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MEMORANDUM

TO: **Secretarial Commission on Indian Trust Administration and Reform**

FROM: **Fredericks Peebles & Morgan LLP**

DATE: **September 13, 2012**

RE: **Recommendations for Federal Trust Reform Commission in Government Management of Tribal Trust Resources.**

This memorandum proposes recommendations to the Secretarial Commission on Indian Trust Administration and Reform (the "Trust Reform Commission" or the "Commission"), to improve the trustee-beneficiary relationship between the United States Government and Indian tribes; specifically, in relation to the Government's fiduciary duties to manage non-monetary Indian trust assets. This memorandum (I) discusses relevant historical developments in the trustee-beneficiary relationship between the Government and Indian tribes, (II) sets-forth overarching issues of concern with such relationship, and (III) addresses three questions presented to Mr. Tom Fredericks by the Commission.

I. HISTORY

"Foremost among the responsibilities historically delegated to the [United States Bureau of Indian Affairs] is the duty to manage Indian lands and funds, often thought of as the essence of the federal trust

responsibility to Indians."[1] The parameters of the trust responsibility have been developed and defined through a series of statutes, regulations, and opinions issued by the Supreme Court.[2]

Early Indian trust cases clarify that the United States has trustee responsibilities of the "most exacting fiduciary standards"[3] and current decisions articulate that the United States should be held to the highest standards when acting as trustee for tribal assets.[4] However, courts and the executive agencies recently have trended towards narrowing federal trustee obligations for tribal trust assets.

Some courts interpret that the Government has the same implied fiduciary duties as a private trustee[5]; however, a recent judicial trend is to narrow the scope of the United States' trust responsibility vis-à-vis Indian assets to only those duties expressly articulated by statute or regulation.[6] That is, courts are requiring tribes to point to duties *expressly articulated in and prescribed* by statute to find that the United States' trustee obligations include such duties.[7]

This current trend of diminishing the scope of the United States' trustee duties releases the United States from many conventional trustee duties and affords tribes fewer remedies where the United States mismanages tribal assets. United States Supreme Court Justice Sotomayor expressed her concern with this trend her dissent in *Jicarilla,* stating:

> [E]ven more troubling that the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the [tribe's] claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively . . . . rejects the role of common-law principles altogether in the Indian trust context. Its decision. . . risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.[8]

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[1] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians,* 19 B.Y.U. J. Pub. L. 1, 19 (2004).

[2] *Id.* at 19-25 (discussing the judicial development of the parameters of the federal trust responsibility vis-à-vis Native Americans).

[3] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

[4] *See, e.g., United States v. Mitchell*, 463 U.S. 206, 226 (1983); *Loudner v. United States*, 108 F.3d 896, 900-901 (8th Cir. 1997); *Rogers v. United states*, 697 F.2d 886, 890(9th Cir. 1983).

[5] *See, e.g., Cobell v. Norton*, 283 F.Supp. 2d 66, 267-72 (D.C. 2003) (listing common-law trustee duties of Government for Individual Indian Money accounts); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *United States v. Mason*, 412, U.S. 391, 398 (1973).

[6] *E.g., United States v. Jicarilla Apache Nation*, 131 S.Ct. 2312, 2318, 2323 (2011). *See also United States v. Navajo Nation*, 537 U.S.488, 501 (2003).

[7] *E.g., Jicarilla*, 131 S.Ct. at 2318, 2323.

[8] *Jicarilla*, 131 S.Ct. at 2343.

The recent trend towards narrowing the Government's fiduciary obligations to Indian beneficiaries exacerbates the difficult task of identifying what duties are included in the United States' role as trustee for tribal assets.[9]

II. FACTORS THAT HAVE CHANGED HOW THE DEPARTMENT OF INTERIOR ("DOI") MANAGES TRIBAL TRUST ASSETS

Two developments have shifted the DOI's focus away from managing non-monetary tribal trust assets and diluted federal resources devoted to such management: the *Cobell* litigation and the Trust Reform Act of 1994.[10]

In 1998, Individual Indian Money ("IIM") account holders sued the United States in a class-action lawsuit, alleging mismanagement of their trust funds. In a series of cases spanning over a decade, collectively known as the *Cobell* litigation, the Supreme Court held that the Government had breached its fiduciary duties to manage the IIM monies in a prudent manner, and awarded the *Cobell* litigants substantial damages for such mismanagement. The *Cobell* litigation exposed the Government's historical and ongoing mismanagement of Indian trust funds and caused the Government to re-visit and focus on reforming its management of tribal and individual Indian monies.

The Office of the Special Trustee for American Indians ("OST") was established pursuant to the Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act"), and was tasked with oversight of all reform management of Indian trust monies. The Office of Trust Funds Management ("OFTM") was created shortly thereafter to manage the investment of trust funds. The Trust Reform Act bifurcated the management of tribal trust assets to create a system whereby one entity (the OST) manages monetary tribal trust funds and applies one set of statutes and regulations, and other entities, including the Bureau of Indian Affairs ("BIA"), the Bureau of Land Management ("BLM"), the Office of Natural Resource Revenue ("ONRR"), manage non-monetary trust assets and applies other statutes and regulations. Such bifurcation dilutes funding dedicated to managing tribal assets by splitting such funding between multiple agencies.

Discussing the OST and OFTM impact on tribal trust resources, Tex G. Hall, President of the National Congress of American Indians and Chairman of the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Indian Reservation in North Dakota stated in a Senate Committee hearing:

> We did not want a bureaucracy that separates the management of our lands from all of the activities that take place on our lands. What has instead evolved is a two-headed bureaucracy that would never make any decision and would take resources from other important programs of the BIA and really limit services to Indian recipients.[11]

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[9] *See, Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1039-40 (Fed. Cir. 2012)(remanding case to lower court to determine whether specific act is included in Government's trustee duties for managing Indian oil and gas leases).

[10] Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. § 4001 (2004)).

[11] *Views of the Administration and Indian Country of How the System of Indian Trust Management, Management of the Funds and Natural Resources, Might be Reformed, Before the Sen. Comm. on Indian Affairs*, 109th Cong., 11 (2005) (statement of Tex Hall, president of the National Congress of American Indians and chairman of the Mandan, Hidatsa and Arikara Nation in Fort Berthold, N.D.).

Because the *Cobell* litigation and the Trust Reform Act focused on the Department of Interior's ("DOI") mismanagement of monetary tribal trust assets, the DOI's resources have shifted to funding better management of tribal monetary assets. The OST drains resources from the BIA's budget for managing non-monetary resources and from other Indian programs. Shifting resources to manage tribal monies takes substantial resources away from DOI management of tribal non-monetary resources, like grazing permits, oil and gas leases, and timber management. As a result, the DOI's management of non-monetary tribal assets is underfunded and understaffed.

III. OVERARCHING ISSUES

There are three overarching issues to keep in mind when analyzing the Government's trustee duties for specific assets; these are: (A) the standards of accountability and the duties of the Government as trustee are ambiguous and inconsistent; (B) the agencies responsible for Indian trust management have become a complex bureaucracy, have inadequate resources and expertise, and have shifted their focus to managing monetary trust assets; and (C) in certain circumstances, the Government has a conflict of interest in its role as trustee for Indian trust assets. Each issue is discussed in turn below.

