RECENT DEVELOPMENTS IN DEFINING THE FEDERAL TRUST RESPONSIBILITY
(The Case of the Reluctant Guardian)

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1. WHAT IS TRUST RESPONSIBILITY?

The doctrine of the trust responsibility had its beginning in the opinion of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In that case the Chief Justice called Indian tribes "domestic dependent nations" and suggested that "their relation to the United States resembles that of a ward to his guardian." 30 U.S. at 16-17. It is from this metaphor and general principle that the doctrine of federal trust responsibility to Indian tribes developed.

The Supreme Court, in defining the trust responsibility, has held that:

[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941).

The same trust principles that govern private fiduciaries also define the scope of the federal government's obligations to the Tribe. *Covelo Indian Community v. F.E.R.C.*, 895 F.2d 581, 586 (9th cir. 1990). These include: 1) preserving and protecting the trust property; 2) informing the beneficiary about the condition of the trust resource; and 3) acting fairly, justly and honestly in the utmost good faith and with sound judgment and prudence. *See Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986); *Trust*, 89 C.J.S. §§ 246-62. Additionally, a long line of cases imposes a trust duty of protection on agencies when their off-reservation actions threaten the use and enjoyment of Indian land. *See, e.g., Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988) (Department of the Interior violated the tribe's interests in coal leases on eight tracts of public lands surrounding the reservation).

The American Indian Policy Review Commission has suggested that, although the initial enunciation of the doctrine described the relationship as one of guardian and ward, that terminology should be replaced by language from the law of trusts. American Indian Policy Review Commission at 127. The whole basis of a guardian and ward relationship is the presumption that the ward is incompetent to manage his or her own affairs and, in fact, can have no say in those affairs. A trusteeship does not similarly assume incompetence on the part of the beneficiary. Further, the beneficiary of the trust does not necessarily have no say in the decisions made by the trustee. Perhaps during the apogee of the "plenary power" theory of Indian relations, *see, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the relationship between many tribes and the United States government approached one of ward to guardian. But such a condescending characterization should not be perpetrated.

That a general trust relationship exists between the United States and Indians does not mean, however, that such a duty is regularly and generally enforced by courts. True, courts commonly reiterate that the trust imposes on the United States an "overriding duty . . . to deal fairly with Indians wherever located." *Morton v. Ruiz*, 415 U.S. 199, 236 (1973). But the history of this

country teaches that fairness has rarely characterized the United States-Indian relationship nor has some general concept of fairness been enforced by the courts. Nevertheless, both the courts and Congress generally accept the notion that there exists a special relationship between American Indians and the federal government, a relationship often likened to a trust. *See, e.g., United States v. Mitchell*, 436 U.S. 206, 225 (1983); 25 U.S.C. § 1601(a) (Indian Health Care Improvement Act).

As the Supreme Court has stated:

"Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the `disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Seminole Nation v. United States, 316 U.S. 286, 297 fn. 12 (1942).] [Quoting from Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1.

In a simplified fashion, some central tenets (and limits) of the trust doctrine are as follows:

1.1 Courts generally hold that the nature of the trust responsibility and its specifics (except, perhaps, when dealing with Indian property and money) are defined by Congress. *See, United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). Congress could presumably subtract, limit, expand or even terminate the trust altogether. Unless a Congressional action violates some other provision of the constitution, such as the Fifth Amendment prohibition against taking of property without just compensation, Congressional action in defining the trust is not reviewable by a court of law. *See, Menominee Tribe v. United States*, 607 F.2d 1335 (Ct. Cl. 1980), *cert. denied* (4454 U.S. 950 (1980).

1.2 Because of Congressional control of the nature of the trust, courts have generally said that an enforceable trust relationship "must be . . . based upon specific statute, treaty or agreement which helps define and, in some cases, limit the relevant [trust] duties. . . ." *Joint Tribal Council of Passomoquaddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). Thus, courts have generally not found trust obligations to provide general financial support, social services, education and that sort of thing to Indians, except when it is explicitly required by Congress. *See, Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1970) *cert denied* 400 U.S. 819 (1970).

1.3 The trust with respect to tribal property and money is somewhat different, however. The courts do generally impose a trust obligation on the federal government when it manages tribal property or money. *See, e.g., United States v. Mitchell*, 463 U.S. 207 (1983). In addition, courts have found under the Non-Intercourse Act a federal a duty to protect Indian land from improper alienation. *See, Joint Tribal Council of Passomoquaddy Tribe v. Morton*, *supra*.

1.4 Although courts are hesitant to enforce a generalized trust obligation outside of the property context, and require instead that enforceable duties be defined by Congress, they have nevertheless used the generalized existence of a trust obligation to accomplish two other important objectives. First, the existence of the trust is used to support the general rule of statutory construction whereby laws passed for the benefit of Indian peoples are broadly construed to protect their interests. *See, Cohen's Handbook of Federal Indian Law*, (Second Edition 1982) at 221-224. Second courts use the existence of some generalized trust responsibility to impose obligations of procedural fairness on the United States when it is making decisions affecting Indians. *See, Morton v. Ruiz,* 415 U.S. 199 (1974).

