government. As Tribes increasingly engage in

self governance, as the Supreme Court continues to take up Tribal cases, and as Federal budgets are trimmed, the question of the Federal Government's responsibility to Tribes is worth examining. And that is why it is important that we are doing what we are doing today.

In drafting budgets, the Executive Branch often falls short of fulfilling its trust responsibility. As construction budgets and healthcare needs go unmet, in recent years the Supreme Court has made rulings that have significantly impacted the relationship between Tribes and the Federal Government to the detriment of Tribes and erosion of trust responsibility.

In June 2011, the Supreme Court decision of *Jicarilla versus the United States*, they ruled on a case called *Jicarilla versus the United States*, is of particular interest to me and my constituents in New Mexico. This case is one such example of the Court's questionable interpretation of the trust responsibility and one of many issues that I look forward to discussing with the panelists today.

I was looking forward to welcoming the president of the Jicarilla Apache Nation to the Committee today but, unfortunately, President Levi Pesata is under the weather and unable to make the trip to Washington. We hope you feel better soon, President Pesata. But I do, however, want to welcome Shenan Atcitty who is standing in for the president.

And I also want to welcome Daniel Rey-Bear, a partner at the Nordhaus Law Firm in Albuquerque, New Mexico, and look forward to hearing the testimony of all of the witnesses. And I want to thank Daniel for his work for New Mexico Tribes.

So, with that, I have shortened everything. I will put my full statement in the record and really look forward to hearing the witnesses.

Thank you, Chairman Akaka.

[The prepared statement of Senator Udall follows:]

PREPARED STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

I would first like to thank Senator Akaka for holding this important hearing. This is a historic event that is vital to establishing an official record describing the responsibilities of the Federal Government to Tribes.

I hope that this oversight hearing on the federal trust responsibility will help reiterate the extent of this longstanding obligation in every branch of government.

As Tribes increasingly engage in self-governance, as the Supreme Court continues to take up Tribal cases, and as federal budgets are trimmed, the question of the Federal Government's responsibility to Tribes is worth examining.

In drafting budgets, the executive branch often falls short of fulfilling its trust responsibility, as construction budgets and healthcare needs go unmet. In recent years, the Supreme Court has made rulings that have significantly impacted the relationship between tribes and the Federal Government, to the detriment of Tribes and erosion of trust responsibility.

The June 2011 Supreme Court decision *Jicarilla vs. the United States* is of particular interest to me and my constituents in New Mexico. This case is one such example of the Court's questionable interpretation of trust responsibility, and one of many issues that I look forward to discussing with the panelists today.

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I also want to welcome Daniel Rey-Bear, a partner at Nordhaus Law Firm in Albuquerque, New Mexico. I look forward to hearing your testimony and thank you for your work with tribes in New Mexico and elsewhere.

Thank you.

The CHAIRMAN. Thank you.
Senator Michael Crapo, your remarks.

**STATEMENT OF HON. MICHAEL CRAPO,
U.S. SENATOR FROM IDAHO**

Senator CRAPO. Thank you, Mr. Chairman, and I, too, appreciate your leadership and the leadership of Senator Barrasso. The two of you are providing strong leadership for the proper approach that we should take in managing our trust responsibilities and I appreciate this hearing as well.

I apologize, I will not be able to stay for the hearing. But I wanted to get here to introduce one of our witnesses in the second panel who is from Idaho. And I appreciate the opportunity to introduce Nez Perce Tribal Executive Committee Vice Chairman Brooklyn Baptiste to the Committee.

Brooklyn is a very good personal friend of mine and we work very well together and he is a great leader in Idaho. I want to commend him for his leadership both to the Tribe and to the State of Idaho and, frankly, to the Nation as his presence here indicates.

In his tenure on the Nez Perce Tribal Executive Committee, Brooklyn has served on the Budget and Finance Subcommittee, the Enterprise Board, Law and Order, Youth Affairs Subcommittee and the Land Enterprise Commission. In addition, he is an accomplished artist and has been commissioned to produce art for numerous organizations, including the Tribe's gaming enterprise.

Throughout my time in the Senate, I have had the extraordinary opportunity to work with Vice Chairman Baptiste on many pertinent issues that directly affect the Federal trust responsibility. A couple of quick examples.

The Nez Perce Tribal Big Horn Recovery Project assists the Federal Land Management Agencies in their regulatory responsibilities to Nez Perce treaty rights through Big Horn Sheep restoration on Federal lands. This project, which has never received Federal appropriations, will hopefully preclude an Endangered Species Act listing for Big Horn Sheep which will be a much more effective way to approach the issue while protecting the necessary interests that we have.

Additionally, Vice Chairman Baptiste has played a significant role in the Nez Perce Tribe's efforts to find consensus agreement among Federal Land Management issues with regard to the Clear Water Basin Collaborative in Idaho.

Today, the Committee will discuss how the Federal Government can effectively reaffirm the important trust relationship between the United States and the Tribes. And I am sure that Vice Chairman Baptiste will have significant wisdom to give us as we approach that responsibility.

Thank you, Mr. Chairman.

[The prepared statement of Senator Crapo follows:]

PREPARED STATEMENT OF HON. MICHAEL CRAPO, U.S. SENATOR FROM IDAHO

Thank you, Mr. Chairman, Vice Chairman Barrasso, and members of the Committee. I appreciate the opportunity to introduce Nez Perce Tribal Executive Committee Vice-Chairman, The Honorable Brooklyn Baptiste, to the Committee.

First, I want to commend Vice-Chairman Baptiste for his great leadership to both the Nez Perce Tribe and the State of Idaho.

In his tenure on the Nez Perce Tribal Executive Committee, Brooklyn has served on the Budget & Finance Subcommittee and Enterprise Board; Law & Order, Youth Affairs Subcommittee; and the Land Enterprise Commission.

In addition, Brooklyn is an accomplished artist, and has been commissioned to produce art for numerous organizations, including the Tribe's Gaming Enterprise.

Throughout my time in the U.S. Senate, I have had the extraordinary opportunity to work with Vice Chairman Baptiste on many pertinent issues that directly address federal trust responsibility.

For example, the Nez Perce Tribe Bighorn Recovery Project assists the federal land management agencies in their regulatory responsibilities to protect Nez Perce Treaty Rights through bighorn sheep restoration on federal lands.

This project, which has never received federal appropriation, will hopefully preclude an Endangered Species Act listing for bighorn sheep, a much more costly restoration effort for the Federal Government, while providing recreational and economic benefits for Idaho and the nation.

Additionally, Vice-Chairman Baptiste has played a key role in the Nez Perce Tribe's efforts to find consensus agreements to federal land management issues with regard to the Clearwater Basin Collaborative.

Today, the Committee will discuss how the Federal Government can effectively reaffirm the important trust relationship between the United States and tribes. As such, I would urge you to listen to Vice-Chairman Baptiste, as he is ideally suited to understand how to enhance and strengthen this connection.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Crapo.
Now, Senator Mike Johanns, with your remarks.

**STATEMENT OF HON. MIKE JOHANNS,
U.S. SENATOR FROM NEBRASKA**

Senator JOHANNNS. Mr. Chairman, thank you. I also can be here just for a limited time so I will abbreviate my comments and submit anything additional that I would like to say in my opening statement for the record. But I do want to just say to the panel, and the second panel, thank you for being here.

Mr. Chairman, I know of no other issue that is more central and bedrock to our relationship than this issue which is the subject matter of this hearing, the trust relationship. And so, I am very anxious to hear the panel members speak to it and I compliment you for holding this hearing. I think this hearing is due. I think it is important that we air this and I am anxious to hear from our witness.

Again, thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Johanns, for your remarks.

I would like to invite our first panel to the witness table and to introduce them as well.

Ms. Melody McCoy, Staff Attorney of the Native American Rights Fund in Boulder, Colorado; Mr. Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center at Michigan State University College of Law in East Lansing, Michigan; and Daniel Rey-Bear, a partner at the Nordhaus Law Firm in Albuquerque, New Mexico.

Welcome, Ms. McCoy, please proceed with your testimony.

**STATEMENT OF MELODY McCOY, STAFF ATTORNEY, NATIVE
AMERICAN RIGHTS FUND**

Ms. McCOY. Thank you, Mr. Chairman, members of the Committee. Good afternoon.

I am Melody McCoy, enrolled member of the Cherokee Nation in Oklahoma and a staff attorney for coming up on 26 years now at the Native American Rights Fund in Boulder.

I appreciate the opportunity to testify today regarding the statutes and the cases that govern the accounts, funds and assets that are held by the United States Government in trust for American Indian and Alaska Native Tribes.

NARF has been representing over 40 Tribes in their historical claims for breaches of trust accounting and management duties. Some of these cases have been in court for 20 years and all of them have recently been in settlement negotiations with the Government.

Of course, the Government's holding of trust accounts for Tribes dates back to an 1820 Federal policy. When the Government purchased land from Tribes by treaty, it did not directly pay the Tribes. The Government chose to hold the payment in trust, the money itself in trust, unless and until it distributed to the Tribes.

These old treaty funds, over time, evolved into statutes by which today the Government holds in trust judgment awards, which are pure monetary awards or claims settlements to Tribes typically from entities like the historic Indian Claims Commission, and proceeds of labor accounts, which are trust accounts based on income earned from land, natural resources, trust assets that are under trust management for Tribes by the Government. And today, the Government purports to hold about 2,900 accounts in trust for Tribes.

Government management of Tribal trust accounts, funds and assets are governed by several statutory schemes. There are statutes that address the accounting duties and issues. There are statutes that address the investment of the Tribal trust funds. And there are statutes that address the management of the trust assets and natural resources. By these statutes, by and large Congress has delegated authority for these trust duties to the Department of the Interior and the Treasury.

In the investment statutes, the history of that is that typically early on there were Tribe specific treaties or statutes that ensured that, as I said, when the Government held the funds in trust for Tribes as payment for the treaty lands, the Government was obligated to earn interest on those funds. Throughout the 20th Century, the statutory fiduciary investment duties and beneficiary protections increased for these Tribal trust funds. Today, the statutes are codified in Title 25 at four separate sections, 161, 161a, 161b and 162a.

In general, the Interior Department has discretion to deposit Tribal trust funds in the Treasury or to invest them in a range of statutorily approved financial investments outside of the Treasury. If they are deposited in the Treasury since 1984, they must earn interest at rates determined by Treasury considering, as the statute says, current market yield on comparable marketable obligations. Since 1974, regulation of the Interior Department have re-

quired judgment awards, the pure monetary funds, to be invested outside of the Treasury.

The resource management statutes for Tribal trust assets and resources are numerous and they typically deal with the management of Tribal land and natural resources such as oil and gas, minerals and timber. I refer to the Handbook of Federal Indian Law. They have, perhaps, a good summary of those.

In the accounting statutes, this is probably Congress' most recent foray into those, and there have been three separate series of statutes involving accounting issues for Tribal trust funds and those are set forth.

And on the cases, I briefly want to go through three points. The historic Indian Claims Commission was a statutory scheme, a unique statutory forum set up by Congress, in the 1940s, 1950s and 1960s and, after three decades, ultimately the Indian Claims Commission awarded over \$1.2 billion to Indian Tribes in the form of these judgment awards that again were held in trust until they were distributed.

The Indian Claims Commission has ended and the Supreme Court, without that kind of a forum, has made it difficult for Tribes to bring these cases although, as we have seen now, there are 100 Tribes that have brought cases involving these historical mismanagement claims. We have settled perhaps about half of those, most of those under the current Administration.

So, I think it very timely that this Congress take a look at this issue in the wake of these historic settlements. And we really appreciate this hearing and the opportunity to assist the Congress and, most importantly, we urge Congress to work with Tribes in a government-to-government fashion and in respect of Tribal sovereignty to see what needs to be done next. That is what needs to happen.

Thank you.

[The prepared statement of Ms. McCoy follows:]

PREPARED STATEMENT OF MELODY MCCOY, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Introduction and Overview

Good afternoon Members of the Committee. I am Melody McCoy, an enrolled member of the Cherokee Nation and a Staff Attorney at the Native American Rights Fund (NARF). NARF thanks the Committee for the opportunity to testify today regarding the statutes and cases that govern the accounts, funds and assets that are held by the United States government in trust for American Indian and Alaska Native Tribes. NARF represents over 40 tribes in their historical claims for breach of trust accounting and management duties. Some of these cases have been in court for 20 years and all them have been in settlement negotiations with the government.

The government's holding of trust accounts for tribes dates back to an 1820 federal policy. At that time when the United States by treaty purchased land from tribes the government did not make direct payment to tribes; rather, it held the money in trust for tribes unless and until it distributed the money to the tribal beneficiaries. Over time this policy and practice evolved into statutes by which the government holds in trust "Judgment Awards," which are monetary awards or claims settlements to tribes typically from entities like the historic Indian Claims Commission, and "Proceeds of Labor" accounts, which are based on income earned from land and natural resources that are under trust management for tribes by the government. Today the government purports to hold about 2,900 trust accounts for about 250 tribes.

Tribal Trust Statutes

The government's management of tribal trust accounts, funds, and assets are governed by several statutory schemes. There are statutes that address tribal trust accounting duties and issues. There are statutes that address the investment of tribal trust funds. There are statutes that address the management of tribal trust assets and natural resources. By these statutes Congress has delegated authority for fiduciary duties regarding tribal trust fund accounts, funds, and assets primarily to the Departments of the Interior and the Treasury.

Investment Statutes. Nineteenth century treaties and statutes usually ensured that while it held funds in trust for tribes, the government was obligated to earn interest on the funds. Throughout the twentieth century, statutory fiduciary investment duties and beneficiary protections increased for tribal trust funds. The statutes governing the government's investment of tribal trust funds are codified at 25 U.S.C. §§ 161, 161a, 161b and 162a. Generally, the Interior Department has discretion to deposit tribal Proceeds of Labor account funds in the Treasury or invest them outside of the Treasury in a range of statutorily approved financial instruments. If deposited in the Treasury, since 1984 they must earn interest at rates determined by Treasury considering current market yields on comparable marketable obligations. Since 1974 Interior regulations have required Judgment Awards to be invested outside of Treasury.

Resource Management Statutes. A good summary of the general statutes governing the management of tribal land (including leases for agriculture, grazing and rights of way) and natural resources such as oil, gas, minerals and timber that the government holds in trust for tribes can be found in Felix S. Cohen, *Handbook of Federal Indian Law* §§ 17.01–17.04 (2005 ed.). These statutes typically include provisions for the government's collection of income from the management of tribal trust assets and deposit of that income in Proceeds of Labor accounts for tribal beneficiaries. There are also a few "tribe specific" statutes that govern the government's management of the trust assets or natural resources of a specific tribe.

Accounting Statutes. Congress recently has addressed tribal trust account accounting matters in several ways. Since 1987 Congress has mandated that the government perform and provide tribal trust account accountings, audits and reconciliations. Pub. L. No. 100–202 (1987). The accounting and audit mandates are key features of the American Indian Trust Fund Management Reform Act of 1994. Pub. L. No. 103–412; 25 U.S.C. §§ 4044, 4011(c). In addition, since 1990, in the so-called Indian Trust Accounting Statutes, Congress has provided that, with respect to tribal trust fund mismanagement claims, the general six year statute of limitations for claims against the government does not begin to run unless and until the government has provided tribal beneficiaries with proper trust fund accountings. Pub. L. No. 101–512 (1990)—Pub. L. No. 112–74 (2011). In the wake of the provision of reports to tribes in 1996 as a result of a government contract with the accounting firm of Arthur Andersen to perform tribal trust accountings, in 2002 and 2005 Congress provided that for purposes of applicable statutes of limitations the date on which tribes received their Arthur Andersen reports is deemed to be December 31, 1999 and December 31, 2000 respectively. Pub. L. No. 107–153 (2002), Pub. L. No. 109–158 (2005). These last two sets of statutes are intended to toll the commencement of statutes of limitations on tribal trust accounting and mismanagement claims and defer the accrual of such claims.

Tribal Trust Cases

Indian Claims Commission. Historically tribes had limited access to federal courts and had to get special acts of Congress authorizing their claims against the government. In 1946 Congress created the Indian Claims Commission (ICC). Pub. L. No. 79–726. The ICC was authorized generally for a limited time period to hear and adjudicate historic claims of tribes against the government that accrued before August 13, 1946. It had jurisdiction only to award money damages. There were over 600 ICC claims filed. When the ICC began, the government was holding about \$28 million in trust for tribes. The ICC ultimately awarded over \$1.2 billion to tribes as Judgment Awards held in trust by the government unless and until distributed.

Supreme Court. Tribal access to federal courts today is generally more available but the U.S. Supreme Court has set strict requirements for tribes suing the government for money damages for alleged breaches of trust. The Court requires tribes to show a substantive statute or regulation that (1) imposes specific fiduciary duties or creates specific beneficiary rights and (2) can be "fairly interpreted" as mandating compensation by the government in the event of a breach. *United States v Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*); *United States v Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*); *United States v Navajo Nation*, 556 U.S. 287 (2009) (*Navajo II*).

Post-AA Reports. As noted above, tribal trust account holders were provided Arthur Andersen reports in 1996. The Arthur Andersen reports examined some transactions in some tribal trust accounts for a 20 year period (1972 to 1992). Also as noted above, for limitations statute purposes, in 2005 Congress deemed these reports to have been received by tribes on December 31, 2000. Without further addressing of the matter by Congress, by the end of 2006, over 100 tribes had filed claims in federal courts for historical trust accountings or for damages for trust funds and asset mismanagement.

Due to threshold issues of jurisdiction, discovery, evidence and procedure very few tribal trust cases have proceeded to determinations regarding the merits of a tribe's claims or remedies. To this day there are no final unappealed court decisions on the merits of government liability for historical failure to account or for funds or assets fiduciary mismanagement. There are no final decisions with appeals exhausted regarding the existence or scope of remedies or relief that may be judicially awarded. Tribal trust cases are costly and time consuming.

Settlements. Between 2001 and 2009 there were four full or partial negotiated settlements of tribal trust claims. From 2010–2011 there were another three negotiated settlements. In 2012 there have been negotiated settlements in 42 tribal trust cases.

Conclusion

Many reports from federal agencies including the Government Accountability Office and the Department of the Interior's Office of the Inspector General have been highly critical of the government's historical failure to account for and properly manage tribal trust funds and assets. Government contractors including Arthur Andersen and Price Waterhouse have reached similar conclusions. The 1994 Trust Reform Act was preceded by House Report No. 102–488 (1992), entitled "*Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund.*"

In light of these reports, court cases and settlements, NARF believes that it is timely for Congress to review the government's on-going fiduciary management of tribal trust accounts, funds and assets. While it is not for NARF to make specific recommendations, in keeping with tribal sovereignty, the federal policy of government-to-government relations with tribal nations and the recent United Nations Declaration on the Rights of Indigenous Peoples—which includes the right of indigenous peoples to "free, prior and informed consent" to approve or reject proposed actions or projects that may affect them and their land and resources—NARF urges Congress to work with tribes regarding any needed trust reform. The new Secretarial Commission on Indian Trust Administration and Reform is tasked with providing advice and recommendations to the Secretary of the Interior on trust management. As part of its comprehensive evaluation of government trust management the Commission is seeking the input of tribes and Indian organizations at a scheduled series of public meetings this year. Tribes and national and regional tribal organizations have invaluable experience and expertise on tribal trust accounts, funds and assets that can be shared with the Commission, and with Congress through hearings such as this.

Thank you for the opportunity to assist the Committee at this Oversight Hearing.

The CHAIRMAN. Thank you very much, Ms. McCoy, for your testimony.

Mr. Fletcher, will you please proceed with your testimony.

STATEMENT OF MATTHEW L.M. FLETCHER, PROFESSOR OF LAW/DIRECTOR, INDIGENOUS LAW AND POLICY CENTER, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

Mr. FLETCHER. Thank you. Chairman Akaka and Members of the Committee, it is a pleasure to testify today on the Federal trust responsibility to Indian nations and I say *chi-miigwetch* for the invitation to testify.

I am a member of the Grand Traverse Band of Ottawa and Chippewa Indians which is located in the center of the universe, Peshawbestown, Michigan. I am the co-author of the sixth edition of *Cases and Materials on Federal Indian Law* with the late David Getches, Charles Wilkinson and Robert Williams, and the author

of American Indian Tribal Law, the first casebook for law students on Tribal law.

In 2010, I was elected to the American Law Institute and my colleague, Wenona T. Singel and I currently head up the effort to initiate an ALI restatement project on American Indian Law. Chapter one of this proposed project will be on Tribal Federal relations. So, it is very fortuitous that I have been called to testify today.

I am going to talk a little bit about the historic underpinnings of the trust responsibility to begin. The Supreme Court interpreted the meaning of the Indian Commerce Clause and how it interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. McIntosh*, an early Indian lands case, Chief Justice Marshall held that the Federal Government had exclusive dominion over land transaction with Indian Tribes, exclusive as to individual American citizens and as to State government.

In *Cherokee Nation v. Georgia*, Chief Justice Marshall held that while Indian Tribes were not State governments as defined in the Constitution, nor were they foreign nations. They were something akin to domestic dependent nations.

And finally, in *Worcester v. Georgia*, Chief Justice Marshall confirmed that the laws of States have no force in Indian Country and that the Constitution's Supremacy Clause has powerful, gives powerful effect, to Indian treaties as the supreme law of the land.

The latter half of the 19th Century and first half of the 20th Century was a low point in Federal Tribal relations, however. In cases like *United States v. Kagama* and *Lone Wolf v. Hitchcock*, the Supreme Court adopted a guardian-ward concept of Federal Tribal relations. The guardian-ward concept gave license to the Executive Branch and Congress to interfere with internal Tribal affairs, undermine and even expropriate without just compensation Tribal property rights and to eliminate the ties between Tribes and the Government during what we now call the Termination Era.

The trust responsibility never completely disappeared, however. In 1942, the Supreme Court held in *Seminole Nation v. United States* that the U.S. should be held to the most exacting fiduciary duty when handling trust funds. I will quote from the Court at this time.

“Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”

In 1970, President Nixon's message to Congress announced a fundamental shift in Federal Indian policy, self-determination. The message renounced the termination policy, established that adherence to the Federal trust responsibility would now guide Federal Indian policy, and proposed a structure to dramatically reduce Federal control over internal Tribal relations by recognizing greatly increased Tribal authority to manage affairs on their reservations as a replacement for Federal bureaucratic control.

Congress has generally adhered to the concepts of the trust responsibility in virtually all modern Indian affairs legislation, from 1971 with the Alaska Native Claims Settlement Act to the present

with various water settlements and the Tribal Law and Order Act. Appendix 1 of my testimony lists many of these statutes.

There have been no termination acts or similar statutes for over 50 years. I have to thank Reid Chambers for reminding me of this continually. This history of Executive and Congressional voluntary adherence to a trust relationship is at the heart of the Federal Tribal relationship in modern times. I will add that the Solicitor General's decision making record in acting as a trustee for Tribal interests since 1970, before the Supreme Court, largely has been exceptional.

But not all is well with the trust responsibility. Conflicts of interest undermine the Federal Government's duties and the Supreme Court has enabled the Executive Branch to avoid responsibility for consequences of trust breach to Indian Country . I am the author and editor of a blog called Turtle Talk where I have been following a lot of these conflicts of interest and I am more than happy to talk about them during the question and answer period.

And I will add, as you can see in my summary, that there are many examples of this including the current relationship with the, excuse me, the National Labor Relations Act as to its application to Indian Tribes and casino interests, the conflict within the Department of Interior about the San Francisco Peaks and the trust responsibility in terms of, in that regard as well.

I thank you for your time and for the Committee's leadership in this area. I welcome your questions. Chi-miigwetch.

[The prepared statement of Mr. Fletcher follows:]

PREPARED STATEMENT OF MATTHEW L.M. FLETCHER, PROFESSOR OF LAW/DIRECTOR,
INDIGENOUS LAW AND POLICY CENTER, MICHIGAN STATE UNIVERSITY COLLEGE OF
LAW

Chairman Akaka, members of the Committee, it is a pleasure to testify today on the federal trust responsibility to Indian nations and I say *chi-miigwetch* for inviting me to this hearing.

I am Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. I am the Chief Justice of the Poarch Band of Creek Indians Supreme Court and I also sit as an appellate judge for the Pokagon Band of Potawatomi Indians, the Hoopa Valley Tribe, the Lower Elwha Klallam Tribe, and the Nottawasippi Huron Band of Potawatomi Indians. I am a member of the Grand Traverse Band of Ottawa and Chippewa Indians, located in Peshawbestown, Michigan. In 2010, I was elected to the American Law Institute (ALI). My colleague Wenona T. Singel and I currently head up the effort to initiate an ALI restatement or principles project on American Indian Law.

I am co-author of the sixth edition of *Cases and Materials on Federal Indian Law* (Thomson West 2011) with the late David Getches, Charles Wilkinson, and Robert Williams, and author of *American Indian Tribal Law* (Aspen 2011), the first casebook for law students on tribal law. This year, I published *The Return of the Eagle: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* (Michigan State University Press), and co-edited *The Indian Civil Rights Act at Forty* with Kriston A. Carpenter and Angela R. Riley (UCLA American Indian Studies Press). I have published articles with *Arizona Law Review*, *Harvard Journal on Legislation*, *Hastings Law Journal*, *University of Colorado Law Review*, *Houston Law Review*, *Tulane Law Review*, and many others. Finally, I am the primary editor and author of the leading law blog on American Indian law and policy, *Turtle Talk*.

I graduated from the University of Michigan Law School in 1997 and the University of Michigan in 1994. I have worked as a staff attorney for four Indian Tribes – the Pascua Yaqui Tribe, the Hoopa Valley Tribe, the Suquamish Tribe, and the Grand Traverse Band. I served as a judicial consultant to the Seneca Nation of Indians Court of Appeals, and as a pro tem judge for the Little River Band of Ottawa Indians Court of Appeals. I am here in my individual capacity and none of my statements today should be treated as official statements.

Today, I hope to provide a brief overview of the historic underpinnings of the federal trust responsibility to Indian nations (Part I); discuss the current status of the trust relationship in light of the laudable Congressional policy supporting tribal self-determination and the lamentable Supreme Court jurisprudence in the field (Part II); and offer a few suggestions on the future of the trust responsibility and Congress's role in dealing with Indian affairs (Part III).¹

¹ DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., AND MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (6th ed. 2011) (hereinafter *GETCHES, FEDERAL INDIAN LAW*) constitutes a significant source for much of the material contained in this Statement. I have also borrowed heavily from several

I. The Foundations of the Trust Responsibility

The constitutional text provides for two means by which Indian tribes and the United States will interact. First, the so-called Indian Commerce Clause provides that Congress has authority to regulate commerce with the Indian tribes. One of the first acts of the First Congress was to implement the Indian Commerce Clause in the Trade and Intercourse Act of 1790.² Second, the federal government's treaty power provides an additional form by which the United States deals with Indian tribes. There are hundreds of valid and extant treaties between the United States and various Indian tribes.

The Marshall Trilogy

The Supreme Court interpreted the meaning of the Indian Commerce Clause and how it interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. M'Intosh*,³ an early Indian lands case, Chief Justice Marshall held that the federal government had exclusive dominion over land transactions with Indian tribes -- exclusive as to individual American citizens and, implicitly, as to state government. In *Cherokee Nation v. Georgia*,⁴ Chief Justice Marshall's plurality opinion asserted that while Indian tribes were not state governments as defined in the Constitution, nor were they foreign nations, they were something akin to "domestic dependent nations." And, finally, in *Worcester v. Georgia*,⁵ Chief Justice Marshall confirmed that the laws of states have "no force" in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as "the supreme law of the land."

In each of these three opinions, Chief Justice Marshall recognized moral limitations on the federal government's plenary authority in Indian affairs; for example, in *Johnson v. M'Intosh*, he wrote, "Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest."⁶ Other Justices pressed Marshall on the status of Indian tribes in the American Republic, however, focusing on the word "protection"

of any other previous writings. I thank Dan Roy-Bear for substantive comments. I also thank Elaine Barr for developing the materials in Appendix 1.

² See An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137, now codified as amended at 25 U.S.C. § 177.

³ 21 U.S. 543 (1823).

⁴ 30 U.S. 1 (1831).

⁵ 31 U.S. 515 (1832).

⁶ *Johnson*, 21 U.S. at 589.

in early Indian treaties.⁷ The various Justices debated the meaning of “protection” as being either an invitation to dependence or the recognition of political distinctiveness.

According to Chief Justice Marshall in the *Johnson* case, Indian tribes included characteristics of both “dependent” and “distinct” nations,⁸ a sort of middle ground. But in *Cherokee Nation*, writing for “the Court” (but really only for himself and one other Justice),⁹ he famously labeled Indian tribes “domestic dependent nations”¹⁰ as a new legal term of art created from whole cloth in order to avoid classifying Indian tribes as either States or foreign nations. In this case, the Chief Justice denigrated Indian tribes a great deal: “[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”¹¹

Justice Thompson’s dissent in *Cherokee Nation* suggested a different reading of the word “protection.” Drawing on principles of international common law, Justice Thompson found that weaker states signing treaties of protection do not, as a side-effect, lose their sovereignty:

[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state.¹²

All that is required for a weaker state to retain statehood is a reservation of the right to self-government, a staple in American Indian treaties.¹³ “Protection” and nationhood are not mutually exclusive.

While Justice Thompson’s definition of “protection” did not win the day in *Cherokee Nation*, the Court in *Warcester*, per Chief Justice Marshall, adopted his analysis. Writing for the Court, Chief Justice Marshall drew upon the relations between Great Britain and the Indian tribes

⁷ Besides the Cherokee treaties, other Indian treaties the Marshall Court discussed, including the Delaware treaty, used the term “protection” as well. See *Cherokee Nation*, 30 U.S. at 63 (Thompson, J., dissenting); see also *Warcester*, 31 U.S. at 553 (noting that “[t]his stipulation is found in Indian treaties, generally”).

⁸ *Johnson*, 21 U.S. at 596 (“The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies....”).

⁹ *Cherokee Nation*, 30 U.S. at 15 (Marshall, C.J.).

¹⁰ *Id.* at 17 (Marshall, C.J.).

¹¹ *Id.* (Marshall, C.J.).

¹² See *Cherokee Nation*, 30 U.S. at 53 (Thompson, J., dissenting).

¹³ See *Id.* at 54-55 (Thompson, J., dissenting) (“They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character.”).

pre-Revolutionary War to find that "protection" meant what the Indians would have thought it meant – "It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character."¹⁴ So it was with the British crown as it is with the American government, Chief Justice Marshall added – "The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."¹⁵

Chief Justice Marshall ended with his famous dictum, "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of congress."¹⁶

The Guardian-Ward Relationship (1835-1970)

Chief Justice Marshall's view that Indian tribes were "distinct political communities" residing on lands where state law "can have no force" did not prevail for long.¹⁷ The latter half of the 19th century and first half of the 20th century was a low point in federal-tribal relations. In cases like *United States v. Kagana*,¹⁸ *Stephens v. Cherokee Nation*,¹⁹ *Cherokee Nation v. Hitchcock*,²⁰ and *Lone Wolf v. Hitchcock*,²¹ the Supreme Court adopted a "guardian-ward" concept of federal-tribal relations.²²

The Supreme Court's review of Congressional acts in this area reached an extreme level of deference when it held in *Lone Wolf v. Hitchcock*²³ that challenges to Congressional authority to regulate Indian affairs were foreclosed by what is now referred to as the political question doctrine.²⁴ Lower courts followed the Supreme Court's lead in cases like *United States v. Clapox*,²⁵ where the court held that Indian reservations were a kind of school for Indian people to learn how to become civilized.

¹⁴ See *Warren*, 31 U.S. at 552.

¹⁵ *Id.* at 551.

¹⁶ *Id.* at 561.

¹⁷ See *Mitchel v. United States*, 34 U.S. 711 (1835) (returning to the dependency rhetoric).

¹⁸ 118 U.S. 375 (1886).

¹⁹ 174 U.S. 443 (1899).

²⁰ 187 U.S. 294 (1902).

²¹ 187 U.S. 553 (1903).

²² See generally Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1234-29 (1975); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1068-75 (1974); Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MICH. L. REV. 145, 195-99 (1940).

²³ 187 U.S. 553 (1903).

²⁴ *Id.* at 565-66.

²⁵ 35 F. 575 (D. Cr. 1868).

The guardian-ward concept gave license to Congress and the Executive branch to interfere with internal tribal affairs, undermine and even expropriate without just compensation tribal property rights, and to eliminate the ties between tribes and the government during the Termination Era. For example, Congress adopted allotment of Indian lands as national policy in 1887. President Theodore Roosevelt referred to the allotment policy in 1901 as "a mighty pulverizing engine to break up the tribal mass."²⁶ It was enormously effective in reducing the tribal land base. From 1887 when Congress adopted this policy until 1934 when it ended the policy, two-thirds of tribal land holdings moved into non-Indian ownership.²⁷

Congress also experimented with extending state jurisdiction into Indian country. In 1953, Congress passed House Concurrent Resolution 108, calling for the eventual termination of services and programs to tribal governments. Congress then began the process of choosing individual Indian tribes and terminating them. Congress targeted tribes mostly in California, Oregon, Utah, Oklahoma, and Wisconsin for termination, which consisted of cutting off federal appropriations, disbanding tribal government, and privatizing tribal businesses.²⁸ President Kennedy informally put the practice on hold and by 1973 Congress had formally ended the termination era by restoring the Menominee Tribe to full status as a federally recognized tribe.²⁹ Not all terminated tribes have been restored, however.

During the Termination era, Congress enacted several statutes that served the process of termination. In 1953, Congress enacted a statute commonly known as Public Law 280 that extended state criminal and civil adjudicatory jurisdiction into Indian country in several states, most notably in California, without tribal consent.³⁰ Other states had the option of accepting jurisdiction over Indian country.

The trust responsibility never completely disappeared, however. In 1942, the Supreme Court held in *Seminole Nation v. United States*,³¹ that the United States should be held to the most exacting fiduciary duty when handling tribal trust funds:

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people, ... in carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. *Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with*

²⁶ ROBERT DERKHOFFER, JR., *THE WHITE MAN'S INDIAN* 175 (1978).

²⁷ See Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 831-32 (2004).

²⁸ For a list of termination acts, see GETCHES, *FEDERAL INDIAN LAW*, *supra* note 1, at 204-05.

²⁹ 25 U.S.C. §§ 903-903f.

³⁰ Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, *codified in relevant part at* 18 U.S.C. § 1162. *See also* 28 U.S.C. § 1366(a) (parallel civil provision).

³¹ 316 U.S. 286 (1942).

moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.³²

While tribal trust breach claims were occasionally successful, for the most part tribal efforts to challenge the federal government's administration of tribal assets were not.³³

II. The Current State of the Trust Responsibility

The Self-Determination Era (1970-Present)

In 1970, President Nixon's message to Congress announced a fundamental shift in federal Indian policy -- self-determination.³⁴ The Message renounced the termination policy, established that adherence to the federal trust responsibility would guide federal Indian policy, and proposed a structure to dramatically reduce federal control over tribes -- by recognizing greatly increased tribal authority to manage affairs on their reservations as a replacement for federal bureaucratic control. Specifically, President Nixon wrote:

In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can best be fulfilled. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.³⁵

The Nixon Administration and later Administrations proposed and oversaw the adoption of numerous statutes in which Congress finally allowed Indian tribes to take over federal Indian

³² *Id.* at 206-97 (emphasis added).

³³ *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 27 (1955); *Sioux Tribe v. United States*, 316 U.S. 317 (1942).

³⁴ Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d. Sess. (1970); 116 Cong. Rec. 23258.

³⁵ *Id.*

affairs programs.³⁶ The various Self-Determination Acts include the Indian Self-Determination and Education Assistance Act³⁷ and the Native American Housing Assistance and Self-Determination Act.³⁸ These Acts implement a federal-tribal relationship first proposed by Interior Secretary Collier during the debates leading up to the Indian Reorganization Act of 1934.³⁹ Congress also took steps to encourage tribal economic development with the enactment of statutes such as the Indian Finance Act of 1974,⁴⁰ the Indian Tribal Government Tax Status Act of 1982,⁴¹ and the Indian Gaming Regulatory Act of 1988.⁴² Congress enacted legislation supporting tribal law enforcement, the development of tribal courts, and perhaps the most controversial Indian affairs statute in the era, the Indian Child Welfare Act,⁴³ requiring the transfer of state court cases involving Indian child custody to tribal courts. Appendix 1 of this Statement includes a list of selected Congressional Acts adopted during the period of the federal self-determination policy.

The relationship between Indian tribes and the federal government is best described as a trust relationship, with the United States acting as a trustee to tribal interests. The give and take of the trust relationship often is under the surface, out of the sight of courts and many policymakers.⁴⁴ From the vantage point of history, the 1970 Nixon Message did something novel by emphasizing the trust responsibility, recognizing the Government's frequent conflicts of interest, and directing Executive officials to devise ways to be faithful to the trust responsibility and where feasible avoid conflicts of interest. This conception of the trust responsibility has been variously observed in subsequent Administrations over the past four decades, but it has often been a significant force in Executive Branch policy and no subsequent Administration has explicitly deviated from it.⁴⁵

Congress has generally adhered to the concepts of the trust responsibility in virtually all modern Indian legislation – from 1971 with the Alaska Native Claims Settlement Act⁴⁶ to the

³⁶ See generally Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191 (Kenneth R. Philip, ed. 1986).

³⁷ Pub. L. 93-638, 88 Stat. 2203 (1975), codified at 25 U.S.C. § 450 et seq.

³⁸ Pub. L. 104-330, 110 Stat. 4017 (1996), codified at 25 U.S.C. § 4101 et seq.

³⁹ See H.R. 7902, 73rd Cong., 2nd Sess., Tit. I, § 4(i) (authorizing Indian tribes “[t]o exercise any other powers now or hereafter delegated to the Office of Indian Affairs, or any officials thereof, ... and to act in general as a Federal agency in the administration of Indian Affairs...”), reprinted at VINE DELORIA, JR., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 10 (2002).

⁴⁰ Pub. L. 93-262, § 2, Apr. 12, 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq.

⁴¹ Pub. L. 97-473, Title II, § 202(a), Jan. 14, 1983, 96 Stat. 2608, codified as amended at 26 U.S.C. § 7871.

⁴² Pub. L. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701 et seq.

⁴³ Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069, codified at 25 U.S.C. § 1901 et seq.

⁴⁴ I thank Reid Chambers and Doug Enderson for this point.

⁴⁵ E.g., Memorandum for the Heads of Executive Departments and Agencies (Nov. 5, 2009) (President Obama), available at <http://www.whitehouse.gov/the-press-office/2009/11/05/20091105-tribal-consultation> (signed-president). For a laundry list of other administrative materials on tribal consultation in the last several administrations, see Thomas Schlosser, Orders and Policies Regarding Consultation with Indian Tribes, available at <http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribes.htm>.

⁴⁶ Pub. L. 92-203, 85 Stat. 688 (Dec. 18, 1971), codified at 43 U.S.C. § 1601 et seq.

present with water settlements,⁴⁷ and the Tribal Law and Order Act.⁴⁸ There have been no termination acts or similar statutes for over 50 years. This history of Executive and Congressional voluntary adherence to a trust relationship (whether it is designated and discussed under the framework of trust responsibility or not) is the heart of the federal-tribal relationship in modern times.

The Difficulty in Enforcing the Trust Relationship

However, what is most visible in the trust relationship are the cases involving tribal efforts to enforce the trust relationship. Tribal-federal disagreements over the enforceable duties under the trust relationship likely will continue to generate significant litigation in the coming years.

The Supreme Court has given definition to the federal trust responsibility in two cases dealing with the government's liability for its management of Indian natural resources, *United States v. Mitchell I*⁴⁹ and *United States v. Mitchell II*.⁵⁰ The two cases involved a claim for money damages by members of the Quinault Tribe for federal mismanagement of the timber on their allotments. In *Mitchell I*, the Court held that the allottees had not established liability under the General Allotment Act, because it contemplated that "the allottee, and not the United States, was to manage the land." The Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."⁵¹

In *Mitchell I*, the Court remanded the case to determine whether liability could be based on statutes other than the General Allotment Act. The Claims Court found an enforceable duty in the Indian timber management statutes and in *Mitchell II* the Supreme Court agreed:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.⁵²

The Supreme Court has retreated from many of the broader statements in *Mitchell II*,⁵³ but still utilizes the analytic structure articulated in that decision. For example, in *United States v.*

⁴⁷ For a chart detailing the dozens of Congressionally-ratified Indian water rights settlements, see GETCHES, FEDERAL INDIAN LAW, *supra* note 1, at 828-29.

⁴⁸ Pub. L. 111-211, Title II, 124 Stat. 2263 (July 29, 2010).

⁴⁹ 445 U.S. 535 (1980).

⁵⁰ 463 U.S. 206 (1983).

⁵¹ *Mitchell I*, 445 U.S. at 542-43.

⁵² 463 U.S. at 224.

⁵³ *E.g.*, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2322-23 (2011) ("The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the

White Mountain Apache Tribe,⁵⁴ the Court affirmed a multi-million dollar judgment in favor of the Tribe where the federal government had promised to transfer ownership of several federal buildings on the reservation to the Tribe, but instead allowed the buildings to rot and decay before the transfer.⁵⁵

Most recently, the Supreme Court in *United States v. Jicarilla Apache Nation*,⁵⁶ suggested that the federal government's enforceable trust obligations could be limited to express Congressional statements accepting a trust obligation, while reaffirming the existence of a "general" trust:

We do not question "the undisputed existence of a general trust relationship between the United States and the Indian people." ... The Government, following "a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust," ... obligations "to the fulfillment of which the national honor has been committed" Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. ...