A. Standards for Government as Trustee are Ambiguous

As discussed *supra*, the Government's duties vis-à-vis Indian trust assets have changed with case law and legislation. As a result, determining the Government's trust duties for non-monetary tribal assets is complex and often the subject of litigation. Tribes must prove three basic elements to hold the United States accountable for a breach of its trustee duties regarding Indian trust assets.

First, tribes must prove that a particular asset is a trust asset by identifying a treaty, statute, or regulation that imposes "comprehensive management duties" on the United States for the asset[12], or the Government must exercise control over the tribal trust asset.[13] Courts have different interpretations of what "comprehensive management duties" consist of and sometimes differ on which assets are Tribal trust assets.[14]

Second, once an asset is categorized as a trust asset, a tribe must establish that the Government has a specific duty as trustee of the asset. This is a difficult task because courts differ on what specific duties are included in the Government's trustee role.[15] Some courts find that the Government has common-law trustee

[12] *See, e.g., Jicarilla*, 131 S.Ct. at 2323; *United States v. Navajo Nation*, 556 U.S. 287, 129 S.Ct. 1547 (2009); *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001)(quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*)).
[13] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).
[14] *Compare Mitchell II*, 463 U.S. at 206 (finding daily supervision of an asset is sufficient to establish a trustee obligation over such asset) *with Navajo Nation*, 129 S.Ct. at 1552-54 (finding that regulations must guide or limit a federal agency's decision-making about a resource to create comprehensive management duties for the asset and therefore trustee responsibilities).
[15] *See, e.g., Shoshone Indian Tribe of the Wind River Reservation*, 672 F.3d at 1039-40 (remanding case to lower court to determine whether specific act is included in Government's trustee duties for managing Indian oil and gas leases).

duties in addition to duties expressly articulated in relevant regulations and statutes,[16] and some courts find that the Government is only obligated to perform the duties expressly articulated in statute or regulation.[17]

Third, once the Government's trustee duties are articulated, a tribe must establish that the Government did not perform its duties to the standard of care that the Government must exercise. Most courts articulate that the Government is subject to a higher standard of care than a private trustee.[18] However, in practice, courts seem to hold the Government to a standard of care equivalent to that of a private trustee.[19]

Because these three elements are subject to ambiguous and fluctuating standards, it is difficult for tribes to hold the Government accountable for its role as trustee for Indian assets. This is true with regard to both monetary and non-monetary tribal trust assets. To eliminate such ambiguity, and decrease litigation over such ambiguity, the Government should produce a document, legislation, or federal regulations that clarify both (i) how to identify and categorize non-monetary Indian assets as trust assets, (ii) what specific trustee duties the Government has vis-à-vis Indian beneficiaries for such assets, and (iii) reaffirming that the Government is subject to the highest standard of care in its role as trustee.

B. Disbursed Management Authority Among Multiple Agencies

The Government has dispersed responsibility for managing Indian assets among several agencies. For example, there may be seven (7) federal agencies involved in extracting Indian minerals and collecting mineral royalties for single reservation, and likely they include: the Bureau of Indian Affairs ("BIA") (responsible for leasing trust land and maintaining title records of land ownership), the Office of Natural Resource Revenue ("ONRR") (responsible for valuation of Indian minerals, collecting royalties for Indian mineral extraction, and auditing mineral operators), the Office of Surface Mining ("OSM") (responsible for approving mining permits and inspecting mining activity on trust land), the Bureau of Land Management ("BLM") (responsible for surveying trust lands and monitoring lease operations), the Office of the Special Trustee ("OST") (responsible for managing trust accounts where mineral royalties are deposited), the Environmental Protection Agency ("EPA") (responsible for protection of air, water, and land), and the Department of Treasury ("DOT") (where tribal trust monies are deposited and invested).

The disbursement of management responsibility among multiple federal agencies has created a complex and costly management scheme for Indian trust assets which dilutes resources devoted to the management of Indian assets. The *Cobell* decisions and the Trust Reform Act added to an already complex bureaucracy by creating the OST and diverting resources from DOI's management of non-monetary trust assets to the OST for its management of monetary trust assets. Disbursing management authority for Indian trust assets among multiple agencies not only creates an unwieldy bureaucracy, but it dilutes resources that should be devoted to the daily management of non-monetary resources and hinders the development of expertise and personnel who

[16] *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mason* 412, U.S. 391, 398 (1973).
[17] *E.g., Jicarilla*, 131 S.Ct. at 2323; *Navajo Nation*, 129 S.C.t. at 1552.
[18] *See, e.g., Mitchell II*, 463 U.S. at 226*; Seminole Nation*, 316 U.S. at 297; *Loudner*, 108 F.3d 896*; Rogers*, 697 F.2d at 890.
[19] *Osage Tribe of Indians of Oklahoma v. United States*, 93 Fed. Cl. 1, 37-38 (Fed. Cl. 2010) (applying the prudent investor standard to the Government's investment of tribal trust funds).

are focused on Indian-asset management. For example, funding that is now spread among several agencies to perform functions that are unrelated to Indian assets could be funneled to one agency to hire new Indian land appraisers or Indian mineral management officers.

This complex regulatory scheme also limits the overall development of the Tribes' resources. In addition to these bureaucratic agency layers, multiple regulations and statutes usually govern the use or extraction of Indian resources. For example, the Supreme Court reviewed "a network" of different statutes to determine whether the Government had a trustee obligation for coal.[20] Other courts have examined the multiple statutes relevant to water[21], oil and gas[22], land[23], timber[24], and gravel and sand[25].

For example, on one reservation, currently the entire permit process for Applications for Permits to Drill ("APD") for Indian oil and gas takes approximately 484 days, according to the Buys & Associates and Bill Barrett Corporation chart but contrary to the BIA, which states that the process takes closer to the 3 months set out as the "realistic" process time period. Developers state that the permitting process currently takes approximately 5 times longer than it should. Some developers indicate that the process is even longer, lasting 550 days on average. For tribes that have large oil and gas holdings, the BIA requires additional staffing in order to meet deadlines for review of the permit requests, especially when the process is slow by all parties' measures and when there is only one National Environmental Policy Act ("NEPA") reviewer for the BIA.

This lag in time supports the need for additional personnel to work on the permit process. Furthermore, as permits remain in queue and more permit applications are submitted, the BIA may require additional staff. On this particular reservation, it is estimated that the Tribe needs about 10 times more oil and gas permits to be approved than are currently being approved. Currently, about 50 APD permits are approved each year on the Reservation; the Tribe and its business partners estimate that about 450 APDs will be needed each year as the Tribe expands its operations.

Given the multiple statutes and regulations that govern Indian assets, and the non-Indian responsibilities that federal agencies have, federal agencies often lack personnel with expertise in Indian asset management. Thus, in addition to resources that are diverted away from the management of non-monetary Indian assets, many federal agencies tasked with managing Indian assets lack expertise in such management, lack adequate staffing, and lack personnel that are familiar with the relevant regulations. To address this dilution of resources, the Government should allow OST to sunset and re-consolidate management of non-monetary and monetary Indian assets into the BIA.

C. Contradictory Roles of the Government Agencies

The Government faces a conflict of interest in its role as trustee for Indian assets; specifically in two particular scenarios (1) where its federal agency obligations conflict with its trustee obligations and (2) when it is sued for a breach of its trust responsibility.

