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VIA EMAIL ONLY

Fawn Sharp, Chair
National Commission on
Indian Trust Administration and Reform
trustcommission@ios.doi.gov

RE: Comments to Indian Trust Commission on Draft Trust Responsibility Principles

Dear Chair Sharp:

On behalf of the Navajo Nation, this letter provides comments to the National Commission on Indian Trust Administration and Reform (“Commission”) regarding the proposed Federal Trust Responsibility Principles (“Draft Principles”) presented at the Commission’s August 13, 2012 public webinar meeting and subsequently posted on the Commission’s website. As recognized at prior Commission meetings, the basic principles underlying the federal-tribal trust responsibility must be identified and clarified in order to provide a sound basis for other work of the Commission. Therefore, we provide the following to “support a reasoned and [legally and]factually based set of options for potential management improvements[,]” in accordance with the Commission’s Secretarial mandate. In particular, as explained below, we recommend that the Draft Principles provide a more robust statement of historic foundations for the federal-tribal trust responsibility as well as additional references on the scope of enforceable duties and governing legal authorities.

Historic Foundations

The Draft Principles should more fully recognize that the federal-tribal trust relationship is based on international law, an original constitutional understanding and limitation, and a historic, binding, and still enforceable and meaningful commitment to preexisting sovereigns. First, the relationship of Indian tribes to the United States is founded on “the settled doctrine of the law of nations” that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government. *Worcester v. Georgia*, 31 U.S. 515, 551-56, 560-61 (1832); *see also United States v. Candelaria*, 271 U.S. 432, 442 (1926) (Congress “was but continuing the policy which prior governments had deemed essential to the protection of such Indians.”); *United States v. Kagama*, 118 U.S. 375, 884 (1886) (“From their very weakness . . . there arises the duty of protection, and with it the power. This has always been recognized . . .”).

Second, because of this background, the federal-tribal trust responsibility necessarily constitutes a foundational basis for, not merely a function of, congressional legislation regarding Indians. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* XI, XIII (1941) (“the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians”; “the entire body of federal legislation on Indian affairs . . . may be viewed in its entirety as the concrete content of the abstract principle of federal protection of the Indian”). Moreover, the federal-tribal trust responsibility may well constitute an inherent limit on the Indian Commerce Clause and exercise of the Treaty Clause regarding Indians, just as “limitations on the commerce power are inherent in the very language of the [Interstate] Commerce Clause,” *United States v. Lopez*, 514 U.S. 549, 553 (1995); *see United States v. Morrison*, 529 U.S. 598, 608 & n.3 (2000) (quoting *Lopez*, 514 U.S. at 556-557), or as an inherent “presupposition of our constitutional structure[.]” such as under the Eleventh Amendment, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *see Seminole Tribe v. Florida v. Florida*, 517 U.S. 44, 54 (quoting same). *See generally Marbury v. Madison*, 1 U.S. 137, 176 (1803) (“The powers of the legislature are defined and limited . . . and those limits may not be mistaken, or forgotten[.]”). Indeed, just earlier this year, the Supreme Court reiterated that “the National Government possesses only limited powers” under the Commerce Clause because—in accordance with the Framers’ original intent—the enumeration of powers in the Constitution “is also a limitation of powers[.]” *National Fed. of Indep. Business v. Sebelius*, 132 U.S. 2566, 2577-78 (2012); *see also id.* at 2579 (quoting *Marbury, supra*). Thus, for example, members of Indian tribes are exempt from the mandate of Affordable Care Act, *id.* at 2580 (citing 26 U.S.C. § 5000A(e)), because the United States has a preexisting federal trust responsibility to provide that health care.

Third, in addition to its international and constitutional bases, the federal-tribal trust responsibility is founded on treaties and agreements securing peace with and land cessions by Indian tribes, which provided legal consideration for ongoing performance of federal trust duties:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation.

