

TO: National Commission on Indian Trust Administration and Reform

FROM: Timothy J. Greene, Chairman,
Makah Tribal Council 

DATE: February 7, 2013

RE: Commission Recommendations

Thank you for the opportunity to meet with the Secretarial Commission. The Commission's evaluation of trust systems and the Commission's duty to recommend options for improvements provide an important opportunity to better the relationship between the United States and Indian tribal governments. The Makah Tribal Council recommends the following improvements to the trust responsibilities of the United States:

1. Recommendations to Improve or Streamline Delivery of Services to Trust Beneficiaries.

A. Reinstate the Makah Trust Officer.

The Makah Tribe has not had a Trust Officer for years. There is currently no Makah Agency, Superintendent, or other agency that serves the Makah Tribe. This isolates the Tribe and creates inefficiencies. For example, all realty transactions that require a delegation of authority to be approved by the Bureau of Indian Affairs (BIA) must be mailed to the Northwest Regional Office (NWRO) in Portland, Oregon. The NWRO staff must then encode the transaction, send it to the Land Title Records Office (LTRO) for recording, and mail it back to the Makah Realty Office. This bureaucratic red tape takes time and causes unnecessary delays. Without a local BIA agency, the Tribe needs an on-Reservation Trust Officer.

B. Improve Real Property Trust Assets Accounting.

While settling our trust funds mismanagement case, *Makah Indian Tribe v. United States*, Court of Federal Claims, No. 06-889, we were asked to agree to the correctness of a January 31, 2012, Statement of Performance for our tribal trust property. While we could agree to the trust fund balances, the Statement of Performance included many pages listing real property assets, itemizing tracts of tribal lands, and lands leased to tribal members for home site purposes. The real property assets listing contains numerous mistakes and has not been properly updated. The process of preparing and maintaining those trust records must be improved.

C. Improve Access to Accounting and Realty Information.

The Tribe has a Tribal Self-Governance Act, Pub. L. 93-638, compact for realty and probate matters, yet it lacks access to the Trust Asset Accounting Management System (TAAMS) and ProTrac. Rather than benefitting from TAAMS and ProTrac, the Realty Office must fax requests for Title Status Reports, Individual Trust Interests, and Tract Histories to the NWRO, which then has to input the information itself. This archaic system results in missing paperwork, disorganization, duplication of work, inefficiencies, and delays. Remote tribes without a local BIA agency must be able to utilize critical technology through some other means. In addition to access, compacted tribes need funding for on-going TAAMS and ProTrac training.

D. Institute Online Account Access.

Individual Indian Money account holders lack easy access to account information. The Department of the Interior (Interior) should institute secure online access to increase transparency for the account holder.

E. Improve Access to Timber Sale Information.

Tribal members need access to timber sale information related to individual sales, including probate records in order to discern who are the rightful recipients of the sale proceeds. The current system takes far too long.

2. Trust Administration Models.

A. The Navajo Model.

The Makah Realty Officer understands that the Navajo Nation utilizes a good trust administration model. Interior should consider adopting all or part of this model for other tribes who may request it.

B. The Makah Project Review.

The Makah Realty Department developed a project review form, which must be reviewed by each Makah governmental department prior to beginning a Reservation project (the review form is attached hereto). This assures that impacts to the land and community are assessed before project approval. Interior should improve its NEPA analysis by engaging in a thorough review of any project prior to approval.

3. Sunset the Office of Special Trustee.

The Office of Special Trustee (OST), established by the 1994 Trust Reform Act, was not intended to become permanent. *See* 25 U.S.C. § 4042(c). However, OST has established a parallel bureaucracy, which duplicates administrative inefficiencies instead of improving trust services. The lines between OST and BIA responsibilities are often unclear, and the same appropriations would cover more services if OST were combined with BIA. Interior must provide an accounting of funds spent on administration of OST, not directly benefitting tribes.

4. Cobell Appraisals within One Year.

The Cobell buy-back process must be completed within the one-year appraisal period, otherwise new appraisals are needed. Alternatively, the appraisals could be effective for two years, but that may be detrimental to the landowner if the land has increased in value. It is not likely that the one-year requirement will be met in all cases, causing further delay and confusion.

5. Improving the Government-to-Government Relationship.

A. Amend Secretarial Order No. 3206 (June 5, 1997) into Regulations with Specific, Measurable Consultation Requirements, Which Have the Force of Law.

In Secretarial Order No. 3206, the Secretary of the Interior and the Secretary of Commerce, pursuant to the Endangered Species Act of 1973 (“ESA”), the federal-tribal trust relationship, and other federal laws, attempted to clarify federal responsibilities when actions taken under the ESA may affect Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. While the Secretarial Order contains good concepts, it has been ruled insufficient to establish a legally enforceable obligation to engage in meaningful government-to-government consultation with tribes. For example, in *Center for Biological Diversity, et al. v. Salazar*, No. 10-2130 (D. Ariz. Nov. 30, 2011), the Court examined the Secretarial Order to determine whether its obligations included requirements that have the force of law. The Court concluded that protections for Sonoran Desert bald eagles, which have great value to tribes, “do not implicate the federal government’s fiduciary duty over the management of specific treaty-protected resources . . . nor does [Fish and Wildlife Service] have the same statutory and regulatory obligations to consult with the tribes under the ESA that the BIA has when making decisions directly related to the management of tribal services and employment on Indian reservations.” *Id.* Order at 19. The Court concluded that “Congress and Interior have not imposed such consultation obligations in the ESA context, and it is not the proper role of the Court to impose such obligations on its own.” *Id.* This defect in Secretarial Order No. 3206 should be corrected. Formal regulations should be adopted to make consultation mandatory and meaningful.

