

## CHAPTER FOUR

# TRUST RESPONSIBILITY

### INTRODUCTION

The Federal trust responsibility to American Indians is one of the most important as well as most misunderstood concepts in Federal-Indian relations. Admittedly, it is a rather confusing legal concept with murky origins and inexact application. Indian opinion is clear that, along with tribal government powers, a reaffirmation by Congress of the Federal trust responsibility could go far in improving Federal-Indian relations and setting a firm course for Government policy which would give substance to self-determination for Indians.

It should be noted that many of the 11 Commission task forces discussed in their reports various aspects, legal analyses, and historical factors in the development of the Federal trust relation.<sup>1</sup> Moreover, several excellent law review articles and general essays have examined Federal judicial decisions, statutory and treaty law, and the historical evolution of the trust doctrine.<sup>2</sup> At least one of these has already been published in a congressional committee print.<sup>3</sup> And Congress previously has conducted hearings on matters which relate directly to what the trust means and how it is and should be administered.<sup>4</sup> What follows is a brief discussion of these elements of the law and history which are most relevant as background for the recommendations.

### THE TRUST RELATIONSHIP

The relationship of the United States to Indians is "perhaps unlike that of any other two people in existence."<sup>5</sup> This statement was made by the Supreme Court almost 150 years ago, and while there have been great changes in that relationship since that time, it is still "marked by peculiar and cardinal distinctions which exist nowhere else."<sup>6</sup> One

<sup>1</sup> See U.S. Congress, American Indian Policy Review Commission, Final Report of Task Force One, Trust Responsibilities and the Federal-Indian Relationship, including Treaty Review, sec. 7; Final Report of Task Force Two, Tribal Government; Final Report of Task Force Three, Federal Administration and Structure of Indian Affairs; Final Report of Task Force Five, Indian Education; Final Report of Task Force Seven, Reservation Resource Development and Protection; Final Report of Task Force Eight, Urban and Rural Non-Reservation Indians (45-56); Final Report of Task Force Nine, Law Revision, Codification and Consolidation. Washington, U.S. Gov't. Print. Off., 1976. Final Reports of Task Forces are hereinafter cited by Task Force number.

<sup>2</sup> For example, R. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stanford L.R. 1213 (1975); C. Wilkinson and J. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth—How Long a Time is That?" 68 Cal. L.R. 601, 612-617 (1975).

<sup>3</sup> U.S. Congress, Senate Comm. on Judiciary, Subcomm. on Administrative Practices and Procedure, R. Chambers, A Study of Administrative Conflict of Interest in the Protection of Indian Natural Resources. Washington, U.S. Gov't. Print. Off., 1971 (91st Cong., 2d sess. Senate Comm. reprint).

<sup>4</sup> E.g., see hearing testimony on the proposed Indian Trust Counsel Authority, U.S. Congress Senate Comm. on Interior and Insular Affairs, hearings before Subcomm. on Indian Affairs on Nov. 22, 23, 1971. Washington, U.S. Gov't Print. Off. (92d Cong., 1st sess).

<sup>5</sup> *Cherokees Nation v. Georgia*, 30 U.S. 1, 16 (1831).

<sup>6</sup> *Id.*

of those distinctions involves the trust responsibility which the Federal Government owes to Indians.

The United States holds legal title to Indian lands, yet those lands cannot be disposed of or managed contrary to the equitable title resting with Indians. This means that while the United States Government has the appearance of title as the nominal owner of Indian trust lands, it is actually holding title entirely for the benefit and use of the Indian owners.

### TRIBAL SOVEREIGNTY AND INDIAN CITIZENSHIP

Indian tribes are not parties to the U.S. Constitution or explicitly institutionalized as part of the federal system of governmental power, yet, similar to States, tribes do retain that degree of governmental sovereignty which they have not relinquished to the United States Government.<sup>7</sup> In other words, in the Constitution, the States delegated to the Federal Government certain powers, including whatever powers they may have had over Indian tribes and lands.<sup>8</sup> Similarly, Indian tribes, pursuant to treaties and agreements, relinquished certain powers to the Federal Government and retained others. Tribal members are United States citizens, yet they are citizens of their tribes also, giving them rights and privileges distinct from any other racial or cultural group in the Nation. Other examples of the different status pertaining to Indians are numerous but the point is that there is present in law and policy certain rights which are unique to Indian tribes and people.

The Federal trust responsibility emanates from the unique relationship between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements, Federal statutes and Federal judicial decisions.<sup>9</sup> It is a "duty of protection" which arose because of the "weakness and helplessness" of Indian tribes "so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised \* \* \*."<sup>10</sup> Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property and the self-government of Indian tribes. The extent to which these purposes have been understood fully, let alone carried out, have varied greatly over the decades. This lack of understanding and consistent policy has contributed immeasurably to Indian resentment and suspicion of Government programs.

