

October 26, 1978

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MEMORANDUM

TO: Indian Attorneys
FROM: Mr. Rogers
RE: Solicitor's Opinion on Federal Trust
Responsibility to Indians (GINC 4.21)

Dan Rosenfelt, Assistant Associate Solicitor (Indian Affairs), in meeting with me on another subject, thanked us for our "helpful" comments on the draft opinion of the Solicitor concerning the federal trust responsibility to Indians.

He said that he had met with Solicitor Krulitz, who had called for even stronger statements in the opinion about the affirmative duty of the trustee to sue in appropriate cases. Rosenfelt said that movement toward a signing of this opinion by Krulitz was rapid. We should have a strong opinion very soon.

Rosenfelt confirmed that there is a serious disagreement between Interior and Justice about this subject and that it is the real animus behind Interior's move for an opinion.

Rosenfelt also reported that Krulitz had asked Griffin Bell not to come forward with any statement on the federal trust responsibility in view of the seeming settlement of the Maine Indian claim. Bell has not agreed on this.

Rosenfelt further reported on an exchange of correspondence between Senator Kennedy and Attorney General Bell. The Kennedy letter was apparently written by Bob Pelcyger and asked Bell for an explanation of why a number of Indian cases are not being initiated and prosecuted by the Justice Department. Bell's answer to Kennedy, although in diplomatic terms, basically told him to go to hell and to hold hearings on it if he was that concerned about it. Rosenfelt is going to try to obtain copies of this correspondence for me.

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October 19, 1978

Daniel Rosenfelt, Esquire
Office of the Solicitor
Department of the Interior
C Street, N.W. - Room 6445
Washington, D.C. 20240

Dear Mr. Rosenfelt:

Thank you for allowing us to review your draft memorandum entitled "Trust Responsibility of the United States to American Indians".

We submit the following comments which you have invited.

1. As a position statement of the Department of the Interior, the memorandum would be generally in agreement with our view of the federal trust responsibility. That is not to say, however, that we will never in the future challenge Interior's interpretation of its trust responsibility in specific instances affecting the rights of one or more of our clients.

2. We feel that conclusion "2" on page 1 of the memorandum should be qualified to indicate that when Congress does act contrary to the best interests of Indians, it can subject the United States to an obligation to pay damages for the loss suffered by the Indians (e.g., a taking of recognized title gives rise to an Indian claim for just compensation under the Fifth Amendment of the United States Constitution). This qualification is stated in the text of the memorandum (p. 5); but we believe it also is appropriate to express it in the summary of your conclusions.

Daniel Rosenfelt, Esq.
October 19, 1978
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3. At the bottom of page 7, you point out that the Menominee and Navajo cases hold that the standards of a private fiduciary must be adhered to by executive officials in administering Indian property. You might also consider citing Cheyenne-Arapaho Tribes v. United States, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), and Coast Indian Community v. United States, 213 Ct. Cl. 129, 550 F.2d 639 (1977). These cases could also be cited and discussed in the second paragraph of page 11.

4. Case citations probably would be helpful to support the arguments made in the second (middle) paragraph on page 12. We suggest citing the Passamaquoddy opinions referred to in the first paragraph of page 15.

5. We have some problems with the second (middle) paragraph on page 13. To the extent this paragraph states that the President should recognize his trust responsibility to protect Indian water rights, we, of course, agree. We cannot agree, however, that the President's announced policy of June 6, 1978, properly recognizes his trust responsibility. Indian tribes have objected to President Carter's water policy in a number of particulars. They object because it would require a prompt quantification of Indian water rights. Tribes also have concern that the President's water policy will utilize technical criterion for water development that are too restrictive in judging the feasibility of water projects. Finally, it should be noted that many Indian groups are less than sanguine about the possibility of successful negotiations with state governments with respect to water rights.

With these changes in mind, we would encourage the Solicitor to make this opinion final in an effort to prevent the Attorney General from taking any lesser, weaker position on the federal trust responsibility to Indians.

