

MODERNIZING THE TRUST: REDEFINING THE UNITED STATES-TRIBAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP AND ADVANCING TRUST ASSET REFORM

KEY PRINCIPLES OF INDIAN TRUST MODERNIZATION

Defining the Federal Trust Responsibility for the 21st Century – The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Indian Tribes were anachronistic and would gradually disappear. As a result, the current trust model requires a comprehensive overhaul to modernize federal Indian policy in a manner that is consistent with self-determination and rooted in retained inherent sovereign authority as opposed to an approach that presumes that Tribes have been granted their sovereign rights. A new model must be based on fulfillment by the United States of treaty obligations and the recognition and support of tribally-driven solutions. No branch of the Federal Government should be permitted to unilaterally decide whether to comply with treaties and other legally-binding agreements.

This new paradigm should follow the spirit of the Indian Reorganization Act and President Johnson's and President Nixon's Special Messages to Congress on Indian Affairs. It is time to establish a trust model that reflects a true nation-to-nation partnership **built** upon diplomacy that will strengthen federal trust administration, enhance federal-tribal relations, and promote and protect tribal sovereignty, all with the goal of building and sustaining prosperous tribal communities. These key elements of Indian trust modernization should guide legislative reform and simultaneous administrative improvements.

In return for Indian Tribes ceding millions of acres of land that make the United States what it is today, the United States has recognized and must protect the tribal right to self-government, the right to exist as distinct peoples on their own lands, as well as remaining Indian trust assets. The Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize the United States' fundamental trust relationship with tribal nations. Under this relationship, the United States has certain legal trust obligations to Tribes, which govern the federal government's administration of Indian trust property and shape its nation-to-nation relations with Tribes.

The United States' legal obligations for the administration, management, and accounting of Indian trust property have been the subject of significant litigation and many executive branch policy statements. The United States administers on behalf of Indians a wide array of trust property, including land, natural resources, and funds. The Department of the Interior's Secretarial Commission on Indian Trust Administration and Reform in 2013 urged a renewed emphasis on fiduciary obligations for this trust administration.

The United States' trust obligations also shape its special nation-to-nation relations with Indian Tribes. The United States carries out many functions on behalf of Tribes, including involvement in water rights disputes, appraisals and probate, congressional funding, and government contracting and compacting. Trust obligations should affect the outcome when there is a dispute between tribal interests and other interests. The trust obligation includes supporting inherent tribal

sovereignty. As governments, Tribes must deliver a wide range of critical services, such as education, workforce development, public safety, infrastructure, and healthcare to their citizens. Tribes have the capability as governments to oversee their own affairs and serve their citizens. As such, they should be in parity with states and local governments.

This paper lays out basic principles for trust modernization.

I. Strengthen Trust Standards – Adopt Implementing Laws and Regulations. As President Nixon recognized 45 years ago, the United States government acts as a legal trustee for the land and water rights of Indian Tribes and their members, and these rights are of critical economic importance to Indian Tribes. Moreover, the second recommendation of Congress’s own American Indian Policy Review Commission in 1977 was that Congress should reaffirm and direct all executive agencies to administer the trust responsibility consistent with a set of specific legal principles. More recently, Secretary of the Interior Bruce Babbitt issued a Secretarial Order that outlined principles for the proper discharge of these trust responsibilities, and those principles were later codified in the Department of the Interior Manual. Also, in 2013, after a two-year review, the Department of the Interior’s Secretarial Commission on Indian Trust Administration and Reform as its first recommendation urged that the United States government clarify that: (1) all federal agencies have a trust responsibility to Indians; (2) this trust responsibility demands a high standard of conduct; and (3) each agency is to place Indian interests before those of the agency and outside parties.

Since then, Secretary of the Interior Sally Jewell has issued a Secretarial Order that outlines additional guiding principles for honoring the trust responsibility. The Secretary should finalize these regulations after full consultation with Indian country, even as the Obama Administration and Congress develop and enact legislation to codify these trust standards in statute. The next logical step is to comply with federal consultation requirements to develop and promulgate regulations to ensure that all future administrations (including all departments, offices, bureaus, and agencies) fulfill their trust responsibilities.

