

The Federal Trust Responsibility

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Indian nations and the United States government have a sovereign-to-sovereign relationship established by treaties, agreements, acts of Congress, and court decisions. European nations that “discovered” what is now the United States asserted exclusive rights to deal with the indigenous nations in matters related to land and intergovernmental relations. When the United States Constitution was adopted, the federal government assumed exclusive authority in all matters related to Indian affairs. Supreme Court Chief Justice John Marshall stated that the “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, later treaties and agreements were geared to the United States’ acquisition of land. In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples. These rights were to be safeguarded by the United States and these promises are at the foundation of the federal trust responsibility.

Although federal policies changed over time from the allotment and assimilation era to outright termination of the federal-tribal relationship, since 1970 the federal policy is one of Indian self-determination without termination. This modern policy is backstopped by the federal government’s trust responsibility to Indian nations. The Supreme Court concluded that the United States “has charged itself with moral obligations of the highest responsibility and trust.” This general principle is

implemented through many federal statutes and programs that implement past promises and modern policy and are intended to promote economic self-sufficiency and the distinct sovereign status of Indian nations and their people. Specific obligations include the following:

- The Department of the Interior is responsible for managing 56 million surface acres and 57 million acres of subsurface mineral estates for 384,000 Individual Indian Money (IIM) accounts and about 2,900 tribal accounts (for more than 250 federally recognized tribes). Tribal trust assets include land, timber, grazing, oil, gas, and mineral resources.
- On trust lands, the Department manages about \$3.9 billion in trust funds and more than 109,000 leases. For fiscal year 2011, funds from leases, use permits, land sales, and income from financial assets, totaling about \$400 million, were collected for about 384,000 open IIM accounts. In FY 2011, about \$609 million was collected for the approximately 2,900 tribal accounts. These numbers are based on the FY 2011 Audit.
- There are currently 156,596 individual Indian land allotments, and one of the major challenges facing the administration with regard to these allotments is the increasing fractionation of land ownership. As of early 2012, there are over 4.7 million fractionated interests.
- There are 566 Indian tribes in Alaska and the lower 48 states that are acknowledged by the United States. Federal policy supports self-determination for these tribes in the exercise of authority over tribal territories and resources, and a wide variety of roles under many federal statutes and programs.

At times in the past, the trust responsibility was viewed as a demeaning and paternalistic guardian-ward relationship. That model is unsuited for the modern self-determination era. That outmoded trust model, however, still influences the performance of the federal government's obligations to Indian nations and people. For example, many federal statutes require federal approval of the leasing of tribal and individual Indian lands for various purposes. The exercise of this authority can sometimes be cumbersome if not implemented in a timely fashion. The federal responsibilities, however, should

serve the valuable function of assisting to ensure the appropriate financial return to tribal and individual Indians from the use of trust assets. While all of the recent Presidential administrations and several acts of Congress call for extensive consultation with Indian tribes and people in matters affecting Indian interests, there are many situations where Indian interests are not adequately considered and tribal requests for action are not accepted. In some cases this may be due to conflicting obligations imposed on the federal administration by Congress, or due to Supreme Court rulings that allow the United States to escape liability for alleged mismanagement of tribal trust resources. In some cases the United States is more concerned about protecting itself from future liability than in effectively executing its trust duties to Indian nations. Federal officials must establish clear protocols for disclosing and minimizing conflicts of interest, which should be implemented after full consultation with Indian nations. This must go beyond conflicts that meet various legal standards and extend to appearances of conflicts of interest that affect tribal interests in terms of assets.

It is thus critical that the United States continue to acknowledge its obligations to Indian nations in order to further the sovereign-to-sovereign relationship at the foundation of the many complex dealings that occur on a regular basis. It must be remembered that the United States would not exist but for the acquisition of tribal territories that were given in exchange for the continued support and respect of the federal government. The promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples impose solemn obligations on all branches of the federal government. How those responsibilities are best administered in particular contexts will be the topic of further work and recommendations by the Indian

Trust Responsibility Reform Commission. The purpose of this document is to set out some of the foundational principles that must guide how the United States carries out its trust obligations.