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KEVIN GOVER\*

## An Indian Trust for the Twenty-First Century

### ABSTRACT

*The statutory and policy bases of the federal trust responsibility for Indian lands arose at the end of the nineteenth century and the beginning of the twentieth century. Policy at that time was based on two related propositions: (1) Indians are incompetent and (2) Indian tribes were soon to be dismantled as political institutions separate from the United States. These notions were basic to the judicial development of the doctrine of federal plenary power over Indians and their property. With these ideas as the foundation of the trust, it grew into a stifling, paternalistic, and ultimately ineffective system of managing Indian property. While virtually all other areas of federal Indian policy have undergone dramatic change, with a radical shifting of authority from the Bureau of Indian Affairs to tribal governments, the trust remains largely ineffective, unenforceable, and immune from fundamental change.*

*Congress must change the trust to reflect the capabilities of the tribes and to implement the federal policy of empowering tribal governments to meet their responsibilities as permanent components of the American federalist system. Tribes should be offered the opportunity to manage their lands without federal supervision while at the same time sustaining their immunities and authorities regarding trust lands. Congress should create both financial and policy incentives for tribal governments to assume these responsibilities. Rather than insisting that the Department of the Interior improve its execution of a system that is flawed at its foundation, Congress should clear a path for tribes that wish to use their primary capital asset – land – to create the financial resources needed to build viable reservation economies. By doing so, Congress will bring the trust into the twenty-first century.*

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## INTRODUCTION

The trust responsibility has served as the source of federal authority to wreak all manner of harm on tribal communities. The responsibility that the United States has assumed to protect Indian well-being has created the "plenary power" that the United States exercises in Indian affairs. This power has been employed often to the enormous disadvantage of Indians. This power arose from two key assumptions among the three branches of the federal government: (1) Indians were incompetent to deal with the complex political and economic systems of white Americans and required federal protection and (2) Indian Tribes would disappear within one or two generations. These assumptions were understandable at the beginning of the twentieth century because Indians had been deprived entirely of their traditional means of sustenance and had virtually no economic system. Moreover, the purpose of federal policy at the time was the destruction of the Tribes, leavened by a humane belief that individual Indians could be saved through immersion into white culture.

These assumptions shaped the trust responsibility at its beginning, and its effects reside in the current administration of the trust. Legal doctrine governing the trust responsibility and federal plenary power has changed little in the past century, even while Indian communities have undergone profound change. In the past 40 years, Indian Tribes have demanded and gained fundamental changes in the way that the United States relates to and delivers services to them. More importantly, though Indians still lag behind the general population in educational attainment, the gap has closed considerably and new generations of college-educated experts are entering tribal government. Tribes have not disappeared, and they are not incompetent. The assumptions underlying the trust are invalid, and it necessarily follows that the specifics of the trust hold little value in the making of modern Indian policy. The trust responsibility must be modernized to meet the new reality.

The concept of a federal responsibility for Indian property arose in the nineteenth century as a means of protecting Indians from intrusions by outsiders. By the end of that century, it had evolved into an intrusive means of denying Tribes control of their lands through the exercise of an unconstrained federal power to manage Indian property regardless of the desires of the Indians. Congress's exercise of this "plenary power" deprived the Tribes of two-thirds of the lands to which the Tribes held recognized title in less than 50 years. The concept of the trust responsibility and the nature of federal power over Indian lands

that was born in this era may still be found in modern administration of the trust.

These devastating losses were followed by inconsistent federal policies that swung wildly from policies supporting tribal self-governance and federal protection of tribal resources to policies literally disestablishing tribal governments and forswearing any further federal responsibility for tribal resources. As a result, the problems of trust administration that emerged early in the twentieth century festered into the collapse of the trust administration system at the century's end. Further, this history of traumatic shifts in policy leaves tribes deeply wary of any federal policy initiative to restore tribal resources to tribal control.

In this article, I focus on the past 40 years of congressional policy on Indian affairs to demonstrate that the assumptions that drove policy when the trust management system was born—that Indians are incompetent and that tribes should be made to disappear—conflict profoundly with the assumptions underlying modern Indian policy. Surprisingly, although many areas of federal Indian policy have been dramatically reformed in the past 40 years to reflect the modern capabilities of Indians and Indian tribes, trust management policy has not been one of these areas. This failure is about to be compounded by current efforts to reform trust management without addressing the deeply flawed foundational policies governing the trust. The trust as currently conceived and managed fails to offer the Tribes an appropriate measure of control over their lands.

Next I discuss the current state of the trust management system. Tribes do enjoy certain advantages from the trust status of Indian lands, but there are serious disadvantages as well. The most serious disadvantage, in my view, is that the trust stifles economic initiative and is responsible in part for the problem of Indian poverty. I then observe that there is no reason that Tribes should not have the advantages of trust status—primarily tribal criminal and civil jurisdiction over the lands and immunity from state jurisdiction—without having to suffer the counterproductive effects of an obnoxious federal supervision of their lands. To resolve the problem and put trust policy into accord with the greater trends of modern Indian policy, I propose that Congress authorize the Department of the Interior to enter into negotiated agreements with each Tribe to apportion responsibilities for the management of Indian trust lands between the Department and the Tribe.

The article then discusses a number of issues that will arise in the negotiation of these trust agreements and proposes certain solutions for consideration by tribal and federal policy makers. I also discuss

certain incentives that should be offered to induce Tribes to take more responsibility for the management of their lands.

Two key points dominate the approach I propose. First, tribal consent is a *sine qua non* in the implementation of the policy. Perhaps most Tribes will tenaciously cling to the hope that a system of trust administration can be created and carried out by federal employees that will fairly balance the paradoxical policy goals of tribal self-sufficiency and self-determination on the one hand and federal responsibility for Indian well-being on the other. Those Tribes that wish to live with the failures of the trust as currently conceived should be free to do so even as they are offered the options I advocate.

Second, the specifics of the trust management system should not be uniform and should not be applied nationwide as though all Tribes were the same. Congress too often has made policy, and the Executive Branch too often has executed policy, as though there were no differences between the small California Rancheria and the huge Navajo Nation. The diversity of tribal circumstances requires a policy that is sufficiently flexible to meet the diverse conditions and capabilities of the Tribes. This will require that Congress empower the Department of the Interior to work on a Tribe-by-Tribe basis in defining how trust administration will be done in the future. Finally, Congress must rigorously oversee the Department's exercise of this authority.

## I. THE HISTORY AND EVOLUTION OF THE TRUST

### A. The Flawed Foundation of the Trust

The federal trust responsibility for Indian lands is rooted in early conceptions of the relationships between the Tribes and the United States. Among the first orders of business in Congress was the enactment of the Trade and Intercourse Act,<sup>1</sup> which prohibited transfers of Indian land in the absence of federal consent. Under the Doctrine of Discovery, the United States inherited the rights of European "discoverers" to exclusive relationships with the Tribes within their boundaries.<sup>2</sup> The Doctrine of Discovery protected the interests of the United States vis-à-vis Great Britain and other powers. The Trade and Intercourse Act and treaties with the Indian nations were intended both to protect federal

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1. See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS* 108-14 (1984). The current version of the statute is found at 25 U.S.C. § 177 (2001).

2. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

prerogatives and to acquire land for the growing country and to protect the Indian Tribes from fraudulent dealing by non-Indians.<sup>3</sup>

Early treaties spoke of the "friendship" between the United States and the treating Tribes<sup>4</sup> and recited that the Tribes were "under the protection" of the United States.<sup>5</sup> In the mid-1830s, the Supreme Court used this latter provision as support for its view that Tribes were not, constitutionally speaking, foreign nations, notwithstanding that their relationships with the United States were based on treaty. Instead, said Chief Justice Marshall in *Cherokee Nation v. Georgia*,<sup>6</sup> the Tribes were "domestic dependent nations" whose relationship with the United States resembled "that of a ward to his guardian."<sup>7</sup>

The Treaty of Hopewell with the Cherokee Nation recited that the Nation was "under the protection" of the United States and acknowledged that the United States would "have the sole and exclusive right of regulating trade with the Indians, and managing all their affairs, as they [the United States] think proper."<sup>8</sup> In *Worcester v. Georgia*,<sup>9</sup> Chief Justice Marshall found that this sweeping language did not indicate utter submission by the Cherokees to the authority of the United States. Rather, "[t]his relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."<sup>10</sup> Even the broad phrase "managing all their affairs" was not a cession of the Cherokees' right of self-government, said the Court. Instead, the phrase related only to their trade relations.<sup>11</sup> The Cherokee Nation, after all, was a power with which the United States had chosen to deal by treaty, and the Constitution had declared those treaties made with the Tribes before enactment of the Constitution to be "the supreme law of the land."<sup>12</sup>

The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well

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3. PRUCHA, *supra* note 1, at 108-11.

4. See, e.g., Treaty with the Delawares, 1778, Sept. 17, 1778, 7 U.S.T. 13, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/del0003.htm>.

5. See, e.g., Treaty with the Cherokee, 1785, Nov. 28, 1785, 7 U.S.T. 18, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm>.

6. 30 U.S. (5 Pet.) 1 (1831).

7. *Id.* at 13.

8. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553 (1832).

9. *Id.*

10. *Id.* at 555.

11. *Id.* at 553-54.

12. *Id.* at 559.

understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.<sup>13</sup>

So long as relations between the Tribes and the United States were governed by treaties, federal authority would not be presumed to extend to the internal affairs of the Tribes. Nor did Congress claim authority over the management of Indian property, save that if a Tribe chose to alienate its property, it could do so only with the consent of the United States.

Over the next 50 years, the relationships between Tribes and the United States underwent profound change. Decades of warfare between the Tribes and the United States and the dispossession of the tribes' traditional homelands left the United States with the power to enforce its will against the Tribes with or without their consent. In 1871, Congress declared that relations with the Indians would no longer be carried out by treaty.<sup>14</sup> Though tribal consent remained at least nominally part of federal Indian policy, Congress soon claimed the power to legislate unilaterally as to the internal affairs of the Tribes. In 1885, for example, Congress passed the Major Crimes Act, granting jurisdiction to the federal courts to try to punish Indians for certain crimes against other Indians of the same Tribe;<sup>15</sup> Indian consent was not required.

Here the relationship took a grim turn for the Tribes. In *United States v. Kagama*,<sup>16</sup> the Court considered the constitutionality of the Major Crimes Act. The Court noted that, whatever the law might have been regarding the status of Tribes as "nations," Congress had changed course: "[A]fter an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure, — to govern them by acts of congress."<sup>17</sup> The Court had little difficulty concluding that Congress had the power to do so:

These Indian Tribes *are* the wards of the nation. They are communities *dependent* on the United States, — dependent largely for their daily food; dependent for their political rights.... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has

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13. *Id.* at 559–60.

14. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (1871) (codified as amended at 25 U.S.C. § 71 (2000)).

15. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified at 18 U.S.C. § 1153 (2000)).

16. 118 U.S. 375 (1886).

17. *Id.* at 382.

been promised, there arises a duty of protection, and with it the power.

...

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the Tribes.<sup>18</sup>

Thus, the conquest of the Tribes justified the exertion of extraordinary federal power over their internal relations. The notion of protecting the Indians from usurpers—the protection that Marshall approved in *Cherokee Nation* and *Worcester*—evolved into protecting Indians from each other in *Kagama*. If the United States were to fulfill this duty of protection, it must also have the power to do so. Indian consent was irrelevant.

Congress wasted little time in exercising this protective power over the internal affairs of Indians in the context of tribal property. Congress determined that Indians would not progress toward civilization so long as they held to their tribal organizations and insisted on holding their lands in common.<sup>19</sup> The best hope for Indian progress was to teach them the advantages of private ownership and entrepreneurship. In 1887, Congress enacted the General Allotment Act.<sup>20</sup> The Act called for the allotment of tribal lands to individual Indians in parcels suitable for farming and ranching enterprises; Indians were to become yeoman farmers and herders. To aid in the transition from their traditional subsistence practices, the tribal lands remaining after allotment to individual Indians would be opened for sale to non-Indian settlers who would demonstrate to the Indians how they might use their land to become self-sufficient.<sup>21</sup>

The allotments were to be held in trust for the benefit of the allottees for a period of 25 years. This trust status left the allotment lands immune from state taxation and subject to a federal restraint on

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18. *Id.* at 383–85.

19. PRUCHA, *supra* note 1, at 661–66. *See also* WILCOMB E. WASHBURN, *THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887* (rev. ed. 1986).

20. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887).

21. PRUCHA, *supra* note 1, at 864–65.



alienation.<sup>22</sup> The thinking was that, at the expiration of the trust period, the Indian owners would have established self-sufficient farms and ranches generating not only their subsistence, but also the cash that would be required for expenses such as state property taxes.

Implementation of the allotment policy involved negotiations with the Tribes for agreements that would open the reservations to non-Indians. The conquered, dispirited, and desperate Indians were no match for the federal negotiators in most cases, and many Tribes readily agreed to the plan. In the end, though, it did not matter whether the Tribes consented or not. In *Lone Wolf v. Hitchcock*,<sup>23</sup> the Supreme Court indicated that Indian consent simply was not required. Kiowa Chief Lone Wolf brought the case, alleging that the allotment agreement with the Kiowas, Comanches, and Apaches, under which their reservation was opened to non-Indian settlement, violated the 1867 treaty that established the reservation. The Treaty of Medicine Lodge required that three-fourths of the Tribal men must consent to any cession of the lands guaranteed by the Treaty.<sup>24</sup> Lone Wolf claimed that three-fourths had not consented to the allotment agreement and that many of the consents were obtained by fraud.<sup>25</sup>

The Court held that it did not need to consider whether Lone Wolf's claims were true, because "[p]lenary authority over the tribal relations of the Indians has been exercised from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."<sup>26</sup> This was true even though the allotment law opening the Kiowa-Comanche-Apache reservation contradicted the Treaty of Medicine Lodge:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will only be exercised when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a Tribe of Indians it was never doubted that the

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22. Indian General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 348 (2000)).

23. 187 U.S. 553 (1903).

24. *Id.* at 554.

25. *Id.* at 560-61.

26. *Id.* at 565.

power to abrogate existed in Congress, particularly if consistent with perfect good faith towards the Indians.<sup>27</sup>

...

