



TRIBAL NATIONS – UNITED STATES DIPLOMATIC RELATIONS

A HISTORICAL TO PRESENT DAY SYNOPSIS

The history of the relationship between Tribal Nations and the United States is complicated, shameful, and rarely told truthfully. Woven throughout is a tension between the United States' recognition of our inherent sovereignty and its simultaneous insistence on controlling or limiting our exercise of that sovereignty. Additionally, woven throughout and beginning with first contact is an effort to dispossess Tribal Nations of vast tracts of land and natural resources, in part by efforts to assimilate us and terminate our rights and our existence within our own lands.

Tribal Nations are sovereign governments that exist within the borders of the United States. Our governments existed before the formation of the United States and continue to exist today. We are the rightful stewards of these lands and our creation stories, our traditions, our cultures, our language, and our understanding of the world, humanity, and all life forms are intricately tied to these lands. Tribal Nations possess inherent sovereignty—which means we have autonomous, independent government authority apart from any recognition of such authority by other entities. This sovereign authority includes jurisdiction over our people and lands, form of government, and administration of justice, and ultimately our right to make decisions that are best for our citizenship now and into the future.

In its early formative years, before the United States evolved into the strong and wealthy global power that it is today, the United States, including the period prior to its formation, sought to establish and maintain strong relations with Tribal Nations. As a reflection of this approach, the United States, in accordance with our sovereign government status, often took action within our lands only after securing our consent through nation-to-nation diplomacy, including through treaty-making. The Second Continental Congress, in adopting the Northwest Ordinance, pledged that our lands and property would not be taken from us without our consent and that our property and rights would not be disturbed. These diplomatic relationships and the understanding that consent was required for U.S. action were a recognition by the United States of Tribal Nations as sovereign political entities.

When the United States adopted its Constitution, it included provisions specifically directed at Tribal Nations and Native people, recognizing our unique status and

giving the federal government power to take actions on our behalf. Soon after, the Supreme Court issued three opinions—called the Marshall Trilogy—that formally articulated the recognition of Tribal Nations' inherent sovereignty while also citing the doctrine of discovery as placing limitations on that sovereign status. The doctrine of discovery is rooted in a self-serving document issued by the Pope in 1493 that said any land not inhabited by Christians was available to be "discovered" and therefore taken into possession, and that the land's inhabitants should be Christianized. Judicial decisions, congressional statutes, and other federal actions have continued to shape the parameters of the relationship between the United States and Tribal Nations over time.

But the understanding that Tribal Nations possess inherent sovereignty, as reflected in the U.S. Constitution, Supreme Court decisions, and numerous laws, did not and still does not compel the United States to fully respect our rights and authorities. In the founding and expansion of the United States, acts of genocide were committed against our ancestors to allow others to pursue life, liberty, and happiness in our stolen homelands, while simultaneously depriving us of those same rights and liberties. The United States, and colonizers before it, rationalized its behavior and approach by utilizing the doctrine of discovery. The doctrine of discovery planted the rotten seed that, although Tribal Nations have inherent sovereignty, the United States need not treat us as full sovereigns because Native people are less human than our colonial counterparts. It also paved the way morally for the physical acts of genocide and the taking of lands committed in the name of colonial expansion.

Tribal Nations ceded millions of acres of land and natural resources to the United States, often involuntarily or out of necessity to prevent the killing of our people who sought only to protect their families, their homelands, and their way of life. These ceded lands and natural resources are a source of and the very foundation of the wealth and power that the United States, and its citizens, enjoys to this day. In exchange, the United States made promises that exist in perpetuity to ensure Native people's health, overall well-being, and prosperity. This exchange is the basis for the general trust obligation to Native people.

Unfortunately, as the United States became more powerful, as maintaining strong relations with Tribal Nations became less necessary, and as greed took

over, the United States quickly moved away from an approach based on Tribal Nations as inherent sovereigns from which it must obtain consent. Instead, to justify and facilitate its continued theft, it began to view Tribal Nations as subsumed under the United States' powers and subject to its whims—using terms such as “domestic dependent nations” and “wards” to describe us and referring to its “plenary power” over us. Eventually, the United States progressively moved away from the concept of “rights-ceded” by Tribal Nations to viewing Tribal Nations as possessing only “rights-granted” by the United States. Over time, the United States has woven these concepts into its legal jurisprudence to create a narrative and understanding based upon legal fiction to justify its actions.

U.S. policy regarding Tribal Nations and Native people continues to evolve. For much of the U.S.'s existence, however, it took drastic measures to undermine Tribal Nations' governance and assimilate Native people, thereby attempting to terminate Tribal Nations and the trust obligations we are owed. The United States took our homelands and placed us on reservations, often in remote areas with little or no resources or economies, prohibited exercise of our cultural practices, kidnapped our children, and took action to limit the exercise of our inherent sovereign rights and authorities. These assimilation and termination policies, and the acts of cultural genocide committed in furtherance of them, were a failure by all accounts—as Tribal Nations fought hard to maintain our cultural existence and have not gone away. And yet, ultimately, U.S. policy toward Tribal Nations remains to this day, at its core, based on two flawed assumptions: (1) that Tribal Nations are incompetent to handle our own affairs, and (2) that our Nations would eventually assimilate out of existence.

The United States' actions towards Tribal Nations and Native people are designed to make our continued existence invisible to mainstream society, since acknowledging our contemporary existence would involve coming to terms with our complicated history together. Instead, the United States seeks to instill in its people a revisionist, incomplete, and often fictional historical understanding that is intended to conceal the truth. Our ongoing existence as sovereign nations is unknown to most, the truth about our long, complex, and complicated nation-to-nation relationship goes untold, and our existence is too often stereotyped, romanticized, and minimalized to a mere historical footnote.