### WARDSHIP VERSUS TRUSTEESHIP

When Indians say they want control over their lives,<sup>11</sup> they often find the Federal trust responsibility being used as a tool (either deliberately or innocently) to deny them that control, to inject Federal

<sup>7</sup> See F. Cohen, *Handbook of Federal Indian Law* 122 (1941).

<sup>8</sup> U.S. Const., art. III, sec. 3(8). See *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>9</sup> See, generally, AIPRC Task Force Nos. 1 and 8; also R. Chambers, note 2 *supra*. At least with respect to Indian lands, the Trade and Intercourse Act created a Federal trust responsibility. *Panamaquoddy Tribe v. Morton*, 528 F. 2d. 370 (1st cir. 1975).

<sup>10</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

<sup>11</sup> See e.g., AIPRC Task Force No. 3, app. D. *Declaration of Indian Purpose*; also Special Tribal Report of the Northwest Affiliated Tribes to the AIPRC.

bureaucracy where there should be self-government, to encourage paternalism where cooperation or independence should prevail. Much of this misuse could be avoided if the Federal duty would be viewed as flowing from a trustee/beneficiary relationship rather than a guardian/ward relationship. Although Indians have sometimes been referred to by the courts as "wards" and while this term may have been a fair description in the 1800's, it is a misleading characterization of the modern-day status of Indians. There is a very significant difference in the authority and control which may be exercised by a guardian as opposed to a trustee.

In common law, the purpose of a guardianship is to protect minors or incompetents. The guardian does not have title to the ward's property but he does have the power to manage it. He is under the direct supervision of a court and is not required to consult with the ward in carrying out his duties.<sup>12</sup> This is distinguished from the Indian situation in which, like the common law trust, title to the property is split (thus requiring the consent of both the Federal Government and the Indians in order to dispose of the property), where management of the property is shared, and where the responsibilities of the Federal Government to account to the trust beneficiary are considerably broader than merely accounting to a court for the management of a ward's property. The relationship should be thought of not only in terms of a moral and legal duty, but also as a partnership agreement to insure that Indian tribes have available to them the tools and resources to survive as distinct political and cultural groups.

In many instances, the duty of the Federal Government in this relationship has been stated as one of "care" and "protection" of Indians. For example, in the treaty with the Cherokees of November 28, 1785,<sup>13</sup> the United States agreed to "give peace to all the Cherokees, and receive them into the favor and protection of the United States," to provide "benefit and comfort" and to prevent "injuries or oppressions". (Article IX). In the treaty, both the United States and the Cherokee Tribe were referred to as "contracting parties" (Article XIII). This language can be viewed as creating an "express trust" although the term "trust" has not been used.<sup>14</sup>

#### TRUSTEE'S DUTY OF CARE

The Federal duty can also be likened to the "implied trust" in common law whereby a trust is created by operation of law. Generally, such trusts are recognized by the courts on the basis of an implied intention of the parties to a transaction (resulting trust) or on the basis that recognition of a trust is necessary in order to prevent the unjust enrichment of one party who committed fraud, deception or some other wrongdoing (constructive trust).<sup>15</sup> In such circumstances, the requirements and restrictions imposed on a trustee are recognized even though no formal trust document creates them.

<sup>12</sup> 5 A. Scott, *Law of Trusts* (3d ed. 1967).

<sup>13</sup> Vol. II, *Kappler's Indian Affairs, Laws and Treaties* 8-10.

<sup>14</sup> In order to create a trust it is not necessary to actually use the term "trust". Intent and circumstances will determine if an actual trust has been created. See, 1 A. Scott, *Law of Trusts* 174-187 (3d ed. 1967).

<sup>15</sup> 5 A. Scott, *Law of Trusts* 3213-3216 (3d ed. 1967).

