## AGENDA

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<th>Time</th>
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<tr>
<td>8:00-8:30 a.m.</td>
<td><strong>Registration</strong>&lt;br&gt;Complimentary Coffee and Pastries</td>
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<td>8:30-8:45 a.m.</td>
<td><strong>Welcome and Overview of the Program</strong>&lt;br&gt;<em>Eric Eberhard</em>, Distinguished Indian Law Practitioner in Residence; Faculty Co-Director, Center for Indian Law &amp; Policy, Seattle University School of Law</td>
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<td>8:45-9:00 a.m.</td>
<td><strong>Welcome from Dean Annette Clark</strong></td>
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<td>9:00-9:30 a.m.</td>
<td><strong>Keynote</strong> – The Evolving Nature of the Federal Tribal Relationships and the Trust Responsibility&lt;br&gt;<em>Professor Robert Anderson</em>, Director, Native American Law Center, University of Washington School of Law</td>
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<td>9:30-10:30 a.m.</td>
<td><strong>Panel I</strong> – Case Study: <em>The 2013 Assessment of Indian Forests and Forest Management in the United States</em>.&lt;br&gt;The United States has been responsible for managing 18 million acres of forest land held in trust for Indians for over a century. During most of that time, federal law required tribal forests to be managed for sustained yield. Following an extensive review of the management of tribal forests in numerous oversight hearings, in 1990 the Congress enacted the National Indian Forest Resource Management Act in an effort to shift the management of the resources to multiple use, to promote greater tribal control and to address the chronic underfunding of every aspect of the management of Indian forest resources. In 2013 the third independent assessment of the status of Indian forests and forestry practices (IFMAT III) documented the continuing shortcomings of federal policies. IFMAT III provides an excellent case history of on-the-ground changes and remaining challenges for federal fiduciary administration. A review of the impacts of allotment and a comparison of timber sales administration by the BIA and private industry</td>
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provide insight into unique aspects of trust administration and the ability to participate in competitive markets.

Moderator:
Gary S. Morishima, Natural Resources Technical Advisor, Quinault Indian Nation

Panelists:
Phil Rigdon, President, Intertribal Timber Council
John Gordon, Chair, IFMAT I & II and Co-Chair IFMAT III; Dean, Yale School of Forestry (1983-1992)
Vincent Corrao, Member, IFMAT III; President, Northwest Management, Inc.; Certified Forester; Past President, Western Forestry Conservation Association

10:30—10:45 a.m.  Break

10:45a.m.-12:00p.m.  Panel II – Federal and Congressional Perspectives on Future Trust Administration.
How do the Department of Interior and the Congress view the recommendations of Secretary Salazar’s Trust Reform Commission? Has the implementation of TERA and HEARTH been satisfactory? If not, what needs to change? If so, can legislation be enacted to provide for more direct Tribal administration and management of other trust assets? Is there any near term prospect for increased funding for trust asset management and administration?

Moderator:
Eric Eberhard

Panelists:
Kevin Washburn, Assistant Secretary – Indian Affairs, United States Department of the Interior
Anthony Walters, Deputy Chief Counsel, United States Senate Committee on Indian Affairs
Chris Fluhr, Staff Director, Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, United States House of Representatives

All panel members are confirmed but may have to change their plans on very short notice due to their official duties.

12:00 – 1:30 p.m.  Lunch Keynote – Termination, Self-Determination, Contraction – Navigating a New Era of Austerity
Box Lunch Provided

Mark Trahant, Attwood Journalism Chair, Department of Journalism and Communication, University of Alaska

1:30-2:45 p.m.  Panel III – Emerging Models for Trust Administration.
Tribal Energy Resource Agreements (TERA) and leasing arrangements under the HEARTH Act provide new approaches for management of trust assets. How widely are these new approaches being used? What problems have been encountered? Are there other ways to provide for more direct tribal administration and management of trust assets and to reduce the federal administrative burden on the use and development of those assets?

The Trust Reform Commission recommended the establishment of an Independent Trust Administration Commission (ITAC). How would the Commission improve the administration and management of trust resources? Will new funding be needed? How would ITAC be different than OST or the BIA in carrying out its duties?

Consistent with the historical and sovereign role of tribes as self-governing managers of their own resources and assets, the current federal policy of self-determination and long standing theories of public trust, the time may be right for Indian tribes to be accorded their full authority as co-managers of their trust resources. How would this be accomplished? Do tribes have the fiscal resources and trained personnel to effectively discharge their duties as co-managers?

Moderator
*Eric Eberhard*

Panelists:
*Professor and Dean Stacy Leeds*, University of Arkansas School of Law
*Professor Elizabeth Kronk Warner*, Associate Professor of Law, Director, Tribal Law & Government Center, University of Kansas School of Law
*Professor Mary Christina Wood*, Philip H. Knight Professor of Law, Faculty Director, Environmental and Natural Resources Law Program, University of Oregon School of Law

2:45-3:00 p.m.  Break

3:00-4:15 p.m.  **Panel IV – Challenges and Opportunities.**

Panelists will discuss seminal challenges and opportunities for re-forming trust administration.

Following the United States Supreme Court’s landmark ruling in Mitchell v. United States in 1983 (Mitchell II), the conventional wisdom was that the federal courts would enforce the trust responsibility through damage awards when the United States failed to act in accordance with common law standards applied to private fiduciaries. More recent decisions of the Court have narrowed and limited Mitchell II holding in ways that suggest that the trust responsibility toward tribes bears no resemblance to the duties of a private fiduciary, except in the very limited instances where the
Congress has affirmatively expressed its intention that the United States should be held to that duty of care. Are the federal courts still viable forums for resolving claims of breach of trust and enforcing the trust responsibility through the award of damages for its breach by federal officials?

What can be done to restructure the federal role in the administration and management of trust assets? Can federal involvement be decreased without undermining the trust and/or exposing the US to new liability for mismanagement?

Can direct tribal control over the development, administration and management of trust resources be enhanced? What tools do the tribes need in order to provide for effective management and administration of trust resources? Is there an inherent conflict between the trust responsibility and direct tribal control over trust resources?

Does the trust responsibility provide for effective management and protection of tribal resources and assets or is it an aspect of federal policy that serves federal interests better than it serves tribal interests?

Moderator – Eric Eberhard

Panelists:
Professor Robert Anderson
Thomas P. Schlosser, Partner, Morisset, Schlosser, Jozwiak & Somerville
Professor Alex Skibine, University of Utah S.J. Quinney School of Law
David Mullon, Chief Counsel, National Congress of American Indians

4:15-5:30 p.m.  
Round Table Discussion – Looking Forward.

Moderator:
Catherine O’Neill, Professor, Faculty Co-Director, Center for Indian Law & Policy, Seattle University School of Law

Panelists:
Fawn Sharp, President, Quinault Indian Nation
Robert Anderson
Elizabeth Kronk Warner
Mary Christina Wood
Phil Rigdon
Alex Skibine
Stacy Leeds
Gary Morishima
Douglas Maccourt

5:30-5:45 p.m.  
Concluding Remarks
Eric Eberhard

6:00-7:30 p.m.  
Reception
Robert Anderson

Robert Anderson is a Professor of Law and Director of the Native American Law Center at the University of Washington. He also has a long-term appointment as the Oneida Indian Nation Visiting Professor of Law at Harvard Law School. He is a co-author and member of the Board of Editors of *Cohen's Handbook of Federal Indian Law* (2012) and is co-author of Anderson, Berger, Frickey and Krakoff, *American Indian Law: Cases and Commentary* (2010). He teaches and writes in the areas of Indian Law, Public Land Law and Water Law. He was a member of Secretary’s Salazar’s Commission on Indian Trust Administration and Reform.

In 2008, he was co-lead of the Obama Transition team for the Department of the Interior. He spent twelve years as a Staff Attorney for the Boulder based Native American Rights Fund where he litigated major cases involving Native American sovereignty and natural resources. From 1995-2001, he served in the Clinton Administration under Interior Secretary Bruce Babbitt, providing legal and policy advice on a wide variety of Indian law and natural resource issues. He is a citizen of the Minnesota Chippewa Tribe (Bois Forte Band).

Vincent P. Corrao

Vincent is the President of Northwest Management, Inc. (NMI) a natural resource consulting firm with offices in Idaho, Washington and Montana. He is an SAF Certified Forester, a member of the Association of Consulting Foresters, and a certified Environmental Management System lead auditor and past president of the Western Forestry Conservation Association.

NMI has provided consulting services in the Northwest for 30 years and has been involved in many facets of forest land management. Vincent participated as a team member on IFMAT III and is also involved in the implementation of the Anchor Forest concept with the Intertribal Timber Council and the Yakama Nation where cooperation of multiple landowners in a geographic area is employed to provide a long-term sustainable wood supply to maintain existing infrastructure and provide stability to the local communities.

Chris Fluhr

Chris Fluhr is the Staff Director of the Subcommittee on Indian and Alaska Native Affairs of the Committee on Natural Resources of the House of Representatives. Chris has worked in the House of Representatives since 1988 when he was a staff assistant for Representative Don Young (R-Alaska). He also served as the Legislative Director for Representative Young before moving the staff of the Committee on Natural Resources in 1997. Chris is a graduate of the University of Notre Dame.
John Gordon

John Gordon served as the Co-chairman of the IFMAT-III team and previously served as the Chairman for the IFMAT-1 and IFMAT-II teams. He is the Pinchot Professor Emeritus of Forestry and Environmental Studies at the Yale University School of Forestry where he served as the Dean from 1983-1992 and 1997-1998. His experience includes service as an Adjunct Professor in the Hatfield School of Government at Portland State University; Head and Professor, Department of Forest Science, Oregon State University; Professor of Forestry at Iowa State University; Chairman of the Candlewood Timber Group LLC/Forestal Santa Barbara, an FSC-certified sustainable forestry company in Argentina and Principal Plant Physiologist in the Pioneering Project in Wood Formation, USDA Forest Service, Rhinelander, Wisconsin.

John holds a B.S. degree (forest management) and a Ph.D. degree (plant physiology and silviculture) from Iowa State University. He was a Fulbright Scholar in Finland (University of Helsinki) and India (GKVK State Agricultural University, Bangalore). His awards include the University Medal from the University of Helsinki in 2002; an honorary doctorate from Unity College in 2004; the Gifford Pinchot Medal from the Society of American Foresters in 2008 and the Henry A. Wallace Award from Iowa State University in 2012. He is the author of numerous scientific papers and books.

Stacy Leeds

Stacy Leeds is the Dean and a Professor of Law at the University of Arkansas School of Law. In her previous role at the of Kansas School of Law she served as a Professor, as Interim Associate Dean for Academic Affairs and as Director of the Tribal Law and Government Center. Prior to joining the law school faculty at the University of Kansas, she was a Professor and Director of the Northern Plains Indian Law Center at the University of North Dakota School of Law. She began her career of teaching law at the University of Wisconsin School of Law, where she served as a William H. Hastie Fellow. She received an LL.M degree from the University of Wisconsin, and a J.D. degree from the University of Tulsa. She also holds an MBA degree from the University of Tennessee.

Stacy has focused her teaching and extensive research on property, natural resources, and American Indian law. Among her many honors, she was awarded the prestigious Fletcher Fellowship to support her work on tribal sovereignty and citizenship issues. As a Fletcher Fellow, she was named a nonresident fellow of the W.E.B. DuBois Institute at Harvard University during the 2008-09 academic year. In addition, she has served as a judge for many tribes including the Cherokee Nation, where she was the first woman and youngest person to ever serve as a Supreme Court Justice. She was a member of Secretary’s Salazar’s Commission on Indian Trust Administration and Reform. She is a citizen of the Cherokee Nation and is the first American Indian woman to serve as the Dean of a law school.

Douglas Maccourt

Douglas Maccourt is a Partner in the Portland office of Ater Wynne where he leads the Land Use and Redevelopment Practice in the firm’s Business Group. He has over 25 years of experience in the assessment, remediation, purchase, funding, development and sale of
industrial, waterfront, urban and rural properties throughout the Pacific Northwest. Doug is the Chair of the firm’s Tribal Business Group where he advises Native American tribes, tribal businesses and private developers on a variety of economic development activities on and off tribal lands across the United States.

Doug practices before local, state and federal administrative agencies, trial and appellate courts and represents clients before state and federal legislative bodies to obtain funding and other approvals for development projects. He is listed in *Best Lawyers in America* in the Native American and Natural Resources Law categories, *Chambers USA: America’s Leading Lawyers for Business* and was been selected as a 2013 Top Rated Lawyer in Land Use and Zoning by American Lawyer Media and Martindale-Hubbell™.

**Gary Morishima**

Gary Morishima has over 35 years of experience in computer simulation modeling, natural resource management, policy analysis, workshop organization and conduct, conflict resolution, and meeting facilitation. He provides consulting services to Indian tribes, government agencies, and private industry in areas pertaining to computer simulation of natural resource management systems, statistical analysis, forestry, and fisheries management. He has been active in a variety of legislative and judicial processes, appearing as an expert witness in court proceedings and testifying before Congress on matters relating to natural resource management, trust reform, and Indian policy. He has served as a Technical Advisor to the Quinault Indian Nation for over thirty years. He also worked as Forest Manager for the Quinault Indian Nation, where he helped to establish a program that paved the way for greater tribal involvement and self-determination in forest management.

His educational background includes a B.S. in Mathematics and a Ph.D. in Quantitative Science & Environmental Management, both from the University of Washington. Gary was appointed to the Intergovernmental Advisory Council by the US Secretary of Agriculture to provide advice regarding implementation of the Northwest Forest Plan and to the Salmon and Steelhead Advisory Commission by the Secretary of Commerce. He has also participated in a variety of special projects, such as assisting in the development of legislation (e.g., Salmon and Steelhead Conservation and Enhancement Act and the National Indian Forest Resources Management Act), crafting the Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, and a US Forest Service National Task Force on Tribal-Federal Relations (1999-2003). Gary has authored numerous publications on natural resource management. He is a recipient of the National Earle Wilcox Award for Outstanding Contributions to Indian Forestry.

**David Mullon**

David Mullon is the Chief Counsel to the National Congress of American Indians. He previously served as the Staff Director and Chief Counsel to the United States Senate Committee on Indian Affairs. Prior to working for the Committee, David practiced law in Oklahoma. In 1993 he became the Director of the Cherokee Nation’s Legal Division under Principal Chief Wilma P. Mankiller. In 1996 he was appointed by the Principal Chief of the Muscogee (Creek) Nation, R. Perry Beaver, to the position of Attorney General of the the Muscogee Nation, and he served in that capacity until he returned to Cherokee Nation in November 1999 to work for Principal Chief
Chadwick Smith. David is a graduate of the University of Tulsa School of Law and is a citizen of the Cherokee Nation.