II. Strengthen Tribal Sovereignty – Empower Each Tribe to Define its Path. Since 1968, every Congress and President has recognized that tribal governments are the entities best suited to meet the needs of their communities. This is because they are more directly accountable to the people they represent, more aware of the problems their communities face, and more agile in responding to changing circumstances. Empirical research also has confirmed that empowering tribal governments through a meaningful recognition of tribal sovereignty is the best way to increase economic development in Indian country. This does not just mean authorizing Tribes to administer federal programs under 638 contracts or self-governance compacts, even though that remains valuable. We must move beyond helpful but piecemeal approaches directed at specific functions or programs and start providing Indian Tribes with real decision-making in the management of their own affairs and assets. This should include, but not be limited to, allowing each tribe to decide for itself the specific role that it wants to play in the management of its own trust assets. One tribe may want to manage some or all of its assets itself with no federal interference. Another may wish to continue to have those assets managed by a federal system. Tribes have different capabilities, goals, and concerns and all of those should be respected by the federal government and its federal policies and systems.

III. Strengthen Federal Management – For Trust Assets and Programs Still Subject to Federal Control. Today, a number of federal agencies continue to institute policies that affect all Indian Tribes and allottees. This “one size fits all” approach ignores the unique differences between the individual Tribes and the unique government-to-government relationship each Tribe has with the United States under its own treaties and other agreements. Too often federal agencies apply federal regulations and environmental laws of general application to tribal assets or to public lands, with potential effects upon tribal assets, according to the best interests of the federal government, when the determination should defer to the best interests of the tribe and its tribal citizens. Such determinations should be made and implemented in collaboration with tribes.

Unfortunately, many solutions imposed by federal agencies or Congress never get changed or abolished, even when the Tribes and a federal Commission point out their shortcomings and recommend improvements. For example, Congress established the Office of Special Trustee to provide *temporary* oversight to improve federal trust management. Now, more than twenty years later, OST has become a separate bureaucracy which remains despite its apparent completion of its purpose and repeated calls to reintegrate Indian trust asset management to be more efficient, effective, and accountable. This is a significant drag on critical tribal and allottee resource use and development. Also, while the United States has settled *Cobell* and most tribal trust cases, and actively sought to reduce its trust fund management through those settlements, OST still employs hundreds of people and as of fiscal year 2015 has a budget of approximately \$139 million.

IV. Strengthen Federal-Tribal Relations – One Table with Two Chairs. Like the National Council on Indian Opportunity that President Johnson established and President Nixon expanded, the new White House Council on Native American Affairs provides an invaluable opportunity for candid and frank discussions of ways to improve the lives of Native people in America. However, as was recognized by two Presidents and Congress decades ago, Indian Tribes must have a seat at the table if this entity and its efforts are to be successful. Indian Tribes’ own leaders understand their communities, their needs, and their obstacles. They are therefore in the best position to make recommendations on how to address their problems, and to help develop federal approaches which will achieve the best results, in the shortest time possible, without wasting federal resources. Regardless of the role Tribes choose to play in the management of their own assets, their opinions should be sought, respected, and listened to. For all these reasons, regular, coordinated, and meaningful high-level engagement is essential if the federal government is going to properly develop, coordinate, and improve federal policies affecting tribal nations.

V. Strengthen Federal Funding and Improve Its Efficiency – A Pillar of the Trust Responsibility. None of the above proposals can succeed without sufficient and effective federal funding, which for far too long has been lacking in Indian programs and services. Federal funding is disturbingly deficient for trust administration, services, infrastructure, and contract support costs, all of which are required by treaties, statutes, and federal trust duties. Continuing these funding policies will exacerbate Indian needs, stifle tribal economies, increase federal costs, and set the stage for the next generation of *Cobell* and tribal trust mismanagement claims. Moreover, as the Department of the Interior’s Secretarial Commission on Indian Trust Administration and Reform and the Department of Justice’s Advisory Committee on American Indian and Alaska Native Children Exposed to Violence have both recently recognized, treaties and the trust responsibility are not discretionary. Accordingly, Congress and the Administration should

increase funding for federal Indian programs and services to the level necessary to fulfill the federal government's fiduciary responsibilities to Indian Tribes and their members and reclassify trust administration, services, and programs as non-discretionary. Finally, because federal Indian affairs funding is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to "means testing" or other inapplicable standards developed unilaterally by Congress or federal officials.