For the past 50 years, and in response to the American Indian Movement and other Tribally-driven efforts, the United States has begun to take a different approach to its relationship with Tribal Nations, instead seeking to facilitate Tribal Nations' self-determination and self-governance. For example, Congress enacted the Self-

Determination and Educational Assistance Act, which authorized Tribal Nations to contract with the federal government for funding to provide services otherwise provided by the federal government. And multiple presidential executive orders have been issued calling on federal agencies, in recognition of our inherent rights and authorities, to consult with Tribal Nations when it comes to federal decisions that impact our people and our homelands. In addition, while the United States was unfortunately the last government to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2010, declaring it to be aspirational and not binding, its endorsement still offers a foundation which we can further build upon.

However, despite some notable gains over this period, the United States is still far from a reality where it is fulfilling its trust and treaty obligations to Tribal Nations, fully respecting our inherent sovereign rights and authorities, and properly acknowledging and honoring our indigenous existence within these lands. The United States continues to issue federal Indian policy based upon a false premise that contributes, in large part, to the imperfect relationship we have today. Tribal Nations remain unified in our efforts to topple these foundational myths, as our perseverance and the sophistication of our governments reveal these myths to be falsehoods.

The current relationship requires a comprehensive overhaul, including a return to a nation-to-nation relationship rooted in diplomacy. As Indian country envisions its future, we must collectively seek a new model based on: fulfillment by the United States of its trust and treaty obligations; achieving full recognition of our sovereign governmental status and authorities; ensuring that every United States citizen receives a factual and truthful accounting of the complex and complicated history of Tribal Nation-U.S. relations; recognizing the preeminent role of Tribal Nations' own laws as the means through which we define who we are and how we exert our sovereign powers and authorities; seeking to force the evolution of 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 Tribal Nations have been granted their sovereign rights; and demanding a reality where we as indigenous people are not marginalized, stereotyped, or discriminated against within our own lands.

MAJOR EVENTS & ACTIONS SHAPING UNITED STATES' RELATIONSHIP WITH TRIBAL NATIONS AND RELATED TRUST & TREATY OBLIGATIONS

Formative Era: Beginning-1871

Initial sustained contact between indigenous populations of North America and European subjugators. Tribal Nations used treaties to conduct business internationally with the Crowns (and later with the colonies, followed with the United States).

- **1493** – The Pope issued a Papal Bull stating any land not inhabited by Christians was available to be “discovered.” Under this doctrine of discovery, while indigenous people maintained the right to occupy their land, the discoverer was granted sole authority to acquire the land.
- **1778** – The United States entered into the first of many treaties with Tribal Nations, thereby recognizing Tribal Nations as politically sovereign entities with treaty-making authority. A basic principle established by the treaties and the United States' course of dealings with Tribal Nations and Indians was that the United States had a broad responsibility to Tribal Nations and Indians. This responsibility flowed both from the consideration promised in exchange for Tribal Nations' homelands and agreement of peace—often extracted through unfair tactics and sometimes without consent—and from the fact that stripping away Tribal Nations' homelands often stripped away the very means necessary for Tribal Nations to provide for their people.
- **1787** – The Second Continental Congress adopted the Northwest Ordinance to charter a government for the Northwest Territory and provide that good faith shall be observed toward Indians, that their lands and property shall not be taken from them without their consent, that their property and rights shall not be disturbed absent lawful wars authorized by Congress, and that laws shall be passed to prevent wrongdoing.
- **1787** – The United States adopted the Constitution, which gave Congress authority to regulate commerce with Tribal Nations and gave the Executive Branch treaty making authority with ratification by the Senate.
- **1790** – Congress enacted the first Nonintercourse Act, requiring authorization by the federal government before Indian lands were purchased.
- **1823** – The Supreme Court in *Johnson v. M'Intosh*, the first case in the Marshall Trilogy, found that, under the doctrine of discovery, the federal government had the exclusive right to extinguish Tribal Nations' aboriginal title to land.
- **1824** – The Bureau of Indian Affairs was created within the War Department.
- **1830** – Congress enacted the Indian Removal Act, authorizing the President to force southern Tribal Nations' removal west of the Mississippi. Many Tribal Nations were forcibly removed from their lands during this time.
- **1831** – The Supreme Court in *Cherokee Nation v. Georgia*, the second case in the Marshall Trilogy, held Tribal Nations are domestic dependent nations and that the relationship between Tribal Nations and the federal government is like that of a ward to a guardian.
- **1832** – The Supreme Court in *Worcester v. Georgia*, the third case in the Marshall Trilogy, recognized that Tribal Nations are sovereign nations with authority of self-government over their people and territories that predates the arrival of colonists, that Tribal Nations have the protection of the federal government, and that the doctrine of discovery gave the federal government the sole right to acquire their land.

- **1849** – The Bureau of Indian Affairs was transferred to the Department of the Interior.
- **1871** – Treaty making ended, and the United States instead began to carry out its relationship with Tribal Nations through legislation. This action was unilateral, and was carried out by a rider attached to the Indian Appropriations Bill of 1871.

Allotment and Assimilation Era: 1871-1928

- **1879** – Carlisle Indian School, a well-known off-reservation Indian boarding school, was established under the philosophy of “Kill the Indian, save the man.” During this time, the United States established and operated many Indian boarding schools, removing Indian children from their homes, families, and cultures.
- **1886** – The Supreme Court in *United States v. Kagama* held Congress has power to legislate with regard to Indians based on the obligations it owes to them.
- **1887** – Congress enacted the General Allotment Act (Dawes Act), which broke lands owned by Tribal Nations into parcels that were then provided to individual Indians to facilitate assimilation. Tribal Nations lost more than 90 million acres without compensation as a result of the allotment process.
- **1903** – The Supreme Court in *Lone Wolf v. Hitchcock* held Congress is authorized to unilaterally abrogate terms of a treaty.
- **1921** – Congress enacted the Snyder Act, which created a more effective funding authorization mechanism for the United States to satisfy its obligations to Indians, including for healthcare.
- **1924** – Congress enacted the Indian Citizenship Act, which extended United States citizenship to all American Indians; however, it wasn't until the 1965 Voting Rights Act that states were required to allow American Indians to exercise their voting rights.