In other cases, we have found that particular "statutes and regulations ... clearly establish fiduciary obligations of the Government" in some areas. ... Once federal law imposes such duties, the common law "could play a role."⁵⁷

However, as Justice Sotomayor noted in her dissent, the real question in future years is whether (and to what extent) the existence of the "general trust" has any import.⁵⁸ She concluded:

But perhaps even more troubling than the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the

Indians a "trust," ... that trust is defined and governed by statutes rather than the common law. See *United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (Navajo I) ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions").

⁵⁴ 537 U.S. 465 (2003).

⁵⁵ But see *Navajo Nation I*, 437 U.S. 488 (reversing a \$600 million judgment against the government for alleged trust violations under the Indian Mineral Leasing Act); *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) (Navajo II) (reversing a \$600 million judgment against the government for alleged trust violations under other statutes).

⁵⁶ 131 S. Ct. 2313.

⁵⁷ *Id.* at 2324-25 (citations omitted).

⁵⁸ See *id.* at 1340 (Sotomayor, J., dissenting).

communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.⁵⁹

The Impact of the Executive Branch's Conflicts of Interest on Supreme Court Litigation

Jicarilla Apache Nation is merely one case in a long line of cases and agency decisions involving conflicts. The Departments of Justice and Interior routinely are forced to make decisions that otherwise constitute a serious conflict of interest between their duties to the federal government and to Indian tribes.⁶⁰ Suits such as the long-running *Cobell* litigation exposed the weaknesses of the Executive branch in administering the trust responsibility.

Recent important Executive branch conflicts include the following:

- The conflict between the Department of Interior and the National Labor Relations Board over whether the National Labor Relations Act, which is silent as to Indian tribes as employers, applies to tribal casino employment.⁶¹
- The conflict within the Department of Interior between tribal interests in sacred sites at the San Francisco Peaks and private business interests making artificial snow tainted by fecal matter.⁶²
- The conflict within the Department of Interior (and perhaps with the Department of Justice) over administering the Bald and Golden Eagle Protection Act in accordance with the American Indian Religious Freedom

⁵⁹ *Id.* at 2343 (Sotomayor, J., dissenting).

⁶⁰ *E.g.*, *Nevada v. United States*, 463 U.S. 110 (1983); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1972). See generally Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 *GA. L. REV.* 1307 (2003).

⁶¹ Compare Letter from Patrice H. Kunesch, Deputy Solicitor – Indian Affairs, Dept. of Interior to Lafe Solomon, Acting General Council, National Labor Relations Board (Dec. 7, 2011), available at <http://turtletalk.files.wordpress.com/2011/12/nlrh-12-7-11.pdf> (arguing that the NLRA does not apply to the casino operations of the Saginaw Chippewa Indian Tribe), and Letter from Edith R. Blackwell, Associate Solicitor, Dept. of Interior to Robert Meisburg, General Council, National Labor Relations Board (Jan. 15, 2009), available at <http://turtletalk.files.wordpress.com/2009/03/interior-solicitor-opinion-letter.pdf> (arguing that the NLRA does not apply to the casino operations of the Little River Band of Ottawa Indians), with *Soaring Eagle Casino Resort*, National Labor Relations Board, Division of Judges (No. 7-CA-53586) (March 26, 2012), available at <http://turtletalk.files.wordpress.com/2012/04/administrative-law-judges-decision.pdf> (holding that the NLRA does apply).

⁶² See *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 139 S. Ct. 2763 (2009).

Act, the Religious Freedom Restoration Act, and the National Environmental Policy Act.⁶³

However, it should be noted that the federal government's decision-making record in acting as the trustee for tribal interests since 1970 before the Supreme Court is *exceptional*. Appendix 2 of this Statement lists all of the Supreme Court cases in which the United States has appeared an amicus. In the vast majority of cases, the government steps up to support the tribal interests in question. Appendix 3 of this Statement lists selected cases, usually relating to treaty rights, where the United States has either brought suit on behalf or intervened in favor of tribal interests. Of course, there are cases not included in these lists where the government chose not to participate where its participation could have been helpful to tribal interests.

There are also many Supreme Court cases where the federal government must defend against Indian or tribal trust breach claims, as well as Fifth Amendment takings claims and other civil claims. Many of these cases are listed in Appendix 4 of this Statement. These cases highlight the unusual character of the conflicts faced by the government. In fact, last month, the government argued two Indian law cases before the Supreme Court over two weeks. In one case, the government vigorously sought to restrict the ability of Indian tribes to seek money damages against it (*Salazar v. Ramah Navajo Chapter*) and, the next week, the government sought to defend its decision to take land into trust for an Indian tribe (*Salazar v. Patchak*). These are not direct conflicts, to be sure, but it cannot be lost upon the Supreme Court that the United States literally sought an expansive view of the trust relationship a mere week after seeking to restrict it.

As a result of these inherent and repeated series of conflicts, the ability of the United States to act as a trustee on behalf of tribal beneficiaries is severely undercut. The government's success rate in front of the Supreme Court normally is astoundingly high, and that success rate extends to the cases where the government opposes tribal interests. When the government favors tribal interests, the Court treats the government just like any other private party, and offers the government *no deference whatsoever*. In fact, a recent study of federal agency success rates in the federal courts suggests that the Bureau of Indian Affairs receives almost no deference from federal courts and succeeds before the Court barely half the time.⁶⁴ The government's success rate in Indian affairs cases is 51.6%, whereas the overall agency win rate is 68.8%.

⁶³ *Compare* Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 et seq. with American Indian Religious Freedom Restoration Act, 42 U.S.C. § 1996; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (RFRA); and National Environmental Policy Act, 42 U.S.C. § 4321 et seq. See *United States v. Wilgus*, 538 F.3d 1274 (10th Cir. 2011) (balancing the federal government's compelling interest in protecting eagles with religious freedom of non-Indians); *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (rejecting challenge to conviction under Eagle Act by American Indian under RFRA).

⁶⁴ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamden*, 96 GEO. L.J. 1083, 1145 (2008).

Consider, for example, the New York Indian land claims. In 2005, the Supreme Court decided the third in a line of cases involving the claims of the Oneida Indian Nation – *City of Sherrill v. Oneida Indian Nation of New York*.⁶⁵ In two prior cases, the United States and the Oneida Indian Nation had been the plaintiffs in the land claims brought against the State of New York and various local governmental subdivisions, establishing a federal common law cause of action to assert land claims in the first case and winning on the merits of the land claims in the second case.⁶⁶

Sherrill involved the reacquisition of the land in fee by the Oneida Indian Nation within its reservation boundaries. Under common law principles of federal Indian law, the Treaty of Canandaigua, and the federal Trade and Intercourse Act, the Nation asserted that it was not required to pay property taxes to the local jurisdictions for this land. The Second Circuit agreed with the Nation on this theory, and the City of Sherrill sought certiorari to review the decision. The United States was not a party to the lower court proceedings, but the Conference requested the views of the Solicitor General (SG). The SG opined that the petition should be denied, but the Court granted cert anyway. Then, the SG participated as amicus and split time during oral argument with the Oneida Indian Nation's counsel, but the Court ruled against the Nation on the merits. The Court ignored the legal theories the parties briefed altogether, instead deciding against the Nation on grounds raised only by amici supporting the petitioner – the equitable defenses of laches, acquiescence, and impossibility.⁶⁷ Moreover, the Court applied those defenses not to the Nation, but to the United States itself as trustee for the tribe. The Court's broad language strongly implied that these equitable defenses would henceforth apply to *any* Indian claim not directly tied to Indian treaty rights.

Shortly after the Court issued the *Sherrill* decision, the Second Circuit dismissed the entire bevy of land claims asserted by the Cayuga Indian Nation of New York, a tribe similarly situated to the Oneida Indian Nation, which had long relied upon the same legal theories that had been successful for the Oneidas.⁶⁸ The United States, already a party to the Cayuga Indian Nation's land claims, brought a petition for certiorari. The Court denied the petition without comment.⁶⁹ Similarly, after the Second Circuit dismissed the land claims brought by Oneida Indian Nation in 2010,⁷⁰ the SG petitioned the Supreme Court for review, only to be denied once again (this time over dissents from Justices Sotomayor and Ginsburg).⁷¹ The New York land

⁶⁵ 544 U.S. 197 (2005).

⁶⁶ *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 414 U.S. 661 (1974) (Oneida I); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) (Oneida II).

⁶⁷ See Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 *GEO. MASON L. REV.* 357 (2009).

⁶⁸ 413 F.3d 266 (2d Cir. 2005).

⁶⁹ See *United States v. Pataki*, 547 U.S. 1128 (2006) (No. 05-978); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006) (No. 05-982). See Kathryn E. Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 *WYO. L. REV.* 375 (2011).

⁷⁰ See *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 617 F.3d 114 (2d Cir. 2010).

⁷¹ See *United States v. New York*, 132 S. Ct. 452 (2011) (No. 10-1404); *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 132 S. Ct. 452 (2011) (No. 10-1420).

claims cases are the most remarkable instances where the interests of the United States, coinciding with tribal interests, failed spectacularly before the Supreme Court. Usually in cases involving tribal interests where the federal government sides with the tribes, it is the tribal interests that have the most to lose.

Another example of the declining fortunes of the federal government before the Supreme Court is in the tribal jurisdiction cases. Despite the support of the SG in several cases, tribal interests have not been able to persuade the Supreme Court that nonmembers can be subject to tribal regulatory or adjudicatory authority.⁷² These cases are explicitly questions of federal common law with nary an Act of Congress applicable.⁷³ Congress could easily fix this question, but proposals have not gone far.

Some of these cases are heartbreaking. In 2008, the Supreme Court decided *Plains Commerce Bank v. Long Family Land & Cattle Co.*⁷⁴ Once again, the SG participated as amicus favoring the tribal interests and shared oral argument time, this time arguing that the federal government's practice of guaranteeing loans to tribal businesses provided a sufficient federal interest to favor tribal court jurisdiction over a non-Indian-owned bank that had foreclosed over Indian lands in a racially discriminatory manner. The Supreme Court did not share the SG's views on the significance the federal loan guarantee program, and found that the Cheyenne River Sioux Tribe had no jurisdiction over the bank.

Another major blow to both the United States and their tribal trustees was *Dept. of Interior v. Klamath Water Users Protective Assn.*⁷⁵ There, the government and the Klamath Tribe in Oregon had shared documents prepared in anticipation of litigation over the limited water resources of the Klamath River. Opponents of the tribe sought to FOIA these documents, and the government rejected the claim because they were prepared for litigation purposes. The Supreme Court broadly interpreted the Freedom of Information Act and narrowly construed the trust relationship between the government and tribes to reject the government's reasoning.

Perhaps the most disruptive case in modern federal Indian law is *Carcieri v. Salazar*,⁷⁶ in which the Supreme Court held that the Department of Interior cannot take land into trust for Indian tribes not "under federal supervision" in 1934. There, the SG argued strenuously in favor of Interior's 70-plus-year interpretation of the Indian Reorganization Act, the federal government's position as trustee for Indian tribes, and the historical purposes of the Act, only to be bluntly rejected by the Supreme Court, 8-1. The decision is incredibly disruptive, as this

⁷² *E.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

⁷³ See generally *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9 (1987).

⁷⁴ 128 S. Ct. 2769 (2008).

⁷⁵ 332 U.S. 1 (2001).

⁷⁶ 129 S. Ct. 1058 (2009).

Committee knows.⁷⁷ A decision against the government in *Salazar v. Patchak* would allow individuals to challenge Interior Department trust land acquisitions under the Administrative Procedures Act in circumvention of the federal immunity barrier expressed in the Quiet Title Act.⁷⁸

III. The Future of the Trust Responsibility

Congress has plenary authority in the exercise of its trust responsibility. Since 1970, with only limited and arguable exceptions, Congress has spoken strongly in favor of tribal self-determination and the preservation of treaty rights and other Indian rights. The Executive branch also has been supportive, but the federal agencies still find themselves mired in difficult conflicts on occasion. The Supreme Court, however, currently is not supportive of tribal interests, as the results of the Indian cases going back two or three decades attests.

Congress is in the enviable position of reasserting itself as the primary policymaking entity in the federal government. While there likely are more specific proposals on the question of the trust responsibility, a clear restatement of the general trust responsibility of the federal government to Indian nations could be an important step. Such a statement could help to reorient the agencies and the judiciary toward a stronger acknowledgment of Congress's primacy as lead policymaker in Indian affairs.

Congress can work to resolve many of the key questions in the trust relationship – namely, the conflicts of interest between the various federal agencies by recognition of the provisions of the United Nations Declaration as a policy matter. Congress should have no trouble tying a restatement of the federal government's general trust responsibility to multiple non-controversial provisions of the United Nations Declaration on the Rights of Indigenous Peoples. Many illustrative provisions are reprinted in Appendix 5 of this Statement.

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⁷⁷ See *The Carceral Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country*, Oversight Hearing before the Senate Committee on Indian Affairs (Oct. 13, 2011).

⁷⁸ See *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir.), cert. granted, 132 S. Ct. 845 (2011).

Appendix 1—Selected Acts of Congress in Indian Affairs Since 1970

American Indian Probate Reform Act of 2004
 American Indian Religious Freedom Act of 1978
 American Indian Trust Fund Management Reform Act 1994
 Coal Leasing Amendments 2005
 “Duro Fix” (1991 Amendments to the Indian Civil Rights Act)
 Indian Arts and Crafts Act of 1990
 Amendments 2011
 Indian Dams Safety Act 1994
 Indian Education Act 1972
 Indian Elementary and Secondary School Assistance Act 1970
 Indian Employment, Training, and Related Services Demonstration Act 2000
 Technical Corrections 2000
 Indian Environmental Regulatory Enhancement Act of 1990
 Indian Environmental General Assistance Program Act 1977
 1992 amendments
 1996 amendments
 Indian Financing Act of 1974
 1984 amendments
 1988 amendments
 2002 amendments
 Indian Health Care Improvement Act 1976
 1992 amendments to the Indian Health Care Improvement Act extended
 the Title III self-governance demonstration to the IHS and IHS programs.
 Technical corrections 1996
 Tribal Self-Governance Amendments of 2000—Title V of the Act, making
 tribal self-governance permanent within the IHS
 The amendments of 2000 also added Title VI to the Act, requiring that the
 Secretary of HHS “conduct a study to determine the feasibility of a tribal
 self-governance demonstration project for appropriate programs, services,
 functions, and activities (or portions thereof) of the agency [HHS].” This
 Title applies to non-IHS programs administered by the Department. Title
 VI also delineates what the Secretary must consider in conducting the
 study and requires a joint federal/tribal stakeholder consultation process.
 Indian Gaming Regulatory Act of 1988
 Indian Land Consolidation Act of 1983
 Indian Mineral Development Act of 1982
 Indian Self-Determination and Education Assistance Act
 Tribal Self-Governance Demonstration Project Act 1991
 In 1994, Congress amended the Act to create a permanent self-governance
 authority in BIA.
 1996 amendments to allow tribes to take over control and management of
 programs in the DOI outside the BIA.
 Indian Tribal Economic Development and Contract Encouragement Act of 2000
 Indian Tribal Energy Development and Self Determination Act 2005
 Indian Tribal Government Tax Status Act of 1982
 Native American Housing Assistance and Self Determination Act of 1988
 Native American Housing Assistance and Self Determination Reauthoriza-
 tion 2002
 National Indian Forest Resources Management Act 1990
 Omnibus Indian Advancement Act 2000
 Tribal Law and Order Act of 2011

Appendix 2—Supreme Court Cases Since 1970: Federal Government’s Position*Supporting Tribal Interests as Amicus*

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)
 Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)
 McClanahan v. Arizona State Tax Commission, 411 U.S. 154 (1973)
 Tonasket v. Washington, 411 U.S. 451 (1973) (per curiam)
 Mattz v. Arnett, 412 U.S. 481 (1973)
 Puyallup Tribe, Inc. v. Dept. of Game, 414 U.S. 44 (1973)
 County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 414 U.S. 661 (1974)
 Antoine v. Washington, 420 U.S. 194 (1975)
 DeCoteau v. District Court, 420 U.S. 424 (1975)
 Bryan v. Itasca County, 426 U.S. 373 (1976)
 Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)

Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165 (1977)
 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)
 Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)
 Idaho ex rel. Evans v. Oregon and Washington, 444 U.S. 380 (1980)
 Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980)
 Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980)
 White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)
 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)
 Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982)
 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)
 Rice v. Rehner, 463 U.S. 713 (1983)
 Solem v. Bartlett, 465 U.S. 463 (1984)
 Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984)
 Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985)
 National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985)
 Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)
 South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)
 Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)
 Duro v. Reina, 490 U.S. 676 (1990)
 Oklahoma Tax Commission v. Citizen Potawatomi, 498 U.S. 505 (1991)
 County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992)
 Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993)
 South Dakota v. Bourland, 508 U.S. 679 (1993)
 Hagen v. Utah, 510 U.S. 399 (1994)
 Dept. of Taxation and Finance v. Milhelm Attea, 512 U.S. 61 (1994)
 Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)
 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)
 Strate v. A-1 Contractors, 520 U.S. 438 (1997)
 South Dakota v. Yankton Sioux Tribe, 522 U.S. 322 (1998)
 Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998)
 Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)
 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)
 C&L Enterprises v. Citizen Potawatomi, 532 U.S. 411 (2001)
 Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)
 Nevada v. Hicks, 533 U.S. 353 (2001)
 Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Colony, 538 U.S. 701 (2003)
 Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005)
 Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)
 Plains Commerce Bank v. Long Family Land and Cattle Co., 556 U.S. 316 (2008)

Opposing Tribal Interests as Amicus

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
 Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985)
 Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987)
 Arizona Dept. of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999)
 El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999)
 South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Florida, 541 U.S. 95 (2004)

Appendix 3—Selected Cases in Which the United States Served as Trustee to Tribal Interests

Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976)
 Cappaert v. United States, 426 U.S. 128 (1976)
 Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)
 Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979)
 United States v. Clarke, 445 U.S. 253 (1980)
 Andrus v. Glover Construction Co., 446 U.S. 608 (1980)
 Montana v. United States, 450 U.S. 544 (1981)
 Arizona v. California, 460 U.S. 605 (1983)
 Nevada v. United States, 463 U.S. 110 (1983)*

**Nevada* involved a federal conflict of interest in which the Supreme Court relieved the government of its trust obligations to Indian tribes where an Act of Congress authorizes the government to act to the detriment of the tribal trust beneficiary. See *Nevada*, 463 U.S. at 128 (“The

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983)
 Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765 (1984)
 Oneida Indian Nation of N.Y. v. Oneida County, N.Y., 470 U.S. 226 (1985)
 Wyoming v. United States, 492 U.S. 408 (1990)
 Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)
 Arizona v. California, 530 U.S. 392 (2000)
 Dept. of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001)
 Idaho v. United States, 533 U.S. 262 (2001)
 United States v. Lara, 541 U.S. 191 (2004)
 Carcieri v. Salazar, 555 U.S. 379 (2008)
 Salazar v. Patchak, ___ U.S. ___ (2012) (pending)

Appendix 4—Selected Cases in Which the United States Defended against Tribal or Indian Trust Breach or Other Claims

United States v. Southern Ute Indians, 402 U.S. 159 (1971)
 Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)
 United States v. Jim, 409 U.S. 80 (1972)
 United States v. Mason, 412 U.S. 391 (1973)
 Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)
 United States v. Mitchell, 445 U.S. 535 (1980)
 United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)
 United States v. Mitchell, 463 U.S. 206 (1983)
 United States v. Dann, 470 U.S. 39 (1985)
 United States v. Mottaz, 476 U.S. 834 (1986)
 United States v. Cherokee Nation, 480 U.S. 700 (1987)
 Hodel v. Irving, 481 U.S. 704 (1987)
 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)
 Lincoln v. Vigil, 508 U.S. 182 (1993)
 Babbitt v. Youpee, 519 U.S. 234 (1997)
 Chickasaw Nation v. United States, 534 U.S. 84 (2001)
 United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)
 United States v. Navajo Nation, 537 U.S. 488 (2003)
 Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005)
 United States v. Navajo Nation, 556 U.S. 287 (2009)

Appendix 5—Selected Provisions of the United Nations Declarations on the Rights of Indigenous Peoples

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;

Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.”)

- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

The CHAIRMAN. Thank you very much, Mr. Fletcher.
Mr. REY-BEAR. please proceed with your testimony.

**STATEMENT OF DANIEL REY-BEAR, PARTNER, NORDHAUS
LAW FIRM LLP**

Mr. REY-BEAR. Chairman, Vice Chairman, Members of the Committee, thank you all for very much for paying attention to the important issues that are presented here. Thank you, Senator Udall, for your kind introduction.

This hearing presents basically three questions. What is the trust responsibility? What is the problem, if any? And what, if anything, should be done about it?

In this, I am guided by the recognition that if there is no trust responsibility or no meaningful trust responsibility, little else matters. So because of this, I am addressing foundational issues but not also important policy issues that flow from them, for example, regarding the *Carciari* fix, energy resource development, tax policy, the HEARTH Act, facts and so forth.

So, what are the foundational principles? One, the trust responsibility, as noted at the outset, is founded on settled international law. The United States necessarily assumed meaningful fiduciary duties over Indian Tribes, regarding Indian Tribes, which remain sovereign. Second, Tribes fully bought and paid for meaningful, ongoing trust responsibility via land cessions and peace. Third, strict "fiduciary trust" duties, in the words of the Department of Interior, extend beyond express statutory and regulatory mandates because that is simply the nature of the relationship.

And finally, while the relationship has sometimes been described as a guardianship, it properly should not be. But even if it were, that merely supports self-determination of Tribes as recognized by Congress repeatedly, and in the United Nations Declaration on the Rights of Indigenous Peoples.

So, what is the problem regarding these foundational issues? Well, the problem is that in Indian trust cases, where Tribes seek to enforce the responsibility, that the Executive Branch has repeatedly misrepresented facts and law in efforts to avoid liability. This is not simply an issue that comes up in these cases, but is an issue that undermines Federal and Tribal working relationships that should be more aligned.

Just to give a few examples. No fewer than seven times Federal courts have expressly rejected the argument by the Executive Branch that there are no fiduciary duties whatsoever beyond express statutory and regulatory mandates. No fewer than 15 times have Federal courts expressly rejected the Federal argument that an arbitrary and capricious standard of care applies, instead of strict fiduciary duties.

And in the *Navajo Nation* case and in the *Jicarilla Apache Nation* case, two recent cases by the Supreme Court, the United States misrepresented their own regulations, their own established policy, in order to achieve a desired result.

So, what is the solution? In essence, it is to reaffirm the full meaning of the trust responsibility. As happened previously with the *Cobell* litigation, the fact that there is pending litigation does not preclude meaningful Congressional oversight.

As noted already by another speaker, first and foremost Tribes themselves must be consulted. It is also notable that there is the pending Secretarial Commission on Indian Trust Administration and Reform. Pending such consultation and such input from the Commission, I can only offer a few preliminary suggestions for the Committee in terms of oversight to the Executive Branch.

First, the Executive Branch must stop disregarding history and express Congressional directions in denying that meaningful fiduciary duties exist. As a related matter, the Executive Branch must stop asserting that an arbitrary and capricious standard applies rather than strict fiduciary duties.

Second, the Executive Branch must acknowledge that the trust responsibility supports, and does not conflict, with self-determination.

Finally, for situations where there are conflicts of interest, because they can in fact happen, because Congress indeed does impose them sometimes, for example, in the situation with the NRLB and San Francisco Peaks, I recommend re-establishing the practice of split briefing so that at least some part of the Executive Branch can adhere to the trust responsibility.

In sum, I simply ask that the Executive Branch consistently, as it does most of the time, respect the foundation and restore the honor to defending the trust responsibility.

I would be happy to take any questions.

[The prepared statement of Mr. Rey-Bear follows:]

PREPARED STATEMENT OF DANIEL REY-BEAR, PARTNER, NORDHAUS LAW FIRM LLP

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on this important topic. I am a partner in Albuquerque, New Mexico, at Nordhaus Law Firm, LLP, one of the oldest law firms in the country that is dedicated to representing Indian tribes. I also am an Adjunct Professor at University of New Mexico Law School, and have been certified as a Specialist in Federal Indian Law by the New Mexico Board of Legal Specialization.

Over the last fifteen years, I and others at my law firm have represented several tribes with substantial breach of trust claims against the United States government. For a dozen years, I served as co-counsel in the \$600 million Navajo coal lease approval case that was decided twice by the Supreme Court. *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003), *on remand*, 347 F.3d 1327 (Fed. Cir. 2003), *on remand*, 68 Fed. Cl. 805 (2005), *rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'd*, 129 S.Ct. 1547 (2009). In addition, since 2002, I have served as co-counsel in three of the largest still-pending tribal breach of trust cases, respectively brought by the Jicarilla Apache Nation (until 2008), the Pueblo of Laguna (to the present), and the Navajo Nation (since 2006).

All these cases have presented issues relevant to today's hearing. For example, in these cases, the Executive Branch has argued among other things that the presiding court does not have authority to require the United States to preserve relevant evidence, contrary to positions it took in two prior cases. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135-37 (2004). It also has argued for an absolute privilege against tribes regarding their own mineral development information despite statutory language, prior loss on the issue, and a contrary prior position. *Jicarilla Apache Nation v. United States* ("*Jicarilla I*"), 60 Fed. Cl. 611, 613-14 (2004). It also has argued that delay of discovery in Indian trust mismanagement cases will not harm tribes. *Jicarilla Apache Nation v. United States* ("*Jicarilla V*"), 91 Fed. Cl. 489, 495-96 (2010). And perhaps most relevant here, the Executive Branch has argued that the United States has no duty to tribes beyond those expressly stated in statutes or regulations—an argument that previously had been expressly rejected by federal courts at least six times—and that the United States has no duty to even attempt to maximize income for Indian trust funds, contrary to express terms of the 1994 Indian Trust Fund Management Reform Act, the Department of the Interior's own mandatory Department Manual, and governing court decisions. *Jicarilla Apache Nation v. United States* ("*Jicarilla VIII*"), 100 Fed. Cl. 726, 731-38 (2011). Further discussion of the Supreme Court decisions in the Jicarilla and Navajo coal cases will be provided below.

This hearing essentially poses three questions: What is the federal trust responsibility to Indian tribes, what is the Executive Branch doing regarding fulfilling that responsibility which warrants congressional oversight, and what, if anything, should Congress do about the latter to respect the former. I will address each of these in turn. Also, substantial citations are provided here to confirm the bases for all statements made.

The Basis, Nature, and Scope of the Trust Responsibility

Over the last two centuries, much has been written by Congress, the Supreme Court, academics, and others regarding the history, scope, and nature of the federal trust responsibility to Indian tribes. In all this, some principles warrant general acknowledgement.

First, the relationship of Indian tribes to the United States is founded on “the settled doctrine of the law of nations” that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government. *Worcester v. Georgia*, 31 U.S. 515, 551-56, 560-61 (1832); see also *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (Congress “was but continuing the policy which prior governments had deemed essential to the protection of such Indians.”); *United States v. Kagama*, 118 U.S. 375, 884 (1886) (“From their very weakness . . . there arises the duty of protection, and with it the power. This has always been recognized . . .”). Indeed, because of this background, the federal trust responsibility necessarily constitutes a foundational basis for, not merely a function of, congressional legislation regarding Indians. See, e.g., Felix S. Cohen, *Handbook of Federal Indian Law* XI, XIII (1941) (“the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians”; “the entire body of federal legislation on Indian affairs . . . may be viewed in its entirety as the concrete content of the abstract principle of federal protection of the Indian”). In addition, the federal-tribal trust responsibility may even constitute an inherent limit on the Indian Commerce Clause and exercise of the Treaty Clause regarding Indians, just as “limitations on the commerce power are inherent in the very language of the [Interstate] Commerce Clause, *United States v. Lopez*, 514 U.S. 549, 553 (1995); see *United States v. Morrison*, 529 U.S. 598, 608 & n.3 (2000) (quoting *Lopez*, 514 U.S. at 556-557), or as an inherent “presupposition of our constitutional structure[,]” such as under the Eleventh Amendment, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); see *Seminole Tribe v. Florida v. Florida*, 517 U.S. 44, 54 (quoting same). See generally *Marbury v. Madison*, 1 U.S. 137, 176 (1803) (“The powers of the legislature are defined and limited . . . and those limits may not be mistaken, or forgotten[.]”).

Second, the federal-tribal trust responsibility is also founded on treaties and agreements securing peace with and land cessions by Indian tribes, which provided legal consideration for the ongoing performance of federal trust duties:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation.

Morton v. Mancari, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)); see also *Worcester*, 31 U.S. at 548-54 (discussing treaties securing and preserving friendship and land cessions, and noting that the stipulation acknowledging tribes to be “under the protection of the United States” “is found in Indian treaties generally”).

Given this, the federal-tribal trust relationship is not a gratuity, but arose and remains legally enforceable because “the government ‘has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements,’ in exchange for which ‘Indians . . . have often surrendered claims to vast tracts of land.’” Br. for Federal Petitioners, *Salazar v. Patchak*, No. 11-247 (U.S. Feb. 7, 2012), at 22 (citation omitted); see also *Misplaced Trust: The BIA’s Misgmt. of the Indian Trust Fund*, H. Rep. 102-499, at 6 (1992) (“The system of trusteeship . . . is deeply rooted in Indian-US. history.”); Stmt. on Signing Exec. Order on Consultation & Coord. with Indian Tribal Govts. (Nov. 6, 2000), Pub. Papers of U.S. Presidents: William Clinton, 2000, at 2806 (“Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security . . .”); Special Msg. on Indian Affairs (July 8, 1970), Public Papers of U.S. Presidents: Richard Nixon, 1970, at 565-66 (stating same as brief and this relationship “continues to carry immense . . . legal force”); Am. Indian Policy Review Comm’n, Final Report Submitted to Congress 5 (May 17, 1977) (“AIPRC Report”) (noting same). Accordingly, historic federal-tribal relations established “obligations to the fulfillment of which the national honor has been committed[,]” *Heckman v. United States*, 224 U.S. 413, 437 (1912), and “the people as a whole benefit when the Executive Branch . . . protects Indian property rights recognized in treaty commitments ratified[] by a coordinate branch.” Letter from Attorney General Griffin Bell to Secretary of the Interior Cecil Andrus 3 (May 31, 1979). Moreover, Indians’ justifiable expectations and legitimate reliance on those commitments and the long passage of time since the United States and all Americans have continuously reaped the benefits of Indian land cessions and peace preclude any current assertion that the federal government does not owe ongoing, enforceable fiduciary duties to Indian tribes. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-17 (2005); *United States v. Minnesota*, 270 U.S. 181, 201, 202 (1926) (“[C]ourts can no more go behind [a treaty] for the purpose of annulling it in whole or in part than they can go behind an act of Congress.” “The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made 70 years after the treaty . . .”). Likewise, the fact that “the Government has often structured the trust relationship to pursue its own policy goals[,]” *United States v. Jicarilla Apache Nation* (“*Jicarilla VII*”), 131 S.Ct. 2313, 2324 (2011), such that the relationship has been often violated and at times terminated, can no more disprove the existence of enforceable fiduciary duties than the fact of people killing others can establish that murder and genocide are not crimes.

Third, given the distinctive trust obligation that has long dominated federal dealings with Indians, enforceable fiduciary duties “necessarily arise[]” when the Government assumes control or supervision over tribal trust assets unless Congress has specified otherwise, even though nothing is said expressly in the governing statutes or regulations. *United States v. Mitchell* (“*Mitchell II*”), 463 U.S. 206, 225 (1983); see also *United States v. Navajo Nation*, 129 S.Ct. 1547, 1553-54 (2009) (enforceable fiduciary duties apply where statutes and regulations give the federal government “full responsibility to manage Indian resources and land for the benefit of the Indians”) (quoting *Mitchell II*, 463 U.S. at 224). Therefore, the federal-tribal trust relationship is enforceable even when “[t]here is not a word in . . . the only [governing] substantive source of law . . . that suggests the existence of such a mandate.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476-77 (2003) (citation omitted). Moreover, once statutes or regulations establish enforceable fiduciary obligations, courts “look[] to common-law principles to inform . . . interpretation of statutes and to determine the scope of liability that

Congress has imposed.” *Jicarilla VII*, 131 S.Ct. at 2325; see 25 U.S.C. § 162a(d) (recognizing that trust responsibilities “are not limited to” those enumerated). In addition, “[t]he Government does not ‘compromise’ its obligation to one interest that Congress obliges it to represent [regarding Indians] by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.” *Nevada v. United States*, 463 U.S. 110, 128 (1983); see also *id.* at 135 n.15.

Fourth, while the federal-tribal relationship both initially and recently has been described as resembling a guardianship, e.g., *Jicarilla VII*, 131 S.Ct. at 2325; *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), that characterization is not legally accurate and does not undermine fiduciary duties. The analogy is not apt because unlike a true guardianship, Indian tribes do not lack legal capacity and the United States holds title to most Indian assets in trust, it was not appointed to that position by a court, and its powers and duties are not merely fixed by statutes. Compare Restatement of Trusts (Second), § 7, cmt. a (“A trustee . . . has title to the trust property; a guardian of property does not . . .”; “a guardian is appointed only when and for so long as the ward is lacking in legal capacity”; “A guardian is appointed by a court[.]”); *id.* § 7, cmt. b (“The powers and duties of a guardian are fixed by statutes; the powers and duties of a trustee are determined by the terms of the trust and by the rules stated in the Restatement . . . as they may be modified by statute.”) with U.S. Const., art. I, § 8, cl. 3 (Commerce Clause); 25 U.S.C. § 462 (continuing periods of trust on Indian lands); *Jicarilla VII*, 131 S.Ct. at 2325 (recognizing application of common-law). In addition, characterization of the federal-tribal relationship as a guardianship does not preclude or limit application of enforceable fiduciary duties, because “[t]he relation between a guardian and ward, like the relation between a trustee and a beneficiary, is a fiduciary relation.” Restatement of Trusts (Second), § 7, cmt. a.

Finally, application of the principle that guardianships apply “only when and for so long as the ward is lacking in legal capacity[.]” *id.*, supports tribal governmental self-determination. Such retained governmental jurisdiction that is not limited to a tribe’s members alone was surely contemplated by tribes when they entered into treaties with the United States. AIPRC Report, *supra*, at 5. Also, recognizing that the federal trust responsibility includes a duty to promote tribal self-determination, and a lack of conflict between the two, is consistent with repeated Congressional recognition and Executive policy for more than 40 years. See, e.g., 25 U.S.C. §§ 450(a) (Indian Self-Determination Act findings), 2103(e) (continuing obligations regarding Indian mineral development agreements), 4021 (providing for withdrawal of tribal trust funds “consistent with the trust responsibilities of the United States and the principles of self-determination”); Exec. Order 13,175, § 2, 3 C.F.R. 304, 305 (2000) (recognizing both as “Fundamental Principles”); Nixon Message, *supra*, at 565-55. In particular, Congress has consistently preserved the trust relationship even with self-determination. E.g., 25 U.S.C. § 450(c) at model self-determination agreement section (d). This recognition also is consistent with the settled law on which the trust responsibility was based, as well as current international law. See, e.g., *Worcester*, 31 U.S. at 560-61; U.N. Charter art. 73 (UN members with non-self-governing territories have trust obligations of “protection against abuse” and “to develop self-government”); International Covenant on Civil and Political Rights art. 1, ¶ 1 (1966) (“All peoples have the right of self-determination.”); U.N. Decl. on the Rights of Indigenous Peoples arts. 3, 8.2(a)-(b), 18-19, 27-28, 32 (2007) (concerning self-determination, state mechanisms for prevention and redress, decision-making, consultation, and use or development of resources).

The Executive's Extended Efforts to Eviscerate the Trust Responsibility

Notwithstanding the established law and policy of the Self-Determination Era and many positive efforts by presidential administrations of both political parties over the last four decades, the Executive Branch over this period also has repeatedly sought to avoid and repudiate the federal-tribal trust responsibility rather than fulfill the foundational principles outlined above. Most broadly, the Executive Branch has repeatedly misrepresented relevant facts and law in Indian trust litigation in an effort to limit federal liability, as part of a broader effort to protect the public fisc and prevail in litigation, and consistent with admitted misrepresentations before the Supreme Court. See generally *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754 (1997), *rev'd sub nom. on other grounds, Swess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008) (concerning *Winstar* savings and loan cases: "Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic."); Neal Katyal, Acting Solicitor General, Confessions of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011) (admitting failure to disclose key intelligence report that undermined rationale in *Korematsu v. United States*, 323 U.S. 214 (1944)); Neal Katyal, Acting Solicitor General, Presentation to Fed. Bar Ass'n 36th Annual Indian Law Conf. (April 8, 2011) (apologizing for material misrepresentations in *United States v. Sandoval*, 231 U.S. 28 (1913), and *Tea-Hi-Ton Indians v. United States*, 348 U.S. 272 (1955)); U.S. Dept. of Justice, Env't. & Natural Resources Division ("ENRD"), FY2013 Performance Budget Congressional Submission 2 (noting "Strategic Objective 2.6: Protect the federal fisc"), 11 ("The effectiveness of our defensive litigation" concerning tribal trust litigation is measured in part by "savings to the federal fisc."); *Emergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 744 n.4 (2010) ("In its response, the Government quotes this text but carefully omits the patently relevant portion To note that the Court is highly dismayed with Defendant's brief in this regard is an understatement. It flatly will not countenance any such misbehavior in the future."); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1355-57 (Fed. Cir. 2003) (affirming federal attorney sanction for misquoted judicial opinions in brief to conceal adverse authority, "which intentionally or negligently misled the court").

For example, a number of federal courts have either imposed sanctions for or strongly rejected unfounded federal assertions in Indian breach of trust cases. See, e.g., *Osage Tribe v. United States*, 93 Fed. Cl. 1, 6-7 (2010) (rejecting assertion that the United States is not bound by prior rulings in case on breach of trust duties, noting that "[t]he court is dismayed by defendant's approach to the resolution of plaintiff's claims"); *Osage Tribe v. United States*, 75 Fed. Cl. 462, 468-69, 480-81 (2007) (rejecting argument previously rejected six times by the Supreme Court and the Federal Circuit, noting that "Defendant's argument would . . . reward the government for inaction that violates the government's fiduciary duties to collect funds and accrue interest."); *Jicarilla II*, 60 Fed. Cl. at 613-14 (rejecting opposition to disclosure of tribes' own information); *Pueblo of Laguna*, 60 Fed. Cl. at 135-37 ("Contrary to defendant's importunings, this court plainly has the authority to issue such orders" to require preservation of relevant evidence); *Mescal v. United States*, 161 F.R.D. 450, 454-55 (D.N.M. 1997) (sanctioning federal attorney sua sponte for factual misrepresentations); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 21 Cl.Ct. 176, 192 (1990) ("Such an assertion [by the United States], we find, is shocking, insofar as it is a gross misstatement of the law."); *Assiniboine &*

Sioux Tribes of Fort Peck Reservation v. United States, 16 Cl. Ct. 158, 164-65 (1989) (imposing sanction for federal factual misrepresentation).

Among these cases, three notable examples warrant further discussion here. First, at least six times over the last 32 years, the Supreme Court and federal appellate courts have rejected Executive Branch arguments that there is essentially no enforceable federal-tribal fiduciary relationship because the United States is not subject to any duty that is not expressly spelled out in statutes or regulations. *See, e.g., Jicarilla VII*, 131 S.Ct. at 2325 (“We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed.”); *White Mountain Apache*, 537 U.S. at 476-77 (affirming trust duty even though there was not a word in the only relevant law that suggested such a mandate); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain Apache*, “once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation”); *Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001) (per *Mitchell II*, “[t]he general ‘contours’ of the government’s obligations may be defined by statute, but the interstices must be filled in through reference to general trust law”); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (rejecting that “a federal trust must spell out specifically all the trust duties of the Government”); *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) (“Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . .”).

Notwithstanding these decisions, including just last year by the Supreme Court, the Executive Branch has reasserted this argument on remand from the Supreme Court. The conclusion of the resulting most recent rejection of this repeated argument warrants restatement:

[The United States] would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics.

That routine would commence with a full jurisprudential gainer—a twisting, backwards maneuver that would allow the court to ignore cases like *White Mountain Apache* and *Mitchell II* that have relied upon the common law to map the scope of enforceable fiduciary duties established by statutes and regulations. The court would then need to vault over *Cheyenne-Arapaho* and a soaring pyramid of other precedents, all of which have found defendant’s argument wanting. Next, the court would be called upon to handspring to the conclusion that Congress’ repeated legislative efforts to ensure the safe investment of tribal funds were mostly for naught—because, if defendant is correct, the provisions enacted were generally not perspicuous enough to create enforceable duties and, even where specific enough to do so, left interstices in which defendant could range freely. Indeed, while egging the court on, defendant never quite comes to grip with the fact that if the government’s fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really “fiduciary” duties at all. *See Varsity Corp. v. Howe*, 516 U.S. 489, 504 . . .

(1996) (“[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose”). Taken to its logical dismount, defendant’s view of the controlling statutes would not only defeat the twin claims at issue, but virtually all the investment claims found in the tribal trust cases, few of which invoke *hacce verba* specific language in a statute or regulation. Were the court convinced even to attempt this tumbling run, it almost certainly would end up flat on its back and thereby garner from the three judges reviewing its efforts a combined score of “zero”—not coincidentally, precisely the number of decisions that have adopted defendant’s position.

This court will not be the first to blunder down this path.