1.5 Courts will enforce both federal statutes and the Constitution against the federal government. In doing so, they often mention the trust and read the statutes to create "trust-like" duties. But as a legal matter, the existence of the trust is not required to protect tribal rights set out in statutes, treaties or the Constitution.

1.6 Cases on trust duty have often discussed issues of "remedy." In some cases, a court might find that a trust exists, but that it only has power to enjoin continued violations of the trust rather than to grant money damages for past violations. Only the Claims Court can award money damages against the United States. *Cf. Duncan v. United States,* 517 F. Supp. 1 (N.D. Cal. 1977). While the battle over the nature of relief can get fairly complex, it is probably sufficient to note here that except in a few isolated instances, money damages are available for Indian tribes for United States' violations of its trust obligations with respect to management of trust property and money. *See, United States v. Mitchell*, (*Mitchell II*) *supra*.

1.7 Finally, depending on Congressional statutory direction, the trust relationship between the United States and Indians can run both to tribes *see, e.g., Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980) and to individual Indians see, *e.g., Cramer v. United States*, 261 U.S. 219 (1923); *Morton v. Ruiz,* 415 U.S. 199 (1973); *Cf. Chippewa Indians of Minnesota*, 307 U.S. 1 (1939) (individuals may not enforce rights belonging to tribe where the Congress dealt with tribal Indians).

2. WHO HAS A TRUST RESPONSIBILITY?

Generally, the federal government and all federal agencies must exercise their respective responsibilities in the context of a trust responsibility to Indian Tribes. They may not adopt policies, promulgate regulations, or take actions that would compromise their ability to fulfill their fiduciary responsibilities to those Tribes.

The federal trust responsibility to Indian tribes applies to all federal entities. *See Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) ("any federal government action is subject to the United States' fiduciary responsibility toward the Indian tribes"). In *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990), the court clearly ruled that *all* government agencies have "fiduciary" responsibilities to tribes. As agencies of the federal government, they are subject to the United States' fiduciary responsibilities towards Indian tribes. The same trust principles that govern private fiduciaries determine the scope of Federal agency obligations. The trustee must always act in the interests of the beneficiaries. *Covelo, supra,* at 586 (citations omitted)(specifically

dealing with the Federal Energy Regulatory Commission). (FERC did not abuse discretion in refusing later intervention to the Covelo Community.)

The Ninth Circuit has underscored the importance of trust responsibility for all agencies:

We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights. See, e.g., Joint Bd. of Control v. United States, 862 F.2d 195, 198 (9th Cir. 1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.

Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) (Part of the Department of Commerce's federal trust responsibility is to protect the exercise of reserved tribal fishing rights.)

3. TRUST RESPONSIBILITY TO MANAGE TRIBAL FUNDS AND TRIBAL PROPERTY.

3.1 What Tribal Property Is Covered By The Trust Responsibility?

Tribal trust law is most well developed in the arena of trust property and money. The courts have made it fairly clear that certain kinds of Indian property and monies are held by the United States in trust. In such cases, the government must assume the obligations of a fiduciary or trustee.

First, the courts have imposed trust duties with respect to tribal funds. *E.g., Seminole Nation v. United States*, 316 U.S. 286 (1942); *Angle v. United States*, 709 F.2d 570 (9th Cir. 1983); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). Additionally, as the Indian Claims Commission noted, "the fiduciary obligations of the United States toward restricted Indian reservation land, including minerals and timber, are established by law and require no proof." *Blackfeet and Gros Ventre Tribes of Indians*, 32 Ind. Cl. Comm. 65, 77 (1973). As a general matter, the United States must properly manage and, protect such resources as: tribal land, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); tribal minerals, *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227 (1985); oil and gas, *Navajo Tribe of Indians v. United States*, 610 F.2d 766 (Ct. Cl. 1979); grazing lands, *White Mountain Apache Tribe v. United States*, 8 Cl. Ct. 677 (1985); water, I*d.*, and timber, *United States v. Mitchell*, (*Mitchell II*), *supra*.

3.2 How Does a Trust Over Indian Property Arise?

There are two ways in which the trust relationship with respect to Indian property is seen to arise. First, Congress can explicitly announce an intent to create a trust, as when certain funds are placed "in trust" for a tribe or tribes. Second, when dealing with tribal property or money, there need not be a specific statute or treaty creating the trust relationship. Rather, "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over [resources] . . . and property belonging to Indians. All of the necessary elements of the common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, or funds)." *United States v. Mitchell*, *supra*, 463 U.S. at 225, citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). One court has suggested with respect to money, that "where the United States holds funds for Indian tribes, a

trust relationship exists unless there is explicit language to the contrary." *Angle v. United States, supra,* citing *Moose v. United States,* 674 F.2d 1277, 1281 (9th Cir. 1982).