Catherine O’Neill

Catherine O’Neill is a Professor of Law at the Seattle University School of Law, where she teaches in the areas of environment, property and Indian law. She is a Faculty Co-Director of the Center for Indian Law and Policy. Prior to coming to the Northwest in 1992 she was a Ford Foundation Graduate Fellow at Harvard Law School. She served as an environmental planner and air toxics coordinator for the Washington State Department of Ecology from 1992-1994. From 1994 to 1997, she was a Lecturer at the University of Washington School of Law. From 1997 to 2001, Catherine was an Assistant and then an Associate Professor at the University of Arizona College of Law.

Catherine’s research and widely published writing focuses on issues of justice in environmental law and policy. Much of her work considers the effects of contamination and depletion of fish and other resources relied upon by tribes and their members, communities of color and low-income communities. She has worked with the National Environmental Justice Advisory Council on its Fish Consumption Report; with various tribes in the Pacific Northwest and the Great Lakes on issues of contaminated fish and waters; and with environmental justice groups in the Southwest on air and water pollution issues. She has testified before Congress on regulations governing mercury emissions from coal-fired power plants. She has also served as a pro bono consultant to the attorneys for the National Congress of American Indians and other tribes in litigation challenging these mercury regulations. Catherine is a Member Scholar with the Center for Progressive Reform.

Elizabeth Kronk-Warner

Elizabeth Kronk-Warner is an Associate Professor of Law and the Director of the Tribal Law & Government Center at the University of Kansas School of Law where she teaches Indian law, tribal law and natural resources. Her research focuses on the intersection of environmental law and Indian law. She has published numerous law review articles and book chapters on this topic. She is the co-author of the casebook, Native American Natural Resources, and co-editor of the book, Climate Change and Indigenous Peoples: The Search for Legal Remedies. Prior to her arrival at the University of Kansas, Elizabeth served on the law faculties at Texas Tech University and the University of Montana. In 2010, she was selected to serve as an Environmental Justice Young Fellow through the Woodrow Wilson International Center for Scholars and U.S.-China Partnership for Environmental Law at Vermont Law School.

In addition to teaching, she serves as an appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals in Michigan. Before entering academia, Elizabeth practiced environmental, Indian, and energy law as an associate in the Washington, D.C. offices of Latham & Watkins LLP and Troutman Sanders LLP. She served as chair of the Federal Bar Association Indian Law Section and was elected to the Association’s national board of directors in 2011. She received her J.D. from the University of Michigan Law School and a B.S. from Cornell University. Elizabeth is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians.
Phil Rigdon

Phil Rigdon is currently the President of the Intertribal Timber Council and represents the Yakama Nation on the Executive Board of ITC. He has been the Yakama Nation Deputy Director of Department of Natural Resources for the last nine years and has worked for the Yakama Nation for over 20 years within the areas of Forestry & Natural Resources. He represents the Yakama Nation on the Tapash Sustainable Forest Collaborative, the Yakima River Basin Watershed Enhancement Project Workgroup & Conservation Advisory Group, the Washington State Columbia River Policy Advisory Group, as well as the Hanford Natural Resource Trustee Council.

Phil obtained a B.S. degree in Forest Management from the University of Washington in 1996 and earned a Master of Forestry degree from the Yale School of Forestry and Environmental Studies in 2002. He is a citizen of the Yakama Nation.

Thomas P. Schlosser

Thomas P. Schlosser represents tribes in fisheries, timber, water, energy, cultural resources, contracting, tax and federal breach of trust matters. He is a director of Morisset, Schlosser, Jozwik & Somerville, where he specializes in federal litigation, natural resources, and Indian tribal property issues. He is also frequently involved in tribal economic development and environmental regulation matters. In the 1970s, Tom represented tribes in the Stevens’ Treaty Puget Sound fishing rights proceedings. He has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. He is a founding member of the Indian Law Section of the Washington State Bar Association and also served on the WSBA Bar Examiners Committee. Tom is a frequent CLE speaker and moderates an American Indian Law discussion group for lawyers at http://forums.delphiforums.com/IndianLaw/messages. He is a part-time lecturer at the University of Washington School of Law.

Fawn Sharp

Fawn Sharp is the president of the Quinault Indian Nation and of the Affiliated Tribes of Northwest Indians. She also is a trustee of Grays Harbor College, Vice President of the Northwest division of the National Congress of American Indians, and served as the Chairwoman of the Commission on Indian Trust Administration and Reform. Fawn received a B.A. degree from Gonzaga University in 1990 at the age of 19. She received a J.D. degree from the University of Washington in 1996 and received an advanced certificate in International Human Rights Law from Oxford University in 2003.

Fawn has served as lead counsel, Quinault Indian Nation; Associate Judge, Quinault Tribal Court; Administrative Law Judge, Washington State Department of Revenue, Tax Appeals Division; and Counsel, Phillips, Krause & Brown. She has been a frequent speaker and panelist in the areas of tax policies and procedures, tribal taxation, tribal regulatory jurisdiction, state-tribal relations, and federal Indian policy and rules of evidence for or on behalf of the National Intertribal Tax Alliance, U.S. Department of Justice, National Indian Gaming Association, and the Washington State Departments of Revenue and Corrections.

Alexander Skibine
Alexander Skibine is a Professor at the S.J. Quinney College of Law at the University of Utah. Alex received a B.A. degree in political science and French literature from Tufts University and a J.D. from Northwestern University School of Law. Before joining the faculty at the University of Utah S.J. Quinney College of Law in 1989, he served as Deputy Counsel for Indian Affairs for the U.S. House of Representatives Committee on Interior and Insular Affairs. Alex has published many articles in the area of federal Indian law and he is frequently invited to speak on federal Indian law issues at venues around the country. He is a member of the District of Columbia Bar association. He teaches administrative law, constitutional law, torts, and federal Indian law. Alex is a citizen of the Osage Indian Nation of Oklahoma.

Mark Trahant

Mark Trahant is the Atwood Chair of Journalism at the University of Alaska Anchorage. He is the 20th person to hold the Atwood Chair. He is also an independent journalist and the former editor of the editorial page of the Seattle Post-Intelligencer. He served as Chairman and Chief Executive Officer at the Robert C. Maynard Institute for Journalism Education in Oakland, California. In 2009 and 2010, Mark was a Kaiser Media Fellow writing about health care reform, focused on programs such as the Indian Health Service. He has been a columnist at The Seattle Times and editor or publisher at several tribal newspapers, including the Navajo Times and a former president of the Native American Journalist’s Association.

Mark is a nationally known author, journalist and Twitter poet. Every week day, for some six years, Trahant writes a 140-character poem on Twitter. His goal is to communicate news and opinion in a four line rhyme. (His handle is @newsrimes4lines.) His most recent book is “The Last Great Battle of the Indian Wars” and he is writing a book on austerity, a project he started after winning a Rockefeller Foundation residency at the Bellagio Center on Lake Como, Italy. Mark is a citizen of the Shoshone-Bannock Tribe in Idaho.

Anthony Walters

Anthony Walters has been with the Senate Committee on Indian Affairs since April of 2013 and is currently serving as Deputy Chief Counsel. Prior to working with the Committee, he was a counselor in the Office of the Assistant Secretary – Indian Affairs at the Department of the Interior. He currently works on issues regarding energy and economic development, trust and natural resource management, self-governance, and water rights. He is a member of the Cherokee Nation of Oklahoma and graduated from the University of Oklahoma College of Law in May of 2010. He received his undergraduate degree in Brain and Cognitive Sciences from the Massachusetts Institute of Technology in 2005.

Kevin Washburn

Kevin K. Washburn is the Assistant Secretary – Indian Affairs for the U.S. Department of the Interior, post he has held since October, 2012. Kevin is the 12th Assistant Secretary – Indian Affairs to be confirmed since the position was established by Congress in the late 1970s. In addition to carrying out the Department’s trust responsibilities regarding the management of tribal and individual Indian trust lands and assets, the Assistant Secretary is responsible for promoting the self-determination and economic self-sufficiency of the nation’s 566 federally
recognized American Indian and Alaska Native tribes and their approximately two million enrolled members.

He came to the Department of the Interior from the University of New Mexico School of Law where he served as Dean, a post he held since June 2009. Prior to that, he served as the Rosentiel Distinguished Professor of Law at the University of Arizona James E. Rogers College of Law from 2008 to 2009, and as an Associate Professor of Law at the University of Minnesota Law School from 2002 to 2008. From 2007 to 2008, he was the Oneida Indian Nation Visiting Professor at Harvard Law School.


Kevin is a well-known scholar of federal Indian law. Among his other books and articles, he is a co-author and editor of *Cohen’s Handbook of Federal Indian Law* (2012 edition). He was raised in Oklahoma and earned a B.A. degree in Economics with Honors from the University of Oklahoma and a J.D. degree from Yale Law School where he was the editor-in-chief of the Yale Journal on Regulation. He has been a member of the American Law Institute since 2007, and is a member of the State B.A.r.s of Minnesota and New Mexico. He is a citizen of the Chickasaw Nation in Oklahoma.

**Mary Christina Wood**

Mary Christina Wood is the Philip H. Knight Professor of Law at the University of Oregon School of Law, where she teaches property law, natural resources law, public trust law, federal Indian law, public lands law, and other courses. She is the faculty director of Oregon’s Environmental and Natural Resources (ENR) Law Program and is a co-author of leading textbooks on natural resources law and public trust law. Her most recent book is *Nature’s Trust: Environmental Law for a New Ecological Age*, published in October, 2013 by Cambridge University Press. She serves as faculty leader of the ENR Program’s Native Environmental Sovereignty Project.

After graduating from Stanford Law School in 1987, Mary served as a judicial clerk on the Ninth Circuit Court of Appeals. She then practiced in the environmental/natural resources department of Perkins Coie. In 1994 she received the University’s Ersted Award for Distinguished Teaching, and in 2002 she received the Orlando Hollis Faculty Teaching Award. She originated the use of Atmospheric Trust Litigation to hold governments worldwide accountable for reducing carbon pollution within their jurisdictions, and her research is being used in cases and petitions brought on behalf of children and youth throughout the United States and in other countries. She is a frequent speaker on global warming issues and has received national and international attention for her sovereign trust approach to global climate policy.
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INDIAN TRIBES AS SOVEREIGN GOVERNMENTS

SECOND EDITION

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Charles Wilkinson & The American Indian Resources Institute
INDIAN TRIBES
AS
SOVEREIGN GOVERNMENTS
SECOND EDITION

A Sourcebook on
Federal-Tribal History, Law, and Policy

Charles Wilkinson
&
The American Indian Resources Institute
Cover Art—About the Artist

ALLAN HOUSER (HA-O-ZOUS)
(1914-1994)

Allan Houser (HA-O-ZOUS), perhaps best known for his monumental sculptures on display in public venues, museums, art galleries and private collections around the world, was the preeminent American Indian artist of the 20th century. Through his life and art, he gently, but powerfully, touched the world with his profound talent and spiritual energy. Allan Houser (Chiricahua Apache)—the son of Sam Haozous, who was captured in 1886 and imprisoned by the federal government for 27 years along with Geronimo, the great Chiricahua Apache leader—was born a short time after his father was released from captivity and dedicated his life to capturing, on canvas and in stone and bronze, images that reflect the enduring spirit and rich cultural traditions of his people. Allan Houser's impressive career included exhibition of his work at two World's Fairs (New York 1933; San Francisco 1939); receipt of the French Palmes d'Academique (1954); dedication of Offering of the Sacred Pipe at the United States Mission to the United Nations (1985); receipt of the National Medal of the Arts (1992); and a retrospective exhibition of his work, in recognition of his unequaled prominence as a Native American artist and his contributions to celebrating Native culture, at the historic opening of the Smithsonian's National Museum of the American Indian in Washington, D.C. (2004).

Buffalo Dance, the Indiana limestone relief depicted on the front cover by permission of Mrs. Anna Marie Houser and the Allan Houser Foundation, is in the permanent collection of the Smithsonian's National Museum of American Art. For more information on the life and art of Allan Houser, contact the Allan Houser Foundation, Santa Fe, New Mexico.

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This book is dedicated to
tribal leaders of the past and of the modern era
who have done so much to safeguard and develop
a working tribal sovereignty in Indian Country.
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FOREWORD

The sovereign status of Indian nations predated the formation of the United States. It is the subject of many writings of our nation's Founding Fathers and the debates of the Continental Congress. In addressing the powers and authorities of the three branches of the national government of the United States, the United States Constitution identifies three, and only three, sovereigns other than the Federal government—the several states, foreign nations, and Indian tribes.

This sovereign status of Indian nations is the fundamental premise upon which a course of dealings between the United States and Indian tribal governments ensued and the foundation upon which hundreds of Federal statutes and thousands of Federal court rulings have been based.

The sourcebook, Indian Tribes as Sovereign Governments, is an invaluable resource for those who may not be familiar with the history of the native people of America or the principles of Federal-Indian law and policy. It helps one to understand why, for well over two hundred years, native people have had a different status under the law from those who later immigrated to our shores, and why the federal policies of native self-determination and tribal self-governance have served as the cornerstones of the government-to-government relationship between the United States and native nations.

As a student of history, and as one who has had the honor and the privilege of working with the peoples of Native America, this nation's First Americans, I highly recommend the second edition of Indian Tribes as Sovereign Governments.

Senator Daniel K. Inouye
United States Senate
FOREWORD

Among the nations of the world, the United States is unique in its recognition of the inherent right of Indian tribes to govern themselves and their lands. The legal foundations of federal policy toward Indian tribes are established in the United States Constitution and can be traced directly to the laws applied to the relations between the tribes and the colonial powers in the period before American independence.

Indian tribes possess a sovereignty that preceded the formation of our nation and which the Congress and the federal courts have, with few exceptions, recognized and upheld since the earliest days of the nation. Tribal governments play an important and significant role in the system of government established by the United States Constitution.

Federal policies toward Indian tribes have been subject to contradictory swings from time to time. Some of these policies, such as allotment and termination, had profound negative impacts on the tribes, the effects of which are still evident today. Fortunately, the policy tide shifted in the last thirty-five years with the promotion of self-determination, which tribes have embraced. Self-determination enables tribes to more successfully develop tribal programs that best serve their members, lessen dependency on the federal government, and ensure greater participation in the national economy.