Jicarilla VIII, 100 Fed. Cl. at 738. Notwithstanding that decision and the “phalanx of . . . precedent” on which it is based, *id.*, the Executive Branch still disputes this point, and it can be expected to continue to press its position following a trial ruling expected later this year in the first phase of the case. *See, e.g.*, U.S.’s Mem. of Contentions of Fact & Conc. of Law (Phase 1 Trial) (“Pre-Trial Brief”), *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Oct. 28, 2011), ECF No. 350, at 3; U.S.’s Post-Trial Brief, *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Jan. 23, 2012), BCF No. 380, at 55 n.1. Similar issues apply to the Executive Branch assertion that its management of Indian trust assets should be subject to an arbitrary and capricious administrative standard of review, rather than a strict fiduciary standard of care, contrary to fifteen prior decisions by the Supreme Court and lower federal courts. *See, e.g.*, *Jicarilla VIII*, 100 Fed. Cl. at 739 (quoting, citing, and discussing prior decisions); *Jicarilla Apache Nation v. United States* (“*Jicarilla II*”), 88 Fed. Cl. 1, 20 & n.28 (2009) (same, noting, “it is often observed that the duty of care owed by the United States ‘is not mere reasonableness, but the highest fiduciary standards’”) (citation omitted), *mandamus denied on other ground sub. nom. In re United States*, No. 09-908 (Fed. Cir. Aug. 3, 2011), ECF No. 318; *see especially Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (The Government’s conduct in dealings with Indians “should therefore be judged by the most exacting fiduciary standards.”).

Next, notwithstanding a heightened duty of candor because of the “special credence” that the Supreme Court gives to the Solicitor General, *see Hirabayashi v. United States*, 828 F.2d 591, 602 & n.10 (9th Cir. 1987) (discussing *Korematsu* misrepresentation), the Department of Justice has not been either candid with the Supreme Court or consistent with prior Department of the Interior policy in either of two recent Supreme Court Indian trust responsibility cases that it won. In *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Supreme Court ruled that neither the Indian Mineral Leasing Act (“IMLA”) nor its regulations established enforceable fiduciary duties that precluded the Secretary of the Interior from secretly colluding with a mining company to force extended unsupervised tribal lease negotiations under severe economic pressure, not disclosing support for a higher royalty, and then approving the resulting lease without assessing the merits of the royalty. *See id.* at 497-500, 506-08, 512. In this, the Supreme Court emphasized a purported distinction under the IMLA and its regulations between oil and gas and coal leasing, *id.* at 495-96, that the IMLA aims to enhance tribal self-determination by giving Tribes the lead role in negotiating mining leases, *id.* at 508, and that it was not until later that a regulation first required consideration of Indians’ best interests in administrative decisions,

id. at 508 n.12. However, the Executive Branch did not admit there that during the relevant period the governing regulations provided the following:

No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with [25 C.F.R.] § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner [of Indian Affairs] grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids.

25 C.F.R. § 211.2 (1958-1996). The governing regulations thus only treated coal leasing differently by allowing limited negotiations subject to strict federal oversight and supervening control, which the Executive Branch failed to provide. Moreover, the Executive Branch did not acknowledge before the Supreme Court that the subsequent regulation requiring consideration of Indians' best interests in all federal actions under the IMLA, 25 C.F.R. § 211.3, merely "settle[d] the issue of whether the Secretary is limited to technical functions or considerations[.]" to be "consistent with the United States' trust responsibility as defined by statute[.]" 56 Fed. Reg. 58734, 58735 (Nov. 21, 1991) (proposed rule). The Executive Branch also failed to acknowledge that in the lower court it had expressly conceded that the IMLA required it to "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands," *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982), and that the later regulation merely codified the preexisting statutory requirement, see 61 Fed. Reg. 35,634, 35640 (July 8, 1996) (final rule).

More recently, in *Jicarilla VII*, the Supreme Court ruled that the fiduciary exception to the attorney-client privilege does not apply to the federal-tribal trust relationship, including for tribal trust fund management. In addition to misrepresenting that no common-law fiduciary duties apply at all, as discussed above, the Executive Branch argued there that the United States does not represent tribal interests and does not have duties of loyalty or disclosure in managing Indian trust assets, that the performance of federal trust administration is essentially a gratuity not paid for by tribes, and that disclosure there would cause ethics problems and chill critical legal advice. See generally Br. for the United States, *United States v. Jicarilla Apache Nation*, No. 10-382, at 13-16, 28, 31-41 (U.S. Feb. 22, 2011). However, the Executive Branch failed to acknowledge any of the foundational history and principles discussed above. It also failed to disclose that all Executive Branch employees have a duty of "loyalty to the Constitution, laws and ethical principles" as a "[b]asic obligation of public service[.]" 5 C.F.R. § 2635.101(a), that Department of the Interior employees must "[c]omply with any lawful regulations, orders, or policies[.]" and that failure to comply with such policies warrants disciplinary action including removal, 43 C.F.R. § 20.502. In particular, the Department of the Interior Manual ("DM") prescribes such mandatory policies, 011 DM 1.2, and requires that employees "discharge . . . the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty[.]"

“[c]ommunicate with beneficial owners regarding the management and administration of Indian trust assets[.]” and “[a]ssure that any management of Indian trust assets . . . promotes the interest of the beneficial owner[s.]” 303 DM 2.7, 2.7B, 2.7L. Moreover, the DM defines “Indian Fiduciary Trust Records” as including all documents that are used in the management of Indian trust assets. 303 DM 6, app. (decision trees); cf. 303 DM 2.71 (recordkeeping duty); Dept. of the Interior, Comprehensive Trust Mgmt. Plan 1 n.1 (March 28, 2003) (defining “fiduciary trust” as concerning trust asset management, as distinguished from the “general trust” regarding appropriated program funds). Furthermore, the Secretarial Order that provided the basis for 303 DM 2 (i.e., its regulatory history) recognized that understanding the Department’s nonexhaustive trust responsibilities includes looking to guidance in legal advice by the Solicitor’s Office. Sec. Order No. 3215 § 2 (April 28, 2000). Thus, required communication with Indian beneficiaries about trust asset management necessarily includes disclosing supporting legal advice.

In addition, the Executive Branch failed to acknowledge before the Supreme Court that its claims of potential harm from disclosure had “a somewhat hollow ring” because it had “simply complied” with several similar prior disclosure orders over nine years. See *Jicarilla V*, 91 Fed. Cl. at 494 & n.8; *Jicarilla III*, 88 Fed. Cl. at 11. Indeed, the Executive Branch previously had disclosed almost half the disputed documents—some even in prior litigation several decades ago—all without any identifiable ill effects. Finally, the Executive Branch failed to disclose that the attorney-client privilege “applies only where necessary to achieve its purpose[.]” *Fisher v. United States*, 425 U.S. 391, 403 (1976), which “serves ‘broader public interests in the observance of law and administration of justice,’” *Mohawk Industries v. Carpenter*, 130 S.Ct. 599, 606 (2009) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)), and that disclosure there—like allowing tribal damage claims—would “deter federal officials from violating their trust duties,” *Mitchell II*, 463 U.S. at 227. For further information on these issues, see the attached PowerPoint Ethics Presentation.

In sum, it appears that the Executive Branch response to prior Congressional oversight and rejection of its trust repudiation legislation proposal has been to continue to proclaim fealty to the trust responsibility as a toothless moral platitude while seeking to avoid full responsibility before the Supreme Court. Compare U.S. Dept. of the Interior, Fiscal Year 2012 Interior Budget in Brief DH-66 (Feb. 14, 2011) (quoting Secretary of the Interior: “Indian Country deserves responsive and responsible business practices from Interior that will . . . comply with the obligations of a trustee.”); Remarks by Assistant Attorney General Ignacia Moreno on 2011 Priorities for ENRD, U.S. Dept. of Justice (Jan. 13, 2011) (“I could not be more committed to fulfilling the Division’s core mission[.]” including “[c]areful and respectful management of the United States’ trust obligations to Native Americans”) with *supra* discussion; Oversight Hearing on Indian Trust Fund Litigation Before U.S. Senate Committee on Indian Affairs, S. Hrg. 110-71 (2007); *Misplaced Trust*, *supra*, at 2-5, 8-28 (discussing prior reports and oversight hearings and BIA’s failure to comply with congressional directives); Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010) (“What matters far more than words . . . are actions to match those words. . . . That’s the standard I expect my administration to be held to.”).

This Executive Branch approach impermissibly ignores foundational American history and commitments, as well as Congress’ express constitutional authority and repeated directives. It also materially undermines federal-tribal government-to-government relationships, as well as

federal and tribal positions that should be aligned in transactions and litigation with third parties. *See, e.g.,* Daniel L.S.J. Rey-Bear and Timothy H. McLaughlin, *United States v. Jicarilla Apache Nation: The Executive Branch's Latest Effort to Repudiate Federal Trust Duties to Indians*, *The Federal Lawyer*, March/April 2011, at 48, 54 & n.8 (discussing proposed Indian Trust Counsel Authority and successful split-briefing practice in the 1970s). Thus, if the Executive Branch does not take the federal trust responsibility seriously, why should anyone else?

Congress Should Help Executive Officials Respect the Trust Responsibility

The fact that some Indian trust litigation remains pending cannot preclude meaningful congressional oversight here. *See, e.g.,* H.R. Rep. No. 110-187, at 80 (2007); S. Hrg. 110-71 (2007); H. R. Conf. Rep. 108-330, at 117 (2003). Also, the current pending Secretarial Commission on Indian Trust Administration and Reform may have substantial suggestions that address these matters, just like the American Indian Policy Review Commission, which submitted its Final Report to Congress exactly 35 years ago today. Accordingly, while others more qualified and experienced have offered and will offer more, and tribes themselves must be directly consulted, I offer some preliminary suggestions for Congressional action:

1. Direct the Executive Branch to complete prompt and fair settlement of pending tribal trust claims and stop making unfounded arguments in litigation to repudiate or undermine the trust responsibility as established by history and confirmed by Congress;
2. Make clear that federal management of Indian trust assets is subject to strict "fiduciary trust" duties consistent with historical commitments and governing legislation, not merely arbitrary and capricious review;
3. Reiterate that support for tribal governmental self-determination is consistent with and does not undermine enforceable federal trust responsibilities to tribes; and
4. Require the Executive Branch to reinstitute the practice of split-briefing, so that the Department of the Interior at least can continue to respect acknowledged federal trust duties to Indian tribes.

Conclusion

I do not suggest that the Executive Branch should merely accede to Indian demands in trust administration or litigation. Indeed, one problem is the Department of Justice assertion that the United States may act as mere broker rather than exercise the duty of independent judgment required by governing statutes, regulations, case law, and Department of the Interior policies. Instead, I ask that Congress help ensure that the Executive Branch brings the same honor to fulfilling and defending its trust responsibility that it had when this commitment was first made so many years ago as the foundation of the government-to-government relationship. As stated by Peterson Zah, first elected President of the Navajo Nation and a member the current Secretarial Commission on Indian Trust Administration and Reform, "We need protection from our protectors." Thank you again for the opportunity to provide this testimony. I would be happy to answer questions that the Committee may have regarding these important issues.

Ethics Issues in United States v. Jicarilla Apache Nation, paper by Dan Rey-Bear, has been retained in the Committee files

The CHAIRMAN. Thank you very much, Mr. Rey-Bear.

To the panel, as you know, fixing the *Carcieri* decision is one of my top priorities. My question to this panel is, what is your view on how the *Carcieri* fix will strengthen the Federal Government's trust relationship with Tribes? Ms. McCoy?

Ms. MCCOY. Thank you, Mr. Chairman. I think it is important that Congress proceed to address the situation in the wake of the decision that has put the matter back to Congress. And I think it is important that, again, it goes back to the history and what can

be done, I think, to treat all Tribes equally and fairly with their most important resource, the land.

So, we urge again, you know, that the work that needs to be done to accomplish that continue to be done in consultation with Tribes on that.

The CHAIRMAN. Thank you very much. Mr. Fletcher?

Mr. FLETCHER. Thank you for that question, Mr. Chairman. The *Carcieri* case is near and dear to my heart. I am a member of a Michigan Tribe, one of six that had been administratively terminated. We are all treaty Tribes and the Department of the Interior in the 1870s chose not to return our phone calls anymore, for about 100 years. As a result, *Carcieri* potentially has applicability to some of the Michigan Tribes.

I think that a *Carcieri* fix, especially a simple one, simply reversing the Supreme Court's decision, would accomplish a very important task which is for Congress to demonstrate to the United States Supreme Court how serious they are in their trust relationship.

Carcieri is a direct rejection of the Department of Interior's seven decade long interpretation of Section 5 of the Indian Reorganization Act. Seven decades of consistent regulatory interpretation of the statute. And the Supreme Court said that it is fundamentally irrelevant to our decision.

And I think for Congress to fix *Carcieri* would be a statement, not only on the question of *Carcieri*, but from Congress directly to the Supreme Court saying we are very serious about the trust responsibility and we are very serious about reducing the Supreme Court's interference in the trust responsibility. Thank you.

The CHAIRMAN. Thank you very much. Mr. Rey-Bear?

Mr. REY-BEAR. I completely agree with the comments that have been made already. I would only add that the importance of enacting *Carcieri* fix legislation, I think, is well illustrated by the fact that it will significantly help enhance prospects for Tribal self-determination and economic development and it will cost taxpayers nothing.

The CHAIRMAN. Thank you. I agree with you that fixing *Carcieri* is vital. It is vital to ensuring a strong trust relationship. I want to announce that a report on this 676, the *Carcieri* Fix legislation, is being filed today and will contain a great deal of information based on the record built by this Committee on the need for this legislation to pass this Congress. We will be working diligently on that.

Let me now ask other members for their questions and I may be back with further questions. Vice Chairman Barrasso?

Senator BARRASSO. Thank you, Mr. Chairman. And like you, I have a question for the panel.

Recently, the Government moved to settle trust mismanagement disputes with 41 Tribes, I think totaling over \$1 billion. Will this large settlement address many of the outstanding mismanagement claims by Tribes against the Government or are there still many pending claims that need to be resolved beyond this?

Ms. MCCOY. Mr. Vice Chairman, I appreciate the question. The landscape of the cases, I think, is such at this time. At one point, there were over 100 pending cases and the previous Administration

settled three of those. And from 2010 to 2011, this Administration settled another three. And then, most recently, another 42 were announced. So, I think that cuts the number in half of the pending cases.

Back in 1996, Arthur Andersen contract reports on the effort to reconcile the Tribal Trust Funds were distributed to 311 Tribal account holders. So, that seems to put the number of Tribes that chose to bring claims to about one-third of the Tribal account holder population.

Senator BARRASSO. The 100 of the 300, one-third.

Ms. MCCOY. That is correct.

Senator BARRASSO. Well, some of the, if anyone wants to jump in on that, or another question. Mr. Rey-Bear, did you have something you wanted to add to that?

Mr. REY-BEAR. Yes.

Senator BARRASSO. Go ahead.

Mr. REY-BEAR. As I believe may have been noted earlier, there are about 100 Tribes that filed breach of trust claims. Forty or so have been settled.

Senator BARRASSO. Yes.

Mr. REY-BEAR. So, there are quite a number that are pending. In particular, the Nordhaus Law Firm where I work represents the Navajo Nation which has the largest claims of any Tribe. We also represent the Pueblo Laguna, which has substantial claims in large part because of what was at one time the world's largest open pit uranium mine. Ms. Atcitty will be testifying on behalf of the Jicarilla Apache Nation. Their case is also pending. In particular, the *Jicarilla Apache* case had a trial last November for which closing argument is scheduled in two weeks. A decision in that case is expected this year.

Senator BARRASSO. So, half of them are settled, essentially. Are the other half that are left over much more complicated or simpler? Or how do you weigh this so we get a better understanding of what is still out there?

Mr. REY-BEAR. I would say both are still pending, both types of claims are still pending.

Senator BARRASSO. You know, some of these mismanagement lawsuits are based on the claim that the Government has sold Tribal resources for below fair market value in violation of really what would be a trust responsibility. You know, sold too low.

Is this a problem that is still occurring today even as we go on, or is the Government taking the proper precautions now to make sure that it is no longer happening, so we do not face additional problems and suits? Anyone have a thought?

Mr. REY-BEAR. I hesitate to make a categorical statement, but the situation has certainly improved in large part because of the increased capacity of Indian Tribes to essentially police what the United States does.

Senator BARRASSO. Okay. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Barrasso. Senator Udall?

Senator UDALL. Thank you, Chairman Akaka. And this question, couple of questions, are just for the first panel here in general.

Many of you mentioned the recent *Jicarilla* Supreme Court decision in your testimony and I would like to open up a little more

discussion on that. What do you believe the current and future impact of the *Jicarilla* decision will be? Does the *Jicarilla* decision erode Tribal rights and/or Federal trust responsibility to Tribes? And do you believe the *Jicarilla* decision needs a legislative fix and what would that legislative fix look like?

Mr. FLETCHER. I will speak generally about the *Jicarilla* decision. I follow the Supreme Court's pronouncements on Indian law pretty carefully.

Jicarilla is a case of relatively limited precedential value. But its statements about the trust responsibility are incredibly broad and, for the first time since, well, perhaps for 20 or 30 or many more years than that, the Supreme Court has begun to cite to a case called *Lone Wolf versus Hitchcock*, which is the classic case of establishing or recognizing a form of guardian-ward relationship between the Federal Government and Indian Tribes.

Now, a ward suing a guardian really has no authority, has no right to force any kind of activity or certainly to win money damages for a breach of a guardianship whereas the trust beneficiary does. Now, if the Supreme Court is starting to rethink the trust relationship as more of a guardian-ward relationship and to limit it, *Jicarilla* is really a bell weather for future trust cases and it gives you a sense of where the Court is heading in that direction. And for Tribal interests, it is not very good.

Senator UDALL. Do the other two panelists, do you have any thoughts on that?

Ms. McCOY. I think part of this stems from the, it is such a unique relationship. We have a sovereign, the United States, serving as a trustee for another sovereign, the Indian Tribes. And there really is no comparable. So, it puts a seemingly ordinary relationship in these extraordinary situations.

I think that the history is important. I mean again, I will go back to, if the Indian Claims Commission in three decades, when Tribes were allowed an opportunity to present their claims and that resulted in awards of \$1.2 billion and we are seeing the settlements now also over \$1 billion to Tribes that have brought their claims, something about that says something that these matters can be addressed.

As far as the future and the Supreme Court's rule on that, this Supreme Court does not need the United States Government to guide its views on Indian rights. But, that tends to happen.

Mr. REY-BEAR. The short answer is, it depends. There are practical implications. Part of my own practice, apart from litigating breach of trust claims, is handling trust acquisitions for Tribes. For a dozen years, when I would do this, in the process of handling these matters we would have to address title issues raised by preliminary title opinions. And, as a matter of course, the Department of Interior and the Bureau of Indian Affairs would provide those so that I, as the attorney for the Tribe, would know what title issues needed to be resolved to complete a transaction.

Ever since the decision by the Federal Circuit in this case, the United States has stopped providing those preliminary title opinions because, as they stated it, they are attorney-client privileged communication that I am not allowed to see. So, that is just one practical working relationship sort of impact.

Since the remand, the United States has used the decision to specifically argue that that decision essentially overturned decades of substantial case law, including case law that specifically recognizes Congressional legislation. For example, the Indian Trust Reform Act specifically holds and recognizes that the United States must maximize revenue from Indian Trust Funds. The United States has argued in cases that, notwithstanding that express Congressional statute, it has no such duty because of the *Jicarilla* decision by the Supreme Court.

So, there can be substantial impact. However, it depends on how the Executive Branch acts going forward. If they reform, so to speak, then there should not be an impact.

In essence, to quote Peterson Zah as stated in my written testimony, we need protection from our protector. And when the Executive Branch does not protect the interest of Tribes, we go to the Supreme Court. And now that the Supreme Court has said that it is not willing to protect the Tribes, the Tribes understandably come back to Congress.

Senator UDALL. Yes, and I think that it is fair to say that there was a period in history where the Supreme Court was really a champion in terms of Native rights and now it has turned the other way and, in many cases, I think, the pleas fall on deaf ears.

So, thank you for those answers. Thank you, Chairman Akaka.

The CHAIRMAN. Thank you very much, Senator Udall.

I do have a question for each of you. Ms. McCoy, the Native American Rights Fund has been instrumental in working with the Tribes over the years in litigation and protecting the scope of the trust responsibility. What do you think we in Congress can do to ensure the trust responsibility is as strong as it needs to be throughout the Federal Government?

Ms. MCCOY. Mr. Chairman, again I will emphasize that it really, while NARF works with Tribes, we do not speak for them. And I urge, I urge the Committee and Congress to seek these answers from the Tribes themselves. That is the only way to really implement the government-to-government relationship. I am happy to facilitate that but I think the answer best comes from the Tribes.

And I appreciate Mr. Rey-Bear's reference, too, to the new Secretarial Commission on Indian Trust Administration and Reform. The Native American Rights Fund, on behalf of its clients, looks forward to working with that Commission which is charged with advising the Secretary of the Interior but which can also, of course, the work of the Commission can be shared with Congress and that would be specifically on the nuts and bolts trust issues that I had talked about, the trust accounts, the trust funds, the trust assets.

Getting into other areas of the trust, education, health, and many other areas, Tribal courts and things like that, I think there are processes in place for that. And it is an ongoing relationship and as Tribal nations evolve, so must this Nation to step up and deal with that.

It is a difficult task but it can be done. So, we appreciate opportunities like this hearing, and the Tribe leaders that are going to speak on the next panel, to really direct the work of this Committee.

The CHAIRMAN. Thank you. Thank you. Mr. Fletcher, I know you host a blog that provides information on ongoing litigation and legal issues to Indian Country . My question to you is, how would you characterize the state of the trust relationship today based on your analysis and what improvements could be made to strengthen the trust relationship?

Mr. FLETCHER. Thank you for the question. Yes, we have been watching what has been going on in Indian Affairs for the last several years. The blog started in September 2007.

The first thing I would have to say, and it sounds like I may sound like what I am going to say is facetious, but I am very serious. I do not envy the Federal Government in its obligations toward Indian Tribes and Indian Nations and its trust responsibility. It is rote with inherent conflicts of interest. You could say they are both vertical and horizontal in that the Federal Government, especially the Executive Branch, must deal with conflicts between Tribes, within Tribes. These are conflicts that are not necessarily areas in which the Federal Government has a dog in those fights. But, in some cases, the Federal Government's actions historically have created these fights.

The other conflicts, of course, are within the Federal Government itself, most obviously within the Department of Interior where you have, perhaps, I do not know, the Environmental Protection Agency has a view in protecting the environment and the Bureau of Indian Affairs in relation to its trust responsibility to Indian Tribes that may conflict with the EPA on something.

And we see that almost every week. Another case, another conflict arising, maybe in the news or maybe in a new decision that has come out. And what we are seeing, I think, are these conflicts are becoming, maybe, they are becoming much more serious, I think in part because Congress and the Executive Branch are taking their trust responsibilities seriously in most instances.

What you are seeing, however, is a clampdown, certainly, on any kind of claims by Indian Tribes for money damages. Absolutely, a clampdown. And what Mr. Rey-Bear is talking about in terms of the actions of the Department of Interior and other Federal agencies in some of these cases has been going on a long time. Judge Lamberth in the early years, really the first 10 years of the Cobell litigation, repeatedly raised these issues of sort of, you know, dirty pool in litigation between Tribes and individual Indians and the United States.

I think a couple of things that we are seeing, that we are going to see in the future that are very, very serious involve the natural resource extraction and environmental protection. There are a lot of Tribes around the United States that have been sitting on natural resources for a long time. Sometimes, those resources have been stolen out from underneath them and they are only now beginning to take control over those resources and begin to actually profit from them in a way that they normally should. And, at the same time, some of those resources are direct contributors to climate change and global warming as the best science would tell us.

And so, and I have to do a call-out to my colleague Professor Singel again, who gave a talk recently at Montana Law School where she talked specifically about this new phenomenon, maybe

it has been around for a while, but a newly important phenomenon called fracking. We do not know what the impacts of fracking are. A lot of it is going on in Indian Country. It is incredibly lucrative. But there have been reports that fracking has polluted drinking water extensively and perhaps even caused earthquakes here in D.C., although who knows.

And so you see this kind of conflict. There are going to be inter-Tribal conflicts and there are also going to be interagency conflicts. I would just conclude with I do not envy the Federal Government in this way because these are very complex and difficult issues.

I know that Congress, in assessing priorities, can do a great deal of important work in this area. And I think probably perhaps, and I mentioned this before, perhaps its greatest impact may be to reconsider some of the cases that the Supreme Court has decided recently in terms of the trust responsibility and to just remind the Supreme Court that Congress and the Executive Branch, and particularly Congress, are really the primary interpreters of the Federal Indian law and policy and they are the policymakers in this question, not the judiciary. Thank you.

The CHAIRMAN. Thank you very much, Mr. Fletcher. Let me make this my final question to Mr. Rey-Bear. What would you consider the lessons learned from the Jicarilla case and what actions would you like to see from Congress or the Administration following the Jicarilla decision?

Mr. REY-BEAR. The cynical answer, unfortunately, is that when called to task for violations of fiduciary duties, the Executive Branch cannot be trusted to act honorably in its own defense. Its own departmental manual specifically requires informing Tribes and communicating with Tribes regarding the administration of their trust assets. And a Secretarial Order specifically recognizes that the administration of trust assets necessarily includes solicitor's opinions.

Notwithstanding the established policy of the Department of Interior which is mandatory and failure to comply with can result in termination, the Department of Interior, through the Department of Justice, argued that it had no such duty to the Supreme Court. So, that is one effect of the decision.

As I noted already, it undermines working relationships with Tribes and the Federal Government when they should be aligned, for example, with the trust acquisition process that I noted already but also in disputes with third parties. Essentially, if the Federal Government does not take its trust responsibility seriously, why should anybody else?

In terms of what Congress can do, I agree with the statement made already by Professor Fletcher that now is the time for Congress to reassert that, under the Constitution, it is Congress which is the primary repository for setting policy regarding Indian Tribes. The Indian Commerce Clause is in Article I, not in Article III. And so, that should be clear and the Supreme Court should respect Congress' authority, just as the Executive Branch should.

The CHAIRMAN. Thank you, Mr. Rey-Bear.

Are there any further questions?

Senator UDALL. Mr. Rey-Bear, if I could just ask one. Did you not mention the practice of split briefing in your testimony and how

that was successful in the 1970s? Could you expand on that for the Committee and describe how this was successful and why the process was stopped and then what the current benefit of split briefing would be for the Tribes?

Mr. REY-BEAR. The practice was instituted in the 1970s essentially as a stopgap measure, sort of an administrative way to implement a policy recommended by President Nixon in his Special Message to Congress in 1970 which called for establishment of what was to be called an Indian Trust Counsel Authority. The idea being that, recognizing that the United States sometimes has conflicts, there should be a specific representation of Tribes by the Federal Government which adheres to the trust responsibility, even if there are conflicts.

So, what happened was that there was essentially an agreement between the Department of Interior and the Department of Justice, at the behest of the White House, providing that where there was a conflict between agencies, for example the Bureau of Indian Affairs representing Tribes and another agency, I cannot recall the specifics but an example current day might be the National Labor Relations Board. Where this is a difference of opinion, the Department of Interior would file a brief sort of respecting the trust responsibility for Indian Tribes and the other agency, through the Department of Justice, would file their brief stating the opposite position. And in the six cases where this was done, every single time the Tribal position prevailed.

The practice was stopped at the behest or direction of Attorney General Bell in 1979. I do not know what the specific reasons were, but I think it is notable that the policy behind it regarding the Indian Trust Counsel Authority was not enacted by Congress in large part because the Executive Branch represented that it was not necessary because the Executive Branch knew what its trust responsibilities were and it would respect them in litigation.

So, the benefits for the current day are in situations like San Francisco Peaks and the NLRB situation.

Senator UDALL. Mr. Fletcher, you look like you might have a comment on that, or not.

Mr. FLETCHER. I do not know the specifics. I had not heard about the split briefing. I think it is a great idea. I do also recognize that I think Tribes are in a much better position to state their own positions on the trust responsibility in the Supreme Court and in Federal courts as amice and as interveners as well. That is probably, possibly a big change as well. But I am in total agreement with Mr. Rey-Bear.

Senator UDALL. Thank you. I do not have any additional questions for this panel.

The CHAIRMAN. Well, thank you very much, first panel. Thank you for your answers and you have been helpful. We may have further questions for you that we will place in the record and there also may be some from some other members of the Committee.

So, thank you very much for being here.

I would like to invite the second panel to the witness table.

The Honorable Ray Halbritter, Nation Representative of the Oneida Indian Nation from Verona, New York, the Honorable Fawn Sharp, President of the Quinault Indian Nation in Taholah,

Washington, the Honorable Brooklyn Baptiste, Vice Chairman of the Nez Perce Tribe in Lapwai, Idaho, and Ms. Shenan Atcitty, Legal Counsel here on behalf of President Pesata of the Jicarilla Apache Nation in Dulce, New Mexico. Unfortunately, the President, as was mentioned earlier, was unable to be here with us today.

So, welcome, Mr. Halbritter, please proceed with your testimony.

**STATEMENT OF RAY HALBRITTER, NATION REPRESENTATIVE,
ONEIDA INDIAN NATION**

Mr. HALBRITTER. I commend this Committee for holding this hearing as the topic is both complex and fundamental to the unique relationship of our governments. The consequences of a half-hearted and flawed implementation of the trust responsibility are many. But the resulting impact on Tribal sovereignty is a central concern to Tribal governments across the United States.

Although this Congress and the current and some past Administrations have been generally supportive of Tribal sovereignty and have aspired to honor the trust relationship, States and local governments often contradict and resist the uniquely Federal relationship, instead often exploiting opportunities affirmatively to undermine it.

In the case of the Oneida Nation, our trust relationship begins with our being the United States' first ally in the Revolutionary War. The United States' obligations derive from the Treaty of Canandaigua, which was signed in 1794 by our friend, President George Washington. The United States continues to recognize our Treaty of Canandaigua, among the oldest of still valid treaties.

It says two things that are mostly relevant for today's hearing. First, the Treaty states that the United States acknowledges the lands of the Oneida, called our reservation, to be our property, and the United States will never claim our lands, nor disturb us in the free use and enjoyment of our lands.

We agreed also to the following key provision from the Treaty. Less the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side, complaint shall be made by the party injured to the other and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken. Significantly, the Treaty of Canandaigua provides safeguards to both parties, the Oneida Nation and the United States.

As contemplated by the treaty, when non-Federal parties overreach, such as in the case of New York's use of its own tax codes to stop transfer of the lands into trust, the duty of addressing those issues falls on the United States pursuant to its treaty obligations. The United States sometimes fulfills its obligations, oftentimes it does not and, when it does, it frequently comes after the damage is done.

In response to my insistence that local counties follow the law with respect to the nation's sovereignty, the Chairman of the Madison County Board used the public platform of official state of the county address to incite extremist and dangerous reactions against our nation, referring to me as a third world dictator, with language

which in turn directly affects the quality of life of our members and more particularly our children in the communities and schools where we are trying best to live peacefully and together.

In light of the harsh realities faced by Indian nations within our local communities, this may be an opportune time for the United States to work with Indian nations to develop a framework to ensure the Federal Government's fulfillment of its trust obligation. There is substantial evidence that empowering Tribal governments leads to economic success, providing many benefits to surrounding communities. In the Oneida situation, the Federal Government's own independent economic study concluded that due to the presence of the Oneida Nation, local communities received back \$16.94 per dollar.

Some Tribes like the Oneida Nation have assumed important governmental functions. For example, creating court systems, fire protection, emergency service, housing and educational programs. That also relieves, as a result of this the Tribes also relieve local governments from having to spend their government dollars spending money on those programs. It is a multiplier effect showing real benefits when communities work together.

We respectfully submit that this Committee ensure that our discussion today leads to the development of a new and constructive paradigm to guide Indian nations and the United States for the next future generations by creating a new bipartisan American Indian Policy Commission.

Our recommendations to the commission would address how the trust relationship would work to ensure an acceptable level of habitability on the present reservations, on the poorest reservations, including the adequacy of education, healthcare, public safety and infrastructure.

It could also address how the trust relationship could work to empower Indian nations that are on the cusp of economic self-sufficiency to redefine their trust relationship to fit their needs of success.

The charge to the commission should not be finalized without additional consideration but it could also include recommendations regarding an appropriate mechanism to ensure that the funding of critical Indian programs are not subject to arbitrary reductions, potential legislation to create a strong presumption in favor of land being accepted into trust at the request of the Tribe, and the potential establishment of additional high level positions within the Administration to represent Indian Country .

This Committee has already played a central role in advancing this discussion through this hearing and for that, we thank you.

[The prepared statement of Mr. Halbritter follows:]

PREPARED STATEMENT OF RAY HALBRITTER, NATION REPRESENTATIVE, ONEIDA
INDIAN NATION

Shekoli, greetings.

Chairman Akaka, Vice Chairman Barrasso and members of the Committee, my name is Ray Halbritter. I am the Nation Representative of the Oneida Indian Nation and a member of the Wolf Clan.

The Oneida Nation is a federally-recognized Indian Tribe located in Oneida and Madison Counties of Central New York State where our people have lived since time immemorial. The Oneida Nation is also a member of the United South and Eastern Tribes, Inc., an inter-Tribal organization representing 26 federally-recognized Tribes from Texas to Florida and from Florida to Maine. Thank you for this opportunity to testify regarding the state of the trust responsibility of the United States toward federally-recognized Indian nations.

I commend this Committee for holding this hearing as the topic is both complex and fundamental to the unique relationship of the governments. As you will undoubtedly conclude from the testimony today, there is serious concern in Indian Country regarding the state of this unique trust relationship.

The consequences of flawed implementation of the trust responsibility are many, but the resulting impact on Tribal sovereignty is a central concern to Tribal governments across the United States. Although this Congress and the current and some past Administrations have been generally supportive of Tribal sovereignty and have aspired to honor the trust relationship, states and local governments are often not inclined to acknowledge the uniquely federal relationship, instead often exploiting opportunities affirmatively to undermine it.

Further, recent United States Supreme Court decisions have had the effect of redefining Tribal sovereignty and the trust relationship. Some of those decisions have turned the trust relationship on its head, emphasizing its value as a shield from federal liability instead of construing it in a manner that would benefit the very people who were the intended beneficiaries of it. The trust relationship, intended as a protection against aggressive action by states and local governments, has eroded over time, making this hearing and the consideration of the trust relationship timely and very important.

However, nothing that is said today should cause any question regarding whether Indian governments honor the rule of law. Indian nations and the United States, however, disagree as to what that law is, or what it should be. We look to the United States Congress to help avoid tensions that can result from those disagreements. Whether it is in the form of efforts in this Congress to reverse some of the United States Supreme Court's holdings, such as the legislation to address the Court's decision in *Carcieri*, or otherwise, we note with concern a reluctance of some in Congress to act on important initiatives relating to Tribal rights.¹² The need for

¹ *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

Congressional action is magnified where the United States Supreme Court issues opinions that are contrary to Indian laws and settled expectations. Such judicial decisions create unnecessary tension in the federal-tribal relationship that the trust process is designed to prevent.

I am hopeful that this hearing marks the beginning of a full review of the Federal trust responsibility, as well as its impact on Tribal sovereignty. In 2012 we may be entering a new era that requires a more nuanced analysis, taking account of a changing commercial world within which some Tribal nations flourish, and others do not. Out of this review, many Tribal leaders, including me, would hope to see the establishment of a new long-lasting framework for Tribal-Federal relations that respects the unique relationship between Indian nations and the United States, instead of a relationship in which the Federal government feels it has sole authority to define and defend our relationship at its discretion.

I respectfully suggest today that we all are ready for the hard work of exploring how to arrive at a regime that furthers the spirit of the trust responsibility, while being responsive to the diverse needs of all Indian nations who struggle with the pressures of varied local circumstances. If people of good will can address foreign conflicts and all manner of complex social issues in non-tribal communities, we can succeed in this endeavor.

In light of the issues discussed by the other witnesses we heard from today, part one of my testimony discusses some of the practical challenges faced by Indian nations, including the Oneida Nation, in gaining the benefits of the trust relationship. Part two discusses the need for

² Legislation to address the implications of the *Carcieri* decision may not be an impediment to have land accepted into trust under the Indian Reorganization Act for all Indian nations, but that is hardly reason to delay passage appropriate and timely legislation that restores the *status quo ante*. Nor should it be necessary to do so at the peril of other important legislation.

the United States to develop a process for protecting tribal interests that looks beyond traditional consultation. Part three explores the need to strengthen relevant and useful government-to-government consultation in light of the increasing sophistication of Tribal governments and the increasingly complex issues that confront them. And, part four addresses some ideas for constructing a new framework for the trust responsibility that could endure for the next century

**The Foundation of the Trust Relationship and Practical Challenges
Indian Nations Face in Local Communities**

For many Indian nations, the federal government's trust responsibility is grounded in the United States' fulfillment of its treaty obligations, implemented based upon historic and the inherently governmental agreements between each separate Indian nation and the United States. How the relationship works in practice, however, is complicated by the actions of non-federal parties who regularly insert themselves into matters that should be primarily between the United States and Indian nations.

The nature of the federal relationship with Indian nations is a vital part of the history of the United States, some of which is worth considering here.

From the earliest days of the United States, the Founders recognized the importance of America's relationship with Native nations and Native peoples. They included important references to those relationships in the Constitution.³ The 100th Congress recognized the influence that Native peoples had in the development of the Constitution in a concurrent resolution that specifically acknowledged the "historical debt" the United States owes to Indian Tribes.

³ See, e.g., Art. I, Section 8, Cl. 3 (Indian Commerce Clause); Article II, Section 2, Cl. 2 (Treaty Clause).

[O]n the occasion of the 200th Anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy and other Indian Nations for their demonstration of enlightened, democratic principles of government and their example of a free association of independent Indian nations; . . .⁴

The Indian provisions in the Constitution were given immediate life in treaties into which the United States entered with Indian nations beginning with the Treaty with the Delaware in 1778 and continuing through another 373 treaties. Additionally, in the first decades of the United States, numerous laws were enacted addressing the details of the Federal-Tribal relationship,⁵ even as the Federal courts defined the Federal government's trust obligation to Indian nations.⁶

Because of this history, the trust obligation of the Federal government to Native peoples is fundamentally different from any other relationship the United States has with any other distinct group of people and carries elevated obligations. As the American Indian Policy Review Commission Report stated:

The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.⁷

The United States trust relationship with the Oneida Nation derives from the Treaty of Canandaigua, which was signed in 1794 between the Grand Council of Haudenosaunee and a representative of President George Washington. The Treaty of Canandaigua, which is among the

⁴ S. Con. Res. 76, 100th Congress.

⁵ See, e.g., Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834.

⁶ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁷ American Indian Policy Review Commission, *Final Report* 130 (1977).

oldest of all treaties signed between the United States and Indian tribes, recognizes rights held by the Six Nations, that extend beyond federally recognized rights that are typically considered within the parameters of the trust responsibility that was initially defined by the Supreme Court in *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823), and the Marshall Trilogy.⁸

President Washington was authorized to enter into the Treaty of Canandaigua by Article II Section 2 of the Constitution of the United States, which permits the President to negotiate and sign treaties, and grants the Senate authority to ratify them. The Supremacy Clause of the Constitution, Article VI Clause 2, provides that treaties and the Federal laws executing and implementing those treaties are the supreme law of the land. As such, the Treaty of Canandaigua and the rights afforded to the Oneida Nation under the treaty should provide safeguards from adverse actions by non-federal governments.

It says two things that are most relevant for today's hearing. First, the treaty states that the United States acknowledges the lands reserved to the Oneida, and called our reservation, to be our property; and the United States will never claim our lands, nor disturb us in the free use and enjoyment of our lands; and that our reservation shall remain ours until we choose to sell it to the people of the United States. And, with respect to protecting our lands from outside intruders, such as states and local communities, the United States and the Oneida Nation agreed to the following key provision in our treaty:

⁸ The Marshall Trilogy, a series of Supreme Court opinions penned by Chief Justice John Marshall between 1823 and 1832, is considered the legal foundation for the federal trust relationship in American jurisprudence. The Marshall Trilogy consists of *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side . . . complaint shall be made by the party injured to the other . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken

Significantly, the Treaty of Canandaigua provide safeguards to both parties – the Oneida Nation and the United States – which preempt hostile actions against the other by third-parties, including non-federal governments. Both the Oneida Nation and the United States are duty-bound to fulfill their obligations to each other under that treaty. The United States enforces its obligations through its trust relationship with the Oneida Nation, and with the other Nations who also are signatories to the treaty.

Notwithstanding the Supremacy of federal treaties, third parties regularly test the United States' relationship with the Oneida Nation, and often in ways that are intended to interfere with that relationship.

The trend of non-federal parties challenging the federal trust relationship with Tribal nations is obvious in New York, where challenges are designed to undermine the Oneida Nation's sovereignty. For example, when the United States Supreme Court directed in 2005 that the Oneida Nation it should use the Federal government's administrative process to have its homelands accepted into trust on its behalf, local taxing authorities created new, special arrangements to impose hefty taxes upon the Nation's homelands, and immediately started foreclosure proceedings calculated to prevent the United States from fulfilling the Supreme

court's directive that lands be taken into trust.⁹ This, notwithstanding the Oneida Nation's staggering economic contribution to the tax base in the local community; we are the largest employer¹⁰ in our region, with the vast majority of our approximately 4,500 employees residing in the local community, paying sales tax, income tax and property taxes amounting to approximately \$140,000,000.