Indian Reorganization Era: 1928-1945

- **1928** – The Merriam Report was released, which recommended major changes in federal Indian policy.
- **1933** – John Collier, who believed in reinvigoration of Tribal Nations' governments to control their own destinies, was appointed Commissioner of Indian Affairs.
- **1934** – Congress enacted the Indian Reorganization Act, which ended allotment, permitted the federal government to acquire lands into trust on behalf of Tribal Nations, and provided Tribal Nations a federally-sanctioned vehicle to adopt governing documents.
- **1934** – Congress enacted the Johnson-O'Malley Act, which provided federal funding for certain services administered to Indians by other entities, such as states, and has been used mostly in the context of education.

Termination Era: 1945-1968

- **1953** – Congress stated in House Concurrent Resolution 108 that the official policy of the federal government toward Tribal Nations was termination of federal benefits and recognition. Under this policy, many Tribal Nations' federal recognition was terminated—but most of these Tribal Nations have since been re-recognized.
- **1953** – Congress enacted Public Law 280 to cede some federal jurisdiction over Tribal Nations' lands to certain states.
- **1955** – The Facilities Transfer Act transferred Indian health programs from the BIA to the Public Health Service, establishing the Indian Health Service.
- **1956** – Congress enacted the California Rancheria Act, which provided for termination of California rancheria lands' trust status and distribution of assets.
- **1956** – Congress enacted the Indian Relocation Act to encourage Indians to relocate to urban areas.
- **1965** – Congress enacted Voting Rights Act of 1965. States were required to allow American Indians to exercise the right to vote in state elections.

Self-Determination Era: 1968-Present

- **1968** – President Johnson issued a message to Congress, entitled “The Forgotten American: The President’s Message to the Congress on Goals and Programs for the American Indian.” His message proposed ending termination and promoting self-determination, and he said “[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government.”
- **1968** – In conjunction with his message to Congress, President Johnson issued Executive Order No. 11399, entitled “Establishing the National Council on Indian Opportunity.” The Council included representation from Indian country and the federal government, and it helped to establish the current era of federal Indian policy by formulating President Nixon’s Special Message on Indian Affairs.
- **1968** – Congress enacted the Indian Civil Rights Act, which recognized and placed certain constitutional limits on powers of self-government exercised by Tribal Nations and required Tribal Nations’ consent for state assumption of jurisdiction over civil or criminal actions in Indian country.
- **1968** – The American Indian Movement (AIM) was established to advocate on behalf of Indian Country.
- **1969** – The United Southeastern Tribes (which would later become United South and Eastern Tribes, Inc.) was established with the shared idea that unity between Tribal Nations was necessary to improve and strengthen their dealings with the federal government.
- **1970** – President Nixon issued a message to Congress, entitled “Special Message on Indian Affairs,” in which he advocated self-determination, greater protection of Indian rights, the end of termination, and upholding the trust responsibility regardless of each Tribal Nations’ progress toward self-sufficiency.
- **1974** – The Supreme Court in *Morton v. Mancari* held that a hiring preference for Indians did not “constitute ‘racial discrimination’” but said instead the Constitution “singles Indians out as a proper subject for separate legislation” due to “the unique legal status of Indian tribes under federal law and upon the plenary power of Congress [drawn from the Constitution], based on a history of treaties and the assumption of a guardian-ward status.” This seminal holding is one of the cornerstones of federal Indian law and has since been applied in many cases upholding actions carrying out the unique obligations the United States owes to Indians.
- **1975** – Congress enacted legislation establishing the American Indian Policy Review Commission for the comprehensive investigation and study of Indian affairs.
- **1975** – Congress enacted the Self-Determination and Educational Assistance Act, which authorized Tribal Nations to contract with the federal government for funding to provide services otherwise provided by the federal government.
- **1976** – Congress enacts the Indian Health Care Improvement Act, authorizing specific Indian Health Service programs and permitting IHS to bill Medicare and Medicaid.
- **1977** – The American Indian Policy Review Commission issued its final report, which recommended that Congress reaffirm and direct all executive agencies to administer the trust responsibility consistent with a set of specific legal principles, called for consultation with Tribal Nations and empowering Tribal Nations’ governments, and made other specific recommendations.
- **1978** – The Supreme Court in *United States v. Wheeler* held Tribal Nations’ criminal jurisdiction over Indians arises from their inherent sovereign authorities and is not granted by the United States.
- **1978** – The Supreme Court issued a decision in *Oliphant v. Suquamish Indian Tribe*, stating Tribal Nations have no criminal jurisdiction over non-Indians in Indian country without congressional authorization based on its reasoning that an exercise of such powers would be “inconsistent with their status” as “domestic dependent nations.”
- **1978** – Department of the Interior Solicitor Krulitz issued a letter to the Department of Justice stating the federal government stands in a fiduciary relationship with Tribal Nations, thereby permitting money damages for trust asset mismanagement, and that the Department of Justice should not take a conflicting position.
- **1978** – Congress enacted the Indian Child Welfare Act to stop the practice of removing Native children from their families and Tribal Nations.
- **1978** – Congress enacted the American Indian Religious Freedom Act, to eliminate interference with the free exercise of Native American religions, based on the First Amendment of the U.S. Constitution; and to recognize the civil liberties of Native Americans, Alaska Natives, and Native Hawaiians to practice, protect and preserve their inherent right of freedom to believe, express, and exercise their traditional religious rights, spiritual and cultural practices.