This analysis of the United States duty to Indians as that of a trustee to his beneficiary is supported by many judicial decisions where common law trust principles were used to measure the actions of the Federal Government toward Indians.<sup>61</sup> Whether the creation of the responsibility is deemed an express trust or implied trust and whether the nature of the duty is identified as an active trust or a passive trust, the results are the same: the Federal Government is a fiduciary and as such is "judged by the most exacting fiduciary standards."<sup>17</sup> This means that it must act with good faith and utter loyalty to the best interests of the beneficiary.<sup>18</sup> It must keep the beneficiary informed of all significant matters concerning the trust and must not engage in "self-dealing."<sup>19</sup> Under common law principles, if the trustee manages the trust property in such a way that he may benefit (such as, for example, buying property for himself) and the beneficiary has not been fully informed of the transaction and consented to it, the transaction is voidable by the beneficiary, even though the trustee may have acted in good faith and the bargain was a fair and reasonable one. And even if the beneficiary did consent to the transaction prior to its taking place, he may still be able to void it if the trustee can be shown to have failed to disclose essential facts which he knew or should have known, or if he fraudulently induced consent, or if the bargain was not fair and reasonable.<sup>20</sup>

#### COURTS FIND GOVERNMENT ACCOUNTABLE

In addition to good faith and loyalty, the fiduciary relationship also requires that the trustee exercise the care, diligence, and skill of a prudent person in managing the trust assets of the beneficiary. This common law principle has been directly applied to the Federal trust responsibility to Indians.<sup>21</sup>

These doctrines are being applied increasingly by the courts to the actions of the executive agencies of the United States with respect to Indian lands,<sup>22</sup> water resources,<sup>23</sup> and trust funds.<sup>24</sup> But there is a key distinguishing factor present in the Federal trust relationship with Indians which does not occur in any other trust relationship: The trustee may unilaterally terminate the trust relationship. The ultimate trustee in Indian affairs is the United States Congress and it can establish or redefine the existence and scope of the Federal trust responsibility and even unilaterally dissolve the relationship if it chooses. This power stems from the plenary power of Congress in Indian affairs. This power and the Indian reaction to its exercise is discussed in chapter II. Congress has designated a principal agent for carrying out the trust, i.e., the Department of the Interior. That agent

<sup>17</sup> E.g., *United States v. Mason*, 412 U.S. 391 (1973); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

<sup>18</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

<sup>19</sup> *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). For further elaboration on this standard of performance, see 5 A. Scott, *Law of Trusts* 1298 (3d ed. 1967).

<sup>20</sup> 5 A. Scott, *Law of Trusts* 1277-1299 (3d ed. 1967).

<sup>21</sup> *Id.* at 1298.

<sup>22</sup> *United States v. Mason*, 412 U.S. 391 (1973); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

<sup>23</sup> *United States v. Creek Nation*, 295 U.S. 103 (1935).

<sup>24</sup> *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

<sup>25</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

cannot terminate the trust nor change the manner in which it is carried out, but the trustee (i.e., Congress) itself can. The beneficiary may be able to relieve the trustee of its trust responsibility in certain circumstances, but the extent to which that may be done should be clarified.<sup>25</sup>

### CONFLICT OF INTEREST

These principles place the United States in a curious position. Not only is it charged as trustee for a private interest, i.e., Indians, but it also must balance competing interests in carrying out public policy. Therein, of course, lies the source of the long-lamented conflict of interest of the Federal Government in carrying out the Indian trust responsibility. What happens when perceived public policy is inconsistent with the Indian interests? Under the current administrative structure, Indian interests often suffer.<sup>26</sup>

While this conflict can never be entirely eliminated, it can be diminished greatly by vesting the primary responsibility for carrying out the trust responsibility in an Executive office which has as its single mission the protection of Indian tribes and improvement of the economic and social status of the Indian people. While the Bureau of Indian Affairs is charged currently with the primary obligation for carrying out the Federal trust responsibility in most subject areas, it cannot fill that role adequately while subject to the competing demands present within the Department of the Interior. It is difficult to reconcile, for example, the functions of the Bureau of Land Management and the Bureau for Fisheries and Wildlife with the requirements of the trust to protect the Indian land base, forestry, mineral resources, and hunting and fishing rights. (See chapter VI for proposals to alleviate this administrative conflict of interest.)

This does not imply, however, that the Federal trust duty rests solely with one Executive office. Courts have firmly stated that the trust duty is an obligation of the United States Government.<sup>27</sup> Legally there may be, and practically there should be, a prime agent in the Federal Government which insures that the trust is carried out faithfully, but this does not relieve other Federal agencies of the fiduciary duty to act with the utmost care, good faith, and prudence where Indian trust rights are concerned or potentially affected. Nor does this relieve the agencies of the duty to provide those services necessary for protection and enhancement of those rights. Many examples of the conflict of interest are cited in the Commission task force reports. This conflict is particularly obvious when Indians attempt to secure adequate legal representation to protect their trust interests.<sup>28</sup>

### SCOPE OF TRUST OBLIGATION

The Department of the Interior adopts a very narrow interpretation of the trustee concept by limiting its application to the lands, natural

<sup>25</sup> See AIPRC, Task Force No. 2, ch. 1, and see ch. 5, part A.3 of this report.