Intent of this Document. This document is largely comprehensive in the sense of identifying many, if not most, of the challenges and principles relative to the nature and evolution of the federal-tribal trust relationship. As a practical matter and given the rhythms and vagaries of the legislative process, it is also true that at any given time, legislation may be pending in Congress or initiatives pursued in federal agencies that address one or more—but not all—of the challenges and principles outlined above. In these cases, this document should be not understood to mean that all of the principles must be included in such legislation or administrative initiatives. Instead, this document assumes that, depending on the circumstances, any one, some, or all of the principles outlined above may be pursued as appropriate opportunities present themselves, whether administrative or legislative.

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KEY STRATEGIES OF INDIAN TRUST MODERNIZATION

I. Strengthen Trust Standards – Adopt Implementing Laws and Regulations

Administrative Actions:

- The President should issue a special message and a related Executive Order on Federal trust functions and responsibilities.
- DOI should develop trust responsibility regulations after full consultation with Tribes.
- The DOI Solicitor should issue an M-Opinion based on the 1978 Krulitz letter that the trust responsibility applies to all federal agencies and that sets certain implementation standards.

Legislative Actions:

- **Trust Modernization Legislation.** Congress should enact legislation that reaffirms and directs all federal agencies to comply with clear and specific federal trust responsibilities regarding actions that affect Indian interests and trust assets.
- **Tribal Tax Reform Legislation.** Congress should enact legislation that re-establishes the tribal tax base by retaining for Tribes taxes paid by residents and businesses in tribal communities.

II. Strengthen Tribal Sovereignty – Empower Each Tribe to Define its Path

Administrative Actions:

- DOI should expedite and approve trust-land acquisitions, leases, rights-of-way, and timber sales.
- DOI should encourage more Tribes to adopt tribal leasing regulations under the HEARTH Act.
- The President should issue an Executive Order on Tribal environmental regulation and jurisdiction based on Secretarial Orders 3206 and 3225 that affirms a tribal best interests determination in all environmental laws and regulations, requires federal agencies to collaborate with Tribes requesting tribal co-management of public lands, and encourages tribal ISDEAA contracts or compacts of eligible federal programs, functions, services or activities.
- Federal agencies should improve the flexibility of their programs and provide more technical assistance to accommodate the varying circumstances of Tribes.
- Federal agencies should expand support for tribal legal infrastructure development through funding, trainings, and resource workshops.

Legislative Actions:

- **Trust Modernization Legislation.** Allow Tribes to manage any or all of their own trust assets.
- **Establish Tribal Jurisdictional Authority Equivalent with Other Sovereigns.** Within their boundaries, Tribes should have authority comparable to states and the Federal government. This means jurisdiction for legislation, taxation, financial transactions, regulation, and civil and criminal court proceedings to the extent that Tribes are able to take on that authority and responsibility.
- **Exclude State and Local Jurisdiction at the Reservation Boundary.** There should be no state taxation of tribal activities on tribal lands. Also, amend the Indian Financing Act to provide that the tribal political subdivisions are nontaxable for any federal, state or local tax liability.
- **Tribal Tax Reform.** Legislation should authorize carry-back to tribes of tax revenue paid by residents and businesses in tribal communities, authorize Tribes' eligibility to monetize all tax credits, establish a revolving fund for low cost loans and tax exempt bonds, and dedicate to tribes allocations of tax credits to improve the access to credit for all Tribes.
- **Assure Tribal Control over Education of Tribal Students.** Tribes should be able to assume full control over the public and federal education systems on their lands and play a major role in the curriculum for other schools on or near their lands serving Native students.
- **Provide that All Federal Programs are Contractible or Compactible.** Indian Country has prospered when and where the federal government has authorized 638 contracting and "self-governance" compacting. These programs should be expanded to all federal programs that affect Indian country.
- **Provide for Tribal Co-Management of Subsistence Resources.** Federal agencies involved in management of subsistence resources should collaborate with Tribes to establish co-management of associated public lands, resources, and law enforcement activities.
- **Expand Protection of Off-Reservation Resources.** Tribal resources found off Tribal lands, such as sacred places, should be accorded protections consistent with Tribal values.
- **Implement the United Nations Declaration on the Rights of Indigenous Peoples.** The United States must incorporate the mandates of the UNDRIP for federal actions affecting Tribes, not merely endorse UNDRIP's principles.
- **Enact a Clean *Carcieri*-Fix.** Congress should approve a clean *Carcieri*-fix for all Tribes, that ensures all Tribes equal rights to trust acquisitions in accordance with the Tribal List Act of 1994 without exception, and does not diminish or further burden the trust acquisition process.
- **Protect Civil and Voting Rights.** Allow tribes the same right to establish polling places and to regulate voting as that of other governments.
- **Access to Capital.** Improve opportunities for on-reservation economic development by eliminating restrictions for tribal tax-exempt bonds, increasing Tribal Economic Development bonds and federal guaranteed loan programs, expanding tribal access to renewable energy grants and New Market Tax Credits, and codifying and augmenting funding for Tribal Community Development Corporations and Community Development Financial Institutions.