Sincerely,

WILKINSON, CRAGUN & BARKER

By: R. Anthony Rogers



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Draft Memorandum

To: Solicitor

From: Associate Solicitor, Division of Indian Affairs

Subject: Trust Responsibility of the United States to American Indians

In connection with the case of United States v. Maine, the Attorney General has raised questions concerning the scope and content of the Government's trust responsibility to American Indians. The Attorney General has stated his desire to file a memorandum with the court discussing the nature of the federal trust responsibility and the role of the Department of Justice with respect to Indian litigation. The Secretary has asked us to prepare an objective statement of the law in this area to assist him in his ongoing discussions with the Attorney General.

That the United States stands in a fiduciary relationship to American Indians is well established. The existence of this trust relationship was most recently affirmed in President Carter's letter of August 30, 1978, to the National Congress of American Indians. But it is the evolving scope and content of the trust responsibility doctrine we here address. Our conclusions may be summarized as follows:

1. There is a legally enforceable trust obligation owed by the United States Government to American Indians. This obligation originated in the course of dealings between the government and the Indians and is reflected not only in the treaties, agreements, and statutes pertaining to Indians but also in the Constitution itself.
2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians must be "tied rationally" to the government's trust obligation; however, in its exercise of other powers, Congress may act contrary to the Indians' best interests.

3. The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.

4. Executive branch officials have discretion to determine how best to carry out their responsibilities to the Indians, but only Congress has the power to set policy objectives contrary to the best interests of the Indians.

5. These standards operate to limit the discretion of the Attorney General.

ORIGIN OF THE DOCTRINE

The origin of the trust relationship lies in the course of dealings between the discovering European nations and (later the original states and the United States) and the Native Americans who occupied the continent. The interactions between these peoples resulted in the conclusion by this country of treaties and agreements recognizing the quasi-sovereign status of the Native American tribes.

The Supreme Court has stated that:

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 an uneducated, helpless and 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 and to prepare the Indians to take their place as independent, qualified members of the modern body politic. Board of County Commissioners v. Seber, 318 U.S. 705, 715 (1943).

Implicitly, the Court recognized the course of history by which the Indian tribes concluded treaties of alliance or—after military conquest—peace and reconciliation with the United States. In virtually all these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility to Native Americans has its roots for the most part in solemn contracts and agreements with the tribes. The tribes ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weak position. No comparable duty is owed to other United States citizens.

While the later executive agreements and presidential orders implementing them with tribes are shorter and less explicit than the treaties, a similar guarantee of protection can be implied from them. As the Court stated recently in Morton v. Mancari, 471 U.S. 535 (1974), then, "the unique legal status of Indian tribes under federal law (is) . . . based on a history of treaties and the assumption of a guardian-ward status".

The treaties and agreements represented a kind of land transaction, contract, or bargain. The ensuing special trust relationship was a significant part of the consideration of that bargain offered by the United States. By the treaties and agreements, the Indians commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians.

From the beginning, the Congress was a full partner in the establishment of the federal trust responsibility to Indians. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new Constitution in 1789, 1 Stat. 50, 52, declared:

The utmost good faith shall always be observed toward 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.

And in 1790, Congress enacted the Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. § 177, which itself established a fiduciary obligation on the part of the United States to protect Indian property rights. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975), and United States v. Southern Pacific Transportation Co., 543 F.2d 676, 677-699 (9th Cir. 1976).

Articulation of the concept of the federal trust responsibility as including more protection than simple federal control over Indian lands evolved judicially. It first appeared in Chief Justice Marshall's decision in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Cherokee Nation was an original action filed by the tribe in the Supreme Court seeking to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, though a "distinct political community" and thus a "state," was neither a State of the United States nor a foreign state and was thus not entitled to bring the suit initially in the Court. Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations. . . in a state of pupilage" and that "their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall's subsequent decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship.

