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June 1, 2012

Terri Parr
Affiliated Tribes of Northwest Indians
6636 NE Sandy Boulevard
Portland, Oregon 97213

By E-Mail: tparr@atnitribes.org; copy to: fsharp@quinault.org

Dear Terri,

Here is the set of ideas and recommendations that I believe Fawn wanted me to draft for ATNI to submit to the Indian Trust Commission. I have drafted this in the form of a letter to the Commission responding to the Commission's request for ideas and recommendations. Of course, you can put this in whatever form you think best.

I think that the Cheryl Lohman, head of the Trust Committee will want to see these recommendations. She said that the Committee already a resolution concerning sunsetting of the Office of Special Trustee.

As I said on the phone, I have tried to create recommendations that are in accord with the views that I heard at the meetings of ATNI and the requests that Fawn made. But naturally, these are just draft ideas that I have created for ATNI to use. You should feel free to use them or change them or ignore them. I hope they are useful.

The draft letter follows:

Thank you for your letter of May 11, 2012 requesting ideas and recommendations from the Affiliated Tribes of Northwest Indians. We are grateful for this opportunity to contribute to the work of the Commission.

We have prepared some initial recommendations and we are submitting them at this time in preliminary form so that they may be in time for the Commission's meeting on June 11th. These initial recommendations are in a general and summary form. We assume that it will be possible to submit additional and more detailed recommendations in the future. We hope that these initial ideas will be of value as the Commission undertakes its mandate.

We wish the Commission success in its work. The Affiliated Tribes of Northwest Indians will continue to contribute to the Commission's important work.

Defining or Describing the Trust Relationship

It may be useful to suggest a possible definition or, more accurately, a description of the trust relationship between the United States and federally recognized Indian and Alaska Native tribes. This might perhaps be an aid in considering the various aspects of the relationship and the issues related to each.

The trust relationship is something that has many different meanings for different people and for different purposes. There does not appear to be any authoritative legal definition. While there could be a number of possible useful definitions, it may be helpful to state the major elements of the relationship that seem to be widely agreed upon by tribal leaders, government officials, lawyers and other professionals.

1. The first element is the broad obligation of the federal government to act with the utmost honesty and good faith in all its dealings with Native tribes and individuals. This standard of conduct was first established in part by Congress in the Northwest Ordinance of 1784, and it was described and relied upon by the Supreme Court in *Seminole Nation v. United States*, 316 U.S. 286 (1942). This aspect of the trust relationship requires the United States to act in all respects as a fiduciary when it deals with Indian and Alaska Native tribes and individuals.

2. The second element is the general obligation of the federal government to provide benefits, assistance, goods, and services to Indian tribes and individuals, including medical care, education assistance, and other needs. This obligation arises from the sacrifices made by tribes in ceding much of the their land and resources, from promises made to many tribes in treaties, from the history of mistreatment and injustices inflicted on many tribes by the United States, from the economic conditions of deprivation into which tribes were forced, and from considerations of humanity and fairness. These general obligations are founded on broad legal and equitable principles, but there is little agreement about the proper extent of these obligations.

3. A third and related element of the relationship is the general obligation of the federal government to protect tribes and their property from harm. This

obligation has been to some extent embodied in various statutes authorizing or requiring federal officials to assist tribes in protecting themselves and defending against actions of others both in court and as a practical matter in many other situations. To a limited extent these obligations of protection and assistance are also provided to individuals on reservations and to Indians who hold allotments in trust status.

4. The fourth element is perhaps the most important. It is the obligation to hold trust title to some (but not necessarily all) tribal lands and resources, to hold other property, land, natural resources, water rights, and funds of tribes in trust, to hold trust title to individual allotments, and to manage and control this trust property exclusively for the benefit of the tribe or individual allottee. This obligation carries with it all the obligations of a fiduciary or trustee, except that courts have not in fact required the United States to fulfill all the obligations of a trustee or fiduciary. This trust obligation is defined and created in part in a multitude of statutes. In certain situations, the United States is *de facto* in possession or control of property or funds belonging to a tribe, and in that situation, the United States has the obligations of a trustee.

Beyond these four major elements of the trust relationship, there is much disagreement and lack of clarity. It should be a part of the Commission's task to make recommendations for clarifying and settling the nature of the trust relationship and how it is to be carried out. Some of the following recommendations may help to achieve that end.

Voluntary Agreements with Tribes to Define the Trust Relationship

The Commission should consider recommending that Congress authorize the Interior Department, on behalf of the United States, to enter into binding legal agreements negotiated with individual tribes to define, so far as desired, the relationship between the United States and the tribe, to specify the trust obligations to the tribe and the trust authority of the United States to manage or control the property of the tribe, and to provide for legal remedies in the event of breach of the agreement or failure to carry out the agreed trust obligations.

Tribes vary widely in their circumstances and in their desires and needs with regard to the trust relationship. Tribes are very diverse with respect to their treaties with the United States and with respect to their histories. Naturally, it is not adequate to have a single 'trust relationship" model that is applied to all tribes alike. Tribes are not alike.