3.3 What Rules Govern A Property Or Money Trust?

Once a court determines that a trust relationship exists between the United States and tribes with respect to tribal property and tribal funds what rules constrain the actions of the United States?

First, of course, an agency of the United States must comply with federal statutory law. Thus, for instance, if the law requires that the BIA manage federal timber on a sustained yield basis, its failure to do so would violate the *statutory* terms of the trust relationship. *See, Mitchell II, supra*.

In addition, however, the courts have held that once a property or money trust relationship is found to exist between the United States and an Indian or an Indian tribe, many of the general common law rules established to govern the fiduciary obligations of a trustee towards his beneficiary will apply to any government action. *See, Mitchell II supra*. On the other hand, it cannot be said that all the rules applicable to private fiduciaries are necessarily and automatically applicable to the trust relationship between the United States government and tribes. *See, United States v. Nevada*, 463 U.S. 110, 127 (1983) ("while these [principles of private trust law] undoubtedly provide useful analogies in cases such as these, they cannot be regarded as finally dispositive of the issues.") The Claims Court, which regularly applies the general principles of trust law says this:

[Although we can apply the general principles of trust law] this does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States . . . . In each situation the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the government and the particular tribe.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980). We now turn to some of the obligations courts have imposed on the federal government in Indian cases.

3.3.1. Most generally, a trustee must act in a reasonably prudent manner in managing the trust assets. With respect to tribal funds, for instance, the United States has the fundamental obligation both to protect the Indian beneficiaries' principal, that is, the so-called trust corpus, as well as to maximize the trust income from the corpus. *See, Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975). Thus, the United States can be held liable in trust fund cases for its failure wisely to invest the monies. *See, Id. Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393 (8th Cir. 1987).

3.3.2. The United States is obligated to protect Indian trust lands from alienation. *Joint Tribal Council of Passomoquaddy Tribe v. Morton, supra*. This is true even when the trust is a limited one. Typically, the primary purpose of federal trust land is to maintain it in federal and tribal hands. *See, United States v. Mitchell,* (*Mitchell I*), *supra,* (1980); *United States v. Chippewa Nations*, 229 U.S. 498 (1912).

3.3.3. The United States as property trustee is generally prohibited from acting in a manner that benefits it and harms its beneficiary. Thus, the United States cannot take economic advantages for itself which should be flowing to its beneficiary, e.g., by leasing its own land but refusing to lease adjacent tribal land. *Navajo Tribe of Indians v. United States*, *supra*, 610 F.2d 766, 768 (Ct. Cl. 1979). This general rule of trust law, however, is somewhat softened in its restrictions on governmental actions because Congress can assign to the executive branch obligations which might conflict. The Supreme Court has said:

It may be that where only a relationship between the government and a tribe is involved the law respecting the 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 as even authorizing 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.

United States v. Nevada, *supra*, 463 U.S. at 142. The Court, unfortunately, did not go on to explain how the executive branch should handle the situation when Congress has assigned it potentially conflicting obligations.

3.3.4. With respect to natural resources, the courts do not require that the United States always seek to lease or sell the resources for profit. Thus, for instance, the Claims Court has held that the government is not obligated actively to seek out persons to drill reservation oil and pay royalties. *Navajo Indian Tribe v. United States*, *supra*, 610 F.2d 766. Nor must it establish a grazing permit system whereby non-Indians would graze on reservation land and pay the tribe for the privilege. *See, White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614 (1987). The Indian Claims Commission described this rule as it generally follows:

Rules for the management of commercial real estate [for instance] by private trustees have little application [in the Indian context]. The primary purpose of establishing Indian reservations is to provide a home for the Indians, where, it was hoped, they might eventually make their living by their own efforts. Consequently, the trust status of reservation land never wholly ousted the Indians from its management, for which, in more recent years, they have been encouraged to assume increasing responsibility. Indian reservations are not like apartment houses which a trustee is expected to keep filled with paying tenants at all times. No general law requires the Government to administer Indian land for profit at all.

Blackfeet and Gros Ventre Tribes v. United States, 32 Ind. Claims Com. 65, 77 (1973). Thus, the Claims Commission concluded that "the government has never been under an obligation to lease out [reservation] . . . land."

The fiduciary obligations to account for trust activities "arises only where the Government has undertaken to permit a third party to use reservation land, to extract reservation minerals, or to cut or haul away reservation timber, or when the government has done one or more of these things itself." *Id*., 32 Ind. Cl. Com. at 78. *See, also Three Affiliate Tribes of the Fort Berthold Reservation v. United States*, 36 Ind. Cl. Com. 116, 130 (1975). Thus, in *White Mountain Apache Tribe v. United States, supra*, the court said that the United States was not required to establish a

grazing permit system in order to make Apache land economically productive. But once it decided to institute a system, it had to run it prudently and for the Indians' financial benefit.