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[20] *Navajo Nation*, 129 S.Ct. at 1554.
[21] *See, e.g., Nevada v. United States*, 462 U.S. 110.
[22] *See, e.g., Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 646 (Fed. Cl. 2003).
[23] *Cobell v. Babbit*, 91 F.Supp. 2d 1, 9-12 (Dist. D.C. 1999); *Brown v. United States*, 86 F.3d 1554; 25 U.S.C. § 406.
[24] *Mitchell II*, 463 U.S. at 218; 25 U.S.C. § 406.
[25] *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d. 1339, 1348 (Fed. Cir. 2004).

1. A Government Agency with Conflicting Obligations

A federal agency has duties unrelated to Indian assets and apart from its trustee duties. In certain instances, an agency's non-Indian related duties conflict with its trustee duties. That is, a federal agency often is obligated to act in the Government's interest or in the interest of the general public, and these obligations can conflict with an agency's obligation to act in the interest of an Indian beneficiary.

One example is when the Bureau of Reclamation, acting in the Government's interest, embarks on a water storage project or irrigation project, which may involve flooding of Indian land or Indian water rights. In 1944, Congress passed the Flood Control Act to control flooding on the Missouri River. The Missouri River Dam Project was referred to as the Pick-Sloan Project for the Bureau of Reclamation and Corps of Engineer planners who had designed and implemented the plan. The Pick-Sloan Missouri Basin Program was authorized by Congress as part of the Pick-Sloan Act of 1944. The program provided flood control, irrigation, navigation, recreation, preservation and enhancement of fish and wildlife and power generation. The Program called for the construction of six large scale dams on the Missouri River that would in turn create a series of water reservoirs. These dams included the Fort Peck Dam, which is the highest of the six major dams along the Missouri River, located in northeast Montana near Glasgow, and adjacent to the community of Fort Peck. The other dams and power plants on the Missouri River produce hydroelectric power under the Pick-Sloan program include Canyon Ferry in western Montana; Garrison at Riverdale, N.D.; Oahe at Pierre, S.D.; Big Bend at Fort Thompson, S.D.,and Fort Randall and Gavins Point in southern South Dakota. Yellowtail Dam on the Bighorn River in south central Montana produces power under the Pick-Sloan Program.

The Pick-Sloan Project inundated a great deal of tribal land, including land in South Dakota, North Dakota, Nebraska and Montana. The flooded land contained the densest collection of trees in these areas and inundated the richest and most arable reservation farmland. Twenty-three percent of the 1,499,759 acres taken for the construction of the dams and reservoirs under the Pick-Sloan plan were lands of the Tribes. Most of the lands were irreplaceable fertile river bottomlands that had been occupied for hundreds of years by the tribes and allottees living along the river.

The taking of these lands led to the displacement of hundreds of allottees and their families and ultimately caused devastating losses to the social, spiritual and cultural vitality of these affected tribes. The Garrison Dam had such devastating effects at Fort Berthold that at the time of the taking of their lands only 6% of the tribal members were on some form of public assistance.[26] In 1990, that number had increased to over 90%.[27] Because the Pick-Sloan Project caused more damage to Indian Country than any other public works project to date, and due to the resulting social and economic consequences that impacted the Tribes and their members, it has been called the single most destructive act ever to impact Tribes in the United States.

This taking not only created a loss of land, but in most cases a loss of livelihood. The taking created a much larger dependent population where a majority self-sufficient population once stood. In addition, study of historical trauma indicates that many of the social ills that befall reservation communities come from suffering

[26] *See* Cummings, Ronald G., *Valuing the Resource Base Lost by the Three Affiliated Tribes as a Result of Lands Taken from them for the Garrison Project*, at p. 1 (Feb. 13, 1986).
[27] *Id.*

this type of great loss. This taking is a flagrant example of the injustice perpetuated on Native people. This specific group of Native people has endured forced removal and relocation to their respective reservations. Once there, they worked within their circumstances to establish themselves in the river-bottom and were successful. With the flood acts, again these people experienced forced removal and destruction of their lands, homes, and livelihoods. At Fort Berthold, the flooding took the homes of 85% of the people since many allottees invited their extended families to live on their allotment in the fertile river bottom.[28] It was the best land of the reservation because there was good soil, good shelter and good water available there. Many, if not most of the social ills that plague these tribes today are a direct result of the impact and losses of those who suffered this historical trauma.

Yet despite the level of destruction the Project caused in Indian Country, ironically, the Pick Sloan Project was originally designed to benefit the Tribes and the people of the Missouri Basin by providing irrigation development and participation in electricity generation, however, to date the Tribes have realized little if any of these intended benefits.

After years of petitioning Congress, the damages suffered by the tribes and allottees were finally investigated by various congressionally authorized committees known as Joint Tribal Advisory Committees ("JTACs"). The Secretary of the Interior chartered the first JTAC to examine the economic and developmental needs of the Fort Berthold and Standing Rock Sioux Reservations, including the need for additional compensation for the lands taken to implement the Pick-Sloan Program. Following the conclusion and issuance of these JTAC reports and after years of perseverance by various Missouri River Basin Tribes and their tribal members, Congress passed a series of compensation acts, otherwise known as Equitable Acts, between 1992 and 2002. Under the Equitable Acts, the United States acknowledged that it failed to fairly and adequately compensate the Tribes and their members for the lands the United States took for dam and reservoir projects under the Flood Control Act of 1944. The Equitable Acts created tribal economic recovery funds and authorized the subsequent appropriation of monies to fund the trusts. Tribes are authorized to spend the interest accumulated by the trusts.

While the passage of the Equitable Acts has been an important first step in accounting for the losses suffered by the tribes and the allottees, it has become evident to the Missouri River Basin Tribes and their respective members -- including individual landowners and heirs whose allotted lands were taken -- that the Equitable Acts have not served to sufficiently correct the injustice of the United States' takings. The takings that occurred following passage of the Flood Control Act of 1944 serves as a prime example of why the Government, as trustee, must defend Indian water rights against parties trying to diminish such rights and ensure that tribes get a fair appraisal of and a fair value for their land. This serves as a prime example of when the Government acts both to diminish Indian assets and simultaneously should act as a trustee for such assets and defend against such diminishment; thus, the Government has conflicting interests because it sits on both sides of the table.

Another example is Government's management of Indian oil and gas permits. When the Government manages federal oil and gas permits, it must consider public uses for land when making management

[28] *Id.*

decisions.[29] Because Government agency staff is accustomed to considering the public uses of land in federal oil and gas management, it also considers public uses when making management decisions for similar uses of Indian lands; however, tribally-owned lands are not federal public lands and are not similarly open to the general public and, therefore, should not be subject to the same public-use considerations as federal public lands.[30] Further, when making Indian decisions or oil and gas management decisions, the Government , as trustee for the Indian mineral owner, should be acting in the best interest of *the Indian mineral owner* and not in the best interest of the general public; thus, the Government faces a conflict when making Indian oil and gas management decisions because it considers the best interest of the general public but must simultaneously act in the best interest of the Indian mineral owner.

2. Government as Plaintiff and Defendant

Another scenario where a Government agency's duties may conflict with its trustee duties is when a Tribe sues a federal agency for breach of fiduciary duty. The Government must act in the interest of the plaintiff-beneficiary and is simultaneously the defendant. The Government's role as defendant against its own beneficiary makes procedural matters complicated, such as whether the Government should provide certain information to the plaintiff-beneficiary. Further, the Government is in a unique position where, as defendant it is arguing to narrow the scope of its fiduciary duties while simultaneously working with a plaintiff-beneficiary who is arguing for a broad definition of such fiduciary duties.