Much more remains to be done, as evidenced by unacceptably high unemployment rates on the reservations, the incidence of suicide and the need to improve the quality of educational opportunities and other indicia of social well-being. But, the pride and experience that come with self-determination have proven the success of this policy in the improvement of the day-to-day lives of Indian people.

Indian Tribes as Sovereign Governments is an important reference for all people who want to know more about the history and contemporary role of Indian tribes in our federal system of government. It is essential reading for all Americans.

Senator John McCain
United States Senate
PREFA CE

There long has been a need for a short and plain summary of Indian law and policy. The Cohen treatise (Handbook of Federal Indian Law), the casebooks on Indian law, and other works all serve vital functions, but they do not meet the requirements of a person seeking a reasonably brief introduction to the field. As such, this overview book is intended for those tribal leaders and employees, federal and state government officials, educators, lawyers, Indian people, and members of the general public who have never had formal training in Indian law and policy; all of them may know a great deal about Indian Country or about law in general but they have never had the opportunity to study Indian law and policy in a systematic way. When the first edition of Indian Tribes as Sovereign Governments was released in 1988 our intent was to provide a framework for the concise study of federal-Indian law and policy for the purpose of promoting a clearer understanding of the unique position Indian tribes occupy within the federal constitutional system. Our goal remains the same with the release of the Second Edition in 2004. This volume can be read as a sourcebook, assigned as a text for introductory courses in universities and community colleges, or used as reading materials for two- or three-day policy seminars.

This volume is divided into four parts. Part One is a narrative description of the field, with chapters on the history of Indian affairs, tribal sovereignty, the trust relationship, and tribal resource rights, reservation environments, and economic development. Part Two begins with an overview of Indian treaty negotiations; it also presents an illustrative treaty and representative executive order—the Treaty of Point Elliott of 1855 and the Walker River Reservation Executive Order of 1874—along with a description of historical and legal developments relating to the treaty and executive order. Part Three is a compilation of excerpts of selected statutes dealing with Indian law. Part Four is a collection of some of the leading Indian law decisions handed down by the United States Supreme Court. Each case is condensed greatly and legal citations have been removed. Our hope is that this section will make accessible to the public the words of the Supreme Court in such great cases as Worcester v. Georgia (1831) (recognizing the supremacy of tribal sovereignty over state laws in Indian Country), Winters v. United States (1908) (upholding tribal reserved water rights), Washington v. Washington State Commercial Passenger Fishing Vessel Association (1979) (recognizing Indian fishing rights in the Pacific Northwest), County of Oneida v. Oneida Indian Nation (1985) (upholding the land claims asserted
by tribes in the eastern United States), and *Minnesota v. Mille Lacs Band of Chippewa* (1999) (recognizing Indian fishing rights in the Great Lakes area).

Ultimately this is a straightforward book that provides basic source materials relating to a great idea—the idea of tribal sovereignty. Tribal sovereignty is an ancient notion, 15,000 years old at least and perhaps far older than that. Yet, in spite of having been tested during dark and treacherous times, tribal sovereignty remains vigorous and vibrant in this modern technological society of the 21st century. We hope very much that readers will be challenged by the study of tribal sovereignty and of the other unique rights possessed by Indian tribes. In the last analysis, rights can be preserved only if they are understood.

We are deeply indebted to a great many individuals who helped create this book. We wish to express our sincere appreciation to Deanna Martinez for editing and overseeing the final production of the Second Edition, as well for her editorial work on the first edition manuscript; to Christine Miklas for her editing work on the first edition; to Reid P. Chambers, Susan M. Williams, Alan R. Parker, and W. Richard West, Jr. for their writing contributions to the first edition; and to Rick Banker for his graphic design and production assistance on the Second Edition. We also benefited from the editorial efforts of several law students and research assistants, including Anna Ulrich, Cynthia Carter, Charles Sheketoff, Todd Smith, and Shannon Work. Finally, we wish to thank the many tribes, in particular the Shakopee Mdewakanton Sioux (Dakota) Community, whose support has contributed greatly to ARLI’s efforts to preserve and strengthen tribal sovereignty.

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CHAPTER 3

Tribes and the Federal Trust Relationship

INTRODUCTION

"The enduring teaching of the Cherokee cases is their perception of the underlying purposes of the trust relationship.... Congress intends specific adherence to the trust responsibility unless it has expressly provided otherwise. Such a formulation preserves the role of Congress as the ultimate umpire of the purposes of the trust while requiring strict executive compliance with the terms of the trust."

— Reid P. Chambers (1975)\(^1\)

"Domestic dependent nations" are permitted an existence in the United States so long as they are weak.

— Mary Shepardson (1963)\(^2\)
[T]he Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.

— Justice Frank Murphy (1942)³

**Pervasive Influence of the Trust**

The trust relationship between the United States and American Indian tribes has many unique features that influence most aspects of Indian law. Although this relationship may have begun as a force to control tribes, even to subjugate them, it now provides federal protection for Indian resources and federal aid of various kinds in development of these resources.

**The Trust Duty and Congressional “Plenary Power”**

Congress has special authority over Indian affairs under the Indian Commerce Clause of the Constitution (art. I, § 8, cl. 3), which allows the national legislature “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes” (emphasis supplied). Today, following the Supreme Court’s 1973 decision in *McCoy v. Arizona State Tax Commission*,⁴ the Indian Commerce Clause, along with the power to make treaties, is seen as the principal basis for broad federal power over Indians. (For text of *McCoy* opinion, see Part Four.) The concept of a special federal power over Indian affairs is a basic notion in Indian law and policy.

Congressional power over Indians is often described as “plenary,” the literal meaning of which is “absolute” or “total.” The phrase “plenary power,” however, is misleading; congressional power is broad but not unlimited. Further, exercises of authority from Congress by administrative officials are limited sharply in many respects, often by statutes and various applications of the trust duty. And—while federal authority often has been exercised to the detriment of Indians, as with allotment and termination—in the modern era we have seen a great many examples where congressional power has been used to benefit Indians. The broad federal power under the Indian Commerce Clause can be appreciated only by an understanding of the rigorous standards of conduct that often are imposed by the trust doctrine.
ORIGINS OF THE TRUST RELATIONSHIP

The federal government's trust duty is rooted in the land cessions made by the native nations. As expressed in treaties and elsewhere, the land cessions were conditioned upon an understanding that the federal government would safeguard the autonomy of the native nations by protecting their smaller, retained territories from the intrusions of the majority society and its ambitious entrepreneurs.

— Mary Christina Wood (1994)

EARLY RECOGNITION OF THE TRUST

The concept of the federal Indian trust responsibility was evident in the Trade and Intercourse Acts and other late 18th and early 19th century federal laws protecting Indian land transactions and regulating trade with the tribes. The trust first was announced in Chief Justice Marshall's decision in Cherokee Nation v. Georgia (1831). (For text of opinion, see Part Four.) Suit was filed by the tribe in the United States Supreme Court to enjoin the State of Georgia from enforcing state laws on lands guaranteed to the tribe by treaties. The Court found that the tribe was neither a state nor a foreign nation under the Constitution and therefore was not entitled to bring the suit initially in the Supreme Court. Chief Justice Marshall, however, 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."

The Supreme Court's subsequent decision in Worcester v. Georgia (1832) reaffirmed the status of Indian tribes as self-governing entities. (For text of opinion, see Part Four.) Chief Justice Marshall construed the treaties and the Indian Trade and Intercourse Acts as protecting the tribes' status as distinct political communities possessing self-government authority within their boundaries. Thus, Georgia state law could not be applied on Cherokee lands because, as a matter of federal law, the United States had recognized tribal self-governing powers by entering into a treaty with the Cherokees. In spite of its governmental status, however, the Cherokee Nation was placed expressly by the treaties "under the protection of the United States."6

Perhaps the most important aspect of the trust relationship is the protection of Indian landownership. Beginning in 1790, the Trade and
Intercourse Acts prohibited the sale of Indian land without federal consent. Indians, although not citizens at that time, held their lands and other property as trust beneficiaries of the United States. This arrangement, in theory at least, protected Indian landownership and allowed the federal government rather than the states to control the opening of Indian lands for non-Indian settlement. The trust relationship, therefore, enhanced federal power, but it also created federal duties relating to Indian lands and other natural resources.

**Later Developments**

The courts consistently have upheld exercises of congressional power over Indian affairs, often relying upon the trust relationship. For example, in *United States v. Kagama* (1886), the Supreme Court affirmed Congress' power to enact the Major Crimes Act. Congress' "plenary" power even includes the power to terminate the trust relationship unilaterally without Indian consent and over Indian objections. Statutes providing for the allotment of tribal lands to tribal members also have been sustained as constitutional by the courts, even where such dilution of tribal property specifically was prohibited by treaty.

Under the special federal-tribal relationship, Indian tribes receive some benefits not available to other citizens. For example, in the 1974 *Morton v. Mancari* decision, the Supreme Court upheld a BIA Indian hiring preference because, like special health and education benefits flowing from the trust relationship, the preference is not based on race; rather, federal programs dealing with Indians derive from the government-to-government relationship between the United States and Indian tribes. The same reasoning applies to off-reservation Indian hunting and fishing rights; they trace to treaties with specific tribal governments and are not rights generally held by members of a race.

**Federal Recognition of the Trust Relationship**

The rights, duties and obligations that make up the trust relationship generally exist only between the United States and those Indian tribes "recognized" by the United States. Once federal recognition is found to exist, it results in the establishment of a government-to-government relationship with the tribe and makes the tribe a "beneficiary" of the trust relationship with the federal government.
An Indian group is a federally recognized tribe if: (1) Congress or the executive created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; or (2) the United States has some continuing political relationship with the group, such as providing services through the BIA. Accordingly, for example, Indian groups situated on federally maintained reservations are considered tribes under virtually every statute that refers to Indian tribes.\textsuperscript{14}

Court decisions of the mid-1970s suggest that even a general act of Congress such as the Trade and Intercourse Act of 1790 (prohibiting the sale of tribal lands without the consent of Congress) serves to establish a partial trust relationship between all tribes and the federal government.\textsuperscript{15} Determination of tribal existence, therefore, becomes critical.

In 1978, in order to resolve doubts about the status of those tribes lacking federally recognized reservations, the Department of Interior issued regulations entitled “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,” now published at 25 C.F.R. 83. The regulations establish both a procedure to obtain federal acknowledgment and a substantive standard for determining whether a group is in fact an Indian tribe. The regulations can be reduced to four essential requirements: (1) a common identification ancestrally and racially as a group of Native Americans; (2) the maintenance of a community distinct from other populations in the area; (3) the continued historical maintenance of tribal political influence or other governmental authority over members of the group; and (4) the status of not being part of a presently recognized tribe. In these respects, the regulations reflect the basic judicial definitions of the term “Indian tribe.” (See discussion in Chapter 2 at p. 30.) The BIA maintains a current list of federally recognized tribes—which includes more than 500 tribes.

MODERN CONSEQUENCES OF THE TRUST RESPONSIBILITY

\textit{The United States Government acts as a legal trustee for the land and water rights of American Indians \textit{and has} a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill.}

— President Richard M. Nixon (1970)\textsuperscript{16}
POWER OF CONGRESS

Congressional power over Indians remains broad, but it is not absolute and is subject to both procedural and constitutional limitations. The Supreme Court has held that the trust relationship does not authorize Congress to lessen any of the rights of property protected by the Fifth Amendment without just compensation.\textsuperscript{17} Cases around the turn of the 20th century suggested that acts of Congress constitute “political questions” not subject to judicial review in the courts. The leading opinion is \textit{Lone Wolf v. Hitchcock} (1903).\textsuperscript{18} (For text of opinion, see Part Four.) Later decisions, such as \textit{Delaware Tribal Business Committee v. Weeks} (1977) and \textit{United States v. Sioux Nation} (1980), have found, however, that acts of Congress and executive officials are subject to judicial review under ordinary principles of constitutional and administrative law.\textsuperscript{19} Later cases also have considered the trust obligations of the United States as a limiting standard for judging the constitutional validity of an Indian statute. In its 1974 decision in \textit{Morton v. Mancari}, 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 obligations toward the Indian, such legislative judgment will not be disturbed.”\textsuperscript{20}

Thus, where Congress exercises its specific authority over Indians, the trust obligation appears to require a determination that the protection of the Indians will be served. Otherwise, a statute would not be “tied rationally” to the trust obligation to Indians, as required by the Supreme Court. However, if Congress exercises a constitutional authority distinct from its authority over Indians, such as the power of eminent domain, it can act contrary to the Indians’ interest. Additionally, reviewing courts usually will not second-guess a congressional determination that a statute is an appropriate protection of Indian interests.

The trust is relevant in other ways. Courts construe statutes affecting Indians, as well as treaties and executive agreements, as not abrogating prior Indian rights or, in cases of ambiguity, in a manner favorable to the Indians.\textsuperscript{21} (See discussion of canons of construction in Chapter 1 at p. 7.) In addition, although the courts have held that Congress can alter treaty rights unilaterally or act in a fashion adverse to the Indians’ interest, the trust requires that Congress set out its intent to do so in “clear,” “plain” or “manifest” terms in the statutory language or legislative history.\textsuperscript{22}
THE ADMINISTRATION OF INDIAN POLICY AND THE
TRUST RESPONSIBILITY TODAY

Traditionally, most aspects of the trust responsibility were delegated by Congress to the Department of the Interior and the Department of Justice, the latter of which historically has litigated many court cases on behalf of Indian tribes and individuals. As federal programs for Indians have proliferated in modern times, many other federal agencies have become involved in Indian affairs and they, too, must comply with the duties imposed by the special relationship. Now, several other agencies in the Interior Department have become active in Indian policy, including the National Park Service, Bureau of Land Management, U.S. Fish & Wildlife Service (endangered species protection), Bureau of Reclamation (water policy), and U.S. Geological Survey (mineral leasing). In addition to the Department of Justice, federal programs for Indians are administered by the Department of Education, Department of Health and Human Services, National Marine Fisheries Service, Department of Agriculture (including the U.S. Forest Service), Department of Housing and Urban Development, and others. A 1995 Executive Memorandum directed all federal agencies dealing with Indian tribes to articulate their government-to-government policies. As a result, the special relationship reaches far beyond the Bureau of Indian Affairs.