<sup>26</sup> See AIPRC, Task Force No. 9, 734-760; AIPRC, Task Force No. 3; R. Chambers, note 3 *supra*.

<sup>27</sup> See generally, F. Cohen, Handbook of Federal Indian Law, 171-172 (1941) and cases cited therein.

<sup>28</sup> See generally, AIPRC, Task Force No. 9, part 6, ch. 10.

resources, and management of trust funds of "federally recognized" tribes.<sup>29</sup> There is little reason to so restrict the trust doctrine other than administrative convenience. There is legal authority that the United States trust duty is much broader.<sup>30</sup> The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. This duty has long been recognized implicitly by Congress in numerous acts, including the Snyder Act of 1921,<sup>31</sup> the Indian Reorganization Act of 1934,<sup>31a</sup> the Johnson-O'Malley Act of 1934,<sup>32</sup> the Native American Programs Act of 1974,<sup>33</sup> the Indian Self-Determination and Education Assistance Act of 1975,<sup>34</sup> and the Indian Health Care Improvement Act of 1976.<sup>35</sup> In fact as early as 1818 Congress established a general civilization fund to aid Indians in achieving self-sufficiency within the non-Indian social and economic structure.<sup>36</sup>

The Commission has found that Indian people are unanimous and consistent in their own view of the scope of the trust responsibility. Invariably they perceive the concept to symbolize the honor and good faith which historically the United States has always professed in their dealing with the Indian tribes. Indian people have not drawn sharp legal distinctions between services and custody of physical assets in their understanding of the application of the trust relationship. Consequently, at its core, the trust relationship has meant to them the guarantee of the U.S. that solemn promises of Federal protection for lands and people would be kept. The fact that the United States has been notoriously unfaithful in observing its commitments to the Indian tribes is not seen as lessening the continuing responsibility. In this context the range of social services which the United States has traditionally provided and for which successive Congresses have appropriated funds (for example, see the above list of statutes) have always been seen as an integral part of the Federal-Indian relationship.

Notwithstanding this common perception of the scope of the trust responsibility, an analysis of the implications of its meaning on a level of practical application logically forces us to make a broad distinction between the protection of physical trust assets and the commitment to provide human services. This distinction is particularly relevant in view of the Commission recommendations articulating a standard of care, remedies for breach of trust, and the necessity for procedural protections to accompany condemnation of trust interests. As the above analysis makes clear, these principles have evolved in the

<sup>29</sup> U.S. Congress. House Comm. on Appropriations, Subcomm. on the Dept. of Interior and Related Agencies. Hearings on BIA Appropriations, 102 et seq. (94th Cong., 1st sess., 1976); see also U.S. Dept. of Interior, Office of the Secretary, Letter from Acting Secretary Kent Friszell to David Getches, Oct. 27, 1976.

<sup>30</sup> See AIPRC, Task Force No. 1; Task Force No. 8; also R. Chambers, note 2, supra.

<sup>31</sup> 25 U.S.C. sec. 18.

<sup>31a</sup> 25 U.S.C. sec. 461 et seq.

<sup>32</sup> 25 U.S.C. sec. 452.

<sup>33</sup> 88 Stat. 2323.

<sup>34</sup> 88 Stat. 2203.

<sup>35</sup> P.L. 94-487.

<sup>36</sup> See ch. 8, this report.

course of judicial analysis of the trust responsibility, which have found the common law principles of trust to be an appropriate frame of reference. Essentially, the courts have found that trusteeship without standards, remedies, or procedural protections borders on being meaningless and unenforceable. It is important to note that these court decisions have all arisen in the context of the trust responsibility as applied to physical assets. The principles of law derived from common law trust doctrine are readily applicable to the trust relationship as it affects the United States' stewardship of Indian trust assets. The identification and formulation of standards of care, remedial devices, and procedural protections by the Commission have only followed this development in the law as found in Federal judicial decisions.

The trust relationship as applied to the broader concepts of human services and supportive Indian tribal government calls for a different, though parallel, line of reasoning. That is, the principles of law so readily applicable in reference to the intangible responsibilities of providing services and respecting right of self-government. It is a matter of a difference in form, which calls for a difference in application. The Federal responsibility to provide services and to support the right of self-government is no less of a trust responsibility simply because the manner of application is distinguishable. The social and governmental trust, which is more nearly analogous to the guardian-ward principles, is clearly no less of a binding responsibility and is certainly understood to be on the same level by Indian people.