Later in the nineteenth century, the Court used the guardianship concept as a basis for congressional power, separate and distinct from the commerce clause. United States v. Kagama, 118 U.S. 375 (1886), concerned the constitutionality of the Major Crimes Act. Although it concluded that this statute was outside the commerce power, the Court sustained the validity of the act by reference to the Government's fiduciary responsibility. The Court stated that "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness. . . there arises the duty of protection, and with it the power."

A number of cases in the decades on either side of 1900 make express reference to such a power based on the federal guardianship, e.g., LaMotte v. United States, 254 U.S. 570, 575 (1921) (power of Congress to modify statutory restrictions on Indian land is "an incident of guardianship"); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property"), and the Supreme Court has continued to sustain the constitutionality of Indian statutes as derived from an implicit power to implement the "unique obligation" and "special relationship" of the United States with tribal Indians. Cf. Morton v. Mancari, 417 U.S. 345, 552, 555 (1973).

LIMITATIONS ON CONGRESS

Congressional power over Indian affairs is subject to constitutional limitations. While Congress has the power to abrogate Indian treaties, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), Indian property rights are protected from repeal by the Fifth Amendment, Choate v. Trapp, 224 U.S. 665, 678 (1912). The Supreme Court held in Chippewa Indians v. United States, 301 U.S. 358 (1937), that

* * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. * * * (P. 375-376).

In addition to these constitutional limitations on Congress' power to implement its trust responsibility, the Court has observed that the guardianship "power to control and manage" is also "subject to limitations inhering in a guardianship," United States v. Creek Nation, 295 U.S. 103, 110 (1935), although the cases do not clarify with precision what limitations "inhere in a guardianship" so far as Congress is concerned. Recent cases have, however, considered the United States' trust obligations as an independent limiting standard, for judging the constitutional validity of an Indian statute, rather than solely a source of power. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the constitutionality of a statute granting Indians an employment preference in the Bureau of Indian Affairs, stating:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indian, such legislative judgments will not be disturbed. Id. at 555.

Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977) expressly held that the plenary power of Congress and the separation of powers shield "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny." The Court in Weeks took the significant step of examining on the merits claims by one group of Indians that legislation had denied them due process, and it applied the above-quoted standard from Mancari.

This standard, in practice, does not suggest that a reviewing court will second guess a particular determination by Congress that a statute in fact is an appropriate protection of the Indians' interests. Congressional discretion seems necessarily broad in that respect. But the power of Congress to implement the trust obligation would not seem to authorize enactments which are manifestly contrary to the Indians best interests. This does not mean that Congress could never pass a statute contrary to its determination that the Indians' best interests are served by it. Congress in its exercise of other powers such as eminent domain, war, or commerce may act in a manner inimical to Indians. However, where Congress is exercising its authority over Indians, rather than some other distinctive power, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served. Otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. Cf., Fort Berthold Reservation v. United States, 390 F.2d 686, 691-693 (Ct. Cl. 1968).

The trust obligations of the United States constrain congressional power in another way. Since it is exercising a trust responsibility in its enactment of Indian statutes, courts presume that Congress' intent toward the Indians is benevolent. Accordingly, courts construe statutes (as well as treaties) affecting Indians as not abrogating prior Indian rights or, in case of ambiguity, in a manner favorable to the Indians. E.g., United States v. Santa Fe Pacific Ry., 314 U.S. 339 (1941). This presumption is rebuttable in that the courts have also held that Congress can unilaterally alter treaty rights or act in a fashion adverse to the Indians interests—even to the point of terminating the trust obligation. But such an intent must be "clear", "plain" or "manifest" in the language or legislative history of an enactment. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

LIMITATION ON ADMINISTRATIVE DISCRETION

In Indian, as in other matters, federal executive officials are limited by the authority conferred on them by statute. In addition, the federal trust responsibility imposes fiduciary standards on the conduct of the executive—unless, of course, Congress has expressly authorized a deviation from those standards. Since the trust obligation is binding on the United States, fiduciary standards of conduct would seem to pertain to all executive departments that may deal with Indians, not just those such

as the Departments of Interior, Health, Education & Welfare, and Justice which have special statutory responsibilities for Indian affairs. This principle is implicit in United States v. Winnebago Tribe, 542 F. 2d 1002 (8th Cir. 1976) where the court employed the canons of construction in favor of Indians to thwart the efforts of the Army Corps of Engineers to take tribal land.

