

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

KEY PRINCIPLES OF INDIAN TRUST MODERNIZATION

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

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

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

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

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

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

This paper lays out basic principles for trust modernization.

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

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

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

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

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

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

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

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

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

INDIAN TRUST MODERNIZATION PRINCIPLES AND SHORT-TERM ADMINISTRATIVE PROPOSALS

I. Strengthen Trust Standards

- Essential trust responsibilities for all federal agencies must be reaffirmed based on foundational history and clear and specific legal principles.
- After proper consultation with Indians, the DOI Solicitor should issue a new M-Opinion to update the 1978 letter by DOI Solicitor Krulitz on the nature and scope of federal trust responsibilities, and the Secretary of the Interior should promulgate regulations to implement recommendations of the AIPRC and the SCITAR and to codify 303 DM 2 and Secretarial Orders 3175, 3215, and 3335.
- President Obama should issue a corresponding Executive Order that affirms federal trust responsibility obligations for all federal agencies and that affirms the best interests determination in favor of tribes in all environmental and administrative determinations.

II. Strengthen Tribal Sovereignty

- Indian tribes should be empowered to comprehensively manage their own trust assets and affairs in order to remove bureaucratic hurdles and better develop their economies, jobs, and resources based on the needs and priorities of their citizens and communities.
- The BIA should expedite trust-land acquisitions, leases, rights-of-way, and timber sales, encourage more tribal self-governance compacts with bureaus of DOI and other Departments such as HHS, expand the 477 program to HHS and improve its implementation, continue to facilitate tribal HEARTH Act regulations, and encourage collaboration with tribes in negotiating co-management for public lands and environmental laws impacting tribes.
- DOI should promulgate regulations based on Secretarial Orders 3206 and 3225 beyond ESA to recognize that Indian tribes are the appropriate governments to manage their lands and resources, which are not subject to federal public lands laws.
- Federal agencies should improve program flexibility and technical assistance for Tribes.
- The DOI Solicitor should rescind or reverse the decades-old opinion holding that Indians are taxpayers because of the Citizens Act.

III. Strengthen Federal Management

- Ongoing federal management of Indian trust assets should be more efficient and effective and should respect and defer to tribes' jurisdiction and authority over tribal lands and resources, as well as tribes' and individual Indians' decisions regarding use of their lands and resources.
- DOI should expedite probates and appraisals, including allowing independent certified appraisals.
- The Office of the Special Trustee for American Indians should report to Congress on the projected completion of required reforms and then be reintegrated into a single Indian Affairs organization in fulfillment of the 1994 Trust Reform Act and in accordance with the recommendation of the Secretarial Commission on Indian Trust Administration and Reform.
- Federal agencies should better address and avoid potential conflicts of interest regarding implementation of federal trust responsibilities, including the duties to act solely in the interest of the beneficiary and to protect Indian trust resources and make them productive.

IV. Strengthen Federal-Tribal Relations

- Regular, high-level federal-tribal consultation is needed to properly develop, coordinate, and improve Indian policies across all federal agencies, as previously recognized by Presidents Johnson and Nixon and Congress.
- President Obama should issue an Executive Order to reestablish and improve the National Council on Indian Opportunity by including regionally representative, tribally nominated, and presidentially appointed tribal leaders as full members of the White House Council on Native American Affairs.
- President Obama should issue a Presidential special message on federal trust responsibilities similar to President Lyndon Johnson's Special Message to the Congress on the Problems of the American Indian dated March 6, 1968 and President Nixon's Special Message to the Congress on Indian Affairs dated July 8, 1970.
- President Obama should fully adopt and endorse the U.N. Declaration on the Rights of Indigenous Peoples and call on Congress for oversight for its implementation, and support the full participation of Indigenous governments at the United Nations through regular and permanent status.

- Federal agencies should assess and revise the metrics used to evaluate federal programs for Tribes and tribal enterprises.

V. Strengthen Federal Funding

- Federal agencies should review and improve existing studies, data, and analyses regarding tribal programs and circumstances to augment federal budget justifications.
- Federal funding for trust administration, services, infrastructure, and contract support costs all should be reclassified as non-discretionary, increased to levels necessary to fulfill the federal trust duties, and not be subject to means testing.
- President Obama and all federal agencies should propose budgets that fully fund all aspects of the federal trust responsibility, and to classify those functions as mandatory components of the federal budget.
- The U.S. Commission on Civil Rights should issue a follow up report on its 2003 Quiet Crisis Report on Federal Funding and Unmet Needs in Indian Country, and President Obama should develop an action plan to address and respond to that report.
- The Office of Management and Budget should provide additional information to tribal leaders on all proposed federal expenditures that affect Indians.