III. Strengthen Federal Management – For Trust Assets and Programs Still Subject to Federal Control

Administrative Actions:

- **Probate and Appraisals.** DOI should eliminate unnecessary appraisals and permit tribes to rely on independent certified appraisals, and expedite probate of allotments.
- **Conflict-of-Interest Issues.** DOI should better address and avoid potential conflicts of interest regarding implementation of federal trust responsibilities.

Legislative Actions:

- **Trust Modernization Legislation.** DOI should sunset the Office of Special Trustee and reintegrate its responsibilities to provide clear and unified supervisory authority within DOI for Indian trust management, and also should improve lease compliance and trespass enforcement.

IV. Strengthen Federal-Tribal Relations – One Table with Two Chairs

Administrative Action:

- President Obama should restructure the White House Council on Native American Affairs to provide for direct Tribal representation selected by Tribes themselves.
- Federal agencies should assess and revise the metrics used to evaluate federal programs for Tribes and tribal enterprises.
- Federal agencies should expand outreach to Tribes to increase awareness and knowledge of federal programs, policies, and funding opportunities, including creation of a one-stop shop clearinghouse for information.

Legislative Actions:

- **Trust Modernization Legislation.** Congress should establish a council or commission based on the White House Council on Native American Affairs, but including direct Tribal representation selected by Tribes themselves, like the Tribal/Interior Budget Council.
- **Fulfill Treaty Obligations for Tribal Members of Congress.** Several treaties provide for a tribal representative in Congress, though there is not one. Such a representative should have a status no less than that enjoyed by delegates from Puerto Rico and the District of Columbia. Having a congressional delegate should not diminish the representative obligations of members of Congress with Indian constituents and should not undermine the ability of the Indian Affairs committees to do their work.
- **Establish a Cabinet-Level Position.** The position of Assistant Secretary of Indian Affairs should be elevated to a Cabinet-level position within the Administration, with the authority to report directly to the President. Ambassadorial status should be accorded to federal representatives to Indian Country and Indian Country representatives to the federal government.

- **Monitor the Implementation of UNDRIP in the United States.** Establish a mechanism to monitor the implementation of UNDRIP in the United States. Support the full participation of Indigenous governments at the United Nations through regular and permanent status. Recognize the right of tribes under UNDRIP to free, prior, informed consent (FPIC) for federal actions affecting Tribes.

V. **Strengthen Federal Funding and Improve Its Efficiency – A Pillar of the Trust Responsibility**

Administrative Actions:

- Federal agencies should review and improve existing studies, data, and analyses regarding tribal programs and circumstances to augment federal budget justifications.
- Federal agencies should propose budgets that fully fund the trust responsibility.
- The President’s budget should fully fund the trust responsibility.
- Indian budgets should be handled through the mandatory component of the federal budget.

Legislative Actions:

- Congress should enact appropriations bills that fully fund the trust responsibility.
- Congress should enact legislation that amends the Indian Financing Act to provide to tribal governments federal income tax revenues of tribal citizens and otherwise modernize that Act to foster economic activity on reservations.

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