A number of court decisions hold that the federal trust responsibility constitutes a limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is United States v. Creek Nation, 295 U.S. 103 (1935), where the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. 295 U.S. at 109-110. (emphasis added)

Creek Nation stands for the proposition that--unless Congress has expressly directed otherwise--the federal executive is held to a strict standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot as a result of a negligent survey "give the tribal lands to others, or . . . appropriate them to its own purposes." Other decisions of the Supreme Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." Seminole Nation v. United States, 316 U.S. 286, 296-297, (1942); United States v. Payne, 264 U.S. 466, 448 (1924). Decisions of the Court of Claims have also held that the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. E.g., Menominee Tribe v. United States, 101 Ct. Cl. 10, 18-19 (1944); Navajo Tribe v. United States, 364 F. 2d. 320, 322-324 (Ct. Cl. 1966).

Creek Nation and the other cited cases were for money damages under special jurisdictional statutes in the Court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of the guardianship, but an act of confiscation." 249 U.S. at 113.

Federal officials as trustees are not insurers. The case of United States v. Mason, 411 U.S. 391 (1973) sustains as reasonable a decision by the Interior Department not to question certain state taxes on trust property. But the case law in recent years generally holds executive action to be reviewable both under the terms of specific statutes and for breach of obligations of an ordinary trustee. A significant recent federal district court decision, Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), enjoins certain diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court held them in violation of the trust responsibility. The court held that the Secretary of the Interior—as trustee for the Indians—was obliged to discharge his potentially conflicting duty to administer reclamation statutes in a manner which does not interfere with Indian rights. The court restrained the diversions because the Secretary's activities failed "to demonstrate an adequate recognition of his fiduciary duty to the Tribe." Both Interior and Justice acquiesced in this decision and chose not to appeal.

If, as we believe, the decisions in such cases as Creek Nation, Pueblo of Santa Rosa, and Pyramid Lake are sound, it follows that executive branch officials are obliged to adhere to fiduciary principles. These cases, in other words, lead to the conclusion that the government is in fact a trustee for the Indians and executive branch officials must act in accordance with trust principles unless Congress specifically directs otherwise.

In addition, the decided cases strongly suggest that the trust obligation of the United States exists apart from specific statutes, treaties or agreements. As previously stated, the Supreme Court in United States v. Kagama, 118 U.S. 375 (1886) sustained the validity of the Major Crimes Act on the basis of the trust relationship, separate and apart from other constitutional powers. And Lane v. Pueblo of Santa Rosa, 249 U.S. 110

(1919), United States v. Creek Nation, 295 U.S. 103 (1935) and Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972) apply the trust responsibility to restrain executive action without regard to any specific treaty, statute or agreement.

This view is reinforced by reference to the origins of the trust responsibility doctrine. Originally, Great Britain claimed for itself sovereignty over all Indian lands in the English colonies. In 1763, the King issued a Royal Proclamation, the precursor of the federal Non-Inter-course Act, decreeing that Indian lands were owned by the Crown and that no person or government could acquire such lands without the consent of the Crown. This policy reflected the practical need of the Crown to assert its control over the land and wealth of the colonies and to preserve peace among the colonists and the Indians. Notably, the 1763 Proclamation applied to all Indians without regard to the presence or absence of specific treaties or agreements.

When the United States acquired sovereignty from Great Britain, it succeeded to all the incidents of the prior sovereign's power. The United States not only did not renounce the peculiar power and duty assumed by Great Britain over Indians, but endorsed it by specific reference in Article I of the Constitution.

