ENFORCING THE FEDERAL TRUST RESPONSIBILITY

Presentation to the Secretarial Commission on Indian Trust Administration and Reform

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Members of the Commission, it is a pleasure and an honor to speak before you today to offer recommendations on improving and strengthening enforcement by the United States of its trust responsibility to Indians.

I have reviewed the Commission's draft dated November 1, 2012 concerning the Federal Trust Responsibility. While the November draft represents a good beginning in many respects, I recommend several improvements.

First, while the first paragraph on page 1 references Chief Justice John Marshall's landmark decisions in the Cherokee cases in the 1830s, I think the Commission should give greater emphasis to the principle that the central purpose of the trust relationship between the United States and tribes – which the Chief Justice stated "resembles [the relation] . . . of a ward to his guardian" – is to furnish federal protection to the self-governing status of the tribes as distinct political societies. The specific holding of the Cherokee case was that this protection shielded tribes from intrusive exercise of state regulatory authority that could infringe on their treaty-protected powers of self-government. I think the broader teaching of the Cherokee cases is that the trust relationship also protects tribes' self-governing status in the management of their internal affairs from federal interference as well. I attach for the Commission's reference my 2005 presentation

to the Rocky Mountain Mineral Law Foundation entitled "Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century." Pages 7-9 of that paper provide more detailed support for these propositions.

Because the primary function of the trust responsibility, at least as set forth by Chief Justice Marshall, is to furnish federal protection for tribes' exercise of power of self-government, I also believe the trust responsibility is generally consistent with the modern federal policy of tribal self-determination. This is so, as again explained in more detail in my 2005 Rocky Mountain paper, because the trust responsibility as articulated by Chief Justice Marshall was not premised on the supposed incompetence of tribes to govern themselves. Instead, its basis was that tribes were and should continue to be self-governing, as indeed the Cherokee Nation assuredly was at the time of Marshall's Cherokee opinions – with a written constitution, elected legislature, a functioning court system and a vibrant civil society with an exemplary adult literacy rate.

Second, I agree with the Commission's November draft that "vacillating federal Indian policies" in the nearly 200 years after the Marshall opinions have resulted in diverse and at times demeaning articulations of the trust relationship, sometimes treating tribes and individual Indians legally and factually as incompetent to manage their affairs. This was particularly apparent in Supreme

Court decisions in the late 19th and early 20th centuries, perhaps best exemplified by Justice Van Devanter's opinion in *United States v. Sandoval*, 231 U.S. 28 (1913), determining that Pueblos in New Mexico were Indians subject to the trust responsibility's protections because they "are essentially a simple uninformed and interior people". . ."adher[ing] to primitive modes of life, largely influenced by superstition and fetishism and chiefly governed the crude customs inherited from their ancestors." *Id*. at 39.

Because of these vacillating federal policies and court decisions concerning Indians over more than two centuries, one should not expect perfect consistency in the trust relationship doctrine over so long a period. The Commission's November, 2012 draft correctly relies upon President Nixon's 1970 Message to Congress on Indian Affairs as setting the model for the bipartisan modern conception of the trust responsibility, which has been embraced and implemented by every Administration, Republican or Democratic, from the 1970s forward.

In his 1970 Message, President Nixon strongly affirmed that the federal trust responsibility to Indians was a legal obligation of the federal government:

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

> relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.
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> The special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

The emphasis in the Nixon Message on adhering to the trust responsibility and avoiding conflicts of interest between Indian rights to which the United States owed a trust responsibility and other federal interests (like reclamation projects, public lands and national parks and forests) was the first time a President had committed the Executive Branch to adhere closely to its trust responsibility. Equally importantly, for the first time I am aware of in the history of federal Indian policy, the Nixon Message also assured Indian tribes "that the United States Government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable." Federal protection of Indian property rights and tribal self-government

was thus to be permanent, not some transitional way station until Indians were fully assimilated or seen as fully competent to manage their affairs.