RESPONSIBILITIES OF FEDERAL OFFICIALS

In contrast to the power of Congress, the power of executive officials is constrained more significantly by the trust relationship. Unless the trust relationship has been terminated by Congress, judicial decisions hold executive officials to stringent fiduciary standards in their management of, and dealings with, Indian trust property. 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." Furthermore, executive officials are bound "by every moral and equitable consideration to discharge [the] trust with good faith and fairness." Therefore, executive officials must adhere to the standards of an ordinary fiduciary in dealing with Indian trust property. If they do not, the United States may be sued for money damages, for declaratory relief, or for injunctive relief.
The courts often have used the trusteeship to limit federal administrative power where Indian ownership of land is affected. Other cases have applied trust obligations where trust funds, mineral resources, timber, and water are subject to federal executive management. The Indian trust cases have not always been consistent, as evidenced by two decisions in 2003, when the Supreme Court found strict trust obligations in a statute calling for federal management of a historic fort on the White Mountain Apache Reservation, but then denied recovery to the Navajo Nation when federal officials withheld critical information from the tribe regarding management of tribal mineral resources.

While the actions of the executive in carrying out the federal trust duties are required to adhere to strict fiduciary standards, the United States as trustee has the flexibility to exercise reasonable judgment in choosing between alternative courses of action. The interests of the beneficiary always must be paramount, however, and the fiduciary's duty of loyalty must be observed strictly. In the major Cobell litigation during the 1990s and into the 21st century, Indian allottees sued Interior Department officials for mismanagement of Indian money accounts, and the courts have made clear that a high fiduciary duty applies.

The requirement of loyalty is especially important in cases where the United States has a conflict of interest between general public programs and the rights or claims of Indian trust beneficiaries. There are innumerable such conflicts. Indians may claim, for example, lands that are administered as public lands or national forests, waters sought by federal agencies for federally financed water projects, or fishing rights that impinge on federal fish management or energy development projects. As noted, most of these conflicts arise within the Department of the Interior, but the obligations of the trust relationship are not limited to agencies in that department. The case law dictates that, unless Congress clearly authorizes it, federal agencies cannot subordinate Indian interests to other public purposes.

One example of a case where Congress did so authorize is the 1983 decision in Nevada v. United States (1983), where a federal water project and the Pyramid Lake Indian Reservation had to share water from the Truckee River. In this case the Supreme Court held that the government does not necessarily compromise its responsibility to Indian tribes when Congress has obligated it by statute to represent simultaneously another interest:
These cases, we believe, point the way to the correct resolution of the instant cases. The United States undoubtedly owes a strong fiduciary duty to its Indian wards. [Citations omitted.] It may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.34

**Duty to Represent Indian Tribes and Individual Indians in Litigation**

A federal statute, 25 U.S.C. § 175, requires that: “In all states and territories where there are reservations or allotted Indians, the United States Attorney shall represent them in all suits at law and in equity.” The statute does not require federal representation of Indian tribes and individuals in all situations,35 but the law is a crucial aspect of the trust relationship. Many major court cases have been litigated by the United States concerning allotments and tribal land, water, and hunting and fishing rights. Section 175 has been criticized as extending to Indians important special benefits not received by any other group in the country. One major decision held that the trust responsibility obligates the Department of Justice to represent Indian claims to lands and other resources in court, even though the Justice Department may have doubts about the validity of the claim.36

**Indian Religious Freedom**

**The American Indian Religious Freedom Act (AIRFA)**

Federal development of natural resources is often at odds with the protection of, or access to, Indian religious sites. In many instances, the federal government has initiated resource development that has interfered with or destroyed Indian religious sites and practices. AIRFA, passed in
1978, articulates specific policy objectives relating to the preservation of Indian religious sites and practices, but does not create a cause of action or any judicially enforceable individual rights. (For the text of AIRFA, see Part Three.) In 1994, AIRFA was amended to prohibit states from penalizing Indians who use peyote in a traditional manner in religious ceremonies.37

In 1988, in *Lyng v. Northwest Indian Cemetery Protective Association*,36 the Supreme Court upheld the Forest Service's right to build a logging road that would be located near a sacred site and would interfere with the ceremonies of religious practitioners. The Court found that, because the federal government's neutral management of its lands did not penalize or coerce Indian religious practitioners, the government should have broad discretion in determining the use of its own land. (For text of Lyng opinion, see Part Four.)

Importantly, however, the Lyng decision found that government officials have authority under AIRFA’s policy direction and other laws to “accommodate” Indian religious practices. This discretion has become increasingly important in recent years, as federal land agencies have taken steps to protect Indian religious practices.

On May 24, 1996, President Clinton signed an executive order further bolstering the mandate of the American Indian Religious Freedom Act with respect to sacred sites. The order directed federal agencies to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners” on federal land. Agencies must “avoid adversely affecting the physical integrity of such sacred sites” through notice to and consultation with tribes. In *Bear Lodge Multiple Use Association v. Babbitt*,39 a federal district court upheld a National Park Service voluntary ban on climbing for the month of June on Devil’s Tower National Monument in Wyoming. The Tower is sacred to several American Indian tribes.

**THE FIRST AMENDMENT**

The First Amendment of the United States Constitution forbids Congress from making laws “prohibiting the free exercise” of religion. Until recently, this has been interpreted as protecting sincere religious beliefs from infringement by otherwise neutral regulations—unintended effects on the free exercise of religion were allowable only if there was at stake a compelling governmental interest, achievable through the least
restrictive means possible. In Employment Division, Dep't of Human Resources of Oregon v. Smith, the Court sharply limited the applicability of the compelling governmental interest test, holding instead that the right of free exercise does not relieve an individual from complying with valid and neutral laws of general applicability—here laws against the use of peyote. Congress reacted to the Court's interpretation of the "compelling interest" requirement by enacting the Religious Freedom Restoration Act (RFRA), restoring the "compelling interest" test as set forth in Sherbert v. Verner. However, the Supreme Court struck down the RFRA, as applied to the states, in City of Boerne v. P.F. Flores, holding that Congress exceeded its remedial powers under the Fourteenth Amendment in enacting RFRA and extending it to the states. Several states, however, subsequently have enacted their own versions of the RFRA.

PROTECTION OF CULTURAL PROPERTY

In the years during the military conflicts between tribes and the American army, it was common practice for Indian remains and cultural property to be confiscated by the military and stored in museums for scientific study. Archaeologists have unearthed remains and artifacts. As a result, countless human remains and sacred objects were locked in museum archives instead of being returned to their ancestors. In 1990, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). The Act requires all federal agencies and museums to make inventories of their human remains, funerary objects, and sacred objects, and return them to the rightful tribes. NAGPRA also prohibits remains and objects from being treated as archeological resources, and prohibits sites from being excavated without tribal consent. Penalties are imposed for unauthorized excavation, removal, damage or destruction of Indian burial sites. (For text of NAGPRA, see Part Three.)

INTERIOR DEPARTMENT REVIEW AND APPROVAL OF TRIBAL ACTIONS

As another aspect of the trust relationship, the Interior Department reviews or approves certain tribal land and resources decisions. For example, as required by federal law, the Department approves tribal resource leases and grants of rights-of-way over both tribal trust lands and allotted lands. In recent years there has been a great deal of controversy
concerning the Secretary's administration of mineral leases on reservations (see discussion in Chapter 4 at pp. 73-74) and concerning the Secretary's approval of water use ordinances, timber sales, land use ordinances, and mineral tax ordinances. (See Chapter 4.)

Another area of dispute involves general secretarial review of tribal ordinances—an issue that arises for many tribes with IRA constitutions that include a clause requiring such secretarial review. As explained by the Supreme Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians* (1985), such provisions are not mandated by the IRA. In the interest of self-determination, the Department now encourages tribes to remove (through tribal constitutional amendment) the requirement for the Secretary to review certain kinds of enactments.

**CONCLUSION**

The trust relationship has proved to be dynamic and ongoing, evolving over time. One question that constantly arises is whether the trust relationship is permanent. Is it a perpetual relationship, or is it one that can or ought to be "terminated?" Is the purpose to protect Indian landownership and self-governing status? Or is it to give the federal government power to assimilate Indians into the larger society, to rehabilitate them as "conquered subjects," or to "civilize" them?

Different eras have provided different answers to these questions. At the turn of the 20th century the trust relationship was seen as short term and transitory. Indian land was to be protected for a brief transition period while Indians were assimilated into the "mainstream." The trust relationship was seen as the basis for congressional power to pass legislation breaking up tribal landholdings into individual allotments.

More recently, the view has broadened. At the turn of the 21st century the trust relationship is seen as a doctrine that helps support progressive federal legislation enacted for the benefit of Indians, such as the modern laws dealing with child welfare, Indian religion, and tribal economic development. The trust also controls contemporary interpretations of time-honored treaties and statutes. The trust relationship seems to have become a permanent doctrine that will function as John Marshall intended—as a benevolent influence in the development of Indian policy and law.

CHAPTER 3

7. See also Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
8. 118 U.S. 375 (1886).
9. 18 U.S.C. § 1153 (federal criminal statute punishing murder and other serious felonies committed by Indians against Indians).


26. See, e.g., Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944) (duty to make trust property productive); Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966) (duty to manage mineral resources properly); United States v. Mitchell, 463 U.S. 206 (1983) (duty to manage forest resources properly on allotted lands).


34. Id. at 143.

39. 2 F. Supp. 2d 1448 (D. Wyo. 1998), aff'd on other grounds, 175 F.3d 814 (10th Cir. 1999).

Chapter 4

7. 207 U.S. 564 (1908).
15. See United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).
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

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 polices 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
 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
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:
FORESTS AND TRUST

Implications of the Indian Forest Management Assessment Process

FIT

- Fire, Investment and Transformation (FIT): Indian forestry as a model:
- Forest issues are large and need to be addressed on a landscape basis
- Sustainability characterized by the ecological, social and cultural considerations
- Challenges and barriers to implementation need to be identified
Fire, Investment and Transformation (FIT): Indian Forestry as a Model:

- Fire management is urgent and illustrates broad trust responsibility across federal lands
- Investment at the right level is a key to trust
- Transformation of tribes to forestry leadership is timely (anchor forests)
- All, not just tribes, will benefit

Where Sustainability can be Reached

- Social
- Ecological
- Economic

Sustainability
FIT

- Forest health treatments are needed to reduce risk of insect and disease through fire management
- Investment is needed to manage resources effectively
- Transformation is a process toward sustainability and to meet, capability, commitment, and vision

Capability, Commitment and Vision

- Vision
- Commitment
- Capability
- Stewardship
Anchor Forests

Proactive approach with three major goals:

- Restore capacity and Infrastructure
- Coordinate management across ownerships to address forest health and ecosystem process issues
- Provide economic, social, and cultural benefits to local communities

Anchor Forest Concept:

Establish a relatively large multi-ownership area that will support sustainable long-term wood and biomass production levels backed by local infrastructure and technical expertise, and endorsed politically and publicly to achieve the desired land
TERAs and the HEARTH Act: The Unintended “Great Mischief for Indian Energy Development”? 

The Problem

• Increasing need to expand domestic energy production
  – National security concerns
  – Environmental-related stresses on traditional energy development
  – Increasing demand for energy and energy efficiency efforts alone likely insufficient

• Restrictions on the ability of tribes to develop their energy resources.
An Opportunity: Energy Development in Indian Country

- To date, energy sources, both traditional and renewable, in Indian country have been largely untapped
- As explained by former Senator Ben Nighthorse Campbell:
  - “One answer to our energy future is in the domestic production, and I just don’t mean in ANWR either. ... Indian-owned energy resources are still largely undeveloped – 1.81 million acres are being explored or in production, but about 15 million more acres of energy resources are undeveloped. ... There are 90 tribes that own significant energy resources, both renewable and nonrenewable.” Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 1 (March 19, 2003) (statement of Senator Ben Night-Horse Campbell, Chairman, Senate Committee on Indian Affairs).
- Although Indian country contains “traditional” energy resources, such as oil and gas, the vast potential is in the area of renewable energies

A Mutually-Beneficial Opportunity

- Energy development in Indian country may prove mutually-beneficial for Indian country and the United States
  - Promotes economic diversification within Indian country that may be consistent with many tribal customs and traditions
  - Promotes tribal sovereignty and self-determination
  - Promotes increased development of energy resources, which likely addresses many of the problems articulated above
One Potential “Solution”: Tribal Energy Resource Agreements (TERAs)

• Purpose of TERA provisions was to hopefully streamline the process applicable to energy development in Indian country
• In relevant part, the Act allows tribes who have met certain requirements to “enter into a lease or business agreement for the purpose of energy resource development on tribal land” without review by or approval of the Secretary of the Interior, which would otherwise be required under applicable federal law. Id. at § 2604(a).
• In order to qualify, a tribe must enter into a tribal energy resource agreement (TERA) with the Secretary of the Interior. The Secretary must approve the TERA if the tribe meets several requirements.
   – Incorporation of environmental review very similar to NEPA
• TERA provisions recognize the federal trust responsibility to tribes
• TERA provisions waive the federal government’s liability for actions taken under a TERA

The Failure

• Tribes have a demonstrated interest in energy development.
• Yet, as of April 2014, no tribes have entered into a TERA with the Secretary of Interior.
• Accordingly, it is helpful to consider why the TERA regime has been unsuccessful.
TERA Legislative History

• A review of the legislative history related to the TERA provisions illuminates three general categories of concerns related to the then-pending TERA provisions
  – Federal Trust Responsibility to tribes
  – Environmental review mandated by federal government
  – Waiver of federal liability

Federal Trust Responsibility to Tribes

• A Brief Overview of the Federal Trust Responsibility
  – Cherokee cases
  – United States v. Kagama
  – Mitchell I and Mitchell II
  – Recent Supreme Court Cases
    • White Mountain Apache
    • Jicarilla Apache Nation

• “Whether the trust responsibility is compatible with tribal self-determination chiefly depends on which conception of the trust responsibility one refers to. ... there are two basic alternative conceptions of the trust responsibility. The conception articulated in the Cherokee cases as having the purpose of protecting tribes as distinct political societies and limiting the power of federal and state government to infringe on tribal self-governments seems generally if not entirely consistent with tribal self-determination. On the other hand, a conception of the trust responsibility premised on dependency of tribes and having objectives such as sustaining federal power and control over tribal affairs or protecting supposedly dependent tribes from improvident transactions, represented by the Kagama-Lone Wolf line of cases, does appear incompatible with tribal self-determination.” Reid Payton Chambers, *Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, 13A-32.
Comments Related to Federal Trust Responsibility

• Some, such as Senator Campbell and a DOI representative, believed the TERA provisions were consistent with the trust responsibility
• Several tribal commentators disagreed and expressed concerns that the TERA provisions constituted a waiver of the federal trust responsibility
• Rebecca L. Adamson, in an e-mail to Senator Campbell, perhaps summed these concerns up best when she stated that “[t]hese bills appear to be designed as tools for trust ‘reform’ either overtly, by legislated abrogation of the government’s trust responsibility ....”
• Ms. Adamson went on to explain that: “The trust responsibility of the United States government is an obligation to protect tribal lands, assets, and resources, and has been defined by the U.S. Supreme Court as “moral obligations of the highest responsibility and trust” (Seminole Nation v. U.S., 1942). Abolishing this responsibility with a small provision in the energy bill is one of the more egregious acts – in a long litany of such acts – that could be taken by the federal government.” Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 139 (March 19, 2003) (statement of Rebecca L. Adamson, President).