- **1979** – Department of Justice Attorney General Bell issued a letter to Secretary of the Interior Andrus setting forth the Department of Justice's position interpreting the federal government's fiduciary responsibility to Tribal Nations regarding asset management more narrowly than what Tribal Nations argue for.
- **1980** – The Supreme Court in *Washington v. Confederated Tribes of the Colville Indian Reservation* held the state had authority to impose taxes on certain on reservation activities.
- **1980 and 1983** – The Supreme Court issued decisions in *United States v. Mitchell*, which, although ruling in favor of the Tribal Nation party, construed the federal government's compensable fiduciary trust responsibilities to Tribal Nations for asset management more narrowly than what Tribal Nations argue for. The letter from Solicitor Krulitz was filed in the case and cited in the dissent.
- **1989** – The Supreme Court issued decision in *Cotton Petroleum Corporation v. New Mexico*, which applied the Bracker balancing test to weigh state, Tribal, and federal interests in determining whether states can imposing tax on non-Tribal entities conducting commercial activities on Tribal land. SCOTUS noted that Congress could offer tax immunity, if it chose to do so.
- **1994** – Congress enacted the American Indian Trust Fund Management Reform Act, which reaffirmed and specified federal trust responsibilities, authorized Tribal Nations to manage trust funds, and established the Office of the Special Trustee for American Indians.
- **1994** – Congress passed the Federally Recognized Indian Tribe List Act, which directs the Department of the Interior to publish annually a list of federally-recognized Tribal Nations and stipulates that federal agencies must treat all federally-recognized Tribal Nations equally.
- **1997** – Secretary of the Interior Babbitt issued Secretarial Order No. 3206, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," which clarified responsibilities when actions taken under the Endangered Species Act affect Indian lands, Tribal Nations' trust resources, or the exercise of Tribal Nations' rights.
- **1998** – The Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* refused to find an exception to Tribal Nations' sovereign immunity for off reservation commercial activities.
- **2000** – Secretary of the Interior Babbitt issued Secretarial Order No. 3215, entitled "Principles for the Discharge of the Secretary's Trust Responsibility," which provided guidance to employees who carry out the trust responsibility as it pertains to Indian trust assets and reaffirmed the letter from Solicitor Krulitz. The Department of the Interior then codified those principles for managing Indian trust assets in the Departmental Manual.
- **2000** – President Clinton issued Executive Order No. 13175, entitled "Consultation and Coordination with Indian Tribal Governments," which required federal agencies to consult with Tribal Nations for policies that have Tribal implications.
- **2001** – Secretary of the Interior Babbitt issued Secretarial Order No. 3225, entitled "Endangered Species Act and Subsistence Uses in Alaska," which supplemented Secretarial Order No. 3206.
- **2003** – The Supreme Court issued a decision in *United States v. Navajo*, which construed the federal government's compensable fiduciary trust responsibilities to Tribal Nations for asset management more narrowly than what Tribal Nations argue for.
- **2003** – The Supreme Court issued a decision in *United States v. White Mountain Apache Tribe*, which found the federal government, when using a Tribal Nation's trust land or property, owes a duty to maintain that land or property.
- **2003** – The United States Commission on Civil Rights issued a report, entitled "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country."
- **2009** – The Supreme Court issued a decision in *Carcieri v. Salazar*, which ruled that the Secretary of the Interior's authority to acquire land into trust on behalf of Tribal Nations under the Indian Reorganization Act was limited to only those Tribal Nations that were "under federal jurisdiction" in 1934.
- **2009** – President Obama held the first White House Tribal Nations Conference, where Tribal Leaders were invited to meet with the President and members of his Cabinet to discuss issues of importance to Indian country. President Obama continued to hold the White House Tribal Nations Conference each year.
- **2009** – President Obama issued a Memorandum for the Heads of Executive Departments and Agencies, entitled "Tribal Consultation," which directed agencies to develop detailed action plans to implement the Tribal Nation consultation policies and directives of Executive Order No. 13175.

- **2009** – The United States settled the *Cobell* trust fund mismanagement litigation, and Secretary of the Interior Salazar issued Secretarial Order No. 3292, entitled “Individual Indian Trust Management,” which provided for the establishment of the Secretarial Commission on Indian Trust Administration and Reform to evaluate the Department of the Interior’s management and administration of Indian trust assets.
- **2010** – The United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), becoming the last nation to sign on, stating the “aspirations [the declaration] affirms, including the respect for the institutions and rich cultures of Native peoples, are one we must always seek to fulfill.”
- **2010** – The Indian Health Care Improvement Act is permanently reauthorized as a part of the Patient Protection and Affordable Care Act after a 10 year effort from Tribal Nations and organizations.
- **2011** – In *United States v. Jicarilla Apache Nation*, the Department of Justice asserted that the federal government’s legally enforceable trust obligations are limited to the terms of statutes and regulations, questioning the legal effect of the letter from Solicitor Krulitz. The Supreme Court reaffirmed that it looks to common law to determine the scope of federal Indian trust liability. It also stated “[t]he Government, following a humane and self-imposed policy . . . has charged itself with moral obligations of the highest responsibility and trust.”
- **2013** – President Obama issued Executive Order No. 13647, entitled “Establishing the White House Council on Native American Affairs,” to ensure that the federal government engages in a true and lasting government-to-government relationship with federally recognized Tribal Nations in a more coordinated and effective manner, including by better carrying out its trust responsibilities.
- **2013** – The Secretarial Commission on Indian Trust Administration and Reform issued a report that recognized trust duties are not discretionary and recommended that the federal government (1) reaffirm that all federal agencies have a trust responsibility to Indians that demands a high standard of conduct, (2) develop a uniform consultation policy, and (3) restructure and improve the management, oversight, and accountability of federal trust administration.
- **2013** – The Supreme Court in *Adoptive Couple v. Baby Girl* interpreted the Indian Child Welfare Act narrowly, with some Justices asserting possible equal protection concerns.
- **2013** – President Obama signs the Violence Against Women Act Reauthorization (VAWA) into law. Tribal advocates fought hard to ensure that the law recognized our rights as inherent as opposed to granted. In signing the bill into law, President Obama expressed “Tribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear.”
- **2014** – Secretary of the Interior Jewell issued Secretarial Order No. 3335, entitled “Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries,” which reaffirmed the letter from Solicitor Krulitz and set forth guiding principles for bureaus and offices to follow to ensure that the Department of the Interior fulfills its trust responsibility.
- **2016** – Standing Rock Protest begins in opposition to the Energy Transfer Partners’ Dakota Access Pipeline project that would cross beneath the Missouri and Mississippi Rivers, as well as part of Lake Oahe near the Standing Rock Indian Reservation. The protest was in direct opposition to the threat the pipeline posed to the region’s clean water and ancient burial grounds.
- **2017** – President Trump in his signing statement associated with appropriations legislation implied that some services for Indians are unconstitutionally race based, stating he will treat provisions that allocate benefits on the basis of race, ethnicity, and gender—listing the Native American Housing Block Grant program—in a manner consistent with the equal protection clause of the Constitution. He has since continued to include such language in appropriations legislation signing statements.
- **2017** – President Trump signed a presidential memorandum to advance approval of construction of the Dakota Access Pipeline.
- **2018** – The Centers for Medicare and Medicaid Services within the Department of Health and Human Services took the position that providing or approving an exemption from Medicaid work requirements for Indians would raise civil rights concerns.
- **2018** – The United States Commission on Civil Rights issued a report entitled “Broken Promises: Continuing Federal Funding Shortfall for Native Americans,” which updates its prior 2003 report, entitled “A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country.”