The recent decision in Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977) holds that the trust responsibility emanates directly from the Constitution, either as a direct limitation on the exercise by Congress of its power over Indian Affairs under the Commerce Clause or as part of a Due Process limitation. Weeks holds that Congress is not free to legislate with respect to Indians in any manner it chooses; rather, Congressional action with respect to Indians is subject to judicial review and will be sustained only so long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Other recent Supreme Court opinions shed further light on what is meant by the "unique obligation toward the Indian." In Morton v. Ruiz, 415 U.S. 199 (1974), the Court in holding that the Bureau of Indian Affairs erred in excluding a certain category of Indians from the benefits of its welfare program spoke of the "overriding duty of our Federal Government to deal fairly with Indians." 415 U.S. at 236. This statement appears as part of the procedural rights of Indians, and in this connection the

Court cited Seminole Nation v. United States, 316 U.S. 286, 296 (1942) which says governmental action must be judged by the "strictest fiduciary standards." Most recently, in Santa Clara Pueblo v. Martinez, _____ U.S. _____ (1978) the court reviewed the record of limited Indian participation in the hearings on the Indian Civil Rights Act and said:

It would hardly be consistent with "the overriding duty of our Federal Government to deal fairly with Indians," Morton v. Ruiz, 415 U.S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views. _____ U.S. _____, _____ n. 30 (1978).

The "unique obligation" mentioned in Weeks and the "overriding duty" of fairness discussed in Ruiz and Martinez exist apart from any specific statute, treaty or agreement, and they impose substantive constraints on the Congress (Weeks), the Executive (Ruiz) and the Judiciary (Martinez) with respect to Indians. These recent decisions of the Supreme Court lead to the conclusion that the government's trust responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties and agreements.

At the same time, however, the content of the trust obligation - apart from specific statutes and treaties - is limited to dealing fairly, not arbitrarily with the Indians both with respect to procedural and substantive issues. The standard of fairness is necessarily vague and allows considerable room for discretion. But these independently based duties do not stand alone. They must be read together with the host of statutory and treaty provisions designed to provide protection for Indian interests. Illustrative of such statutes are 25 U.S.C. Sec. 81 (contracts); 25 U.S.C. Sec. 175 (legal representation); 25 U.S.C. Sec. 177 (conveyance of property); 25 U.S.C. Sec. 194 (burden of proof in property cases); 25 U.S.C. Secs. 261-264 (regulation of traders); 25 U.S.C. Sec. 465 (acquisition of land in trust).

The more general notions of the "unique obligations" and "overriding duty" of fairness form a backdrop for the construction and interpretation of the statutes, treaties and agreements respecting the Indians. This means that provisions for the benefit of Indians must be read to give full effect to their protective purposes and also they must be given a broad construction

consistent with the trust relationship between the government and the Indians. General notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework.

SPECIFIC OBLIGATIONS

What are the obligations of a trustee? One of the primary duties of a private trustee is the duty of loyalty with the corollary principle that a trustee must subordinate its own interests to those of its beneficiary. One aspect of this duty is illustrated in the case of Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966). During the second World War, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium bearing, noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau developed and produced the helium under the terms of the assigned lease instead of negotiating a new, more remunerative lease with the tribe. The court analogized these facts to the case of a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself", and held the action unlawful. Pyramid Lake discussed above also involves the fiduciary duty of loyalty.

Private fiduciaries also have a duty to make trust property income productive, and the courts have imposed this obligation on the United States. In Manchester Band of Pomo Indian v. United States, 363 F. Supp. 1238 (N.D. Cal., 1973), the federal district court held that officials of this Department had violated their trust obligations by failing to invest tribal funds in nontreasury accounts bearing higher interest than was paid by treasury accounts. 1/ Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944) also enforces the fiduciary obligation to make trust property income productive.

1/ It should be noted that the practice by the trustee of borrowing the Indian's funds - (by depositing them in the treasury) - was not per se invalid as involving a prohibited conflict of interest.