The act of June 6, 1900...purported to give adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*..., decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.<sup>28</sup>

Thus, in the 70 years between *Cherokee Nation v. Georgia* and *Lone Wolf v. Hitchcock*, federal power had grown from the exclusive power to regulate commerce with the Indians to "plenary authority" over the internal relations of the Tribes and over tribal property. This "plenary authority" arose from the duty of protection assumed by the United States in its relations with the Tribes. The trust responsibility of the Congress gave rise to the plenary power of the Congress. Indeed, the two ideas are inseparable. The United States may arrogate the authority to administer the property and internal affairs of other nations by asserting a duty to protect a weak nation not only from others, but also from itself. This idea, which has currency in the foreign policy of the United States even now, has permitted the federal government to wreak devastating harm on Indian Tribes. And it is the basis of the trust responsibility.

## **B. The Trust in Action: Allotment and Assimilation**

When *Lone Wolf* was decided, a federal policy of coercive assimilation of Indian people was in full swing. The centerpiece of the

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27. *Id.* at 566.

28. *Id.* at 568 (citation omitted).

assimilation policy was the General Allotment Act of 1887. Most of the large reservations had been broken up and parceled out to tribal members and non-Indian homesteaders. Indian trust lands would be reduced from 155.6 million acres in 1881 to 104 million acres in 1890 to 78 million acres in 1900.<sup>29</sup> By 1934, only 52.1 million acres remained in Indian ownership;<sup>30</sup> most of the land was lost through the sale of "surplus" tribal lands. These lands were then opened to non-Indian settlement. By 1934, fully 60 million acres of tribal land had been acquired by non-Indian homesteaders pursuant to the allotment policy.<sup>31</sup>

This "mere change in the form of investment of Indian tribal property"<sup>32</sup> had the effect of relieving the United States from its responsibility to manage the lands acquired by non-Indians. The United States retained the responsibility, though, for the remaining tribal lands and for the lands of the Indians who had received individual allotments. The Allotment Act provided that the responsibility would cease after 25 years, on the assumption that the Indians would become self-sufficient in that time and would not require federal supervision.<sup>33</sup> Tribal organization would fade away, and Indians would move into the mainstream economic and social structures of the non-Indians who entered the opened reservations. This attempt at social engineering failed. Many of the allottees fell immediately into desperate economic straits. The non-Indians who entered the reservations as homesteaders were more interested in taking advantage of the Indians than in teaching them the virtues of American life.<sup>34</sup> As a result, the Indians were desperately poor.

In order to relieve their poverty, Congress enacted legislation authorizing Indians who were unable to work their allotments to lease them instead.<sup>35</sup> Thus began the broad supervision of Indian leasing transactions by the Department of the Interior, which located lessees, negotiated the lease terms, approved the leases, collected the lease payments, and doled out the proceeds to the Indian landowners. Within a few years, Congress authorized leasing by all Indian allottees. This authorization represented a quick surrender in the effort to turn the Indians into farmers.

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29. PRUCHA, *supra* note 1, at 671.

30. *Id.* at 896 n.80. See also WILCOMB E. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 75 (1971).

31. PRUCHA, *supra* note 1, at 896.

32. *Lone Wolf*, 187 U.S. at 568.

33. See Indian General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 348 (2001)).

34. PRUCHA, *supra* note 1, at 876.

35. *Id.* at 672.

Notwithstanding the early and evident failure of the allotment experiment, the government proceeded with its efforts to allot reservation lands. By 1920, 34.5 million acres of reservation lands had been allotted to individual Indians.<sup>36</sup> Even as allotments were still being made on some reservations, efforts were underway at other reservations to remove Indians from federal supervision and release their lands from trust status. In 1906, Congress authorized the Department of the Interior to issue fee patents to allottees deemed "competent" by the Secretary prior to the expiration of the 25-year trust period.<sup>37</sup> The effect was to make the lands of "competent" allottees alienable and subject to state taxation. The Department exercised this authority by appointing "competency commissions" to determine which Indian allottees were ready to have their lands freed from federal supervision.<sup>38</sup> Commissioner of Indian Affairs Cato Sells had his Indian agents compile lists of "mixed blood" Indians. Full-blood Indians were presumed incompetent; those of mixed ancestry were presumed to have benefited sufficiently from their European-American blood to be ready for freedom from federal supervision.<sup>39</sup>

Those individual Indian landowners who had been deemed "competent" by the Bureau of Indian Affairs alienated 23 million acres of allotted land by selling it or subjecting it to foreclosure through their failure to pay taxes. The government, on behalf of incompetent Indians and certain inheritors of allotments, sold another 3.7 million acres. By 1934, the Tribes owned only 34.3 million acres, while individual Indian allottees or their heirs owned 17.6 million acres.<sup>40</sup>

Those Indians whose allotments remained in trust fared little better. Though the objective of the allotment policy was to make the Indians into self-sufficient farmers, that objective was quickly compromised. In 1894, Congress made Indians with an "inability" to improve their allotments eligible to lease their lands.<sup>41</sup> By 1900, the Department of the Interior had approved 2,600 leases, and the number continued to grow.<sup>42</sup> The effects completely undermined the goals of the policy of self-sufficiency. Between 1910 and 1930, the amount of acreage

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36. *Id.* at 865-66.

37. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 349 (1994)).

38. PRUCHA, *supra* note 1, at 881.

39. *Id.* at 882-83.

40. *Id.* at 896.

41. *Id.* at 672.

42. *Id.* at 672 n.31.

under cultivation by Indian allottees actually declined by more than 25 percent.<sup>43</sup>

This decline was in part the product of the already burgeoning problem of fractionated ownership of allotments. This fractionation occurred as allottees died intestate and ownership of their allotments descended to their heirs according to state inheritance laws. Though Congress in 1910 had authorized Indians to make wills, it did little to stem the tide. Because subdividing the allotments was often impractical, the land had little value to the owners except as a source of lease income.<sup>44</sup> As the relatively meager income available from leasing became insufficient, more and more owners sought to sell their interests.<sup>45</sup> The fractionation of allotments has continued to rage on for 100 years. Ownership interests grow ever smaller; there now exist over 1.65 million fractional interests of two percent or less involving more than 32,000 tracts of allotted land.<sup>46</sup> The passage of the American Indian Trust Fund Management Reform Act<sup>47</sup> and the *Cobell* litigation<sup>48</sup> has revealed a system of trust administration that has collapsed on itself, largely as the result of a century of fractionation.

While some Indians were able to farm their allotments and make a reasonable living, the more common experience was to sink into economic destitution. A masterpiece of understatement, the famous Meriam Report concluded in 1928 that "[a]dmirable as were the objects of individual allotment the results have often been disappointing."<sup>49</sup> Far from creating the self-sufficient Indians that the proponents of allotment had predicted, the allotment and assimilation policies left the Indians desperately poor. The Meriam Report noted that, for Indians on several reservations, "the figures for income are reported so low as to be almost unbelievable."<sup>50</sup> Seventy-one percent of reservation Indians lived in communities where per capita income was less than \$200 per year; almost one-quarter lived in areas where per capita income was less than

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43. *Id.* at 895.

44. *Id.* at 872-74.

45. *Id.* at 873.

46. *Oversight Hearing on the Status of the Indian Trust Fund Lawsuit Before the H.R. Comm. on Resources*, 109th Cong. 2 (2005) (statement of James Cason, Associate Deputy Secretary of the Interior).

47. American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. §§ 4001-4061 (Supp. 2005)).

48. *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd* in part and remanded in part by *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

49. BROOKINGS INST., INST. FOR GOV'T RES., *THE PROBLEM OF INDIAN ADMINISTRATION* 460 (Lewis Meriam tech. dir., 1928) [hereinafter Meriam Report].

50. *Id.* at 447.

\$100 annually.<sup>51</sup> The Report gamely suggested that Indian subsistence practices and Indian disinterest in material goods made the picture slightly less bleak, but it was obvious that 40 years of coercive assimilation efforts by the United States had left reservation Indians destitute.<sup>52</sup>

The allotment era was plainly the nadir of the Indian experience in America. Policy makers hoped, some of them earnestly, that allotment and assimilation would end tribal organization and tribal culture and that Indians would become self-sufficient individuals not requiring the ongoing oversight of the Department of the Interior. They were wrong. Although Indian communities were reduced to destitution and complete dependence on the federal government, they remained communities nevertheless. The trust had failed not only in these broad objectives, but also in its specifics of protecting Indian landowners from fraud and dispossession. Even when the allotment policy was formally abandoned, the need for ongoing federal oversight remained acute. The question became whether a policy system so flawed in its conceptual foundations and its objectives, and weighed down even further by incompetent implementation, could be reformed.

### C. Rebuilding the Trust: The Reorganization Policy

Reform was obviously necessary, yet, for the first three decades of the twentieth century, policy makers were bound by their faith in the eventual—and desirable—disappearance of the Tribes. A reform movement, led by John Collier, originated outside of government in the 1920s with the rise of reformers who thought that Indian tribal existence should not be destroyed. Their primary argument in favor of a change of policy was the evident failure of coercive assimilation. The Meriam Report confirmed most of the criticisms of the reformers: the Indians were poor, many of them very poor. They were ignorant and unhealthy. The Bureau of Indian Affairs compounded the problems with poor organization, bad management, and inadequate funding for its assigned tasks. The abject failure of the Bureau of Indian Affairs to protect Indians from sharp dealing in managing their land was an ongoing source of embarrassment to Indian policy officials.<sup>53</sup>

Yet federal Indian policy only changed with the grand failure of national economic policy that resulted in the Great Depression. The desperate economic need resulting from the Great Depression overcame

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51. *Id.* at 448.

52. *Id.* at 430–37.

53. PRUCHA, *supra* note 1, at 797–813.

the nation's traditional hostility to centralized government. The notion of getting the government out of the Indians' business lost currency when the government started getting into everybody's business with its New Deal programs. The pervasive and intrusive administration of Indian programs by the Bureau of Indian Affairs did not seem so extraordinary when agency government grew spectacularly across the board.

These forces, combined with the appointment of John Collier as Commissioner of Indian Affairs, produced a policy that 30 years before would have been laughable: Indian Reorganization. The Indian Reorganization Act of 1934 (IRA)<sup>54</sup> embodied the then-revolutionary idea that Indians themselves should make the important decisions regarding their affairs. The Act authorized Tribes to enact constitutions to establish governments that would exercise the inherent sovereignty of the Tribes.<sup>55</sup> The legal constructs of tribal sovereignty were examined and embedded into these constitutions. Federal corporate charters were granted to Tribes that wished to manage their economic affairs through a corporate entity.<sup>56</sup> Programs were established to purchase land for Tribes and individual Indians.<sup>57</sup> Revolving credit programs were established to encourage economic development.<sup>58</sup> Finally, a seemingly modest provision for Indian preference in employment in the Bureau of Indian Affairs eventually resulted in a dramatic change in the culture of the Bureau that blossomed in the 1970s and 1980s and continues to the present.<sup>59</sup>

The IRA, however, fell well short of the more wide-ranging proposal put forward by Collier, especially with regard to land reforms. Collier saw that the tribal land base was inadequate to support growing Indian communities. He also saw that ownership of allotted land was becoming increasingly fractionated due to the intestate descent of allotments to the heirs of original allottees. Had his revolutionary program of land reforms been implemented, it would have addressed these problems by exchanging the ownership interests of allottees and

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54. Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994)) [hereinafter Indian Reorganization Act of 1934].

55. *Id.* § 16, 48 Stat. at 987.

56. *Id.* § 17, 48 Stat. at 988.

57. *Id.* § 5, 48 Stat. at 985.

58. *Id.* § 10, 48 Stat. at 986.

59. *Id.* § 12, 48 Stat. at 986.

their heirs for stock in tribal corporations. This consolidated ownership by the Tribes would permit more effective planning and development.<sup>60</sup>

Assimilated Indian landowners and some Christian missionaries and their converts railed against the Collier reform program,<sup>61</sup> and Congress enacted only a modest version of the program. Under the IRA, the Department of the Interior was authorized to acquire lands in trust for the benefit of the Tribes and individual Indians.<sup>62</sup> Thus, more, not less, Indian land would be under federal supervision. Furthermore, the ongoing fractionation of ownership of the allotments continued. Although Collier brought the problem to the attention of Congress,<sup>63</sup> nothing was done. The opportunity was missed to address the burgeoning problem that produced the management collapse that would come to light in the 1990s in the *Cobell* litigation.

The reorganization policy did not realize its full potential, primarily due to the outbreak of World War II.<sup>64</sup> The war absorbed all of the nation's money and attention. Collier's programs saw reductions in funding, and the additional authorities he sought were not forthcoming. In hindsight, Collier's programs peaked in the mid-1930s. He spent much of the remainder of his tenure as Commissioner—the longest in the history of the agency—fighting merely to hold on to the authorities he had gained in the IRA.<sup>65</sup>

#### *Ending the Trust: Termination*

The return of Indian veterans and war industry workers from their World War II experiences would have a profound effect on Indian communities and the federal policies regarding Indians. The skills acquired in the war effort had little place on reservations where industry and jobs were largely non-existent. Yet, these veterans and war workers had demonstrated their ability to deal with the non-Indian world. They were not incompetents requiring government oversight of their every transaction. They wanted more than the deprived lifestyles the reservations had to offer.

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60. See DAVID W. DAILY, *BATTLE FOR THE BIA: G.E.E. LINDQUIST AND THE MISSIONARY CRUSADE AGAINST JOHN COLLIER* 82-87 (2004).

61. *Id.* at 87-99.

62. See Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984.

63. See, e.g., 1939 SEC. INTERIOR ANN. REP. 36-37.

64. For an excellent description of the impact of the War, see ALISON R. BERNSTEIN, *AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS* (1991). See also DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960*, at 3-20 (1986).