Tribes should be able to have the level of federal assistance and oversight that they desire with respect to their trust assets, that is, their property (including lands, natural resources, and related rights) held in trust by the United States. Likewise, tribes should be entitled to all the programs, funding and other assistance required by treaties, agreements, and the general trust obligation of the United States. Some tribes rightfully demand a high level of trust assistance and management oversight. Many other tribes are

taking responsibility for much program management and other "trust" work under PL 638 contracts, and these tribes may want a lesser degree of federal supervision. Still other tribes want very little or no involvement of the federal government as trustee. But in all of these situations, the present, existing trust obligations of the federal government remain unchanged, undiminished, and subject to being called upon by tribes that require assistance, support, or protection.

Tribes that wish to do so should be able to make voluntary, legally binding agreements with the federal government to specify the precise content, obligations, and responsibilities of their relationship to the United States, that is, to define the trust relationship that they have with the United States. Such agreements would permit the relationship to be clarified and adapted to the particular needs and desires of each tribe, with the full agreement and consent of both the tribe and the United States. The federal government should provide funding to enable willing tribes to prepare for and negotiate such agreements.

Agreements must be on a government-to-government basis. In this respect, such agreements would be similar to treaties.

Legislation authorizing such agreements should state clearly that such agreements would have no effect on the present, continuing trust relationship and the trust obligations of the United States to all tribes. There must be no diminishment of the underlying trust obligations of the federal government, though an agreement could specify the way these obligations are to be applied to and carried out with respect to the tribe for the duration of the agreement. Agreements should be the result of free and good faith negotiations, and should be made only with the free, prior, informed consent of the tribe. There must be no penalties or adverse conditions of any kind associated with either making or not making such an agreement.

Such agreements should be subject to change or modification at any time at the request of the tribe. This would permit the relationship to be changed to respond to changing circumstances and needs, and even permit a complete cancellation of the agreement and a return to the general trust relationship that now exists.

Authorizing legislation should make such agreements fully legally binding on the United States and enforceable in the federal courts through actions for specific performance, injunctive relief, damages, and other forms of legal and equitable relief. Legislation should also authorize tribes to negotiate out-of-court dispute resolution measures if they so desire.

Limitations on the Power of the Trustee

The Commission should recommend measures to place appropriate limits on the authority claimed by the United States as trustee to control tribes, control tribal governments, and to control and dispose of tribes' property and funds. Such powers should be limited to powers directly necessary to carry out the United States' trust

obligations to tribes. Each tribe must be free, through agreement, to give the federal government greater authority over the tribe's own property and affairs, or to limit the trustee's authority, as the tribe may desire.

Statutes such as the American Indian Agricultural Resources Management Act of 1990 (25 U.S.C. 3715(a)), the National Indian Forest Resource Management Act of 1990 (25 U.S.C. 3101-3120), the Indian Mineral Development Act of 1982 (25 U.S.C. 2102), and the statute concerning rights of way on tribal lands (25 U.S.C. 323-328)), which give the Secretary of the Interior or other federal officials unilateral authority over trust property, without the consent of the tribe, should be amended to make such statutes subject to agreement with the tribe or to limit the federal authority to act unilaterally to what is strictly necessary to protect the property, for the shortest possible time, until agreement can be reached with the tribal government.

Reaffirm Trust Obligations

The Commission should recommend that the Administration and Congress explicitly and clearly reaffirm the United States' trust relationship and trust obligations without any reduction or limitation of the assistance, benefits, and services to be provided to tribes.

Many tribes have deep concerns about changes and proposed changes in the Bureau of Indian Affairs and other agencies and departments. There is a strong perception that these changes tend toward possible termination of trust programs and services.

Trust Duties Act

The Commission should consider recommending that Congress pass a Trust Duties Act that would set clear legal standards for all United States agencies having trust responsibilities to tribes. A Trust Duties Act would clarify and establish specifically the duties of the United States as trustee, including the duties and requirements that the Commission will recommend to improve trust management and services, as well as appropriate limits on the authority or power of the United States as trustee. Some examples of trust duties are: the duty to respect and abide by treaty agreements; the duty to respect the sovereignty and self-determination of tribes; the duty to account to the beneficiary (tribe) fully and regularly; the duty of loyalty, especially the duty to avoid all conflicts of interest; and the duty to consult in good faith with tribes.

The content of a Trust Duties Act must be developed in detail in consultation with tribes to assure that all duties are stated in full detail and to assure that corrective provisions are included to correct present problems with trust administration.

The Trust Duties Act should include authorization for the Interior Department and possibly other federal departments to enter into trust agreements with tribes as described above. The Act could include provisions authorizing a dispute resolution process as

described in the next recommendation.

The Trust Duties Act should be enforceable by tribes in the federal courts. It must be implemented through regulations adopted by the affected departments in consultation with tribes.

