

THE FEDERAL-TRIBAL TRUST RELATIONSHIP: ITS ORIGIN, NATURE, AND SCOPE

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Introduction

The relationship between the United States and Indian tribes is based on and built around the *doctrine of trust responsibility*. As the Supreme Court noted in 1983, a principle that "has long dominated the government's dealings with Indians. . . [is] the undisputed existence of a general trust relationship between the United States and the Indian people." United States v. Mitchell, 463 U.S. 206, 225 (1983). In 2003, the Supreme Court confirmed "the general trust relationship" between Indian tribes and the federal government. See United States v. Navajo Nation, 537 U.S. 488, 490 (2003).

The trust doctrine is both a fundamental concept in federal Indian law and a motivating force. Virtually every law enacted by Congress during the past 40 years involving Indians and tribes has cited to, and found its support in, the federal government's trust obligations. For example, the Indian Tribal Justice Support Act of 1993, 25 U.S.C. Secs. 3601-3631, which seeks to support the work of tribal courts, states as its first two congressional findings:

"(1) There is a government-to-government relationship between the United States and each Indian tribe; [and] (2) the United States has a *trust responsibility* to each tribal government that includes the protection of the sovereignty of each tribal government."

25 U.S.C. Sec. 3601(1) and (2) (emphasis added).

Similarly, the purpose of the Federal Oil and Gas Royalty Management Act of 1983, which assists tribes in managing their oil and gas reserves, is "to fulfill the *trust responsibility* of the United States for the administration of Indian oil and gas resources." 30 U.S.C. Sec. 1701(b)(4) (emphasis added).

The No Child Left Behind Act of 2001 contains provisions that relate exclusively to the education of Indian and Alaska Native children. These provisions were enacted, Congress said, "to fulfill the Federal Government's unique and continuing *trust relationship with and responsibility* to the Indian people for the education of Indian children." 20 U.S.C. 7401 (emphasis added).

I. The origin of the trust doctrine: the Indian treaties

A. The federal government's trust responsibility to Indian nations has long been recognized by the courts, by Congress, and by the executive branch. However, there

is no single court decision, federal law, or Presidential proclamation that first identified this doctrine of trust responsibility.

B. Most commentators have stated, as Professor Tsosie from Arizona State University wrote in 2003, that the roots of the trust doctrine "extend back to the earliest treaties between European governments and Indian nations," as well as similar treaties between the United States government and Indian nations. See Rebecca Tsosie, "The Indian Trust Doctrine After The 2002-2003 Supreme Court Term," 39 *Tulsa Law Review* 271, 272 (2003).

C. Between 1785 and 1871, the U.S. entered into nearly 400 treaties with Indian tribes. The goal of the United States in signing these treaties was to obtain Indian land without further bloodshed. In exchange, the tribes received a set of promises. Almost every treaty tribe was promised that its sovereignty, remaining lands, and its people would be *protected* by the United States. For example, the Treaty of Hopewell, signed with the Cherokee Nation in 1785, guarantees "peace to all the Cherokees" and promises to "receive them into the favor and protection of the United States of America." See Documents of United States Indian Policy 7 (Francis Paul Prucha ed., 2d ed., U. Neb. Press 1990). Many treaties expressly require the United States to provide food, clothing, and shelter to the tribe, but the most important guarantee was that of federal protection.

D. These promises, the Supreme Court has held, create a unique bond between the United States and each treaty tribe, imposing on the federal government "moral obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Indian tribes relinquished their sacred lands in exchange for these promises, and the United States should keep its word.

II. Statutes can create trust duties, as treaties can

A. It is easy to see how a treaty can create a trust responsibility. A treaty is a formal exchange of obligations, and each party is required to fulfill its end of the bargain. It is not as easy to see how a statute can create a trust duty, however.

B. In 1871, Congress passed a law ending all treaty making with Indian tribes. Since then, Congress has regulated Indians and tribes by passing laws. These laws, the Supreme Court has recognized, can create trust responsibilities in the same way that a treaty can. This is true for two reasons:

1. Statutes often are the vehicles by which Congress creates the programs and services necessary to fulfill its treaty obligations. These statutes, in other words, can be viewed as emanating from, and extensions of, the treaties.