65. See generally DAILY, *supra* note 60, at 101-48.



The idea of reducing the federal role in, and responsibility for, ensuring Indian welfare had been brewing for some time. The failure of Collier's reforms to work a quick reversal of Indian poverty, along with the growing amount of funds appropriated to meet federal responsibilities in Indian Country, had both the Truman Administration and the Congress seeking a permanent solution for the problems of Indian Country.<sup>66</sup> The Bureau of Indian Affairs (BIA) was actively pursuing new policies and programs to address the higher expectations that Indian veterans brought back from the war. In early 1947, the Bureau began developing lists of Tribes that were ready to have federal oversight withdrawn and those that were not.<sup>67</sup> The lists, drawn at the request of Congress, became the blueprint for the implementation of the termination policy—the next great experiment in releasing Indians from federal supervision and assimilating them into the population at large.<sup>68</sup>

The hammer fell on August 1, 1953, with the passage of House Concurrent Resolution 108.<sup>69</sup> There, Congress announced its policy that, "as rapidly as possible," Indians should be made "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States...."<sup>70</sup> Congress declared, "At the earliest time possible, [Indians] should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."<sup>71</sup> These goals of equality and freedom, benign to the uninformed observer, resulted in the withdrawal of federal programs and protections from over 100 Tribes over the following 13 years.<sup>72</sup> Some 13,000 Indians lost their legal status as Indians, and nearly 1.4 million acres of land lost its status as trust land.<sup>73</sup> Most of this land was soon lost to the Tribes, and although the tribal members received distributions of the proceeds from the land sales, the tribes failed to prosper.<sup>74</sup> Tribal members became subject to the laws of the States and dependent on the services the States provided. Federal Indian policy had again hit bottom.

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66. See FIXICO, *supra* note 64, at 21–62.

67. The criteria for this determination were "(1) degree of acculturation of a tribe; (2) economic condition of the tribe; (3) willingness of the tribe and its members to dispense with federal aid; and (4) willingness and ability of the state in which a tribe lived to assume the responsibilities dropped by the federal government." PRUCHA, *supra* note 1, at 1026.

68. FIXICO, *supra* note 64, at 33.

69. H.R. Con. Res. 108, 83rd Cong. (1953) (enacted).

70. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS* 40 (4th ed. 2003) (internal quotations omitted).

71. *Id.*

72. *Id.*

73. PRUCHA, *supra* note 1, at 1058–59.

74. FIXICO, *supra* note 64, at 183–86.

As the 1960s began, policy makers faced a dilemma. The trust as conceived and executed seemed to have hindered Indian progress for 70 years, yet the abrupt cessation of the trust had produced results just as bad. Indian leaders and federal policy makers alike agreed that reform of the trust was necessary, yet for the next three decades, few meaningful legislative reforms regarding trust lands were undertaken. Perhaps this is the result of the unapparent effects of termination. Termination caused profound dislocation in many Indian communities. Although the formal policy of termination was short-lived—due in large part to organized and effective tribal resistance—it had the effect of making Tribes extremely wary of federal policy initiatives that would affect the trust responsibility. Any policy initiative involving even the hint of a suggestion that the federal role in reservation land management should be reduced raises the suspicion that the new policy is termination in disguise.<sup>75</sup>

As a consequence, any policy initiative to reduce the federal presence in the management of any Tribe's trust resources may only be done on an incremental basis and on the basis of a negotiated agreement with the affected Tribe. Further, the initiative must include tangible incentives for the Tribes to overcome the understandable suspicion that they bring to current policy debates. The Tribes seem to prefer even a deeply flawed trust to no trust at all. The challenge for current policy makers is to find a formula that leaves the Tribes feeling secure in the federal-tribal relationship even as the federal role is reduced and tribal self-governance strengthened.

## II. CONTEMPORARY INDIAN POLICY AND THE TRUST

Reforming the trust is made easier by the current policy of self-determination. Even as termination was grinding to a halt, the makings of a new policy were being created within the context of President Johnson's "war on poverty."<sup>76</sup> As Johnson's "Great Society" legislation moved through Congress, Indian concerns received unusual levels of attention. For example, tribal needs were specifically addressed in the Economic Opportunity Act of 1964,<sup>77</sup> which made Tribes eligible for funding for youth programs, community action programs, and the Volunteers in Service to America program, among others.<sup>78</sup> The

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75. PRUCHA, *supra* note 1, at 1059.

76. *Id.* at 1091-95.

77. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. §§ 2701-2981 (2000)).

78. PRUCHA, *supra* note 1, at 1094.

Neighborhood Youth Corps, Job Corps, and Operation Head Start brought new programs and funding to the reservations.<sup>79</sup> And unlike Bureau of Indian Affairs and Indian Health Service programs, Office of Economic Opportunity (OEO) funds were administered directly by the Tribes. While OEO funds were hardly sufficient to make a dent in the problem of Indian poverty, they had the collateral effect of increasing tribal government capacity to administer federal programs, and, in turn, increased the desire of tribal governments to take over other federal programs for the reservations.<sup>80</sup>

The Johnson Administration's Indian affairs efforts peaked in March 1968. In a Special Message to the Congress,<sup>81</sup> President Johnson marked the change in Indian policy by proposing a "new goal": "A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."<sup>82</sup> The policy watchword in Indian affairs became "Self-Determination" and has not changed since 1968.

The new policy flourished in the Nixon Administration. Nixon had specifically fore sworn forced termination during his 1968 campaign,<sup>83</sup> and in 1970, President Nixon made the most important statement in the modern history of federal Indian policy. In his July 8 Special Message on Indian Affairs,<sup>84</sup> President Nixon critiqued the termination policy and its consequences as well as the paternalism that had long characterized the federal government's relationship with the Tribes.<sup>85</sup> He concluded that neither approach was acceptable as the basis for modern policy and then offered another approach:

Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening this sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the

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79. *Id.*

80. *Id.* at 1095.

81. Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335 (Mar. 6, 1968) (internal quotations omitted).

82. *Id.* at 336.

83. PRUCHA, *supra* note 1, at 1111.

84. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

85. *Id.* at 565-66.

tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.<sup>86</sup>

The changes that have been made since 1970 in areas such as social services, cultural resource protection, environmental regulation, and tribal administration of federal programs fundamentally changed the landscape of Indian policy. As will be explained below, tribal governments now directly administer dozens of service programs previously administered by federal agencies. Tribal cultures, once thought by federal policy makers to inhibit Indian progress, now receive federal support and protection. Tribes regulate reservation environments with federal support in the manner that states regulate off the reservations. In large measure, Tribes and their members have been relieved of the intrusive federal presence of the past with no withdrawal of federal support—just as envisioned by President Nixon. Most tellingly for present purposes, the assumptions that drove policy when the federal trust for Indian lands and the plenary power doctrine were created have been rejected absolutely. Belief in the inferiority and incompetence of Indians has finally been discredited and policy now assumes that Indian Tribes are a permanent feature of American federalism. A brief review of the legislative record from 1970 to 2000 demonstrates these points.

#### **A. Tribal Administration of Federal Programs**

Modern legislation demonstrates that Congress now views the tribal organization of Indians as the primary vehicle of Indian progress rather than a hindrance. As noted above, the OEO experimented with providing funds directly to tribal governments to operate service programs on the reservations. In 1975, Congress aggressively expanded the concept to include virtually all programs administered by the BIA and the Indian Health Service (IHS). The Indian Self-Determination and Education Assistance Act of 1975<sup>87</sup> has thoroughly changed the relationship between tribal governments and these two agencies. Tribes may, upon request, contract with the agencies to administer programs on their reservations, and the agencies have almost no discretion to decline to enter into such contracts.<sup>88</sup> Though the agencies predictably resisted the diminution of their roles in providing services in the early years of

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86. *Id.* at 566–67.

87. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.

88. *See* 25 U.S.C. § 450f(a) (1995).

the new law, Congress and the Tribes persevered, and the BIA and IHS now boast of the number of programs and the amount of funds contracted to the Tribes.<sup>89</sup>

The Self-Determination program was expanded in 1994 by the enactment of the Tribal Self-Governance Act.<sup>90</sup> This Act increases tribal discretion in the design and execution of service programs on reservations. Congress even applied the Self-Determination model to programs administered by the Department of Housing and Urban Development in the Native American Housing Assistance and Self-Determination Act of 1996.<sup>91</sup> In addition to restructuring the administration of service programs on reservations, Congress has made substantive reforms to specific programs—and created new programs for Indian communities as well—in legislation such as the Indian Health Care Improvement Act of 1976,<sup>92</sup> the Tribally Controlled Community College Assistance Act of 1978,<sup>93</sup> and the Indian Law Enforcement Reform Act of 1990.<sup>94</sup>

## B. Cultural Resource Protection

The trust began during the organized, persistent, comprehensive assault on Native culture by the federal government. This assault is over. Indian cultural and religious practices and languages now receive favorable congressional attention. In 1978, Congress enacted the American Indian Religious Freedom Act,<sup>95</sup> expressing its conclusion that Native American religions were entitled to the same constitutional protections as those religions imported to North America. In 1989, Congress passed the National Museum of the American Indian Act,<sup>96</sup> using the last open space on the Capitol Mall in Washington, D.C., for a

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89. See, e.g., *Hearing on Indian Self-Determination and Education Assistance Act – Contract Support Costs Before the S. Comm. on Indian Affairs*, 106th Cong. (1999) (statement of Michael E. Lincoln, Deputy Director, Indian Health Service); *Oversight Hearing on the Bureau of Indian Affairs Capacity and Mission Before the S. Comm. on Indian Affairs*, 106th Cong. (1999) (statement of Kevin Gover, Assistant Secretary—Indian Affairs, Department of the Interior).

90. Tribal Self-Governance Act, Pub. L. No. 103-413, 108 Stat. 4270 (1994).

91. American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016.

92. Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400.

93. Tribally Controlled Community College Assistance Act of 1978, Pub. L. No. 95-471, 92 Stat. 1325.

94. Indian Law Enforcement Reform Act of 1990, Pub. L. No. 101-379, 104 Stat. 473.

95. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

96. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989).

museum that promoted the presentation of Indian cultures. In 1990, Congress passed the Native American Graves Protection and Repatriation Act,<sup>97</sup> requiring that human remains and items of cultural significance in the possession of federally funded museums be returned to the Tribes. The Native American Languages Act<sup>98</sup> was passed in 1990 with the objective of preserving threatened indigenous languages.

### C. Economic Development

Congress has also attempted to address a problem that has persisted since the traditional tribal economies were destroyed and the reservations established in the nineteenth century: Indian poverty. While no solution has yet been found for most of the larger Tribes and Indian poverty still exceeds that of the public at large,<sup>99</sup> the Tribes have been the primary engines of progress on this issue and now enjoy the assistance of the Congress. In 1974, Congress enacted the Indian Financing Act,<sup>100</sup> which created a direct loan program, a revolving loan guarantee fund, and an interest subsidy program to help Tribes and Indian business owners borrow money for their enterprises. In 1982, Congress enacted the Indian Tribal Governmental Tax Status Act,<sup>101</sup> extending to Tribes several of the federal tax immunities and advantages offered to States. In 1988, the most important economic development legislation of all was passed: The Indian Gaming Regulatory Act.<sup>102</sup> Since the Act's passage, gaming has provided most tribal communities in the lower 48 States with badly needed discretionary income to support tribal government operations.

### D. Environmental Regulation

Tribal governments have been assigned important roles in federal regulatory programs as well. For example, Congress has amended several of the nation's key environmental regulatory statutes to enhance the Tribes' role in the federal regulatory regime. The

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97. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990).

98. Native American Languages Act, Pub. L. No. 101-477, 104 Stat. 1153 (1990).

99. U.S. CENSUS BUREAU, INSURANCE, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004 12 (2005), available at <http://www.census.gov/prod/2005/pubs/p60-229.pdf> (according to the Census Bureau, from 2002-2004 the Indian poverty rate of 24.3% was nearly twice that for all races (12.4%)).

100. Indian Financing Act, Pub. L. No. 93-262, 88 Stat. 77 (1974).

101. Indian Tribal Governmental Tax Status Act, Pub. L. No. 97-473, 96 Stat. 2607 (1983).

102. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

Comprehensive Environmental Response, Compensation, and Liability Act<sup>103</sup> and the Safe Drinking Water Act<sup>104</sup> were amended in 1986 to permit Tribes many of the same authorities as States under the statutes. In 1987, the Clean Water Act<sup>105</sup> was similarly amended, and the Clean Air Act was amended in 1990.<sup>106</sup> Finally in 1992, Congress enacted the Indian Environmental General Assistance Program Act,<sup>107</sup> authorizing block grants to Tribes to fund tribal environmental regulatory efforts.

### E. Restoration Acts and Settlement Acts

Modern policy also abandons the assumption that the Tribes will disappear. Proof of this is found in statutes that restore federal recognition to many of the Tribes that were terminated in the 1950s and 1960s, statutes settling ancient Indian land claims in the eastern United States and granting federal recognition to the claimant Tribes, and statutes settling water rights claims in the arid southwestern United States. The Menominee and the Klamath, the largest terminated Tribes, were restored to federal recognition in 1973 and 1986, respectively.<sup>108</sup> Dozens of terminated Tribes have been restored, including: the Siletz;<sup>109</sup> the Cow Creek Band of Umpqua;<sup>110</sup> the Confederated Tribes of the Grand Ronde Community;<sup>111</sup> the Coos, Lower Umpqua, and Siuslaw;<sup>112</sup> the Coquille;<sup>113</sup> and the Paiute Tribe of Utah.<sup>114</sup>

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103. See Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 99-499, 100 Stat. 1615, 1706 (1986) (codified at 42 U.S.C. § 9626 (Supp. 2005)).

104. See Safe Drinking Water Act, Pub. L. No. 99-339, 100 Stat. 642, 665 (1986) (codified at 42 U.S.C. §§ 300j-311 (Supp. 2005)).

105. See Clean Water Act, Pub. L. No. 100-4, 101 Stat. 7, 76 (1987) (codified at 33 U.S.C. § 1377 (Supp. 2005)).

106. See Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 7601(d) (Supp. 2005)).

107. See Indian Environmental General Assistance Program Act, Pub. L. No. 102-497, 106 Stat. 3258 (1992) (codified at 42 U.S.C. § 4368b (2000)).

108. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. § 903-903f (Supp. 2005)); Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398 § 2, 100 Stat. 849 (1986) (codified at 25 U.S.C. §§ 566-566h (1995)).

109. Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. §§ 711-711f (Supp. 2005)).

110. Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982) (codified at 25 U.S.C. §§ 712-712d (Supp. 2005)).

111. Grand Ronde Restoration Act, Pub. L. No. 98-165, 97 Stat. 1064 (1983) (codified at 25 U.S.C. §§ 713-713g (Supp. 2005)).