As President Nixon stated, the trust responsibility carries both "immense moral and legal force." Your Commission should give specific content to that force by recommending that it be implemented robustly and without diminishment within the Executive Branch.

As most of you know, I served as Associate Solicitor in charge of the Indian Division from 1973 to 1976. When Solicitor Kent Frizzell hired me to serve in that position, he directed that my sole responsibility and that of the other attorneys in the Indian Division was exclusively to serve as attorneys for the United States as a trustee, for its trust responsibility to enforce and protect the resources of tribes – lands, water, mineral and hunting and fishing rights – and to other rights under federal law, such as freedom from state regulation or taxation and the authority to govern themselves and affairs on reservations. Solicitor Frizzell directed that the Indian Division was to have no responsibility to defend suits brought by Indians against other Interior Department agencies (except we enjoyed the freedom to advocate to him as Solicitor that these cases be settled in a manner favorable to the Indian interests). We also had no responsibility for defending claims brought against the United States by Indians for breach of its fiduciary duties – such as cases before the Indian Claims Commission. And in administrative issues before

the Department where Indian rights and interests conflicted with the goals or policies of another Interior Department agency, Solicitor Frizzell charged us with asserting the maximum reasonable Indian claim to Department decision-makers. His successor as Solicitor during the Ford Administration, Greg Austin, reaffirmed those directions and they have been carried forward (at least informally) by most successor Solicitors.

I believe these policies should be formally established in writing for Interior and Justice Department entities involved in Indian affairs. I think the Commission should specifically recommend that the Assistant Secretary of the Interior for Indian Affairs, and the Indian Division of the Solicitor's office as well as the Indian Resources Section and Office of Tribal Justice at the Justice Department should have comparable charges – solely to serve as advocates for the trust responsibility for Indians.

Equally important, I think the Commission should set forth specific trust duties for these entities to follow. Such specific duties were comprehensively set forth in the attached letter from President Carter's Solicitor – Leo Krulitz – to the Department of Justice in 1978. Another exemplary expression of the trust responsibility's mandates for the Interior Department is set forth in Secretary Babbitt's enclosed 2000 Secretarial order. The basic principles of the trust responsibility are not murky or obscure. They are contained in these documents

and should be permanent institutional directives for these Offices to follow. I believe this is of even greater importance than the conflict of interest protocols I understand the Commission is considering.

I think formalizing the trust principles in permanent written form is particularly important at the present time in the aftermath of the *Cobell* litigation. To its credit, the Obama Administration settled that litigation in a fashion that both provides compensation to affected landowners and promises to reduce the progressive fractionation of Indian trust and restricted allotments that were the source of many of the problems giving rise to the litigation. But I believe that one unfortunate consequence of nearly two decades of the *Cobell* litigation is that it has produced an unseemly defensiveness by many federal officials about the possible liabilities encompassed by the trust responsibility.

As a lawyer outside the government representing tribes and tribal organizations, I have witnessed numerous instances in which federal officials have seemed unduly concerned with limiting or truncating the trust responsibility to avoid possible legal liability for the United States in recent years. Let me give a few brief examples.

First, Interior officials in a number of situations in recent years have been excessively reluctant to hold funds in trust both for tribes and individual Indians. Tribes and individual Indians ought to have the option of having the Department

hold and manage trust accounts. This is especially necessary where minor children are involved. In addition, during the pendency of the Cobell litigation, Interior for a period of many years seemed resistant to take new lands into trust for tribes, a policy that has largely been reversed in the Obama Administration.

Second, in water rights settlements, the Interior and Justice Departments have been increasingly insistent that tribes waive all manner of claims against the United States when concluding a settlement. To be sure, a water rights settlement should ordinarily resolve the litigation out of which it arises – that is a given for any settled litigation. But in water rights litigation, tribes and the United States are usually not adversaries – they are almost always on the same side of a case. Tribes' water rights claims are generally contested by the states and private water users. They are usually supported by the United States as the tribe's trustee. When one compares the waivers in favor of the United States that tribes agreed to in Indian water settlements in the 1980s and 1990s with those contained in most recent Indian water settlements, the differences are pronounced and striking. These differences are the product of excessive concern by the United States in recent years with protecting itself when settling Indian water rights cases. By contrast, in earlier decades, Interior and Justice officials involved in water settlement negotiations were more exclusively focused on protecting and implementing the tribal water rights themselves.