Comments Related to Mandated Environmental Review

• In testimony in front of the Senate Committee on Indian Affairs, Arvin Trujillo, Director of Navajo Natural Resources, highlighted the point that federal control of tribal affairs, such as mandating environmental review in Indian country, is at odds with Indian self-determination.
• Commentators also pointed to the fact that the environmental review mandated in the TERA provisions would institute requirements on tribal nations not applicable to states or private land owners.
Comments Related to Waiver of Federal Liability

- Vernon Hill, Chairman of the Eastern Shoshone Business Council, shared this concern, explaining, “[a]s a policy matter, we are concerned about releasing the Federal Government from the responsibilities over energy resource development. The current Federal regulatory regime for oil and gas leasing places the responsibilities on the BIA, BLM, and MMS. Until we gain a better understanding of the streamlining process and its impact on oil and gas leasing, we are not prepared to release these Federal agencies from their responsibilities.” *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 83* (March 19, 2003) (statement of Vernon Hill, Chairman, Eastern Shoshone Business Council, Fort Washakie, Wyoming).

- Even Senator Bingaman acknowledged that the TERA provision waiving the federal government’s liability was controversial, as he stated that “[t]here are concerns with language in the bill that limits the liability of the Federal Government with respect to leases and rights-of-way approved by tribes under the citing provisions of the bill.” *Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act, 108th Con. 75* (March 19, 2003) (statement of Senator Jeff Bingaman, U.S. Senator from New Mexico).

Reforming TERA Provisions

- Indian Tribal Energy Development and Self-Determination Act Amendments of 2014, S. 2132
  – Clarification of liability
  – Capacity determinations, inclusive of environmental review process similar to the HEARTH Act
- Report of the Commission on Indian Trust Administration and Reform
HEARTH Act: An Introduction

- The HEARTH Act amends the Indian Long-Term Leasing Act of 1955 by allowing tribes to approve leases for enumerated purposes without prior approval of the Secretary of the Interior, assuming “the lease is executed under the tribal regulations approved by the Secretary.”
- Before the Indian Long-Term Leasing Act of 1955 was amended by the HEARTH Act, individual tribes, with a few notable exceptions, would have to get approval from the Secretary of the Interior for leases of tribal lands.
- Enacted to increase tribal self-determination.
- As of September 2014, Secretary of the Interior had approved the leasing regulations under the HEARTH Act of 13 tribes.

HEARTH Act: Environmental Provisions

- (B) Considerations for Approval – the Secretary shall approve any tribal regulation issued in accordance with paragraph (1), if the tribal regulations ---
  - (i) are consistent with any regulations issued by the Secretary under subsection (a) (including any amendments to the subsection or regulations); and
  - (ii) provide for an environmental review process that includes –
    - The identification and evaluation of any significant effects of the proposed action on the environment; and
    - A process for ensuring that –
      - (aa) the public is informed of, and has a reasonable opportunity to comment on, any significant environmental impacts of the proposed action identified by the Indian tribe; and
      - (bb) the Indian tribe provides responses to relevant and substantive public comments on any such impacts before the Indian tribe approves the lease.
HEARTH ACT: Federal Liability

• “The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations.” 25 U.S.C. § 415(h)(7)(A).

Moving Forward

• Report of the Commission on Indian Trust Administration and Reform
• Consider how statutes, like TERA and the HEARTH Act, may impact:
  – Tribal Sovereignty
  – Capacity for Tribal Innovation
  – Federal Trust Relationship
Chi Miigwetch!

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Building Tribal Economic Sovereignty

Energy Development and the Future of Trust Asset Management

Douglas C. MacCourt, Ater Wynne LLP

Key Discussion Points

• *Economic Sovereignty* in the context of tribal trust assets and energy resources
• *Trust Assets* – the role of energy in advancing trust asset management and improving tribal economic sovereignty
• *The Missing Link* – competitive advantage
• *Bridging the Gap* – recommendations for improving tribal economic sovereignty
  – Using/sharpening the tools within the current “enhanced” trust asset framework
  – Strategic Trust Reform
Economic Sovereignty

• “The power of [national] governments to make decisions independently of those made by other governments”
  » London South East Ltd.; www.lse.co.uk

• “Economic Sovereignty invokes both the pride of the traditional era and the sophistication required to compete in today’s global economy. Economic sovereignty is about expanding the Tribes’ economic choices in a resource-constrained environment.” (emphasis added)
  » Economic Sovereignty, CTUIR Overall Economic Development Plan, 2010-2015 (hereinafter CTUIR)

In the Context of Tribal Sovereignty

• “A country’s independent authority and the right to govern itself”
  » Merriam-Webster, Inc. 2014

• “…sovereignty means a careful balancing of resources to counter threats, meet opportunities, and maximize the choices available to tribal families and to the community as a whole—all while protecting the gifts of clean water, clear air, and healthy land.”
  » CTUIR, supra.
In the Context of Trust Reform

• United Southern and Eastern Tribes (USET):
  – The trust responsibility should not vary…on whether a Tribe is doing better or worse. It is not an economic indicator, but rather a fundamental obligation of the United States. However, the trust responsibility should support Tribal empowerment and self-sufficiency so that Tribes may achieve economic sustainability.

  – USET Resolution on Trust Reform, October 11, 2012

The Magnitude of the Trust Asset

• The Department of Interior is responsible for managing 56 million surface acres and 57 million acres of subsurface mineral estates held in trust by the United States for individual Indians and Indian tribes. More than 11 million acres belong to individual Indians and nearly 44 million acres are held in trust for Indian tribes. On these lands, the Department manages over 119,000 leases for such things as mineral development, oil and gas extraction, and grazing.

  – Order of the Secretary of Interior No. 3335, Aug. 20, 2014
The Potential of Tribal Energy Trust Assets

- Tribal lands make up about 2% of the total land area of the US, but approximately 5-10% of all US energy resources
- Wind resources on tribal lands contain approximately 14% of total annual US energy production
- Solar resources on tribal lands approximately 4.5 times the total annual US electric generation


The Goal – From Landlord to Owner/Investor

- Increasing tribal ownership of energy facilities to serve local and wholesale demand
- Significant tribal investment positions
- Greater emphasis on tribal management and labor in construction and operation
- Tribes are free to choose the form of governmental or non-governmental organization through which they do business.

Motivation for the Goal

- Energy development becoming a more significant element in tribal economic planning
- Enhanced tribal capacity for conducting business, attracting investment, and planning options for future economic development
- Strengthening sovereignty
- Increasing tribal employment and contracting, including tribal preference
- Protecting tribal assets

A Diversified Source of Revenues/Benefits

- Tax benefits: Accelerated depreciation and Tax Credits to taxpaying entities
- Serve local energy demands and/or economic development with utility scale projects with revenues to tribe
- Cash flow to equity investors
- Tribal contracts & employment
- Opportunity for tribe to regulate the activity
Enhancing Trust Management for Tribal Energy

- Indian Energy Resources Act of 1992
  - To promote tribal economic self sufficiency and tribal control of energy development in Indian Country (commonly known as Title 26)
- Indian Tribal Energy Development and Self Determination Act of 2005
  » 25 U.S.C. §§ 3501-3506
- Includes renewable and nonrenewable energy resources, and transmission

Existing Trust Management Improvements

- EPAct 2005 Authority:
  - TERA
  - Loan guarantees
  - Double REC’s for fed buyers; federal agency RPS; other incentives
- HEARTH Act
  - Tribal leasing/environmental review
- Interior 25 CFR Part 162 Amendments
  - Wind/WEEL/Solar Lease Regulations
  - Modifications to business leasing regs
Other Tools to Promote Economic Sovereignty

• Indian Tribal Economic Development and Contract Encouragement Act of 2000
    – Section 81 Reform

• Indian Reorganization Act of 1934; as amended in 2000
  – Section 17 Corporation authority
    » 25 U.S.C. § 477
    – Removes BIA approval, and the “federal action” from leases of trust/restricted lands for up to 25 years

Judicial Notable

• *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. Ariz. 2011)
  – Colorado River Indian Tribes
  – Sweeping victory, affirming the Tribes' regulatory and adjudicatory jurisdiction over a non-Indian trespasser (both the company and the individual) on tribal land.
  – Lease is outside the *US v. Montana* limitations on tribes authority over non-Indians on tribal lands
Tribal Energy Program – DOE/EERE

• Mission:
  – Promote Tribal energy sufficiency and foster economic development and employment on Tribal lands through the use of renewable energy and energy efficiency technologies.

G to G Financial/Technical Assistance To:

• 1) Enable Tribal leaders to make informed decisions about energy choices;
• 2) Bring renewable energy and energy efficiency options to Indian Country;
• 3) Enhance human capacity through education and training;
• 4) Improve local Tribal economies and the environment; and
• 5) Make a difference in the quality of life of American Indians and Alaska Natives.
175 Tribal Energy Projects Funded by EERE

- Over 800 MW of potential new renewable energy generation under development
- Over 4,000 MW of tribal renewable energy resources being assessed
- Over 67 tribal buildings (1.7 million square feet) retrofitted = savings over $3 million/yr
- Energy audits completed on over 250 tribal buildings
- Over 170 tribal members training as part of these tribal energy projects
- Leveraged by $36M in tribal cost share

$41.8 MM EERE Investment Since 2002
National Renewable Energy Laboratory

- Renewable Energy Development in Indian Country: A Handbook for Tribes
- Tribal training
- [http://www.nrel.gov/docs/fy10osti/48078.pdf](http://www.nrel.gov/docs/fy10osti/48078.pdf)
- Updates pending

DOD’s $7 Billion MOU

Memorandum of Understanding between
The Department of Defense and
The Department of the Interior on
Renewable Energy and a Renewable Energy Partnership Plan
THE RFP

• Each of the military branches has committed to deploying 1 GW of renewable energy on or near its installations by 2025.
• U.S. Army's Central Contracting Command just released the $7 billion request for proposals (RFP) for renewable energy generation.
• The RFP calls for wind, solar, geothermal and biomass energy generation through 30-year power purchase agreements (PPAs).

Going from Grants to Sustainable Economies

• Energy development a long-term strategy.
• Successful energy projects require 3 elements:
  – Efficient business structures
  – Standardized and fair regulatory processes administered by reliable, stable and transparent government authorities
  – Enforceable, fair and balanced contracts
• Once a level playing field is established, these three elements can generate a wide variety of economic opportunities for the tribe.
Renewable Energy Project Finance

- Majority of renewable projects have been financed with a tax equity model
- Renewable energy project finance is a combination of:
  - Equity,
  - Bank debt, and
  - Monetized tax incentives (credits and depreciation)

Extracting Value from Energy Trust Assets

- Attracting capital for renewable resource projects generally requires five essential elements (the "BIRST"):
  - 1. Buyers for the energy
  - 2. Incentives
  - 3. Renewable resource
  - 4. Site control
  - 5. Transmission to market

» *MacCourt, D., supra.*
Why Proper Trust Management is Critical

• Time to market very limited/structured
• Tribal institutional capacity essential for governmental and business decisions
• Coordination of tribal/federal approvals, incentives, access to infrastructure
• Strict, conservative financing requirements

= ACCESS TO BUYERS/MARKET
= ALLOWS TRIBES TO COMPETE

The Missing Link: Ability to Compete

• Finding buyers for tribal power is a race to the bottom – in terms of pricing – and the only tribal utility scale projects in operation are leases with no tribal equity
• DOD has selected NO tribal projects to date
• The DOD competitive bid/low bidder preference excludes tribal competitors
• Federal buyers may choose to purchase RECs instead of power to comply with federal agency RPS requirements because of pricing and competition from fossil fuel
Recommendations for Trust Reform

- Use Section 17 corporations for tribal energy development and avoid BIA leasing
- Monitor the success or delays in implementation of the HEARTH Act and the BIA leasing regulations
- Support the portions of the NCAI, ANTI, USET and Navajo Nation platforms that all seek a better defined trust relationship with greater tribal autonomy and control over trust assets to enhance economic sovereignty

Regulatory Reform to Increase Competition

- Create a tribal preference for DOD energy purchases and transmission to serve DOD
- Amend the Federal Acquisition Regulations (FAR’s) to create an exception to low bidder requirements for renewable energy produced on tribal lands
- Extend the EPAct ‘05 Double REC provision to purchases by states, non-profits, government contractors, tribal businesses
- Amend 25 USC § 477 to allow for one renewal term of up to 25 years
United States Department of Energy

• Maintain the Tribal Energy Program in EERE
  – Keep the grant program focused on renewable energy development and tribal capacity building
  – Support *policy and program development* in DOE’s Office of Indian Energy, Policy and Programs

For More Information

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“At stake is nothing less than the ecological integrity of the land base and the physical and social health of Native Americans throughout the continent.”

Winona LaDuke
I. STATUTORY ENVIRONMENTAL LAW

II. THE SOVEREIGN TRUST FRAMEWORK

New directions?
ENVIRONMENTAL LAW

Statutes Passed by Congress

Benefit Majority Society, not tribes
ENVIRONMENTAL LAW

Statutes Passed by Congress

Benefit Majority Society, not tribes

Agency failure

Environmental Law Assimilates Legal Rights of Tribes into Statutory Processes that are Ineffective
The agencies – in the business of permitting pollution.

The Earth Endowment – Being Spent By Agencies Carrying out Environmental Statutes

Overall, the Earth’s natural ecosystems have declined by 33% during the last thirty years.
Ecological Collapse

“If we continue to do exactly what we are doing, . . . the world in the latter part of this century will be unfit to live in.”