112. Coos, Lower Umpqua and Siuslaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984) (codified at 25 U.S.C. §§ 714-714f (Supp. 2005)).

113. Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989) (codified at 25 U.S.C. §§ 715-715g (Supp. 2005)).

Similarly, Tribes that brought land claims to correct ancient wrongful takings of their land both gained the status of federally recognized Tribes and negotiated settlements of their claims. Congress has enacted legislation settling the claims of the Narragansett,<sup>115</sup> Penobscot, Passamaquoddy and Maliseet,<sup>116</sup> Mashantucket Pequot,<sup>117</sup> Mohegan,<sup>118</sup> and Gay Head Wampanoag<sup>119</sup> Tribes, among others. These laws direct the acquisition of additional lands into trust for the Tribes.

A final set of examples arises from statutes settling Indian water rights claims. During the self-determination era, Congress enacted water rights settlements for the Gila River Indian Community,<sup>120</sup> the Tohono O'odham Nation,<sup>121</sup> the Pueblo of Zuni,<sup>122</sup> the Paiute Tribe of Utah,<sup>123</sup> the Yavapai-Prescott Indian Tribe,<sup>124</sup> the San Carlos Apache Tribe,<sup>125</sup> the Fallon Paiute-Shoshone Indian Tribes,<sup>126</sup> and the Salt River Pima-Maricopa Indian Community,<sup>127</sup> among others. The scarcity of water in the West and the pains taken by Congress to assure adequate supplies to meet tribal needs are further confirmation that Indian Tribes will be with us for the indefinite future.

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114. Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 2, 94 Stat. 317 (1980) (codified at 25 U.S.C. §§ 761-768 (2000 & Supp. 2005)).

115. Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, § 2, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701-1716 (2000 & Supp. 2005)).

116. Maine Indian Claims Settlement Act, Pub. L. No. 96-420, § 2, 94 Stat. 1785 (1980) (codified at 25 U.S.C. §§ 1721-1735 (2000 & Supp. 2005)).

117. Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 2, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751-1760 (2000 & Supp. 2005)).

118. Mohegan Nation of Connecticut Land Claims Settlement Act, Pub. L. No. 103-377, § 2, 108 Stat. 3501 (1994) (codified at 25 U.S.C. §§ 1775-1775h (2000 & Supp. 2005)).

119. Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act, Pub. L. No. 100-95, 101 Stat. 704 (1987) (codified at 25 U.S.C. §§ 1771-1771i (2004)).

120. Gila River Indian Community Water Rights Settlement Act of 2004, Pub. L. No. 108-451, tit. II, § 201, 118 Stat. 3499 (2004) (codified at 43 U.S.C. § 1501, amending 43 U.S.C. § 1524 (Supp 2005)).

121. Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, tit. III, 96 Stat. 1274 (1982).

122. Zuni Indian Tribe Water Rights Settlement Act, Pub. L. No. 108-34, 117 Stat. 782 (2003).

123. Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, 114 Stat. 737 (2000).

124. Yavapai-Prescott Indian Tribe Water Rights Settlement Act, Pub. L. No. 103-434, 108 Stat. 4526 (1994).

125. San Carlos Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-575, tit. XXXVII, 106 Stat. 4740 (1992).

126. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3289 (1990).

127. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512, 102 Stat. 2549 (1988).



## F. The Effects of Modern Indian Policy

By any measure, and certainly when measured against past eras of federal Indian policy, the preceding list is an impressive accomplishment by Indian Tribes and their advocates. In 1900, Indian culture was under attack. Tribal government, to the extent it existed at all, was underground. Indians were uniformly poor, without formal education, and tragically unhealthy. Government policies dictated that they were to be absorbed into the population at large and the peoples known as American Indians were to cease to exist. Clearly, policy has changed dramatically in the last 40 years and, as a result, the dire conditions of Indian life have also changed for the better.

This is not to say that there are not daunting problems and challenges for Indian Tribes. From the tribal perspective, the legislation described above is far from perfect, and the effort continues to improve each of these statutes to more closely reflect tribal aspirations. Moreover, there is no constitutional assurance that policy will never shift back to coercive assimilation. The doctrine of federal plenary power, as scholar P.S. Deloria regularly points out, makes it possible for Congress and the courts to do away with tribal government in an afternoon, should they choose to do so.

At this point, though, that seems profoundly unlikely. The Tribes have succeeded in fundamentally changing the terms of the debate in Indian policy. Indian policy is no longer made with an eye toward the eventual disappearance of the Tribes. That tribal governments possess, and should possess, a certain measure of authority is no longer a subject of debate, even though a lively battle continues over the extent of that authority in particular cases. No serious policy maker proposes that the federal-tribal trust relationship be terminated. Indeed, recent federal efforts reflect a sense among policy makers that the federal responsibility is ongoing, perhaps perpetual. Tribes have found their voice in the federal policymaking process and are no longer the passive victims of policy errors made by others. They are part and parcel of the policy process and have the legal, political, and economic wherewithal to defend their interests in the federal political system. If bad policy is made, it is not because Indians had no opportunity to influence the process.

Thus, current policy favors greater tribal control of Indian resources. It disfavors any abrupt termination of the trust and indeed envisions an ongoing federal-tribal relationship. Because roles for Tribes are woven into national social service and regulatory programs, the opportunity exists for a new approach to the trust, one grounded in assumptions that are the opposite of those assumptions that underlay the

trust at its inception. This new approach would be premised on the assumptions that (1) Indians are fully capable of managing their internal affairs and their property; (2) the Tribes will not disappear, and they desire and are owed a permanent place in American federalism; and (3) the federal-tribal relationship is a permanent one, based not in paternalism, but in partnership. In the words of President Nixon, Tribes should be "independent of Federal control without being cut off from Federal concern and Federal support."<sup>128</sup>

### III. THE CURRENT ADMINISTRATION OF THE TRUST

In keeping with the many reforms of the Self-Determination Era, Congress has attempted to improve management of both tribally and individually owned lands held in trust for Indians by the United States. Both the Indian Land Consolidation Act of 1983<sup>129</sup> (and its serial amendments)<sup>130</sup> and the American Indian Trust Fund Management Reform Act of 1994<sup>131</sup> represent earnest efforts by Congress to help the Tribes make the most of their single largest asset: 55 million acres of land. Congress has also made efforts to help the Tribes increase their returns on the mineral resources of the reservations. Most significantly, the Indian Mineral Development Act of 1982<sup>132</sup> authorized creative transactions by Tribes, abandoned the outdated and exploitative model of leasing to outsiders in return for insufficient royalties, and reduced federal intrusion into tribal decision making regarding tribal mineral resources.

Although these are relatively small reforms to the trust itself, Congress has expressed its ongoing commitment to the trust many times since 1970 and now routinely designates specific programmatic functions as "trust responsibilities." For example, the No Child Left Behind Act of 2001 provides that "[i]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and

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128. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 566-67 (July 8, 1970).

129. Act to authorize the purchase, sale, and exchange of lands by Indian tribes and by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation of North Dakota specifically, and for other purposes, Pub. L. No. 97-459, tit. II, § 202, 96 Stat. 2517 (1983).

130. Technical Amendments to Various Indian Laws Act, Pub. L. No. 102-238 § 3, 105 Stat. 1908 (1991); Indian Land Consolidation Act Amendments, Pub. L. No. 106-462, § 103, 114 Stat. 1992 (2000); American Indian Probate Reform Act, Pub. L. No. 108-374, 118 Stat. 1773 (2004).

131. American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 2, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001-4061 (1994)).

132. To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes Act, Pub. L. No. 97-382, 96 Stat. 1938 (1982).

responsibility to the Indian people for the education of Indian children."<sup>133</sup> Similarly, in the Indian Tribal Justice Act of 1993, which reformed programs designed to assist tribal courts, Congress said, "[T]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."<sup>134</sup> The Native American Housing Assistance and Self-Determination Act provides that "Congress, through treaties, statutes, and the general course of dealing with Indian Tribes, has assumed a trust responsibility for the protection and preservation of Indian Tribes and for working with Tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition."<sup>135</sup>

Rather than attempting to end its responsibilities to Indians, as it did during the Assimilation and Termination eras, the United States has accepted these responsibilities as a principal component of the ongoing federal-tribal relationship. Framing a new trust based on the assumptions that underlie modern Indian policy requires an examination of the current state of trust administration and tribal status. The point of this review is to define the various aspects of the current trust in order to permit Tribes to select those elements of the trust that they wish to see continued and to dispatch those that are unhelpful.

### A. The Advantages of the Trust

Clearly there are advantages for Tribes and their members in having their land in trust status. Indians on trust land are "ordinarily exempt from certain state laws, including: (1) state or local taxation,...(2) local zoning and regulatory requirements...or, (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction."<sup>136</sup> Income that Indians derive directly from trust lands is immune from federal income taxation as well.<sup>137</sup>

Other elements of tribal and state jurisdiction also have come to be defined by the trust status of the land. At one time, it appeared that the reach of tribal and state jurisdiction was defined by 18 U.S.C. § 1151,

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133. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 701, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 7401 (2000 & Supp. 2005)).

134. Indian Tribal Justice Act of 1993, Pub. L. No.103-176 § 2, 107 Stat. 2004 (codified at 25 U.S.C. § 3601 (2004)).

135. Native American Housing Assistance and Self-Determination Act, Pub. L. No. 104-330, § 2, 110 Stat. 4017 (1996) (codified at 25 U.S.C. § 4101(4) (2000 & Supp. 2005)).

136. *Carcieri v. Norton*, 423 F.3d 45, 60 n.4 (1st Cir. 2005), quoting *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000).

137. *Squire v. Capoean*, 351 U.S. 1 (1956).

which defines "Indian Country" for purposes of federal criminal jurisdiction as follows:

Except as otherwise provided in sections 1154<sup>[138]</sup> and 1156<sup>[139]</sup> of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The Supreme Court at one time broadly hinted that "Indian Country" status was also determinative of the reach of tribal and state civil jurisdiction as well. In *Decoteau v. District County Court for Tenth Judicial District*,<sup>140</sup> the Court went so far as to say, "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."<sup>141</sup> *Decoteau* involved an interpretation of 28 U.S.C. § 1360(a), which extended state jurisdiction over civil causes of action arising in Indian Country in several states and authorized other states—including South Dakota—to assume such jurisdiction through a prescribed process. South Dakota had not followed this statutory process, yet attempted to assert authority over a child custody dispute among Indians, allegedly arising on a reservation. The Court held that the matter was governed by whether the case arose in Indian Country, apparently assuming that, in the absence of the federal grant of authority in section 1360(a), no such authority existed in the South Dakota state courts over civil cases arising in Indian Country. The Court determined that, because an 1891 Act of Congress had disestablished the Lake

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138. 18 U.S.C. § 1154 imposes criminal penalties under certain circumstances for sales of alcohol to Indians. "Indian country" is defined to exclude fee-patented lands in non-Indian communities within reservations.

139. 18 U.S.C. § 1156 imposes criminal penalties for possession of alcohol in "Indian country," which is defined to exclude fee-patented lands in non-Indian communities on reservations.

140. 420 U.S. 425 (1975).

141. *Id.* at 428 n.2, citing, inter alia, *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 177-78 n.17 (1973).

Traverse Reservation, the matter did not arise within Indian Country and the state court had jurisdiction.<sup>142</sup>

The Court, however, has since rejected the application of section 1151 in determining the extent of tribal power over non-Indians on fee land within reservations. In *Montana v. United States*,<sup>143</sup> the Court agreed with the Ninth Circuit that the Crow Tribe could regulate hunting and fishing by non-Indians on land held in trust by the United States for the Tribe.<sup>144</sup> However, the Tribe could not assert such authority over the activities of non-Indians on fee lands within the Crow Reservation.<sup>145</sup> It did not matter that the fee lands were within the reservation and were therefore Indian Country. More recently, in *Atkinson Trading Co., Inc. v. Shirley*,<sup>146</sup> the Court flatly stated, "Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land."<sup>147</sup> While the Court in *Montana* acknowledged that circumstances might exist in which a Tribe could regulate the conduct of non-Indians on fee land within a reservation, in the years since, the Court has not upheld any such assertion of tribal authority, consistently ruling that Tribes do not have jurisdiction over non-Indians on fee land.<sup>148</sup>

Thus, while the statutory definition of "Indian Country" may well determine the extent of state jurisdiction over Indians, the same cannot be said of tribal authority over non-Indians. This means that, even within an Indian reservation, land must be held in trust by the United States in order for a Tribe to have jurisdiction over non-Indian activities on the land. This statutory definition is strong incentive for Tribes to have all of their lands held in trust.

An equally strong incentive arises from the fact that tribally owned lands within a reservation may be subject to state taxation if the Tribe owns the land in fee. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*,<sup>149</sup> the Court considered whether the County could impose property taxes on reservation lands that had been alienated by allottees after the allotment of the Yakima Reservation but had been subsequently reacquired by the Tribe. The Court rejected the argument that the Indian Reorganization Act had repealed the Burke Act

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142. *Id.* at 445.

143. 450 U.S. 544 (1981).

144. *Id.* at 557.

145. *Id.* at 557-67.

146. 532 U.S. 645 (2001).

147. *Id.* at 653 n.5.

148. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 357-63 (2001).

149. 502 U.S. 251 (1992).

of 1906,<sup>150</sup> holding that the Burke Act made “unmistakably clear” the intention of Congress to permit state taxation of allotted lands for which patents in fee had been issued.<sup>151</sup> The Tribe’s subsequent acquisition of the land did not affect state jurisdiction. Only if the land were held in trust by the Department of the Interior<sup>152</sup> could the Tribe avoid the state’s ad valorem tax.