Because multiple Government agencies are charged with responsibility for Indian trust assets, the likelihood that an agency will have an obligation that will conflict with its trustee duties increases. Consolidating responsibility for Indian trust assets with one agency will decrease the possibility that an agency's non-trustee duties will conflict with its trustee duties. It is important to keep these three overarching issues in mind as the questions below are addressed.

IV. QUESTIONS

The Commission has presented the following questions related to the Government's trustee obligations, each of which are responded to in turn herein.

A. What are the Most Important Functions the Government, as Trustee, Performs with Regard to a Tribe's Non-Monetary Assets (i.e., oil and gas; water; timber; grazing; land; minerals like coal, gravel, sand)? How Would These Functions Differ for Specific Natural Resources?

1. Oil & Gas and Other Extractable Minerals

Several federal laws are relevant to mineral leasing on tribal lands, including the : Federal Land Policy and Management Act of 1976[31] (defining the Bureau of Land Management's responsibilities regarding oil and

[29] Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands? : The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 Energy L.J. 119 (2012).
[30] *Id.*
[31] Codified at 43 U.S.C. § 1701 *et seq*.

gas development); Indian Minerals Leasing act of 1938[32] (which facilitates leasing minerals on tribal land); Indian Mineral Development Act of 1982 (IMDA)[33] (which allows tribes to enter mineral leasing agreements with third parties subject to DOI approval), and regulations regarding mineral development leasing[34] (Bureau of Indian Affair's regulations governing leases and permits to develop tribal oil and gas, geothermal and solid minerals); regulations implementing the IMDA[35] (Bureau of Indian Affairs regulations governing mineral agreements for Indian-owned minerals); and regulations issued by the Bureau of Land Management which implementing the oil and gas development requirements of multiple federal laws which supplement other BLM responsibilities[36]. Indian minerals are typically developed through lease contracts between a tribe and a third party developer. The Government's most important functions in the mineral leasing process are (a) appraising the value of the minerals and approving the leases and (b) monitoring a lessee's performance of the lease.

(a) Appraising the value of the mineral and approving the lease

Private trustees managing commercial rental property secure fair market rent for such property. Similarly, during the negotiation and formation of a lease contract for Indian minerals, the Government, as a trustee for Indian mineral assets, should ensure that a lease for Indian minerals is in the economic interest of the Tribe or Indian owner and should assist in negotiating the lease to this end.[37] The Government has a duty to maximize the royalties paid for some minerals, such as oil and gas[38], but not for others, such as metalliferous minerals such as gold, silver, copper,[39] and coal[40]. In the case of any mineral for which the Government has trustee responsibility, it should provide *timely, thorough, and complete information* to the Tribe or Indian owner regarding *current market rates in the relevant market* for minerals.[41] That is, the Government should assist an Indian mineral owner in negotiating mineral leases by providing accurate valuation for the mineral.

Even where an Indian tribe wishes to lease its minerals for less than market value, the Government should ensure that the Indian lessor is aware of the market value of his asset and should not approve such lease if the royalty rate is not in the best interest of the Tribe or Indian owner.[42] Finally, the Government should not approve leases for periods of time longer than the average lease in the market. This will prevent locking Indian mineral owners into leases where they may be receiving uncompetitive returns for their minerals and allows the royalty rates to change with the market rates.

The Government often does not fulfill its fiduciary duties of adequate appraisal and approval of economically beneficial leases. For example, according to a statement by Chairman Tex G. Hall, Tex G. Hall, in

[32] Codified at 25 U.S.C. § 396 a- g.
[33] Codified at 25 U.S.C. § 2102 *et seq.*
[34] 25 C.F.R. § 211.
[35] 25 C.F.R. § 225.
[36] 43 C.F.R. §§ 3100-3190
[37] *See* Indian Minerals Development Act at 25 U.S.C. §§ 2101-2108.
[38] 25 U.S.C. § 396b (stating oil and gas leases shall go to highest qualified bidder); 25 C.F.R. § 211.41 (stating minimum royalty rate for oil and gas leases).
[39] 25 U.S.C. § 399.
[40] *See* 25 U.S.C. § 396a; 25 C.F.R.§ 211.43; *Navajo Nation*, 129 S.Ct. at 1554
[41] *See, e.g., Cobell v. Norton*, No. Civ. A.96-1285, 2003 WL 21978286, *12 (D.C. Aug. 20, 2003) (discussing trustee duties entailed in accurately appraising rights-of-way over Indian land).
[42] *E.g.*, 25 C.F.R. 211.41 (b).

an oversight hearing before the Subcommittee on Indian and Alaska Native Affairs on Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands:

> The Interior Department was not prepared for the level of oil and gas approval requests at Fort Berthold, when leasing and exploration activities began in earnest in 2007. With help from the North Dakota Congressional delegation, we were able to increase staffing for these regulatory activities at both the Fort Berthold Agency and the Great Plains Regional Office. The Department also accepted our recommendation that a "One Stop Shop Office" begin operation at Fort Berthold, in order to ensure that all four Interior agencies are represented in one location and can operate in a coordinated fashion. Unfortunately, Congress has yet to provide funding for the personnel necessary to staff this One Stop Shop Office. As a result, mistakes have been made and leases have been approved at less than market value.
>
> Let me give you one example. In early 2008, the BIA approved a tribal lease executed pursuant to the Indian Mineral Development Act that tied up nearly 42,000 acres. The bonus paid for this lease was $50 per acre, at a time when bonuses for oil and gas leases in the Bakken, including leases on the Reservation, were going for $1000 or more an acre. <u>This is inexcusable</u>. [43]

(b) <u>Monitoring performance of the lease</u>

The Government, as trustee for Indian minerals, should ensure that mineral lessees are abiding by both the terms of the lease and federal and tribal regulations governing such leases.[44] This generally entails careful and consistent monitoring of the lessee's extraction, ensuring that the lessees are paying royalties commensurate with their extraction, and collecting and depositing such royalties in a timely manner.[45] The Government should ensure that lessees comply with federal and tribal regulations, which entails assuring: that mineral resources are being diligently developed[46] and if they are not, that the lease is cancelled and re-leased to a developer that will develop the resource; that lessees are posting bonds adequate to remediate an extraction site; extracting the minerals in an environmentally safe manner; minimizing the extraction site's impact to Indian lands; are not developing and extracting minerals to which they are not entitled (known as "drainage"); are paying for and maintaining adequate and safe extraction infrastructure, and are adequately shutting-down and remediating extraction sites when they are finished with extraction.[47]

2. Timber

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[43] *See* Statement of Tex G. Hall, Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation Before the Subcommittee on Indian and Alaska Native Affairs, Committee on Natural Resources, U.S. House of Representatives, *Oversight Hearing on Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands*, p. 6-7 (April 1, 2011).

[44] *E.g.*, 25 C.F.R. §§ 211.4-211.6; 225.36, 225.37; 43 C.F.R § 3163.

[45] *E.g.*, 25 C.F.R. § 225.1(a); *Osage Tribe of Indian v. United States*, 68 Fed. Cl. 322, 328-33 (Fed. Cl. 2005); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1352 (Fed. Cir. 2004).