2. Many of these laws give a federal agency elaborate control over tribal property, precluding the tribe from managing these resources on their own. The

Supreme Court recognized in United States v. Mitchell, 463 U.S. 206 (1983), that when this arrangement occurs, the agency then has the *fiduciary* duty to manage that property wisely and in the tribe's best interests.

III. The nature and scope of the trust doctrine: what it requires of federal officials

A. That the federal government has a trust responsibility is well recognized. Today, the dispute is not about the existence of the trust doctrine, but its *scope*: is it broad or narrow, and what must the government do to fulfill its trust obligations?

1. A broad interpretation: the federal government must support and encourage tribal self-government and economic prosperity, and protect tribes and their interests. This broad duty exists separate and apart from any individual duties expressly contained in treaties and statutes. Under this construction, the federal government has an obligation to manage all federal resources, both on and off the reservation, in a manner that promotes Indian interests.

2. A narrow interpretation: the federal government need fulfill only the specific promises and tasks set forth in treaties and statutes. Although Congress and federal agencies may do more, they have no duty to do so. As one court recently stated in rejecting a tribe's request for a broad application of the trust doctrine, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." See Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006), quoting Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

B. Courts have recognized that, even under a narrow interpretation of the trust doctrine, federal agencies have a legal duty to undertake those activities and tasks delegated to them by Congress. See United States v. Mitchell, 463 U.S. 206 (1983); Cobell v. Norton, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001).

C. When Congress deprives a tribe of the ability to manage a tribal resource and has given a federal agency elaborate control over that resource, the agency's actions with respect to that property must be judged by fiduciary standards. See United States v. Mitchell, 463 U.S. 206 (1983).

D. A "fiduciary" relationship imposes the highest degree of responsibility the law recognizes, similar to the relationship between a guardian and a ward. It requires utmost loyalty. Agency officials must advocate for the tribe, act in good faith towards the tribe, and seek to make tribal resources under the agency's control productive and profitable. Generally, courts have required the agency to:

1. Consult with the tribe in determining how best to use or develop these resources.

2. Carefully analyze all relevant information in determining what is best for the tribe.
3. Make decisions based on the tribe's best interests.
4. Provide the tribe with an accurate accounting of all transactions involving these resources.

See Stephen L. Pevar, *The Rights of Indians and Tribes* (NYU Press 2004) at 35, 40.

G. The first requirement just listed--consultation--is a critical component of an agency's trust duties. Two Executive Orders issued during the Clinton Administration expressly impose that duty on federal agencies. There have been few court decisions, however, clarifying what "consultation" requires. At a minimum, an agency should:

1. Inform the tribe of all relevant facts, and do so as early in the process as possible.
2. Give the tribe sufficient time to consider the situation, and provide the tribe with technical assistance and data, if the tribe requests it.
3. Maintain a dialogue with the tribe. Address the tribe's concerns in a timely manner, and keep the tribe informed of developments. Consider alternatives. Act in good faith, and be open to looking at things from the tribe's perspective.
4. Document the consultation process. Send letters after phone calls or meetings documenting the status of the situation, and request responses and comments.
5. Accept the tribe's recommendation unless compelling reasons require otherwise.

See Derek Haskew, "Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?", 24 American Indian Law Review 21, 23 (1999/2000).

IV. Enforcement of the Federal Trust Duty

A. Courts have repeatedly recognized that Indian tribes may enforce their trust rights under federal treaties and laws. See Pevar, *The Rights of Indians and Tribes* at 40-42.

B. Tribes are more likely to win such lawsuits when the government's duty to act is clear and express, or when Congress has delegated to a federal agency elaborate control over the tribal resource in question. This explains the difference between what the Supreme Court decided in United States v. Mitchell, 445 U.S. 535 (1980) ("Mitchell I") and in United States v. Mitchell, 463 U.S. 206 (1983) ("Mitchell II"). "Where the Federal Government takes on or has control or supervision over tribal monies or properties," the Court said in Mitchell II, "a fiduciary relationship normally exists with respect to such monies or properties." Id., 463 U.S. at 225. See Klamath Tribe v. United States, 1996 WL 924509 (D. Ore. 1996); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, 507 U.S. 1003 (1993); Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995).