In *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*,<sup>153</sup> the Court extended the *Yakima* holding to former tribal lands that were sold as “surplus” lands when the reservation was allotted. In *Cass County*, the Tribe had reacquired the land as part of its land acquisition program. Unlike the Burke Act’s proviso authorizing taxation of allotments for which fee patents had been issued, the Nelson Act<sup>154</sup>—under which the Leech Lake Reservation was allotted—was silent as to the subsequent taxation of tribal lands that were sold after allotment. The Court said, “*Yakima*...stands for the proposition that when Congress makes reservation lands freely alienable, it is ‘unmistakably clear’ that Congress intends that land be taxable by state and local governments, unless a contrary intent is ‘clearly manifested.’”<sup>155</sup>

*Yakima* and *Cass County* present the Tribes with a dilemma. If alienability automatically gives rise to state taxation, they cannot own land free from the oppressive elements of the federal trust. The Tribe that seeks to exercise control of its lands without federal interference thus must volunteer for state taxation. The Court in *Yakima*, though, may have offered a solution, noting that in *Goudy v. Meath*<sup>156</sup> the Court “said that, although it was certainly possible for Congress to ‘grant the power of voluntary sale while withholding the land from taxation or forced alienation,’ such an intent would not be presumed unless it was ‘clearly manifested.’”<sup>157</sup> Thus, it is possible (based on this interpretation of the Supreme Court’s opinion) for Congress to relieve Tribes of the oppressive features of the trust while retaining their immunity from state taxation. That is precisely what I will propose that the Congress do.

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150. 34 Stat. 182 (1906).

151. *County of Yakima*, 502 U.S. at 258–59.

152. See 25 U.S.C. § 465 (Supp. 2005).

153. 524 U.S. 103 (1998).

154. Relief and Civilization of the Chippewa Indians in the State of Minnesota Act, ch. 24, 25 Stat. 642 (1899).

155. *Cass County*, 524 U.S. at 113.

156. 203 U.S. 146 (1906).

157. *County of Yakima*, 502 U.S. at 263 (quoting *Goudy v. Meath*, 203 U.S. 146, 149 (1906)).

## B. The Disadvantages of the Trust

### 1. *Economic Development and the Trust*

What has the trust done for Indian communities? Tribes and individual Indians own the beneficial interest in 55 million acres of land. While much of this land is arid and semi-arid, and not much of it is prime real estate, this is a lot of land. Many millions of dollars worth of minerals have been extracted from these lands over the past 100 years. Yet, Indian Country remains poor.

There are many reasons for Indian poverty, and the trust is at the center. In his *Handbook of Federal Indian Law*, Felix Cohen observed that the early twentieth century legislation governing the trust was concerned "almost entirely in the problem of how Indian lands or interests therein may be transferred from Indian tribe to individual Indian or from individual Indian to individual white man."<sup>158</sup> Although some of these statutes have been replaced or repealed, the policies of the statutes remain the guiding principles of the trust. Small wonder that Indian resources have been administered inefficiently and largely for the benefit of others; the trustee has failed to maximize tribal income from the use of Indian resources, and it is unlikely that Indians will ever be compensated adequately for much of this mismanagement.

Worse still, under current law the trust *cannot*, in fact, produce maximum economic benefit for the Tribes. The trust creates structural impediments to maximizing income that even the best administrative practices will not overcome; the ordinary tools of government finance and private capital formation simply are not available on trust land. A primary finance tool of most local governments is a tax on the value of real property. Individually owned Indian trust land—11 million acres in all—cannot practically be taxed by the Tribes due to fractionated ownership and the generally low income of reservation Indians. As for tribal land, there would obviously be little point in Tribes taxing their own ownership interests.

Nor is trust land easily used as collateral for capital loans. The typical owner of large amounts of land would borrow against that resource in order to capitalize enterprises, either on the land or elsewhere. Tribal trust land, however, cannot be mortgaged.<sup>159</sup> While many Tribes have been able to finance enterprises through leasehold

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158. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 80 (1942).

159. 25 U.S.C. § 483a (2000 & Supp. 2005) authorizes mortgages of individually owned trust lands, subject to the approval of the Department of the Interior. No similar provision exists for tribally owned trust lands.

mortgages, the leasehold lacks the security and marketability of title to the land. Thus, the Tribes can borrow only a fraction of the value of the land, and then only at the premium interest rate that lenders apply to higher risk loans.

Aside from these structural problems, there are problems in administration of the trust that further devalue the resource. The United States must approve every transaction conveying an interest in trust land and, arguably, in any land owned by an Indian tribe.<sup>160</sup> Tribes constantly complain about the delay involved in this process, and with good reason. Consider the process in the usual real estate transaction: The parties engage in a process of negotiation, examine the applicable statutes and regulations, estimate the value of the project to themselves and the other, draft the transactional documents, and finally close the agreement with the execution of the written instruments. Ordinarily, that would be the end of it.

With trust land, though, the process has only begun. After all these steps are complete, the Department of the Interior, acting through the BIA, now enters the process, and in essence performs all of the same tasks the parties have just completed. The Department of the Interior is the final arbiter of the value of the land and whether the Indian party to the transaction has received fair value. The Department may conduct its own appraisal of the property and make its own evaluation of the economic benefit to the Tribe or individual owner.<sup>161</sup> If the Tribe has received non-monetary compensation in the transaction—for example, a promise of a certain number of jobs for tribal members—the Department of the Interior may or may not agree that such compensation counts in the determination of whether the Tribe has been adequately compensated.<sup>162</sup> The Department might interpret its own regulatory requirements in the same way the parties have, or it might not. It might agree that the parties have adequately documented the transaction, or it might not. The Department of the Interior may ask for amendments to the lease, requiring another round of negotiation and drafting by the parties.

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160. See 25 U.S.C. § 177 (2000 & Supp. 2005).

161. See 25 C.F.R. § 162.604(b)(3) (2005). "Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners." *Id.*

162. See 25 C.F.R. § 162.107(a). The Department of the Interior "will defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible." *Id.* (emphasis added).



This process can go on for quite some time, because the Department rarely binds itself to a deadline for its review.<sup>163</sup> Consider further that BIA realty officers may be handling dozens of other transactions at the same time and that the Tribe has no ability to set the priorities of the federal employees reviewing the transaction. Thus, the multi-million dollar transaction may be arbitrarily made to wait behind lesser transactions depending upon the discretion of a federal employee.

Regulatory delays are a fact of life on major real estate transactions whether on or off Indian reservations, but the developer wishing to work on Indian lands faces not only the usual travails of gaining local governmental approvals from the Tribe, it also faces the additional chore of clearing a path through an antiquated federal regulatory system that is unfamiliar, often unresponsive, and occasionally downright mysterious in its ways.

The Tribes can shorten this path somewhat by assuming responsibility for the federal realty program under the Indian Self-Determination and Education Assistance Act,<sup>164</sup> which authorizes Tribes to operate programs previously administered by the BIA. Under the Act, the Tribes can contract to perform most of the realty functions, but final approval authority still rests with the Department of the Interior.<sup>165</sup>

Current reform efforts threaten to exacerbate rather than relieve this problem. The path the Department has chosen in its reform efforts is to ensure that proposed leases are reviewed by realty personnel in the BIA and then reviewed again by "Trust Officers" in the Office of the Special Trustee for American Indians.<sup>166</sup> This approach may result in fewer errors in the approval process, but only at the cost of a lengthier and duplicative review process.

Moreover, it is doubtful that the reduction in errors will result in substantially more profitable use of Indian lands. The Department of the Interior does not ask whether a particular transaction represents the best and highest use of a particular parcel, nor should it. The Department is not in the commercial real estate business. Rather, it asks only whether a particular transaction meets the relevant statutory and regulatory requirements. The Department has neither the incentive, nor the responsibility, nor the capability to act as a broker of Indian lands. It

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163. See 25 C.F.R. § 162.600–162.621 (No deadlines for review and approval of business leases appear in the regulations.).

164. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 2, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450–450n (Supp. 2005)).

165. 25 C.F.R. § 162.110 (2005).

166. See generally Dep't of the Interior, Comprehensive Trust Management Plan, ch. 4 (2003), available at [http://www.doi.gov/indiantrust/pdf/doi\\_trust\\_management\\_plan.pdf](http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf).

approves the deals that are brought to it, and it denies any responsibility to find lessees for Indian lands in most cases.<sup>167</sup> Department of the Interior employees are, in my experience, as dedicated and hard working as the employees of most organizations. They are not, however, experts in the entrepreneurial use of commercial real estate. There is little reason to expect that their review of proposed transactions will add substantial value to the transaction for the Indian landowner. That is not their job, and one cannot reasonably expect that the agency will ever be a catalyst for entrepreneurial progress among Indian landowners. The primary effect of reform will be to regularize the process and establish standards for approving transactions. These processes and standards in turn define the extent of the federal trust responsibility, so long as they are consistent with the applicable statutes. By conducting the processes it defines, and meeting the standards it sets, the Department of the Interior can shield itself from any future liability for breaches of trust. While that is a desirable and reasonable policy objective, it does not meet tribal objectives of maximization of income from their primary asset and tribal control of tribal resources.

The problems are made worse by the reduction in the capacity of the BIA. In the 25 years since the Indian Self-Determination Act was passed, the number of BIA personnel has been cut nearly in half.<sup>168</sup> The Tribes themselves have taken over many functions formerly performed by BIA personnel, but the Interior Department, acting primarily through the BIA, retains the responsibility and authority for final approval of transactions involving trust lands. Small wonder that the Interior Department is unable to keep pace with the leasing of Indian lands.

These problems only exacerbate the challenge of capitalizing and operating profitable reservation enterprises. The remote locations of most reservations, the prevailing poverty in most Indian communities, and the reluctance of the financial industry to lend in depressed communities makes most reservation enterprises—save perhaps gaming enterprises—marginal in terms of risk and reward. The burdens on these transactions created by the trust status of Indian land inevitably moves

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167. In a recent radio interview, Special Trustee Ross O. Swimmer observed that the landowners are “the first persons responsible for leasing the land,” and that the BIA only approves those leases. See *Indianz.com*, *Swimmer Shifts Trust Responsibility to Landowners*, Sept. 8, 2005, <http://www.indianz.com/News/2005/010219.asp>. Though the cited report is critical of Swimmer’s position, he is clearly correct. With rare exceptions, the Department only approves leases.

168. *Oversight Hearing on the Bureau of Indian Affairs Capacity and Mission Before the S. Comm. on Indian Affairs*, 106th Cong. 4 (1999) (statement of Kevin Gover, Assistant Secretary—Indian Affairs, Department of the Interior).

many marginal transactions—those that might attract financing, “all things being equal”—into the category of being unacceptably risky.

The trust has failed the Tribes economically, but this should come as no surprise. The trust system was set up as a temporary means of providing income for Indians while they learned the ways of the American economic system—it was not intended to last indefinitely. Yet Congress has not revisited the statutory bases of the trust in any comprehensive way, choosing instead to reform essentially the same system that existed in the early twentieth century. This approach virtually guarantees the failure of the trust administration system as an economic development policy. Unless the system is changed to permit and encourage the Tribes to assume final approval authority over transactions involving trust lands, economic progress in Indian Country will continue to be hindered by the trust.

## 2. *The Difficulty of Pursuing Remedies for Breach of the Trust*

As shown above, Congress’s plenary power has been used extensively to create a regime of federal control over Indian trust resources. Yet not every statute in which the United States assumes management responsibility for Indian trust resources gives rise to a damages remedy against the United States, even if the mismanagement is evident. In *Mitchell v. United States (Mitchell I)*,<sup>169</sup> the Court held that the Indian owners of trust allotments could not bring an action for damages against the United States for mismanagement of timber resources. The plaintiffs argued that the General Allotment Act,<sup>170</sup> through its provision that the allotments would be held in trust, rendered the United States liable in damages for various management failures. The Court held that the General Allotment Act “created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.”<sup>171</sup> This was so because Congress intended that allottees occupy their lands as a homestead and use it for agriculture or grazing.<sup>172</sup> As noted above, the Interior Department’s control of the allottees and their property could not have been more thorough and overbearing in the early days of allotment. Yet because no federal duties were specified in statutes and regulations, no enforceable federal duties existed.

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169. 445 U.S. 535 (1980).

170. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).

171. *Mitchell*, 445 U.S. at 542.

172. *Id.* at 542–43.

The *Mitchell* plaintiffs recast their claim and their case made it back to the Supreme Court. The Court in *Mitchell II*<sup>173</sup> analyzed the various statutes and Department of the Interior regulations specifically governing the leasing of trust lands for purposes of harvesting timber.<sup>174</sup> Unlike the General Allotment Act, the Court found that these statutes and regulations “clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.”<sup>175</sup> The Court noted that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.”<sup>176</sup> This elaborate control presented all elements of a common law trust: a trustee, a beneficiary, and a trust corpus.<sup>177</sup> Thus,

[b]ecause the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust....This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian Tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.<sup>178</sup>

Further, said the Court, a damages remedy fulfilled the purpose of the statute to generate proceeds for the Indians.<sup>179</sup>

*Mitchell II* is now the primary precedent on the issue of when damages are available for breaches of trust. The rule is clear enough, but it creates troublesome policy challenges. First, Tribes and individual Indians wishing to hold the government accountable in damages may do so only at the expense of submitting to the government’s “elaborate

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173. *United States v. Mitchell*, 463 U.S. 206 (1983).

174. *Id.* at 219–23.

175. *Id.* at 224.

176. *Id.* at 225.

177. *Id.*

178. *Id.* at 226.

179. *Id.* at 226–27.

control" of the resource. The more a Tribe is involved in management of the resource, the less likely the government can be held responsible for its role, even though it retains ultimate approval authority over all transactions involving an interest in trust land. Second, the choice as to whether the trust will be enforceable does not belong to the beneficiary and trustee jointly, but rather is the exclusive determination of the trustee. With its plenary power over Indian property, Congress may create an enforceable trust if and when it chooses, whether or not the affected Tribe consents. The Tribe, on the other hand, cannot require the United States to act as trustee.

More troubling still, the Court gives weight to the existence or absence of agency regulations specifying its responsibilities in determining whether the required "elaborate control" exists. This suggests that the Department of the Interior has control over whether an enforceable trust is created through its rulemaking; the Interior Department could use its rulemaking power to minimize its specific obligations in trust land transactions. Its power to do so is limited only by the relatively vague authorizing statutes so common in Title 25 of the United States Code. If it chooses, the Department of the Interior can minimize its responsibilities in the management of trust lands and still retain the ultimate approval authority.

This problem is on display in the Court's most recent decision on this issue, *United States v. Navajo Nation*.<sup>180</sup> The Tribe based its claim on the Indian Mineral Leasing Act of 1938 (IMLA),<sup>181</sup> which provides that tribal trust lands "may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities."<sup>182</sup> The purposes of the IMLA, according to the Court, were to provide Indians with a source of revenue and to foster tribal self-determination.<sup>183</sup> The Court noted that, prior to the IMLA, the decision whether to lease Indian lands for mineral extraction rested with the federal government, and that such leases were sometimes granted over tribal objections.<sup>184</sup>

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180. 537 U.S. 488 (2003).