Morton v. Mancari, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm’rs v. Seber*, 318 U.S. 705, 715 (1943)); *see also Worcester*, 31 U.S. at 548-54 (discussing treaties securing and preserving friendship and land cessions, and noting that the stipulation acknowledging tribes to be “under the protection of the United States” “is found in Indian treaties generally”). Consequently, the federal-tribal trust relationship is not a gratuity, but arose and remains enforceable because “the government ‘has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements,’ in exchange

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for which ‘Indians . . . have often surrendered claims to vast tracts of land.’” Br. for Federal Petitioners, *Salazar v. Patchak*, No. 11-247 (U.S. Feb. 7, 2012), at 22 (citation omitted); *see also* Misplaced Trust: The BIA’s Mismgmt. of the Indian Trust Fund, H. Rep. 102-499, at 6 (1992) (“The system of trusteeship . . . is deeply rooted in Indian-U.S. history.”); Stmt. on Signing Exec. Order on Consultation & Coord. with Indian Tribal Govts. (Nov. 6, 2000), Pub. Papers of U.S. Presidents: William Clinton, 2000, at 2806 (“Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security”); Special Msg. on Indian Affairs (July 8, 1970), Public Papers of U.S. Presidents: Richard Nixon, 1970, at 565-66 (stating same as brief and this relationship “continues to carry immense . . . legal force”); Am. Indian Policy Review Comm’n, Final Report Submitted to Congress 5 (May 17, 1977) (“AIPRC Report”) (same). Such “Indian treaty rights are too fundamental to be easily cast aside.” *United States v. Dion*, 476 U.S. 734, 739 (1986).

For example, the 1849 Treaty between the United States and the Navajo Nation ended “hostilities between the contracting parties” and granted the United States the “sole and exclusive right of regulating the trade and intercourse with the said Navajo[.]s,” such that laws “for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government [of the United States], shall have the same force . . . as if said laws had been passed for the[Navajos’] sole benefit and protection. . . .” 9 Stat. 974 (articles II-III). The 1849 Treaty also provided that “[f]or and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will . . . adopt liberal and humane measures[.]” *id.* at 975 (art. X), “and that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.” *Id.* (art. XI). Accordingly, via the 1849 Treaty, the United States made specific commitments to the Navajo Nation in exchange for significant consideration by the Navajo Nation. *See id.*; *cf.* S. Rep. No. 112-166, at 2-3 (2012) (“Treaties . . . have created a fundamental contract between Indian tribes and the United States and it is incumbent upon the federal government to protect tribal treaty rights, lands, assets, and resources[.]”). Moreover, the United States willingly assumed these obligations. *Compare* 9 Stat. 975 (art. XI) *with Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 n.1 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part) (discussing same provision in 1855 Jicarilla treaty), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir. 1986), *supplemented*, 793 F.2d 1171 (10th Cir. 1986). The fact that these and other similar commitments were made over 160 years ago makes them more—not less—legally enforceable today. *See, e.g., United States v. Minnesota*, 270 U.S. 181, 201, 202 (1926) (“[C]ourts can no more go behind [a treaty] for the purpose of annulling it in whole or in part than they can go behind an act of Congress.” “The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made 70 years after the treaty”).

In light of all the above, historic federal-tribal relations have established enduring “obligations to the fulfillment of which the national honor has been committed.” *Heckman v.*

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United States, 224 U.S. 413, 437 (1912). Also, “the people as a whole benefit when the Executive Branch . . . protects Indian property rights recognized in treaty commitments ratified[] by a coordinate branch.” Letter from Attorney General Griffin Bell to Secretary of the Interior Cecil Andrus 3 (May 31, 1979). Given this, Indians’ justifiable expectations and legitimate reliance on these commitments and the long passage of time since the United States and all Americans have continuously benefitted from Indian land cessions and peace preclude any assertion that the federal government does not owe ongoing, enforceable fiduciary duties to Indian tribes. See *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197, 215-17 (2005). Likewise, the fact that “the Government has often structured the trust relationship to pursue its own policy goals[,]” *United States v. Jicarilla Apache Nation* (“*Jicarilla*”), 131 S.Ct. 2313, 2324 (2011), such that the relationship has been often violated and at times terminated, can no more disprove the existence of enforceable, meaningful fiduciary duties than the fact of people killing others can establish that murder and genocide are not crimes. The Draft Principles accordingly should be expanded to provide a fuller statement of all of the above foundational bases for the federal-tribal trust responsibility.