[46] 25 C.F.R. § 211.47.

[47] See regulations at 25 C.F.R. Part 211 for performance requirements for Indian oil and gas lessees.

The Department of Interior is authorized to manage Indian forests and to regulate sales of timber from Indian land by the Act of June 25, 1910[48], the Indian Reorganization Act of 1934 (the "IRA")[49], National Indian Forest Resources Management Act of 1990 (NIFRMA),[50] and its implementing regulations[51]. Pursuant to these statutes and regulations, the Government plays a pervasive role in the day-to-day management of Indian forests and oversight of the harvest and sale of timber from Indian lands.[52] The Government undertakes such management either directly, or through contracts, grants or cooperative agreements with tribes.[53] The NIFRMA clarified certain functions the Government has in its management of Indian forests, such as preventing trespass and un-permitted timber harvesting,[54] how the Government must handle revenues for Indian timber,[55] Government support for Indian forestry programs and contractors,[56] and identified performance goals for Indian forest management and set-aside resources for such management[57]. The Government's most important role in managing Indian timber is (a) securing the greatest revenue for a tribe for its timber[58] and (b) ensuring that timber harvesting is done in a sustainable manner[59].

(a) Securing the greatest revenue for tribally-owned timber

Like other non-monetary Indian assets, ensuring the greatest revenue for timber entails accurate and timely appraisals of the timber value so that the Government or the Indian manager may accept the highest and most beneficial bid for timber permits.[60] Further, the Government should not approve timber leases that do not secure at a minimum the fair market value of the timber to the Indian owner.

(b) Ensuring sustainable timber yield

Federal regulations set-forth multiple sustained use and yield principles for federal forest management.[61] Indian timber may also be sold according to the principles of sustained yield.[62] Sustained yield principles are crucial for ensuring that timber harvesting is done in a sustainable manner that will yield profit for the Indian owner in the future. The Government could fulfill its role in ensuring sustainable timber yields for Indian-owned timber by utilizing established federal guidelines for sustained yield in its management role for Indian timber.

3. Grazing

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[48] Act of June 25, 1910, ch. 432, §§ 7, 8, 36 Stat. 855, 857, as amended, 25 U.S.C. §§ 406-407.
[49] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, now codified as 25 U.S.C. § 466 (imposing upon the Department of Interior the principle of sustained-yield management for Indian timber).
[50] Pub. L. 101-630, 104 Stat. 4532 (Nov. 28, 1990), codified at 25 U.S.C. §§ 3101-3120, as amended by Pub. L. 103-437, 108 Stat. 4589 (Nov. 2, 1994).
[51] 25 C.F.R. Part 163.
[52] *See Mitchell II*, 463 U.S. at 222-23.
[53] 25 U.S.C. § 3104; 25 C.F.R. § 163.10.
[54] 25 U.S.C. § 3106.
[55] 25 U.S.C. § 3107.
[56] 25 U.S.C. § 3110.
[57] 25 U.S.C. §§ 3101-3104, 3115a.
[58] 25 C.F.R. § 163.18.
[59] 25 U.S.C. § 3104(3); 25 C.F.R. § 163.11 (requiring Indian forest management plans that include the principles of sustained yield for Indian timber harvesting); *Mitchell II*, 463 U.S. at 221-23 (discussing various regulations requiring the Government to maximize the revenue of Indian timber and to ensure sustainable timber harvesting).
[60] 25 C.F.R. 163.18.
[61] Multiple-Use, Sustained-Yield Act (MUSYA) of 1960, 16 U.S.C. §§ 528-531.
[62] 25 C.F.R. § 407; 25 C.F.R § 163.11.

The Department of Interior is authorized to regulate grazing activities on Indian land[63] pursuant to the Taylor Grazing Act of 1934,[64] the Indian Reorganization Act of 1934,[65] and the American Indian Agricultural Resource Management Act of 1990.[66] The Secretary of Interior is authorized to establish range units, issue grazing permits and set grazing permit rates.[67] Tribes and the BIA manage Indian rangeland either through contracts, compacts, cooperative agreements or grants.[68]

The Government's most important role in Indian rangeland management is (a) accurate and timely appraisal of the rangeland and establishing accurate rental rates for rangeland[69], (b) ensuring that the terms of the permit are complied with[70], and (c) ensuring that grazing and rangeland planning is undertaken in a sustainable manner.[71]

(a) Appraisal of the rangeland

During the negotiation and formation of a lease contract for Indian grazing land, the Government, as a trustee for such assets, should work to ensure that a lease secures to an Indian owner the fair market value for grazing land. Ensuring fair market value for Indian rangeland entails that the Government should establish a fair annual grazing rental rate for tribes that have not established an annual rental rate or providing *timely, thorough, and complete information* regarding *current market rates in the relevant market* to tribes establishing their own rental rates.[72] The BLM should ensure that all economic factors that may impact the value of rangeland is accounted for in its appraisal. For example, a grazing allotment with fences, stock-watering ponds, and that has no invasive plant species or animal species diminishing the grass-stock on the allotment, should include these factors in the appraisal price. Further, the trustee should not allow leases to lock-up the land for period of time that are longer than a typical grazing lease; that is to ensure that if market rates change, the Indian lessor is not locked into an uncompetitive or unreasonable lease for his grazing land.

(b) Ensuring compliance with permit terms

The Government, as trustee for Indian rangeland, should ensure that permittees are complying with federal and tribal laws and requirements,[73] such as posting adequate performance bonds for grazing permits.[74] Like with timber, the Government should ensure that lease permittees are not overgrazing and are conducting grazing in accordance with all applicable sustainable yield principles.[75] The MUSYA principles can also be applied to rangeland. Government monitoring of Indian permittees may entail analysis of what grazing yield the

[63] *See* 25 U.S.C. § 397, 25 C.F.R. § 166.1 *et seq*.
[64] 43 U.S.C. §§ 315-315r
[65] 25 U.S.C. § 461 *et seq*.
[66] 25 U.S.C. §§ 3701-3746.
[67] 25 C.F.R. Part 166, Subpart D.
[68] 25 C.F.R. § 166.300.
[69] 25 C.F.R § 166.400.
[70] 25 C.F.R. § 166.213.
[71] *See* 25 C.F.R. § 166.311.
[72] *See* 25 C.F.R. § 166.400.
[73] *See* 25 C.F.R. §§ 166.700-.709.
[74] 25 C.F.R.§ 166.600.
[75] 25 C.F.R. §166.213.

leased land can sustain[76] and consideration of environmental factors – such as drought or invasive species that may decrease grazing yield.

During the lease term, the Government should ensure that lessee's of Indian rangeland comply with the terms of the grazing permit and with the any relevant federal and tribal regulations.[77] Infrastructure, like stock-watering ponds and fences are crucial to ensuring rangeland is useable and competitive with other rangeland.

(c) Rangeland planning

Like management plans for timber-harvesting on public lands, Indian rangeland should have management plans that address improvements/infrastructure, sustainable yield, and how to assess market rates for a given geographic area.[78] The Government creates range units for Indian rangeland[79], determines the grazing capacity for each range unit[80], ensures that tribes have agriculture resource management plans for rangeland[81], and ensures that conservation plans are developed for each permit.[82] The Government should assist tribes in developing adequate rangeland management plans and should monitor permittees to ensure they are complying with such plans, such as conservation plans. Further, the Government should monitor any improvement made to the land by permittees[83] and take such improvements into account when appraising the rental rate for the rangeland.