181. Indian Mineral Leasing Act, ch. 198, 52 Stat. 347 (1938) (codified as amended at 25 U.S.C. § 396a-396g (Supp. 2005)).

182. *Id.* § 396a.

183. *Navajo Nation*, 537 U.S. at 506-09.

184. *Id.* at 494.

The Court determined that, as to coal leases like the one at issue, the IMLA assigned the Secretary "primarily an approval role."<sup>185</sup> While the IMLA contained certain specific requirements for oil and gas leases, coal leases were left to "the governance of rules and regulations promulgated by the Secretary."<sup>186</sup> The Interior Department's responsibilities as to this valuable resource were to be defined by the Department alone, and the sole regulation relevant to royalty rates for coal specified only that the royalty rate be "not less than 10 cents per ton."<sup>187</sup>

The lease into which the Navajo Nation had entered in 1964 required a royalty of 37.5 cents per ton, but permitted the Secretary to adjust that rate after 20 years and every ten years thereafter. Since the 1970s, the Tribe has sought to renegotiate the royalty, and by 1984, the royalties being paid by the Tribe represented only two percent of the gross proceeds received by the lessee, Peabody Coal Company. The Tribe asked the Secretary to exercise his authority under the lease and to raise the royalty rate to 20 percent of gross proceeds. The BIA area director issued an opinion letter granting the Tribe's request. Peabody appealed the area director's decision, and the appeal was referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz. Mr. Fritz considered the appeal and prepared a draft memorandum denying Peabody's appeal. However, after meeting *ex parte* with Peabody representatives, Interior Secretary Donald Hodel sent a memorandum that "suggested" that Mr. Fritz inform the parties that a decision was not forthcoming and urge them to resume negotiations.<sup>188</sup> The Tribe resumed negotiations with Peabody and reached a tentative agreement that, among other things, raised the royalty rate to twelve and a half percent of gross proceeds, acknowledged the legitimacy of the Tribe's tax on coal production, and capped the tax rate at eight percent. The Navajo Tribal Council approved the agreement, and the Secretary approved it shortly thereafter.<sup>189</sup>

The Navajo Nation eventually learned of the Secretary's *ex parte* meeting with Peabody and the Secretary's memorandum to Fritz and brought suit in the Claims Court claiming that the Secretary's approval of the twelve and a half percent royalty rate constituted a breach of trust. The Court said, "[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions,"<sup>190</sup> and held that

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185. *Id.*

186. *Id.* (citing 25 U.S.C. § 396d).

187. *Id.* at 494-95 (internal quotation marks omitted).

188. *Id.* at 497.

189. *Id.* at 495-500.

190. *Id.* at 506.

the IMLA and the accompanying regulations created no fiduciary obligation that had been breached:

The IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective...Unlike the "elaborate" provisions before the Court in *Mitchell II*...the IMLA and its regulations do not "give the Federal Government full responsibility to manage Indian resources...for the benefit of the Indians." The Secretary is neither assigned a comprehensive managerial role nor, at the time relevant here, expressly invested with responsibility to secure "the needs and best interests of the Indian owner and his heirs."<sup>191</sup>

The Court was unimpressed with the Tribe's argument that the *ex parte* meeting between Peabody representatives and the Secretary and the Secretary's subsequent intervention with the Deputy Assistant Secretary "skewed" the bargaining power between the Tribe and Peabody and thus constituted a breach of trust. The Court said, "However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages."<sup>192</sup>

The Court's disinterest in the specific facts of the case and its overriding concern with specific statutory or regulatory obligations leaves the Department of the Interior in a very advantageous position. The Department is left to define the content of the vague statutory command of the IMLA through rulemaking. Under the Court's analysis, if the Department chooses not to put any additional procedures in place, and chooses not to issue rules interpreting the statute and establishing standards, there is no damages remedy. Consider the primary leasing statute for Indian lands:

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial

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191. *Id.* at 507-08 (quoting *Mitchell*, 463 U.S. at 224-25).

192. *Id.* at 514.

investment in the improvement of the land for the production of specialized crops as determined by said Secretary....[A]ll leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.<sup>193</sup>

This statute, adopted in 1955, does not require that the Secretary take steps to ensure that the landowner receives an adequate rental. Under the Court's formulation in *Navajo Nation*, unless the Department of the Interior chooses to impose such a requirement on itself, it need not make any effort to guarantee a fair return.

As it happens, the Department's regulations require fair market rental,<sup>194</sup> but my point here is that it need not do so. In 1955, Congress was anxiously working to free the Indians from federal supervision in hopes that soon the Tribes would no longer exist and was not interested in creating or maintaining comprehensive federal responsibilities. Thus, the 1955 Act does not even require a fair rental.

This is what I mean when I say that the trust is flawed to its core. Many of the statutes that define the trust responsibility for Indian lands were enacted by Congresses that were working toward the elimination of tribal governments. Congress has made only the most nominal efforts to reform these fundamental components of the trust, choosing instead to direct the Department to reform its management practices. The Interior Department's administration of the trust has been abysmal, but no more so than Congress's neglect of its responsibility to properly define the duties of the administrators of the trust. And with the Court unwilling to read into the trust statutes something as basic as an

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193. 25 U.S.C. § 415 (Supp. 2005).

194. 25 C.F.R. § 162.107(a) calls for a "fair annual rental," which is defined as "the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market." 25 C.F.R. § 162.101 (2006).



obligation of good faith and fidelity in the absence of specific statutory language, the three branches have together created a largely useless trust.

### *3. Tribal Sovereignty and the Trust*

One is hard-pressed to imagine a less-sovereign government than one unable to engage in transactions with its own property. Yet even as federal policy recites the fact of tribal sovereignty, it imposes numerous conditions on the Tribes' exercise of the most basic sovereign rights: the right to control their property.

Ironically, the Tribes continually consent to this treatment. The fear of the termination of the federal-tribal trust relationship leads Tribes to accept without complaint the proposition that their property transactions are subject to the approval of the Department of the Interior. This fear is well founded. As described above, Congress in the 1950s set out to terminate the trust relationship with Indian Tribes and did so with regard to several dozen Tribes. The results were terrible, especially for the largest of the terminated Tribes. Termination meant not only an end to the federal trust responsibility, but a withdrawal of all federal services for Indians of the affected Tribes. Deprived of the tribal commonweal and the federal services upon which they had come to rely, terminated Indians were destitute. This history is why the Tribes have been willing to accept even the poorly conceived and badly executed trust administration that now exists. So long as the alternative to this broken trust system is the termination of the federal trust that was experienced in the 1950s, the Tribes will continue to prefer the broken trust.

But what of the impact on tribal sovereignty? How can the Tribes claim to be self-governing when federal officials must approve every transaction regarding their lands? And why would the Tribes welcome this gross intrusion? The answer can be found in the evolution of Supreme Court doctrine on tribal and state jurisdiction on Indian reservations. As discussed above, the Court has quite simply dispensed with the concept that the statutory definition of Indian country has any bearing on the reach of tribal authority. If the land is not in trust, Tribes must essentially demonstrate extreme circumstances justifying tribal jurisdiction. The reach of tribal jurisdiction and, even more clearly, the barriers against state jurisdiction are most secure on land that is held in trust by the United States. As has been clear for the last 40 years at least, the Tribes must invite federal intrusion into their affairs in order to establish a barrier against state intrusion. As the Court observed in *McClanahan v. Arizona State Tax Commission*:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.<sup>195</sup>

Surely, if the Tribes are really to take charge of their destinies and achieve self-sufficiency, they must take charge of their property. They have made great progress in this regard. Through the Self-Determination Act, they have taken control of much of the Department's funding for its realty programs. With these funds, the Tribes have also taken control of the information needed to make good land use decisions. Tribes no longer routinely approve leases that have been negotiated by the Department on their behalf. To the contrary, the Tribes have taken charge of the negotiation, and the Department has assumed the advisory role.

Because of this progress, the time has come for the Tribes to move even further forward in the exercise of their proprietary powers, and to further remove the United States from the day-to-day management of their lands. The Tribes' assertions of authority and responsibility gain strength and credibility when they take responsibility for the administration of trust resources. Furthermore, so long as the United States has ultimate responsibility for trust lands, the Tribes have a ready scapegoat for any failures in the management of those lands. This both perpetuates dependency on the United States and retards the development of tribal institutions for the responsible management of their lands. Accepting more responsibility will help spur the development of tribal capability in this regard. Those Tribes that are serious about sovereignty need an alternative to the burdensome and intrusive trust.

### C. A Failed Policy

What can be done with a system, a policy, that has failed dramatically, that is premised on conditions that no longer exist, that hinders its intended beneficiaries as much as it helps? Unfortunately, the trust cannot just be abandoned. Abandoning the Tribes and individual Indian landowners to cope alone with the consequences of the policy only compounds the wrongs that have been done to them. Surely,

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195. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973) (citations omitted).

though, it is no answer to simply say that the United States should make the current system operate well through management reforms. To do so is only to execute bad policy more effectively.

Even if the Department of the Interior has the will to genuinely reform trust management, Congress may not. The price tag for trust reform continues to grow, and the system that will be constructed is likely to be unjustifiable in light of the value of the trust assets. Congress grows more skeptical with each appropriations cycle, to the point that it is balking at providing funds to carry out the accounting activities that have been ordered by the *Cobell* court.<sup>196</sup> Notwithstanding the common rhetoric about meeting its obligations to Indian people, how can the Congress justify spending tens of millions of dollars to reform a failed system at a time when the country is at war, a time when it must rebuild a Gulf Coast devastated by hurricanes?

More fundamentally, what will result from such a reform effort? The *Cobell* court has ordered, and the Department of the Interior has planned, a reformed system that will intrude ever more on the prerogatives of the tribal and individual owners of trust land. As is true of most government systems, this one will not be nimble. The Department has been, at best, casual in its administration of the trust in many respects. That casualness, though, has had its advantages: it permitted agency officials to respond to emergent needs of account holders; it permitted Tribes to lease their lands at less than market value to permit tribal members to establish businesses; it permitted agency officials to act on the basis of their knowledge of the landowners and their wishes rather than measuring their proposed transactions against rigid standards intended to insure that the United States will not be liable for errors in administering the trust. The proposed reforms to the system will rob it of this desirable flexibility. The system will only become bigger, more rigid, more cumbersome, and more intrusive on the owners of trust lands. This in turn will result in fewer transactions with trust lands, less use of the primary resource of the Tribes.

Failing to reform the system is not an option, either. The Department of the Interior will be in the trust business for the indefinite future if for no other reason than to clean up its mess and prepare the system for meaningful change. There is no excuse for the federal failure with the trust, and the blame is shared among the three branches of government. Furthermore, there is much to be said for a dispassionate

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196. See *Indianz.com, Bush Administration Won't Give Up Fight on Cobell*, Mar. 18, 2005, <http://indianz.com/News/2005/007113.asp> (describing comments of members of the House of Representatives Appropriations Committee's Subcommittee on Interior Appropriations).

trustee, doing only what is required and broaching no exceptions to the rules of the trust. It minimizes arbitrary and dishonest decision making by agency officials. Nevertheless, rigid administration of the trust will work to the landowners' considerable disadvantage.

#### IV. A NEW TRUST FOR A NEW CENTURY

Before presenting specific proposals, it is important to emphasize once again the necessity of consent. The reforms that I propose cannot simply be thrust upon the Tribes whether they like it or not. Such "reform" has been attempted before, and it has failed. Rather, the reform that must take place requires that tribal governments have meaningful roles in its conception and implementation. Indeed, I propose that no change may be made to the trust without the written consent of the affected Tribes.

##### A. The Necessity of Customized Trust Administration

How can the advantages of the trust to Indian Tribes and individual Indians be preserved while eliminating the requirement that all transactions in trust land be approved by the United States? The details of the answer are inevitably complex, but the basic answer is quite simple: the Tribes should be able to retain those aspects of the trust that they find useful and desirable and eliminate those that they do not want.

The formula will differ from Tribe to Tribe; any attempt to prescribe by legislation the specifics of a new trust will fail because the needs, wants, and conditions of the Tribes vary dramatically. Congress, for obvious reasons, prefers to legislate in omnibus fashion by enacting statutes equally applicable to all Tribes rather than taking into consideration the vast differences in Indian Country. But given the vastly different circumstances of the Tribes,<sup>197</sup> what possible sense does it make

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197. Reservation populations range from less than 10 to over 250,000, and reservations vary in size from six acres to the size of West Virginia. See generally AMERICAN INDIAN RESERVATIONS AND TRUST AREAS (Veronica E. Velarde Tiller ed., 1996). Tribal physical environments include everything from high desert to rain forests. Their histories are as varied as that of the 50 States. Some have treaties with the United States; others do not. Socio-economic conditions range from genuine prosperity to grinding poverty. Of the 560 or so federally recognized Tribes, over 220 are in Alaska, where only one Tribe has a reservation. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180 (Dec. 5, 2003); SAN DIEGO STATE UNIVERSITY, LIBRARY & INFORMATION ACCESS, CALIFORNIA INDIANS AND THEIR RESERVATIONS: AN ONLINE DICTIONARY, <http://infodome.sdsu.edu/research/guides/calindiands/calinddict.shtml> (last visited Nov. 13, 2006). Over 100 are in California, many

to have statutes and court decisions treat Tribes as though they were the same?<sup>198</sup>

Other Federal statutory programs for Tribes do have some flexibility. Tribes may, for example, choose from the menu of BIA and IHS programs which programs they will contract to operate under the Self-Determination and Self-Governance Acts. When it comes to the trust, however, that flexibility is limited. Each contract entered into under the Self-Determination Act must contain the following: "Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe or individual Indians."<sup>199</sup> The Interior Department has thus issued a regulation stating that tribes may, under the Self-Determination Act, perform the Department's functions with regard to leasing Indian lands, "[e]xcept...for the granting, approval, or enforcement of leases."<sup>200</sup>

The considerable obstacle that must be overcome is the preference of the Congress and the Executive agencies for the convenience of a single set of rules applicable to all Tribes. Certainly Congress cannot be expected to legislate Tribe-by-Tribe as to each element of the trust. However, there is no reason that the authority to deal with the Tribes individually cannot be delegated to the Department of the Interior. It will require considerable effort by the Tribes to force the Department to deal on such a basis but, with adequate congressional oversight of agency implementation, it can be done. Moreover, the Department has its own incentives to redefine the trust, as will be discussed below.