- **2018** – The Reclaiming Native Truth: A Project to Dispel America's Myths and Misconceptions Report issued. It is the largest public opinion research project ever conducted by, for and about Native peoples. The research has been critically important in helping to start important and potentially transformative conversations with leaders in entertainment, media, K-12 education, philanthropy and other sectors. It has helped to validate, through data, the experiences of Native peoples across the country of how invisibility and toxic stereotypes that are perpetuated primarily by media, pop culture and K-12 education fuel bias and racism against Native peoples. It has raised important awareness among non-Natives allies about these systemic issues and the abundance of opportunities to work in partnership with Native peoples to advance narrative change and social justice.
- **2019** – On August 9, the Fifth Circuit Court of Appeal affirmed the constitutionality of the Indian Child Welfare Act (the Department of Justice defended the Indian Child Welfare Act's constitutionality). This decision was a reversal of the 2018 U.S. District Court for the Northern District of Texas decision in *Brackeen v. Bernhardt* that held the Indian Child Welfare Act violates the Constitution, including the equal protection clause (it further held that ICWA is race based, finding the principles of *Morton v. Mancari* do not extend to cover it).
- **2020-2021** – The U.S. and Nations around the world contend with SARS-COV-2, the COVID-19 pandemic. Tribal Nations and Native American people are uniquely impacted by the virus due to the chronic underfunding of trust and treaty obligations, with higher rates of illness and poorer outcomes, as well as greater economic impacts due to lockdowns. The U.S. responds with several large spending packages designed to provide resources and relief to units of government and individuals throughout the country, including Tribal Nations and our citizens. The American Rescue Plan provides the single largest transfer of federal resources to Tribal Nations ever at \$31.2 billion. However, access to COVID-19 relief funding and other resources is uneven, and many of Indian Country's priorities are ignored. The U.S. Commission on Civil Rights attempts to update its Broken Promises report to reflect these failures, but a vote to publish these findings fails along partisan lines.
- **2020** – The Trump Administration attempts to disestablish a reservation for the first time since the Termination Era in ordering the homelands of the Mashpee Wampanoag Tribe taken out of trust. The disestablishment was put to a halt when the D.C. District Court deemed arbitrary and capricious Department of Interior's 2018 decision that the Mashpee Wampanoag Tribe did not prove it was "under federal jurisdiction" in 1934, and therefore did not meet the first definition of "Indian" under the Indian Reorganization Act—making the Tribal Nation ineligible to acquire land in trust.
- **2020** – On July 9, the United States Supreme Court issued its decision in *McGirt v. Oklahoma*, holding that the Muscogee (Creek) Nation's reservation is intact and remains Indian country. The Court reaffirmed that reservations remain intact until Congress demonstrates clear congressional intent to disestablish them, such as through an "explicit reference to cession or other language evidencing the present and total surrender of all Tribal interests." The Court was not persuaded when Oklahoma argued that its wrongful exercise of jurisdiction over the land should affect the reservation disestablishment analysis. Courts have since applied this case to find that other reservations in Oklahoma remain intact. As such, prosecution of crimes by Native Americans on these lands falls into the jurisdiction of the Tribal courts and federal judiciary under the Major Crimes Act, rather than Oklahoma's courts.
- **2021** – Congresswoman Debra Haaland, a citizen of the Laguna Pueblo, is confirmed as the first-ever Native American Secretary of the Interior.
- **2021** – For the first time, the Office of Management and Budget, an agency within the Executive Office of the President, takes the position that it has consultative responsibilities to Tribal Nations leading to historic consultations on the President's Fiscal Year 2022 and 2023 Budget Requests.
- **2021** – On April 6, the United States Court of Appeals for the Fifth Circuit issued its *en banc* decision in *Brackeen v. Haaland*, where plaintiffs challenged the constitutionality of the Indian Child Welfare Act. The court held Congress had authority to enact the Act and that the Act's "Indian child" classification is not unconstitutionally race-based in violation of the Equal Protection Clause of the U.S. Constitution. However, the judges were equally divided and thus the District Court's ruling was affirmed without a precedential opinion that ICWA's adoptive placement preference for "other Indian families" and foster care placement preference for "Indian foster home[s]" both violate the Equal Protection Clause. Because federal Indian laws are a reflection of the political relationship between the United States and Tribal Nations, they have not been subject to the heightened level of Equal Protection Clause review required for racial classifications, so this decision represents a dangerous precedent and a violation of the government-to-government relationship. In September, petitions for *certiorari* were filed with the United States Supreme Court.
- **2021** – On June 25, the United States Supreme Court issued its decision in *Yellen v. Confederated Tribes of the Chehalis Reservation*, holding that Alaska Native Corporations are "Indian tribes" under the Indian Self-Determination and Education Assistance Act and, thus, are "Tribal governments" under the Coronavirus Aid, Relief, and Economic Security Act and eligible to receive Coronavirus Recovery Fund monies. The case placed before the Court questions regarding Tribal identity, Tribal sovereignty, and status as a Tribal Nation for purposes of federal Indian law.