4. Land Use (Easements, Rights-Of-Way, Takings)

The Department of Interior is authorized to grant rights-of-way, easements and other uses of Indian lands, with the consent of tribal land-owners, by numerous statutes.[84] The Government may also "take" Indian land for a public purpose. Like other Indian trust assets, the Government's most important role in Indian land-use leases or permits is (a) in accurately appraising and assessing the value of land-use permits or leases, like easements or rights-of-way, granted across tribal land,[85] and (b) ensuring that lessees comply with the terms of the lease and with federal and tribal laws and regulations.[86]

(a) Accurate and timely appraisals

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[76] Grazing permits are generally expressed in Animal Units (AUs) or Animal Unit Months (AUMs), that is the amount of forage required by one animal unit for a given area or for one month. Pursuant to 25 C.F.R. 166.305, BIA establishes the grazing capacity for each Indian grazing range unit.

[77] *See* 25 C.F.R.§ 166.213.

[78] *See* 25 C.F.R. § 166.300-.317.

[79] 25 C.F.R. § 166.302.

[80] 25 C.F.R. § 166.305.

[81] 25 C.F.R. § 166.311.

[82] 25 C.F.R. § 166.312.

[83] 25 C.F.R. § 166.317.

[84] *E.g.*, 25 U.S.C. § 318a (covering roads on Indian reservations); 25 U.S.C. §§ 323-328 (empowering the Secretary to grant rights of way over Indian lands); 25 C.F.R. § 169.1 *et seq*.

[85] *See, e.g.*, *Cobell v. Norton*, No. Civ. A.96-1285, 2003 WL 21978286, *12(D.C. Aug. 20, 2003) (citing *Jicarilla Apapche Tribe v. Supron Energy Corp*., 782 F.2d 855 (10th Cir. 1986)); *Nez Perce Tribe v. United States*, 176 Ct. Cl. 815 (1966).

[86] *See* 25 U.S.C. § 324; 25 C.F.R.§162.108 (stating Government obligations for leases of Indian land); 25 C.F.R. §§ 169.3, .13, .14, .5, .25. *See also San Felipe v. Hodel*, 770 F.2d 915 (10th Cir. 1985).

The Government has a duty to ensure that Indian lessors secure a fair market value for easements and rights-of-way[87], which entails that the Government obtain accurate appraisal for Indian land and advise Indian lessors of such value during lease or contract negotiation.[88] However, because of inadequate staffing, these duties are often unfulfilled and Indian lessors secure payments that are far below fair market value.

B. What Are The Pros And Cons Of A Private Versus A Public Trustee For A Tribe's Non-Monetary Assets?

The benefits of a private trustee include that, because common-law regarding the duties of private trustees is well-developed, the trustee's duties and its standard of performance in such duties is clear. Further, unlike a federal agency that sometimes has conflicting obligations, a private trustee would not face conflicting interests. Finally, private trustees are focused solely on their trustee duties and, thus, have well-developed expertise and resources to successfully fulfill their trustee roles.

The benefits of a public trustee are that it has access to resources that a private trustee may have to pay for. For example, the United States Geological Service ("USGS") produces maps of underground resources such as minerals and water. A Government agency has access to USGS products whereas a private trustee would likely have to pay for such maps, which diminishes beneficiary resources. Also, the Government has infrastructure such as local and regional offices, that is useful for local monitoring and information dissemination, whereas a private trustee would likely have to travel frequently or establish local offices in its service area – all of which would cost a beneficiary and diminish its resources.

As discussed above, the limitations of public trustee include the potential for a conflict of interest, unclear and inconsistent fiduciary duties and standards, management authority spread amongst multiple agencies which creates a complex bureaucracy and diminishes resources available for management activity, and fewer resources devoted to management of non-monetary assets.

C. What Type Of Involvement Should Tribes Have With The Government's Oversight Of A Tribe's Non-Monetary Assets? What Form Should Such Tribal Involvement Take?

Tribes should be given more control over the management of non-monetary tribal trust assets; alternatively, tribes should have input into the Government's management of non-monetary tribal trust assets. [89] The form of tribal involvement could take one of two forms: (i) a Section 17 tribal corporation that vests a tribe with management of its own non-monetary assets or (ii) regional oversight committees that have oversight authority and/or input into management decisions.

1. Section 17 Corporation

[87] 25 C.F.R.§ 169.12 (stating that rights-of-way should garner fair market value in consideration for rights-of-way); 25 C.F.R.§ 162.107 (stating that when the Government grants a lease on behalf of a tribe, it should garner fair market value for such lease).
[88] *See* 25 C.F.R. § 169.12*; Cobell v. Norton*, No. Civ. A.96-1285, 2003 WL 21978286, *12 (D.C. Aug. 20, 2003).
[89] *See, e.g.*, Thomas v. Panoff, *Legislative Reform of the Indian Trust Fund System*, 41 Harv. J. on Legis. 517 (2004).

The Indian Reorganization Act of 1934[90] (IRA) Section 17 allows Indian tribes to form tribal corporations and such corporations have the power to:

> purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits on the reservation. [91]

Thus, the IRA's Section 17 clearly authorizes Indian tribes to form corporations to manage their own non-monetary trust assets subject to some limitations.

The Government should enact a charter which authorizes Tribal Section 17 corporations to manage a tribe's non-monetary trust property, while the property remains "bare" trust[92] property subject to restrictions on alienation. This leaves the Tribes who form a corporation to manage their own non-monetary tribal assets on a day-to-day basis, with the protection of the United States, but without the extensive federal management and control of such assets. These corporations could, for example, take land into trust on a Tribes' behalf. Allowing tribes who have the adequate resources to form Section 17 corporations to manage their own tribal assets via such corporations would vest the tribe with management authority over its own assets, provide some protection for the assets, and simultaneously limit the liability of the Government for trustee mismanagement of such assets.

2. Regional Oversight Committees

Stakeholder advisory and oversight panels are not a novel concept in the management of public resources, and are currently utilized to improve the Government's management of federal public lands. Pursuant to the Federal Land Policy and Management Act ("FLPMA"), codified at 43 U.S.C. Ch. 35, 1739, the BLM convenes citizen advisory councils (called "RACs") who have input into BLM's land policy and management decision. The RACs are comprised of local citizens who live in a region and whose assets will be directly impacted by BLM planning, policy, and management. The RACs furnish advice to the BLM about land-use plans, land-classification, retention, management, and disposal of public lands in the RAC's region. The advisory panel model has been explored to assist the BIA in improving its appraisal of Indian-owned agricultural land.[93]

The RAC model can be replicated on a regional basis, and can convene local tribal leaders whose tribal assets will be impacted by decisions made by federal agencies. A tribal advisory panel could assist the

[90] Wheeler-Howard Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 988, as amended by Act of May 24 1990, Pub. L. 101-301, §3(c), 104 Stat. 207, codified as amended at 25 U.S.C. § 461 *et seq.*

[91] 25 U.S.C. § 477.