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with very small reservations and small populations. Thirty-eight are in Oklahoma, where there are no reservations, though there is trust land over which the Tribes have jurisdiction. See Tiller, *supra*, at 497-538.

198. The Department of the Interior made a ham-handed effort at distinguishing among Tribes in the early 1990s when it announced that "historic" Tribes (those intact since their contact with Europeans, particularly treaty Tribes) had inherent sovereignty, while "created" Tribes (those Indian communities cast together from several groups or that were only a part of larger groups from which they had separated) did not have inherent sovereignty. While the facial appeal of the distinction is somewhat understandable, the Department of the Interior painted with too broad a brush. Congress almost immediately enacted legislation prohibiting any regulation, decision, or determination—made by any federal agency pursuant to any Act of Congress—that "classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476 (f), (g) (2000).

199. 25 U.S.C. § 4501 (d)(1)(B) (Supp. 2006).

200. 25 C.F.R. § 162.110 (2006).

A statute recently enacted at the request of the Navajo Nation demonstrates the policy I advocate. Public Law 106-568 amended the Indian Long-Term Leasing Act<sup>201</sup> by adding the following:

(e) Leases of restricted lands for the Navajo Nation

(1) Any leases by the Navajo Nation for purposes authorized under subsection (a) of this section, and any amendments thereto, except a lease for the exploration, development, or extraction of any mineral resources, shall not require the approval of the Secretary if the lease is executed under the tribal regulations approved by the Secretary under this subsection and the term of the lease does not exceed--

(A) in the case of a business or agricultural lease, 25 years, except that any such lease may include an option to renew for up to two additional terms, each of which may not exceed 25 years; and

(B) in the case of a lease for public, religious, educational, recreational, or residential purposes, 75 years if such a term is provided for by the Navajo Nation through the promulgation of regulations.

(2) Paragraph (1) shall not apply to individually owned Navajo Indian allotted land.

(3) The Secretary shall have the authority to approve or disapprove tribal regulations referred to under paragraph (1). The Secretary shall approve such tribal regulations if such regulations are consistent with the regulations of the Secretary under subsection (a) of this section, and any amendments thereto, and provide for an environmental review process.<sup>202</sup>

Thus, the Navajo Nation has already taken charge of the approval responsibility as to leases of tribal lands. The Secretary remains in the process by evaluating the Tribe's leasing regulations to ensure that they adequately protect tribal interests. Later provisions provide a process and remedies for the Tribe's failure to abide by its regulations.<sup>203</sup> Congress thus has already taken a key step in the direction of the policy I advocate.

Congress should authorize the Department of the Interior to negotiate agreements with all willing Tribes to take over the approval

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201. 25 U.S.C. § 415(a)-(d) (2000).

202. Navajo Nation Trust Land Leasing Act, 25 U.S.C. § 415(d)-(e) (2000).

203. *Id.* § 415(e)(6).

function rather than requiring each Tribe that wishes to do so to petition Congress for a specific amendment. That policy and programmatic responsibilities can be customized on a Tribe-by-Tribe basis is not a radical idea. There is ample precedent for such an approach. Both the Self-Determination and Self-Governance Acts require negotiated agreements between the Tribes and the Department of the Interior.<sup>204</sup>

The Indian Gaming Regulatory Act (IGRA)<sup>205</sup> also provides precedent for customized and negotiated policy and programmatic responsibilities. The requirement that Class III gaming be conducted only in compliance with a Tribal-State Compact has resulted in an interesting variety of approaches to the regulation of gaming. The IGRA sets parameters for the compacts, but requires little in terms of specific outcomes. This approach should be used for the negotiation of agreements for the administration of trust lands.

## **B. Issues to Be Negotiated**

The following section addresses some of the various matters that should and should not be considered in agreements between Tribes and the United States, acting through the Department of the Interior. The key objective is for Tribes to exercise final approval authority for transactions involving trust lands. As noted, the Self-Determination Act has permitted the Tribes to take over virtually every realty function of the Department, but approval authority is the one function that cannot be contracted. Thus, this proposal is hardly groundbreaking. In context, it is only the next step to be taken in the process of implementing the self-determination policy.

### *1. Immunities from State Taxation and Regulation*

Every Tribe will insist that certain attributes of trust land be retained. One such attribute is the existing immunity from state taxation and regulation. State taxation and regulation could negatively affect, and even completely prevent, land uses the Tribes deem desirable. The objective of giving Tribes greater control over their lands would be thwarted were states permitted to tax or regulate tribal lands.

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204. The Acts also specifically provide that they do not diminish the trust responsibility. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 2213 (1975); Tribal Self-Governance Act, Pub. L. No. 103-413, 108 Stat. 4270, 4267 (1994). Thus, the Department of the Interior is unable to free itself from, for example, statutory approval requirements without specific congressional authorization.

205. Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11, 102 Stat. 2467, 2472 (1988) (codified at 25 U.S.C. §§ 2701, 2710(d) (Supp. 2005)).

## 2. Tribal Jurisdiction

Similarly, tribal authority over trust lands must be maintained. Tribal territorial jurisdiction is largely restricted to trust lands. No Tribe will willingly cede that authority, nor should it be required to do so. However, Tribes should have the option of alienating land without thereby losing their authority over it. There are good reasons that Tribes might choose to alienate, the most obvious being that they might choose to mortgage land in order to raise capital for tribal enterprises. Tribes currently rely primarily on leasehold mortgages that give lenders only the right to operate the business envisioned by the lease in the event of a default. The right to own the land in the event of a default should be more attractive to lenders and should result in somewhat lower interest rates on the mortgage loans than can be obtained on leasehold mortgages.

Another example of the need for Tribes to be able to alienate land without thereby losing jurisdiction over it is the Tribes' use of land for housing for tribal members. Conventional mortgages are unavailable on tribal trust lands, and a Tribe might decide that it should set aside lands for sale to tribal members for home sites. Those tribal members in turn will take conventional mortgages with the land as security. Under current law, the Tribe would have to take this land out of trust (first obtaining the approval of the Department of the Interior), and the land would then be subject to state taxation. Under this proposal, the land becomes alienable without federal approval, and it remains under tribal jurisdiction.<sup>206</sup>

Tribes should be free to limit alienability, for example, to tribal members only or to persons whose immediate families include tribal members. To do so, however, reduces the properties' value and therefore reduces the market for resale of foreclosed properties. The result will be that lenders become reluctant to lend, save at a premium interest rate. This may be a matter best left to the Tribes and the financial community to experiment with different formulae for addressing marketability.

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206. Both Tribes and lenders should proceed with considerable care before taking such a step, though. Realistically, non-Indian lenders are not likely to be sanguine about owning an asset under tribal jurisdiction without certain assurances as to their rights as landowners. Tribes may find that they have to make assurances regarding their use of their authority to tax and regulate lands within their authority. Further, some tribal courts may lack jurisdiction over disputes arising from contracts between Indians and non-Indians, or may simply lack the experience and capability to entertain commercial litigation. Tribes may find that, in order to attract lenders to the reservations, they will have to agree to alternatives to litigation in tribal court. Some will decide that this is too high a price to pay. Both are legitimate choices, and the decision should be up to the Tribes.



Needless to say, if the Tribes erect high barriers to resale, they will have accomplished little from their decision to take control of the trust approval process.

### *3. Retention of Specific Lands in Trust*

Even Tribes that wish the freedom from federal supervision that this proposal envisions may determine that certain lands should continue under the substantial protection of the trust. Lands that are sacred to the Tribes such as ceremonial sites might be better held in trust. The Tribes will not develop such lands, and there is no need to free them from the transaction costs arising from the trust. Also, some Tribes have lands that are customary for the exercise of hunting, fishing, or gathering rights guaranteed by treaty. Like sacred sites, these lands will not be the subjects of transactions, and their use for treaty purposes is not affected by the burdens of the trust. Special treatment of such lands has the added advantage of confirming the tribal view that treaties remain the basis of the federal-tribal relationship, and that the United States shares the Tribes' priority of preserving Indian religion and culture.

### *4. Alienability*

As mentioned above, Tribes should have the option of alienating tribal lands without federal approval. I suspect that they will rarely sell land outright, but in the age of Self-Determination, they should have that option. The challenge for the Tribes that choose to have this option will be to resist temptation. Particularly in poorer tribal communities, the temptation will be great to sell the land—their primary capital asset—to meet ongoing needs. Those needs are great in many places, and one can well imagine the urge to use long-term assets to relieve immediate problems. Still, I believe the option should be available. Free alienability may accommodate tribal land consolidation efforts, for example, and, as noted above, the ability to enter into mortgage loans may also be a useful option.

The primary argument in favor of alienability, though, is that it places the ultimate decision where it belongs: with the landowner. The trust as it presently exists places the ultimate determination of risk and reward in transactions with the Department of the Interior. How large a price is a Tribe willing to pay to have this additional review? What is the value of that additional review? Does the Department have expertise that the Tribes do not? Even if it does, must it be exercised only through the power of ultimate approval? The answers to these questions vary from Tribe to Tribe, from location to location, and certainly from time to time.

### *5. Lease Approvals*

Most of the primary statutes governing leasing and other transfers of interests in trust lands were passed at times when Indians were presumed incompetent or Congress was attempting to remove the federal government from the supervision of tribal land transactions. In the past, the professional expertise in Indian Country resided almost exclusively in the Department of the Interior. The Self-Determination Act, however, has resulted in a transfer of authority, funding, and expertise from the Department to the Tribes. Those Tribes with confidence in their business decision making should be permitted to take charge of the process. It is simply no longer appropriate for the Department to have the final word unless a Tribe prefers that approach.

Rather than attempting to revise each of these old leasing statutes, Congress should jointly authorize the Tribes and the Department of the Interior, by written agreement, to waive the statutory requirements of federal approval of leases of Indian trust land. The statute should make clear that leases approved in accordance with the procedures agreed to by the Tribes and the Department of the Interior are valid as a matter of federal law.

### *6. Enforceability and Enforcement*

Remedies and enforceability also must be considered. Section 415(f), 25 U.S.C. provides an interesting approach for leases at the Gila River Indian Community:

(f) Leases involving Gila River Indian Community Reservation; arbitration of disputes

Any lease entered into under sections 415 to 415d of this title, or any contract entered into under section 81 of this title, affecting land within the Gila River Indian Community Reservation may contain a provision for the binding arbitration of disputes arising out of such lease or contract. Such leases or contracts entered into pursuant to such Acts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of title 9. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 9 to abide by the outcome of arbitration pursuant to the provisions of chapter 1 of title 9, sections 1 through 14, shall be deemed to be a civil action arising under the Constitution, laws or

treaties of the United States within the meaning of section 1331 of title 28.

Added in 2002,<sup>207</sup> this provision makes arbitration awards arising from lease disputes at Gila River enforceable in federal court through the Federal Arbitration Act.<sup>208</sup> Both a refusal to arbitrate "any lease" entered into under Section 415 and any failure to abide by an arbitration award are actionable in federal court. Congress may wish to consider other options for enforceability and offer a series of options for Tribes and the Department of the Interior to select from. The point here is that leases of Indian trust land must create rights under federal law, and those rights must be enforceable in a forum agreed upon by the parties to the lease.

Current law also assigns to the Department the responsibility for enforcing the lease terms in the event the tenant defaults.<sup>209</sup> Tribes should have the option of assuming this responsibility.

### 7. Receipts

A key issue is whether the Tribe or the Department of the Interior will be responsible for collecting the proceeds of trust transactions. If the Tribe chooses to collect the receipts, the Department should have no role to play. If the Tribe chooses to have the Department collect the receipts, those funds are trust funds subject to all of the requirements of the Indian Trust Funds Management Reform Act. Certainly the Tribe that has chosen to take over lease approvals from the Department is also capable of collecting the proceeds of the lease and auditing compliance with the lease. Perhaps they should even be required to do so, at least as to leases of tribal lands.

The situation is different with regard to allotted lands. The receipt and distribution of payments on leases of highly fractionated allotted land is already an extremely complicated and expensive business. Before a Tribe can be permitted to have that responsibility, it should be required to demonstrate to a high level of probability that it has the resources to meet this responsibility. I suspect that most will wisely decline this responsibility. The Navajo statute cited<sup>210</sup> above specifically does not include tribal authority over allotted lands. It is easy to see why the Navajo Nation would decline the responsibility. The problem of collecting and distributing lease payments has given the Department of the Interior fits over the years, and until the Department

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207. 25 U.S.C. § 415(f) (Supp. 2002).

208. 9 U.S.C. §§ 1-16 (2000).

209. See 25 C.F.R. §§ 162.108, 162.110 (2006).

210. 25 U.S.C. § 415(e) (2000).

comes up with a reliable system for handling the job, Tribes would be well-advised to avoid taking over the job. Still, those Tribes that wish to do so should be permitted to, so long as they can demonstrate that the allottees' money is going to be handled properly.

#### *8. Tribal versus Individual Lands*

A key decision that each agreement must cover is whether trust lands owned by individual Indians will be covered under the new regime created by the agreement. This is perhaps the most troublesome issue. The Tribe seeking control of its trust resources might well find little to be gained from taking responsibility for allotted lands within their reservations. First and foremost is the problem of fractionation. Allotments made in the later nineteenth and early twentieth centuries have passed through several generations of descent, most by intestacy. Thus, allotments having several dozen owners are the norm, and those having hundreds of owners are not uncommon. Moreover, land title records maintained by hand and paper for 100 years may be quite inaccurate. Tribes will be quite justified in saying to the Department of the Interior, "You broke it, you fix it."

There are other strong disincentives for tribes to take over the administration of allotted lands. Allottees tend to be extremely solicitous of their rights as property owners and extremely vocal critics of both the Department of the Interior and the tribal governments. Most tribal councils are elected and might well choose not to be responsible for the lands of troublesome constituents. Further, there are some reservations where a tradition of tribal government corruption or turmoil has left tribal members with so little confidence in tribal management that they would prefer the trust as administered by the Department over tribal management of their resources. I do not believe that federal law should require that a tribal government's decision to enter into an agreement to take over administration of the trust be subjected to a vote of tribal members. However, the Department of the Interior and the Tribe should be required to notify all tribal members and to conduct public meetings to hear the opinions of tribal members prior to entering into an agreement that would transfer any portion of the administration of the trust for individual allotments from the Department to the Tribe.