When non-federal parties overreach, such as in the case of the New York's use of its tax codes to block transfer of the lands into trust, the duty of addressing those issues falls on the United States pursuant to its treaty obligations. Although the United States sometimes fulfills its obligations, oftentimes it does not – and, when it does, it frequently comes too late. This shifts the burden of preventing unlawful intrusions upon the shoulders of Indian tribes. The burden tribes often face in this circumstance includes vilification and political attacks on themselves, their leaders and even their members.

⁹ Further, after the Oneida Nation filed its trust application, the State of New York enacted special legislation targeting certain Nation lands. That legislation required, among other unique rules, that tax rates be set in one county as if the Oneida Nation's lands in that county were tax-exempt. Accordingly, the taxing jurisdiction and the county calculated taxes on Nation lands at a tax rate that assumes the Oneida Nation will not pay the taxes, resulting in an artificially inflated tax rate. It effectively triples the taxes that would be due under the taxing system used elsewhere in New York. It also produces the illogical circumstance shown in tax bills that, for example, declare the taxing jurisdiction's budget for fire protection to be \$142,844 and the Oneida Nation's share of that budget item to be \$539,359.

¹⁰ Central New York has suffered dramatic economic setbacks over the last 15 years. Reports have detailed the loss of approximately 4,500 jobs due to the closure of Griffiss Air Force Base, the loss of 1,000 Lockheed-Martin jobs in Utica and the loss of thousands of jobs at Oneida Limited (a non-Indian business that has no relation to the Nation). In the wake of the loss of approximately 18,000 jobs in the region, the Nation's role in stabilizing the regional employment picture cannot be understated. According to the Bureau of Labor Statistics, employment grew by 1.69 percent between 1990 and 2003 in the Madison and Oneida County region. In part due to the closing of Griffiss Air Force Base and the Lockheed Martin Plant in the mid-1990s, employment in Oneida County decreased at an annual average rate of 0.02 percent. The losses in Oneida County, however, were offset by an average annual employment growth of 0.82 percent in Madison County. Thus, the two counties together, combined for a reported total employment growth of 2,700 jobs. During this period, the Nation added 4,000 jobs, which fully accounts for any employment growth reported for the two county region and was a critical offset against the structural economic losses being registered in other industries.

We have a vivid example of that vilification at the Oneida Nation. In response to my insistence, as the Oneida Nation representative, that local counties follow the law with respect to the Nation's sovereignty, the Chairman of the Madison County Board of Supervisors used his official state of the county address to attempt to galvanize the local community against me, referring to me as a "[third world dictator]".¹¹ This same county, while claiming financial strain from the Oneida Nation not paying taxes which the courts rule were not owed, paid Park Strategies more than \$350,000 per year to lobby you and the executive branch to remove our sovereignty, rather than invest the same resources for the betterment. This county claims that the Oneida Nation's non-payment of taxes somehow was hurting the county, even though our Nation currently holds roughly 1% of the lands within the county yet roughly 50% of the county's lands are wholly or partially exempt from the same taxes.

Tribal sovereignty and the trust responsibility obviously are not understood by some local and state elected officials. It is a signal to all of us that we must join together as we consider how to improve the United States' trust responsibility and do more to ensure better understanding within our communities.¹²

Although no Tribal nation ever should rely upon the United States to guarantee a positive working relationship with state and local governments, a revitalized trust relationship is vital protection against the very overreaching that it was intended to address.

¹¹ See Attachment A. *Exhibit A has been retained in the Committee files*

¹² Notwithstanding these challenges, the Nation has found ways to cooperate with some of its neighboring governments on regulatory matters – as demonstrated by cooperative agreements on taxes and regulation between the Nation and the Cities of Oneida and Sherrill.

The United States Must Reconsider How to Promote its Trust Responsibility

Under such Federal policies as Self-Determination and Self-Governance, many Tribes have re-asserted increasing control of their own destinies, often with spectacular results. However, many other Tribes still struggle to guarantee basic public safety and healthcare to their citizenry, much less economic opportunity. Where there has been Tribal economic success, there has also been a growing backlash from other elements in the mainstream society that feel threatened by the restoration of Tribal rights and by Tribal prosperity, one explanation for some of what I described above.

The federal trust relationship has been reaffirmed by nearly every modern President, a very positive and significant political gesture. In the name of Federal government's trust responsibilities towards Tribal nations, President Obama issued a Presidential Memorandum on November 5, 2009 that called upon all executive agencies to develop consultation and coordination efforts with Tribal governments. The Memorandum confirmed the unique political status of Tribal nations, as established through treaty, legislation, and judicial decisions, and called for a rededication to President Clinton's Executive Order 13175. Executive Order 13175 calls for consistent and substantive consultation with Tribal nations on the development and implementation of all policies that have Tribal implications. The Executive Order was legally grounded in the federal trust responsibilities and called for agencies to respect Tribal self-government, sovereignty, and self-determination. The genesis of that respect is rooted in the early treaty era when Tribes were regarded as powers to be treated with respect rather than quelled and subjugated.

The lifeblood of the unique trust relationship between the United States and Indian tribes is consultation, and the pathway to a robust trust relationship is likely through consultation that is redesigned to better meet the needs of both parties to the relationship. Although most modern Presidents have recognized the need for meaningful government-to-government consultation, consultation continues to be regarded by agencies as burdensome and an impediment to Federal action rather than a mechanism to protect Tribal treaty rights and appropriate Federal decision-making. Matters are further complicated when the Federal government blurs the important distinction between Tribal consultation and all other communication with non-federal interests, even where consultation with non-tribal parties may be required by law.

A case in point is consultation among parties under Section 106 of the National Historic Preservation Act, which compels federal agencies to consider the effects of their actions on historic or cultural properties. In certain circumstances, a local governmental project sponsor and an affected Tribe may be consulting with a Federal agency. In our recent experience at the Onocida Nation, a project sponsor, which sought Federal funding took steps to evade consultation with the Nation, notwithstanding the Nation's right to be consulted pursuant to the Federal agency's consultation obligation under its trust relationship.

The steps taken by the local project sponsor to keep the Nation from consultation to protect culturally significant artifacts that may have been buried within the path of the project were astounding to behold, especially given that this occurred as recently as 2011. The project sponsor, also seeking state funding, made untrue representations within the state environmental clearance process under state law to cause the state to make certain determinations regarding the potentially negative effects of the project that had to be reconsidered by the state once the

relevant state officials became aware of the project sponsor's actions. Ultimately, the Oneida Nation and the Federal agency that was funding the project negotiated a programmatic agreement. At the end of the day, the project will be built, but it took the Oneida Nation's vigilance to ensure that the law was followed, and in this instance its role in consulting with the United States proved to be meaningful. Still, a stronger timely response by the Federal government would have set the project sponsor on a correct course much sooner. And, happily, once there was intervention by appropriate Tribal liaisons within the Secretary's office, that course correction did occur and a programmatic agreement was executed, although ironically the project sponsor refused to sign it because the project sponsor disagreed with a definition of "tribal lands" that was set forth in federal law, supported by the Department of Justice and upheld by multiple courts.

We acknowledge that Federal agencies are under significant pressure to fulfill their program mandates to provide funding for needy projects with all deliberate speed, but it is important to be certain that the our trust relationship is always at the forefront of the process, lest it becomes a sticking point when Indian nations become aware of the undertaking and assert their right to consult or to object to the project. And, in the most blatant cases, the failure to engage in consultation will only strain government-to-government relationships and impede future potential cooperative efforts between governments.

Not only is the trust relationship and consultation between the Federal government and Indian nations constantly under attack from local governments, but certain local officials in the State of New York have gone so far as to urge New York State Governor Cuomo to repeal the State's Tribal consultation policy that was adopted in 2009 to protect important Tribal interests.

While I am confident that Governor Cuomo will not repeal a policy that shows the State's leadership and progressive thinking on that score, it is the kind of direct attack against legitimate tribal interests that is worth noting. We are hard pressed to be able to explain such actions by certain local officials, but it serves as a chilling example of how the Federal government must work with Indian nations to restore respect for Tribal treaty rights and its federal trust responsibility towards Indian nations.¹³

In light of the harsh realities faced by Indian nations within their local communities, this may be an opportune time for the United States to work with Indian nations to develop a new framework to ensure the Federal government's fulfillment of its trust obligation, taking into account the unique and disparate needs of Indian governments.

**The Trust Responsibility, Self-Determination & Strengthening
Government-to-Government Consultation**

Depending on a specific Tribal nation's political relationship with the United States and the context of particular issues, there will be differences of opinion about what the trust responsibility means, but at a minimum it should make clear the extent of the Federal government's obligation to ensure that Tribal lands are habitable by today's standards, ensuring that Indian communities are permitted to create or maintain decent schools, hospitals, public safety and infrastructure. It may be that the primary vehicle to ensure the fulfillment of those obligations is to empower Tribal governments to create an environment hospitable to economic development. In addition, the Federal government should strengthen the government-to-

¹³ See Attachment B. **Attachment B has been retained in the Committee files**

government relationship by integrating the Indian voice more directly into the highest levels of the Federal legal and policymaking structure.

Many of these goals may be difficult to achieve in the current environment. As Tribes seek recognition of their sovereign rights, others resist, deeming Tribal sovereignty a threat to their own power or sovereignty. Therefore, it is important to demonstrate that stronger and more effective Tribal governments are not only good for Tribes, but also good for surrounding communities, the states within which the Tribes reside, and the United States, as a whole. There is already substantial evidence that empowering Tribal governments leads to economic success, providing many benefits to surrounding communities. In some cases, especially where Tribes have assumed an important governmental or social function (e.g., creating jobs, providing fire, police and emergency services, etc.); this has been recognized by the impacted non-Indian communities.

The Oneida Nation's story is a prime example of how strengthening Tribal sovereignty and Tribal economic success benefits surrounding communities. Since 1993, when we opened the first legal casino in the State of New York, the Oneida Nation has invested more than \$1 billion in infrastructure in Central New York. We have spent \$2 billion on goods and services with non-tribal vendors, with much of that money going to businesses in New York State. We are a major source of employment in a community where many large employers are downsizing. We have generated more than \$140 million in income and property taxes for the state and local governments. The result is that the Oneida Nation has used the revenues from gaming operations to improve the lives of its own people, with relatively little financial assistance from the United

States. We have invested in housing, health care and education programs for our members, so that we break the cycle of poverty and dependence.¹⁴

Moreover, our economic success has driven our level of sophistication in business enterprises and diversification, including our acquisition and publication of the Indian Country Today Media Network and Four Direction Productions, an animation and film production company. Commercial strength and diversification has also reinforced our ability to determine our own destiny and to limit our interaction with the United States to matters that are central to the protection of our interests in cultural preservation and the restoration of land within our Reservation boundaries. And, while many Indian nations are similarly situated, many are not, requiring a more profound level of interaction with the United States within the context of their trust relationship.

I do not suggest that self-sufficiency and commercial and governmental sophistication should end the need for the trust relationship. Rather, as self-determination yields self-sufficiency in Indian Country, the trust relationship will come to reflect that, and government-to-government relationships and consultation with Tribes will change as a result.

Indeed, the HEARTH Act¹⁵, under consideration by this Congress, is an express recognition of the need to empower Tribes to diminish their exclusive reliance on Federal

¹⁴ The Nation's economic base does more than provide jobs for the local residents. It is the basis of tribal self-government and self-sufficiency because it funds essential government operations, services and programs. These services and programs include member health care, education, legal services, day care and youth programs, family services and housing. The Nation pays nearly \$17 million annually for these programs and services. The fact is that state and local governments save a lot of money because the Nation government is able to and does provide so many programs and services to its members – meals for the aged, health insurance for the healthy and the infirm, care for the very young, education for everyone, and on and on. State and local money that would go to providing many of these programs and services to Nation members can be devoted instead to persons who are not Nation members.

government by being more actively involved in economic development on their lands. They are reflections of a modern view of what the trust responsibility is – empowering Tribes to solve their own problems and carve their own destiny but also protecting Tribes from external forces that undermine Tribal sovereignty. In addition, the Oneida Nation and other Tribes are aware that Congress can clarify the law in other important areas of significance in Indian Country like strengthening the ability of Tribes to have land taken into trust so they can achieve self-determination and self-sufficiency.

Advancing a New Framework for the Trust Responsibility in the 21st Century

The Oneida Nation's experiences and the testimony that we have heard today leads me to conclude that we may have a meaningful opportunity to consider how to create a new framework for the trust relationship. Such a new framework would consider the complexities of the issue, the unique relationships that Indian nations have with the federal government, the impact that existing laws have upon the implementation of the trust relationship, and, challenges to the relationship posed by other governments.

The need for a rational vision of the trust responsibility that is fully respectful of the rights and views of Indian nations is clear. I respectfully submit that this Committee ensures that our discussion today leads to the development of a new and constructive paradigm to guide Indian nations and the United States for the next century by creating a new bi-partisan American Indian Policy Review Commission. That Commission would be charged with the responsibility

¹⁵ The HEARTH Act is pending in the House of Representatives and Senate as H.R. 205 and S. 703, respectively.

of examining these issues and reporting to Congress within two years from its inception with recommendations regarding a new framework for the trust relationship for the next century.

The recommendations of the Commission could address how the trust relationship would work to ensure an acceptable level of habitability on the poorest reservations, including the adequacy of education, health care, public safety and infrastructure. It could also address how the trust relationship could work to empower Indian nations that are on the cusp of economic self-sufficiency to redefine their trust relationship to fit their needs. The charge to the Commission should not be finalized without additional consideration, but it could also include recommendations regarding the following: an appropriate mechanism to ensure that the funding of critical Indian programs are not subject to arbitrary reductions; potential legislation to create a strong presumption in favor of land being accepted into trust at the request of a Tribe; the appropriate role of state and local governmental involvement in trust acquisitions and other actions that permit public input into certain federal actions; and, the potential establishment of additional high-level positions within the Administration to represent Indian country. The recommendations of the Commission would also be intended to demonstrate that strong and effective Tribal governments are mutually beneficial not only for Tribes, but also good for surrounding communities, and the states within which the Tribes are located.

This Committee has already played a central role in advancing this discussion through this hearing, and for that I thank you.

The CHAIRMAN. Thank you very much, Mr. Halbritter. President Sharp, would you please proceed with your testimony.

STATEMENT OF HON. DAWN SHARP, PRESIDENT, QUINAULT INDIAN NATION

Ms. SHARP. Thank you, Chairman, distinguished Members of the Committee. We truly appreciate the opportunity to appear before you today.

I represent not only the Quinault Indian Nation, but am the President of the Affiliated Tribes of the Northwest Indians. And I also have a unified and complementary role as Chairman of the new Trust Commission on Administration and Reform. So, I hope to interweave perspectives into this presentation and testimony, representing all three of those hats that I currently wear.

I would like to begin by addressing the relationship itself that Indian Tribes have with the United States Government. And then I want to speak a little to the natural resources, and then wrap it up with our people.

The relationship itself, we have determined out of the Northwest, out of the Quinault Indian Nation as well as beginnings of a discussion towards that end at the Commission that we need to define trust and trusteeship. It is long overdue for a very clear, succinct definition of what that means, not only what it means in the minds of those in this Congress, in the minds of those sitting on the U.S. Supreme Court, but first and foremost, in the minds of Indian people and Tribal leaders.

To that end, we are working toward out of the Northwest through a series of sovereignty summits and meetings at the Affiliated Tribes of Northwest Indians, in concert with USET, to come up with a definition of trust and trusteeship from our perspective. And we believe that will be very helpful to not only this Congress, but the Court and others to define our perspective.

Right now, that definition has been diluted, and as pointed out by Senator Udall, it is being further eroded through this term of the Congress. The old definition is based on this notion of dependency, it is based on this notion of incompetency, that we are wards of a guardian.

We have always been very capable of managing our own affairs from the beginning of time. We have always been a competent people. We had very complex ecosystems that we managed as good stewards. We had very sophisticated economic structures within our communities. We had trade. We had many good things in our communities. It was only with the imposition of another sovereign into our lands and territories that corrupted that value system, that continues to corrupt that value system.

This last Congress, a bill was passed in the House purporting to convey 2,400 acres to a multi-national corporation outside of the United States to mine copper in an area that is very sacred to the San Carlos Apaches. It is a place where they continue to do sacred dances. It is a place where they continue to gather traditional foods. An acorn that takes 100 years to mature in that area is threatened to be desecrated for profit, for gain, not to benefit those within this Country but to benefit those outside of the United States.

It is a sad commentary that in this modern time, even over the objections of Indian people and our leadership, we continue to see an erosion not only in Congress but in the courts and even within the Administration. There are many good friends that we have been able to ally with within the Administration. Some that have good hearts, good minds, that see things from our value systems.

But there is a structure in place that, even with the best of intentions and even with the best mind and heart, they are still incapable of discharging their duties along that sacred, solemn commitment that the United States has with Indian people. It is that Federal bureaucracy that needs change.

And it needs change that is guided by sound principles that are deeply rooted within the values of our people so that we can not only set a good example for today to correct the past wrongs, but that we lay a strong foundation for future generations, that when they look back at this era and this time, they will see that it was that point in history when the United States not only recognized

the past wrongs, but truly viewed Indian people as equal sovereigns with their own unique set of values and principles.

Joe DeLaCruz, our Chair at Quinault, once stated that there is no right more sacred than a people to freely govern their lands, their people, their territories without external interference. Right now, even with self-governance, we are simply managers of Federal dollars. Under 638, we administered Federal dollars. We now manage. We cannot spend those dollars in a way where we can freely determine our future because of the bureaucratic barriers that we continue to confront today.

So, with having an opportunity to be able to come to this Congress to redefine that relationship and set a new course, we believe that we are at a post self-governance era. We will always be self-determining, but we need to set a new course on the relationship and the definition, and that includes engaging with this Congress on agreements, renewed agreements, to build that stronger foundation.

So, on behalf of the Quinault Nation, the Affiliated Tribes of the Northwest Indians and the Trust Commission, we thank you for this opportunity.

[The prepared statement of Ms. Sharp follows:]

PREPARED STATEMENT OF HON. DAWN SHARP, PRESIDENT, QUINAULT INDIAN NATION

Good afternoon distinguished Committee Members and esteemed witnesses joining me today to provide testimony on *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Responsibility*. My testimony addresses this topic from several, unified perspectives: as the President of the Quinault Indian Nation and President of the Affiliated Tribes of Northwest Indians regarding natural resources under authorities of Self-Determination and Self-Governance, and as the Chairperson of the Secretary of the Department of the Interior's National Commission on Indian Trust Administration and Reform.

First and foremost I would like to applaud this Committee for continuing such a vigilant effort to address the plethora of disparities Indian people are forced to deal with on a daily basis. It is because of these hearings and the Roundtable Sessions that Congress, the Administration and the American public are being educated about our issues. Mase' [Thank you]!

Prologue and Vision

Five centuries ago, Europeans relied upon the notion of the "Doctrine of Discovery" to provide a quasi-religious, political justification for colonialism. This Doctrine led to the expropriation and exploitation of the natural resources of this land with little regard for the impacts on the cultures and economies of the Indian peoples that had relied upon for them for countless millennia.

When the United States was founded two and a half centuries ago, alliances were sought with Tribal nations to try to free the colonies from European powers. For nearly a half century after Independence, the United States entered into treaties to formalize relations with Tribal nations. In exchange for promises to protect Tribal peoples from depredation and provide for their needs, Tribal nations relinquished claims of title to their traditional territories and agreed to relocate to small areas of land that were to be set aside for their exclusive use and occupancy. These promises, and subsequent laws such as the General Allotment Act, form the foundation of the trust responsibility, a concept that was rooted in the fundamental notion that Tribal nations are dependent on the largesse of the dominant government, somehow incompetent and incapable of managing their own affairs.

Yet, even the solemn treaty promises of the United States were broken repeatedly.

- Treachery, fraud, and corruption of Indian agents assigned to serve the needs of reservation communities were common.
- Indian children were removed from their homes and placed in boarding schools where they were forbidden to speak their native languages.

- As non-Indians coveted the land and resources such as gold which were found on reservations, Tribal nations were forced to relocate or accept diminished land bases.
- Tribal lands were flooded to create reservoirs to provide water and power and to try to protect non-Indian property.
- A policy of allotment was adopted to “civilize” Indians while opening reservations to settlement and development by non-Indians. The confused and complex ownership and occupancy of Indian reservations created a jurisdictional morass that allows developers to ignore laws and regulations intended to protect the environment and perpetrators of crimes such as rape or the manufacture and distribution of illegal substances to evade prosecution.
- Tribal lands have become dumping grounds for hazardous materials that non-Indian communities would not tolerate.
- Tribes are being required to compensate for environmental deterioration caused by non-Indian development on and off reservations, infringing upon our prerogatives to utilize reservation resources for the benefit of our own communities.
- When the duty to fulfill treaty obligations became burdensome, the United States pursued a policy of termination to try to “get out of the Indian business”.

Until just a few decades ago, when a new era of Self-Determination and Self-Governance was ushered in, the Indian policy of the United States was centered on conquest, removal, dislocation, and extirpation.

The purpose of highlighting this litany of wrongs against Indians is not to dwell on the past, but to serve as a prelude to discussion of the future form and substance of relations between Indian Tribes and the United States. The trust responsibility and government-to-government relationships are central to *our* deliberations. I say “our” because decisions cannot be made unilaterally by the United States. Our discussion should include consideration of the implications of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly articles relating to free, prior, and informed consent. As sovereigns, Indian Nations and the United States must engage in substantive dialogue to collectively establish a common vision and policy to guide our path to tomorrow.

In 1977, the American Indian Policy Review Commission issued a report to Congress noting, “The Relationship of the American Indian tribes to the United States is founded on principals of international law . . . a relationship founded on treaties in which Indian tribes placed themselves under the protection of the United States and the United States assumed the obligation of supplying such protection.”¹ This relationship is not working! The implementation of the United Nations Declaration on the Rights of Indigenous Peoples is essential, the inability to pass amendments to the DOI Self-Governance amendments and the lack of funding to allow Tribes to protect our borders and communities are but a few of the elements of the current dysfunctional trust responsibility to American Indian and Alaska Native peoples. The United States trust responsibility has not evolved with the changed political relationship between the United States government and Indian governments. It must be changed to reflect the realities in Indian Country in the 21st century.

The following comments center on Self-Determination and natural resources, the particular area on which the Committee is seeking comments from the Quinault Nation:

- *A Different Kind of Trust Responsibility.* Historical notions of dependency and incompetency must be abandoned. Our dialogue should be focused on the forgotten trust responsibility of the United States—the responsibility to support the capacity of Tribes to take their place alongside the American system of governments. For natural resources, recognition and acceptance of Tribes as capable, responsible resource managers will be essential to enable us to protect our cultures and economies and to work collaboratively at the local, state, regional, national, and international levels to sustain the environment.
- *Self-Determination and Self-Governance.* The Quinault Nation was one of the first Tribes to employ Self-Determination contracting and Self-Governance compacting to improve its ability to manage its natural resources. The devastation of our forests, salmon, lands, and waters wrought by decades of mismanagement by the United States could no longer be tolerated and spurred our determination to embark on the newly opened path to Self-Determination. For years, buy-Indian and Self-Determination contracts provided a means for us to perform activities in lieu of the Bureau of Indian Affairs (BIA). We had little lati-

¹American Indian Policy Review Commission Report, 1977, p. 11

tude to establish objectives and goals, but were rather limited to those imposed and supported by the federal administration and BIA. We found it necessary to turn to Congress to enable us to establish a demonstration program for a Tribal forestry program that was designed to address resource management problems that had accumulated over decades of BIA administration. Our ability to develop our own programs and priorities for forestry, fisheries, health, and social programs has been greatly enhanced through the use of Self-Governance compacting. Quinault was in the first tier of Tribes to participate in the Self-Governance program. While Self-Governance has provided us with the flexibility to tailor programs to best fit the needs of our own communities, several improvements, noted in H.R. 2444, the Department of the Interior Self-Governance Amendments, are needed.

The Quinault Indian Nation compacted to manage our forest lands but we have not received the additional funding or increases in our formula to manage existing obligations. We are further challenged by the increased cost of fuel to perform these services.

- *A New Focus for Federal Administration: Support for Tribal Self-Government.* There is a need to expand our vision of the nature of the trust responsibility to see beyond the accustomed, narrow confines of fiduciary duties and obligations. In some respects, this requires the term trust responsibility to be turned on its head. Instead of a policy that perpetuates paternalism and dependency, trust responsibility should be viewed as the responsibility to administer Indian Affairs in a manner deserving of the trust of Indian Country. The time has come to transform the role of the United States from guardian to enabler, to make the primary function of the trustee that of supporting and assisting the capacity of Tribes to truly exercise Self-Determination. Tribes that are ready for this step should have the opportunity to establish relationships with the United States that move beyond tutelage to a position of sovereign equality. To make this transformation, fundamental, seminal issues must be addressed.

Paternalistic procedures, practices, and policies for management of the trust corpus that perpetuate paternalism, dependency, and bureaucracy while trying to shield the United States from financial liability for mismanagement have debilitating effects on the ability of Tribes to manage and develop their own lands and resources and greatly increased the costs of federal administration. Federal bureaucracy and administration has left Indian Country dirt poor despite the abundance of natural resources that blesses many reservations.

These administrative measures should be reformulated through a collaborative process between Tribal governments and the United States with the over-arching objective of strengthening the ability of Tribes to fully and exclusively exercise their inherent sovereign authorities to manage the lands and resources within reservation boundaries.

This discussion should include clarification that Indian lands are private lands that are held in trust with a fiduciary responsibility of the United States to manage the trust corpus for their beneficial owners. Trust lands are not subject to the federal nexus that triggers application of laws and regulations intended to govern public lands, such as NEPA and the ESA.

Tribal authority to make and enforce laws and regulations of their own making, including taxation authority, against Indians, non-Indians, and non-Tribal members alike must become a reality.

Currently, the Department of the Interior is in the position of being both “pitcher” and “umpire” for trust administration; independent oversight is needed.

Consideration should also be given for the need for, and value of, establishing a high-level ombudsman position, to help overcome recalcitrance in federal administration of Indian Affairs.

- *Land consolidation and Jurisdiction.* A major focus of trust responsibility and government-to-government relations should be directed at assisting Tribes to restore the integrity of reservation land bases as permanent homelands for their peoples and to establish viable land bases for newly federally-recognized Tribes. Funding provided under the recent Cobell settlement could provide critical resources for land consolidation, but efforts and priorities must be Tribally, not administratively-driven. Chaos caused by the Supreme Court’s decision in *Carcieri* must be rectified legislatively.
- *Off-Reservation Co-Management.* The ability of Tribes to co-manage resources within their traditional ceded territories off reservation needs and deserves support. Arbitrary restrictions, such as those employed by the EPA for development of Tribal water quality programs restrict use to on-reservation activities, failing

to recognize Tribal needs to protect off-reservation resources that are essential to their ability to exercise treaty and other federally reserved rights. The United States should provide financial, technical, and political support for Tribal governments to formally engage and substantively participate in international deliberations involving natural resources and environment, e.g., climate change, biodiversity.

- Consultation. Federal entity requirements for consultation with Tribal governments on matters pertaining to Tribal rights and interests should be made mandatory and enforceable. However, it is crucial, that consultation be implemented as part of a true government-to-government process that involves respectful dialogue to identify and try to overcome differences, not as a pro-forma checklist that reserves decisionmaking authority solely to the federal entity.
- Formalize Trust Agreements. The foundations for trust administration of natural resources need to be poured. Consideration should be given to enacting a suite of laws pertaining to Tribal natural resources. The National Indian Forest Resources Management Act and Indian Agriculture Act enunciated the federal trust responsibility and set forth certain standards for management. Comparable laws are needed for fish and wildlife, energy, and water resources.

Fiduciary standards expressed in Section 303 of the Department of Interior manual should be cooperatively and collectively reviewed by Tribal and administrative representatives and revised as needed.

The ability to establish formal contractual intergovernmental agreements between the United States and Tribes which would clarify duties, obligations, and responsibilities should be explored. These Agreements would establish performance standards for programs operated by both Tribes and federal agencies. A variety of arrangements could be considered, such as the option for Tribes to place their lands in a special form of trust that would protect them from taxation or jurisdictional intrusions by local, state, and federal governments. This option could reduce burdens, liabilities, and costs of federal administration and remove impediments in securing financing for Tribal natural resource development. The concept of converting Tribal trust lands to a new type of ownership, Tribal restricted fee, is presently under discussion by the House of Representatives (American Indian Empowerment Act of 2011, H.R. 3532). President Rob Porter (Seneca Nation of New York) testified at a recent hearing on this proposed legislation: “[I]t would do this by enabling Indian nations and Tribes to voluntarily convert some or all their existing Tribal lands from Tribal trust lands held by the United States to Tribal restricted fee status held by the Tribal government and thereby enjoy the enhanced flexibility that attaches to restricted fee land holdings. That flexibility should produce great savings in time and cost that otherwise would burden development on Tribal trust land.” The advantages and disadvantages, pros and cons of providing such an option deserve thoughtful, serious deliberation by Tribal governments, Congress, and the Administration.

National Commission on Indian Trust Administration and Reform

The work of the National Commission on Indian Trust Administration and Reform is underway. As Chairperson I am joined by a cadre of Leadership and Academia who has listened and been engrained in the trust reform issues for many decades. Ours is a charge that we all consider very serious and with the help of this Committee, we will take the first step to improving the system that we can all agree is “not working”! We held our first meeting on March 1–2, 2012 and will begin to convene field Listening Sessions in June 2012. We are seeking the input of Indian Country regarding the Department’s administration and management of trust assets and carrying out its fiduciary trust responsibility for individual Indians and Tribes.

Again, thank you to the Committee for allowing me to testify before you today on this important issue.

The CHAIRMAN. Thank you very much, President Sharp.

Vice President Baptiste, will you please proceed with your testimony.

STATEMENT OF HON. BROOKLYN BAPTISTE, VICE-CHAIRMAN, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE

Mr. BAPTISTE. [Greeting in Native tongue.] To the Chairman and the Committee, I would like to thank you for allowing us this op-

portunity to provide testimony, but also such a large target but also something that is important to us that provides a mechanism for Tribes to be resilient and be able to define themselves in the manner that we would like rather spiritually, culturally, you know, economically.

I think it is important as far as the Tribes are concerned that we are allowed to define those for ourselves and, in this Committee, I know you have had a series of roundtables and discussions that allow the Tribes to kind of provide testimony and provide some guidance for the Tribes themselves to allow you yourself and the Committee members to provide that guidance that we give you to the rest of your peer group as well. To provide leadership for us is important, and we thank you for your leadership and the Committee's leadership in that manner.

As was kind of mentioned in the previous panel, you know, the Nez Perce Tribe and many other Tribes recently settled lawsuits with the United States over Government's mismanagement of the trust assets of the affected Tribes. The settlement was the culmination of six years of litigation that had been preceded by working groups, meetings that were trying to avoid the court system.

The Nez Perce Tribe itself, you know, finds itself in the courtroom a lot. We would rather not. We do not think that helps. We do not find that the justice for the Tribes is found in the court system. We think it is in this specific forum right here that we can find the things that we need to define that trust obligation rather than depending on an individual that is not versed in Indian law or in the culture and life ways of Indian people as a whole across the Nation.

So, we would like to, you know, we thank the Administration and we thank this Committee as well because you are providing that avenue for us as well.

So, the issue I would like to talk, to discuss, today is how to move the relationship between Tribes and the United States forward to a better place. I believe we can use the remarkable achievement of the settlement, these lingering trust claims, as momentum to focus on the collaborative efforts of the Tribes and the United States on truly fixing the trust relationship, eliminate the need for costly, protracted litigation and the us versus them mentality.

The Nez Perce Tribe would propose several courses of action that it believes would help enhance and strengthen the trust relationship between the United States and the Tribes. These actions include one, clear and unequivocal affirmation of Tribal sovereignty and the treaty relationships between the parties, two, prioritization of funding for Tribally related Federal programs operated by the Tribes, three, Congressional and Executive Branch supported efforts to protect long-standing Indian law concepts that are being eroded through the courts, four, reaffirmation and support of Indian self-determination, and last, continued refinement of government-to-government consultation set forth in Executive Orders and Executive Memorandums of past and current Administrations.

We feel that the last consultation process which served the Tribes is one of most important because that communication will provide the foundation for the understanding between Tribes. In

my past seven years as a leader of my people, I have noticed that you do not always have to agree. But if you understand, it makes things a lot easier.

So, as a Tribal leader on this panel, I think we have the ability to transcend some issues or some topics that are not always talked about, the hardships of social, the social wrongs in our Country but also in our own communities as well, the spiritual detriment that the Tribes are facing now that affect their Tribes long standing.

Kind of an analogy I have used before was that before we met as government to sovereigns we would bring pipes and that would represent our belief system, our walk with the creator, God, Jesus, whichever way you looked at it. That was our way of agreeing and saying this is going to be our truth to our word and it was a written language that we were foreign to but we believed and had faith and trust in these treaties that we signed that are held, of course, supreme law, you know, by the Constitution.

We no longer bring pipes no more because that does not, it is hard to quantify that type of relationship. So, now we bring attorneys, our people are attorneys, and we bring that to the table to try to implement the letter of the law when it is our treaties, the trust obligation with a Federal agency or in that it is with the sovereign as well as the States.

So, we hope that the protection of our treaty is a protection, that the implementation of those treaties will continue. I think this subject is fairly large compared to what we can offer. But I appreciate the opportunity to come here and allow some insight to us as leadership. I know you take a larger burden representing us and the public sector as well and we appreciate all that do you for the Tribes and the Nations.

[Closing in Native tongue.] Thank you.

[The prepared statement of Mr. Baptiste follows:]

PREPARED STATEMENT OF HON. BROOKLYN BAPTISTE, VICE-CHAIRMAN, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE

Honorable Chairman and members of the Committee, as Chairman of the Nez Perce Tribal Executive Committee, I would like to thank you for the opportunity to provide testimony on behalf of the Nez Perce Tribe to this Committee on the issue of the trust responsibility of the United States to Indian tribes. As you may know, the Nez Perce Tribe, and many other tribes, recently settled lawsuits with the United States over the government's mismanagement of the trust assets of the affected tribes. The settlement was the culmination of six years of litigation that had been preceded by scores of meetings and workgroups that had been formed to try and address the problem outside of a courtroom setting. This entire effort was a long and arduous process that consumed the time and resources of the tribes involved. I would like to thank the United States and the Obama administration for finally being willing to engage the tribes on this issue with a goal towards resolving the long standing dispute.

It is good that the settlement of the trust mismanagement cases provide for a path forward and a "clean slate" between the tribes and the United States with regard to its management of the trust assets of tribes and how future disputes over those assets will be handled. However, the settlement does not address the larger question of the current status of the trust relationship between tribes and the United States. The process itself was indicative of some of the issues that are adversely affecting the important trust relationship between tribes and the United States. Although the Nez Perce Tribe was well represented in the litigation and settlement by the Native American Rights Fund and our own in-house legal counsel, at one point in the settlement process, I found myself in a room alone with approximately 20 governmental representatives working on finalizing an agreement. At that time I thought that this was very symbolic of how tribes sometimes feel when

working with the government, outnumbered and facing an opponent with unlimited resources. A common phrase among tribal leaders when referencing the relationship with the United States is that tribes used to bring weapons to battle with the United States and now we bring a quiver of attorneys. That is a sign of a relationship that is not functioning properly, especially a trust relationship. So the issue I would like to discuss today is how to move the relationship between tribes and the United States forward to a better place. I believe we can use the remarkable achievement of the settlement of these lingering trust claims as momentum to focus the collective efforts of the tribes and the United States on truly fixing the trust relationship and eliminate the need for costly protracted litigation and the “Us versus them” mindset that exists.

The Nez Perce Tribe would propose several courses of action that it believes would help enhance and strengthen the trust relationship between the United States and tribes. These actions include: (1) clear and unequivocal affirmation of tribal sovereignty and the treaty relationships between the parties, (2) prioritization of funding for tribally related federal program and programs operated by tribes, (3) Congressional and Executive Branch supported efforts to protect longstanding Indian law concepts that are being eroded through the courts, (4) reaffirmation and support of Indian Self-Determination and (5) continued refinement of government to government consultation set forth in Executive Orders and Executive Memorandums of past and current administrations.

I. Reaffirmation of Tribal Sovereignty and Treaty Relationships

Based on the U.S. Constitution, treaties, statutes and the historical, political and legal relationship with the Indian tribes, the United States has assumed a trust responsibility to Indian people. Those laws and relationships serve as the backdrop for the government-to-government relationship. Rep. Dale Kildee has long advocated that Congress, as well as the other branches of government, remember that Article VI of the United States Constitution states in part that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Despite this constitutional affirmation of the supremacy of treaties, many tribes continually face threats of diminishment or disestablishment of their reservations and lands reserved under their treaties with the United States as well as erosion of the rights and privileges reserved under those documents. This issue is very critical when it comes to the land base of tribes and how those lands are threatened through rights-of-ways or easements or various other means. For any government, land is a foundational block. However, the fee to trust process usually takes years or in some cases decades because of different policies of different administrations and concerns over gaming. This places tribes in the position of being a sovereign that is taxed by a subdivision of a state. This prospect is repugnant to tribal governments. Congressional action or an executive order from the President that clearly reaffirms those treaty relationships and the inherent sovereignty of those tribes and the rights reserved by those tribes would be a good start in helping preserve what was intended to be permanent relationships between the Tribes and the United States.

II. Prioritization of Funding

In light of the foundational nature of the relationship between the tribes and the United States, it is frustrating to Tribes when each budget cycle presents the question of whether tribal programs or federally related tribal programs will be properly funded or funded at all. The fact that spending on tribal programs is discretionary in nature runs counter to the obligations and promises that arise from the trust and treaty relationship of the parties. Although progress has been made on increasing funding for agencies and programs that provide services in Indian country such as the Bureau of Indian Affairs and Indian Health Service as well as increased commitments to properly fund services provided by tribes such as housing and health clinics, it is time to move to a new paradigm in relation to federal funding of tribally related programs. Funding for these programs should not be dictated by political party affiliation or which party is in office but rather it should be a baseline spending obligation that the United States committed to long ago in return for the development of this country.

III. Support of Indian Law Principles Under Scrutiny by Courts

Many of the principles and tenets of the trust relationship have been affirmed, developed, and refined through the United States court system. However, tribes believe this trust relationship is currently being eroded in the courts today. A 2009

empirical study done by Matthew Fletcher of Michigan State University College of Law entitled: "Factbound and Splitless: Certiorari and Indian Law" shows that since the Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians* in 1987, the Supreme Court has decided against tribal interests in more than 75 percent of cases. This rate of success is lower than the success rate of criminal defendants. With this trend, Tribes are relying more on the Executive Branch as well as Congress to be aware of, protect, and uphold the longstanding principles of Indian law. The *Carcieri* decision is a perfect example of this dynamic but it is by no means the only example. In addition, there are several cases that are before or could come before the United States Supreme Court that could have negative consequences for Indian Country in a way similar to the *Carcieri* decision. If the courts are not going to protect these long-standing principles, the Executive and Congressional branches of the government must take up the issue. Discussion is needed on ways to address these issues through other avenues such as Congress exercising its plenary power in support of tribal issues and in honoring the Federal Government's trust responsibility.

IV. Reaffirmation of Self-Determination

Another aspect of the trust relationship that deserves congressional attention is the policies on self-determination. There is need for work by the United States in formulating strategies to provide effective reaffirmation and support by the Executive Branch and Congress of the policy of Indian Self-Determination. Stephen Cornell and Joseph P. Kalt recently published a paper entitled: "American Indian Self-determination: The Political Economy of a Successful Policy". The authors believe that there is an alarming trend away from support for tribal self-determination which has been a success. They state: "The policy of self-determination reflects a political equilibrium which has held for four decades and which has withstood various shifts in the party control of Congress and the White House. While Republicans have provided relatively weak support for social spending on Indian issues when compared to Democrats, both parties' representatives have generally been supportive of self-determination and local self-rule for tribes. Analysis of thousands of sponsorships of federal legislation over 1970–present, however, finds the equilibrium under challenge. In particular, since the late 1990s, Republican congressional support for policies of self-determination has fallen off sharply and has not returned. The recent change in the party control of Congress calls into question the sustainability of self-determination through self-governance as a central principle of federal Indian policy." It is important to begin to discuss strategies to reverse this trend and continue forward with the major progress in promoting self-determination that has been made on this issue since the administration of President Nixon.

V. Government-to-Government Consultation

Finally, and maybe most importantly, there needs to be continued emphasis and attention paid to the consultation process that occurs between tribes and the United States. When the United States makes decisions and implements those decisions through the Executive Branch, there can be an impact. Tribal issues are not confined simply to the Bureau of Indian Affairs. Tribes work with many agencies on many issues. For example, the Nez Perce Tribe is a natural resource intensive tribe having connections with over 11 national forests. The relationship between the Nez Perce Tribe and the United States Forest Service is extremely important. The Nez Perce Tribe has a connection through its treaty with one out of every 20 acres of forest service land or 6 percent of the entire national forest system. In addition, the Nez Perce Tribe works daily with the Bureau of Land Management, the United States Park Service, the Department of Energy through our work on the Hanford Nuclear Reservation, the Bureau of Reclamation, the Department of Commerce, the Department of Health and Human Services, the Army Corps of Engineers, the U.S. Fish and Wildlife Service and many others. The Nez Perce Tribe relies on its government-to-government relationships to ensure that the rights and privileges of the Nez Perce Tribe are protected and preserved. However, despite the best education efforts of tribes, many decisions are made by federal agencies without thoughtful consideration of the impact these decisions will have on a tribe and without proper consultation with the affected tribes. In truth, consultation should be a foundational component of decision-making by any federal agency because of the trust relationship that exists. Tribes believe there is a lack of accountability in this area when agencies make decisions and the decision to consult is too individually driven. If the will of the persons in charge are to consult, consultation happens. If the will is not there, tribes have to fight to force proper agency consultation when consultation should just be how business is conducted regardless. President Obama has worked to increase meaningful consultation and accountability during his tenure. Those ef-

forts need to continue and be supported by Congress through legislation and oversight.

