



## **Advancing the Trust Responsibility Bold Concepts for a Fairer and More Prosperous Future For Indian Country**

**Introduction.** In response to widespread dissatisfaction in Indian Country with the Federal government's implementation of the trust responsibility and the resulting impact on Tribal sovereignty, USET has been exploring the idea of a fundamental review of the Federal trust responsibility, as well as its impact on Tribal sovereignty, with the intent of building a new framework for Tribal-Federal relations that provides Tribes with an equal say in the defining of that relationship, instead of it almost entirely being defined by the Federal government. This analysis starts from the conclusion that the defects in the trust responsibility are systematic in nature and therefore must be addressed at the systematic level.

In a prior document, USET staff presented to the USET Board key questions that need to be addressed to advance a new framework for the trust responsibility and Tribal sovereignty. That document proposed some conceptual answers to those questions. In this document, those answers are made more specific.

It should be noted that any attempt to define the actual, real-world scope of tribal sovereignty and the trust responsibility faces the dilemma that once defined in such a precise way, it would be difficult to expand those definitions. On the other hand, the fact that the scope of these two doctrines remains ambiguous is one of the reasons why the Federal government is able to provide far less support for tribal sovereignty and for fulfillment of the trust responsibility than Indian Country believes these doctrines require.

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1. **What should Tribal sovereignty look like?** Among Tribal Nations there is a wide range of sovereign authority, with some Tribes exercising substantial (although not total) sovereign powers over their lands and peoples, while others operate with an authority that is more like a municipal government, subject to substantial state control and dominance. Even for those Tribes that exercise the maximum amount of Tribal sovereignty, that sovereignty is limited compared to the authority of other sovereigns, such as the federal and state governments. For example, Tribes have very limited jurisdiction over non-Indians that come onto Tribal lands, even though the federal government, states and even cities exercise virtually full jurisdiction when non-citizens come within their territorial limits.
    - **Self-Governance – More Than Just Control of Federal Dollars.** In Indian law, “self-governance” is principally used to refer to those Tribes that have chosen to assume control of, and the authority to, reallocate certain Federal program dollars.

However, true self-governance, like true sovereignty, is running one's own affairs, free of unwarranted state and federal interference.

- **Jurisdictional Authority – Equivalency with Other Sovereigns.** Within their boundaries, tribes should have jurisdictional authority comparable to what the states enjoy, and even the Federal government. This means both legislative jurisdiction (lawmaking) and adjudicative jurisdiction (jurisdiction of the tribal court system over criminal and civil matters). To the extent that not every tribe has the funding or the developed governmental entities to implement a mature jurisdictional system, then some accommodation should be made for a rational transition as tribes are able and interested in assuming these powers.
  - **Exclusion of Other Sovereign Authority - State and Local Jurisdiction Stops at the Reservation Boundary.** So, for example, there should be no state taxation of tribally related activities on tribal lands. Just as one state cannot generally tax activities in another state, no state should be able to tax activities, including non-Indian activities, within Tribal boundaries. The federal government's authority should also be curtailed within Tribal boundaries, meaning that the federal government's power is not necessarily "plenary," but to the extent it is not, the remaining power is with the Tribe and not with the state.
  - **Control over Education of Tribal Students.** Tribes should be able to assume, at their option, complete control over the public and federal education systems that operate on their lands and play a major role in the curriculum for other schools on or near their lands serving Native students. Tribes should have greater control over the education of their students with Federal support for a stronger emphasis on Tribal culture and language.
2. **What should the trust responsibility look like?** One of the paradoxes of Indian law and policy is that the trust responsibility is the source of much Federal authority to act in Indian affairs, even to the detriment of Tribal sovereignty. Despite this paradox, the trust responsibility is a key component of Federal Indian law and an important safeguard in warding off intrusions by state governments. At a minimum the trust responsibility should provide that the Federal government has a *tribally enforceable* obligation to ensure that reservations are habitable by today's standards, including that they have decent schools, hospitals, public safety and infrastructure and that Tribal governments are empowered to create an environment hospitable to economic development.
- **Federal Funding for Indian Programs Should Meet Actual Need.** Federal funding levels should support decent schools, hospitals, public safety, social services, housing, roads and other infrastructure. For example, the IHS is funded at 60% of need; it should be funded at 100% of need.
  - **Federal funding of Indian programs Should be Treated as Entitlement, not Discretionary, Funding.** Indian program funding should not be subject to the

arbitrariness of the regular appropriations process but, rather, should reflect that it is the fulfillment of a federal legal obligation. Such funding should also go directly to Indian Country and not pass through the States;