[92] It is important to note that this "bare trust" limits the Government's liability for breaches of trustee duties. It seems that the greater control a tribe exercises over an asset, the less likely it is that the Secretary will be liable for its failure to meet its fiduciary duties as trustee. *See, e.g.*, *United States v. Navajo Nation*, 527 U.S. 488 (2003) and *United States v. Mitchell* , 445 U.S. 535 (1980). Thus, while the United States will protect the Tribal Section 17 corporate property from taxation and alienation, the United States will not be monetarily liable for the management by the Section 17 corporations.

[93] See Indian Rangeland Management Task Force proposal attached hereto.

Government by furnishing advice on management and policy of tribal trust assets and offering suggestions on where resources should be focused to improve the management of tribal trust assets.

D. What Are My Three Top Recommendations That You Think Would Improve Or Strengthen Trust Management And/Or Administration For The Commission To Consider?

Considering the above comments, the following are the top three recommendations:

1. The Government should allow OST to sunset and should re-centralize management for non-monetary and monetary Indian assets in BIA. This re-centralization will increase resources available for managing Indian assets and will allow the BIA to build expertise regarding Indian assets within one agency. Further, this will diminish the chance that agencies will have conflicting interests in managing Indian resources. Alternatively, increase Indian oversight and control of tribal assets by either allowing tribes to create Section 17 corporations to manage their own non-monetary assets or forming regional advisory panels to advise federal agencies in their management of tribal trust assets.

2. The Government should produce a document or regulation that articulate: (1) which assets are tribal trust assets; (2) the Government's fiduciary duties vis-à-vis Indian trust assets; and (3) the Government's required standard of performance. Such document should reaffirm that the Government is subject to the highest fiduciary standard in its role as trustee of Indian assets.

3. The Government should re-focus funding intended for Indian assets to agencies and personnel charged with managing Indian assets. The Government should build expertise in managing Indian assets.

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Recommendations for Improving the Federal Government's Management of Non-Monetary Indian Trust Assets

Tom Fredericks

September 13, 2012

United States' Changing Trustee Role

- Parameters of the Federal Trust responsibility have been developed through legislation, statutes, and Supreme Court opinions.
- Current trend is to diminish the scope of the United States' responsibility and require duties to be expressly articulated and prescribed by statute
- Changing parameters make it difficult to know what United States' trustee duties are

DOI's Shifting Focus

Cobell litigation and Trust Fund Management Reform Act of 1994 shift DOI focus to management of monetary tribal trust assets, and accounting and investment thereof.

Creates larger, bifurcated bureaucracy for management of all Indian trust assets

Dilutes funding and personnel resources for managing non-monetary Indian trust assets.

Three Overarching Issues with United States as Trustee

1. The standards of accountability and duties encompassed in the Government's trustee role are ambiguous and fluctuating.
   - Tribes must prove an asset is a trust asset
   - Tribes must prove a particular duty is encompassed by the Government's trustee role
   - Tribes must establish a standard of care for the Government's performance of its trustee duties and show that such standard of care was not met

Three Overarching Issues with United States as Trustee

2. The DOI's management of Indian trust assets is dispersed among multiple agencies.

- Unwieldy, multiple-agency bureaucracy
- Diverts resources to multiple agencies instead of focusing resources on daily management personnel
- Prevents one agency from creating expertise and training personnel in Indian asset management

Three Overarching Issues with United States as Trustee

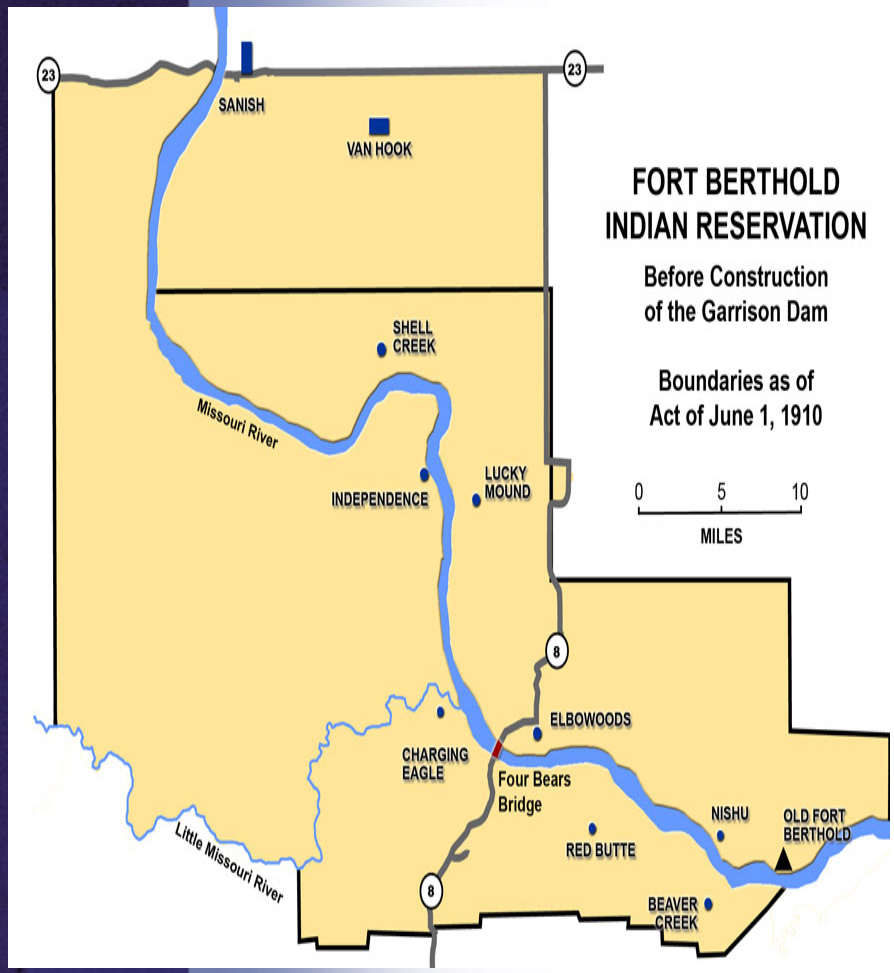
3. Government has conflict of interest in certain circumstances.