The precise manner in which these obligations are fulfilled in terms of magnitude and distribution may be changed by Congress as the relative strength and self-sufficiency of Indian tribes change. But the federal duty to provide them remains constant. Furthermore, the nature and degree of services provided by the Federal Government pursuant to the trust obligation is not altered by the services which Indians may receive on the same basis as other United States citizens or governmental units. This follows from the dual-entitlement concept whereby Indians, pursuant to equal protection of the laws, have a right to receipt of general government services on a nondiscriminatory basis and also a right to those services offered specifically to Indians as a distinct group of citizens.

It must be pointed out that the special "Indian" services have never resulted in double benefits nor have they been understood as such by Indian people. The congressional purpose in providing Indian services has always been to meet the minimal human service needs of Indian communities where general government services have been unavailable. However, the Commission has found that in many instances Indians have been declared ineligible for general government services due to a pattern of misunderstanding of the effect of dual entitlement by government officials with the result that too often Indians have received no services. In chapter eight of this report, the Commission calls for congressional oversight hearings to investigate this problem.

It should be noted that the trust obligation extends not only to tribes as governing units but also to their members wherever they may be.<sup>87</sup> There is nothing in the law which holds that the Federal trust

<sup>87</sup> *United States v. Holliday*, 70 U.S. 407 (1865); *Seminole Nation v. U.S.*, 316 U.S. 286 (1942); *McOlanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

responsibility stops at the reservation gate, nor do sound policy considerations dictate such a result. On the contrary, consistency and fairness demand just the opposite. Moreover, the trust duty of the U.S. Government is not affected one way or the other by the delivery or nondelivery of Federal social service programs in urban and other nonreservation settings or by the Federal choice of delivery vehicles. The trust obligation is unique and independent of other Government activities.

#### CONGRESSIONAL GUIDANCE REQUIRED

Congress has often contributed to the misunderstanding of the U.S. trust responsibility and has sometimes inadvertently prevented Federal agencies from administering it in the best interests of the Indians. This results because Congress has not always given sufficient guidance to executive agencies as to what is expected of them in carrying out these responsibilities. Furthermore, inadequate appropriations for Indian programs indirectly encourage agencies to restrict eligibility for their trust services, contrary to both the purposes and the rationale for the Federal trust relationship. Given the dramatic significance of the trust responsibility in Federal-Indian relations, and the plenary power of Congress in Indian matters,<sup>38</sup> there is little reason for leaving the doctrine to founder in judicial and administrative guesswork and budgetary juggling. Therefore, the Commission concludes that Congress is the appropriate forum for discussion of the trust relationship.

#### SHOULD THE TRUST BE SPECIFICALLY DEFINED?

There was considerable discussion in and outside the Commission as to the relative merits of two alternative approaches to recommended legislation dealing with the trust responsibility:

- (1) A detailed definition;
- (2) A general statement of policy.

The argument for the first alternative was that such a definition would clarify legal rights under the concept, give day-to-day guidance to executive agencies carrying out the trust and diminish the inconsistencies in administrative and Federal court decisions as to how the trust translates into affirmative duties and rights in Indian law.

The argument against a precise definition of the trust obligations with an enumeration of specific rights and obligations is that the Federal trust responsibility is a continually evolving concept. This argument suggests that a general affirmation of the trust responsibility by Congress would not place undue restrictions on the development of this doctrine but still would constitute an explicit recognition of the scope of the obligation by Congress.

The Commission has taken the middle ground between these alternatives and elected not to offer a detailed definition of trust responsibility because such a definition offered today could become obsolete and unmanageable as the nature and functions of tribal governments evolve, as the role which Indians play as United States citizens

<sup>38</sup> *United States v. McGowan*, 302 U.S. 535 (1938); *Warren Trading Post v. State Tax Commission*, 380 U.S. 685 (1965). For discussion of the plenary power, see AIPRC, Task Force No. 9, 32-35.



changes, and as the relationship between the Federal Government and tribal governments responds to new realities and demands. In such circumstances, a specific legal definition of the trust relationship could in time be a hindrance to Indian self-government and economic improvement.

Likewise, we elected not to recommend a simple, broad reaffirmation by Congress that there is such a concept as a trust responsibility. Congress has recognized implicitly the special obligation of the United States to American Indians in many statutes. The Federal courts have recognized and given substance to the trust duty for more than 150 years.<sup>39</sup> And various sectors of the executive branch do specifically recognize the trusteeship.<sup>40</sup>

Despite this recognition, the trust duty remains somewhat fuzzy, poorly administered, and a matter of some disappointment to Indians who read Federal court statements that the trust responsibility involves "moral obligations of the highest responsibility and trust" and is to be "judged by the most exacting fiduciary standards,"<sup>41</sup> then try to perceive those obligations being met. As a rule, Indians cannot see the performance of the promise.