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3335

Subject: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries

Sec. 1 Purpose. In 2009, Secretary's Order No. 3292 established a Secretarial Commission on Indian Trust Administration and Reform (Commission). The Commission issued its Final Report and Recommendations in December 2013, which sets forth its views and recommendations regarding the United States' trust responsibility. In response to the report, this Order sets forth guiding principles that bureaus and offices will follow to ensure that the Department of the Interior (Department) fulfills its trust responsibility.

Sec. 2 Authority. This Order is issued pursuant to the U.S. Constitution, treaties, statutes, Executive Orders, and other Federal laws that form the foundation of the Federal-tribal trust relationship and in recognition of the United States' trust responsibility to all federally recognized Indian tribes and individual Indian beneficiaries.

Sec. 3 Background. The trust responsibility is a well-established legal principle that has its origins with the formation of the United States Government. In the modern era, Presidents, Congress, and past Secretaries of the Interior have recognized the trust responsibility repeatedly, and have strongly emphasized the importance of honoring the United States' trust responsibility to federally recognized tribes and individual Indian beneficiaries.

a. **Legal Foundation.** The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States formally recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen's Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

The U.S. Supreme Court has repeatedly opined on the meaning of the United States' trust responsibility. Most recently, in 2011, in *United States v. Jicarilla*, the Supreme Court recognized the existence of the trust relationship and noted that 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.”” The Court further explained that “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.’ But the applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011)(internal citations omitted).

While the Court has ruled that the United States’ liability for breach of trust may be limited by Congress, it has also concluded that certain obligations are so fundamental to the role of a trustee that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee. “This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. ‘One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.’” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)(internal citations omitted).

b. Presidential Commitments to the Trust Responsibility. Since this country’s founding, numerous Presidents have expressed their commitment to upholding the trust responsibility. In the historic Special Message on Indian Affairs that marked the dawn of the self-determination age, President Nixon stated “[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.” Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. President Obama established a White House Council on Native American Affairs with the Secretary of the Interior serving as the Chair. President Barack Obama, Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013). The Order requires cabinet-level participation and interagency coordination for the purpose of “establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities.” See also President Barack Obama, Memorandum on Tribal Consultation (Nov. 5, 2009); President George W. Bush, Executive Order No. 13336, American Indian and Alaska Native Education (Apr. 30, 2004); President William J. Clinton, Public Papers of the President: Remarks to Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George H.W. Bush, Public Papers of the President: Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (Jun. 14, 1991); President Ronald Reagan, American Indian Policy Statement, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983); President Gerald L. Ford, Public Papers of the President: Remarks at a Meeting

with American Indian Leaders (July 16, 1976); President Richard M. Nixon, Public Papers of the President: Special Message on Indian Affairs (July 8, 1970); President Lyndon B. Johnson, Public Papers of the President: Special Message to the Congress on the Problems of the American Indian: "The Forgotten American" (March 6, 1968).

c. Congress. Congress has also recognized the United States' unique responsibilities to Indian tribes and individual Indian beneficiaries. Recently, Congress passed a joint resolution recognizing the "special legal and political relationship Indian tribes have with the United States and the solemn covenant with the land we share" and acknowledged the "long history of depredations and ill-conceived policies by the Federal government regarding Indian tribes" and offered "an apology to all Native peoples on behalf of the United States." 111th Cong. 1st Sess., S.J. Res 14 (Apr. 30, 2009). Congress has expressly and repeatedly recognized the trust responsibility in its enactments impacting Indian Affairs. *See, e.g.*, Indian Education and Self-Determination and Assistance Act of 1975; Tribal Self-Governance Amendments of 2000; American Indian Trust Fund Management Reform Act of 1994; Federally Recognized Indian Tribe List Act of 1994; Tribally Controlled Schools Act of 1988 and Indian Education Act of 1972; Indian Child Welfare Act of 1978; Indian Mineral Development Act of 1982; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).

d. The Department of the Interior. The Department likewise has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has been vested with the authority to perform certain specific trust duties and manage Indian affairs.

The Bureau of Indian Affairs (BIA) was transferred from the War Department to the Department in 1849. Congress delegated authority to the Department for the "management of all Indian affairs and of all matters arising out of Indian relations[.]" 25 U.S.C. § 2 (2014); *see also* 25 U.S.C. § 9 (2014); 43 U.S.C. § 1457. The BIA became the principal actor in the relationship between the Federal Government and Indian Tribes, and later Alaska Native Villages, exercising administrative jurisdiction over tribes, individual Indians, their land and resources.

The BIA has evolved dramatically over the last 185 years from an agency implementing past policies of allotment and assimilation, to a bureau charged with promoting and supporting Indian Self-Determination. In addition, several other bureaus and offices within the Department were created for or have specific duties with respect to fulfilling the trust responsibility, such as the Bureau of Indian Education, Office of the Assistant Secretary – Indian Affairs, Secretary's Indian Water Rights Office, Office of the Special Trustee for American Indians, Land Buy-Back Program for Tribal Nations, Office of Historical Trust Accounting, Office of Natural Resource Revenue, Office of Appraisal Services, and Office of Minerals Evaluations. All of these programs support and assist federally recognized tribes in the development of tribal government programs, building strong tribal economies, and furthering the well-being of Indian people. As instruments of the United States that make policy affecting Indian tribes and individual Indian beneficiaries, the Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, and the Department's other bureaus and offices share the same general Federal trust responsibility toward tribes and their members.

In an extended legal opinion regarding the meaning of the trust responsibility, former Department of the Interior Solicitor Leo M. Krulitz concluded that “[t]he 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.” Memorandum from Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, at 2 (Nov. 21, 1978). This opinion remains in effect today.