- **All Federal programs should be contractible or compactible.** Indian Country has prospered when the federal government has stopped its paternal practices, such as through 638 contracting and “self-governance” compacting. These programs should be expanded to all federal Indian programs.
- **Trust responsibility should be based on Federal legal obligations and not dependent on the economic status of a tribe (i.e., no means testing), although tribes, at their own option, could opt out of Federal programs.** The trust responsibility should not vary depending on whether a Tribe is doing better or worse. It is not an economic indicator, but rather a fundamental obligation of the United States. However, the trust responsibility should support Tribal empowerment and self-sufficiency so that Tribes may achieve economic sustainability.
- **Each Tribe should be empowered to negotiate the details of the application of the trust responsibility with the Federal government as best meets the need of that tribe.** There is wide variability among Tribes and what they seek out of the government-to-government relationship with the United States. Each Tribe should be able to negotiate the details of the application of the trust responsibility to it.
- **Tribal Congressional Delegate.** Several treaties provide for a tribal representative in the Congress, though there is not one. Such a representative should have a status no less than that enjoyed by delegates from Puerto Rico and the District of Columbia. Having a congressional delegate should not diminish the representative obligations of members of Congress with Indian constituents and should not undermine the ability of the Indian Affairs committees to do their work.
- **Land Reform.** There are a wide range of improvements that could be made to the status of Indian lands. For example, there should be a strong presumption in favor of land going back into trust at the request of a Tribe, especially given that Indian land was effectively stolen and the current process takes years, with the states and counties seeking veto power. In general, tribal land rights and control should be strongly enhanced, including tribal ability to move land into restricted fee status. See generally, the recommendations of the Indian Land Tenure Foundation. Land reform includes, along with jurisdiction, the authority of Tribes to protect their natural resources.
- **Implementation of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples.** Although the United States claims that it already has implemented the provisions of UNDRIP, most Tribal leaders would disagree.

- **Limitation of state involvement in Federal and Tribal actions to a right of consultation not a veto power.** State governments constantly seek a veto power over Indian affairs. Rather than a veto power, state governments should be provided a right of consultation, and no more.
- **Cabinet-Level Position.** The position of Assistant Secretary of Indian Affairs should be elevated to a Cabinet-level position within the Administration, with the authority to report directly to the President. Ambassadorial status should be accorded to federal representatives to Indian Country and Indian Country representatives to the federal government.
- **Tribes Should not Just have Consultation Rights, but Approval Rights over Federal Actions Impacting Tribes.** In addressing Federal actions that affect Tribes, Tribes should not only be consulted, but in many cases have the right to approve or disapprove those actions.
- **Expanded Protection of Off-Reservation Resources.** Tribal resources found off Tribal lands, such as sacred places, should be accorded protections consistent with Tribal values.

**3. How we get there – Tribal Excellence in Government.** Many of these goals would be difficult to achieve in the current environment. As Tribes seek recognition of their sovereign rights, others resist, deeming Tribal sovereignty a threat to their own power or sovereignty. Therefore, it is important to demonstrate that stronger and more effective Tribal governments are not only good for Tribes, but also good for surrounding communities, the states within which the Tribes reside, and the United States, as a whole. There is already substantial evidence, assembled by such entities as the Harvard Project on American Indian Economic Development, that empowering Tribal governments leads to economic success, providing many benefits to surrounding communities. In some cases, especially where Tribes have assumed an important governmental or social function (e.g., creating jobs, providing fire, police and emergency services, etc.), this has been recognized by the impacted non-Indian communities.

- **Formation of a Joint Tribal-Federal Commission.** Historically, major changes in Indian law and policy have often been guided by a Federal report assessing the status of Native communities and making proposals that laid out a blueprint for future action. For example, the Merriam Report of 1928 led directly to passage of the Indian Reorganization Act of 1934, and American Indian Policy Review Commission report, submitted to Congress in 1977, laid the groundwork for much legislation that followed. A new era for Indian Tribes should begin with the establishment of a joint Federal-Tribal commission to define a new Tribal sovereignty and trust framework. In support of such a joint commission, Indian country needs to do further intellectual work, through consultation with leading scholars, development of a “think tank”, and engagement with Congress through

hearings and roundtables with key Congressional committees on the three questions set forth above.

- **Issuance of a Report.** The Commission would be tasked with the issuance of a Tribal-Federal report on the future of the trust responsibility and Tribal sovereignty that would serve as a framework for legislative and policy changes in the coming years.

**Conclusion.** USET seeks to define a path for advancing Tribal sovereignty and the trust responsibility in the 21<sup>st</sup> Century through the articulation of a clear and rational vision of what they should look like and in a form that can be broadly supported across the political spectrum. USET welcomes the further comments of its Board and supporters in achieving this end.