Thank you for the opportunity to speak here today on this issue. Although this is a vast topic that cannot be covered in one hearing, the Nez Perce Tribe does believe that there are ways that Congress and the Executive Branch can work in coordination to reaffirm and improve the trust relationship it has with tribes.

The CHAIRMAN. Thank you very much, Mr. Baptiste.
Ms. Atcitty, please proceed with your testimony.

**STATEMENT OF SHENAN ATCITTY, LEGAL COUNSEL,
JICARILLA APACHE NATION**

Ms. ATCITTY. Thank you, Mr. Chairman. Aloha.

The CHAIRMAN. Aloha.

Ms. ATCITTY. I am Shenan Atcitty. I am from the Navajo Nation and I am a partner with the law firm of Holland & Knight. I have had the honor and privilege to represent the Jicarilla Apache Nation for more than 15 years and am happy to be here with you today. President Pesata sends his regrets that he could not be here but is very thankful for your holding this very important hearing.

A lot has been said today about the case involving the Jicarilla which is now pending before the United States Court of Federal Claims. We filed the case, the nation filed the case, more than a decade ago. So, we have been in the case for quite a while.

It is a pretty broad case involving breach of the Federal Government's duties with respect to management of their natural resources. The case has been broken into several phases. We just completed trial on Phase 1 which involves the trust funds for a particular period.

When we were before the Supreme Court last year, it was shocking and disappointing to hearing the Associate Solicitor General stand before the Justices and deny the existence of an enforceable trust relationship. I commend the panel before me which discussed a lot of the underpinnings and the principles. But in real life time, to hear that with your client in a case of significant importance, it was very disheartening.

Equally disheartening was the reaction from the Justices. It is almost as if they are willing to throw out decades and generations of case law regarding the trust responsibility and the fact that we have what would otherwise, has otherwise been considered, an enforceable trust duty when the Government is managing Tribal trust funds and Tribal trust mineral resources. There had been no doubt that certainly that is a fiduciary relationship.

But the particular issue in our case had to do with discovery. In our case, we had filed a motion to compel the Government to produce certain documents that it had claimed were protected by the attorney-client privilege. We were able to work out, the nation was able to work out, an accommodation for part of the documents at issue. But there still remains a set that the Government claimed were protected by the attorney-client privilege.

That forced us to go to court and to file a motion before the court, the motion to compel. We prevailed at the trial court. The Government appealed and the Federal Circuit supported our position and upheld the trial court's ruling. And the ruling was based on the fiduciary exception, a legal principle, a long-standing legal principle,

which would allow a trustee to see communications relating to how the trustee, would allow the beneficiary to see communications on how the trustee is managing the trust assets. That is what private fiduciary's get, banks who manage your money, you are entitled to see that information.

But for a lot of unfair reasons that we believe that were not substantiated, the Court ruled against us. We think that is very damaging. It has been very detrimental to the trust relationship. You have heard professors and practitioners explain the practical terms of what this decision has done and we think Congress should take corrective action and fix that decision.

In our written testimony we propose a narrow, streamlined fix. We think Congress could get an amendment to the American Indian Trust Reform Act and allow trustees, allow Indian trustees, to discover and see those types of communications. That is only fair. It is the right thing to do. And we look forward to working with the Committee to do that.

My remarks also cover some other areas where we probably need more Congressional oversight and attention with respect to management of natural resources and land decisions. Even outside the litigation context there are still challenges there. And a lot of it is bureaucratic resistance. Perhaps some form of ADR that is compelled by statute.

Some other hammer needs to be placed on the executives so, they know what to do but, unfortunately, when they are trying to avoid liability, those issues tend to surface higher and get more attention than actually fulfilling trust responsibilities and duties.

And with, I will conclude my remarks. Thank you, Mr. Chairman.

[The prepared statement of Mr. Pesata follows:]

PREPARED STATEMENT OF HON. LEVI PESATA, PRESIDENT, JICARILLA APACHE NATION

I. Introduction

On behalf of the Jicarilla Apache Nation ("Nation"), I am Levi Pesata and I serve as President of the Jicarilla Apache Nation. I would like to thank the Committee for convening this hearing to discuss Indian Energy Issues. The Nation is a federally recognized Indian tribe located in north-central New Mexico. Eighty-five (85) percent of the tribal population resides on the Jicarilla Apache Reservation (Reservation), mostly in the town of Dulce, which serves as our tribal headquarters. We have a tribal population of nearly four thousand (4,000) members and our Reservation consists of approximately one (1) million acres of trust land.

We have been blessed with abundant natural resources such as oil and gas, timber, water, and fish and wildlife. Fortunately, our Reservation was not subjected to the disastrous Allotment Policy initiated in the 19th Century. As a result, we do not face the difficult checker-board jurisdictional challenges encountered by those Tribes and individuals whose lands were broken apart (and in many instances lost) as part of that Federal Policy. Certainly, this consequence has been beneficial to protect and enhance our sovereign governance over our lands and to facilitate our energy development initiatives over the years. Yet, given our extremely rural location, the considerable public health and welfare needs of our people, as well as the fact that we provide governmental services not only to our tribal members but for those living near or travelling through our Reservation, the Nation has a heightened need to generate revenue to provide essential governmental services on our Reservation as well as to the surrounding rural region. Thus, we rely heavily on the development of our natural resources, primarily our oil and gas resources, to raise revenue to fund our government and provision of essential governmental services. The Federal Government has significant trust responsibilities and duties to protect our trust land and trust resources and to ensure that we obtain the maximum value for our resources.

Because of the Federal Government's failure to fulfill its trust responsibilities and duties owed to the Nation, we have been compelled to sue our trustee in various forums for breaching those trust responsibilities and duties. In one of our cases, an issue was recently decided by the U.S. Supreme Court which greatly diminished the Trust Responsibility. This decision has broad implications for all Indian tribes and is one that Congress should immediately correct. I am pleased to present the Nation's testimony on the very important issue of the United States fulfilling the Trust Responsibility to Indian tribes.

II. Background: the Origin and Foundation of the Federal Trust Responsibility

The United States has a special trust responsibility to Indian tribes, and the Federal trust responsibility has its roots in the foundation of the American Republic. In the early years of our Nation's history, the British, French, Spanish, and Russians had colonies and military forces in North America. These colonial powers entered into treaties and agreements with Indian nations. The United States sought to secure the friendship and allegiance of Indian tribes, so the American Republic sought to enter into its own treaties with Indian tribes.

In a 1778 Treaty, the United States established a military alliance with the Delaware Nation. The United States pledged to preserve "perpetual peace and friendship" and "guarantee to the . nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner" so long as the Delaware "hold fast the chain of friendship now entered into." Treaty with the Delaware Nation, 1778. The United States was anxious to repudiate accusations made by its enemies (Great Britain) that it sought to "extirpate" the Delaware and "take possession of their country."¹

In the Northwest Ordinance of 1787, Congress pledged "good faith" and protection for Indian tribes:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them . . .

(The Northwest Ordinance was followed by years of war with the Indians in Ohio, which only ended when all of their lands had been ceded and they were removed to Indiana—the original Indian territory.)

In the formative period of the United States, Secretary of War Henry Knox explained that violence by U.S. citizens against Indians violated those treaties and endangered the peace:

[W]hite inhabitants on the frontiers of North Carolina in the vicinity of Chota on the Tennessee River have frequently committed the most unprovoked and direct outrages against the Cherokee Indians [T]his unworthy conduct is an open violation of the treaty of peace made by the United States . . . [and] have arisen . . . to an actual although informal war of the white inhabitants against the Cherokees [T]he unjustifiable conduct . . . has most probably been dictated by the avaricious desire of obtaining the fertile lands possessed by the said Indians [T]he United States have pledged themselves for the protection of the said Indians within the boundaries described by the treaty and that the principles of good faith, sound policy and every respect which a nation owes to its own reputation and dignity require if the union possess sufficient power that it be exerted to enforce a due observance of the said treaty [U]nless this shall be the case the powerful tribes of the Creeks, Choctaws, and Chickasaws will be able to keep the frontiers of the southern states constantly embroiled with hostilities, and that all other tribes will have good grounds . . . for waging perpetual war against the citizens of the United States

Report of Secretary Henry Knox, July 18, 1788. Thus, Federal protection of Indian tribes and Indian lands was essential to maintain the peace of the new American Republic.

In 1791, President George Washington, in his third annual address, explained that Congress must protect Indian tribes from violence committed against them by U.S. citizens. President Washington told Congress, "[E]fficacious provision should be

¹The Delaware Nation still holds the chain of friendship with the United States though the Nation was long ago removed from its original country to Oklahoma.

made for inflicting adequate penalties upon all those who, by violating [Indian] rights, shall infringe the treaties and endanger the peace of the Union.”

As an adjunct to America’s colonial legacy, the United States asserted title to the 13 colonies based on land grants from England. It was recognized that Indian tribes held the right of occupancy to the lands undisturbed by the assertion of fee title by the Federal Government, except that Indian tribes could not alienate Indian lands without the permission of the United States. President Washington signed the first Indian Non-Intercourse Act into law to manage Indian land cessions under Federal authority: The Act of July 22, 1790 provides:

[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption of those lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Shortly after the passage of the Act, President Washington explained its import to the Seneca Nation:

I am not uninformed that the six Nations have been led into some difficulties with respect to the sale of their lands since the peace. But I must inform you that these evils arose before the present government of the United States was established, when the separate States and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered. The general Government only has the power, to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding. Here then is the security for the remainder of your lands. No State nor person can purchase your lands, unless at some public treaty held under the authority of the United States. The general government will never consent to your being defrauded. But it will protect you in all your just rights.

American State Papers 142 (1823).

President Jefferson agreed with Washington’s views on the issue of Indian lands and reauthorized the Indian Non-Intercourse Act in the Act of March 30, 1802, which provided:

[N]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution

Accordingly, the United States asserted fee titles to lands within its borders, outside the borders of the original 13 colonies, and protected the Indian right of occupancy or the beneficial interest in the land.

In the Louisiana Purchase Treaty, President Jefferson agreed that existing international treaties with the Indian tribes would be honored, until the United States, by mutual consent, had negotiated its own treaties with Indian tribes. Specifically, the Treaty provides:

The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other suitable articles shall have been agreed upon.

Louisiana Purchase Treaty, Art. VI (1803). In the aftermath of the War of 1812, the United States agreed to treat with the Indian tribes on the same basis as it had before the War. Specifically, in the Treaty of Ghent, Great Britain sought to protect Indian interests and secured the concession that:

The United States of America engage to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom they may be at war at the time of such Ratification, and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities.

Treaty of Ghent, Art. XI (1815). Following the Treaty of Ghent, the United States entered into a series of “peace and friendship” treaties with numerous Indian tribes. For example, the Treaty with the Sioux of the Lakes, 1815, provides:

Every injury, or act of hostility, committed by one or either of the contracting parties against the other, shall be mutually forgiven and forgot.

There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the said tribe . and all the friendly relations that existed between them before the war, shall be, and the same are hereby renewed.

The undersigned chiefs and warriors, for themselves, and their said tribe, do hereby acknowledge themselves and their aforesaid tribe to be under the protection of the United States, and of no other nation, power, or sovereign, whatsoever.

Taken together with the United States' assertion of title over Indian lands outside the original 13 colonies, the United States' treaty and statutory pledges of protection to Indian nations form the foundation of the Federal trust responsibility.

In the seminal Cherokee Nation cases, the State Legislature of Georgia sought to expropriate the treaty protected lands of the Cherokee Nation and force the Cherokee Nation to dissolve or remove beyond its borders. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Supreme Court denied jurisdiction over the case, explaining that it was a "political" controversy beyond the court's power and that the Cherokee Nation, as an Indian tribe, could not be considered a "foreign" nation within the meaning of the Constitution:

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

The Supreme Court explained the importance of these early treaty relations and the meaning of the United States' protection in *Worcester v. Georgia*:

[T]he strong hand of government was interposed to restrain the disorderly and licentious from intrusion into their country, from encroachments on their lands, and from the acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, no dominion over their persons. It merely bound the Nation to the British Crown as a dependent ally, claiming the protection of a powerful friend and neighbour and receiving the advantages of that protection without involving a surrender of their national character

The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. They receive the Cherokee Nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.

Worcester v. Georgia, 31 U.S. 515, 517–518 (1832). The *Worcester* Court explained further:

This treaty . . . [in] its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The Treaty of Holston, negotiated with the Cherokees in July, 1791, explicitly recognising the national character of the Cherokees and their right of self-government, thus guarantying their lands, assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.

The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among the powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth.

Worcester v. Georgia, 31 U.S. at 519. In short, the Supreme Court acknowledged the original sovereign status of native nations and recognized the treaties as evidence of the Constitution's acknowledgement of Indian nations. The United States extended Federal protection to Indian nations to prevent encroachment on Indian lands by its own citizens, and consequently, to preserve the peace.

The Trust Responsibility as a Colonial Sword

At times in the past, the United States used the Federal trust responsibility as a sword to strip Indian tribes of their lands in violation of treaties. In *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903), the Chief of the Kiowa Tribe objected to the sale of so-called "surplus land" on the Kiowa Reservation, despite the fact that the Treaty with the Kiowa, 1867 required $\frac{3}{4}$ adult male consent to any further sale of tribal lands. The Supreme Court refused the challenge, explaining:

Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands

But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations the legislative power might pass laws in conflict with treaties made with the Indians.

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Under the *Lone Wolf* doctrine, the United States sold millions of acres of Indian lands as "surplus lands," supposedly not needed by Indian tribes. From 1887 to 1934, Indian nations lost more 90 million acres of land to the Allotment Policy at issue in *Lone Wolf*, and although the United States ended the Allotment Policy, precious little land has been restored.

In 1934, Congress, through the Indian Reorganization Act, provided that tribal governments should have the right to veto any use or disposition of their land in the absence of tribal consent. Specifically, Section 16, discussing powers of Indian

tribes, provides, "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest . . . the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. sec. 476.

Historical abuses of the Federal trust responsibility were limited in the 20th Century by the Courts and Congress. For example, in *Shoshone Tribe v. United States*, 299 U.S. 476 (1937), the Shoshone Tribe sued the United States for allowing the Arapaho Tribe to live on and claim a one-half interest in the Wind River Reservation, which had been reserved to the Shoshone by Treaty. The United States argued that the Treaty had a provision to allow for the settlement of friendly Indians on the reservation, so the placement of another tribe, such as the Arapaho, had been contemplated by the treaty. The Supreme Court rejected that argument:

Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. The power does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation; * * * for that would not be an exercise of guardianship, but an act of confiscation. The right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is as sacred as that of the United States to the fee. Spoliation is not management.

Accordingly, the *Shoshone Tribe* Court authorized an award of damages by the court below on remand in accordance with the 5th Amendment.

Similarly, in *Sioux Nation v. United States*, 448 U.S. 371 (1980), the Supreme Court held that the United States Congress had not acted in good faith as a trustee when it took the Black Hills from the Sioux Nation. Rather, the Federal Government had engaged in an exercise of dishonorable dealing by taking the Sioux Nation land without just compensation. Accordingly, the Supreme Court ruled that the Sioux Nation was entitled to compensation under the 5th Amendment.

The Federal Trust Responsibility as a Shield

At times, the Federal trust responsibility has been used as a shield to protect Indian tribes from third-party depredations. For example, in *United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), the United States sued Santa Fe Railroad for possession of the aboriginal Indian land of the Hualapai and for back rent from Santa Fe Railroad for its trespass on the lands. The Court ruled in favor of the United States and the Hualapai explaining:

Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with by the United States . . . [T]he Indian right of occupancy is considered as sacred as the fee simple of the whites It would take plain and unambiguous action to deprive the Walapais of the benefits of that policy. For it was founded on the desire to maintain just and peaceable relations with Indians. The reasons for its application to other tribes are no less apparent in case of the Walapais, a savage tribe which in early days caused the military no end of trouble.

The Court found no clear congressional action extinguishing the Hualapai title to the land, the Railroad surrendered the land to the United States, and the Court ordered an accounting for back rents due to the Tribe.

The United States has also acted to protect tribal mineral interests and natural resources, and when Federal law provides protection for Indian lands and mineral leases, lessees must strictly comply with the law. In *United States v. Noble*, 237 U.S. 74 (1915), the United States sued Noble for entering into an unauthorized lease with Quapaw Indian allottees. The Court explained the United States authority to act on behalf of the Quapaw:

The Quapaws are still under national tutelage. The government maintains an agency, and, pursuant to the treaty of May 13, 1833 (7 Stat. at L. 424), an annual appropriation is made for education and other assistance (37 Stat. at L. 530, chap. 388). In 1893, the Quapaw National Council made provision for allotments in severalty which were to be subject to the action of Congress, and in the act of ratification of 1895 Congress imposed the restriction upon alienation which has been quoted. The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees; and, where Congress has imposed restrictions upon the alienation of an allotment, the United States

has capacity to sue for the purpose of setting aside conveyances or contracts by which these restrictions have been transgressed.

The allottees had authority to lease their lands for ten years, and the allottees had been induced to enter into a series of overlapping mineral leases of ten years for five years in a row, with the final lease being an overlapping lease for a term of twenty years. The Court viewed the overlapping leases in an unfavorably: "The practice, to say the least, is an abnormal one, and it requires no extended discussion to show that it would facilitate abuses in dealing with ignorant and inexperienced Indians" The *Noble* Court held that Congress had not authorized "overlapping leases":

The rents and royalties were profit issuing out of the land. It was the intent of Congress that the allottees, during the period of the restriction, should be secure in the actual enjoyment of their interest in the land. The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute

The allottee, as we have seen, is under an absolute restriction with respect to his reversion for a period of twenty-five years from the date of his patent. In the light of this restriction, and of the governmental policy which induced it, there is sound reason for construing the power as not authorizing anything more than a lease in possession, as well understood in the law. At common law, as the government points out, it was the established doctrine that a tenant for life, with a general power to make leases, could make only leases in possession, and not leases in reversion or in futuro. He was not authorized by such a power to make a lease to commence 'after the determination of a lease in being. Such a lease was deemed to be reversionary. A general power to lease for a certain number of years without saying either in possession or reversion, authorizes only a lease in possession, and not in futuro. Such a power receives the same construction as a power to make leases in possession. What is expressed in the one is understood in the other

We are unable to see that the allottee under the power in question has any better position. The protection accorded by Congress, through the restriction upon the alienation of the allottee's estate—modified only by the power to lease as specified—was not less complete, because the limitation was not in the interest of a remainderman, but was for the benefit of the allottee himself as a ward of the Nation. The act of 1897 gives him authority 'to lease' for a term not exceeding the stated limit. Taking the words in their natural sense, they authorize leases in possession, and nothing more. The language does not compel the recognition of leases which are to take effect in possession many years after their execution, if, indeed, it could be assumed that they were not intended to be concurrent. Such leases certainly violate the spirit of the statute, and according to the analogies of the law, they violate its letter.

The Court found that the "overlapping leases" violated the congressional requisites for the Indian land leases, and accordingly, the Court held that the leases were void.

The Scope of Federal Laws Are Sometimes Limited to Protect the Federal Trust

Indian treaties, statutes, executive orders, court decisions and administrative rulings provide a body of law that forms the backdrop for the trust responsibility and the Federal trust is a venerable doctrine with roots reaching to the foundation of the American Republic. On occasion, the Supreme Court has limited the scope that Federal laws would otherwise have in Indian country, based upon the Federal trust responsibility.

For example, in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the United States did not have authority to try Crow Dog for the murder of Spotted Tail, a well recognized Lakota Chief, because the treaty reserved crimes by one Indian against another to tribal justice systems. The Supreme Court explained:

And congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.' It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all—that

of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.

Accordingly, the Court held that the general Federal statutes against murder did not apply in the killing of one Lakota Indian by another, since the 1868 Treaty with the Sioux Nation reserved such crimes to tribal law.

In the area of taxation, the Supreme Court decided in *Squire v. Capoeman*, 351 U.S. 1, 7-10 (1956), that the proceeds of timber sales from allotted trust lands on the Quinault Indian Reservation were not subject to Federal capital gains taxes. The Court explained: "The Government urges us to view this case as an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians." The Court agreed that, outside the areas governed by treaty and remedial legislation, Indians are citizens and in ordinary affairs of life are treated as other citizens. Yet, the Court found that taxation of Indian trust lands was the subject of treaty and remedial legislation:

Congress, in an amendment to the General Allotment Act, gave additional force to respondents' position. Section 6 of that Act was amended to include a proviso—

That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent * * *.

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. The fact that this amendment antedated the federal income tax by 10 years also seems irrelevant. The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

The first opinion of an Attorney General touching on this question seemed to construe the language of the amendment to Section 6 as exempting from the income tax income derived from restricted allotments. And even without such a clear statutory basis for exemption, a later Attorney General advised that he was—

(Unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.

Two of these opinions were published as Treasury Decisions. On the basis of these opinions and decisions, and a series of district and circuit court decisions, it was said by Felix S. Cohen, an acknowledged expert in Indian law, that it is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom. These relatively contemporaneous official and unofficial writings are entitled to consideration

The wisdom of the congressional exemption from tax embodied in Section 6 of the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which the cutting is made. Once logged

off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be at the least, a sorry breach of faith with these Indians.

In short, the Federal trust responsibility provides the overarching principle for Federal law relating to Indian trust lands, natural resources, and trust property. Other Federal law must be interpreted in light of the Federal trust responsibility when it applies to Indian lands, natural resources, trust property, or tribal self-government.

Federal Accountability Under the Federal Trust Responsibility

In the 20th Century, the Supreme Court has held that the United States should be held to the exacting standards of a fiduciary in its treaty and trust relationships with Indian tribes. In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), the Seminole Nation sued the United States for failing to protect the treaty payments and annuities due to the Nation. The Supreme Court, relying on the traditional standards for common law trustees, explained:

It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary. The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. *In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.* Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

(Emphasis added). Accordingly, the Supreme Court remanded the case back to the lower courts with instructions to determine whether the United States had made payments with the knowledge that they would be wasted and a provide a recovery for the Seminole Nation, if that were the case.

The Federal trust responsibility has also been a means to hold the United States accountable for its management of Indian resources, when Congress has created a statutory framework for management of those resources. In *United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II), the Supreme Court held that individual Indian allottees could sue the United States for breach of trust based on mismanagement and waste of timber resources where Congress had enacted a statute providing a comprehensive framework for management of the timber resources and the primary elements of a common law trust were present: a trustee (the United States), a beneficiary (Indian allottees), and a trust corpus (Indian timber, lands, and funds). The Court explained:

The timber management statutes, 25 U.S.C. 406–407, 466, and the regulations promulgated thereunder, 25 CFR Part 163 (1982), establish the “comprehensive” responsibilities of the Federal Government in managing the harvesting of

Indian timber. The Department of the Interior—through the Bureau of Indian Affairs—exercises literally daily supervision over the harvesting and management of tribal timber. Virtually every stage of the process is under federal control [T]he statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). “Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” . . .

Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” This principle has long dominated the Government's dealings with Indians.

Thus, in the 20th Century, the Supreme Court drew on common law trust principles to ensure the United States' accountability for the management of Indian lands, natural resources and trust property.

The Federal Trust Responsibility and the Indian Minerals Leasing Act

In 1924, U.S. Attorney General Harlan F. Stone ruled that executive order Indian lands could not be leased as public lands because *the governing Indian tribe owned the beneficial interest in the mineral estate.*²

In 1938, Congress enacted the Indian Mineral Leasing Act (IMLA) to provide general governance of mineral leasing on Indian lands.³ Federal Courts explain that: “[T]he United States, acting to safeguard the Indians in the conduct of their affairs, has established a comprehensive statutory and regulatory scheme covering mineral leasing on tribal lands.”⁴ The basic purpose of the IMLA is to “maximize tribal revenues from reservation lands.”⁵ The IMLA provides that:

[Tribal lands] may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council . . . for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities, that [l]eases for oil and or gas-mining purposes . . . shall be offered to the highest responsible qualified bidder at public auction or on sealed bids.⁶

Under the IMLA, the Secretary serves as both the administrator and the trustee of tribal government oil and gas resources. Acting for the Secretary, the BIA Superintendent must take the Indian tribe's best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors that may affect tribal interests, including long-term economic interests, conservation of tribal mineral resources, and production.⁷ The Secretary's regulations implementing the IMLA explain:

These regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental or cultural impacts resulting from such development.⁸

² 34 Op. Att'y Gen. 171 (1924).

³ U.S.C. § 396a–396g.

⁴ *United States v. 9,345.53 Acres of Land, Etc.*, 256 F. Supp. 603 (W.D.N.Y. 1966).

⁵ *Kerr McGee v. Navajo Nation*, 471 U.S. 195, ____ (1985).

⁶ *United States v. 9,345.53 Acres of Land, Etc.*, 256 F. Supp. at 605 (quoting 25 U.S.C. sec. 396a–396d).

⁷ *Kenai Oil and Gas v. Dept. of Interior*, 671 F.2d 383 (10th Cir. Utah).

⁸ 25 C.F.R. § 211.1(a).

Oil and gas leases on Indian lands entered into under the authority of the IMLA, and which violate the IMLA are void.⁹

The IMLA and its implementing regulations establish a comprehensive Federal law framework for the management of Indian trust resources, and the BIA and the Interior Department are involved in the daily management of Indian mineral resources under the Act. The basic elements of a common law trust are present: the trustee (the United States), the beneficiary (the Indian tribe), and the trust corpus (the Indian minerals, lands, money and funds). Thus, the IMLA imposes fiduciary obligations on the United States acting through the Secretary in order to maximize mineral revenues for Indian tribes.

In *Jicarilla Apache Tribe v. Supron Energy, Southland Royalty, and Secretary Hodel*, 782 F.2d 855 (10th Cir. 1986), the Jicarilla Apache Tribe sued Supron, Southland and Secretary Hodel for failing to properly value and account for oil and gas royalties due to the Jicarilla Apache Tribe under IMLA mineral leases. Comparing the IMLA to the timber statutes and regulations at issue in Mitchell II, the 10th Circuit *en banc* explained:

Leasing of minerals located on Indian reservations is also a creature of federal statute. As in timber harvesting, the federal government's role in mineral leasing is pervasive and its responsibilities comprehensive. The Indian Mineral Leasing Act of 1938, 25 U.S.C. Secs. 396a–396g (1976), requires the Secretary to: set the “terms” and “conditions” for leasing, *id.* Sec. 396b; approve leases, *id.* Sec. 396a; establish lease sale procedures, *id.* Sec. 396b; reject unsatisfactory bids, *id.*; require satisfactory performance bonds of lessees, *id.* Sec. 396c; promulgate rules and regulations governing “all operations” under leases, *id.* Sec. 396d; and approve leases for subsurface storage when necessary to avoid waste, or to promote conservation of resources, or to protect tribal welfare, *id.* Sec. 396g. The evident purpose of the statute is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing.

This interpretation is supported by the Act's legislative history. When the Act was proposed, the Secretary of the Interior urged that the legislation be enacted because “it is not believed that the present law is adequate to give the Indians the greatest return from their property.” Senate Report No. 985 at 2 (1937); House Report No. 1872 at 2 (1938). Congress responded to the need to ensure that the Indians' welfare be protected and their natural resources be managed to the tribes' maximum benefit by emphasizing the Secretary's fiduciary obligations, directing the Secretary to approve lease sales only when they are “in the interest of the Indians.”

Interior has promulgated extensive regulations for managing leases under the Act. See 25 C.F.R. pt. 211 (1982). The regulations stress that the Secretary must act in the best interests of the tribes. See, e.g., *id.* Secs. 211.3(b), .6(a), .9(b)(1), .12(a), .19, .21(a), .22, .27. Additional regulations, published in 30 C.F.R. Part 221, require the government to maintain comprehensive records of price and production, and to determine royalties. 30 C.F.R. Sec. 221.12. These regulations detail in exhausting thoroughness the government's management and regulatory responsibilities. See *id.* pt. 221.

Because the statutes and regulations contain such an explicit and detailed enumeration of duties, in my view Mitchell II compels the conclusion that Congress intended the Secretary to be a trustee.

The 10th Circuit ruled that the Secretary breached his trust responsibility to the Jicarilla Apache Tribe by failing to administer royalty payments for the Tribe's gas resources in a manner that would maximize the return to the Tribe. In addition, the Court upheld the trial court's determination that the Secretary had breached his trust responsibility by failing to insure that lessees complied with the terms of tribal oil and gas leases and by being negligent in monitoring for potential drainage by lessees.

The Administration's Stated Policy

For the past 30 years and more, the Executive Branch and Congress have promoted the Federal government-to-government relationship with Indian tribes. The guiding executive branch pronouncement on this policy is President Clinton's Executive Order 13175 (2000), which directs Federal agencies in their dealings with Indian tribes to be guided by the fundamental principles that:

⁹See *Kenai Oil and Gas v. Dept. of Interior* at 607–608 (The leases in question, entered into in violation of the provisions of sections 396a, 396b, 396c, and 396d . . . are void).

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

More specifically, agencies are directed to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribes.” The Bush and Obama Administrations have pledged to honor the Clinton Executive Order on Consultation and Collaboration with Indian Tribal Governments.

III. Breach of Trust Case—Fiduciary Exception

In January 2002, the Jicarilla Apache Nation filed a breach of trust suit against the Federal Government in the U.S. Court of Federal Claims (CFC) for mismanagement of the Nation’s trust funds and trust assets. The trust funds at issue are held in trust and managed by the United States for the Nation.

From December 2002 to June 2008, the Government and the Nation engaged in an alternative dispute resolution process. During this time, the parties produced thousands of documents. The Government withheld 226 potentially relevant documents claiming that they were protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or the deliberative-process privilege.

With no apparent end to the ADR process, in 2008 Nation requested that the case placed on the active litigation docket. The CFC divided the case into phases for trial and set a discovery schedule. The first phase involves the Government’s management of the Nation’s trust fund accounts from 1972 to 1992 and our claim that during this period the Government failed to invest its trust funds properly, by failing to maximize returns on our trust funds, investing too heavily in short-term maturities, and failing to pool our trust funds with other tribal trusts. During the discovery process, the Nation filed a motion to compel the Government to produce the 226 withheld documents. The Government withdrew its deliberative-process privilege claim and agreed to produce 71 documents, but continued to invoke the attorney-client privilege and attorney work-product doctrine for the remaining 155 documents. Among other claims, the Government maintained that those documents contained advice given by the Department of the Interior Solicitor’s Office (and other federal legal offices) about acceptable investments for tribal trust assets.

The Nation asked the CFC to require the Government to produce these documents on the basis of the “fiduciary exception” to the attorney-client privilege, a well-established exception in the common law of trusts. It provides that a trustee cannot withhold from the beneficiary any legal advice about the management of trust assets. The justification for this exception is two-fold. First, the trustee is not the exclusive client of the attorney rendering advice, but rather is obtaining that advice as a representative of the trust’s beneficiaries. Thus, the trustee does not have an attorney-client privilege that would exclude the beneficiary from access to the legal advice. Second, the trustee has a duty to disclose all information related to trust management to the beneficiary. This duty overrides the attorney-client privilege, especially where the information sought by the beneficiary is relevant to an alleged breach of a fiduciary duty.

The CFC accepted the Nation’s “fiduciary exception” argument and ordered the Government to produce the attorney-client documents to the Nation. The Government appealed the CFC’s ruling to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the CFC’s ruling. The Government sought review by the Supreme Court. The Court agreed to hear the appeal and heard oral arguments in April 2011.

It’s important to note that the Nation had a strong legal basis for seeking court ordered production of these documents. At that point, several decisions by federal

courts had favorably applied the “fiduciary exception” to the Government in previous breach of trust cases. Moreover, the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit agreed with our position. All of the appellate litigation was instigated by the Government in an apparent attempt to create an adverse precedent that it could rely on in defending against the other pending tribal trust lawsuits.

The Supreme Court’s Decision

On June 13, 2011, in a 7–1 decision, the Supreme Court unfortunately ruled in the Government’s favor with respect to whether the “fiduciary exception” can be applied to the Government. *See* 131 S.Ct, 2313 (2011). The majority held that tribes suing the Government for breach of trust cannot require the Government to disclose documents containing legal advice the Government obtained regarding the management of tribal trust assets.

Justice Sotomayor agreed with the Nation’s position and expressed her views in a dissenting opinion. (One Justice, Elena Kagan, recused herself and did not participate in the decision of the case because she had served as the United States Solicitor General when this case was making its way through the appeals process).

The majority opinion, written by Justice Alito, ruled that when the Government manages Indian trust property, including trust funds, it does not act as a private trustee and is not subject to the general common law trust principles that are applicable to private trustees. Rather it acts in its sovereign capacity as Government and in the furtherance its own sovereign interests:

Although the Government’s responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.

Id. at 2318. Accordingly, the majority held that the Government is not subject to the common law “fiduciary exception.”

The majority reasoned that the two justifications for the “fiduciary exception” do not apply to the Government. First, when the Government obtains legal advice regarding the management of Indian trust funds, it does so not as a mere representative of the Nation, but in its own sovereign capacity and in furtherance of its own interests. “For that reason,” the majority held, “when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a ‘personal’ rather than a fiduciary capacity.” *Id.* 2327–28. That advice is privileged and not subject to disclosure.

Second, the majority held that the Government does not have a general common law duty to disclose information to Indian trust beneficiaries. The majority stated that “common-law principles are relevant only when applied to a ‘specific, applicable, trust-creating statute or regulation.’” *Id.* at 2329. In this case, the majority held that the relevant statute—25 U.S.C. § 162a(d)—requires disclosure of periodic statements of trust fund performance and account balances, but it does not require the disclosure of all information related to the administration of the trust funds. The majority stated: “We will apply common-law trust principles where Congress has indicated it is appropriate to do so.” *Id.* at 2340. In view of the limited duties mandated by Congress in 25 U.S.C. § 162a(d), the majority refused to apply common-law trust principles to require the disclosure of additional information.

Finally, the majority noted that the Government pays for legal advice out of its own funds, instead of trust funds, and that the documents containing the advice are “the property of the United States.” *Id.* at 2330. The Court considered these to be significant factors in deciding who ought to have access to the documents.

Justice Ginsburg wrote a concurring opinion that was joined by Justice Breyer. They said the majority opinion went too far by indicating that the government may have the power to withhold additional documents from tribes (in addition to documents protected by the attorney-client privilege).

Justice Sotomayor wrote a dissenting opinion. She said that the statutory framework governing Indian trust funds is adequate to allow courts to apply general trust principles, including the common law duty to disclose information to trust beneficiaries:

We have never held that all of the government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship be-

tween the government and an Indian tribe bears the hallmarks of a conventional fiduciary relationship, we have consistently looked to general trust principles to flesh out the government's fiduciary obligations.

Id. at 2339.

Implications of the Court's Decision

This decision is extremely disappointing. It prevents Indian tribes from obtaining information about the management of their trust assets that is available to "private" trust beneficiaries who sue their trustees for breach of trust. It turns Indians into "second class beneficiaries" in terms of their rights to receive information and to assess their trustee's performance of its fiduciary obligations. The Supreme Court held that the United States is different from other trustees and is not bound by the same rules. The Supreme Court majority discussed in abstract terms how the Government, as a "sovereign," is different from other trustees and stated that "the Government has too many competing legal concerns" to permit a case-by-case inquiry as to whether it has to balance competing interests in a particular case. This rationale is astounding in light of the fact that there were NO competing interests set forth in the record.

The decision is also troubling because it limits the applicability of general trust law principles to the Government's management of Indian trust assets. The majority stated that "common-law principles are relevant only when applied to a 'specific, applicable, trust-creating statute or regulation,'" and further that the courts will only "apply common-law trust principles where Congress has indicated it is appropriate to do so." Previously, the Court had required specific trust-creating statutes only to establish jurisdiction under the Tucker Act for claims for money damages. The Court's decision now appears to impose this requirement on all trust claims against the Government, including claims for non-monetary relief, like the Nation's claim for the production of documents in this case.

The majority asserted that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." Justices Ginsburg and Breyer, in their concurring opinion, criticized this language as being unnecessarily broad. Justice Sotomayor, in her dissent, expressed fear that the Court's decision may "reinvigorate the position of the dissenting Justices in [the Court's] previous decisions in *White Mountain Apache and Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes." From now on, the Government will cite this language to attempt to minimize its fiduciary duties to Indians and to avoid liability for its mismanagement of Indian assets.

As Andrew Cohen wrote in the *Atlantic*, an unsettling theme that emerges from the Supreme Court's opinion is that the "trust" relationship between the Government and Indians "is less about 'trust' and more about the exercise of [the Government's] sovereign authority over a vanquished people."

Legislative "Fix"

We are very disappointed by the Supreme Court's decision and concerned about the negative implications on the Trust Responsibility as well as the detrimental impact for other Indian tribes. Fortunately, Congress can correct this decision through legislation. We suggest that Congress amend the American Indian Trust Fund Management Reform Act of 1994, by adding a new provision to 25 U.S.C. 162a(d):

New provision: (9) Providing Indian tribes, upon request, with any documents relating to the Secretary's management of the tribe's trust funds and natural resources except for work product relating to litigation or potential litigation between the United States and a tribe or individual Indian.

We strongly believe that Congress should immediately take action to correct this detrimental decision.

IV. Trust Responsibility: Trust Lands and Mineral Resources

The Nation also takes this opportunity to raise a set of other trust responsibility issues which relates to our trust land and mineral resources.

Oil and Gas Exploration and Production

The Nation continues to experience challenges with oil and gas lease compliance primarily due to the large amount of acreage under lease and/or production, the number of wells in service, the extensive gas gathering systems operating throughout the Reservation, the large number of operators and related vendor service providers on the Reservation, to name a few. Under these circumstances, there is an

acute need for additional regulatory oversight including enhanced federal coordination with the Nation and increased funding to fully support tribal regulatory needs.

As discussed above, oil and gas leasing activity on our Reservation is conducted in accordance with the IMLA or the IMDA, and through these laws, Congress created a statutory fiduciary relationship, whereby the government acts as a trustee for the tribes in the context of mineral leasing of tribal trust resources. Accordingly the three separate agencies within the Department of Interior (Department) have jurisdiction over Indian leasing: the Bureau of Indian Affairs (BIA), the Bureau of Land Management (BLM), and the Office of Natural Resources Revenue (ONRR). The Nation exercises concurrent regulatory jurisdiction with these federal agencies over oil and gas leasing activities, and the Nation imposes and collects tribal severance taxes.

Yet, though we have made tremendous progress of the years working with our federal partners, the Nation believes there is room for improvement as far as coordination in the management and regulation among the Nation and the federal agencies. The Nation requests that Congress exercise oversight to consider a reform of current policies, procedures, practices and systems of the Department, the BIA, the BLM, and the ONRR in order to ensure the proper and efficient discharge of the Secretary's trust responsibilities regarding oil and gas leasing on our Reservation.

Bankruptcy Filings by Oil and Gas Lessees

The Nation is concerned about the bankruptcy filings involving entities that hold or assert rights to IMLA leasing interests covering thousands of acres on our Reservation. In some cases, it is apparent that these bankruptcy filings have been pursued as a means to circumvent federal and tribal laws. The Nation has already been involved in several bankruptcy proceedings to protect our interest in these IMLA leases. To address this alarming circumvention of federal law and regulations, the Nation proposes that legislative or administrative fixes be put into place. Specifically, the law should be made clear that prior to any assignment or assumption of tribal oil and gas leases, especially in the context of bankruptcy cases, both the tribal mineral owner and the BIA must review and duly approve. A related issue is compliance by industry and enforcement by the BIA. It is important that Congress protect the integrity of IMLA leases by ensuring that federal and tribal oil and gas regulatory authority is not diminished through bankruptcy filings.

Split Mineral Estate Development

An important aspect of the trust responsibility is to protect the integrity of the Nation's sovereignty and control of our lands and the development of our resources. This extends to the development of the split mineral interests on our Reservation. As noted above, our Reservation was not subject to the Allotment Policy and Law and therefore we retain 100 percent of the surface and mineral estate of our original Executive Order lands. However, the Nation subsequently purchased several large ranches adjacent to the Reservation and such lands and minerals were taken into trust and added to the Reservation. One particular ranch was taken into trust subject to a split mineral estate.

As background, in 1985, the Nation purchased a 55,000 acre ranch contiguous to our northeastern boundary. At the same time, we purchased an approximate undivided twenty-five percent (25 percent) interest in and to all oil, gas, and other minerals owned by the seller, who held seventy-five percent (75 percent) of the mineral estate. A third party entity holds the other twenty-five percent (25 percent) of the mineral interests. In November 1987, the Nation conveyed the surface lands of this property to the United States, to be held in trust. In December 1987, the Nation conveyed its interest in the mineral estate to the United States. On or about March 10, 1988, pursuant to 25 U.S.C. § 465, the United States accepted these conveyances and approved the trust status of the surface lands and the Nation's undivided interest in the subsurface mineral estate. On or about September 1, 1988, pursuant to 25 U.S.C. § 467, the United States added the surface lands and the Nation's undivided interest in the subsurface mineral estate to the Reservation. *See, Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation*, 53 Fed. Reg. 37355-02 (Sept. 26, 1988).