3.3.5. Management of tribal land or resources for tribal income creates, really, a dual obligation on the government. It must both make money from the resources and protect the value of the trust property. For instance, when managing timber, the government must "obtain revenue from the forest and . . . protect the forest. To neglect or minimize that latter in performance of the former would amount to a breach of fiduciary duty." *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 672 (1987). Similarly, if the government permits grazing on federal land it must insure that the grazing does not lead to erosion and diminution of the value of the land itself. *Id.; see, also Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (1986) (obligation to protect ground water to permit continued agricultural uses). In the famous *Mitchell* case, the allottees contended that the federal government failed to replant harvested areas, thus reducing the long-term value of the reservations resources. *See, Mitchell v. United States*, 10 Cl. Ct. 63, modified 10 Cl. Ct. 787 (1986). At the same time, the government has to make choices that are advantageous for the tribes financially and must protect their interests when negotiating or regulating non-Indian lessees of tribal resources. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986) (*en banc*); 793 F.2d 117 (1986).

3.3.6. In seeking a profit for tribes, the government must act as a prudent manager using good business judgment, seeking to obtain full value for the resources sold or leased. Nevertheless, the mere existence of a difference between what the government obtains for the Indians and what a later independent analysis identifies as the fair market value, does not automatically show a breach of fiduciary obligation. Not all deals turn out well. The government is a trustee, not a guarantor. As long as the government makes reasonable and prudent efforts the failure of some investments does not give rise to a cause of action. *See, United States v. Mason*, 412 U.S. 391 (1973) (failure of the United States to challenge the legality of inheritance tax on certain Indian property held not to be unreasonable); *Montana Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601 (1985) (approval by Secretary of the Interior, under 25 U.S.C. § 81, of certain contracts between an Indian-chartered corporation and a bank did not make the United States liable to make up any losses which the Indians suffered as a result of the contract approved). *Cf. Hydaberg Coop Association v. United States*, 667 F.2d 64 (Ct. Cl. 1981) (government not guarantor of profits of tribal enterprise). On the other hand, if a discrepancy of value and price is extreme, a court might find the difference sufficient proof of gross neglect and actionable on its face. *See, Coast Indian Community v. United States*, 550 F.2d 639 (Ct. Cl. 1977) (right of way, worth at least $50,000 sold for $2500).

3.3.7. The government must, at a minimum, take such steps to protect the level of water necessary to continue existing Indian agricultural practices. *See, Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (1986). However, it would appear that there is no obligation on the part of the government either to develop the full potential of Indian water supplies or even to protect the full extent of Indian water rights. *Id.* It seems also clear that the United States may not act in a manner that suppresses or limits Indian use of water to which they have rights, *see, White Mountain Apache Tribe v. United States*, *supra*, 8 Cl. Ct. 677 (1985), 11 Cl. Ct. 614 (1987).

3.4. Beneficiary Consent Does Not Defeat Trust Responsibility.

In standard trust law, the beneficiary may not complain about an action of the trustee to which the beneficiary consents. *See, e.g.*, *Restatement of Trusts Second*, § 216. Of course, in many instances, tribes must by statute give their consent to natural resource actions of the BIA. *See, e.g.*, 25 U.S.C. § 324 (right-of-way approvals); 25 U.S.C. § 398 (oil and gas leases); 25 U.S.C. § 402a (lease of agricultural land). No cases are known in which tribal council general consent to BIA action has been used successfully to defend a breach of trust case. The Indian Claims Commission knew well that Indians were involved in the management of their resources, but it never suggested that constituted a valid defense in a tribal property breach of trust case. *See, Blackfeet and Gros Ventre Tribes*, *supra*, 32 Ind. Cl. Comm. at 77. Additionally, in some cases there appears to have been explicit consent to actions that were held, nevertheless, to be a breach of trust. *See, e.g., United States v. Mitchell*(*Mitchell II*), *supra*, (Supreme Court notes that Indian allottees must consent to certain forest management decisions); *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977); *Duncan v. United States*, 597 F.2d 1337 (1979) (tribe agreed to what turned out to be inadequate water supplies, yet the government was found to have breached a trust in not providing water supplies).

A tribe may bring a breach of trust action if the government lets a tribal council, which it knows to be corrupt, mismanage tribal funds. In such a context, the corrupt council could not properly provide the tribe's consent for any action, and the government was held liable for participating in the loss of tribal resources because it dealt with the incompetent or corrupt council. *See, Seminole Nation v. United States*, 316 U.S. 286 (1942).

Although beneficiary consent does not seem to prevent tribal trust lawsuits in the natural resources context, there are a number of cases involving tribal funds which are worth pondering. In that setting, it appears that actual tribal control of the funds is seen as a valid defense against a claim that the federal government breached its trust in using the funds. For instance, in *Navajo Tribe v. United States*, 34 Ind. Cl. Com. 432, 434 (1974) the Commission dealt with a contention "that the Commission erred in ordering defendant to account for [the use of] those tribal funds which are controlled and managed by plaintiff [tribe]. Plaintiff's Reply concedes this issue . . . ." Given that concession, the Claims Commission ordered that the federal government was not required to account for any tribal funds which had been transferred directly to the plaintiff for its use.(1)

A similar issue came up in another funds accounting case, *American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (Ct. Cl. 1981). The court required a government accounting of the use of funds. But in doing so, it cited the *Navajo* case and said:

If complete control of tribal organization funds has been transferred to the tribe, the government is not required to account. If the government contends that control has been transferred it has a burden of showing that fact, and, where tribal leadership did not control use of the money, the government must account.