Scope and Authorities

Given the historic foundations discussed above, enforceable fiduciary duties “necessarily arise[]” when the Government assumes control or supervision over tribal trust assets unless Congress has specified otherwise, even though nothing is said expressly in the governing statutes or regulations. *United States v. Mitchell* (“*Mitchell I*”), 463 U.S. 206, 225 (1983); see also *United States v. Navajo Nation*, 129 S.Ct. 1547, 1553-54 (2009) (enforceable fiduciary duties apply where statutes and regulations give the federal government “full responsibility to manage Indian resources and land for the benefit of the Indians”) (quoting *Mitchell II*, 463 U.S. at 224). Therefore, the federal-tribal trust relationship is enforceable even when “[t]here is not a word in . . . the only [governing] substantive source of law . . . that suggests the existence of such a mandate.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476-77 (2003) (citation omitted).

Moreover, once statutes or regulations establish enforceable fiduciary obligations, courts “look[] to common-law principles to inform . . . interpretation of statutes and to determine the scope of liability that Congress has imposed.” *Jicarilla*, 131 S.Ct. at 2325; see 25 U.S.C. § 162a(d) (recognizing that trust responsibilities “are not limited to” those enumerated). Therefore, “[i]n general, the standards which govern private trustees govern the Secretary” when he manages Indian trust assets, particularly when “[n]o guidance is found in the statute with respect to the present question.” Mem. from Thomas Fredericks, Assoc. Solicitor, to Deputy Asst. Sec.—Indian Affairs (Program Operations) 1 (Jan. 24, 1978); see generally Letter from Leo Krulitz, Solicitor, U.S. Dep’t of Interior, to James Moorman, Asst. Attorney General, U.S. Dep’t of Justice 2, 7, 8, 9-11 (Nov. 21, 1978). Accordingly, “many courts have rejected” and “zero” courts have adopted the position that enforceable federal trust duties for Indian trust asset management are limited to the express terms of statutes and regulations. *Jicarilla Apache*

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Nation v. United States, 100 Fed. Cl. 726, 738 (2012). In addition, “[t]he Government does not ‘compromise’ its obligation to one interest that Congress obliges it to represent [regarding Indians] by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.” *Nevada v. United States*, 463 U.S. 110, 128 (1983); *see also id.* at 135 n.15. Instead, the Government’s fiduciary obligation is subject to “the most exacting fiduciary standards[,]” including “undivided loyalty[,]” *Seminole Nation v. United States*, 316 U.S. 286, 297 & n.12 (1942) (citation omitted). Moreover, these standards are legally enforceable even when the United States acts at the request of an Indian tribe. *See id.*

In addition, while the federal-tribal relationship both initially and recently has been described as resembling a guardianship, *e.g.*, *Jicarilla*, 131 S.Ct. at 2325; *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), that characterization is not legally accurate and does not undermine fiduciary duties. The analogy is not apt because unlike a true guardianship, Indian tribes do not lack legal capacity and the United States holds title to most Indian assets in trust, it was not appointed to that position by a court, and its powers and duties are not merely fixed by statutes. *Compare* Restatement of Trusts (Second), § 7, cmt. a (“A trustee . . . has title to the trust property; a guardian of property does not”; “a guardian is appointed only when and for so long as the ward is lacking in legal capacity”; “A guardian is appointed by a court[.]”); *id.* § 7, cmt. b (“The powers and duties of a guardian are fixed by statutes; the powers and duties of a trustee are determined by the terms of the trust and by the rules stated in the Restatement . . . as they may be modified by statute.”) *with* U.S. Const., art. I, § 8, cl. 3 (Commerce Clause); 25 U.S.C. § 462 (continuing periods of trust on Indian lands); *Jicarilla*, 131 S.Ct. at 2325 (recognizing application of common-law). In turn, characterization of the federal-tribal relationship as a guardianship does not preclude or limit application of enforceable fiduciary duties, because “[t]he relation between a guardian and ward, like the relation between a trustee and a beneficiary, is a fiduciary relation.” Restatement of Trusts (Second), § 7, cmt. a.