James Gustave Speth, Dean, Yale School of Forestry, *The Bridge at the Edge of the World* (Yale University Press 2008)

Predicted 9 -11°F warming over most of inland U.S. by 2090
Global warming threatens "not simply the Earth, but the fate of all its species, including humanity"

Jim Hansen, NASA Head Climate Scientist
TRIBAL RESISTANCE TO FOSSIL FUEL PROJECTS

NEZ PERCE BLOCKADE AUGUST 6-9, 2013

THE SOVEREIGN TRUST FRAMEWORK – A PROPERTY FRAMEWORK
THE SOVEREIGN TRUST FRAMEWORK
– A PROPERTY FRAMEWORK

A. THE INDIAN TRUST OBLIGATION

B. THE PUBLIC TRUST
INDIAN TRUST OBLIGATION

Described as “cornerstone” of federal Indian law.

FEDERAL OBLIGATION TO PROTECT TRIBAL LANDS AND RESOURCES
EARLY CASELAW ENFORCED TRUST DUTY OF PROTECTION THROUGH INJUNCTIVE RELIEF UNDER THE APA

But MORE RECENT case law has taken a U-turn
NEED SPECIFIC STATUTORY BASIS TO FIND TRUST OBLIGATION TO PROTECT RESOURCES

STANDARD TAKEN FROM TUCKER ACT AND USED IN APA CASES FOR INJUNCTIVE RELIEF
Tucker Act standards now imported into Administrative Procedure Act

Department of Justice advances the position:

“[T]he government’s general trust obligation is discharged by the government’s compliance with general regulations and statutes not specifically aimed at protecting tribes.”

Recent brief in Navajo Nation v. U.S. Dept. of Interior: cites Gros Ventre v. U.S.
NEW DIRECTION:

TRUST COMMISSION RECOMMENDS:

“[t]he Secretary could direct the Department to employ a mode of analysis more favorable to tribal interests in all non-damages cases.”

WHAT ABOUT NEW POLICY IN DEPT OF JUSTICE?
THE PUBLIC TRUST

ANOTHER SOVEREIGN PROPERTY OBLIGATION

GAINING ATTENTION AS SOURCE OF PROTECTION OUTSIDE OF STATUTORY LAW
The Public Trust:

1. Government is trustee of natural assets – has duty to protect
The Public Trust:

1. Government is trustee of natural assets -
2. Tribes, as sovereigns, are co-tenant trustees of shared resources
3. Duty to prevent waste to shared resources
Property rights and duties extend off the reservation

The treaty established “something analogous to a co-tenancy. . . .”
Puget Sound Gillnetters Ass’n, 573 F. 2d 1123, 1126 (9th Cir. 1978)

“Co-tenants stand in a fiduciary relationship one to the other. . . .
A court will enjoin the commission of waste. “

United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).

NEW DIRECTION

Tribes asserting role as co-trustees of shared ecology
NEW DIRECTION

Tribes asserting role as co-trustees of shared ecology

Most urgent role: CLIMATE CRISIS

“We are at a planetary **tipping point**.”

Need 6% emissions reduction/year to recover stable climate (Hansen et. al)
“We are at a planetary tipping point.”

Need 6% emissions reduction/year to recover stable climate (Hansen et. al) --by 2020 too late (15% reduction)

Atmospheric Trust Litigation
Atmospheric Trust Litigation

coordinated by:
OUR CHILDREN’S TRUST

Seeks government plans to reduce carbon 6%/year
Nelson Kanuk
18 years old
TRUST Alaska
Yup’ik Eskimo Tribe

The Federal ATL Case

National Congress of American Indians Amicus Brief in Support of Youth
There is no body of expertise -- no authoritative answers -- for this one. We are crossing a threshold into uncharted territory.

Ross Gelbspan
Challenges and Opportunities in the Future Federal-Tribal Relationship

Tom Schlosser

http://www.msaj.com

Topics

• Resource damage trust arguments failing in the 9th Circuit
• Contrast trust funds cases in the CFC
• Suggestions include amending and rulemaking for the Secretarial Order on Tribes and the Endangered Species Act
**Assiniboine v. Bd. of Oil & Gas**  
*(9th Cir. 1986)*

- State Board examined well placement on trust lands per agreement
- Had BLM abdicated IMLA responsibility and its trust responsibilities?
- D.C. should not have dismissed before hearing evidence on scope of the delegation

**Pyramid Lk. Paiute v. U.S. Navy**  
*(9th Cir. 1990)*

- Navy leases of runway buffers with water
- Endangered cui-ui require Truckee flow and lake level
- Not arbitrary to rely on FWS BiOp
- Compliance with ESA shows no breach of fiduciary duty to tribe occurred
**Morongo Band v. FAA (9th Cir. 1998)**

- NEPA, NHPA claims re East Arrival Enhancement for LAX
- Following procedures of Acts is sufficient to fulfill fiduciary obligations
- Unless special obligations are placed on the agency, trust duty is fulfilled by compliance with general regulations and statutes
- Failure to identify historic sites is irrelevant because no impact

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**PCFFA v. USBOR & NMFS (N.D. Cal. 2003)**

- Klamath Irrigation Project BiOp flows were implicated in historic fish kill of 2002
- RPA relied on actions not “reasonably certain to occur,” thus violating ESA
- Evidence of fish kill is relevant to disputed trust breach claim
- EFH violation of procedures doesn’t show specific fiduciary duties violated
**Westlands Water Dist. v. Dept. of Interior** *(9th Cir. 2004)*

- D.C. found restoration program violated NEPA and ESA but refused to enjoin everything
- Remedy should consider breach of general and specific independent trust obligations of CVPIA sec. 3406 (b)(23)
- U.S. appeals brief objects to trust finding
- Not a holding so no need to vacate ruling

**Hoopa Tribe v. Ryan** *(9th Cir. 2005)*

- Tribe denied ‘638 contract for TRRP work
- Restoration required by 1992 Act “to meet Federal trust responsibilities to protect the fisheries resources” of the Tribe
- View specific obligations of trust doctrine
- Implementing the TRRP honors trust obligation; U.S. need not provide tribe a primary right to restoration contracts
**Gros Ventre Tribe v. U.S. (9th Cir. 2006)**

- Tribe claimed trust obligation to protect tribal resources from upriver gold mining
- Ft. Laramie treaty requires U.S. to protect tribe from citizen depredations
- Conflating trust law principles with APA fails where no specific duty of U.S. to regulate for tribal benefit


- Mismanagement of tribal trust funds
- BIA invested funds in securities 1 year or less
- $21 mil. underinvestment & deposit lag damages
- Charged tribe interest for overdrafts caused by U.S.
What we’ve seen since 1983

- Statutes & regs define the scope of trust
- Burgeoning law and regulation of Indians (USCA expanded from 1 --> 4 volumes)
- Pub. L. 93-638 evolved into tribal self-governance but little applicability outside of BIA programs
- Dependency on federal funding
Trust recommendations

- Recognize trust funding obligations to human and resource programs
- Expand TAS and Self Governance
- Abolish OST-BIA separation
- Account for real property assets
- Bar federal trust reduction advocacy
- Use rulemaking to support tribal taxes
- Provide documents as G2G (not FOIA)
- Fix Secretarial Order 3206

Amend, adopt Secy. Order 3026

- Tribal rights, trust responsibilities & ESA (1997)
- Goal: avoid disproportionate burden, ensure tribal participation re critical habitat
- Limited tribe role in sec. 7 consultations except in BIA actions
- Secy Order not enforceable under APA
Summary

• Trust breach theories apply in narrow circumstances
• Neither federal nor tribal government is vanishing
• Government program employment isn’t enough for tribal economies
In 1997, the Departments of Commerce and the Interior, issued Secretarial Order 3206 (hereafter “SO 3206”) to ensure enforcement of the Endangered Species Act would not violate the United States’ trust responsibility toward tribal nations. For decades, tribes had protested the impact of conservation restrictions on the sovereign use and management of trust resources, treaty rights, and tribal lands. Under SO 3206’s new regime, government agencies would commit anew to meaningful consultation and deeper consideration of the Federal impacts on listed species and habitat affecting tribal interests. A decade and a half later, SO 3206’s legacy is lukewarm. Agencies continue to treat consultation as an empty formality as often as a sacred duty. They remain unbound by the Order. SO 3206’s commitments should therefore be reviewed and assessed, its failures in application held to criticism. Old roads must be repaved and new ones mapped. This memo explains the history of tribal opposition to ESA enforcement, the government response in issuing SO 3206, the impact of the Order, and ultimately the criticisms it continues to engender in Indian country. It ultimately seeks to point forward, noting several ways in which SO 3206 should be modified improve consultation and bind the Departments to their trust responsibilities.

I. Statutory Background: The Endangered Species Act (ESA).

The ESA authorizes the Departments of the Interior and Commerce, through the Fish and Wildlife Service (hereafter “FWS”) and National Marine Fisheries Service (hereafter “NMFS”) (collectively “the Services”) to identify species in imminent danger of extinction or under threat to become endangered in the near future. 16 U.S.C. § 1533. The Services must then designate “critical habitats” that are either occupied by the species or essential for its conservation. § 1533(b)(2). They must, in doing so, consider scientific, economic, and “any other relevant impact[s],” excluding otherwise suitable areas if the “benefits of exclusion outweigh the benefits of designation.” Id. Thereafter, if a federal action may jeopardize a listed species or adversely modify its critical habitat, the acting federal agency must, in cooperation with any non federal permit applicants, consult with the appropriate Service before acting. § 1536 (a)(2). Non federal action that may harm a listed species constitutes an unauthorized “take” for which the actor must acquire an Incidental Take Permit (hereafter “ITP”), revocable if the permittee acts out of compliance with the permit, the associated Habitat Conservation Plan’s (hereafter “HCP”) program for minimization and mitigation of harm, or other applicable law. § 1539; 50 C.F.R. § 13.27-28. If the Service determines that the action will affect a listed species or critical habitat, formal consultation will be required, ending with the issuance of a Biological Opinion (hereafter “BiOp”), including consideration of the ITP. A court may set aside the action, authorization, or BiOp may be set aside if found to be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).
a) Impacts of the ESA on Tribal Land and Sovereignty

The ESA forces tribes to shoulder an unfair and disproportionate responsibility for conservation to make up for environmental degradation resulting from non-Indian development, while ignoring their sovereign resource management rights. Because tribal action so often includes a federal action ingredient, and since state, local, and private action in the vicinity of Indian lands will often be included in a BiOps baseline, “a jeopardy determination is almost preordained to impose a heavier burden on Indian lands.” Sandi B. Zellmer, Conserving Ecosystems Through the Secretarial Order on Tribal Rights, Nat. Resources & Env't, WINTER 2000, at 162, 163 (Calling tribal development proposals the “straw that…break[s] the camel’s back”). Under such circumstances, ESA enforcement can disproportionately “delay, curtail[] or prohibit[]…development activities” in tribal construction and resource extraction, compared with non-tribal activities. Sandi B. Zellmer, Indian Lands As Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First, 43 S.D. L. Rev. 381, 398 (1998). Sandi Zellmer describes the inclusion of tribal lands within critical habitat designations as “particularly offensive, in that it effectively imposes a federal zoning system on Indian lands by creating a wildlife “district” zoned for habitat uses, while incompatible uses, such as [tribal] oil and gas development, must be undertaken elsewhere.” Sandi B. Zellmer, Indian Lands As Critical Habitat at 418. Such “zoning” ignores the widespread development of competent and professional tribal management programs that seek to address conservation issues more holistically than the ESA’s single species approach. In this context, meaningful consultation becomes ever more necessary to ensure that tribal resources are maintained, the trust responsibility upheld, and conflict mitigated.

b) Tribal Response

Under the shadow of the ESA’s looming 1994 reauthorization, tribal resource managers and lawyers began to organize. Two years later they held a meeting in Seattle to discuss the aforementioned concerns and examine legislative and administrative solutions, eventually deciding to pursue a Joint Secretarial Order. Charles Wilkinson, The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order, 72 Wash. L. Rev. 1063, 1074 (1997). Their inspiration was the 1994 Statement of Relationship (hereafter “Statement”) negotiated by the FWS and the White Mountain Apaches, the latter represented by Chairman Ronnie Lupe, a key figure in the Seattle meeting. Id. at 1068. While the Statement had not referenced the ESA, it had pointed towards possible cooperative intergovernmental management based on the Tribe’s “institutional capacity to self manage its lands.” Id. White Apache Chairman Ronnie Lupe, who had negotiated the Statement, joined the call for a Secretarial Order.

In response, Interior Secretary Babbitt and Commerce Secretary Daley agreed to consult with tribal representatives to develop such an order. Id. at 1076. Prominent representatives at negotiations included the FWS Deputy Assistant Secretary, the General Counsel for NOAA, Billy Frank Jr., Chairman Lupe. Id. at 1077. Federal negotiators received relevant education in advance and both parties developed comprehensive consultation protocols. Charles Wilkinson described the federal party as a “informed, high-level team --in consultation with a fully involved Solicitor--
...[and] broad authority [to] report directly to the Secretary.” Id. at 1081. Babbit called the resulting Secretarial Order 3206, “the equivalent of a treaty,” born out of mutuality between sovereign governments. Id. at 1086. He expressed the hope that it would “banish forever the traditional treaty process that has been one sided, overbearing, and not infrequently unfair.” Id.

c) Secretarial Order 2306

SO 3206 was signed, “to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.” SECRETARIAL ORDER: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act § 1 (June 5, 1997). Agencies must therefore “consult with, and seek the participation of, the affected tribes to the maximum extent practicable,” when an action may impact trust resources, tribal rights or Indian lands (defined to include both trust and tribally held fee lands). § 5(1). Such participation may result in formal intergovernmental agreements on species management, delegations of conservation law enforcement, and the development of guidelines to accommodate tribal access to, and traditional use of protected species or habitat. § 6. In recovery actions, the Services commit to ensure “tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian land...affected tribal trust resources, or affects the exercise of tribal rights.” Appendix § 3(E).

The Services must not only invite participation but must “give deference to tribal conservation and management plans” when action will impact resources on Indian lands and listed species. Id. (emphasis in original). This requires training and sensitivity to tribal culture, § 5(4), and to the unique legal status of Indian lands, § 5(2). The Services must also consider “information on, but not limited to, tribal cultural value, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development,” in developing Reasonable and Prudent Alternatives (RPAs). Appendix § 3(B)(3).