In exercising this broad authority, past Secretaries have acknowledged that the Department’s relationship with Indian tribes and individual Indian beneficiaries is guided by the trust responsibility and have expressed a paramount commitment to protect their unique rights and ensure their well-being, while respecting tribal sovereignty. *See e.g.*, Secretary’s Order 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011); Secretary’s Order 3175, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993); Secretary’s Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997); Secretary’s Order 3215, Principles for the Discharge of the Secretary’s Trust Responsibility (Apr. 28, 2000); Secretary’s Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001).

The Department has also sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.

Sec. 4 A New Era of Trust. During the last few decades, the trust relationship has evolved. In the Era of Tribal Self-Determination, the Federal trust responsibility to tribes is often fulfilled when the Department contracts with tribal governments to provide the Federal services owed under the trust responsibility. Because tribal governments are more directly accountable to the people they represent, more aware of the problems facing Indian communities, and more agile in responding to changes in circumstances, tribal governments can often best meet the needs of Indian people. In sum, the Federal trust responsibility can often be achieved best by empowering tribes, through legislative authorization and adequate funding to provide services that fulfill the goals of the trust responsibility.

In recent decades, the trust relationship has weathered a difficult period in which Indian tribes and individual Indians have resorted to litigation asserting that the Department had failed to fulfill its trust responsibility, mainly with regard to the management and accounting of tribal trust funds and trust assets. In an historic effort to rebuild the trust relationship with Indian tribes, the Department recently settled numerous “breach of trust” lawsuits. This includes *Cobell v. Salazar*, one of the largest class action suits filed against the United States, and more than 80 cases involving Indian tribes. Resolution of these cases marks a new chapter in the Department’s history and reflects a renewed commitment to moving forward in strengthening the government-to-government relationship with Indian tribes and improving the trust relationship with tribes and individual Indian beneficiaries.

As part of the *Cobell* Settlement, the Department established a Secretarial Commission on Indian Trust Administration and Reform in 2009 through Secretary's Order No. 3292. The Commission issued its final report in December 2013. The report highlighted the significance of the Federal trust responsibility and made recommendations to the Department on how to further strengthen the commitment to fulfill the Department's trust obligations. The Commission urged a "renewed emphasis on the United States' fiduciary obligation" and asserted that this "could correct some [issues], especially with respect to ensuring that all federal agencies understand their obligations to abide by and enforce trust duties."

As a response to the Commission's recommendation, this Order hereby sets forth seven guiding principles for honoring the trust responsibility for the benefit of current and future generations.

Sec. 5 Guiding Principles. Pursuant to the long-standing trust relationship between the United States, Indian tribes and individual Indian beneficiaries and in furtherance of the United States' obligation to fulfill the trust responsibility, subject to Section 6 below, all bureaus and offices of the Department are directed to abide by the following guiding principles consistent with all applicable laws. Bureaus and offices shall:

Principle 1: Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.

Principle 2: Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.

Principle 3: Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

Principle 4: Work in partnership with Indian tribes on mutually beneficial projects.

Principle 5: Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 6: Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility.

Sec. 6 Scope and Limitations.

- a. This Order is for guidance purposes only and is adopted pursuant to all applicable laws and regulations.
- b. This Order does not preempt or modify the Department's statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility obligations of Department employees.
- c. Nothing in this Order shall require additional procedural requirements related to Departmental actions, activities, or policy initiatives.
- d. Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.
- e. Should any Indian tribe(s) and the Department agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.
- f. This Order is intended to enhance the Department's management of the United States' trust responsibility. It is not intended to, and does not, create any right to administrative or judicial review or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person.

Sec. 7 Expiration Date. This Order is effective immediately and will remain in effect until it is incorporated into the Department Manual, or is amended, suspended, or revoked, whichever occurs first.



Secretary of the Interior

Date: August 20, 2014



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

NOV 21 1978

Honorable James W. Moorman
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

Re: United States v. Maine

Dear Mr. Moorman:

By letter of October 20, 1978, to the Attorney General, I requested that Justice not file any pleading designed to advise the federal district court of the government's view of the nature of the trust relationship between the United States and Indian tribes. I hereby reaffirm the views set forth in my October 20 letter. I did suggest in the letter, however, that Justice and Interior continue to work on the legal questions concerning the government's trust responsibility.

Congress has reposed principal authority for "the management of all Indian affairs and of all matters arising out of Indian relations" with this Department. 25 U.S.C. Sec. 2. As you no doubt realize, any legal memorandum filed by the Attorney General on such a broad issue as the trust responsibility would have far reaching policy implications. We have serious reservations about the statement as originally drafted and I am attaching a line by line critique, as promised, as a way to highlight some of the disputed issues. To be of further assistance to you, set forth below is this Department's view of the legal obligations of the United States, as defined by the courts, with respect to Indian property interests.

That the United States stands in a fiduciary relationship to American Indian tribes, is established beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy. Our discussion is confined to the government's responsibilities concerning Indian property interests and should be understood in that context. Our conclusions may be summarized as follows:

1. There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and 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 the best means 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 not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.

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) 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 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 canon of construction that ambiguous federal statutes should be read to favor 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., Coast Indian Community v. United States, 213 Ct. Cl. 129, 550 F.2d 639 (1977); Cheyenne-Arapahoe Tribes v. United States, 206 Ct. Cl. 340, 512 F.2d 1390 (1975); 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." The Department of 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.

INDEPENDENT EXISTENCE

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 Line 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 is subject to due process limitations. 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

The decided cases set forth a number of specific obligations of the trusteeship. 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. In Navajo, 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.

Manchester Band of Pomo Indian v. United States, 363 F. Supp. 1238 N.D. Cal., 1973), holds that the government as trustee has a duty to make trust property income productive. The federal district court held, in that case, 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. Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944), also enforces the fiduciary obligation to make trust property income productive.

Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), imposes on the United States the duty to enforce reasonable claims of the beneficiary. This duty may be seen as related to the duty of loyalty. 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.