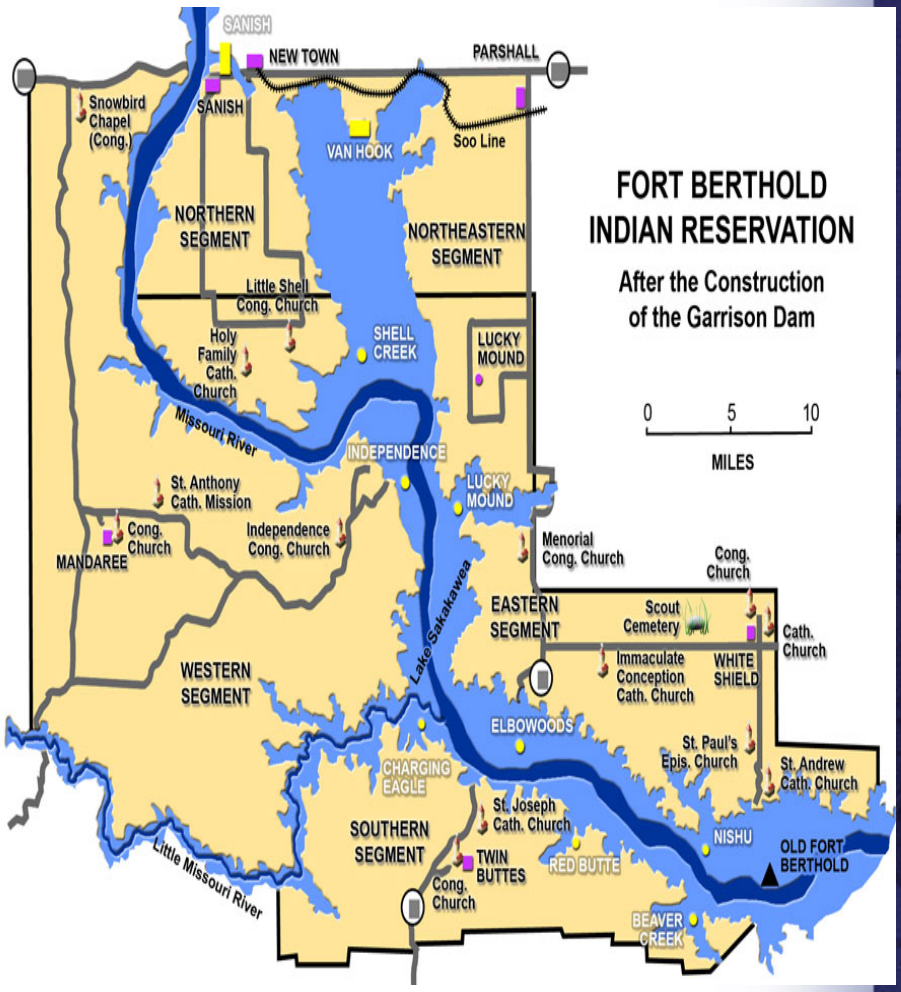
- Where Government is litigating with a tribe and is both Defendant and Plaintiff.

- When Government agency must act in best interest of the Government it may conflict with best interest of a tribe.

- Examples:
  - BLM oil and gas permitting where it considers public-uses but should consider the best interest of the Indian mineral owner

Pick-Sloan project that flooded valuable Indian land in South Dakota, North Dakota, Nebraska and Montana.





Question:
What are the most important functions the Government, as trustee, performs with regard to management and administration of a Tribe's non-monetary assets?

1. Accurate appraisal and valuation of the asset and providing accurate valuation in a timely manner.

2. Monitoring performance of the lease and ensuring that lessee/permittee complies with lease terms and federal and tribal regulations.

3. Collecting and investing royalties and accounting for such collection and investment, similar to the Government's function for monetary tribal assets.

1. Accurate Appraisal and Valuation

Providing accurate valuation and current market rates in the relevant market

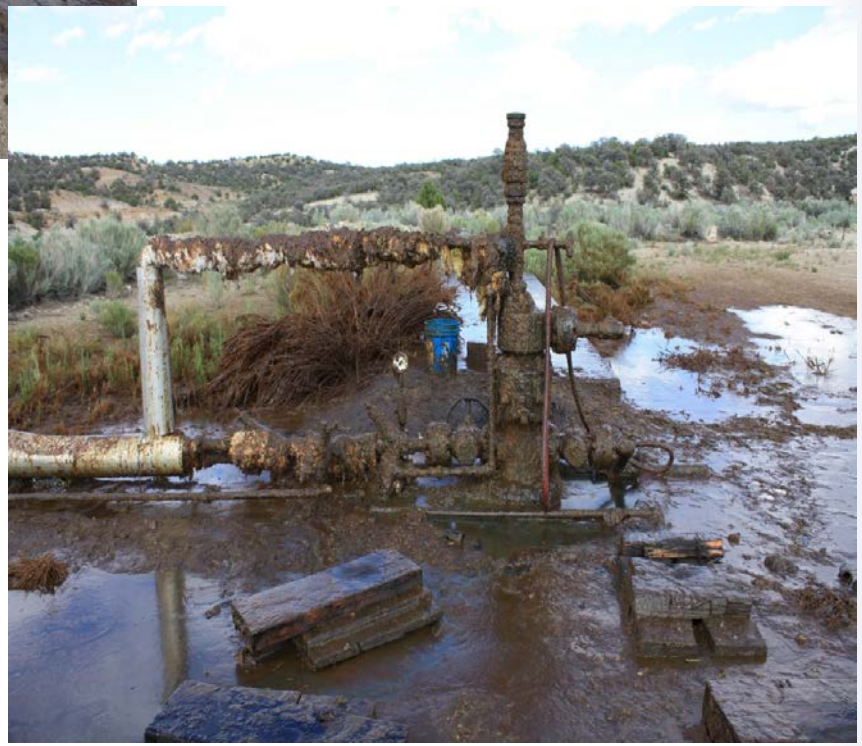
- Minerals: market rate for the relevant basin
- Timber: securing the highest bid for timber
- Grazing: taking into account relevant economic factors such as rangeland condition and infrastructure

Providing appraisals in a timely manner for contract negotiation or bids

Advising Indian owner of what a fair return is for all assets

2. Monitoring Performance of the Lease

- Ensure lessee or permittee compliance with lease or permit terms, federal laws and regulations, and tribal laws and regulations
- Oil and gas:
  - Diligent development
  - Adequate bonds for remediation
  - Environmental concerns and minimal impact on Indian land
  - No drainage
  - Adequate infrastructure and extraction
  - Remediating site and closing well when finished



Timber

- Timber harvesting in sustainable manner

Grazing

- Adequate performance bonds
- Monitoring that there is no overgrazing
- Ensuring that rangeland planning is complete and accurate and ensure that lessees comply with plans

Land Use (Easements, Rights-of-way, etc)

- Ensure compliance with terms of specific permit

Question:
What are the Pros and Cons of Private Versus a Public Trustee for Non-Monetary Assets?

- Cons of a Private Trustee:
  - Infrastructure for outreach to Tribes is not developed
  - Infrastructure for monitoring performance of lessees/permittees is not developed

- Benefits of a Private Trustee:
  - laws regarding trustee duties and standards of performance are well-developed
  - No conflicting obligations
  - Well-developed expertise and ability to focus on management of Indian assets

Question:
What are the Pros and Cons of Private Versus a Public Trustee for Non-Monetary Assets?

- Benefits of a Public Trustee
  - Access to resources that private trustee will not have
  - Infrastructure, such as local offices, that facilitate outreach to Tribes and on-the-ground monitoring
- Cons of a Public Trustee
  - Conflict of interest
  - Ambiguous duties and standards of performance
  - Complex bureaucracy and multiple agency management dilutes resources and prevents building expertise in Indian asset management

Question:
What Type of Involvement Should Tribes Have With The Government's Oversight of A Tribe's Non-Monetary Assets?

- More direct control for those Tribes who volunteer for such control.
  - Section 17 Tribal Corporation is a good mechanism for direct control.

- More oversight authority in all regions.
  - Regional Oversight Committee model

Top Three Recommendations

1. Allow OST to sunset and re-consolidate management for non-monetary Tribal assets in one agency.

2. Develop statutory or regulatory clarification of the Government's trustee duties and standards of care, which reaffirms that Government is held to highest fiduciary standards for its management of Tribal assets.

3. Increase resources dedicated to managing non-monetary Tribal assets. Re-focus Government entities on managing non-monetary assets by increasing or focusing funding on agencies that manage such assets and building expertise specifically-focused on Indian asset management. Increase tribal involvement in managing non-monetary assets through Section 17 corporations and oversight committees.