In 2006, more than twenty years after the Nation purchased the ranch and eighteen years after the United States took into trust the surface lands and mineral interest the Nation purchased, the owner of the majority mineral interest entered into a lease with a third party for mineral development. The lease was not reviewed by the Nation or the BIA even though it purported to lease the Nation's trust lands and its undivided trust mineral interest. BIA is responsible to review and approve the leasing of tribal lands and mineral resources, and is further required to secure

our consent. The failure to exercise these trust duties constitutes a breach of the Federal Government's trust responsibility.

Incidentally in July 2006, the Solicitor's Office of the Department of the Interior essentially determined that neither the Nation nor the United States could "stop" development, which has led to a confusing opinion creating more questions than answers. In particular, the Solicitor's opinion ignores Supreme Court decisions, which clearly hold that Indian trust land cannot be leased or otherwise encumbered without the approval of Congress. Congress has passed statutes which provide such approval subject to important protections, such as the IMLA and the Indian Reorganization Act. The fundamental reason for these laws is that the United States to hold title to Indian trust land, and therefore, the United States must protect the beneficial interest of the Indian nation. The Nation requested that the Solicitor rescind or modify its legal opinion and further requested to meet directly with the Solicitor. Our requests were not granted, though the law is clear that both federal approval and tribal consent are required prior to any development or encumbrance of tribal trust minerals. Congress should exercise its oversight authority over the Department of the Interior to ensure that these important and fundamental principles are fully adhered to, especially in our case where we have worked so hard to protect reservation lands.

Dual Taxation of Oil and Gas Production in Indian Country

Our Nation heavily depends on our oil and gas production as the primary means of generating governmental revenue. Our Reservation is located in the San Juan Basin, a well-known prolific source of oil and gas production for over seventy (70) years. Oil and gas development began on our Reservation during the 1950's, under the leasing authority of the Secretary of the Interior pursuant to the IMLA. Throughout those early years, the Secretary negotiated and entered into oil and gas IMLA leases on the Nation's behalf leaving us with a modest royalty interest in the development and production of our oil and gas reserves. In the 1970's and 1980's the Nation became more active in the development of our resources and won a significant legal ruling in the U.S. Supreme Court in 1982. In that seminal case, *Jicarilla Apache Tribe v. Merrion*, 455 U.S. 130 (1982) the U.S. Supreme Court recognized our inherent right to regulate our lands and resources within our Reservation, and upheld our sovereign authority to impose our own severance tax on the production of our oil and gas resources. That same year, Congress passed the Indian Minerals Development Act (IMDA) which authorized Tribes to negotiate energy deals directly, though subject to Secretarial approval. The tremendous impact of the *Merrion* case coupled with the enactment of the IMDA provided our Nation and other Tribes powerful resources and tools to expand our energy development initiatives.

Following our victory in the *Merrion* case, the Supreme Court considered another case arising from our Reservation which involved an oil and gas company's challenge to the imposition of the New Mexico Oil and Gas Severance Tax for activities on the Reservation arguing that those taxes were preempted by the State and Tribal regulatory schemes. In that case, States were granted permission to impose severance taxes on non-Indian activities involving the on-reservation production of Indian oil and gas reserves in the 1989 United States Supreme Court decision *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), which established a dual taxation burden on tribal non-renewable trust resources.

Three years later, Congress acknowledged the problem with this type of dual taxation. In the Energy Policy Act of 1992, Pub. L. 102-486, an Indian Energy Resources Commission ("Commission") was established. Among several other objectives, the Commission was to (1) develop proposals to address the dual taxation of the extraction of mineral resources on Indian reservations; (2) develop proposals on incentives to foster the development of energy resources on Indian reservations; (3) identify barriers or obstacles to the development of energy resources on Indian reservations, (4) make recommendations designed to foster the development of energy resources on Indian reservations and promote economic development; and (5) develop proposals on taxation incentives to foster the development of energy resources on Indian reservations including, but not limited to, investment tax credits and enterprise zone credits.

In June 2001, the Nation attempted to address the dual taxation issue working with our then senior Senator, Pete Dominici, who introduced S. 1106, a bill to provide a tax credit for the production of oil or gas from deposits held in trust for, or held with restrictions against alienation by, Indian tribes and Indian individuals. A year later, the National Congress of American Indians passed Resolution #BIS-02-060 to include S. 1106 in the National Energy Bill during conference between the United States House of Representatives and the United States Senate. However,

the proposed bill was referred to the Committee on Finance, and was not passed into law.

To date, the issues the Commission was to address have not been fully addressed by either the Commission or Congress. As tribes increase their economic development efforts, issues with dual taxation also increase. Dual taxation is an impediment and deterrent to economic development on Indian trust and restricted land. Dual taxation of tribal oil and gas reserves creates an adverse economic environment which impedes self-determination and strong economic development in Indian Country. The United States Congress has the power to address the dual taxation of tribal non-renewable resources by providing a Federal tax credit for the production of tribal resources, much like the one Senator Dominici introduced in the 107th Congress.

It is important to note that the State of New Mexico enacted a state severance tax credit for producers who developed new wells after 1995. This is an important incentive to address the dual taxation issue. However, it is also important to note that the many of the existing wells on the Nation's lands were placed in service prior to 1995, and that many other States with oil and gas producing tribal lands do have similar law in place.

Thus, the enactment of a Federal tax credit for the production of oil and gas produced on Indian lands would be helpful in addressing this problem. The creation of such a tax credit would not only address the dual taxation of tribal non-renewable resources, but would also help stimulate tribal economies, and contribute to the United States energy policy of boosting domestic production to decrease reliance on foreign production. It is truly ironic that, as America seeks greater energy independence and undertakes hazardous energy sources such as nuclear energy and off-shore drilling, Federal caselaw burdens the development of safe Native American energy resources with dual taxation. This must end.

We respectfully request an opportunity to work with you to craft a provision outlining Federal tax credit for the production of oil and gas produced in Indian Country. This will certainly strengthen the trust responsibility to protect tribal trust lands and mineral resources.

V. Conclusion

In closing, the Nation appreciates the opportunity to appear before this Committee and provide testimony on this extremely important subject. We look forward to working with the Committee to strengthen and enhance the Trust Responsibility.

The CHAIRMAN. Thank you very much, Ms. Atcity.

Mr. Halbritter, in your testimony you stated that "flawed implementation" of the trust responsibility is where Tribes are most affected. What can Congress and the Administration do to improve implementation of the trust responsibility?

Mr. HALBRITTER. Well, we are recommending that a review commission be established. One was in the past, but one that can investigate and be empowered to help understand this issue better.

In our particular situation, local governments, State and local governments, contradict the intent of the way our protections and our treaties and the trust responsibility exist. And oftentimes the Government ignores our request, despite our treaty guarantees, to have the opportunity to be protected, the opportunity to be heard, the opportunity to appeal to the Federal Government. It is right in our treaties which as we know by the Constitution are the supreme law of the land.

The Federal Government often, our position is often determined by their will, or lack of will, to involve themselves as a moderator when we are in conflict with State and non-Federal governments. And oftentimes, as we know, the facts determine the outcome of a case. And a lot of times our issues are overtaken by lawyers.

And so, when the issue is shaped by the local courts, we are the minority in this Country. The locals will always be in the majority. They will always have the more popular will opposing us in a conflict. That is where the Federal trust responsibility is critical, to

help moderate and alleviate the change in leverage in your relationship.

Every case now that comes before this court that is alienated from Indian life, I mean, I do not know if any of these courts often really know what is going on in the communities and as a result what is decided in the courtroom is somewhat limited. Whereas the Federal Government has representatives that can visit Indian reservations, can talk to Indian people and get to the heart of the issue and help when our position is so impeded by the fact that we do not represent the majority where we are located. We are the minority. We are often picked on and vilified when there is an issue.

And the media also plays into that as well. Sure, we do not expect Congress to be able to do anything about the media, but they can certainly have a role and they have an obligation under law and a duty by honor as well to work with Indian nations to resolve these issues. And that is our preferred choice. It is not to be in the courts but to be at a table where we can negotiate and discuss these things just like the original relationships were established by negotiation and treaty.

The CHAIRMAN. Thank you very much.

President Sharp, you are a member of the Commission on Indian Trust Administration and Reform that was created by the Department of Interior following the Cobell settlement. Can you describe what the end product will be for the Commission? And what impact you think that will have on Tribal governments and the Indian people?

Ms. SHARP. Thank you for that opportunity and question, Chairman.

We have had many discussions about our preliminary work, about organizing the Commission and certainly are looking at the goals of the Commission. The goals include providing a comprehensive evaluation of the trust services, management functions. We hope to deliver a very well thought out, a very well informed set of recommendations following a comprehensive evaluation.

We have recognized that there is not going to be a single person that is going to have enough expertise to look at the entire system, that we are going to have to reach out to subject matter experts in leasing and various other topics that are going to require expertise.

So, we hope to deliver not only a set of recommendations that is going to provide a roadmap for all to look at, how we can adjust, realign and redefine that relationship with the United States, but those recommendations are going to be based on a sound evaluative process, a very deliberative evaluative process, and a process that includes the direct engagement of Tribal leadership, Tribal organizations and individual allottees.

We have an approach in which we are going to be reaching out to those in Indian Country . They have four hearings that are set to go out into the field, four listening sessions. And so, we are hoping that we can deliver not only a product that is going to be comprehensive but one that will be useful.

And to your second question of what value will that have for Indian Country , we believe that if these recommendations and evaluation is Tribally driven, not Administratively driven, that there is

going to be a vested interest in the outcome and Tribal leaders will be able to work into the, work in partnership with, the Commission. Recommendations are going to be real, they are going to be meaningful and they are going to make a difference in the future relationship that we have with the United States.

The CHAIRMAN. Thank you very much.

Vice-Chairman Baptiste, given the Department of Interior's recent efforts in settling long-standing trust mismanagement cases, what do you think the next step is to affirm the trust relationship between the Federal Government and Tribes?

Mr. BAPTISTE. I thank you for that question. I believe that, you know, this sets a tone for further involvement in Tribes. It also evaluates and sets a standard that might guide those Tribes. And those individual Federal agencies, they have also implemented their own government-to-government capabilities to work with Tribes across the Nation.

I think that the Nez Perce Tribe, in its own, we have our own government-to-government consultation process. I think a lot of the Tribes across the Nation would be able to develop their own, to be able to guide themselves. That way you can implement that when a Federal agency is developing a policy that concerns Tribes, all of the existing ones, the Department of Energy in itself has one and I think we work well with them.

I think that this, this last go around will help set the tone for that, again, will help provide Tribes and push the momentum. I think the momentum that we are using right now, I think, will build, I think with your help, the Committee's help. I think that we can prioritize some of the Federal agencies' Indian policies to change and format with the working group that Ms. Sharp is a part of. I think that also will be helpful to try to provide some guidance for them.

But they have to also be willing to come across and educate themselves to Indian policy and the Indian, I guess, how Tribes are operating and our point of view.

The CHAIRMAN. Thank you, Mr. Baptiste.

Shenan Atcitty, the Congress is committed to looking to the recent crisis at J.P. Morgan and the transactions that led to billions of dollars in losses to their shareholders. Congress and the shareholders are seeking transparency into how decisions were made, with the impact these decisions will have on shareholders and the industry.

My question to you is, what correlation do you see in the Supreme Court's recent decision in the Jicarilla case?

Ms. ATCITY. With the J.P. Morgan situation?

The CHAIRMAN. Yes. Well, the idea is to access information. Yes.

Ms. ATCITY. Well, I think the correlation is, with respect to the private beneficiary, I doubt that they are going to have to go to the Supreme Court to get access to records. And I think the correlation is a fairness one.

You know, you have got a debacle of that level and certainly the shareholders are entitled to know how their, how decisions were made with respect to management of their trust assets. In our situation, unfortunately, the Supreme Court sees it differently. You know, we, too, are beneficiaries. Those are Tribal monies, not Fed-

eral monies. But we are not entitled to see how decisions were made because of this attorney-client claim. I think that probably the, you know, how it correlates and shows the unfairness of the situation.

The CHAIRMAN. I see.

Let me get back to Mr. Halbritter. When speaking on the trust responsibility, we focus on the impact it has on Tribes. In your testimony, you noted that a strong Federal Tribal trust relationship also benefits local communities. Can you expand on that thought?

Mr. HALBRITTER. Well, yes. The fact that we are a minority politically in the community in which we live, the will of the community affects the leadership and how they relate to us. And our desire is to negotiate and work things out with the community because it is our legacy as Oneida people. We were allies in this Country in the Revolutionary War.

But for example, the community does not always look at how much they benefit. We are the, in a 16 county upstate New York region, we are the largest employer. We have nearly 5,000 people working for us in an area that is economically deprived. We put in about \$1 billion in infrastructure and about \$2 billion in salaries and vendor and payroll in the local community. And yet, they still oppose us on every level that they possibly can along with the State. And it is largely political.

The Federal Government, their trust relationship has always been in a position to help us balance the table when we are trying to have a discussion about resolving our issues. And now with the courts making decisions, the courts are making decisions eroding the sovereignty of Indian nations. They do not want to negotiate. They want everything to go to court and they are just gambling and believing that the courts are going to rule against the Indian nations as you hear about the legal case.

The place for our people, we believe, is at the negotiating table, like we negotiated treaties, as sovereigns, as government-to-government. And that is what the trust responsibility and the years of having the Federal Government play such a prominent role is to not allow that to happen where the local governments and communities are eroding and conflicting with Indian nations. And we create great economic opportunity in the region.

With the Federal Government, we can resolve some outstanding issues so that we can have a more peaceful existence for future generations.

The CHAIRMAN. Thank you very much for that answer.

Mr. Baptiste, in your testimony, you applaud the Government settlement of trust mismanagement cases but say that the larger question of the current state of the trust relationship between the Tribes and the United States is not addressed. How do you think the current status of the trust relationship can be addressed by the Administration and in Congress?

Mr. BAPTISTE. Thank you. I believe, you know, the trust asset settlement, you know, like I said before, has provided the answer or provided a clean slate to work through. But I believe that it is through the true consultation process.

I know there was a Memorandum and each Federal agency had an opportunity to submit their consultation process with Tribes. It

is also the implementation of those consultation policies that, I think, will provide a success for Tribes. If they are not implemented properly and without, you know, the guidance of the Tribes, I think we will remain at the kind of juncture where we are at where we can, you know, either improve it or work with a broken system.

I think that we all identify that there are flaws in the trust relationship. We are working through that. I think the Tribes have ultimate faith that it will continue and get better, we think, with the work of the Committee.

With the Administration right now, we have an opportunity to better that relationship. But it, it lies within the hope of those implementations of those consultation policies and those individual Federal agencies and hopefully that those sister agencies will work together and collaborate so that a lot of them will not duplicate the same service and that they understand each other.

Each Tribe has a different working relationship, or even a social or a need or a cultural economic need, and those will kind of drive how they operate with the Federal agencies. But, I think in the end it is just those policies, those individual Federal agencies that will help drive this and better our trust relationship.

The CHAIRMAN. Thank you.

President Sharp, in your testimony you noted that improvements are needed in department's self-governance program. What specific recommendations do you have for improving this program?

Ms. SHARP. Yes. The self-governance program, as I mentioned, the original vision that Tribal leaders had for self-governance was an ability for us to freely determine our political, economic and social futures. We received block grants of dollars through compacts and were allowed the flexibility to adjust resources from education and natural resource and we have that flexibility, as I mentioned in my testimony, of being managers of Federal dollars.

We do not have the freedom or ability to make fundamental decisions affecting our lands, our resources, our people outside of that framework that is based on this idea that we are somehow incompetent, that, you know, we have this dependency, this ward-guardian relationship.

I will give you an example. When the Quinault Nation had worked on a comprehensive restoration effort for our salmon and our blue back stocks, another Federal agency took action that was directly not only not respecting our science that was based on Bureau of Reclamation Reports and other reports, but they took action that directly undermined our efforts.

And so, the bureaucracies that we face within agencies that still, and it was mentioned by another panel, or by a fellow panelist here, that there needs to be some way of enforcing the relationship. When we are at odds, whether it based on science, whether it is based on policy, whether it is based on a value system, if there is a conflict we need to have a means by which we can come to the table as equal sovereigns.

The United States does not enter into other countries to take unilateral action affecting resources, etc., and that same type of equality in a relationship with Indian nations must be respected. So, if we look to international law, if there is a dispute there is a

three-step process of official talks, of negotiation. But by all means, those parties come to the table in equity. There is no ability to take unilateral action. And so, we need some means of enforcing and supporting our views and our position when it comes to implementation of that relationship.

The CHAIRMAN. Thank you.

I want to thank this panel for your answers to our questions. We may have further questions that we will place in the record and also from other Members as well.

As you note, you know, my questions have been questions which are looking for answers as to how the Congress can make a difference. And as you know, I am looking at the Tribes to try to assess this and we will see what we can do to help you out on this because this is a huge, as I continue to say, trust relationship and a *Carcieri* fix is my high priority. And I think it will help resolve, you know, many problems that are there now. But we need to get all of the information we can. So, you know, help us try to bring that about.

So, I want to say mahalo, thank you to you and all the other witnesses. Today's testimony provides for me and for the Committee a greater understanding of the trust relationship that exists between the Federal Government, the Tribes and the Indian people. And so, again, I thank you for helping us out on this and we will continue to work together to help bring this about.

What is clear is that the trust relationship has existed, as you mentioned, since the formation of this Country and the first government-to-government contacts between the United States and the Indian Tribes. Even though the implementation of that trust relationship may change based on legal decisions, from Administration to Administration and from Congress to Congress, the trust responsibility endures. It is the obligation of Congress, the Administration and the courts to uphold the legal, moral and fiduciary responsibilities that are at the core of the trust relationship between the Federal Government and the Tribes.

So, I look forward to continuing this dialogue with our witnesses at today's hearing and other interested parties and stakeholders. I also pledge my best efforts to keep the enduring principles embodied in the trust relationship at the forefront whenever this Committee conducts business on behalf of the Native peoples of the United States. And we will continue to strive to do that.

So, again, mahalo. Thank you very much. Have a safe way home. Today's hearing is adjourned.

[Whereupon, at 4:03 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JULIE KITKA, PRESIDENT, ALASKA FEDERATION OF NATIVES

The Alaska Federation of Natives, Inc. (AFN), hereby submits the following comments on the federal government's trust responsibility to Alaska Natives.

AFN was formed in 1966, to address Alaska Native aboriginal land claims. From 1966 to 1971, AFN devoted most of its efforts to passage of a just land settlement in the U.S. Congress. On December 17, 1971, those efforts were rewarded with the passage of the Alaska Native Claims Settlement Act (ANCSA). Today, AFN is the largest Native organization in Alaska. Its membership includes 178 villages (both federally recognized tribes and village corporations), 13 regional for-profit corporations (established pursuant to ANCSA), and 11 of the 12 regional Native nonprofit tribal consortia that contract for and run a broad range of state and federal programs for their member villages. The overall mission of AFN is to enhance and promote the cultural, economic and political voice of the Alaska Native community.

Federal officials, often drawing from their experience of the "Indians" on reservations in the lower 48 states, sometimes have assumed the same legal principles applicable there do not apply in Alaska. This is perhaps due to the perception that Alaska's history is "different," and that ANCSA untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's American history is that it began with the Alaska Treaty of Cession in 1867¹ rather than with the adoption of the United States Constitution in 1789. This meant that Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the Commerce Clause of the United States Constitution, which grants Congress the power: "To regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."² Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) "all the other inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

¹ Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat.529, TS No. 301 (1867).

² U.S. Const., Art. I, §8, cl. 3.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.³ Nonetheless, until perhaps the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same "trust" relationship with the United States and that, notwithstanding the 1867 treaty, federal Indian law did not apply in Alaska.⁴ Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975, and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.⁵

II. ORIGINS OF THE TRUST RESPONSIBILITY

The federal government's trust responsibility to Native Americans finds its origins in the federal government's assumption of power and responsibility over Indian lands and tribal governments. The power, exercised by Congress under the Commerce Clause, is characterized as "plenary" or complete.⁶ The executive branch is often delegated authority over Indian affairs, including the authority to "recognize" tribal governments.⁷ Both Congress and the executive are characterized as the "political" branches of the government whose determinations as to the existence of Indian tribes and the extent to which they are recognized as tribes are judicially unreviewable.⁸ The United States Supreme Court recently characterized the origins of the federal authority over Indian affairs as being "preconstitutional," because it incorporates elements of military and foreign policy that are "necessary concomitants of nationality" which do not necessarily require the affirmative grant of federal power.⁹

The federal trust responsibility is founded on the inherently unequal relationship between the Native Americans and the federal government – an inequality largely of the government's own making.¹⁰ The nature of that relationship was defined in the early years of the republic by congressional enactments and the decisions of the United States Supreme Court – the so-called

³ *In re Minook*, 2 Alaska Repts. 200, 220-221 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). See generally David S. Case and David A. Voluck, *Alaska Natives and American Law*, 44-46 (2d ed., Univ. Alaska Press 2002) (discussing the application of the 1867 treaty to Alaska Natives).

⁴ Case and Voluck, *supra* at 6-8.

⁵ Cohen, *Handbook of Federal Indian Law* (2007 ed., LexisNexis Mathew Bender) at 336, n. 1068, citing among other authorities, AMERICAN INDIAN POLICY REVIEW COMMISSION, Final report, 95th Cong., 1st Sess. 489 (Comm. Print 1977) ("Alaska Natives did not differ markedly from other American native peoples. They organized themselves into social and political units (groups or tribes) as various and multiform, but of the same general nature, as those evolved by the Indians in the lower 48."); David S. Case & David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 628-631 (2d ed. Univ. Alaska Press 2002).

See authorities cited there.

⁶ See, e.g., *United States v. Lara*, 541 U.S. 193, 201-202 (2004).

⁷ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913). See also, Federally Recognized Tribe List Act of 1994 (25 U.S.C. §479a, note and §479a-1).

⁸ *U.S. v. Holliday*, 70 U.S. 407, 419 (1865).

⁹ *U.S. v. Lara*, 541 U.S. *supra* at 200. (Citation omitted.)

¹⁰ E.g., *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

Marshall Trilogy. The Trade and Intercourse Acts of 1790 imposed a statutory restraint on the alienation on all tribal lands, preventing their disposition by the tribes except by a federal treaty.¹¹ The statute ensured a federal monopoly over the disposition of Indian lands, but it was the Supreme Court that defined the nature of Indian title.

In *Johnson v. M'Intosh*, John Marshall employed the fiction of the "rule of discovery" to find that the United States held a superior title to the lands (variously characterized as "fee," "absolute title" or "absolute ultimate title").¹² The Indians, on the other hand, were considered to have an exclusive right of use and occupancy (which later came to be described as "aboriginal title" or "Indian title") that can only be terminated by the exercise of congressional authority. Because the United States gained the preemptive right to purchase the title, the result was that the Indian title was significantly diminished at common law in a way that paralleled the Trade and Intercourse Act's restraint on alienation.¹³

In the Cherokee cases (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*), Marshall extended the analysis of the federal-tribal relationship to describe the political status of the Indian tribes as "domestic dependant nations" whose relationship to the federal government was something like that of a "ward to his guardian."¹⁴ As a result of the Marshall decisions, and as a matter of federal common law, the Indians lost control of the disposition of their lands, and their governments were deemed placed under the protection of the federal government, subject to further limitations of their powers by Congress.¹⁵

Supreme Court decisions in the late 19th to early 20th centuries expanded upon the Marshall Trilogy, to evolve a virtually unchallengeable interpretation of the scope of congressional authority to legislate in the field of Indian affairs.¹⁶ Congressional power to legislate seems to be limited only by other provisions of the Constitution, which, for example, require compensation for the taking of treaty lands and rights.¹⁷ Similarly:

[I]n respect distinctly Indian communities the question is whether, to what extent to and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.¹⁸

The trust responsibility, as exercised by Congress, is almost unfettered power without responsibility. Thus, Congress can extinguish Native land claims, settle them without

¹¹ Act of July 23, 1790, 1 Stat. 137 (25 U.S.C. §177).

¹² *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

¹³ See generally, *Cohen*, supra, section 5.04 [4][a], describing the development of the trust responsibility.

¹⁴ *Cherokee Nation v. Georgia*, 20 U.S. 1, 17 (1871).

¹⁵ *Cohen*, supra, at page 420. See also, *U.S. v. Lara*, 541 U.S. supra, at 205 (inherent tribal power subject to divestiture by Congress.)

¹⁶ See e.g. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902) (tribal status determined exclusively by the political branches of government) and *U.S. v. Kagano*, 118 U.S. 375 supra at 384 (although not within the scope of the Commerce Clause, Congress had power to regulate and prescribe penalties for crimes by Indians in Indian country because from the federal relationship to the tribes "there arises the duty of protection, and with it the power.")

¹⁷ *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Congress can not exercise plenty of power to deprive a tribe of its treaty lands without just compensation).

¹⁸ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913).

compensation to or the consent of the Natives, and terminate federal recognition of tribal status.¹⁹ However, once Congress delegates the power to manage tribal assets to the executive branch and prescribes the standards for doing so, the executive branch can be held to principles applicable to a private trustee.²⁰

To summarize, the federal trust responsibility is considered to arise out of the inherently unequal relationship between the federal government and the "distinctly" Native communities that are federally recognized as tribes. Whether, to what extent and for what time those tribes are to be recognized by the federal government is exclusively a matter left to Congress and the executive ("the political branches of government"). The power of the United States asserted in the field of Indian affairs, under both the Commerce Clause and federal common law, has been held to impose upon the United States a responsibility of trust when dealing with Indian tribes. Congressional exercise of the power is unreviewable so long as it is not inconsistent with other provisions of the United States Constitution. But once Congress has delegated power to the federal executive to administer Indian resources and has sufficiently described the standards by which those resources are to be managed, the United States executive can be held accountable as would a private trustee.

The general trust responsibility is manifested primarily in the "government-to-government" relationship between the United States and the federally recognized tribes and the plenary authority of Congress to legislate on their behalf. The executive branch has also long been understood to have the authority to recognize the tribes, much as it has the authority to recognize foreign nations. In 1994 Congress confirmed this authority with the enactment of the Federally Recognized Indian Tribe List Act that required the Secretary of the Interior to publish an annual list of federally recognized tribes, and prohibited tribes from being removed from the list except by an act of Congress.²¹ Congress has gone even further in Alaska, where it has frequently defined the Alaska Native corporations established under ANCSA as "tribes" for particular purposes.

III. THE GOVERNMENT'S TRUST RESPONSIBILITY TO ALASKA NATIVES

The great confusion about the history of the relationship between the Alaska Natives and the federal government is that it is often characterized as being "unique." In truth it is no more unique than the history of any other Native American community within the United States. Like all Native American communities, that history begins with a treaty between the United States and a European power ceding the European power's authority over Native American territory to the United States. These cessions are understood to convey to the United States the exclusive right

¹⁹ See, e. g. *Tee-Hit-Ton Band of Indians v. U.S.*, 348 U.S. 272, at 283, n. 17 (1955) (Holding that Native land claims in Alaska are on the same footing as in the lower 48 states and congressional extinguishment of aboriginal title is not compensable under the Fifth Amendment.) See also, *U.S. v. Lara*, 541 U.S. 193 *supra*, at 202 (Congress can enact laws both restricting, then relaxing restrictions on tribal sovereignty).

²⁰ Compare *U.S. Mitchell I*, 445 U.S. 535 (1980) (Remanded to determine if federal government had defined statutory responsibilities in the management of allotment timber) with *U.S. v. Mitchell II*, 463 U.S. 206 (1983) (Upholding a statutory responsibility to manage Indian timber). See also, *Seminole Nation v. U.S.*, 316 U.S. 286, 297, n.12 (1942). (Holding the United States to "the most exacting judiciary standards" when it erroneously paid money to the agents of the Indian tribe knowing them to be dishonest).

²¹ Act of Nov. 2, 1994, 108 stat. 4791 (25 U.S.C. §479a, note and §479a-1).

recognized under *Johnson v. McIntosh* to acquire the aboriginal title of the Native Americans.²² As in the contiguous United States, Native people living primarily in village communities historically denominated as "tribes" also populate Alaska.

As noted earlier, what was different about Alaska was that the year was 1867, not 1789. By that time, following the end of the Civil War, America was on the march west and the Indians were in the way. In the latter half of the 19th century the United States adopted policies calculated to assimilate Native Americans and break up their tribal governments and tribal lands. These policies found their expression in late 19th century Alaska judicial decisions and federal Alaska policies. Until 1884 Alaska was governed as a military district, but when the army attempted to use the Trade and Intercourse Act to stop the introduction of liquor, the courts held that Alaska was not "Indian country" subject to the Act.²³ The next year, Congress applied the liquor control sections of the Intercourse Act to Alaska, after which the courts upheld prosecutions for supplying liquor to the Indians.²⁴

Similarly, the BIA was held to have no authority to implement programs or spend money in Alaska.²⁵ The 1884 Organic Act also required education in the territory to be "without regard to race."²⁶ In 1886 the Alaska courts held that the Tlingit Indians did not have sovereign authority.²⁷ Much as was then the policy in the lower 48 states, these cases, statutes, and policies in Alaska were designed to assimilate the Natives into American society and generally avoided treating Alaska Natives as being subject to federal Indian law. At the end of the 19th century, the Department of the Interior Solicitor held that Alaska Natives did not have the same relationship to the federal government as other Native Americans.²⁸

In spite of these policies, other forces were at work to protect Alaska Native lands under the doctrines of aboriginal title and to deal with the Alaska Native villages as tribal governments. Two cases, in 1904 and 1914, upheld the authority of the United States to prevent trespass to aboriginal lands in Alaska.²⁹ Additionally, although education was to be "without regard to race", in fact, it was very much with regard to race.

A noted missionary, Dr. Sheldon Jackson, was appointed General Agent for Education in Alaska to implement the educational policies of the 1884 Organic Act. In that capacity he established numerous schools in remote Native villages, which became the focus of health care, reindeer herding, and other programs administered by the Department of Interior's Bureau of Education exclusively for Natives. In 1905 the Nelson Act specifically required the separation of white and Native children in the schools and increased the appropriations for Native services in Alaska.³⁰

²² *Fletcher v. Peck*, 10 U.S. 87, 142-143 (1810). ("[T]he Indian title. . . to be respected by all courts, until it be legitimately extinguished," continues with the land when it is acquired by a new sovereign.)

²³ See *U. S. v. Seweloff*, 1 Alaska Rpts. 64 (1872).

²⁴ In re *Carr*, 1 Alaska Rpts. 75 (1875).

²⁵ *Case and Voluck* supra at 187, n. 2.

²⁶ Act of May 17, 1884 §13, 23 stat 24.

²⁷ In re *Sah Quah*, 1 Alaska Fed. Rpts. 136 (1886).

²⁸ *Alaska-Legal Status of Native*, 19 L. D. 323 (1894).

²⁹ *U.S. v. Berrigan*, 2 Alaska Rpts. 442 (D. Alaska 1904) and *U.S. v. Cadzow*, 5 Alaska Rpts. 125 (D. Alaska 1914).

³⁰ Act of January 27, 1905, 33 stat 616, 619. See also *Case and Voluck* supra at 8.

In 1932, responsibility for Alaska Native programs was transferred to the BIA. Shortly thereafter the Interior Department Solicitor issued a new opinion, concluding after an exhaustive analysis of applicable cases, statutes and policies:

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos or other natives are natives or of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska referred to in the [1867 Treaty of Cession], are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.³¹

Four years later the Indian Reorganization Act was amended to specifically apply to the Alaska Natives.³² Nonetheless, the confusion about the status of the Alaska Natives continued to the end of the 20th century.

Alaska was admitted as a state on January 3, 1959. As was typical of most western states, a provision in the Alaska Statehood Act and an identical provision in the Alaska Constitution disclaimed "all right or title ... to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives)" and retained these lands "under the absolute jurisdiction and control of the United States until disposed of under its authority."³³ Six months later, in a long pending case, the United States Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska.³⁴ This decision set the stage for the settlement of the broader Alaska Native claims to aboriginal title throughout the new state and implicitly rejected the notion that the Alaska Natives were "unique" and not entitled to such claims.

Responding to these claims, then Secretary of the Interior Udall imposed a land freeze on state selections under the Statehood Act. The state challenged the land freeze, but the Ninth Circuit Court of Appeals affirmed that the Native claim to exclusive use and occupancy was sufficient to prevent the state from making its selections under the statehood act until the claims were resolved.³⁵ Two years later, Congress, exercising its plenary power, enacted ANCSA, extinguishing aboriginal title throughout Alaska and confirming what would amount to 45 million acres of surface and subsurface estate to 12 regional and more than 200 village corporations.

The only mention of "tribes" in ANCSA is in the definition of "Native village," which includes "any tribe, band, clan, group, village, community, or association in Alaska" that

³¹ *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310. (1932).

³² Act of May 1, 1936, §1, 41 stat. 1250 (25 U.S.C. §473a).

³³ Act of July 7, 1958, §4, 72 stat. 339. See also Art. XII, §12 of the Alaska Constitution.

³⁴ *Tlingit and Haida v. U.S.*, 147 Ct. Cls. 315, 177 F. Supp. 452 (1959).

³⁵ *Alaska v. Udall*, 420 F. 2d 938 (9th Cir. 1969).

qualified for ANCSA benefits.³⁶ The residents of each Native village were authorized to organize a "Village Corporation"³⁷ which is defined in ANCSA as:

an Alaska Native Village Corporation organized under the law of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and behalf of a Native village in accordance with the terms of [ANCSA].³⁸

The village corporations were to receive the surface lands under ANCSA and the regional corporations were to receive the subsurface of those lands as well as, in some cases, additional surface and subsurface lands.³⁹ Although the "Native villages" clearly included "tribes," the corporations were not initially considered to be tribes. That soon changed.

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEA"). The ISDEA expressed a firm congressional commitment to:

the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.⁴⁰

The ISDEA required the contracting of federal programs to an "Indian tribe" or the tribe's designated "tribal organization." The definition of these terms was crucial. "Indian tribe" under the ISDEA means:

Any Indian tribe, band, nation, or other organized group or community including any Alaska Native *village or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (Emphasis added.)⁴¹

A "tribal organization" is defined in important part as "any legally established organization of Indians which is controlled, sanctioned, or chartered by [the governing body of an Indian tribe]."⁴²

³⁶ Act of December 18, 1971, §3(c), 85 stat. 689 (43 U.S.C. §1602(c)).

³⁷ 43 U.S.C. §1607(a).

³⁸ 25 U.S.C. §1602 (j).

³⁹ Regional corporations were organized within each of the 12 ethnic regions of Alaska under 43 U.S.C. §1606.

⁴⁰ Act of January 4, 1975, §3 (b), 88 stat. 2203 (25 U.S.C. §450a(b)).

⁴¹ 25 U.S.C. §450 b(e).

⁴² *Id.* at 25 U.S.C. §450b(f).

Thus, four years following the enactment of ANCSA, Congress identified three separate Alaska Native institutions as "tribes." At that time and up to the present most Alaskan Native villages are also organized as consortia of regional nonprofit corporations, which were ideally suited to act as a "tribal organization" for purposes of ISDEA contracting. This resulted in the rapid contracting of BIA and IHS services to those organizations, as well as in many cases, to individual village tribes.⁴³ Moreover, the inclusion of the village and regional corporations as "tribes" enabled the corporations to obtain contracts under the ISDEA when Native villages were not available for contracting.⁴⁴

A year earlier, Congress had enacted the Indian Financing Act.⁴⁵ The Indian Financing Act also defined "tribe" to include "Native villages and Native groups ... as defined in [ANCSA]."⁴⁶ Moreover, the Indian Financing Act defined "reservation" to include "land held by incorporated Native groups, regional corporations, and village corporations under the provisions of [ANCSA]."⁴⁷ The treatment of all of Alaska as being "on or near the reservation" is also a longstanding federal policy. The United States Supreme Court has described this policy in great detail as being the geographic area in which BIA social service programs are implemented in Alaska.⁴⁸ Current social service regulations also define "reservation" as "including Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act."⁴⁹ Moreover, the Indian Financing Act definitions of reservation and the ISDEA definition of tribe are commonly repeated in more than two-dozen federal statutes enacted over the last twenty years.⁵⁰ In fact, over 100 legislative acts define ANCSA corporations as "Indian tribes" or ANCSA lands as "Indian lands." These statutes include the Indian Health Care Improvement Act of 1976, under which hundreds of millions of dollars in health care programs are now provided annually through the Alaska Native Tribal Health Consortium.⁵¹

Likewise, federal courts have upheld preferential economic treatment for Alaska Native corporations and Native-owned enterprises. For example, under Section 7(b) of the ISDEA, preferences in subcontracts and contracts are to be given to Indian organizations and Indian economic enterprises in implementing housing and any other programs under the ISDEA.⁵² The Alaska Chapter of the Associated General Contractors challenged these regulations when applied

⁴³ See *Case and Voluck* at 221-224 describing the effect of the ISDEA in Alaska.

⁴⁴ *Cook Inlet Native Assn. v. Bowen*, 810 F. 2^d 1471-1476 (9th Cir. 1987) (ANCSA regional corporation held to be a tribe for purposes of ISDEA contracting for health and other federal services.)

⁴⁵ Act of April 12, 1974, 88 stat. 77 (25 U.S.C. §1451 et seq.).

⁴⁶ *Id.* 25 U.S.C. §4539(c).

⁴⁷ *Id.* 25 U.S.C. §4532(d).

⁴⁸ *Morton v. Ruiz*, 415 U.S. 199, 212-213 (1974). Oklahoma Natives have historically been afforded a similar special treatment.

⁴⁹ 25 C.F.R. §20.100 "Reservation."

⁵⁰ See e.g. Indian Child Protection and Family Violence Act of November 28, 1993 (25 U.S.C. §3202(9)) defining "Indian reservation" to include land held by Alaska Native groups or regional or village corporations under ANCSA and (10) defining "Indian tribe" to be the same as the definition under the ISDEA; See also American Indian Agriculture Resource Management Act of December 3, 1993, 25 U.S.C. §3703(10) defining "Indian tribe" to include Alaska Native village or regional corporations.

⁵¹ 25 U.S.C. §1601 et seq. The Act defines "Indian Tribes" as including ANCSA corporations. 25 U.S.C. §1603(d). See also, *Case & Voluck*, supra, note 2 at 220-221. (Describing the scope of these programs.)

⁵² 25 U.S.C. §450e(b).

to Department of Housing and Urban Development programs. In upholding the preferences the Ninth Circuit concluded that:

Congress has utilized methods other than tribal rolls or proximity to reservations, which have generally been used as eligibility criteria in statutory programs for the benefit of Indians. The Supreme Court has already noted and approved one such different treatment of Alaska Natives.⁵³

More broadly the Ninth Circuit noted that:

It is now established that through [the 1867 Treaty of Cession] the Alaska Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.⁵⁴

More recently, the District of Columbia Circuit Court of Appeals has similarly upheld a preference in defense contracting specifically benefiting the Alaska Native corporations. The legislation enabled an Alaska Native corporation joint venture to obtain a preferential contract for the management of a federal military base. Unlike the other statutes discussed above, the Defense Appropriation Acts adopted between fiscal years 1999 and 2000 allowed a preference in federal contracting for firms of at least 51 percent "Native American ownership." The joint venture applied for and received a preferential contract to manage Kirtland Air Force Base.⁵⁵

The D.C. Circuit Court rejected the argument that the preference was racially based because: "When Congress exercises this constitutional power [under the Commerce Clause] it necessarily must engage in classifications that deal with Indian tribes."⁵⁶ The court noted that Congress has the exclusive authority to "determine which 'distinctly Indian communities' should be recognized as Indian Tribes."⁵⁷ The court therefore upheld the contracting preference as applied to the Alaska Native corporations even though they were not specifically defined as "tribes" in the Defense Appropriation Acts.⁵⁸ This decision implicitly confirms the constitutionality of an earlier amendment to ANCSA that statutorily qualifies Alaska Native Corporations as "disadvantaged businesses" for purposes of the federal 8(a) contract set-aside program.⁵⁹

The Consolidated Appropriations Act for Fiscal Year 2004 directed the Office of Management and Budget (OMB) to consult with Alaska Native corporations on the same basis as Indian Tribes under Executive Order No. 13175.⁶⁰ Similarly, the Consolidated Appropriations

⁵³ *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162, 1169 n. 10 (9th Cir. 1982) citing *Morton v. Ruiz*, supra, at note 49.

⁵⁴ *Id.* at 1169, n. 10 (citation omitted).

⁵⁵ *American Federation of Government Employees v. U.S.*, 330 F.3d 513 (D. C. Cir. 2003).

⁵⁶ *Id.* at 521.

⁵⁷ *Id.* at 520, citing *U.S. v. Smitonal*, 231 U.S. 29, supra note 8.

⁵⁸ *Id.* at 522-523. ("[P]romoting the economic development of federally recognized Indian tribes (and their members) is rationally related to a legitimate legislative purpose and thus constitutional").

⁵⁹ 43 U.S.C. § 1626(e).

⁶⁰ See Pub. L. No. 108-199, Division H, Section 161.