In order to minimize adverse impacts on tribal lands and resources the Services must only apply conservation restrictions under narrow circumstance, when:

i) The restrictions are reasonably necessary for conservation. § 5(3)(C)(i). In designating critical habitats, “[tribal] areas” can only be included if “determined essential to conserve a listed species, after evaluating the possibility of excluding such lands.” Appendix § 3(B)(4).

ii) Their purpose cannot be achieved through the exclusive regulation of non-Indian actions. § 5(3)(C)(ii).

iii) They are the least restrictive option in their impact upon tribal management, economic development, and treaty rights. § 5(3)(C)(iii).

iv) They do not discriminate against Indians, as stated or applied. § 5(3)(C)(iv).

v) Voluntary tribal measures are inadequate. § 5(3)(C)(v).

In the specific Habitat Conservation Planning (HCP) context, the Services must request consultation with tribes. When other parties are involved in the action, the Services must “encourage [them] to recognize the benefits of working cooperatively with affected tribes” and advocate for tribal participation in HCP development. Appendix § 3(D)(2). If other parties refuse
to invite tribes into negotiation, the Services shall consult themselves. *Id.* The result of these consultations must be considered in the development of RPAs and the Services must “[a]dvocate the incorporation of measures…that will restore or enhance tribal trust resources.” Appendix § 3(D)(3). Subsequent decisions must explain how the trust responsibility has been addressed and accounted for. Appendix § 3(D)(2) (After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility).

SO 3206 however disclaims that it “shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law.” It only provides internal, non-binding, guidance. § 2(B).

II. Criticisms of SO 3206 and Suggested Modification in Text and Application

SO 3206 has failed to alleviate many tribal concerns with ESA enforcement. Meaningful consultation remains elusive, due to lack of federal investment in the process and any legal recourse for tribes. If the Services hope to better meet their trust responsibility, they must (a) invest in more meaningful consultation by sending educated, high level, and committed decision makers, that will diligently keep tribes informed through decision making regarding agency consideration of their concerns. Ultimately, (b) the Departments should promulgate SO 3206 as a binding regulation upon their agencies, clarifying the tribal rights bind Federal action and must be considered when implicated in any ESA analysis.

a) The United States must send qualified negotiators able to ensure meaningful Section 7 consultation with tribes.

If the Services expect tribes, already pressed for time and resources, to invest both to ensure meaningful consultation, then they must act likewise. They must send representatives who are (i) knowledgeable and (ii) highly committed. Such representatives must (iii) inform tribes throughout the decision making process and offer a comprehensive response on their consideration of relevant trust duties. They must be (iv) institutionally competent to make the decisions at issue. Interior’s current consultation policy, shaped by 2011’s SO 3317 takes steps in this direction, and will be referenced where appropriate, noting that it, of course, does not bind agencies within Commerce. *Policy on Consultation With Indian Tribes*, 76 FR 28446-01 (May, 2011) (hereafter “Interior Policy”); *SECRETARIAL ORDER: Department of the Interior Policy on Consultation with Indian Tribes* (August 20, 2014).

i) Under SO 3206 § 5(2), the Services recognize the unique legal status of tribes. Such recognition requires ongoing education of federal negotiators. Wilkinson notes that it was critical during SO 3206 negotiations to reserve “ample time for presentations on, and understanding of, the cultural, historical, and legal background…[as well as] the real world problems faced by field level federal and tribal administrators.” Wilkinson, 1078. See McCoy Oatman, Chairman, Nez Perce Tribal Executive Committee, *Comments on Department of*
**Interior Policy on Consultation with Indian Tribes** (March 14, 2011) (Such education must extend to “federal Indian law, jurisdictional issues[,] treaty rights”) (hereafter “Nez Perce Comment”). This required the federal negotiators to “put aside many of their other duties to deal with the preparation,” for consultation. Wilkinson, 1079. Only then were “the federal negotiators, most of whom had previously spent little time on Indian matters, able to understand the true distinctiveness of Indian policy: the depth of the commitment of Indian people to preserve and protect tribal sovereignty, their homelands, the trust relationship, and Indian culture.” Wilkinson, 1079. Tribes must be invited to develop and implement this training in order to ensure its efficacy. See Nez Perce Comment. The Interior Policy outlines a training model to be facilitated Department wide through the Department of the Interior University. Interior Policy § V. This model, developed “incollaboration with…Tribal colleges,” Id., “promotes consultation,” § V(A), “[o]utline[s]…duties concerning tribal interests,” § V(B), “[d]escribe[s] the legal trust obligation of the Federal-Tribal relationship,” § V(C) all “with attention to the unique distinctions within Indian Country,” § (D). SO 3206 should be modified to commit Commerce, wherein such training remains discretionary, to develop such a model. NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations § III(A) (November 12, 2013) (hereafter “NOAA Procedures”).

Proper training will enable federal negotiators to develop truly bilateral consultation protocols and intergovernmental agreements. See SO 3206 § 5(2). It will also allow decision makers to draw a proper scope of consultation that ensures that affected tribes are heard. Such meaningful attention requires that agencies not “cast[] the net of consulting tribes too broadly, in a given action, thus unnecessarily increasing the burdens associated with consultation and simultaneously diminishing the effectiveness of consultation with Indian nations who are the most affected.” Thane D. Somerville, Attorney for the Quechan Indian Tribe, Morisset, Schlosser, Jozwiak & Somerville, Re: Comments of Quechan Indian Tribe on Proposed Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28446, II(J) (July 12, 2011) (hereafter “Quechan Comment”). Casting that net more sensitively will require that the Service remain attentive “inter-tribal conflict[s]”. Marge Anderson, Chief Executive, Mille Lacs Band of Chippewa Indians, [Comment on Consultation Policy, 76 Fed. Reg. 28446] (June 24, 2011) (hereafter “Mille Lacs Comment”). In the SO 3206 context, overbroad consultation would allow unaffected tribes to influence the conservation management of resources and lands upon which directly affected tribes may depend. Tribal lands should not be put at risk of critical habitat designation because of the views of parties without interest.

ii) Even educated negotiators may still treat consultation as an empty ritual. Currently the BIA is held to a higher consultation duty under SO 3206. The Order should be modified to bind all acting agencies within Interior and Commerce to the same high level of commitment. Under Appendix § 3(C)(3) the Services engage in far deeper consultation and consideration, on “action[s] proposed by the BIA,” than on other actions, “includ[ing], but is not limited, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinion.” § 3(C)(3)(a). Conversely, in working with other action agencies, the Services shall merely “notify the affected Indian tribe(s) and provide for the participation of the BIA in the
consultation process,” and “encourage the action agency to invite the affected tribe(s)…to participate.” § 3(C)(3)(b). Furthermore, in the BIA context, the Services shall use tribal management plans “as the basis for developing any reasonable and prudent alternatives, to the extent practicable,” § 3(C)(3)(a), while in other contexts, they shall only “give full consideration to all [tribal] comments…and shall strive to ensure that any alternative selected does not discriminate against such tribe(s),” § 3(C)(3)(d). These distinctions commit the Services to treat the trust responsibility as a special obligation unique the BIA. Federal action implicating the trust responsibility goes far beyond the classic BIA management of trust resources in United States v. Mitchell and its progeny. 463 U.S. 206 (1983) (concerning BIA management and fiduciary relationship with allotted timber lands). All federal agencies act in ways that affect trust resources, treaty rights, and Indian lands. Recently Secretary of the Interior Sally Jewell released Secretarial Order 3335 noting that “[a]l instruments of the United States that make policy affecting Indian tribes…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.” SECRETARIAL ORDER: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries § 3(d) (August 20, 2014). Indeed all agencies of the “United States bear[] a trust responsibility toward Indian Tribes,” which, in essence consists of acting in the interests of the tribes,” Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569 (9th Cir. 1998) (quoting Skokomish Indian Tribe v. FERC, 121 F.3d 1303, 1308). See Inter Tribal Council of Arizona, Inc. v. Babbit 51 F.3d 199, 203 (9th Cir. 1995); Nance v. EPA, 645 F.2d 701, 710. As such, § 3(C)(3) should be collapsed to apply the high standard elucidated for the BIA context to Service consultation with all Interior and Commerce agencies.

iii) Either the high participation standard applied to BIA actions or the lower notification standard applied to other agency actions require the agencies to ensure tribes are kept informed about decision making from initial proposal through government consideration of tribal concerns. This commitment is implicated in Appendix § 3(C)(2), whereby the Services “[p]rovide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.” In recommending improvements to the National Commission on Indian Trust Administration and Reform, the Hoopa Valley Tribal Council contrasted this high pledge with the current state of affairs wherein tribes are left, like any other party, “to the Bureaucratic Black Hole of the Freedom of Information Act.” Leonard Masten, Chairman, Hoopa Valley Tribal Council, Commission Recommendations § 9 (Draft November 1, 2012). Such a process “leaves much to be desired,” and is “applied grudgingly and responses are long delayed.” Id. Just as tribes have noted that “[t]here is a difference between [public NEPA] comments and consultation,” so too is there a difference between allowing tribes the same rights as any American to request information, and insuring they are informed as sovereign nations in a government to government relationship. Quechan Comment.

Keeping tribes informed also requires the Services to respond more fully, and after adequate consideration, to tribal concerns raised in consultation. SO 3206 should be modified to require the agencies and Services give:
“detailed explanation how each consulting tribe’s comments and recommendations were considered and incorporated into the decision, and if not, why not, and finally, how the decision is fully consistent with the Department’s trust responsibility.” Ben Shelley, President, The Navajo Nation, Re: Proposed Policy on Consultation with Indian Tribes, 76 Fed.Reg. 28446 (July 15, 2011) (hereafter “Navajo Comment”).

Conversely, in a 2013 Klamath Project Operations BiOp, NMFS stated that it had not had “sufficient resources to do more than a cursory evaluation” of tribal management plans and had not invested resources to evaluate it with involved agencies. Effects of Proposed Klamath Project Operations from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and Endangered Species. Consideration of tribal plans too often stops at a “cursory look” as the Services wait until litigation to address possibly excluding tribal lands or engage in meaningful consultation. Marren Sanders, Implementing the Endangered Species Act in Indian Country, JOPNA No. 2007-1, 28. The trust responsibility requires a deeper and more sincere investment. In Pyramid Lake Paiute Tribe of Indians v. Morton, the District Court for the District of Columbia recognized that this sort of treatment is insufficient. 354 F.Supp. 252 (D.D.C. 1972). In that case the court set aside an Interior rule delivering water from the Truckee Dam to a local District, that would otherwise have flown into the Tribe’s lake. Id. at 252. Because the lake “the Tribe’s principal source of livelihood,” Id., and because of similar past diversions, the “fish native to the lake [had become] an endangered protected species,” the Interior had a trust duty to maintain its level for the Tribe’s use, Id. at 255. Without further comment, the Secretary called his decision a “judgement call.” Id. at 256. The court instead called it an “abuse of his discretion”, finding that he had “failed to meet [his] burden of establishing that this decision was anything but arbitrary.” Id. The trust duty was not so easily discharged by placating the non-Indian interests for the purposes of “accommodation.” Id. Rather, that duty was a “moral obligation of the highest responsibility and trust.” Id. (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)). Ultimately, “[i]n order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.” Id.

iv) Federal negotiators must not only be trained and committed to consultation, but must have the clear authority to make decisions or “present tribal views to the…decision maker.” Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 401 (D.S.D. 1995). As noted by the Quechan Band, “[t]oo often, Interior has attempted to meet its consultation obligations by sending low-level staff members to meet with the Tribal Council.” Quechan Comment. The Services should rather strive to emulate the “informed high level team in consultation with a fully involved solicitor…[and] broad authority [to] report directly to the Secretary” that negotiated SO 2306.1 Wilkinson, 1081. Modifying SO 3206 to specify this requirement will give tribes more actual ability to impact final decisions. Interior Policy takes proper steps in this direction by instructing the Department to designate a Tribal Governance Officer, with access to the Secretary, who will monitor compliance

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1 To ensure that appropriate representatives are chosen it may be necessary that “Tribes should be afforded the opportunity to comment on potential candidates.” Mel R. Sheldon Jr., Chairman, The Tulalip Tribes, Comments from the Tulalip Tribes of Washington at DOI request; Department of the Interior DRAFT Policy on Consultation with Indian Tribes (March 11, 2011).
with the policy, promote consultation and supervise similar Bureau level Tribal Liaison Officers. § VII(B). As with training, the designation of such dedicated personnel remains discretionary within Commerce and SO 3206 should be modified to require it. NOAA Procedures § III(B).

b) SO 3206 must be amended and promulgated as a binding regulation clarifying that (i) consideration of the impact on tribal interests is a necessary component of the BiOp analysis, and that (ii) agency discretion is bound by the legal force of tribal rights.

Tribes challenging a failure to consult have been told time and again that SO 3206 has little substantive force of law. 2 Until tribes have “legal recourse to guarantee that the…agencies comply with their [consultation] duty,” the commitments in SO 3206 will remain “dishonest.” Navajo Comment. The Order should therefore be promulgating as a binding rule, acquiring the force of law through being rooted in the language of the statute, by clarifying that (i) the “other relevant impact[s]” that must be considered in a BiOps include impacts on tribal interests, and that (ii) federal discretion remains subject to tribal rights as relevant “applicable law.” Through rulemaking, tribes will gain their legal recourse to sue under the APA when the Services act arbitrarily and capriciously without regard to their own regulations. 3

i) In making SO 3206 binding, the Services should clarify that consideration of tribal concerns constitutes a vital component of Section 7 consultation, in that the “other relevant

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2 Two District Courts have recognized the Order’s failure to bind Government ction. Miccosukee Tribe of Indians of Fla. v. United States, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006). The Miccosukee Tribe of Indians challenged the failure of FWS and Army Corps of Engineers to consult in order to avoid jeopardizing an endangered sparrow. Id. Count VI of their complaint alleged that the federal defendants had “violated the Indian Trust Doctrine as reflected in…Department of the Interior Secretarial Order # 3206.” Id. The court held that his argument failed to assert a claim because the Order was “for guidance within the Department only,” and does not create a substantive trust obligation.” Id. Similarly in Center for Biological Diversity, the plaintiffs, including two tribes, asked the court to set aside an FWS finding that the desert eagle, an important trust resource, was not a bald eagle population entitled to ESA protection. 2011 WL 6000497 (D. Ariz. 2011). While finding that the Service had engaged in some mediocre consultation that “undoubtedly [could] have been more meaningful to and respectful of the tribe, the court did not find SO 3206 to “carr[y] with it specific, measurable consultation requirements that have the force of law in the ESA context.” Id. at 13, 11.