Third, both Justice and Interior have aggressively engaged in efforts in the past decade to narrow the scope of the trust responsibility in suits tribes have brought against the United States for breaches of trust. The result has been an overly complex and formalistic body of law concerning whether particular treaties, statutes, Executive Orders or federal regulations on which a tribal claim is based can be fairly interpreted as mandating financial liability for breach of trust by the United States. Largely driven by the United States' convoluted efforts to avoid monetary liability, the leading Supreme Court cases in the field – two *Mitchell* cases dealing with claims by Quinault allottees,[1] two cases rejecting the Navajo Nation's claims against unseemly and apparently corrupt interventions by Interior Secretary Hodel on behalf of a coal lessee of the Nation's lands[2] and a claim by the White Mountain Apache Tribe for failure of the United States to preserve tribal property[3] – have sown considerable confusion as to when an intent can fairly be imputed to Congress to mandate monetary compensation for a breach of trust. The resulting muddle has baffled lawyers charged with advising tribal clients and lower courts deciding actual cases leading to inconsistent and often unjust results.

[1] *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"); *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*").
[2] *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo I*"); *United States v. Navajo Nation*, 566 U.S. 287 (2009) ("*Navajo II*").
[3] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

In my view, this short-sighted emphasis by federal lawyers seeking to minimize the United States monetary liability for what are often obvious and egregious transgressions by federal officials is principally a consequence of the excessive defensiveness produced by the *Cobell* experience. The distortions in the law concerning the federal trust responsibility brought about by these contortions threaten long-term damage to this salutary fiduciary doctrine under which federal protection is extended to tribal-self government. I want in fairness to add that in the past two years, the Justice Department in the so called "SPOA" process has made a generous and commendable effort to settle particular tribal trust claims. My impression is that the Justice and Interior Departments in the Obama Administration have been trying to follow the trust responsibility as a moral doctrine while simultaneously trying to diminish it as a legal responsibility.

I think the Commission should adopt a proposal to Congress to preserve and revive the trust responsibility as a legal doctrine, as set forth below. I make that suggestion because I believe imposing legal liability on the United States for failure to observe the trust responsibility is an appropriate outcome where breaches of trust have occurred. As Justice White stated dissenting in *Mitchell I,* a view the Court majority quoted with approval in *Mitchell II*, *supra* at 227, "[a]bsent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties. . . ."

The United States, after all, has frequently fallen short of observing its trust responsibility to Indians – sometimes because of conflicts of interest, but also often because of failures in institutional competence or because some political appointees have been unsuited to strict adherence to fiduciary standards. The trust responsibility may be something of an ideal, a vision of a correct relationship that is at times hard for some federal officials to achieve in practice. Like the Constitution, the trust responsibility is never perfectly adhered to, and indeed often violated.

But while violations of the trust responsibility are perhaps unavoidable, the federal departments should do everything possible to adhere to the proper vision. Reducing trust duties to specific standards, as I recommend the Commission do, could greatly aid in that endeavor. So also could judicial redress where breaches of trust occur. For this reason, I also recommend that the Commission propose an amendment to 28 U.S.C. Section 1505, the existing federal statute waiving the immunity of the United States to legal claims against it by tribes. The amendment should provide that the United States shall be liable for money damages in claims brought under that Section wherever it has violated its common law fiduciary responsibilities to any tribe, band or identifiable group of American Indians, irrespective of whether a treaty, law, Executive Order or regulation has mandated such a liability. The amended statute should also specifically reaffirm that the

United States owes the highest fiduciary duties of responsibility and trust to tribes and Indian allottees and waive the immunity of the United States to permit recovery of money damages when those duties have been breached.