667 F.2d at 1003.

There is a difference of course between control and consultation. In *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 512 F.2d 1390 (Ct. Cl. 1975) the government tried to defend its failure to use productively tribal funds in part by pointing to its policy of consulting with the Indians. The government said the tribes failed to respond usefully or on time. The court responded to that claim as follows:

[W]hile such consultation may have been a useful part of the defendants overall policy to make the Indians ready for dissolution of trust status, the government was duty bound to make the maximum productive investment unless and until specifically told not to do so by a tribe and until the defendant also made an independent judgment that the tribes request was in its own best interest.

512 F.2d at 1396. If this rule were adopted generally, it would appear that as long as the federal government approves tribal actions, it may still be held liable as a trustee if the actions are imprudent.

In *Loudner v. United States*, the court held that certain descendants could recover judgment funds. In *Loudner*, certain lineage descendants of the Sisseton-Wahpeton Sioux Tribe did not learn of a judgment fund until more than twenty years after distribution of the fund. The government alleged that the action was too late, and it was barred by the statute of limitations. In disallowing this defense the court noted that the beneficiaries duty to discover claims against the trustee was lessened by the beneficiaries' right to rely upon the trustee's good faith and expertise and that the government's efforts to call attention to the original distribution through Federal Register postings, news releases and other matters was insufficient to put reasonably diligent beneficiaries on notice. *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997).

4. WHAT IS THE NATURE OF THE TRUST RESPONSIBILITY OUTSIDE OF THE INDIAN PROPERTY AND INDIAN FUNDS CONTEXT?

Courts have hesitated to find enforceable substance of the trust responsibility outside the context of tribal property or funds. Thus, for instance, the courts have refused to find the existence of some general trust responsibility of the United States to care for the general health and welfare of Indians absent an explicit statute, treaty or executive order. The general rule was stated in *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980):

[W]here the federal government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) . . . . On the other hand, if no tribal money or property is involved and the question is, for instance, whether the United States has a general fiduciary obligation to educate Indians, the existence of the special relationship for that purpose depends upon the proper interpretation of the terms of some authorizing document (e.g., statute, treaty, executive order).

The court in *Navajo* relied on its own case, *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1198 (Ct. Cl. 1980); *cert. denied* 400 U.S. 819 (1970), to support this view. The Indian community there had charged that the United States had failed to provide adequate educational opportunities and health care to the tribe, in violation of the trust responsibility. It said that having undertaken to help the Indians, the government must do so

reasonably well. The court rejected such arguments. 427 F.2d at 1199. In other words, the court would not imply an enforceable trust relationship simply because the United States has taken over management and control of tribal education, even though it would imply a trust if the government had taken over management and control of tribal property. *See, also Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982); *Fort Sill Apache Tribe v. United States*, 477 F.2d 1360 (Ct. Cl. 1973).

Thus, the courts have held that the Federal Energy Regulatory Commission need not afford a tribe greater rights than they otherwise would have had under the Federal Power Act in assigning preliminary power licenses. *Skokomish v. F.E.R.C.*, 121 F.3d 1303 (9th Cir. 1997). Neither must the FAA make special arrangements for an Indian tribe if it otherwise complies with applicable law in determining flight paths. *Morongo Band v. FAA*, 161 F.3d 569 (9th Cir. 1998).

Nevertheless, the courts have found some trust duties outside of the money and property context. First, and most clearly, courts have found that the trust duty imposes certain procedural obligations on the federal government. Second, the courts have imposed some substantive trust or trust-like obligations on the federal government related to social services for Indians.

4.1 Trust Responsibility And Procedural Rights.

Trust responsibility means that Federal agencies must consult with tribes before taking action which affects their property and rights. Thus, the United States must observe procedural fairness when it is making decisions affecting Indians. *See, Morton v. Ruiz*, 415 U.S. 199 (1974).

As a general matter, courts emphasize that special attention to procedural fairness is required because of the "overriding duty of our federal government to deal fairly with Indians wherever located" and the "distinctive obligation of trust incumbent upon the government in its dealings with these dependent and sometimes exploited people." *Morton v. Ruiz*, 415 U.S. at 236. Citing *Seminole Nation v. United States*, 316 U.S. 236 (1942).

In *Morton v. Ruiz*, the Supreme Court reviewed a decision of the BIA to deny certain general assistance (welfare) benefits to tribal members who lived off reservations. The BIA had determined to limit such benefits only to those persons who lived on the reservation. The off-reservation Indians argued that violated the trust responsibility.