Act for Fiscal Year 2005 requires "all Federal agencies," in addition to the OMB, to consult with Alaska Native Corporations pursuant to Executive Order 13175.⁶¹

Beyond the congressional treatment of the Alaska Native corporations as tribes for certain purposes, it is also now well established in the general sense that the Alaska Native villages (also defined as "tribes" in ANCSA) are federally recognized tribal governments. Owing perhaps to ANCSA's omission of tribes in the settlement, it took more than twenty years of litigation to confirm their status. At the end of the first Bush administration, Thomas L. Sansonetti, the Solicitor for the Department of Interior, issued a comprehensive 133-page opinion examining the historical status of the Alaska Natives and their continued entitlement to federal services and programs. Although the opinion stopped short of deciding that all the Alaska villages were federally recognized tribes, it noted in conclusion that:

In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.⁶²

Nine months later the new Clinton administration published a comprehensive "Notice" in the federal register listing more than 200 of the Alaska Native villages and two regional tribes as federally recognized Indian tribes. The Notice states specifically that:

This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.⁶³

The very next year, Congress passed the Federally Recognized Indian Tribe List Act that required the annual publication of a list of all federally recognized Indian tribes.⁶⁴ In 1998, after many years of litigation, the United States Supreme Court denied territorial jurisdiction to Alaska Native tribes to impose a tax on non-Natives on ANCSA land now held by the tribe.⁶⁵ In reaching its decision, the Supreme Court noted with apparent approval that the effect of ANCSA was to leave the Alaska Native villages as "sovereigns, without territorial reach."⁶⁶ The next year the Alaska Supreme Court concluded, in a ground-breaking decision, that even without territory Alaska Native villages, as federally recognized tribal governments, retained inherent jurisdiction over their members even outside of Indian country, sufficient to determine a child

⁶¹ See Pub. L. No. 108-447, Div. H, Title V, Section 518.

⁶² "Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members" (M-36975, January 11, 1993).

⁶³ 58 F. Reg. 54365, 54366 (October 21, 1993).

⁶⁴ See 25 U.S.C. §479a note, and 479a-1 at note 22, supra.

⁶⁵ *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

⁶⁶ *Id.* at 526.

custody and probably other "internal" matters significant to the exercise of inherent tribal sovereignty.⁶⁷

IV. CONCLUSION AND RECOMMENDATIONS

It is now beyond doubt that Alaska Native villages, as well as ANCSA regional and village corporations, are federally recognized "tribes." The "Native villages" defined in ANCSA, the ISDEA and other statutes and listed under the requirements of the Federally Recognized Tribe List Act are tribal governments with political jurisdiction over their members and perhaps others. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of particular statutory programs and services, including preferences in government contracting as authorized under federal law. As the United States Supreme Court decided nearly a century ago in the case of "distinctly Indian communities ... whether to what extent and for what time they shall be recognized ... is to be determined by Congress."⁶⁸ In this respect, Alaska Native villages and ANCSA regional and village corporations are squarely within the scope of Congress's plenary authority and trust responsibility over Native American policy under the commerce clause of the United States Constitution. Congress therefore has the same authority to legislate on behalf of all the "distinctly Indian communities" of Alaska as it does throughout the United States.

AFN agrees with the recommendations of many of the witnesses at the hearing who urged Congress to reverse some of the US Supreme Court's holdings that have been adverse to tribal rights, and reassert itself as the primary policymaking entity for the federal government. A clear statement of the general trust responsibility of the federal government to Indian tribes would be helpful in ensuring that all federal agencies and the federal courts acknowledge Congress's primacy as the lead policy maker in Indian Affairs. In doing so, Congress should link its restatement of the federal government's general trust responsibility to the provisions of the UN Declaration on the Rights of Indigenous Peoples.

In terms of Alaska specific recommendations, we offer the following:

1. Congress must continue to refine the government's consultation policy so that federal agencies recognize and respect the institutional development and current organizational structures and interrelationships among Alaska Natives. Neither Executive Order No. 13175 nor the congressional acts requiring consultation with ANCSA corporations on the same basis as Indian tribes⁶⁹ require separate consultation policies for Alaska's tribes and ANCSA corporations. Yet, the Department of the Interior has implemented dual consultation policies for tribes and ANCSA corporations. We believe the dual consultation policies will create additional demands and potential confusion and even conflicts within villages that have both an ANCSA corporation and a federally recognized tribe. Also, neither consultation policy provides a role for Alaska Native regional non-profit tribal consortia. These organizations provide services and institutional support to villages within their regions, and are particularly important to smaller villages, which often lack the financial and human resources to provide the services that a regional entity is able to provide.

⁶⁷ *John v. Baker I*, 982 P. 2d 738 (Alaska 1999).

⁶⁸ *U.S. v. Sanjaval*, 23 U.S. note 8 supra at 46.

⁶⁹ See notes 60 and 61, supra.

2. Congress is urged to ensure that Alaska's tribes, ANCSA Corporations, and Alaska Native organizations are included as eligible entities in federal Indian legislation intended to benefit Native Americans; and further, that ANCSA Corporation lands and lands owned in fee by federally recognized tribes in Alaska be included in federal Indian legislation on the same basis as tribal trust and reservation lands. Too often Alaska's tribes are denied the benefits of major Indian legislation because they do not occupy "Indian country." For example, the Department of Education is currently soliciting applications for the State-Tribal Education Partnership (STEP) pilot. Under the pilot, competitive grants will be awarded to Tribal Education Agencies (TEAs) to increase their role in the education of American Indian and Alaska Native students. Unfortunately, these grants will only be available to TEAs for schools located on Indian reservations, thereby excluding most of the TEAs in Alaska.

3. Congress settled Alaska Native land claims but did not deal with our hunting and fishing rights in ANCSA. Instead, it expected both the Secretary of the Interior and the State of Alaska to "take any action necessary to protect the subsistence needs of the Natives."⁷⁰ That expectation was not fulfilled and the current program established in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), with its rural preference for subsistence hunting and fishing, has proved inadequate. It does not ensure food security for our people. Protection of Native hunting, fishing and gathering rights is a part of federal law throughout the United States. The right to food security for oneself and one's family is a basic human right. Justice and fairness require that Congress, in consultation with Alaska's federally recognized tribes, consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected.

4. Congress should empower Alaska Native Villages to deal with violent crime and other problems impacting our people. The state of Alaska's public safety system does not effectively serve vast areas of the state where many remote Alaska Native villages are located, except in response to crimes that result in severe injury or death. The vast majority of Alaska Native communities have no formal law enforcement presence. In these communities, tribal citizens often turn to their tribal courts to secure immediate help. A pilot project, such as the one provided for in S.1192, should be established to allow a select number of Alaska's tribes to enforce their civil tribal ordinances dealing with possession and importation of alcohol and illegal drugs, and with domestic violence, assault and child abuse. Such a program would arm tribal courts with the ability to stop violence at the early stages before the crimes escalate to aggravated assault, rape and homicide. Improving law enforcement in the villages and empowering Alaska's tribes to address these issues is necessary to fill the gap in local authority, and ensure domestic safety for village residents.

5. The Secretary of the Interior is currently barred by regulation, 25 C.F.R. § 151, from taking land into trust in Alaska outside the Metlakatla Reservation. The regulatory bar prohibiting all trust land acquisitions in Alaska violates 25 U.S.C. § 476(f) and (g) (which guarantees all tribes equal treatment). It is estimated that Alaska's tribes collectively own approximately 100,000 acres of land in fee. These lands do not have any special protections from taxation or from potential loss through involuntary conveyances, bankruptcy, or imminent domain. The Secretary should be allowed to take tribally owned land into trust in Alaska.

⁷⁰ S. Rep. No. 581, 92nd Cong., 1st Sess. 37 (1971).

PREPARED STATEMENT OF HON. LEONARD MASTEN, CHAIRMAN, HOOPA VALLEY TRIBE

Fulfillment of the United States' trust responsibility is of utmost importance to the Hoopa Valley Tribe. We currently have 3,006 tribal members and the largest reservation in California, covering approximately 144 square miles. We were among the first tier of self-governance tribes, having participated in the demonstration project, and the first in the nation to have its compact with the United States signed. Through self-governance we have been able to leverage federal dollars to fund our programs, all of which serve as a means to exercise our sovereignty, preserve, protect and manage our trust assets and provide services and benefits for our members.

We are grateful for the opportunity to provide our views for the record on fulfilling the trust responsibility. It is of fundamental significance to Indian nations and, with the recent creation of the National Commission on Indian Trust, it is an important time for tribes to be engaged in the discussion of how the trust responsibility should be carried out as our relationship with the United States moves forward. Our testimony focuses on the United States' fulfillment of the trust responsibility and self-governance.

The Federal Trust Responsibility

Others have provided for the record comprehensive backgrounds on the origins and nature of the United States' trust responsibility. We briefly set forth the foundation of the trust responsibility before looking forward on how it should be fulfilled in this new century.

The trust responsibility is rooted in treaties and provisions of the Indian Commerce Clause (U.S. Const. art. I, § 8, cl.3) and the Treaty Clause (U.S. Const. art. II, § 2, cl.2) of United States Constitution. The cases of the *Marshall Trilogy* interpreted the meaning of the Indian Commerce Clause. In *Cherokee Nation v. Georgia*, Chief Justice Marshall's opinion acknowledged the legal status of tribes as "distinct political societies] . . . capable of managing [their] own affairs and governing [themselves]." 30 U.S. 1, 15 (1831). He went on to characterize tribes as "domestic dependant nations," *Id.* at 17, likening the relationship to that of a "ward to his guardian," *Id.* at 17. As Cohen's Handbook of Federal Indian Law states

Cherokee Nation v. Georgia provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust

relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.

Felix S. Cohen's Handbook on Federal Indian Law, 420 (2005 Edition).

In *Worcester v. Georgia*, Chief Justice Marshall confirmed the Cherokee Nation to be "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force. . . ." *Worcester*, 31 U.S. at 561. He put forth the tenet that tribes remained separate political entities, despite colonization, and while they accepted the "protection" of a more powerful nation, such acceptance did not divest tribes of self-governance. *Id.* at 555-559, 561 ("A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.").

Worcester also confirmed that the Supremacy Clause gave powerful effect to treaties as "the supreme law of the land." *Id.* at 595. Treaties are bargained for exchanges through which tribes ceded vast tracts of land and resources in exchange for the United States' protection, provision of goods and services and support for tribal self-sufficiency and liveable and sustainable communities. As President Nixon stated:

For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

President Nixon, Special Message on Indian Affairs, July 8, 1970. In *Morton v. Mancari*, the Supreme Court set forth the United States' obligation for on-going performance of federal trust duties:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation. . . .

Morton v. Mancari, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); see also *Worcester*, 31 U.S. at 548-54 (discussing treaties, including land cessions, securing and preserving friendship, and noting that stipulation acknowledging tribes to be "under the protection of the United States" "is found in Indian treaties generally").

Additionally, the Court in *Seminole Nation v. United States* confirmed the high standards the federal government must meet when carrying out trust duties (here in relation to the handling of trust funds):

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Sequoyia Nation v. United States, 316 U.S. 286, 298 (1942). Further, the 1977 American Indian Policy Review Commission expounded upon the purpose of the trust doctrine as follows:

The purpose behind the trust [doctrine] is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and *self-government*, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

American Indian Policy Review Commission, Final Report Vol. 1, 1977, p. 130 (emphasis added). The Commission also noted that "the Federal-Indian trust law, as expressed both by Congress and the courts, calls for Federal protection, not Federal domination." Final Report at 106.

The Federal Trust Responsibility and Self-Governance

Background: Self-Governance

Putting forth the policy of self-determination, President Nixon stated

{We} have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be fulfilled. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

Nixon Special Message. He also stated that "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions" and that ". . . the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life." Nixon Special Message.

The Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450 et seq., allows tribes to contract with the United States to take over administration of programs carried out by the federal government, facilitating tribes' planning and administering

of programs to govern their lands and provide for their members. The Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa et seq., allows a tribe to enter into a compact with the United States for all programs the tribe assumes. Self-Governance allows tribes more flexibility in the administration, design and consolidation of programs and in the allocation of funding among programs.

Through Self-Governance, Indian Country has experienced many dynamic and pioneering changes over the last few decades. Self-Governance tribes have progressively moved to stabilize funding bases, improve and expand services at the reservation level, and increase staffing and technical capabilities. Tribes have been able to strengthen tribal government and establish administrative capability. Tribes have become effective partners with the United States, working together to positively address and resolve decades of bucklogged trust management issues.

Self-Governance spurred an important transition from bureaucratic one-size-fits-all, federally-dominated programs to flexible tribally-designed and administered programs. Tribes are in the best position to determine what is needed by, and how to provide for, their governments and members. Prior to Self-Governance, there was a lack of tribal participation in designing programs and setting agendas. Instead, there was a reliance on federal-project planning, and the federally-developed programs were not only chronically under-funded, they did not meet the on-the-ground needs of Indian people. Self-Governance affords tribes the opportunity to take over the planning and development of these programs, and since the programs become based on the priorities and needs of Indian communities as determined by the tribes, they work.

Self-Governance Does Not Diminish the United States' Trust Responsibility

The United States' trust responsibility is not diminished in any way in the context of self-governance.

Nothing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

25 U.S.C. § 458ff(b)¹ To the contrary, the trust responsibility is carried out in part by supporting and promoting tribal self-governance. The Secretary encourages tribal self-governance by entering into funding agreements with tribes "consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people." 25 U.S.C. § 458cc. As Cohen's Handbook explains:

... the law reaffirms Congress's "commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to individual Indian tribes and to the Indian people as a whole." This commitment is

¹ 25 U.S.C. 458aaa-14(b)(Nothing in this subchapter shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive Orders or other laws and court decisions.)

expressed by support for Indian "planning, conduct, and administration" of "quality programs" for Indians.

Cohen's at 1347.

Specifics about the Hoopa Valley Tribe Programs and Benefits of Self-Governance

Self-Governance has allowed our Tribe the flexibility to design and manage our own programs. Currently, we manage more than 50 programs which cover the entire spectrum of issues. Early on, we compacted forestry management and have been managing our forest lands independently under a forest management plan that exceeds environmental standards required by federal law and incorporates our values and priorities. Our Forestry Department has received exemplary trust evaluations from the BIA's Pacific Regional Office (PRO). We also own and operate our own logging company and nursery, and, as a part of our forestry management, we created our own Wildland Fire Protection Program through which we assumed the federal government's wildland fire functions and services. Our tribal firefighters meet the same qualification requirements of the United States Forest Service. Additionally, when we assumed forestry management, we also took over the BIA roads department, a successful program through which we have been able to leverage monies from our timber sales, aggregate plant and other sources with our federal funding to pay for road maintenance and upgrading.

We have our own Fisheries Department that monitors in-stream habitat and salmon populations in the Trinity River basin. This is a well-respected program that contracts with the Bureau of Reclamation and the Fish and Wildlife Service to carry out river restoration functions. We are also proud of the fact that Hoopa was the first to compact health care with the Indian Health Service (IHS) in California, and now has a hospital, a dental clinic, and the only ambulance service and emergency room within about 80 miles of the Reservation and the next nearest hospital. Further, we have a Police Department which entered into an historic cross-deputization agreement with Humboldt County to provide comprehensive police protection and law enforcement on our Reservation. While additional funding is needed, we are carrying out law enforcement services.

We also compacted realty from the BIA regional office. Further, we created a Public Utilities Department that has worked on a Reservation-wide water system and continues to work on Reservation-wide irrigation and sewer systems which are needed to serve our community. We also have our own Tribal Environmental Protection Agency, TEPA, which ensures that our resource management programs perform in compliance with Federal EPA regulations. TEPA monitors and enforces air and water quality standards set by the Tribal Council and is also responsible for enforcing the Tribe's solid waste ordinance. We also have a housing authority, a human services department and an education department that covers preschool to a junior college branch campus.

Through Self-Governance we provide a range of services to our people, have spurred economic development on our Reservation, and ensure quality management of our trust resources. We have been able to successfully administer our many programs by establishing a solid governmental and administrative structure. We are a government of laws, ordinances and

procedures. While we believe this is essential for self-governance and successful program administration, it must be recognized that the ISDEAA includes opportunities for all tribes to plan programs or portions thereof. With this, a tribe that does not want to assume carrying out the program itself can nevertheless participate in the planning and design of the program so that its values and priorities are incorporated into the program.

Benefits and Government-to-Government Relationship

Benefits of Self-governance flow not only to tribes and their members, but to the United States as well. Tribes are superb partners for the United States. A benefit of major importance in Self-Governance that gets little attention is how it has helped to generate additional funding for carrying out underfunded federal programs. The chronically underfunded Indian programs within the BIA and IHS budgets have been well-documented over the past several decades. Many tribes hesitate to assume federal programs under Self-Governance because they understand there is not adequate money to support the tribe in carrying out the functions of the programs that the tribes want to administer. However, while Self-Governance is an authorizing law – not an appropriations law – it gives tribes the ability to generate significant additional dollars to help offset the cost of carrying out trust activities. At Hoopa, we can show that the Tribe matches \$3.00 from other sources for each \$1.00 compacted from the BIA that is used for trust management programs. This is a significant benefit not only for the programs and tribal members they serve, but for the United States too which carries an ultimate responsibility of providing for and protecting the Tribe. In the context of Self-governance, a part of the United States' responsibility is to facilitate compacting with the Tribe and support tribal programs. This results in more robust and tailored programs than what the United States could design or administer on its own.

We emphasize, however, that the United States still has a responsibility to ensure adequate funding for programs that serve tribes and Indian people. Most of these programs, if not all, are woefully underfunded. Again, Self-Governance does not diminish the federal trust responsibility in any way. With this, Self-Governance and its ability to facilitate leveraging of funds does not relieve the United States from adhering to its trust responsibility to provide sufficient funding levels for programs. When developing its annual budgets, the federal government must ensure that the funding needs of Self-governance tribes are met and that as needs increase, such as for infrastructure development necessary to carry out programs, that funding levels increase as well.

Another benefit of Self-governance is the ability to redefine the working relationships between tribes and the federal government. The Hoopa Tribe has enjoyed a solid working relationship with the BIA PRO for more than a decade. In 1997, Hoopa and six other California tribes established the California Trust Reform Consortium. It was created to work with the PRO to address the trust resource management issues upon which many of the claims made in the *Cobell* litigation were based. In 1998, the Consortium and the PRO entered into an agreement that established the terms, conditions and operating procedures for the Consortium. The ability to develop a new working relationship with the PRO was made possible by the flexibility created by Self-Governance. The agreement defines the management roles and responsibilities of the PRO and the tribes and includes provisions for a funding process through the PRO; a joint

oversight advisory council; a process for developing "measurable and quantifiable trust management standards;" methods for resolving disagreements and disputes; and finally, a participatory process for annual trust evaluations. This unique working relationship has worked well for years.

When the Department of Interior launched its trust reform initiatives in the early 2000s, we took action on the foundation that what was working in Indian Country regarding trust resource management should not be changed, it should be preserved. We created the Section 139 Trust Reform Demonstration Project with the Consortium, the Salt River-Pima Maricopa Indian Community, the Confederated Salish and Kootenai Tribes and the Chippewa Cree Tribe of the Rocky Boy's Reservation. The Demonstration Project authorized the tribes' successful trust asset management systems to operate separate and apart from Interior's trust reform reorganization, and prevented Interior from imposing its trust management infrastructure upon or altering the tribes' existing trust resource management systems. The tribes had to carry out their responsibilities under the same fiduciary standards as those to which the Interior Secretary was held and had to demonstrate to the Secretary's satisfaction that they had the capability to do so.

We, along with the other Section 139 tribes, underwent an evaluation by the Office of Special Trustee and received a determination that we had the capability to perform compacted trust functions under the same fiduciary standards to which the Secretary is held. We were even cited as "an excellent example of trust administration, in furtherance of tribal self-determination." Section 139 confirmed that local tribal decision-making and cooperation from the federal government can result in significant trust management improvements and that tribes can properly implement trust management even though they may use different practices and methods than Interior.

Preserving what is working in Indian Country is the foundation for our forward-looking approach to today's topic, Fulfilling the Trust Responsibility: The Foundation of the Government-to-Government Relationship.

Next Steps for Fulfilling the Trust Responsibility

The United States should acknowledge that tribal governments are great partners and that Self-Governance has provided myriad benefits to tribes, tribal members and the United States, itself. It should rest on the fact that its trust responsibility is not diminished by Self-Governance and, in fact, it is carried out in part by supporting tribes' abilities and endeavors to exercise self-governance for the benefit of their members.

Tribal Participation in the National Commission on Indian Trust

If trust reform is to be successful, tribes must be considered indispensable parties. For this reason, tribes must be an integral part of the National Commission on Indian Trust's discussion and work. A cornerstone of the Commission's draft work plan is to recommend options to the Secretary "to improve the DOI management and administration of the trust administration systems," and to "include whether any legislative or regulatory changes are necessary to permanently implement such improvements." The Commission is working to

define or redefine the trust relationship, and has a unique opportunity to help forge for the United States a more honorable relationship with Indian Country. Tribes must be involved in the Commission's effort, and local decision-making must be key in the Commission's recommendations. We stress that the Commission should be ensured the resources and time it needs to develop, in conjunction with tribes, considered, robust and progressive recommendations to the Secretary.

Non-BIA Mandatory Programs

Another area of major interest for our Tribe is compacting non-BIA programs. Title IV of the ISDEAA (the Tribal Self-Governance Act, 25 U.S.C. §458aa et seq.) should ensure that non-BIA programs are mandatory for compacting. The trust responsibility is an obligation of the United States not just the BIA. All federal agencies that perform functions that impact trust resources or tribal rights have a trust obligation to protect those resources and rights. Self-Governance affords tribes the ability to ensure trust resources and tribal rights are protected through compacting. We strongly feel that this ability should be extended to other federal agencies on a mandatory basis without the discretion of the Secretary.

The Tribal Self-Governance Act provides for compacting non-BIA functions in § 403(h)(2) and (c) of Pub. L. 93-638. Mandatory compacting is required only as to services "otherwise available to Indian tribes or Indians," while discretionary compacting extends also to programs of special geographical, historical, or cultural significance to the tribe. The courts have limited mandatory compacting to programs specifically targeted to Indians. Thus, programs directed to improving trust resources, such as fish harvests, because they have collateral benefits to non-Indian fishing interests, fall outside of '638 compacts unless the non-BIA agency, in its discretion, chooses to include them.

A primary example of the problem concerns our federally-reserved fishing rights in the Trinity River which flows through the Hoopa Reservation. The Bureau of Reclamation operates the Trinity River Division of the Central Valley Project. The Trinity Dam, completed in 1964, was the primary reason for 80% declines in the Trinity River fishery resources, and has been the subject of numerous congressional and court actions associated with violations of the United States' trust obligations to the Tribe. To correct the declines in fishery resources, Congress passed various federal laws that mandated restoration of the Trinity River fishery resources as part of the Federal trust obligations to the Tribe.

The problem is that funding and management for Trinity River habitat restoration may jeopardize a trust resource and threaten our federally-reserved fishing rights. The Hoopa Tribe is recognized by law as a co-manager of the Trinity River Fishery. We have worked tirelessly for years to obtain congressional action to address inadequate funding levels for the Trinity River Restoration Program. We have also sought to carry out more functions related to river restoration. Reclamation, however, determined that the programs that are mandated by Congress to fulfill the trust obligations of the United States to our Tribe are not "Indian Programs" under the Self-Governance Act. Reclamation does not perceive the trust responsibility as an obligation that gives tribal water and fishing rights any priority. Absent an acknowledgement that a trust

duty is owed, protection of our rights takes a back seat to other projects, even new or newly proposed projects.

The Title IV legislation, now H.R. 2444, at one time included specific language that would enable tribes to compact to perform programs, or portions thereof, that "restore, maintain or preserve a resource (for example, fisheries, wildlife, water or minerals) in which an Indian tribe has a federally reserved right, as quantified by a Federal court." Proposed § 405(b)(2) of H.R. 3994, 110th Cong. 1st Sess. Such language is important to our Tribe: it would resolve problems we face with Reclamation over the management of Trinity River programs. These problems include delays in executing contracts which result in a significant financial burden for the Tribe and administrative, programmatic and staffing nightmares for our programs.

Another example involves realty. As previously mentioned, we compact realty and, this gives rise to another example of the need for compacting on a mandatory basis with agencies outside the BIA. We struggle with the underfunding of the realty program in general as well as with the fact that surveys are done through the Bureau of Land Management with federal monies transferred from the Bureau of Indian Affairs to the BLM. When we first compacted with BIA, the BIA would transfer monies allocated to it for surveys to the BLM where BLM would designate a BLM surveyor for surveys needed on the Reservation. BIA's position was that, technically, it did not have funding for surveyors since such monies were transferred to BLM. Now, there is one BLM position, identified as American Indian Surveyor, in each of the BIA Regions. With this, there is one such position in the BIA Pacific Region to serve 115 tribes. Not only is this inadequate for the workload, but the position does not do actual surveys, it reviews documentation submitted in relation to fee-to-trust applications. Our realty functions are hindered due to the lack of funding for, and inability to obtain, adequate and timely surveys. We believe it would be helpful to compact directly with the BLM for survey activities. Additionally, more funding is required for such functions to be carried out effectively.

Again, the trust responsibility is the trust responsibility of the United States and it is owed to tribes by all federal agencies. This must be put into practice to ensure proper management of trust resources. Tribes signed treaties with the federal government; their relationship is with the United States overall. We had no part creating the structure of the federal government which is divided into several agencies. If an agency is part of the federal government, it should be held to carrying out the trust responsibility. There is no reason for a different policy to exist with respect to an agency that carries out a trust function just because it exists outside of the BIA. Significantly, for BIA programs to develop law enforcement, for example, the presence of benefits to non-tribal members does not remove the program from mandatory compacting. Neither should programs directed to restoration and protection of trust resources such as Indian water rights or fisheries resources be insulated from mandatory compacting simply because those programs are administered by non-BIA agencies and bureaus of the Department of the Interior.

We believe the time has come for tribes to exercise their self-governance in other areas and in a more expansive way. With this, we ask the Committee to focus on the non-BIA compacting issue as soon as possible as a means for the United States to fulfill its trust responsibility.

TITLE III of S. 1439, the Indian Trust Asset Management Demonstration Act

We also request that the Committee introduce Title III of the S. 1439, the Indian Trust Reform Act of 2005. Hopna worked with several tribes in the Northwest and the Committee staff on the development of this proposal. It would further the fulfillment of the United States' trust responsibility and further facilitate tribal self-governance.

Title III of S. 1439 would create the Indian Trust Asset Management Demonstration Project, which would allow tribes to develop and operate their own tribally-developed trust asset management plans and manage their assets in a manner different than the Secretary as long as the tribe's plan is consistent with tribal and Federal law applicable to the trust assets, or the management of the assets, and the federal trust responsibility, and satisfies certain standards. We are already doing this with our forestry program, which is acknowledged nationally as a model program. Further, we were one of the Section 130 (131) tribes which would be grandfathered into the Demonstration Project under the terms of Title III of S. 1439. Title III encourages local decision-making and cooperation between tribal governments and the United States and acknowledges that the United States' fulfillment of the trust responsibility does not require day-to-day management, but facilitation in furtherance of tribal self-governance and self-sufficiency.

We believe Title III would provide another useful model for how tribes can assist the United States with proper trust assets management and create an understanding on the United States' part of the differences between our respective values and expectations when managing trust assets within our tribal territories. We believe that all tribal governments, regardless of whether they are Direct Service or Self-Governance should be a part of the management of trust resources within their jurisdictions. Active participation by tribal governments in the management of trust assets creates good results and reduces chances of conflict between tribes and the United States. Enacting Title III would result in positive practical and trust management improvements. We support the concept of Title III of S. 1439 and would look forward to working with the Committee to enact such a provision.

Repeal the Office of Special Trustee

The Office of Special Trustee ("OST"), established by the 1984 Trust Reform Act, was never intended to become permanent. 25 U.S.C. § 4642(c). However, OST has established a parallel bureaucracy which duplicates administrative inefficiencies instead of improving trust services. The lines between OST and BIA responsibilities are often unclear. The same appropriations would go further if OST were recombined with BIA.

Improve the Accounting of Real Property Trust Assets

In the course of settling our trust lands mismanagement case, *Nompa Valley Tribe v. United States, Court of Federal Claims, No. 06-0412*, we were asked to agree to the correctness of a January 31, 2012, Statement of Performance for our tribal trust property. While we could agree to the trust fund balances, the Statement of Performance was found to include scores of pages listing real property assets, including tracts of tribal lands, and lands leased to tribal members for home site purposes. The listing of real property assets is full of mistakes and

obviously has not been properly updated. The process of preparing and maintaining those trust records must be improved.

Issue a Secretarial Order Barring Department Employees From Advocating Reductions in Federal Trust Responsibilities

There are many examples of federal employees negotiating to reduce the scope of the federal government's trust responsibility to Indians. For example, in 2010 the Department as a "drafting service" for Congressman Mike Thompson, proposed the following bill language "[T]he United States, as trustee on behalf of the Federally-recognized tribes of the Klamath Basin . . . is authorized to make the commitments provided in the Restoration Agreement, including the assurances in Section 15 of the Restoration Agreement." In the Restoration Agreement, Section 15, the Department employees committed that the United States would provide "Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories . . . that will interfere with the diversion . . . of water for the Klamath Reclamation Project." When the Department proposed that bill language, it was well aware that three of the federally recognized tribes of the Klamath River Basin opposed Section 15 of the Restoration Agreement. Nevertheless, the Department, over tribal opposition, proceeded to advocate reduction of its trust responsibilities. That legislation was introduced as H.R. 3398 and is still pending.

Several efforts to limit trust duties arose in connection with the tribal trust fund settlement negotiations noted above. For example, the tribes were asked to agree that the Statements of Performance satisfied the government's obligations under the Trust Reform Act. Similarly, the Treasury Department sought agreement that its obligations were limited to those defined by 25 U.S.C. § 161a(a). We recognize that the Department cannot prevent the Justice Department from taking advocacy positions in litigation. However, a Secretarial Order prohibiting Department employees from attempting to reduce the government's trust obligations to Indians will help protect trust duties.

The Department Should Use Its Rule-Making Authority to Help Tribes Protect Trust Property

The Indian Trader Statute illustrates areas where the Department has missed opportunities to help tribes protect their resources and programs. 25 U.S.C. § 261 authorizes the Department to appoint traders to Indian tribes and to adopt appropriate regulations. This statute became an issue in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001), where the Navajo Nation and the United States argued that Atkinson was subject to tribal taxes by virtue of being an Indian trader. The Supreme Court noted, however, that "Although the regulations do not 'preclude' the Navajo Nation from imposing upon 'Indian traders' such 'fees or taxes it may deem appropriate,' the regulations do not contemplate or authorize the hotel occupancy tax at issue here. 25 CFR § 141.11." *Id.* at n.10. But the Department, instead of taking the opportunity to amend the regulation to expressly authorize such taxes, instead proposed to repeal the Indian Trader Statute. Rulemaking to support tribal taxes to protect programs and property is needed.

Amend Secretarial Order No. 3206 (June 5, 1997) Into Regulations With Specific, Measurable Consultation Requirements That Have the Force of Law

In Secretarial Order No. 3206, the Secretary of the Interior and the Secretary of Commerce, pursuant to the Endangered Species Act of 1973 ("ESA"), the federal-tribal trust relationship, and other federal laws, attempted to clarify federal responsibilities when actions taken under the ESA may affect Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. While the Secretarial Order contains good concepts, it is insufficient to establish a legally enforceable obligation to engage in meaningful government-to-government consultation with tribes. For example, in *Center for Biological Diversity, et al. v. Salazar*, No. 16-2130 (D. Ariz. Nov. 30, 2011), the Court examined the Secretarial Order to determine whether its obligations included specific, measurable consultation requirements that have the force of law. The Court concluded that protections for Sonoran Desert bald eagles, which have great value to tribes, "do not implicate the federal government's fiduciary duty over the management of specific treaty-protected resources . . . nor does [Fish and Wildlife Service] have the same statutory and regulatory obligations to consult with the tribes under the ESA that the BIA has when making decisions directly related to the management of tribal services and employment on Indian reservations." *Id.* Order at 19. The Court concluded that "Congress and Interior have not imposed such consultation obligations in the ESA context, and it is not the proper role of the Court to impose such obligations on its own." *Id.* This defect in Secretarial Order No. 3206 should be corrected, and adopted as formal regulations to make consultation meaningful.

Copies of Records Should be Provided to Tribes as Part of the Government-To-Government Process, Instead of Relegating Tribes to the Bureaucratic Black Hole of the Freedom of Information Act

The Department's administration of the Freedom of Information Act ("FOIA") leaves much to be desired. FOIA is applied grudgingly and responses are long delayed. However, there is no reason for insisting upon the formal FOIA process when responding to a records request from an Indian tribe. Just as federal agencies do not employ FOIA against each others' document requirements, so too the Department should expressly provide for the prompt availability of federal records upon the request of a tribe as a matter of government-to-government consultation.

Conclusion

We appreciate the opportunity to submit our views for the record on this important topic. Thank you for your consideration, and please do not hesitate to contact us if you have questions or need additional information.

PREPARED STATEMENT OF HON. EDWARD K. THOMAS, PRESIDENT, TLINGIT AND HAIDA
INDIAN TRIBES OF ALASKA

Dear Chairman:

On May 17, 2012 you led a very timely oversight hearing on fulfilling the Federal Trust responsibility and our government to government relationship. Central Council was unable to attend, but respectfully requests that you enter our concern into the hearing record.

Attached is a copy of a letter I sent on May 17th to President Obama where I detail the Department of Interior's failing to honor our Government to Government relationship and their failure to adhere to Interior's own Tribal Consultation policy.

Specifically, Interior is planning to implement "significant" changes to the Indian Reservation Roads Program absent timely or meaningful tribal consultation. Our first and only notice of this planned "significant" implementation was a Federal Register notice issued on May 7, 2012 for a 'tribal consultation' in Anchorage, AK on June 5, 2012.

This call for "tribal consultation" fails to adhere to policy on many counts, not the least of which is that it appears tribes are being called last minute to travel to Anchorage to be told that federal officials have decided to change the rules that effect funding in a significant way. No feedback mechanism is identified, as the agency plans to simply implement the change. This is not Tribal Consultation, meaningful or otherwise.

Also, we object to the short time frame and the lack of content in the notice which might inform us as to the outcome of this pending unilateral agency change to the IRR program funding.

Until there is a central scorecard for federal agencies where tribes might, in a consolidated fashion, rate their "consultation experiences" we will forever be independently policing agency actions which affect Indian Peoples. To this end, we have developed a basic internet based survey tool of performance measures to rate the effectiveness of federal agency tribal consultation in a transparent and comparative way. The sample Tribal Consultation

Scorecard may be accessed at <https://www.surveymonkey.com/s/CVZGWYP>. A sample report from this survey is enclosed for your consideration. We would be pleased to discuss furthering this concept with your committee.

Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council), based in Juneau, Alaska, is a federally recognized tribe of more than 23,000 tribal citizens worldwide

Attachment

May 17, 2012

President Barack H. Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

RE: Call for Tribal Consultation on Indian Reservation Roads Program Issues

Dear President Obama:

As President of the Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council), a tribal government representing over 28,000 Tlingit and Haida Indians worldwide, I am writing you on a most urgent matter regarding our Government to Government relationship. The Department of the Interior (Interior) is not properly adhering to its own Interior Department policy governing tribal consultation. As you are aware, departmental policies were laboriously developed in response to your own Executive Order 13175 regarding the need for meaningful Tribal Consultation.

A Federal Register Notice dated May 7, 2012 announced that Interior intends to hold a tribal consultation in Anchorage, Alaska on June 5, 2012. However, the Interior Department Consultation policy promises that Interior "will strive to ensure that a notice is given at least 30 days prior to scheduling a consultation. If exceptional circumstances prevent notice within 30 days of the consultation, an explanation for the abbreviated notification will be provided in the invitation letter." We have received neither a letter nor notice of any "exceptional circumstances."

We ask that you insist that Interior adhere to the process outlined in its own policy. The consultations during the week of June 5th occur at a time that has long been set aside for "Celebration" which is a bi-annual cultural festival for the Tlingit, Haida, and Tsimshian people. This cultural gathering is one of the largest in the Southeast Alaska Native community and the second largest event sponsored by Alaska Natives in the State of Alaska. Many tribes and tribal members are committed to this event, making the consultation dates unsuitable and the untimely notice unworkable. Interior's Tribal Consultation Policy specifically states that its bureaus should work with tribes and consider schedules of the tribes in setting consultation timelines.

Further, the Interior Tribal Consultation Policy specifically states that "[a]dequate notice entails providing a description of the topics to be discussed, a timeline of the process, and possible outcomes. Notification of a consultation should include sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation."

Interior's untimely notice provides us with no "possible outcomes" other than that a "joint BIA and FHWA recommendation" regarding proposed roads and primary access is being implemented. Last minute notice of implementation is not consultation. The existing rules and regulations on "proposed roads" and "primary access routes" were the subject of a formal rulemaking under the negotiated rulemaking process consistent with our Government to Government relationship. We would consider it a violation of federal law, as well as of our Tribal Consultation Policy, for Interior to implement changes to the regulations that were negotiated. Even more peculiar is the timing of this "consultation" on a change -- at the very moment the Senate and House committees are in conference dealing with changes to the statutory framework.

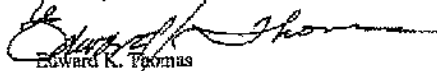
Consistent with our Government to Government relationship, we insist that "significant" changes to the Indian Reservation Program, including changes that alter the funding formula, likewise be considered only in the context of government to government Negotiated Rule Making.

We see nothing in Interior's proposed meetings that will allow tribes to engage in 'meaningful' consultation, nor even a process for consideration of feedback on the topic of consultation. Interior policy requires that "[t]he notice should also give Tribal leaders the opportunity to provide feedback prior to the consultation, including any request for technical assistance or request for clarification of how the consultation process conforms to this Policy."

It appears that tribes are being called last minute to travel to Anchorage to be told that federal officials have decided to change the rules that affect funding in a significant way: This is not consultation, meaningful or otherwise.

For these and other deviations from the established Department of Interior and White House policy, we ask that you direct Interior to honor the consultation policy, and provide adequate notice and content so that tribes may be truly engaged in consultation. If the federal recommendations are "significant", we then request formal negotiated rule making procedures be followed.

Sincerely,


Edward K. Thomas
President

PREPARED STATEMENT OF HON. JOHN YELLOW BIRD STEELE, PRESIDENT, OGLALA
SIOUX TRIBE

Chairman Akaka, Vice Chairman Barasso and Members of the Committee, I submit testimony on behalf of the Oglala Sioux Tribe on the Federal Trust Responsibility to Indian tribes to urge you to protect and preserve it from diminishment, adverse change, or repudiation by the Administration, Federal Agencies or Federal Courts.

The Lakota, Nakota, and Dakota Oyate, or in English—the Sioux Nation—occupied a vast original territory, which reached from south central Minnesota, western Iowa and Nebraska through northern Kansas, northern Colorado, South Dakota, North Dakota, Wyoming and Montana.

Indian tribes are Native Nations, with original sovereignty arising from the Will of our People, who formed the *Oceti Sakowin*, or Seven Council Fires of the Sioux Nation in time immemorial. Today, our sovereignty continues through the Will of our People, who keep our traditions, culture and community a proud, vibrant, living Native Nation.

We suffer many hardships to remain together as Lakota People, as our Oglala Lakota Nation. Shannon County on our Pine Ridge Reservation is the 3rd poorest county in America, measured by per capita income. Over 47% of our people live below the poverty line.

Our Lakota relatives on the Cheyenne River Sioux Reservation in Ziebach County, South Dakota live in the poorest county in America. Our Lakota relatives on the Rosebud Sioux Reservation in Todd County, South Dakota live in the 2nd poorest county in America. When our Lakota and Dakota relatives on the Standing Rock Sioux Reservation counties are counted, 5 of the 10 poorest counties in America are located on our Sioux Reservations that were originally part of the Great Sioux Nation.

In our treaties, we ceded millions of acres of land to the United States in exchange for treaty promises, education, health care, housing, and economic development. The basic pledge is that the United States will help us make our permanent homes on the reservations to be livable homes. Yet, those treaty promises have not been fulfilled. This is the real life situation against which the Federal Trust Responsibility must be measured. The Federal Trust is broken and must be repaired.

The Background of the Federal Trust Responsibility

From the very beginning of the American Republic, the United States recognized Indian tribes as Native Nations, endowed with sovereign authority to govern our people, our territory, and our nations. The 1778 Treaty with the Delaware Nation sets forth a military alliance intended to assist the United States in maintaining its independence. The Delaware Nation Treaty is founded in international law.¹

In 1787, Congress enacted the Northwest Ordinance, which was intended to establish a framework for Indian affairs in Ohio, Indiana, and Michigan:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them....

At the same time, America's Founding Fathers, Washington, Adams, Jefferson, Franklin, and Madison were engaged at the Constitutional Convention in the debate over the substance and form of the Constitution. The Constitutional Convention had been initially charged with revising the original Articles of Confederation, yet the Framers decided to write an entirely new Constitution to govern the United States.

The Constitution explicitly strengthened Federal authority over Indian Commerce—Congress is vested with plenary power to regulate commerce with the Indian tribes. The proper understanding is that plenary power is "plenary" or complete vis-à-vis the states. Not "plenary" vis-à-vis the Indian tribes, not to substitute its judgment for tribal self-government. Congress is vested with power to regulate commerce "with the Indian tribes" in language parallel to the foreign commerce clause, "with foreign nations." Put another way, the Constitution establishes a bi-lateral relationship with Indian tribes.