#### THE TRUST CONCEPT IS A CONSTANTLY EVOLVING DOCTRINE

The recommendations constitute a "definition" in that they set out more clearly than previous congressional actions what the trust duty is, who owes it and to whom, and what the standards should be for judging performance. But they have purposely restricted statements of these elements to broad principles.

This approach is desirable because, much like the principles and rights contained in the U.S. Bill of Rights, the United States trust responsibility is a constantly evolving legal concept. To a great extent, this flexibility in meaning accounts for the continued vitality and relevance of these legal determinants, despite the enormous political and social changes witnessed in the 200-year history of the United States. The principles contained in the Bill of Rights and those inherent in the trust relationship with Indians should be allowed that flexibility.

It should be noted that there is considerable support in statutory, judicial, and constitutional law for the congressional declaration set forth below. Consistent with Supreme Court mandates, these sources have been read in favor of Indians, and as Indians would have understood them.<sup>42</sup>

#### DEVELOPMENT OF A SOUND TRUST POLICY

The first paragraph of the recommended policy statement (A1 below) proposes an explicit recognition that the trust obligation is

<sup>39</sup> For example, *Worcester v. Georgia*, 31 U.S. 515 (1832) and more recently *Passamaquoddy Tribe v. Morton*, 528 F. 2d 870 (1st cir., 1975) affirming 388 F. Supp. 679 (D.C. Me., 1974).

<sup>40</sup> E.g., message from President Nixon to Congress, the American Indians—Message from the President of the United States, 116 Cong. Rec. 23131, 23132 (1970); also 1976 Appropriations Hearings, note 28 supra.

<sup>41</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

<sup>42</sup> For a thorough discussion of the case law setting forth this rule of interpretation, see AIPRC, Task Force No. 9, pt. I, ch. 1, sec. C.

linked historically to protection of Indians and Indian tribes in three areas: (1) trust resources, including lands, natural resources, and trust funds; (2) services related to the economic and social well-being of the Indian people; and (3) the right to self-government. With respect to services related to protection and enhancement of trust assets, the United States should be held to the standards of a common law trustee as discussed in the narrative above, and it should be subject to liability in Federal courts for violation of this trust obligation. In the absence of such a remedy there is no incentive for the trustee to perform its obligation in a diligent manner.

In matters relating to possible liability for failure to protect rights of self-government or to provide social and economic services, the courts have not spoken. Certainly it is possible that events such as the diminishment of the governmental capacities of the tribes in matters such as the power to regulate hunting and fishing activities could lead to significant monetary losses. The Commission recommendations set forth below would not preclude legal actions either for monetary damages or for injunctive relief in either of these areas.

The second paragraph (A2) reaffirms Federal court holdings that the trust duty is not one which applies only to the Bureau of Indian Affairs or another "Indian agency." Federal agencies may not be required to establish special Indian programs, but they are required to act consistent with fiduciary standards when they take actions which may affect Indian trust property.

The third paragraph (A3) makes it clear that the Federal trust responsibility extends to members of Indian tribes but is not limited to Indians living on reservations. The last sentence merely reaffirms the rights of Indians to those services offered to all United States citizens and to those offered specifically to American Indians. Eligibility for receipt of one does not preclude eligibility for receipt of the other.

The fourth paragraph (A4) emphasizes that Indian lands are not public lands. They are privately owned lands held in trust by the United States for Indians. It should be unnecessary to state this in a congressional policy except that it is a legal fact which sometimes still is misunderstood. For example, as recently as 1972, the U.S. Court of Appeals for the Tenth Circuit identified Indian trust lands as "public lands," thereby subjecting them to more stringent environmental protection rules than other private lands.<sup>43</sup>

The recommendation of an Indian rights impact statement contained in section B below follows from two premises: (1) Federal agencies have in the past and today continue to violate Indian trust rights; and (2) a procedure should be established which would prevent such violations without consent of the Indians or specific authorization of Congress. The need for such an Indian rights impact statement is fully discussed in the final report of Task Force Number Nine, pages 62-70. Among other specific instances listed is the conflict between the Seneca Indian Nation and the Army Corps of Engineers in which the tribe lost in excess of 80 percent of its reservation without specific congressional authorization.

Under our proposal, prior to taking any action which may abrogate or otherwise infringe on Indian trust rights, Federal agencies must

<sup>43</sup> *Davis v. Morton*; 469 F. 2d 593 (10th cir., 1972).

first seek consent from the affected Indians and obtain authorization from Congress. Under part 2 of section B below Congress will not authorize such action absent Indian consent except under "extraordinary circumstances where a compelling national interest requires" it. In any case, the congressional authorization must identify the specific Indian rights being affected and that it is the intent of Congress to "abrogate or infringe such rights." It is implied in this procedure that the appropriate Indians and Federal agencies will receive copies of the impact statement and be permitted to comment on its contents.