C. Thus, tribes can enforce their rights under the doctrine of trust responsibility, and in appropriate cases may obtain damages and/or injunctive relief if those rights have been or are being violated.

D. The U.S. Supreme Court's two most recent trust responsibility cases, both decided on March 4, 2003, show a tension on the Court regarding when tribes may sue the government for money damages. In United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), a 5-4 Court held that a tribe could sue the US for damages for violating the government's fiduciary duties based on the fact that the government took control of tribal land and used it for a military base and then returned it to the tribe in worse condition. The Court held that a trustee is required to preserve and maintain trust assets and must not allow them to "fall into ruin on his watch." Id., 537 U.S. at 475 (internal citation omitted).

However, in United States v. Navajo Nation, 537 U.S. 488 (2003), a 5-4 Court held that the Navajo Nation could not sue the federal government for damages even though Secretary of the Interior Donald Hodel had held secret meetings with Peabody Coal, after which Hodel gave the Navajos, they claimed, inaccurate information that caused the Navajos to accept royalty payments for their coal far less than what they should have received. The Court held that because federal statutes did not give the Secretary comprehensive control over tribal coal, the government did not violate its trust duties even if the Secretary had misled the tribe during negotiations. The Court noted that federal laws, such as those involving the production of tribal coal, that aim to "enhance tribal self-determination by giving tribes, not the Government, the lead role" in protecting tribal resources, place added responsibilities on tribes (and relieve the federal government of certain responsibilities) in managing those resources. In other words, tribes need to realize that if they acquire more control over their property and assets, courts may hold that the federal government has a diminished fiduciary duty with respect to those same properties and assets.

V. The Reserved Rights Doctrine

An important principle in federal Indian law is the *reserved rights doctrine*. The Supreme Court explained in 1905 in United States v. Winans, 198 U.S. 371, a fishing rights case, that an Indian treaty is not "a grant of rights to the Indians, but a grant of rights from them." Three years later in Winters v. United States, 207 U.S. 564 (1908), the Supreme Court applied this principle in a water rights case. Together, these cases set forth the fundamental concept known as the reserved rights doctrine, which recognizes that tribes generally retain those rights of a sovereign government not expressly extinguished by a federal treaty or statute.

VI. The Federal Trust Duty cannot be enforced against Congress

A. Tribes cannot compel Congress, the courts have held, to honor the federal government's trust obligations. The trust doctrine is only a *moral and ethical* duty as far as Congress goes. Congress has "plenary" power over Indians. Congress can destroy a trust relationship--and even terminate an Indian tribe--or enhance that relationship, as it sees fit. However, once Congress creates a program, benefit, or service and instructs a federal agency to administer or supervise it, a fiduciary duty is created that is *legally* enforceable against that agency.

B. Consequently, Indian tribes should keep reminding Congress of its trust responsibilities, and seek to educate the public about the importance of keeping the promises made to Indians centuries ago in exchange for Indian land.

VII. Conclusion

Indian treaties are not solely the Indians' treaties: they belong to everyone in the United States. Indian tribes paid dearly for the rights they have under these treaties. The United States gave its solemn word to these tribes in exchange for tribal lands and the end of hostilities. The government should keep its promises.

The trust responsibility has advantages and disadvantages for Indian tribes. Some persons have called for its complete abolition due to how oppressive some agencies have been in exercising their trust obligations, and the fact that it prevents tribes from having full control over their land and property. Others have recommended major overhauls, giving tribes increasing authority to manage their resources if they request it. See Kevin Gover, "An Indian Trust for the Twenty-First Century," 46 Natural Resources Journal 317 (2006). How the federal government exercises its trust duties in the future will reflect the degree to which it honors its word and maintains its legal, moral, and ethical standards.