Furthermore, unlike a Tribe's administration of its own resources, tribal administration of the trust on allotted lands should be subject to federal oversight. The United States has assumed a direct fiduciary relationship with the owners of allotted lands. Tribal interests and the interests of the allotment owners are not always the same and Tribes must be deterred from using their new authority to serve tribal interests at the expense of the allotment owners' interests. This need not

be a deeply intrusive oversight. The Department of the Interior has for several years been conducting reviews of the trust activities of Self-Governance Tribes.<sup>211</sup> These reviews are not to second-guess tribal decisions, but rather to ensure that adequate procedures are established and followed.

If the objective of having Tribes take over trust administration is to be achieved with regard to allotted lands, Congress will have to create incentives for Tribes to take on such a troubled system. One such incentive might be that the Tribe will receive priority in the execution of the federal program to acquire small fractionated interests and turn them over to the Tribes.<sup>212</sup> Currently, the program requires that the Department of the Interior apply a lien to such reacquired interests and that any income to the Tribes derived from such interests be used to repay the federal government for its expenses in acquiring the land. As lands become increasingly fractionated, though, the likelihood of the income from the acquired interests paying for their purchase seems distant. Worse still, it creates yet another recordkeeping burden for the Department. It would be better to simply turn the interests over to the Tribe without any lien and without any repayment obligation on those reservations where the Tribe has chosen to assume management of the trust on allotted lands. Whether this will be incentive enough for the Tribes to take on the difficult task cannot be known, but certainly it is a step in the right direction.

### *9. Some or All Tribal Land*

A Tribe might also decide that it does not want approval authority as to all tribal lands, but rather only over certain designated areas. A couple of scenarios explain why this decision might come about. A Tribe might decide that it wants to establish a housing development. If it has members who can afford mortgage financing, a Tribe might well want to designate an area of tribal lands for sale as housing sites, thus permitting tribal members to use their resources to build homes using conventional mortgages. Similarly, Tribes might want to create commercial zones where tribal members might purchase lots for the development of businesses financed by conventional business mortgages. Such designations would have to be compact and rational.

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211. See Trust Evaluation Review, 25 C.F.R. §§ 1000.350-1000.367 (2005).

212. The program was established by the Indian Land Consolidation Act Amendments, Pub. L. No. 106-462, § 103(6), 114 Stat. 1999 (codified at 25 U.S.C. §§ 2205-2219 (Supp. 2005)). Changes to the program were made in the American Indian Probate Reform Act, Pub. L. No. 108-374, § 6(a)(5), 108 Stat. 1773, 1800 (2004) (codified at 25 U.S.C. §§ 2220-2221 (Supp. 2005)).

Arbitrariness in the designations would be grounds for the Department of the Interior to refuse to make the agreement. But if a Tribe has a rational plan that justifies making some but not all of its land subject exclusively to tribal trust administration, it should be permitted.

Tribes might also wish to choose just what types of transactions they want to approve on their own. A Tribe might well have all the expertise needed to administer the trust on grazing lands, for example, but not for mineral leases. Thus, the agreement should specify the kinds of leases for which the Tribe will be responsible and those for which the Department of the Interior will retain final approval authority.

#### *10. Funding for Tribal Administration*

The Tribes and the Department of the Interior are accustomed to making contracts by which Tribes assume responsibility for federal service programs and trust administration. Both are skilled at determining what a function will cost and how much is available. However, if a Tribe is going to assume the federal responsibility of approving transactions on trust lands, something more is required. A financial incentive would be appropriate to encourage the Tribe to take on this responsibility. For some years, Congress has appropriated a special fund of money for new self-governance compacts to ensure that, when a Tribe takes a share of funding from a BIA Regional Office that serves several Tribes, sending the funds to the Self-Governance Tribe does not result in a diminution of services to other Tribes served by the Regional Office. A similar fund that provides a straightforward incentive to the Tribes that choose to take on all or part of the Department's approval authority could be established.

A problem that the Tribes have faced for many years is the uncertainty of federal appropriations. The Tribes have taken on many of the responsibilities of the Department of the Interior and the Indian Health Service over the years, only to see federal appropriations to those agencies fail to keep pace with the Tribes' increasing service populations.<sup>213</sup> These shortfalls are ameliorated somewhat by the rising business income of the Tribes, but the Tribes have a fair point when they complain both of the downward trend in per capita federal funding for the programs they have contracted and the annual uncertainty they experience as to the specific levels of funding that Congress will settle upon. This problem will make many Tribes extremely reluctant to take on greater trust administration responsibilities. They will be concerned

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213. U.S. COMM'N ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 24-26 (2003).

that they will take on these responsibilities only to have the rug pulled out from under them in the form of budget cuts.

This problem is not easily solved. There is probably no statutory promise that Congress could make that would guarantee funding over the long term and be enforceable; subsequent Congresses would be free to change the law. It will require a leap of faith for Tribes to assume greater responsibility over trust resources. In context, though, perhaps the leap is not so great. Congress could eliminate the trust responsibility to Tribes altogether if it so chose, as was done in the 1950s to over 100 Tribes. The Tribes should now be more confident that they have the political influence to prevent that policy from returning. Similarly, Tribes that choose to be free from the requirement of departmental approval of trust land transactions must also believe in their ability to prevent "termination by appropriations" or, more precisely, by lack of appropriations.

In addition, Tribes choosing the option I propose should receive some specific preferences in the allocation of funds. For example, Congress might provide that, if appropriations for trust programs are cut, Tribes that have taken over the approval function will not have *their* funding cut. Similarly, if appropriations rise, the Tribes that have assumed final approval authority are first in line to have their documented unmet needs addressed with the increased funding. While these assurances fall short of an enforceable promise to adequately fund tribal trust administration programs, they do create incentives for Tribes to move in the desirable direction of assuming more responsibility for the management of their resources.

### *11. Acquiring Additional Trust Lands*

Section five of the Indian Reorganization Act permits Tribes to have additional lands taken into trust:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians....Title to any lands or rights acquired pursuant to this Act...shall be taken in the name of the United States in trust for the Indian Tribe or individual Indian for which the land is

acquired, and such lands or rights shall be exempt from State and local taxation.<sup>214</sup>

The Department of the Interior should continue to have this authority. The Tribes, of course, would prefer to have this authority transferred to them, but that is unrealistic as a political matter. As beneficiaries of the provision, the Tribes cannot be expected to weigh the negative impacts of trust acquisitions on surrounding governments. That assessment should be done by the Department of the Interior. The regulations governing these acquisitions generally consider appropriate factors such as the compatibility of the proposed use of the trust land with surrounding land uses and the impact of the acquisition on the tax bases of local governments.<sup>215</sup> The Tribes have complained that the Department of the Interior is too reluctant to take new lands into trust and that the process can take too long. The complaints have merit, and so does the Department's reluctance. The Department is being rational when it asks why it should take responsibility for ever more trust land when it is struggling to meet its responsibilities for the land already in trust.

When a Tribe takes charge of trust administration in the manner I propose, it should be rewarded for its initiative. One tangible reward would be to give some sort of concession in the process of acquiring trust lands. Perhaps the Department of the Interior could establish a flat presumption in favor of the acquisition of lands into trust when the subject lands are within existing reservation boundaries. Current policy is nearly this strong,<sup>216</sup> so it is but a small step to codify the presumption. The Department might also be required to act within a specified period as to on-reservation acquisitions. Such advantages have the virtue of serving the congressional policy of encouraging the consolidation of tribal land bases as well.<sup>217</sup> Needless to say, lands that are subsequently taken into trust should be subject to the administrative regime agreed upon by the Tribe and the Department for the rest of the Tribe's trust lands.

## 12. *Liability*

Under the Self-Determination Act, Tribes can already contract to perform virtually all of the realty functions of the Interior Department,

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214. 25 U.S.C. § 465 (2000).

215. See 25 C.F.R. § 151.10-11 (2006).

216. Compare factors considered for on-reservation acquisitions to those for off-reservation acquisitions, 25 C.F.R. §§ 161.10-161.11 (2005).

217. See Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 (2000).



save the final approval of transactions involving trust lands. Thus, the Department remains subject to liability in at least some circumstances for failure to meet both the duties Congress has imposed in statutes and the duties that the Department has imposed on itself through the regulations it promulgates. If a Tribe has assumed duties that otherwise would have to be performed by the Department of the Interior, the Department obviously cannot be made responsible in damages for failing to meet those duties. The essence of self-government is for a Tribe to make its own decisions and be responsible for the consequences. The Department of the Interior cannot be a guarantor for mistakes made by the Tribes with their trust assets.

The more interesting question is whether a Tribe may be held responsible and required to pay damages for breaches of trust in its administration of allotted lands. Sound arguments can be made for either position on this issue. The arguments in favor of liability include that any trustee must be liable for mismanagement in order to encourage effective trust management and deter malfeasance. Moreover, trust allotments may be the primary asset and source of income for many tribal members. Mismanagement of the asset can have devastating personal consequences for the beneficiaries of the trust, and a damages remedy alleviates those consequences. Finally, imposing liability helps make Tribes more responsive to their constituents, and that is good for both the Tribes and their members.

The arguments against permitting damages actions against the Tribes have merit as well. Imposing liability in damages can profoundly affect the financial condition of the Tribes and undermine their ability to meet their many other responsibilities to their members. This possibility, in turn, will deter Tribes from taking these responsibilities and undermine self-determination. Tribal members are not without remedies, though their remedies may be political rather than legal; if the tribal leaders fail to meet their obligation to manage the trust effectively, tribal members can refuse to re-elect them. Finally, and most compellingly in my opinion, individual owners of trust lands should take responsibility for their own assets and the decisions made regarding those assets. Indians are not incompetents. They should not be dependent on their tribal governments any more than they should be dependent on the United States.

Both positions have appeal, and I could accept either. In the end, though, I favor leaving this decision to the Tribes themselves. Some will choose to be responsive and responsible to their members and subject themselves to liability, perhaps with appropriate liability caps. Others will not, for good reasons and bad. This, too, is self-determination.

## CONCLUSION

The trust administration of the past has been unacceptably poor. Reform has been a long time coming, but the opportunity finally has arrived. Passage of the American Indian Trust Fund Management Reform Act and the ongoing *Cobell* litigation ensure that something is going to happen. The Department of the Interior, under the compulsion of the court in *Cobell*, is going to force management changes in the system, and that can only be good. But if management reforms are all that result, we will have missed an extraordinary opportunity to make long-term changes to the trust that will improve administration, further tribal self-determination, and relieve the United States of an increasingly inappropriate responsibility. If this opportunity is missed, it is not the fault of the *Cobell* court, or the Department of the Interior, or—least of all—the Tribes. The responsibility rests with Congress.

Current policy is stirringly dumb. Congress has set the Department of the Interior to work to make more efficient a system grounded in a belief of Indian incompetence, a system designed to bring about the Tribes' demise. Congress has not changed most of the statutes under which the system is operating; the Indian Mineral Leasing Act of 1938, the Indian Long-Term Leasing Act of 1955, and others remain substantially unchanged. Congress has fallen for the absurd proposition that the trust can be made effective if the trustee changes its ways. Yet the trustee, for its myriad shortcomings, is not the ultimate problem. The problem is the trust itself.

The current approach to reform will fail. The Department of the Interior, under intense pressure from the *Cobell* court, *will* make changes. But nowhere is it written that the changes must be changes that the Tribes want. The problem with the *Cobell* litigation is that the parties who most need to be involved in the trust reform effort—the Tribes—are not participants. As a result, the holders of Individual Indian Money accounts, or, more accurately, a handful of class representatives and their attorneys, are driving what was supposed to be a paradigmatic reform effort. The result, inevitably, will be that the Department of the Interior is going to be able "to do stupid things better," in the words of a knowledgeable friend.

The fundamental dilemma is that fractionation has so devastated the value of the trust allotments that maintaining the current system very shortly costs the government more than the assets are even capable of generating. This is not the fault of current account holders. There is no excuse for the performance of the United States over the years, and the account holders should be compensated. This compensation effort, however, must be separated from the reform effort. The *Cobell* plaintiffs

have made extravagant claims about what they are owed, but according to expert mediators who attempted to mediate a settlement of the litigation, the valuation of the claim by the plaintiffs is “without foundation.”<sup>218</sup>

The size of the demand and the costs to the United States of complying with the orders of the court are clearly eroding congressional support for reform. This erosion of support manifests itself in Congress’s reluctance to appropriate funds for the accounting that has been ordered by the court. My greatest concern is that Congress will decide that the costs of reform are simply too great and abandon the entire effort. It would not be unreasonable as a matter of sound fiscal policy for Congress to simply say the following: “If you have a claim for damages, you may bring it in the Claims Court. As of today, the trust allotments are no longer in trust.” Sooner or later, faced with many millions, perhaps billions of dollars in costs and potential liabilities, Congress will begin considering such drastic measures.

Even though the owners of trust allotments are driving litigation strategy, they own only 20 percent of the affected trust lands. The Tribes own most of the trust assets, yet they play only a consultative role in the reform efforts. Under these circumstances, I believe that the current reforms cannot possibly succeed, no matter the good will and the genuine efforts of all involved. They *cannot* succeed. The trust is broken at its foundation, and to build a new house on that broken foundation is not sound policy.

Something very different is needed, and I have proposed an approach that serves the policy of tribal self-determination rather than a policy of promoting ongoing tribal dependency and the federal plenary power this dependency has spawned. There are many challenging details that would arise in the implementation of the policy, and no doubt there are errors in my own opinions and judgments about some of the specifics discussed above. I am quite certain, though, that a policy based in tribal consent and tribal administration of Indian resources will be better than the policy that has existed for the last 120 years.

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218. *Joint Oversight Hearing of the Senate Comm. on Indian Affairs and the House Comm. on Resources, 109th Cong. 5 (2006)* (testimony of Charles Renfrew & John Bickerman), available at [http://www.indian.senate.gov/public/\\_files/RenfrewBickerman.pdf](http://www.indian.senate.gov/public/_files/RenfrewBickerman.pdf).