A Dispute Resolution Process

The Commission should consider recommending the creation of a speedy, out-of-court dispute resolution process for tribes having conflicts with the United States concerning trust issues. Such a dispute resolution process should not replace any existing process for administrative appeals or possible actions in court, nor should it be an administrative remedy that must be exhausted before a tribe files suit. It should be a process created or authorized by statute as an additional, non-obligatory remedy for tribes. Such a new dispute resolution process should be available to tribes without first going through any other available administrative appeal process. Using such a dispute resolution process should toll the time limitations for taking any other available administrative appeal or court action, so that this process would be in addition to any other possible process or remedy.

The purpose of this process would be to provide a swift and efficient means for dealing with disagreements and problems concerning trust obligations, trust property, trust management of resources, and other such issues that are common for most tribes and many individual allotees. Existing means for dealing with such disputes or problems are often too time consuming, too expensive, and not necessarily fair.

The exact nature of the process should be decided after consultations with tribes. Some of the possible options are for disputes to be resolved by:

a. Formal arbitration. A single arbitrator may be agreed upon by the parties, or an arbitration panel may be created by each party naming one panel member and these two panel members selecting the third member. Decisions may be binding or non-binding, and they may be made final or appealable to a court.
b. Mediation. A mediator designated by agreement between the tribe and the federal agency would assist the parties to reach a negotiated resolution
c. Negotiation. A formal process of negotiation involving face-to-face conferences, exchanges of proposals and information, and a time frame for reaching an agreement or moving to another form of dispute resolution.
d. An ombudsman. A process whereby an individual is appointed on a permanent or on-going basis (probably with staff support) to receive and make recommendations to resolve complaints or disputes. Decisions may be made binding or merely advisory.
e. Friendly measures. This is a process employed with some success by the Inter-American Commission on Human Rights for dealing with alleged human rights violations by countries. Friendly measures are steps taken by some designated neutral or impartial body aimed at resolving the problem or

dispute. This can include gathering and sharing information with the disputing parties, making recommendations for settlement, mediating negotiations, proposing temporary measures to prevent harm while a settlement is sought, and other steps that could lead to a resolution. Friendly measures are not themselves binding on either party.

A dispute resolution process should probably include a process for determining certain matters that are not necessarily a "dispute" or conflict but matters that need to be determined, settled or clarified. Such issues would include, for example, what property or subject matter is within the trust obligations, what agency or department holds a trust responsibility or obligation, and what authority and responsibility the trustee has in a particular situation, and related issues.

Out-of-court dispute resolution will require that clear rules of procedure be established. Provisions must also be made for paying the costs of the procedure. These can be substantial, and should probably be born by the United States.

Such a dispute resolution process could be made part of trust agreements made by tribes. Agreements could specify what form of out-of-court dispute resolution, if any, the tribe and the United States agree upon.

Additional Legal Remedies for Violations of Trust Obligations

The Commission should gather information from tribes and consider what additional legal remedies should be created by Congress to enable tribes to have legal redress where the United States violates is trust obligations. Tribes do not now have clear and effective remedies for trust violations. Existing federal statutes authorizing suits against the United States are far too restrictive, and the federal courts continue to narrow the possibilities for tribes to gain court relief for trust violations.

The failure of the United States to provide prompt and effective resort to the federal courts for violations of trust obligations is unjust and inexcusable. The failure to provide access to judicial remedies for all trust violations should be identified by the Commission as a denial or violation of the trust responsibility. The Commission and Congress should consult fully with tribes and their legal counsel about the need to provide additional legal remedies, so that appropriate legislation can be drafted and passed.

Option for Tribes to Take Property out of Trust

The Commission should consider recommending that Congress authorize by legislation a process whereby tribes can, at their option, take land out of trust and hold title to the land themselves without subjecting the land to taxation by any government and without removing the land from the tribe's governmental jurisdiction. Such legislation has been introduced in the House, but that legislation needs further refinement to protect tribes' interests fully. Such legislation should reaffirm and guarantee that the United

States will continue to protect and safeguard tribes' property particularly against harm or wrongdoing by others. Such legislation must reaffirm the trust obligations to tribes.

Improving Consultation Between Tribes and Federal Agencies

The Commission should recommend standards for consultation with tribes that assure a respectful and useful process consistent with the United States fiduciary obligations. Consultations must provide a full and meaningful opportunity for tribes to present information, proposals, arguments, statements, and questions. Consultations must involve a higher level of federal officials than is now usual in consultations. Consultations must be scheduled with sufficient advance notice to tribes and complete information about the subject matter of the consultation. Consultations should permit tribes to designate agenda items for consultation and to play an equal role in the consultation process. These are a few possible recommendations, but it will be crucial to hear the views of other tribes about the need for improved consultations.

The Office of the Special Trustee Should be Ended

The Office should be "sunsetted," and its functions should be returned to the appropriate agencies. The problems and shortcomings of this office are too numerous to list here. It is clear that many or most tribes are strongly in favor of putting an end to this very detrimental experiment.

Thank you for this opportunity to submit these ideas and recommendations.

Sincerely,

(ATNI)