Because of the conflict of interest problems, frequent refusal by the Department of the Interior and the Department of Justice to represent tribes or individuals involved in trust issues, and limited resources of the tribes to employ their own attorneys, Indians are often unable to secure adequate legal representation to protect or enforce their rights under the Federal trust responsibility.<sup>44</sup> And even when they are able to litigate, the enormous expense involved depletes tribal resources and hinders delivery of needed services. The recommendations in section C below are intended to alleviate this situation by creating a new office with litigation authority and providing for government payment of fees for private attorneys representing Indians in trust matters. Nothing in this section, however, affects the right of tribes to engage counsel on their own behalf.

Section C recommends that within a new Department of Indian Affairs, which is recommended elsewhere in this report (see chapter six), there be established an Office of Trust Rights Protection. It may be part of a general counsel's office in the department or it may be a separate entity. In either location, it would assume a role as the primary legal advocate in the Federal Government for protecting and enforcing Indian rights pursuant to the Federal trust responsibility. With Indian consent, it would provide legal guidance in trust matters, initiate and participate in administrative proceedings affecting Indian trust rights and prepare and try Indian cases in Federal and State courts. The Department of Justice would have a secondary duty to handle such matters upon request of the Office. Upon establishment of the Office, the function of the Division of Indian Affairs of the Solicitor's Office in the Department of Interior would be transferred to the new office.

This approach to relieving the conflict of interest problems so troublesome with the present structure for providing legal assistance to Indians presupposes the creation of a Department of Indian Affairs. In the absence of such action, it is the recommendation of this Commission that some entity like the proposed Indian Trust Counsel Authority<sup>45</sup> be established.

The difficulty with the Trust Counsel concept as proposed is that: (1) it does not go far enough to diminish conflict of interest situations; (2) the distribution of responsibility between the Authority, the Department of the Interior and the Department of Justice was confusing; (3) the proposed staff of the Authority was too limited to adequately handle the potential caseload; and (4) because of the

<sup>44</sup> For an excellent discussion of specific cases of inadequate legal representation for Indians and the reasons for it, see pt. VI, ch. 9 of the Final Report of Task Force No. 9.

<sup>45</sup> See Hearings on the Proposed Indian Trust Counsel Authority, note 4 supra.

absence of field offices, communication between Indians seeking legal assistance and the Authority would be cumbersome. Even still, the idea would lead to an improvement of the current situation in that Indians would have at least some alternative besides the Department of Justice with its inherent conflict of interest.

The advantage of establishing a legal office with litigation authorization in an independent Indian agency is that it would have readily available the expertise and manpower of the parent agency; it could place legal staff in the various field offices of the agency thus facilitating communication with Indian clients; and it would lessen the risk of severe reductions in appropriations which would drastically reduce the effectiveness of the legal office as an advocate of Indian trust rights.

A recent Supreme Court decision strengthened the general rule in Federal courts that the prevailing party in litigation is not entitled to an award of attorney's fees by the court in the absence of statutory authorization or other exception.<sup>46</sup> This rule, however, is subject to revision or exception by Congress and numerous current statutes provide for such exceptions.<sup>47</sup> Recommendation D, below, is intended to provide an additional exception in the case of Indians involved in litigation. For an excellent and thorough discussion of the need for such legislation and the consequences of the current practice, see part 6 of the final report of Task Force No. Nine.

#### RECOMMENDATIONS

*To clarify and improve the administration of the Federal trust responsibility to American Indians, the Commission recommends that:*

Congress reaffirm and direct all executive agencies to administer the trust responsibility consistent with the following principles and procedures.

##### A. STATEMENT OF POLICY

In carrying out its trust obligations to American Indians (including Alaskan Natives) it shall be the policy of the United States to recognize and act consistent with these principles of law:

1. The trust responsibility to American Indians is an established legal obligation which requires the United States to protect and enhance Indian trust resources and tribal self-government and to provide economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

In matters involving trust resources, the United States be held to the highest standards of care and good faith consistent with the principles of common law trust. Legal and equitable remedies be available in Federal courts for breach of standards.

2. Although the trust responsibility is a legally binding duty required of all United States agencies and instrumentalities, and although Congress has the ultimate responsibility for insuring that the

<sup>46</sup> *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240.