A third fiduciary duty which the trust obligation would appear to impose on the United States is the duty to enforce reasonable claims of the beneficiary. This duty may be seen as related to the duty of loyalty. Thus, in Pyramid Lake, the court rejected an accommodation of public interests and trust obligations and held that the Secretary of Interior had a higher obligation to protect Indian property rights than to advance public projects within his charge - again, absent an express direction from Congress. Where there is a dispute between Indians and other government interests, executive branch officials are required to favor the Indian claim so long as it is reasonable.

This does not mean that executive branch officials are required to advance or accede to every colorable claim which may be suggested by an Indian tribe. The government may properly examine these claims critically and make a dispassionate analysis of their merit, it may consider whether the advancement of a particular claim is in the long term best interests of the Indians, and it may determine the timing and the forum in which a claim is advanced. But executive branch officials may not reject or postpone the assertion of a claim on behalf of Indians on the ground that it would be inimical to some other governmental or private interest or refuse to advance an Indian claim on the ground that it is merely "reasonable" as opposed to clearly "meritorious". Although trust duties are neither rigid nor absolute, the controlling principle is that executive branch officials must act in the best interests of the Indians.

The Supreme Court has held that the United States as trustee has some discretion to exercise reasonable judgment in choosing between alternative courses of action. United States v. Mason, 412 U.S. 391 (1973). In Mason, Indian allottees claimed that Bureau of Indian Affairs officials erred in paying state estate tax assessments on trust properties. Bureau officials relied on a prior decision of the Supreme Court which had sustained the particular taxes in question. With some plausibility, however, the allottees claimed that subsequent Supreme Court decisions had eroded the vitality of the earlier case. The Court determined that in this instance the trustee had acted reasonably by paying the taxes without protest. In Mason, unlike Pyramid Lake, there was no suggestion that any conflicting interests had detracted from the trustee's duty of loyalty to the Indians, and the case stands for the proposition that in the nonconflict situation the trustee's reasonable judgments will be sustained.

Another principle which follows from this reading of the trust relationship is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. The water rights area is a prime example. The Indians' rights to water pursuant to cases like Winters v. United States, 207 U.S. 564 (1908), and Arizona v. California, 373 U.S. 546 (1963), is prior to any subsequent appropriations. But failure of the trustee in the past to assert or protect these rights, and to assist in construction of Indian irrigation projects, has led non-Indian ranchers and farmers to invest large sums in land development in reliance on the seeming validity of their appropriations. See Report of the National Water Commission, ch. 14 (1973). The trust obligation would appear to require the trustee both to take vigorous affirmative action to assert or defend these Winters Doctrine claims.

The impact of these principles upon the public administration within the government appears to be surprisingly modest, for present policies are essentially consistent with the dictates of the trust responsibility. In the area of water rights, for example, President Carter has called for the prompt quantification of Indian claims and their determination through negotiation if possible or litigation if necessary, and he has also called for development of Indian water resources projects so that the Indian rights may be put to beneficial use. The President's perception of the government's responsibility in this area appears entirely consistent with the dictates of the trust responsibility doctrine. The obligation of executive branch officials is to implement the President's policy. Similarly, the Departments of Interior and Justice are engaged in the process of enforcing reasonable Indian claims in some instances by negotiation and in others through litigation. The Bureau of Indian Affairs works to make trust property income productive and the present Secretary of the Interior, so far as we are aware, has taken no action inconsistent with his duty of loyalty to the Indians.

Even if the imposition of the trust responsibility doctrine is assumed to be completely consistent with present policy and administrative practice, the doctrine clearly places constraints on the future policy formulation and administrative discretion. Executive branch officials have some discretion in the discharge of the trust, but it is limited. For example, they may make a good faith determination that the compromise of

an Indian claim is in the long term best interests of the Indians, but they are not free to abandon Indian interests or to subordinate those interests to competing policy considerations. Flexibility in setting policy objectives rests with Congress which alone is free to direct a taking or subordination of the otherwise paramount Indian interests.