The bi-lateral, government-to-government relationship is reinforced by the Constitution's Treaty and Supremacy Clauses, which recognize that treaties made under the Articles of Confederation

¹ The United States firmly rejected the notion, promoted by the British, that the American Republic sought to "extirpate" the Delaware and steal their lands. The United States fully guarantees and protects the Delaware Nation's territory, so long as the Delaware held fast to the chain of friendship with the United States. The Delaware Nation still holds fast to the chain of friendship, but the United States removed them from their original territory and placed them within the Cherokee Nation's removal territory.

are part of the "Supreme Law of the Land." As the Supreme Court explained in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Constitution implicitly recognizes Indian tribes as sovereigns capable of treaty-making by affirming the prior Indian treaties made under the Articles of Confederation.

George Washington was the President of the Constitutional Convention, and was elected as the first President of the United States immediately after the ratification of the Constitution in 1789. The next year, President Washington invited the Creek Nation to New York (then the U.S. Capital) to negotiate the first treaty with an Indian nation under the Constitution. In the 1790 Creek Nation Treaty, "[t]he United States solemnly guaranteed to the Creek Nation all their lands within the limits of the United States...." Thus, the Treaty was a bi-lateral treaty, recognizing Creek Nation territory and Creek Nation status as a self-governing nation. Both nations agreed to "carry forth the foregoing treaty into full execution, with all good faith...."

President Thomas Jefferson recognized that Indian tribes were governed by tribal law and tradition, and that it would be wrong for the United States to extend its laws over Indian tribes, which would be alien and unfamiliar and a violation of tribal rights to self-government. Indeed, in the Apportionment Clause, the Constitution recognizes that individual Indians are tribal citizens, subject to tribal self-government and not subject to state law by excluding "Indians not taxed" from apportionment of Congress and per capita taxation by the States.

In the 1803 Louisiana Purchase Treaty, Jefferson acknowledged that he was buying the right of preemption to purchase the Indian lands, and that Indian tribes retained our "natural rights" to the possession of the soil. Accordingly, the Louisiana Purchase Treaty provides:

The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other suitable articles shall have been agreed upon.

Louisiana Purchase Treaty, Art. VI (1803). In this foundational treaty, the United States pledged to act on the basis of government-to-government relations with Indian tribes and to take action concerning Native Nations based upon "mutual consent." Accordingly, when Federal Territories were formed, Indian lands were excepted from the Territories' jurisdiction unless the Indian tribes had consented to their inclusion and made that consent known to the President. See Wyoming Territory, 25 July 1868, c. 235, sec. 1, 15 Stat. 178 (1868).

Conversely, when the United States sought to establish a fort within the Sioux Nation territory in Minnesota, the American Republic sought Sioux Nation recognition that the Federal Government would possess sovereign authority over the lands ceded under the 1805 Treaty with the Sioux Nation:

[T]he Sioux Nation grants unto the United States for the purpose of the establishment of military posts, nine miles square at the mouth of the river St. Croix, also from below the confluence of the Mississippi and St. Peters, up the Mississippi.... That the Sioux Nation grants to the United States, the full

sovereignty and power over such districts forever, without any let or hindrance whatsoever.

At the conclusion of the War of 1812, the British sought the concession from the United States in the Treaty of Ghent that:

America would "end ... hostilities with all the Tribes or Nations of Indians ... and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in [1811] previous to such hostilities."

The United States entered into 1815 treaties with numerous Indian tribes. The 1815 Treaty with the Teton Sioux, for example, provides:

There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the said tribe ... and all the friendly relations that existed between them before the war, shall be, and the same are hereby renewed.

The undersigned chiefs and warriors, for themselves, and their said tribe, do hereby acknowledge themselves and their aforesaid tribe to be under the protection of the United States, and of no other nation, power, or sovereign, whatsoever.

As the Supreme Court explained in *Cherokee Nation*, protection implied that the Sioux Nation's interests would be promoted and defended by the United States, not destroyed or undermined.

The Federal Trust Responsibility to Indian tribes has its beginnings in the 1787 Congressional pledges of America's "utmost good faith" towards Indian tribes found in the Northwest Ordinance, in President Washington's pledges of protection to the Creek Nation in the 1790 Treaty with the Creek Nation, and Jefferson's recognition of the natural rights of Indian tribes to possess the soil and govern ourselves, reflected in the Louisiana Purchase Treaty.

Genocidal Warfare Against Indian Nations

Despite the United States pledges of protection, the Federal Government embarked on a series of genocidal wars against the Sioux Nation. In 1866, the United States called for a treaty meeting at Fort Laramie, Nebraska. The United States treaty commission sought to negotiate a road through the Powder River Country in Wyoming, yet as Sioux tribal leaders met with the U.S. delegation, an Army column arrived bound for Wyoming with packs and equipment for building forts to guard the Powder River road. This caused outrage among the Sioux tribal leaders. Chief Red Cloud summed up the feeling, "The Great Father sends us presents and wants us to sell him the road, but the White Chief comes with the soldiers to steal it before the Indian says yes or no. I will talk with you no more. I will go now and fight you!"

Red Cloud, Crazy Horse and other tribal leaders were determined to preserve their last untrammled hunting ground. From 1866 to 1868, the Red Cloud and the Sioux Nation fought the Powder River War. There were several battles, with the most notable victory in the Fetterman fight. Captain Fetterman and his command were wiped out as they sought to kill Crazy Horse and a team of decoys.

During congressional debates, Congressmen said that the Lakota were the finest light cavalry in the world and it took 10 U.S. soldiers to pin down one Lakota warrior. On the heels of the Civil War, Red Cloud's War was not cost effective for the United States, which the U.S. Treasury said spent \$1 million to kill one Lakota warrior. The U.S. simply could not afford to fight us. And, moreover, they said it would be 150 years before white men would want to live on the desert lands along the west bank of the Missouri, so the Great Sioux Reservation could be established as a "permanent home" for the Sioux Nation.

To end Red Cloud's War, President Johnson presented the 1868 Sioux Nation Treaty to the Senate and the Senate ratified the treaty in February, 1869. The 1868 Sioux Nation Treaty, provides that "the United States desires peace and pledges its honor to keep the peace." The Treaty set aside all of western South Dakota from the low water mark on the east bank of the Missouri to the 104th Meridian as a "permanent home" for the Lakota. The 1868 Sioux Nation Treaty recognized more than 40 million acres in Nebraska, Wyoming and Montana as unceded Indian territory and preserves hunting lands in Nebraska and Kansas. Article 2 sets forth the boundaries of the Great Sioux Reservation:

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same thence along the low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of the State of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning ... is set apart for the absolute and undisturbed used and occupation of the Indians....

Article 11 reserves the hunting lands of the Sioux Nation along the Platte River and the Smoky Hill River:

In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of the North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase....

Article 16 reserves the Powder River Country as follows:

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same....

The United States agreed that no one would enter or cross over the reservation, except agents, officers or employees of the government "authorized to enter upon Indian reservations in discharge of duties enjoined by law."

In 1874, the Army's Custer expedition violated the treaty by unauthorized entry into the reservation, *discovered gold* and Custer gave the news to the reporters he had brought along to spread his fame: Gold "right from the grass roots," in his words to the New York Times.

By 1875, Generals Sherman and Sheridan convinced President Grant that it was no longer worthwhile to defend the reservation from white encroachment and Grant authorized the violation of the 1868 treaty. The next spring, President Grant gave his authorization to send out three army columns to converge on Sioux Nation at the Little Big Horn River, resulting in the Army's defeats at the Battles of the Rosebud and the Little Big Horn in June, 1876. The public learned of Custer's defeat on July 4, 1876, at the time of the Nation's Centennial Celebration. Reacting to the news with outrage, President Grant sent new army columns to the Dakota-Wyoming-Montana area, killing Chief Lame Deer, forcing Sitting Bull to retire to Canada and Crazy Horse to surrender in 1877.

In August 1876, Congress passed an appropriations bill directing that there would be no more money spent for the "subsistence" of the Lakota, unless our people gave up the Black Hills and our reserved hunting lands. A presidential commission secured signatures of only 10% of the adult males to a so-called "agreement" to give up the Black Hills, in violation of the 1868 treaty's ¾ consent requirement for land cessions. Congress enacted the 1876 "agreement" as the Act of Feb. 28, 1877—the "Sell or Starve Act."

At times, the Federal Trust Responsibility Protected Tribal Self-Government

Despite historical Federal breaches of trust, there were sometimes glimmers of hope. Indian treaties, statutes, executive orders, court decisions and administrative rulings provided a body of law that forms the backdrop for the trust responsibility and the Federal Trust Responsibility is a venerable doctrine with roots reaching to the foundation of the American Republic. At times, the Supreme Court limited the scope that Federal laws would otherwise have in Indian Country, based upon the Federal Trust Responsibility, to stop Federal Government interference with tribal self-government.

For example, in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the United States did not have authority to try Crow Dog for the murder of Spotted Tail, a well recognized Lakota Chief, because the treaty reserved crimes by one Indian against another to

tribal justice systems. The Supreme Court explained:

'And congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.' ... The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

Accordingly, the Court held that the general Federal statutes against murder did not apply in the killing of one Lakota Indian by another, since the 1868 Treaty with the Sioux Nation reserved such crimes to tribal law.

Throughout the Nineteenth Century, Indian tribes were subject to the Social Darwinist Attitude that "white society" was a superior society. As a result, Federal law was often ignored and Indian rights were trampled under in the effort to "civilize" Indians. In the later period, the Supreme Court committed heinous violations of Indian Civil Rights, such as *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) where the Court approved the destruction of the Kiowa and Comanche Indian reservations under a Social Darwinist "Guardian/Ward" theory of the Federal Trust Responsibility. The Court's decision was contrary to the express direction of the 1867 Treaty with the Kiowa and Comanche, which required $\frac{3}{4}$ male tribal member consent to any further land cessions.

In the New Deal Era, the Supreme Court began to unwind some of the worst violations of Indian Civil Rights from the 19th Century. As America entered the mid-20th Century, President Roosevelt sought to restore respect for tribal self-government through the Indian Reorganization Act. And, in this period the Supreme Court began to recognize Indian rights: Therefore, the United States' settlement of the Arapaho Tribe on the Shoshone Indian Reservation was acknowledged as an illegal taking, which required compensation. As the preeminent trust law expert, Justice Cardozo explained:

The power does not extend so far as to enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation; * * * for that would not be an exercise of guardianship, but an act of confiscation.' The right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is as sacred as that of the United States to the fee.' Spoliation is not management.

Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States, 299 U.S. 476, 497-98 (1937)

In this era, the Federal Trust Responsibility was used as a shield to protect Indian tribes from third-party depredations. For example, in *United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), the United States sued Santa Fe Railroad for possession of the aboriginal Indian land of the Hualapai and for back rent from Santa Fe Railroad for its trespass on the lands. The Court ruled in favor of the United States and the Hualapai explaining:

Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with by the United States.... [T]he Indian right of occupancy is considered as sacred as the fee simple of the whites.... It would take plain and unambiguous action to deprive the Walapais of the benefits of that policy. For it was founded on the desire to maintain just and peaceable relations with Indians. The reasons for its application to other tribes are no less apparent in case of the Walapais, a savage tribe which in early days caused the military no end of trouble.

The Court found no clear congressional action extinguishing the Hualapai title to the land, the Railroad surrendered the land to the United States, and the Court ordered an accounting for back rents due to the Tribe.

In the 20th Century, the Supreme Court Held the United States to the Highest Trust Standards

In the mid-20th Century, the Supreme Court ruled that the United States should be held to the exacting standards of a fiduciary in its treaty and trust relationships with Indian tribes. In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), the Seminole Nation sued the United States for failing to protect the treaty payments and annuities due to the Nation. The Supreme Court, relying on the traditional standards for common law trustees, explained:

It is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary. The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. *In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many*

acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

(Emphasis added). Accordingly, the Supreme Court remanded the case back to the lower courts with instructions to determine whether the United States had made payments with the knowledge that they would be wasted and to provide a recovery for the Seminole Nation, if that were the case.

History Shows the Wisdom of Native Nations

Today, history has shown that our Lakota people were right. Our philosophy is to Respect the Earth, as our Mother so the People will live. Today, man pollutes the Earth at his own peril.

Congress has repudiated many of the policies of the 19th Century Social Darwinism by enacting Federal laws protecting Indian Civil Rights and Self-Government:

- The Indian Self-Determination and Education Assistance Act;
- The American Indian Religious Freedom Act;
- The Tribal Self-Governance Act;
- The Native American Graves and Repatriation Act; and
- The Native American Languages Act.

Even so, during this "more enlightened period," Indian tribes were denied full and fair justice.

In *Sioux Nation v. United States*, 448 U.S. 371 (1980), the Supreme Court held that the United States' taking of the Black Hills from the Sioux Nation, was in direct violation of the 1868 Treaty, and was perhaps the most "ripe and rank case of dishonorable dealings" in the Nation's history. Still, there was no real justice.

The Supreme Court's New Brand of Injustice to American Indians

Yet, at the dawn of the 21st Century, the United States Supreme Court has turned into an anachronistic instrument of negative social policy—in cases, such as *Navajo Nation v. United States*, 556 U.S. 387 (2009), the Supreme Court held that it was okay for the Secretary of the Interior to hold secret meetings with Coal Company executives while Navajo coal leases under his care were being re-negotiated. Interior put its thumb on the scale, ensuring a lower cost lease for the Coal Company and less revenue for the Navajo Nation from its non-renewable resources. The Supreme Court gave no credence to the fact that *Congress had directed the Secretary to "maximize" tribal royalties from Indian minerals under the 1938 Indian Mineral Leasing Act. Where is the Federal Trust Responsibility for Navajo Nation non-renewable minerals?*

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the State of Rhode Island argued that the term "now under federal jurisdiction," referred to Indian tribes, that back in 1935 were under federal jurisdiction, at the time of the passage of the Indian Reorganization Act. That means that the

Naragansetts, neighbors of the first Thanksgiving, were prevented from reclaiming a small fraction of their original homeland. It also meant that the Supreme Court threw out over 70 years of statutory construction in favor of Indian tribes that have been restored to recognition and refused to apply FDR's New Deal to these forgotten tribes. Where is the Federal Trust Responsibility to the Naragansetts? Lost in the Supreme Court's return to the 19th Century.

Then there is *Cobell v. Salazar*. Elouise Cobell, a Blackfoot Indian banker, sought to correct 100 years of mismanagement of Indian trust lands by suing the Secretary of the Interior, Secretary of Treasury, and the Attorney General to force an accounting for Individual Indian Money Accounts. These accounts are the result of the Allotment Act, where individual Indian lands were held in trust for the benefit of their owners, and Interior managed revenues from these lands. Tragically, Interior never kept real accounts, so the BIA could not account for the revenue from the lands. Fractionalization of Indian trust lands became a major problem, with many tribal members owning a small portion of family lands. These fractionated interests are large enough to be an accounting headache, not large enough to farm or ranch. So, the Federal Government agreed to a \$3+ billion settlement for individual Indian land owners, yet Indian tribes were not consulted and Cobell lawyers agreed to the expansion of the settlement claims without any consultation with Indian tribes. As a result, individual Indians within the Bakken Oil Formation—perhaps the largest oil field in the World—stand to lose their claims for breach of trust, and other unintended results include the cancellation of Indian land boundary disputes, without any legal review.

The Cobell Settlement and Recent Supreme Court Mistaps Demonstrate the Need for Trust Reform Legislation

The Cobell Settlement needs to be reopened so that the individual Indian land owners thrown out of court because they failed to opt-out of the Cobell Settlement, should be given a new chance to weigh the costs and benefits of Cobell. Tribal governments were unable to help because the United States, Justice and Interior Departments refused to consult with us until after the fact—after all, according to them, Indian tribes had no interest in the case. Only their tribal members lands were at stake! They forgot that individual Indians are the citizens, who make up Indian tribes. Where is the justice for the Cobell Indians, who without their knowledge had claims extinguished?

There should be a new Federal Trust Responsibility Enhancement Act that provides that:

- When the United States takes control of Indian trust land or property, there is a trust corpus;
- When the United States establishes standards for dealing with Indian trust lands or property, it must adhere to them as a trustee; and
- When the United States has control of an Indian trust corpus, then it must be as responsible as a trustee that has control of private land or property and provide compensation for undue mistakes.
- When the United States gathers information about Indian trust lands or property, it must share the information with the beneficiaries, as any other trustee would do.

In other words, the United States must exercise a duty of loyalty to its beneficiaries, Indians and Indian tribes, and not hold secret meetings with Coal Companies or private interests not aligned with the Indians' or tribes' best interests. The United States must account for funds, must prudently invest resources, and must properly assist Indian nations in the development of resources. And, the United States must assume the responsibility for its malfeasance, misfeasance, nonfeasance, and breaches of trust. This is the legislation needed to strengthen the Federal Trust Responsibility, so that Indian tribes may truly be protected by the United States—even if it is the United States from which we need protection.

The United States Has A Good Consultation Policy on Paper. It Must be Enforced in Practice.

President Clinton issued Executive Order 13175, Consultation and Collaboration with Indian Tribal Governments (Nov. 6, 2000), to respect tribal sovereignty, tribal self-determination, and economic self-sufficiency. Presidents Bush and Obama have both reaffirmed the Consultation Executive Order.

The Executive Order explains: "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." It further states:

Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

The Executive Order provides direction to Federal agencies on agency rulemaking:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments...

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

This is a good directive, yet because it is simply an executive order each agency interprets it (and disregards it) as it sees fit.

For example, the IRS has recently targeted Indian tribes for audits. The fact that our Sioux Nation tribes have 5 of the 10 poorest counties in the country on our reservation lands does not dissuade them. The IRS is auditing us, asking for every payment to any tribal council member, employee or tribal member over a period of several years, every bank account, every expense report, every pow-wow prize. Literally, millions of paper transactions. For what?

We explain to the IRS that it is working with tribal governments, who have a treaty protected right to self-government and a right to work to provide a better community life on our reservations, where the average life expectancy for men is 56 years. Yet, it says we need to have a uniform application of the general welfare doctrine. If a government program is not in the general welfare, the IRS wants to tax it. For example, there is some suggestion that it wants to tax FEMA trailers provided to tribal members as a housing allowance, yet when the United States provides the White House and Camp David to the President, there is no thought of Federal taxation. We support the President but it is a double standard to try to impose a tax on a poor Indian family for a FEMA trailer while the President's home is simply part of the job. There is a cultural divide.

In the Mid-20th Century, Indian Lands Were Shielded From Federal Taxation by the Trust Responsibility

In the area of taxation, the Supreme Court decided in *Squire v. Capoeman*, 351 U.S. 1, 7-10 (1956), that the proceeds of timber sales from allotted trust lands on the Quinault Indian Reservation were not subject to Federal capital gains taxes.

The Court explained: "The Government urges us to view this case as an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians." The Court agreed that, outside the areas governed by treaty and remedial legislation, Indians are citizens and in ordinary affairs of life are treated as other citizens. Yet, the Court found that taxation of Indian trust lands was the subject of treaty and remedial legislation:

Congress, in an amendment to the General Allotment Act, gave additional force to respondents' position. Section 6 of that Act was amended to include a proviso—

"That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent." * * *

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. The fact that this amendment antedated the federal income tax by 10 years also seems irrelevant. The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment

shall be free from all taxes, both those in being and those which might in the future be enacted.

The first opinion of an Attorney General touching on this question seemed to construe the language of the amendment to Section 6 as exempting from the income tax income derived from restricted allotments. And even without such a clear statutory basis for exemption, a later Attorney General advised that he was --

'(U)nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.'

Two of these opinions were published as Treasury Decisions. On the basis of these opinions and decisions, and a series of district and circuit court decisions, it was said by Felix S. Cohen, an acknowledged expert in Indian law, that 'It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom.' These relatively contemporaneous official and unofficial writings are entitled to consideration....

The wisdom of the congressional exemption from tax embodied in Section 6 of the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which the cutting is made. Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be 'at the least, a sorry breach of faith with these Indians.'

In short, the Federal Trust Responsibility provides the principle guideline for Federal law relating to Indian trust lands, natural resources, and trust property. Other Federal law must be interpreted in light of the Federal Trust Responsibility when it applies to Indian lands, natural resources, trust property, or tribal self-government.

Today, the IRS General Welfare Doctrine Ignores the Federal Trust Responsibility.

The IRS should know: Indian treaties are laws. There is no repeal of law by implication, so our treaties are still in force on our Indian lands. The Federal Government seeks to promote a better community life on Indian reservations by providing programs for:

- Children—Headstart, Healthy Start, Youth programs, Boys & Girls Clubs.
- Education—Pre-School, Elementary, Secondary, Post-Secondary, Technical Schools, Scholarship programs, among others.
- Culture—Native American Graves Protection and Repatriation Act, Native Languages Act, National Museum of the American Indian Act, American Indian Religious Freedom Act.
- Elderly—Older Americans Act Native American Program.
- Economic Development—SBA Indian Programs, Commerce MEDA, BIA Office of Energy and Economic Development, USDA RUS.
- Health Care—IHS.
- Housing—Native American Housing and Self-Determination Act HUD, FHA.
- Transportation—BIA Roads, USDOT Native American Highways Program.
- Justice—COPS, Tribal Jails, Tribal Courts.

The IRS should say to itself, if the Federal Government is doing all of these programs to promote better reservation community life in accordance with Indian treaties and failing due to immeasurable need and impossibly limited funding, then Indian tribes should do whatever they can to better their communities. *And, if a tribal government program is designed to better tribal community life and make an Indian reservation a "livable" permanent home for tribal citizens, then it is in the "general welfare" of the United States because it furthers U.S. treaty obligations to Indian tribes, which are part of the Supreme Law of the Land.*

The IRS should not burden tribal self-government on Indian lands. Yet, the IRS cannot see this because it has a goal of making the tax code uniform. If you destroy our reservations through the IRS audit process and IRS bureaucratic intrusion into our tribal lands and governments ("you can argue about your treaties in jail," one of our tribal leaders was told), then the IRS have simply violated our treaties one more time. The IRS is certainly not applying the Executive Order on Consultation. Sure, right now, the IRS is consulting (years after implementing a discriminatory audit process), but they say their hands are tied because they must implement the tax code uniformly—meaning without regard to our treaties. We have seen that "uniform" before.

There should be a statute like the Regulatory Flexibility Act, which protects small businesses from Federal Government burdens. But it should protect Indian tribes, like the Federal Trust Responsibility, so it should be called the Trust Responsibility Uniform Enforcement Act ("TRUE"). Federal agencies should be required to consult with tribes, identify ways for Indian tribes to handle issues relating to reservation governance, and defer to tribal governments to provide our own traditional, cultural solutions to the issues that we face on our reservations. If they do not, tribal governments should have a right to go to court to reverse undue Federal agencies' burdens on treaty rights and tribal self-government. Perhaps, the Act should be called the Tribal Responsibility, Uniform Self-Governance Trust Act and the acronym could be "TRUST." In any event, if small businesses are worth protecting, Indian tribes—the original American sovereigns—are worth protecting.

Congress should also consider enacting the Consultation and Coordination with Indian Tribal Governments Act, H.R. 5608 (110th Cong.). This legislation seeks to ensure meaningful

consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and would require agencies to explore and use consensual mechanisms for developing policies when issues relate to tribal self-determination, tribal trust resources and treaty and other rights.

The Return of the Native Nations

The goal of the Federal Trust Responsibility should be re-examined. The goal is not to lift up Indian society to the level of white society, as posited under the Guardian-Ward analogy in the Social Darwinist Era of the late 19th Century.

The goal of the Federal Trust Responsibility should be to honor Indian treaties, as the fundamental agreements between sovereigns. Treaties recognize and protect:

- Indian tribes as prior sovereigns, with self-governing authority over our Indian lands and people;
- Indian lands as permanent homelands, that are a small part of original Native Nation territory and which must serve as viable, livable homelands;
- The United States has a trust responsibility to provide for education, health care, housing, reservation economic development, and to protect tribal and individual Indian trust lands, property, natural resources, water and air;
- The United States trust responsibility should be aimed at promoting tribal self-government so that Indian tribes can be returned to the independent, self-governing homelands that our people enjoyed from time immemorial;
- Policy should be based upon government-to-government consultation and mutual consent about goals, policies, strategies, finances and implementation should be the province of the tribal governments; and
- Appropriations should be negotiated between Federal agencies, Congress and Indian tribes to reflect our actual needs, actual population, and actual situation;
- Appropriations should be increased to meet the actual treaty obligations of the United States Government.

There should be a return to respect for International law, as President Jefferson recognized in the 1803 Louisiana Purchase Treaty—mutual consent is the true basis of government-to-government relations. The Secretary of the Interior frequently testifies that the basis for our relations with Federal territories is a policy founded upon mutual consent to the greatest extent practicable. Indian tribes, as Native Nations, deserve at least that much respect.

The Federal Trust Responsibility and Federal protection involve the enhancement of Native Nations. They must promote Self-determination and Self-Governance in accord with our treaties and the U.N. Declaration on the Rights of Indigenous Peoples. The U.N. Declaration calls for respect for indigenous self-determination, indigenous lands, waters, and resources, indigenous languages, cultures and traditions, indigenous education, indigenous health care, and adequate financing for indigenous institutions. It is time for the United States to move forward with the rest of the World, and recognize indigenous rights as natural, human rights, which have origins long prior to today's nation-states.

The United States must end the genocidal effects of failure to appropriate. We must change the terrible dynamic, where our children can expect a life expectancy 20 years less than the general population. We must end the astronomical high school drop out rates. We must end the killing effects of no jobs and no foreseeable opportunity. We must reinvest in Indian Country. The Federal Trust Responsibility is a life and death matter to our people, and the United States' honor hangs in the balance.

Enhance the Federal Trust Responsibility. Give it its original and true meaning. Do not let Federal agencies and the Federal courts chip away at the foundation of our government-to-government relations simply to escape their legal responsibility.

Thank you for your hard work. Thank you for caring.

On behalf of the Oglala Sioux Tribe, I am also submitting additional testimony for the record with an attached resolution from the Great Plains Tribal Chairman's Association.

Attachments

Chairman Akaka, Vice Chairman Barrasso, and members of the Committee, it is an honor to submit this testimony on behalf of the Oglala Sioux Tribe on this issue that is so enormously important to the well-being and future of our people.

The Oglala Sioux Tribe, located on the Pine Ridge Reservation in South Dakota, continues to endure some of the most adverse social and economic conditions found in the United States. We have many, many unmet needs, especially in the areas of medical care, education, housing, food, and job opportunities. I don't need to tell you that jobs are extremely scarce in our communities.

Our Tribe must rely on the United States' fulfillment of its treaty obligations and trust obligations in order to help meet the most basic needs of our people and the Tribe. These obligations, as we have pointed out many times, are not limited to the items mentioned in the English language version of the 1868 Treaty. In fact, greater promises were made, under our interpretation of the Treaty and according to our own oral history of the Treaty. Our understanding of the Treaty is consistent with the United States' own legal rule of treaty interpretation that a treaty must be interpreted as it was understood by the Indian party.

Today we continue to rely on the federal government to protect and manage our tribal lands, water and other resources, as well as the allotted lands that are in trust status. Strengthening and maintaining the trust relationship is of the very greatest importance to us. It is no exaggeration to say that maintaining the trust relationship is really a matter of life or death for many of us.

The greatest concerns for the Oglala Sioux Tribe about the trust relationship are these:

- a. The failure of Congress to appropriate adequate funds for the Bureau of Indian Affairs and other federal agencies to protect, manage, and oversee the

property, resources, and interests of the Oglala Sioux Tribe and other tribes. Without adequate funding, the BIA and other agencies cannot carry out their trust duties, and the Tribe's resources, property and funds are then at risk of loss or mismanagement.

- b. The failure to provide adequate funding for the BIA to carry out its duties causes real hardship and suffering for families on the reservation. For example, there are enormous delays of several years in probating Indian wills, and these delays result in serious economic hardship for hard-pressed families. It is clear that this problem and others are the result of grossly insufficient funding.
- c. The failure of Congress to appropriate adequate funds for programs and assistance to the Oglala Sioux Tribe and to individual members of the Tribe. Our Tribe and our communities, despite our long-term efforts to develop economically, remain extremely dependent on federal trust programs for meeting our most basic needs – from medical care to housing, education, and general assistance for food and other needs of families and individuals.
- d. We are particularly alarmed by what we and other tribes in our region see as a deliberate turn toward the disastrous policy of termination. Everywhere, we see signs and indications that the Department of the Interior intends “to get out of the Indian business.” We believe that we are facing the threat of drastic reductions in trust assistance — even eventual termination of the trust relationship. Termination would be a disaster of enormous proportions, inflicting even more suffering and deprivation on our Tribe. The trust obligations of this country are deep, legal and moral obligations that cannot be simply laid aside as a policy decision. These trust obligations are not mere entitlements that Congress can withdraw at will. The Great Plains Tribal Chairman's Association, of which I am a member, adopted a Resolution last Fall concerning this issue. A copy of the Resolution is attached.
- e. We also are concerned with the possible abuses of the federal government's authority when it acts as trustee — excessive power and authority claimed by the United States and the lack of full accountability to the tribes. An example of this is the power sometimes claimed by the federal government to dispose of or sell our lands without our consent. We do not agree that the federal government has any such power as a legal matter — and the use of any such power would be a direct violation of our treaties. Steps should be taken by Congress to clarify that no such power exists on the part of the trustee.
- f. The trust relationship and trust obligations must remain strong, but the trust relationship doesn't include interference with our sovereign tribal

government or tribal decisions. The trust relationship does not mean abuse of power or the violation of treaties. As a sovereign tribe, we cannot bargain away our sovereignty in exchange for benefits and protection that the federal government is required to provide. *We do not accept abuse of federal power in the name of trusteeship.* The Resolution of the Great Plains Tribal Chairman's Association speaks very strongly about respecting both the trust relationship *and* sovereignty.

Our relationship with the United States is a trust relationship, but it is first and foremost a treaty relationship, based on the Treaty of 1868. It is a relationship between sovereign nations, on a government-to-government basis. Sovereign nations are obligated by law to honor and carry out their promises and commitments. The trust responsibility of the United States is such a commitment, based on the promises of our Treaty and upon our long history with the United States. The Oglala Sioux Tribe's treaty relationship with the United States includes the recognition of our inherent right of self-determination and other human rights as set out in the U.N. Declaration on the Rights of Indigenous Peoples.

The trust relationship has old roots in the idea of white racial superiority, and it was once thought to mean that the Indian trust beneficiary was incompetent or unfit. But these ideas of incompetence, dependency on the federal government, and unilateral power on the part of the trustee have now been mostly laid aside. That old vision of trusteeship is not at all what the Oglala Sioux Tribe means when we speak of a trust relationship. We are not incompetent, of course. We focus instead on another aspect of the trust relationship — the promises of the federal government to provide assistance and to protect us and our lands and our resources.

The UN Declaration on the Rights of Indigenous Peoples is an excellent guide that Congress and the Administration should look to for maintaining and strengthening the trust relationship. The UN Declaration is supported by the United States and by a consensus of all the countries of the world. The Declaration contains a number of provisions that are very relevant to the trust relationship and to our government-to-government relationship.

The Declaration affirms a paramount rule that is often forgotten by Congress and the other branches of the federal government that "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States . . . and to have States honour and respect such treaties, agreements and other constructive arrangements. [Article 37] This obligation to respect and enforce the promises and agreements of our Treaty is the heart of the trust relationship.

The Declaration also proclaims our inherent rights of self-determination and autonomy. This is a clear acknowledgement of the sovereignty of our tribal governments. In addition to declaring the right of self-determination, the Declaration also states that

"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." [Article 4] This article points out that we not only have the legal right to govern our own affairs, but we have a right to financial support from the federal government for carrying out these government functions. This is just one of many provisions in the Declaration that state that the government of the country has obligations to provide financial and other assistance to indigenous peoples such as the Oglala Sioux Tribe.

Another provision that declares rights very similar to the trust responsibility of the United States is the following paragraph from Article 21: "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their [indigenous peoples'] economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities." Article 24 provides that indigenous peoples have a right to the highest attainable standard of physical and mental health, and that the country (the federal government) must do what is necessary to achieve that standard. Article 39 declares a right to financial and technical assistance that is very similar to one aspect of the United States' trust obligations. It declares, "Indigenous peoples have the right to have access to financial and technical assistance from the State and through international cooperation, for the enjoyment of the rights contained in this Declaration."

Article 8 of the Declaration sets important standards for the protection of indigenous peoples by the countries where they are located, and this is another important aspect of the trust relationship. Countries are obligated, among other things, to provide effective mechanisms for preventing and for redressing actions that would deprive them of their integrity as distinct peoples, deprive them of their cultural values, dispossess them from their lands, or subject them to forced assimilation. The obligation to protect tribes from harm is extensive and is described in detail in the Declaration.

Likewise, the Declaration uses the concept of free, prior, and informed consent as a standard for determining when indigenous peoples have agreed to some action affecting them or their rights or have taken some step to permit use of their lands or resources. This high standard is one that should be adopted by the United States as trustee, in keeping with the high fiduciary standards that the United States is obliged to observe.

Tribes are not all the same, and tribes have different needs and desires as regards their relationship with the United States. The precise nature of the trust relationship will vary somewhat from tribe to tribe, depending on their treaty agreements, on their economic needs, and on the goals and choices adopted by each sovereign tribe. Nevertheless, the fundamental trust obligations and responsibilities of the United States remain unchanged and available to all tribes. With this in mind, we believe it may be useful to consider

whether voluntary tribal agreements with the United States could strengthen, clarify and bolster the trust relationship. Such agreements, on a tribe-by-tribe basis, could make the trust relationship more definite, more enforceable, and more clear, and such agreements might make the trust relationship more suitable for needs of tribes with different needs and desires. Tribes should have an option to make an agreement or not. No adverse consequences should come from not making an agreement. The trust relationship and the federal government's trust responsibility must remain undiminished whether there is an agreement or not. We would want to study very carefully any legislation aimed at authorizing such agreements to be sure that there would be no diminishment of the trust responsibility that is so critical to the Oglala Sioux Tribe.

I also want to take this opportunity to urge that Congress bring to an end, as soon as possible, the Office of the Special Trustee. This Office has not been a success. It should be ended, and its functions returned to the BIA and other agencies which held these responsibilities previously.

Finally, let me summarize very briefly a number of other concerns. There are many things that could and should be done to improve the way the federal government carries out and fulfills its trust obligations. Congress should create clear rules and legal standards governing the trust relationship. Naturally Congress will want to consider the recommendations that the Secretarial Commission on Indian Trust Administration and Reform will submit in a little more than a year. The Oglala Sioux Tribe intends to make recommendations to that Commission. In particular, we believe Congress should consider enacting a Trust Duties Act that would specify in detail the legal duties of the United States when it acts as trustee on behalf of a tribe and whenever it carries out its trust responsibilities – such as the duty of loyalty, the duty to avoid conflicts of interest, the duty to provide an accounting, the duty to act in a timely fashion, the duty to inform and consult with a tribe when it deals with the tribe's trust property, the duty to act solely in the interest of the beneficiary (the tribe), and other duties. Tribes today are often not able to go to court when the trustee, the federal government, fails in its trust responsibilities and harms the tribe. Because the legal remedies available to tribes are very inadequate, Congress, in consultation with tribes, ought to correct this long-standing unfairness.

Thank you for this opportunity to communicate the concerns and recommendations of the Oglala Sioux Tribe on this enormously important subject.

Resolution: 34-10-25-11

Great Plains Tribal Chairman's Association (GPTCA)

TO CEASE UNFOUNDED DISMANTLING OF THE BUREAU OF INDIAN AFFAIRS, TO REAFFIRM THE PRIMARY RESPONSIBILITY OF THE BUREAU OF INDIAN AFFAIRS, TO PROVIDE THE SERVICES OUTLINED IN ITS BUDGET PROPOSALS, RESTORE SELF-DETERMINATION AND LOCAL AND REGIONAL CONTROL, TO HONOR THE TREATY AND TRUST RESPONSIBILITY OF THE UNITED STATES AND TO SEEK THE FUNDING REQUIRED TO MEET THE TRIBE'S ACTUAL NEEDS IN EACH OF THESE AREAS.

WHEREAS, the Great Plains (Formerly Aberdeen Area) Tribal Chairman's Association (GPTCA) is composed of the elected Chairs and Presidents of the 16 Sovereign Indian Tribes and Nations recognized by Treaties with the United States that are within the Great Plains Region of the Bureau of Indian Affairs; and

WHEREAS, the Great Plains Tribal Chairman's Association was formed to promote the common interests of the Sovereign Tribes and Nations and their members of the Great Plains Region which comprises the states of North Dakota, South Dakota, Nebraska; and

WHEREAS, through its treaties, status, Constitution, international law and well-articulated policies, the United States assumed a legal responsibility to protect Indian Tribes; provide them with certain goods and services, guarantee the right of Tribal self-government, guarantee the protection and safety of tribal members, and promote the viability of Indian reservations and lands as permanent homelands for tribes; and

WHEREAS, the Bureau of Indian Affairs was established to implement these core trust and treaty obligations of the United States, and

WHEREAS, the BIA Mission Statement is "To enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian Tribes and Alaska Natives." and

- WHEREAS**, the Bureau of Indian Affairs is, and has been since its inception, the primary federal agency which is ultimately responsible for providing the Tribes with adequate education, law enforcement, burial, tribal governmental assistance, land and natural resource enhancement and protection, social services and many of their other most critically needed services provided to the Tribes under their Treaties; and
- WHEREAS**, these monies and services are not provided by the BIA or the United States as gratuitous grants, they are instead entitlements which the Tribes of the Great Plains Region negotiated for in Treaties for the direct exchange of the land and other rights they were forced to give up in their Treaties; and
- WHEREAS**, this separates these BIA programs and services from the other federally funded programs and services which are currently included in the discretionary budget of the United States; and
- WHEREAS**, while all of the federal agencies of the United States have a treaty and trust responsibility to the Tribes of the Great Plains Region, only the Bureau of Indian Affairs is designed, structured, staffed and funded in the manner necessary to insure the provision of these trust and treaty based services on a constant, timely and recurring basis; and
- WHEREAS**, the Bureau of Indian Affairs budget has never been adequate to meet the agency's obligations and it has actually fallen even further behind the actual need over the course of the last ten year; and
- WHEREAS**, rather than increasing the Bureau of Indian Affairs budget to address this shortfall, the Department of Interior (DOI), Indian Affairs, has started moving many of its services to central locations which are at a great distance from the Indian Tribes and people that they serve, making it difficult for the Tribes to work directly with these divisions at the local level; and
- WHEREAS**, the DOI, Indian Affairs, has also begun to transfer many core support services out of the BIA and into other divisions in Interior and even to other federal agencies; and
- WHEREAS**, because the DOI, Indian Affairs & Bureau of Indian Affairs and the present and past Administrations have failed to request the funds required to meet the United States' trust responsibilities in these core areas, the Tribes have

been forced to seek an ever increasing percentage of their core funding for law enforcement, courts, roads, education, home repair and a variety of other treaty based programs through competitive grants from other federal agencies; and

WHEREAS, this movement away from adequate funding for the BIA and towards the Tribe's need to rely on competitive grants from other federal agencies, has led to a decrease in the services provided, and it has undermined the Tribe's basic ability to manage their programs; and

WHEREAS, the tribal and BIA programs most affected by this change in federal policy are core Governmental programs like law enforcement, education, transportation and social services which need a stable and reliable federal budget in order to properly operate Large Tribal Governments; and

WHEREAS, the Tribal Nations most affected are the Large Tribes who operate large governments, much like states with large populations, numerous Communities, extensive land base, numerous Tribal Programs, i.e. Law enforcement Departments, School Systems, Transportation Departments, hundreds of Housing sites, water systems, etc. and,

WHEREAS, competitive grants are inadequate to serve the Large Governments and Sovereign Nations who signed Treaties in good faith; and

WHEREAS, unlike the BIA funding which is available on the first day of the fiscal year, the funding coming from other federal agencies is often not made available until the third or fourth quarter of the fiscal year, forcing tribal governments to delay important procurements hire and then lay off staff, and even go into debt in order to keep their core treaty based programs operating; and

WHEREAS, all of this is in flagrant violation of the federal government's trust responsibility; and

WHEREAS, virtually all of these changes in federal policy have come about without any real tribal consultation, and this failure to consult violates the stated policy of the United States, in particular Executive Order 13175 and the stated policy of Interior, Indian Affairs and the Bureau of Indian Affairs; and

WHEREAS, many of these federal decisions have undermined Indian preference, tribal consultation, tribal contracting policies and jeopardizing Tribal Governments; and

WHEREAS, collectively these decisions have the end result of dismantling the role of the Bureau of Indian Affairs.

THEREFORE BE IT RESOLVED, that the Tribes of the Great Plains Tribal Chairman's Association call upon the Obama Administration and the Congress of the United States to cease this unfounded dismantling of the Bureau of Indian Affairs, reaffirm that the Bureau

of Indian Affairs primary responsibility to provide the services outlined in its budget proposals, restore self-determination and local and regional control, honor the Treaty Responsibility of the United States and seek the funding required to meet the Tribe's actual needs in each of these areas.

NOW THEREFORE BE IT FINALLY RESOLVED that this resolution shall be the policy of the Great Plains Tribal Chairman's Association until otherwise amended or rescinded.

Resolution No. 34-10-25-11

CERTIFICATION

This resolution was enacted at a duly called meeting of the Great Plains Tribal Chairman's Association held at Rapid City, South Dakota on October 25, 2011 at which a quorum was present, with 8 members voting in favor, 0 members opposed, 0 members not abstaining, and 8 members not present.

Dated this 25th day of October, 2011.