The Bureau of Indian Affairs (BIA) argued first that Congress knew of and approved the limitations. The Court rejected that argument upon review of the legislative record.

The Court went on to note, however, that given a limit on available funds, the BIA obviously had to make benefit choices as long as they did not violate specific statutory directives. Given the breadth of the authorizing legislation (the Snyder Act, 25 U.S.C.§ 13), these choices necessarily lay, in large part, within the BIA's discretion.(2)

But the Court found that in this instance the BIA had erred by choosing its policy without promulgating the decision as an administrative rule available for public review and comment. The Court relied for its decision on the Administrative Procedure Act. But it also emphasized

that special attention to procedural fairness was required because of the "overriding duty of our federal government to deal fairly with Indians wherever located" and the "distinctive obligation of trust incumbent upon the government in its dealings with these dependent and sometimes exploited people." 415 U.S. at 236. Citing *Seminole Nation v. United States*, 316 U.S. 236 (1942).

In short, according to *Morton v. Ruiz,* the Snyder Act and subsequent Congressional appropriations did not impose a particular substantive obligation on the government to provide a particular level of assistance. (Indeed, the Court noted that if appropriated funds are not sufficient to provide fully for the needs of Indians, the resulting hard choices do not necessarily violate the trust. 415 U.S. at 230-231.) But the Court used the trust responsibility to impose the procedural obligation that the BIA make its decisions in an open and above-board manner. Several courts following *Morton* have imposed similar obligations in like circumstances. *See, e.g., Oglalla Sioux Tribe v. Andrus,* 603 F.2d 707 (8th Cir. 1979) (the assignment of superintendent of Pine Ridge Agency without full consultation with the Tribe violated the Administrative Procedure Act, BIA guidelines, and the "trust responsibility"); *Rogers v. United States,* 697 F.2d 886 (9th Cir. 1983) (failure to give adequate notice to distributees of judgment fund violated the trust); *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974) (Indians entitled to due process prior to termination of Indian Health Service benefits because of "overriding duty of fairness due to Indians");*Navajo Nation v. Hodel*, 645 F. Supp. 825 (D. Ariz. 1986) (failure to follow own internal decision guidelines violates trust).

This requirement of procedural fairness is now surely a basic component of the trust obligation, whether the issue involves Indian property or some other federal programs that affect Indians or Indian tribes.

4.2 Court Imposition of Other Substantive Obligations Under Trust Law.

There are other cases that impose some substantive obligations on the federal government based on the trust, or a "trust-influenced" reading of federal statutes and regulations in social service contexts.

One case arose in Alaska and may be the most unusual. In *Eric v. Secretary of the United States HUD*, 464 F. Supp. 44 (D. Alaska 1978), the court had before it an objection brought by certain Indians to the adequacy of housing provided under the so-called Bartlett Act. That law generally provided that housing should be constructed for Alaska natives. The court decided that the Act was passed, in part, to implement the trust responsibility and did, in fact, establish a trust relationship between the government and the Alaska natives with respect to housing. Having found that such a "housing" trust existed, the court nevertheless recognized that the Bartlett Act itself established no standards for the quality or nature of the housing to be provided. But, using the kind of theory typically used in the Indian property contexts, the court imposed on the federal government a general fiduciary obligation to provide decent, healthful housing. But *Cf., Begay v. United States*, 865 F.2d 230 (Fed. Cir. 1989) (Navajo-Hopi Settlement Act did not require United States to pay incidental damages allegedly caused by relocation).

In the case of *White v. Califano*, 437 F. Supp. 543 (D. S. Dakota 1977) *aff'd.* 581 F.2d 697 (8th Cir. 1978) the court considered the obligation of the United States to pay for emergency in-patient mental health care for an indigent member of the Oglalla Sioux Tribe. Citing statements in the Indian Health Care Act, 25 U.S.C. § 1601, referencing the unique relationship between the federal government and Indians and calling for adequate health services for Indians, the court decided:

Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the "unique relationship" between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U.S. Code pertained only to Indians.

437 F. Supp. at 555. On this basis, the court held that those cases limiting the enforceable trust responsibility to tribal property and money. It concluded, however, that the Indian Health Service had to provide in-patient mental health care for a seriously mentally ill person, when the state would not or could not do so. The court said that in health care, Congress had done much more than generally announce the trust responsibility.

Therefore, when we say [the court said] that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract, but rather to a Congressionally recognized duty to provide services for a particular category of human needs. The trust responsibility, as recognized and defined by statute, is a ground upon which federal defendants' duties rest in this case.

437 F. Supp. at 557.

Finally, the *Califano* court acknowledged that Congress only appropriated a certain limited amount of money. Obviously, the Indian Health Service had to use its discretion in determining what persons to serve with limited funds. The court determined, however, that that discretion was constrained by IHS regulations and it went on to read those regulations to require an allocation of funds for those with the most pressing health needs--such as severe mental illness.