Furthermore, application of the principle that guardianships apply “only when and for so long as the ward is lacking in legal capacity[,]” *id.*, supports tribal governmental self-determination. Such retained governmental jurisdiction that is not limited to a tribe’s members alone was surely contemplated by tribes when they entered into treaties with the United States. AIPRC Report, *supra*, at 5. Also, recognizing that the federal trust responsibility includes a duty to promote tribal self-determination, and a lack of conflict between the two, is consistent with repeated Congressional recognition and Executive policy for more than 40 years.

See, e.g., 25 U.S.C. §§ 450(a) (Indian Self-Determination Act findings), 2103(e) (continuing obligations regarding Indian mineral development agreements), 4021 (providing for withdrawal of tribal trust funds “consistent with the trust responsibilities of the United States and the principles of self-determination”); Exec. Order 13,175, § 2, 3 C.F.R. 304, 305 (2000) (recognizing both as “Fundamental Principles”); Nixon Message, *supra*, at 565-55. In particular, Congress has consistently and expressly preserved the trust relationship even with self-determination. *E.g.*, 25 U.S.C. § 450l(c) at model self-determination agreement section (d). This recognition also is consistent with the settled law on which the trust responsibility was

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based, as well as current relevant international law. *See, e.g., Worcester*, 31 U.S. at 560-61; U.N. Charter art. 73 (UN members with non-self-governing territories have trust obligations of “protection against abuse” and “to develop self-government”); International Covenant on Civil and Political Rights art. 1, ¶ 1 (1966) (“All peoples have the right of self-determination.”); U.N. Decl. on the Rights of Indigenous Peoples arts. 3, 8.2(a)-(b), 18-19, 27-28, 32 (2007) (concerning self-determination, state mechanisms for prevention and redress, decision-making, consultation, and use or development of resources). In sum, the characterization of a federal-tribal relationship as a guardian-ward one does not limit enforceable federal duties and merely reflects the original and contemporary international law framework that supports self-determination.

Finally, the above statements regarding the scope of and nature of the federal-tribal trust relationship are consistent with relevant Congressional and Executive Branch recognitions. Most broadly, “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.” Cohen’s Handbook of Federal Indian Law § 5.04[4][a], at 420-21 (Nell Jessup Newton *et al.* eds. 2005 ed.). These congressional statements are not merely toothless moral platitudes, since such statutory statements “draw much of their content from the common law of trusts.” *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (concerning ERISA). Most pointedly, Congress has recognized that “proper discharge of the trust responsibilities of the United States shall include (but are not limited to)” numerous enumerated matters. 25 U.S.C. § 162(d) (emphasis added). Consistent with that statutory reaffirmation, the Executive Branch has formally recognized a broad scope of federal fiduciary duties, 303 U.S. Dep’t of Interior Manual 2.7. For example, federal trust duties must be recognized as broadly applying to all federal trust asset management, and as requiring a “high degree of skill, care, and loyalty” *Id.* § 2.7. In addition, the “proper discharge of the Secretary’s trust responsibilities requires[, among other things,] that persons who manage Indian trust assets:” “[c]ommunicate with beneficial owners regarding the management and administration of Indian trust assets; and” “[a]ssure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the beneficial owner[.]” *Id.* §§ 2.7(B), 2.7(L). All these points should be recognized in the Draft Principles.

Conclusion

Unfortunately, notwithstanding all the above foundational history, governing law, and its own repeated prior recognitions, the Executive Branch sometimes has sought to limit or avoid its federal-tribal trust responsibilities. Therefore, the Commission’s Draft Principles should be revised to more fully confirm the significant and enduring historic bases for current, legally enforceable federal trust duties to Indians. The Draft Principles also should be revised to explicitly reflect the broad scope of those enforceable federal “fiduciary trust” duties to Indians, as well as that those duties are not limited by self-determination policies, and that they are supplemented by common law unless expressly provided otherwise by Congress.

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Thank you very much for considering these comments. Please do not hesitate to contact either of us with any questions regarding these important matters.

Sincerely,

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