<sup>47</sup> For a list of such statutes, see footnote 9, part VI, ch. 9 of the Final Report of Task Force No. 9.

duty is met, there be in the executive branch one independent prime agent charged with the principal responsibility for faithfully administering the trust.

3. The trust responsibility extends through the tribe to the Indian member, whether on or off the reservation. His or her rights pursuant to this United States obligation are not affected by services which he/she may be eligible to receive on the same basis as other United States citizens or which the tribe may be eligible to receive on the same basis as any other governmental unit.

4. The United States holds legal title to Indian trust property, but full equitable title rests with the Indian owners.

## B. INDIAN TRUST RIGHTS IMPACT STATEMENT

### *Limitation Upon Agency Action*

Before any agency takes action which may abrogate or in any way infringe any Indian treaty rights, or nontreaty rights protected by the trust responsibility, it prepare and submit to the appropriate committee in both Houses of Congress an Indian trust rights impact statement, to include, but not be limited to, the following information:

1. Nature of the proposed action.
2. Nature of the Indian rights which may be abrogated or in any way infringed upon by the proposed action.
3. Whether consent of the affected Indians has been sought and obtained. If such consent has not been obtained, then an explanation shall be given of the extraordinary circumstances where a compelling national interest requires such action without Indian consent.
4. If the proposed action involves taking or otherwise infringing Indian trust lands, there must be notification whether or not lieu lands have been offered to the affected Indian or Indians.

### *Action by Congress Required*

When considering legislation which may have an adverse impact upon treaty or nontreaty rights of Indians the Congress adhere to the following principles.

The United States not abrogate or in any way infringe any treaty rights, or nontreaty rights that are protected by the trust responsibility, without first seeking to obtain the consent of the affected Indian or Indians. Such rights not be abrogated or infringed without such consent except under extraordinary circumstances where a compelling national interest requires otherwise. With or without Indian consent, such rights not be abrogated or infringed upon in any way except pursuant to a congressional act which identifies the specific affected Indian rights and which states that it is the intent of Congress to abrogate or infringe such rights.

## C. LEGAL REPRESENTATION FOR INDIANS

To diminish the conflict of interest prevalent when the Department of Justice and the Department of the Interior provide services to Indians, to provide for more efficient rendering of legal services to In-

dians, and to otherwise improve the representation which Indians receive for protection and enforcement of their trust rights, Congress enact the following legislation:

1. There be established within a newly created Department of Indian Affairs (*see* recommendation in chapter six) an Office of Trust Rights Protection. Its duties shall include, but not be limited to, cataloging and assisting in the management of Indian trust property, advising Indians and Indian tribes in legal matters and representing them in all litigation and administrative proceedings involving Indian trust rights. In appropriate field offices of the Department of Indian Affairs there be a legal and professional staff under the supervision of the Office of Trust Rights Protection.

2. The Office of Trust Rights Protection be authorized to render all appropriate legal services which now are rendered by the Department of Justice and the Department of the Interior, provided that the Indian client agrees to accept representation and services.

3. The Office of Trust Rights Protection have the primary responsibility of the Federal Government for protecting, enforcing, and enhancing Indian trust rights, but this shall not relieve any Federal agency from the duty to recognize and act consistent with the Federal trust responsibility for Indians.

4. The Office of Trust Rights Protection act in the name of the United States as trustee for Indians in all legal matters and proceedings, except those which it refers to the Department of Justice for litigation. It have the discretion to so refer those matters for which it does not have the staff, resources, or expertise to handle. The Office also have the discretion and authority to engage private legal counsel to represent Indians, tribes or groups in trust matters. In such cases, the United States Government may pay all fees and costs and the wishes of the Indian clients shall be complied with, as much as possible, in the selection of counsel. Where there is conflict of interest between an individual Indian and a tribe involving trust issues, the Office represent the tribe and it have the discretion to engage private counsel to represent the individual at Government expense.

5. The United States waive sovereign immunity for all actions involving Indian trust matters brought by the Office of Trust Rights Protection or private counsel engaged by it to represent Indians.

6. The Office be authorized to obtain whatever information, services, and other assistance deemed necessary from other Federal agencies, and such agencies be obligated to comply with such requests.

#### D. AUTHORIZATION FOR AWARD OF ATTORNEY FEES AND OTHER LITIGATION COSTS

Federal courts be authorized to award attorneys' fees and expenses and all reasonable costs incident to litigation, including but not limited to expert witness fees, in cases in which an Indian or Indian tribe or group engages private attorneys and is successful in protecting or enforcing treaty, trust, or other rights protected by Federal statute. Federal courts be given the discretion to order that all such fees and costs be paid by the losing party or by the United States Government.