Instances will surely arise where the discharge of trust responsibilities to the Indians raises unmanageable, practical or political difficulties for executive branch officials. It may be that congressional appropriations are inadequate to carry out a perceived duty - say, the quantification of Indian water entitlements - or that the enforcement of trust responsibilities results in an extraordinarily intense political backlash against the administration. Under such circumstances it would seem that the responsibility of executive branch officials would be to seek express direction from the Congress. The existence of this congressional safety valve assures that the legal trust responsibility to American Indians is a viable doctrine not only now but in the future as well.

THE DEPARTMENT OF JUSTICE

The remainder of this memorandum will address some of the more specific questions which have been raised by the Attorney General in connection with litigation by the Department of Justice on behalf of Indians. How does Indian litigation differ, if at all, from other litigation handled by the Department of Justice? Do special standards constrain the prosecutorial discretion of the Attorney General?

By statute, the conduct of litigation in which the United States is a party is reserved to the officers of the Department of Justice under the direction of the Attorney General. 28 U.S.C. 516, 519. In addition, the United States Attorneys, under the direction of the Attorney General, are specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. 175.

Generally, the Attorney General has broad discretion to determine whether and when to initiate litigation and on what theories. As the chief legal officer of the United States, the Attorney General may consider broad policy consequences of a litigation strategy and may refuse to initiate litigation despite the requests of a particular agency.

The discretion of the Attorney General with respect to the initiation of litigation is not unlimited. First, the exercise of prosecutorial discretion by the Attorney General is subject to judicial review in order to insure that the Attorney General's decision is based on a correct understanding of the law. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 665-666 (D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. 1975). Cf. e.g., Nader v. Saxbe, 497 F.2d 676, 679-680 n. 19 (D.C. Cir. 1974). And second, all executive branch officials including the Attorney General can be required by the judiciary to "faithfully execute the laws" which, in some instances, may require the initiation of litigation. E.g., Adams v. Richardson, 351 F. Supp. 636, 641 (D.D.C. 1972), 356 F. Supp. 921 (D.D.C. 1973), mod. and aff'd, 480 F.2d 1159 (D.C. Cir. 1973).

In the case of Indian litigation, the Attorney General's discretion is somewhat more limited than in other areas. As an officer of the executive branch of government the Attorney General acts as a fiduciary and must accord the Indians a duty of loyalty. This means that in the exercise of discretion the Attorney General may not refuse to initiate litigation on the ground that it would be inimical to the welfare of some other governmental or private interest. Of course, litigation, in extreme instances, may so excite the hostility of some segment of the population that it would not be in the Indians' best interests to pursue.

The Attorney General has no obligation to assert every claim or theory advanced by an Indian tribe without regard to its merit. At the same time, the Attorney General may not abandon reasonable Indian claims on any ground other than the best interests of the Indians. Further, in the exercise of discretion, the Attorney General must take care that litigation decisions do not undercut the efforts of the Secretary of Interior or other executive branch officials to discharge their trust responsibilities to the Indians. As the Supreme Court recently stated: "Where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not repudiate it." S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 (1972). Indeed, published opinions of the Attorney General reflect the great deference which has been accorded by the Department of Justice to the decisions of the Secretary of Interior. 25 Op. Atty. Gen. 524, 529 (1905); 20 Op. Atty. Gen. 711, 713 (1894); 17 Op. Atty. Gen. 332, 333 (1882).

It bears some emphasis that successful implementation of policy decisions of the Department of Interior may require support from the Department of Justice. For example, the President and the Secretary of Interior have announced a policy of preferring the quantification of Indian water rights entitlements through negotiation rather than litigation. In order to enhance the ability of the Secretary of Interior to negotiate appropriate settlements, it is necessary that the Department of Justice be willing and able to initiate litigation in the event negotiations fail. In this sense litigation decisions of the Attorney General must be made in the context of the overall governmental effort to discharge Indian policy.

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