3 The Eighth Circuit has also recognized that discretionary policy directives may acquire the force of law when they create a justified expectation of tribal consultation. In Oglala Sioux Tribe of Indians v. Andrus, the court found that the BIA was bound by its internal Personnel Management policy (hereafter “Personnel policy”) to consult the affected tribe. 603 F.2d 707, 717 (8th Cir. 1979). The policy had created a “justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made.” Id. at 721. In failing to afford that opportunity, the BIA “not only violate[d] those general principles which govern administrative decision-making, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” Id. (citations and internal quotations omitted) (finding “that the two meetings of the tribal delegates with Washington officials” did not constitute meaningful). See Lower Brule Sioux Tribe, 911 F. Supp. 395; Fort Berthold Land and Livestock Assoc. v. Great Plains Regional Dir., Bureau of Indian Affairs, 35 IBIA 266 (2000) (holding that even if tribal consultation guidelines did not establish “a right enforceable in Federal court,” they may nevertheless establish such a right before “the Board, which speaks for the Secretary of the Interior”3). Contra Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1103 (9th Cir. 1986) (Noting that unlike in Oglala Sioux Tribe of Indians, the BIA did not concede the Personnel policy to be binding. This distinction was expressly rejected in Lower Brule Sioux Tribe).
impact[s]” of an action must include “information on, but not limited to, tribal cultural value, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development,” Appendix § 3(B)(3), as components of the “other relevant impact[s],” they must look to under the ESA, 7 U.S.C. § 1533(b)(2). With such a hook in the statute, SO 3206 will allow tribal factors to shape the required analysis of when the “benefits of exclusion outweigh the benefits of designation,” and make failures to do so arbitrary and capricious under the APA. § 1533(b)(2). The Ninth Circuit has found that otherwise non-binding internal directives may create a consultation requirement when such a hook is found. Te-Moak Tribe of W. Shoshone Indians of Nevada v. U.S. Dep’t of the Interior, 565 F. App’x 665 (9th Cir. 2014); S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep’t of Interior, 588 F.3d 718 (9th Cir. 2009). Over the last few years, the Te-Moak Tribe of Western Shoshone Indians has repeatedly challenged BLM authorizations for mining at their holy Mount Tenabo in Nevada. The tribe has argued that the approval violated Executive Order 13007 for failing to accommodate tribal ceremonial use of sacred sites on the mountain and adversely affect the physical integrity of such sites.” Id. (citing Indian Sacred Sites, 61 FR 26771 § 2(a)). Like SO 3206, that order “intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.” Indian Sacred Sites, 61 FR 26771 § 4. Consequently, the court found it had “no force and effect on its own.” Te-Moak Tribe of W. Shoshone Indians of Nevada, 565 F. App’x at 667. However, “its requirements were incorporated into FLPMA by virtue of FLPMA’s prohibition on unnecessary or undue degradation of the lands,” Id. (citing 43 U.S.C. § 1732(b));, and the BLM thus “was required to comply with the Executive Order.” S. Fork Band Council Of W. Shoshone Of Nevada, 588 F.3d at 724. As a promulgated rule, SO 3206 should explain that consideration of impacts on tribal interests form an integral component ESA analysis.

ii) SO 3206 should also be modified to clarify that tribal rights are “applicable law” for the purposes of Federal permitting. This is especially true in the ITP context where authorized take may cut into tribal property interests. According to ITP regulations, “[t]he privileges of exercising some or all of the permit authority” may be “suspended” or “revoked” at any time if the permittee is not in compliance with the conditions of the permit, or with any applicable laws or regulations governing the conduct of the permitted activity.” 50 C.F.R. 13.27-28. Tribal rights have already been recognized as “applicable law” in general fishery management. Parravano v. Babbitt, 861 F.Supp. 914 (N.D. Cal. 1994), aff’d, 70 F.3d 539 (9th Cir. 1995). In Parravano, the court looked to the Departments’ trust responsibility in the context of managing “a chinook population too small to satisfy the needs of all who have a stake in the Klamath salmon.” Id. at 914. Facing that scarcity, non-Indian fishermen challenged the Department of Commerce’s Klamath Chinook ocean harvest rate that had been calculated in order to protect the Yurok and Hoopa tribal fisheries. The court conducted such an analysis in its 1999 rule for the Rio Grande silvery minnow, ultimately deferring to the Pueblos’ well developed management plans that “provided significant conservation benefits to the minnow.” Sanders, 27. The significant benefits for conservation and the trust responsibility tipped the scales towards excluding Pueblo land from the minnow’s habitat designation.
upheld the harvest rate, explaining that under a Department of Commerce rule, Yurok and Hoopa “the Federally reserved fishing rights of the Yurok and Hoopa Valley Tribes...applicable law for the purposes of the Magnuson Act.” *Id.* at 920-921 (citing rule at 58 Fed.Reg. 68063 (December 23, 1993)). That rule was promulgated pursuant to a 1991 Solicitor’s opinion, which did not restrict its analysis to the Magnuson Stevens Fishery Management context, but rather recognized that “all parties that manage the fishery, or whose actions affect the fishery, have a responsibility to act in accordance with the fishing rights of the Tribes.” John. D. Leshy, *Fishing Rights of the Yurok and Hoopa Valley Tribes*, M-36979, 30 (1993). That duty required the United States ensure that other users of the fishery “not interfere with the Tribes’ right to have the opportunity to catch their share.” *Id.* at 28. This duty held regardless of the purpose for which the fish were taken. *Id.* at 21 (noting that the tribes’ rights were based “the degree of dependence on the fishery resource at the time the reservation was created or expanded, rather than on what the particular uses were made of the fish”). The Solicitor had further noted that “an argument could be made that the tribal moderate standard of living needs should be satisfied first, before other user groups can be afforded fishing privileges,” considering the seniority of the former. *Id.* at 26. There is no reason that tribal rights in listed species should not be considered “applicable law,” barring the Services from permitting take of those species unless founded upon an express Congressional abrogation of those rights. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

**CONCLUSION**

SO 3206 was, in its time, an admirable step forward. Responding to tribal concerns, two Departments committed the time and resources to negotiate through educated and empowered representatives. Their commitment produced a document that seeks to ensure a central place for tribal concerns in ESA Consultation and Habitat Conservation Planning with reluctance to designate critical habitat and a willingness to defer to tribal management. The legacy of that commitment, however, has been lukewarm. The Order should thus be modified to insure that agencies do not treat consultation as an empty ritual but as a sacred duty demanding the involvement of committed and educated decision makers. Ultimately this mixed impact will only be improved if SO 3206 is modified to bind the relevant agencies, clarifying that tribal rights and the impact upon them legally require consideration before federal action. Only then can the ESA be reconciled with the United States’ trust duty. Only then will the federal government have to recognize that Indian lands are critical habitats, first and foremost, for tribal nations.
USING THE NEW EQUAL PROTECTION TO REASSERT TRIBAL CONTROL OVER NATIVE AMERICAN LANDS

Alex T. Skibine

CHEMEHUEVI v. SALAZAR

• TRIBAL LAND DEEDS ASSIGNMENTS.
• BIA REFUSES TO APPROVE UNDER SECTION 81 BECAUSE OF SECTION 177.
• QUESTION: DID 81 IMPLICITELY AMEND 177
• ANOTHER WAY TO RESOLVE THE ISSUE: ARE SECTIONS 81 AND 177 AS APPLIED CONSTITUTIONAL?
FROM PLENARY POWER TO EQUAL PROTECTION

• WHAT IS THE SOURCE OF CONGRESSIONAL POWER TO CONTROL INDIAN OWNED LAND?
  – 1. Land held in trust by the US. Not true for all lands.
  – 2. Congress has plenary power. No longer true
• EVEN IF ALLOWED UNDER THE INDIAN COMMERCE CLAUSE, LAWS MAY BE A DENIAL OF EQUAL PROTECTION.
• MORTON V. MANCARI:
  – 1. classification political not racial
  – 2. Therefore no strict scrutiny.
  – 3. Laws OK if rationally tied to the trust.

The tribal dilemma: Challenging federal power without rejecting Mancari

• Carole Goldberg’s position: The Article I response: Indians set up for special treatment in the Indian Commerce Clause.
• Laws should be upheld as long as tied rationally to the trust.
• Critics of Mancari: This is not enough protection for Indians. Besides Classification based on tribal membership racial: strict scrutiny should apply.
• Pro tribal Scholars’ response: This would invalidate too many laws favorable to Indians.
Are all laws related to Indians “political” classifications?

• Asking Indians to sit in the back of the bus?
• Preventing only Indians to drink alcohol on Indian Reservations?
• Requiring only Full Bloods to obtain a certificate of competency and wait five years before being able to sell their allotments?
• Requiring all Indians and Tribes to get BIA Approval before leasing their lands?

THE THESIS

— Whether classification is racial or not depends on whether Law was enacted pursuant to the Indian Commerce Clause.
— Congress power under ICC limited.
— The Tied to the trust standard is illusory.
— Laws can be challenged using the new equal protection.
Why illusory: impossible to tell what laws are tied to congress unique obligations?

• WHERE DOES THE TRUST DOCTRINE COME FROM?
  – 1. Doctrine of federal common law emanating from: Doctrine of discovery, *Kagama*, or
  – 2. The treaties? Or
• 3. only created by statutes enacted by Congress (Jicarilla).
  – 4. No consensus.

The new equal protection

• Dept. of Ag. v. Moreno: 1973 (Hippies)
• City of Cleburne v. Cleburne Living center, 1985 (mentally disabled)
• Romer v. Evans (1996)(Homosexuals)
• U.S. v. Windsor (2013)((DOMA)
• Four cases as rational basis with bite or 
• unconstitutional animus.
RATIONAL BASIS WITH BITE

• How different than regular rational basis review:
  – Search for the real purpose of the law.
  – Questioning the legitimacy of the governmental interest. Irrational fear, mere desire to harm, illegitimate stereotypes.
  – More in depth review to see if the means chosen are tailored to the protection of the interest. No assumption of correlation between classification and purpose.

Making the equal protection argument

• 1. Attacking the purpose: not related to the trust. The *Sioux Nation* Black Hills case.
• 2. Arguing that the Classification is not related to the true purpose: The *Navajo Nation* breach of trust case.
OVERVIEW OF LAWS GOVERNING THE USE OF INDIAN TRUST RESOURCES

- Surface Leasing Laws
  - Act of February 28, 1891: 5-year term for grazing, with Secretarial Approval
  - Act of August 15, 1894: 5-year term for farming purposes
  - Act of June 25, 1910: 5-year unrestricted leases of allotted lands
  - Act of March 3, 1921: Leases of allotted lands for farming and grazing
  - Act of July 3, 1926: 10-year leases of unallotted irrigable lands for farming with tribal council approval
  - Act of June 18, 1934: 25-year leases authorized by IRA tribes
  - Act of August 9, 1955: 25-year surface leases/10-year leases for grazing Indian Long-Term Leasing Act
OVERVIEW OF LAWS GOVERNING THE USE OF INDIAN TRUST RESOURCES

• Mineral Leasing Laws
  – Act of February 28, 1891: 10 year leasing terms
  – Act of March 3, 1909: Provides general authority for leasing of allotted lands for mining purposes
  – Act of June 30, 1919: Authorization for leasing of unallotted tribal lands in nine western states for mining “metalliferous” minerals
  – Indian Mineral Leasing Act of 1938 – Uniformity in leasing laws; authorizing the mineral leases of up to 10 years “and as long thereafter as mineral are produced in paying quantities.”

EFFORTS TO REFORM INDIAN LAND USE LAWS

• Pros and Cons with the Trust Management System
  – Pros:
    • Protects land from involuntary (sometimes voluntary) alienation
    • Adequate consideration
    • Royalty or rent collection and disbursement
  – Cons:
    • Compliance with NEPA and other Federal laws = delays, lost opportunities
    • Control, red tape, but limited liability
    • Navajo Nation v. U.S./White Mountain Apache Tribe v. U.S.
    • Is the beneficiary really protected?
EFFORTS TO REFORM INDIAN LAND USE LAWS

• Trends in Changes to Land Management Laws—Surface Leasing
  – Indian Long-Term Leasing Act of 1955 has been amended almost 50 times
    • Dozens of amendments provided individual tribes with 99 year leasing authority
  – American Indian Agricultural Resources Management Act of 1993
    • Increasing tribal authority over agriculture lands (farming and grazing), provides
      10 year agricultural resource management plans with goals and objectives, application of tribal law, and authority to lease for agricultural purpose for up to 10 years
  – Navajo Trust Land Leasing Act of 2000
  – American Indian Probate Reform Act of 2004
    • Allows 10 year agricultural purposes leases to owner(s) of trust or restricted land without Secretarial approval
  – HEARTH Act of 2012

• Changes to Land Management Laws—Subsurface Leasing
  – Indian Mineral Development Act of 1982
    • Enacted to overcome deficiencies in the Indian Mineral Leasing Act; provide more flexibility in leasing provisions
    • Direct tribal participate in the negotiations of mining leases and agreements, as well as ability to enter into commercial relationships
    • Waiver of U.S. liability for losses incurred by the tribe
  – Indian Tribal Energy Development and Self-Determination Act of 2005
    • Authorizes Tribal Energy Resource Agreements (TERAs)
    • With a TERA, tribes can enter into energy leases and agreements without DOI approval
    • More narrow waiver of U.S. liability than under IMDA
EFFORTS TO REFORM INDIAN LAND USE LAWS

• The HEARTH Act of 2012
  – Authorizes any lease purpose authorized by 25 U.S.C. 415(a)
  – Expressly excludes mineral leasing and leasing of individual Indian allotted lands
  – Provides all tribes with an alternative, completely voluntary mechanism for leasing the surface of tribal trust lands
  – Business and agricultural leases may have an initial term of 25 years, with two renewals authorized for up to 25 years each
  – Leases for public, religious, educational, recreational, and residential purposes may be for terms of up to 75 years

REFORM/MODERNIZATION EFFORTS

• Commission on Indian Trust Administration and Reform
  – Created by the Claims Resolution Act of 2010
  – Issued 67-page report

• National Congress of American Indians – Trust Modernization Task Force
  – Resolution passed in March 2014 mandates NCAI to work with tribes, Indian landowners, Federal agencies, and other stakeholders to develop recommendations for modernizing the trust system

• Recent Reform/Modernization Bills in Congress
  – S. 1439 (109th Congress)
  – H.R. 409 and S. 165 (113th Congress)

• Recent Energy-Related Bills
  – S. 1684 (112th Congress)
  – S. 2132 (113th Congress)
Thank You!

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