In *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987), an individual indigent Indian claimed that she and her child were not being properly served by the Indian Health Service. She and her child could not obtain health care from the local or state government and demanded that the federal government take care of their health needs. In agreeing with her assertions, the Ninth Circuit did not rely quite as explicitly on the trust doctrine as had the Eighth Circuit in *White v. Califano*. Rather, the court concluded that the language of the Indian Health Care Act, "brought into sharper focus by the trust doctrine," required that the Indian Health Service either assist an individual Indian in obtaining other medical care (such as from a state) or provide the medical care itself. The court decided Congress intended that result. Thus, in a way, the *McNabb* case can be seen as an imposition by the court of a "trust like" obligation based primarily on a specific statutory announcement of the trust by Congress. Significantly, the court was unwilling to impose any particular kind of health care obligation based on the broadly worded Snyder Act and turned, instead, to the more specifically Indian Health Care Act.

The Ninth Circuit has also held that the federal government may not delegate its trust responsibilities to other governmental entities. *See Assiniboine and Sioux Tribes v. Bd. Of Oil and Gas*, 792 F.2d 782 (9th Cir. 1986).

4.3 Trust Responsibility and Treaty Rights.

Treaty rights are legally enforceable without reference to trust theory. *See e.g. Washington v. Passenger Fishing Vessel*, 443 U.S. 658 (1979). However, the courts have also reminded the United States that it has a trust duty to protect those rights.

Thus, the United States has been held subject to monetary damages if reserved Indian fisheries are harmed by federal mismanagement or environmental degradation. *See e.g., Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Northern Paiute Tribe v. United States*, 30 Ind. Cl. Comm. 210 (1973). *See also United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976).

The treaty right to take fish is a property right protected by the Fifth Amendment. As the district court in *Muckleshoot Indian Tribe v. Hall* stated:

The United States has a fiduciary duty and "moral obligations of the highest responsibility and trust" to protect the Indians' treaty rights. *Seminole Nation v. United States*, . . .

698 F. Supp. at 1510 (Corps of Engineers enjoined from permitting marina which would eliminate judicially recognized fishing areas). The Court observed that "no court has permitted the actual taking of fishing grounds without an act of Congress." *Id*. at 1512.

In upholding federal action providing for fisheries for Indians of the Hoopa Reservation in California, the Ninth Circuit noted:

. . . We must conclude, as we did in *Washington Charterboat*, that the Tribes' federally recognized fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.

Parravano v. Masten, 70 F.3d 539, 546-547 (9th Cir. 1995).

4.4 Executive Action and Trust Responsibility.

In modern times, the federal executive has recognized the unique relationship and trust responsibility of the federal government to Indian tribes. In his special message on Indian Affairs, President Richard Nixon disavowed the concept of termination of Indian tribes as follows:

Termination implies that the federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and it can therefore discontinue this responsibility on the unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians

and the federal government is a result instead of solemn obligations which have been entered into by the United States' government.

. . . .

. . . [T]he special relationship between the Indian tribes and the federal government which arises from these agreements continues to carry immense moral and legal force.

"Special Message on Indian Affairs," July 8, 1970, by Richard M. Nixon, quoted in "Documents of the United States Indian Policy," edited by Francis Paul Prucha, University of Nevada Press, p.256 (1975).

Federal agencies are subject to President Clinton's Executive Order regarding environmental justice, which requires all federal agencies to identify and address disproportionately high and adverse human health or environmental effects of programs and activities on minority and low-income populations. *See* Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629-7633 (Feb. 11, 1994). Although this Executive Order applies to all minority and low-income populations, it contains special mention of Native American programs due to the special relationship between the federal government and Indian tribes. *Id*. § 6-606.

Federal agencies are also subject to President Clinton's Memoranda on the subject of government-to-government relations with tribal governments. Memoranda, *Government-to-Government Relations With Native American Tribal Governments*, 59 Fed. Reg. 22951 (April 29, 1994). This memoranda requires federal agencies to implement activities affecting tribal rights or trust resources in a "knowledgeable, sensitive manner respectful of tribal sovereignty." *See id*. Further, federal agencies must "assess the impact" of their action on tribal trust resources and "assure that tribal government rights and concerns are considered." *See id*. at § (c). Requirements of this memorandum were further clarified in Executive Order 13084 entitled "*Consultation and Coordination with Indian Tribal Governments*," 63 Fed. Reg. 27655 (May 14, 1998). Although the memorandum of April 29, 1994, and Executive Order 13084 both are couched in terms of government-to-government relations and based on the recognition of tribal sovereignty, these documents also reference the "unique legal relationship" and the "responsibilities that arise from the unique and legal relationship" as a basis for their provisions. *See e.g.*, Exec. Order 13084 § 2.

Numerous government agencies have attempted to comply with these directives. *See Wood, Fulfilling The Executive's Trust Responsibility . . .*, 25 Envtl. L. 733 (1995).