The Supreme Court has held that executive branch officials are not required to advance or accede to every colorable claim which may be suggested by an Indian tribe. United States v. Mason, 412 U.S. 39; (1973). It appears that 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 allot-

tees 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 Indian trust cases is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. Cf., Poafybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). 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. See, Pyramid Lake Paiute Tribe v. Morton, supra.

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 under the principles discussed above, 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. And the Supreme Court has suggested that the Attorney General has an affirmative obligation to institute litigation on behalf of Indians. Poafybitty v. Skelly Oil, 390 U.S. 365, 369 (1968).

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).

-16-

The fulfillment of this nation's trust responsibility to American Indians is one of the major missions of this Department. Both the President and the Vice-President have publicly stated their support of the trust responsibility as a matter of policy.

The definition of the government's trust responsibilities to Native Americans involves both legal and policy issues. The President's P.R.I.M. process is designed to assure development of policy after input from all concerned. It would be unfortunate to preempt this process by filing a memorandum in a court case that was not asked for by the judge and is not necessary to the litigation which will be moot if Congress and the tribes approve. If the Attorney General wants to address the legal issues regarding the trust responsibility, it would be more appropriate to do so through a formal Attorney General's opinion.

Sincerely,

LEO M. KRULITZ

SOLICITOR

PRESIDENT NIXON, SPECIAL MESSAGE ON INDIAN AFFAIRS
JULY 8, 1970

The new direction of Indian policy which aimed at Indian self-determination was set forth by President Richard Nixon in a special message to Congress in July 1970. Nixon condemned forced termination and proposed recommendations for specific action. His introduction and conclusion are printed here.

To the Congress of the United States:

The first Americans - the Indians - are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement - employment, income, education, health - the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proved to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country - to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. 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.

SELF-DETERMINATION WITHOUT
TERMINATION

The first and most basic question that must be answered with respect to Indian policy concerns the history and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the other hand, it has - at various times

during previous Administrations - been the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. 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.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more

appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW's Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of

eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening this sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy....

The recommendations of this administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wiser spending. 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 furthered. 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.

The Indians of America need Federal assistance – this much has long been clear. What has not always been clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

[*Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76.*]



United South and Eastern Tribes

Because there is Strength in Unity

About USET

On October 4, 1968, the Eastern Band of Cherokee Indians, the Mississippi Band of Choctaw Indians, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida met in Cherokee, North Carolina, with the shared idea that some form of unity between the Tribes would facilitate their dealings with the federal government. Today, USET is a non-profit, inter-tribal organization that collectively represents its member Tribal Nations at the regional and national level. USET has grown to include 33 federally recognized Tribal Nations, operating through various workgroups and committees and providing a forum for the exchange of ideas and information amongst Tribal Nations, agencies and governments.

Statement of Unity

We, the [collective Tribal Nations of USET/USET SPF] being numbered among the Nations People of the South and Eastern United States, desiring to establish an organization to represent our united interest and promote our common welfare and benefit, do of our own free will in Council assembly, affirm our membership in the organization to be known as United South and Eastern Tribes, Inc.

United South and Eastern Tribes (USET)

Established in 1969, the United South and Eastern Tribes, Inc. (USET) is a non-profit, inter-Tribal organization serving thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET is dedicated to enhancing the development of Tribal Nations, improving the capabilities of Tribal governments, and improving the quality of life for Indian people through a variety of technical and supportive programmatic services.

USET Sovereignty Protection Fund (USET SPF)

Established in 2014, the USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

USET/USET SPF TRIBAL NATIONS

- | | | |
|---|---|---|
| 1. Eastern Band of Cherokee Indians
Ani'Yunwiya | 14. Poarch Band of Creek Indians
Mvskoke | 27. Pamunkey Indian Tribe
Pamunkey |
| 2. Miccosukee Tribe of Indians of Florida
Mikasuki | 15. Narragansett Indian Tribe
Nanaanongseuk | 28. Rappahannock Tribe
Rappahannock |
| 3. Mississippi Band of Choctaw Indians
Chahta | 16. Mashantucket Pequot Tribal Nation
Pequot | 29. Chickahominy Indian Tribe
Chickahominy |
| 4. Seminole Tribe of Florida
Itaponthli | 17. Wampanoag Tribe of Gay Head (Aquinnah)
Aquinnah | 30. Chickahominy Indian Tribe – Eastern Division
Chickahominy – Eastern Division |
| 5. Chitimacha Tribe of Louisiana
Sitimaxa | 18. Alabama-Coushatta Tribe of Texas
Alibamu & Koasati | 31. Upper Mattaponi Indian Tribe
Mattaponi |
| 6. Seneca Nation of Indians
Onondowa'ga' | 19. Oneida Indian Nation
Onyota'a:ka' | 32. Nansemond Indian Nation
Nansemond |
| 7. Coushatta Tribe of Louisiana
Koasati | 20. Aroostook Band of Micmacs
Mikmaq Nation | 33. Monacan Indian Nation
Monacan |
| 8. Saint Regis Mohawk Tribe
Akwesasne | 21. Catawba Indian Nation
Ye Iswah h'reh | 34. USET Headquarters |
| 9. Penobscot Indian Nation
Panawahpskek | 22. Jena Band of Choctaw Indians
Chahta | 35. USET SPF Office |
| 10. Passamaquoddy Tribe – Pleasant Point
Peskotomuhkati | 23. The Mohegan Tribe
Mohiks | |
| 11. Passamaquoddy Tribe – Indian Township
Peskotomuhkati | 24. Cayuga Nation
Gayogoho:no' | |
| 12. Houlton Band of Maliseet Indians
Metaksonikewiyik | 25. Mashpee Wampanoag Tribe
Mâseepee Wôpanâak | |
| 13. Tunica-Biloxi Tribe of Louisiana
Tayoroniku – Halyayihku | 26. Shinnecock Indian Nation
Shinnecock | |





Because there is Strength in Unity

www.usetinc.org

 /USETinc  /USET.inc  /USETinc