5. CONCLUSION - THE CASE OF THE RELUCTANT (INCOMPETENT?) GUARDIAN.

While the trust responsibility of the federal government is clear, implementation of that responsibility proves difficult. No case better illustrates this than the recent litigation over the government's management of the so-called IIM accounts (Individual Indian Money). *Cobell v. Babbitt*, Cause No. 96-1285, United States District Court for the District of Columbia. Through the IIM trust account system the United States acts as trustee on accounts that hold money on behalf of individual Indian beneficiaries. When the complaint in *Cobell* was originally filed, it

was estimated that those accounts held nearly $500,000,000. By February of 1999 the estimate was that the accounts allegedly held approximately $4,000,000,000.

The IIM accounts hold funds that originate from various sources related to Indian affairs. However, the majority of the funds are derived from income earned from individual land allotted to members of Indian tribes. This income includes income generated from grazing, farming, timber, mineral rights, and land leases. On February 4, 1997, the district court certified the class consisting of all present and former beneficiaries of these accounts. *Cobell v. Babbitt*, 30 F. Supp.2d 24 (D.D.C. 1998).

The case would seem to involve straight forward matters. Of course the United States must act as fiduciary in handling the money of Indians under its administration. Indeed, Congress reconfirmed the United States' duties with regard to these accounts in 1994 in the Indian Trust Fund Management Reform Act. 25 U.S.C. § 162a(d). This act codified several obligations of the Secretary of the Interior with regard to the discharge of his trust duties and IIM accounts.

Despite the fact that the Department of the Interior's duties are clear, the course of litigation has uncovered a bungling incompetence that boggles the mind. So incompetent is the government's maintenance of these records and so incompetent was the handling of the case, that on February 22, 1999, the court took the extraordinary steps of finding the Secretary of the Department of the Interior, the Secretary of the Treasury, and the Assistant Secretary for Indian Affairs in the Department of the Interior, in civil contempt for failure to comply with discovery orders. *Cobell v. Babbitt*, ___ F. Supp.3d ____, 1999 WL 101636 D.D.C. In testimony during the contempt trial, the former special trustee who had been unable to sort things out, testified that the IIM account record keeping system was "the worst that I have seen in my entire life." *Id*. at 5. This testimony was from a man who had served for five years supervising trust operations for the Comptroller of the Currency, as Chief Executive of a large trust department for a commercial bank and as Chief Executive Officer of Riggs Bank.

The record in the case shows that Interior Department officials essentially did nothing of any value to produce discovery documents, that Treasury officials destroyed records while under an order to produce them, etc. The court said:

The way in which the defendants have handled this litigation up to the commencement of the contempt trial is nothing short of a travesty.

Id. at 6. The court found that defendants' "misbehavior is especially egregious," *id.* at 8, that defendants' arguments "must be looked upon with suspicion . . .," *id*. at 10, that defendants' interpretation of the court's discovery order ". . . defies all logic." *id*., that the government displayed a ". . . reckless approach to managing document production . . ." *id*. at 12, that the "facts of this case belie any showing of good faith." *id*. at 16, and that several of the governments' attorneys ". . . have acted incompetently and with a shocking lack of candor to this Court." *id*. at 17.

The Justice Department also got its share of criticism. The court said:

Because of the Court's great respect for the Justice Department, the Court repeatedly accepted the government's false statements as true, and brushed aside the plaintiffs' complaints. This two-week contempt trial has certainly proved that the Court's trust in the Justice Department was misplaced. The federal government did not just stub its toe. It abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception of the Court. I have never seen more egregious misconduct by the federal government.

Id. at 31. This case highlights some serious ethics issues which we will discuss at the seminar.

ACKNOWLEDGMENTS

In preparation of this article, I wish to acknowledge reliance on the excellent memorandum entitled "The Federal Government's Trust Responsibility To Tribes: A Summary" by my partner M. Frances Ayer, Esq. and by Terrence Thatcher, Esq., detailing the legal development of the Federal Trust Responsibility Doctrine. I also utilized an October 5, 1998, memorandum entitled "Existence of a Trust Responsibility" by Allen Sanders, Esq. I also utilized the exhaustive (and exhausting?) work by Professor Mary Christina Wood known as the "Trust Trilogy" as follows:

Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty, The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994).

Mary Christina Wood, *Protecting the Attributes of Native Sovereignty, A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109 (1995).

Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues . . .*, 25 Envtl. L. 733 (1995).

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1. In a later decision in this case, the Commission found in fact, no money that was completely controlled by the tribe. Although it had taken advice from the tribe, the BIA still controlled the money, and, therefore, was obligated to account as a trustee for its use. *Navajo Tribe v. United States*, 39 Ind. Cl. Com. 10, 13 (1976).

2. The Snyder Act is the basic authorization act for the Bureau of Indian Affairs. It provides that:

"The Bureau, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States,"

. . . .

including such matters as general support and civilization, administration of Indian property, and general expenses in connection with the administration of Indian affairs.

25 U.S.C. § 13.