B. Actual Decision Maker Participation in Consultation.

In order for meaningful government-to-government consultation to occur, actual decision makers from Interior and the Tribe must participate. Consultation is futile if Interior’s representative lacks decision making authority. Likewise, Interior’s representative needs to meet with the Tribal Council in a private meeting, not in a large forum with attendees representing broad and conflicting interests.

C. Copies of Records Should Be Provided to Tribes as Part of the Government-to-Government Process.

Interior’s administration of the Freedom of Information Act (“FOIA”) leaves much to be desired. FOIA is applied grudgingly and responses are long delayed. However, there is no reason for insisting upon using the formal FOIA process when responding to a records request from an Indian tribe. Just as federal agencies do not employ FOIA against other agencies’ document requirements, so

too Interior should expressly provide for the prompt availability of federal records upon the request of a tribe as a matter of government-to-government consultation.

6. Improving Trust Management and Administration.

A. Issue an Executive Order Barring Federal Employees from Advocating Reductions in Federal Trust Responsibilities.

Several efforts to limit trust duties arose in connection with the tribal trust fund settlement negotiations. For example, tribes were asked to agree that the Statements of Performance satisfied the government's obligations under the Trust Reform Act. Also, tribes had to agree to limit the time that proceeds could be held in a tribal trust account to five years. Similarly, the Treasury Department sought agreement that its obligations were limited to those defined by 25 U.S.C. § 161a(a). We recognize that Interior cannot prevent the Justice Department from taking advocacy positions in litigation. However, an Executive Order prohibiting Interior's employees from attempting to reduce the government's trust obligations to Indians will help protect trust duties. The Affiliated Tribes of Northwest Indians has adopted Resolution 12-64, petitioning the President to issue an Executive Order barring federal employees from proposing or advocating reduction of the United States' existing trust responsibilities. That Resolution should be honored.

B. Increase Funding.

The chronically underfunded Indian programs within the BIA and Indian Health Services budgets have been well documented over the past several decades. Some tribes hesitate to assume federal programs under self-governance, because they understand there is not adequate money to support the tribe in carrying out the functions of the program that the tribe wants to administer. The United States has a responsibility to ensure adequate funding for programs that serve tribes and Indian people. The disgraceful process of underfunding contract support costs was recently rejected again by the United States Supreme Court in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

Tribes with Geographic Information Systems (GIS) need funding to update maps and records. Out-of-date information hinders a tribe's ability to accurately project future timber sales and sustainably manage forests and fisheries.

C. Amend Pub. L. 93-638 to Direct Mandatory Compacting for Programs, Functions, Services, and Activities that Non-BIA Interior Department Bureaus and Other Federal Agencies Provide with Respect to Indian Trust Resources and Rights.

The Tribal Self-Governance Act provides for compacting non-BIA functions in § 403(b)(2) and (c) of Pub. L. 93-638. Mandatory compacting is required only as to services "otherwise available to Indian tribes or Indians," while discretionary compacting can include programs of special geographical, historical, or cultural significance to the tribe. The courts have limited mandatory compacting to programs specifically targeted to Indians. Thus, programs directed to improving trust resources that have collateral benefits to non-Indian fishing interests, such as fish harvests, fall outside of '638 compacts unless the non-BIA agency, in its discretion, chooses to include them in a tribal compact. For BIA programs to improve law enforcement, however, the presence of benefits to

non-tribal members does not remove the program from mandatory compacting. Neither should programs directed to restoration and protection of trust resources, such as Indian water rights or fisheries resources, be insulated from mandatory compacting simply because those programs are administered by non-BIA agencies and other Interior bureaus. The Commission should recommend improvement of '638 compacting along the lines of proposed § 405(b)(2) of H.R. 3994, 110th Cong. 1st Sess.

More broadly, the Indian Self-Determination Act should be expanded to enable tribes to contract to carry out any federal program, service, function, or activity directed to an Indian reservation or benefiting tribal members. The Treatment as a State process enacted in § 518 of the Clean Water Act, 33 U.S.C. § 1337(e), and similar environmental laws illustrate our recommendation. The Equal Employment Opportunity Commission and the Department of Labor similarly have recently proposed memoranda of understanding with tribes to enable tribes to carry out those federal programs. These federal agency efforts should be systematized and shaped into a more uniform contracting and certification program, which would enable tribes to choose to carry out and tailor federal programs to the needs of vibrant Indian tribal communities.

D. Help Tribes Protect Trust Property.

The Indian Trader Statute offers a missed opportunity to help tribes protect their resources and programs. 25 U.S.C. § 261 authorizes Interior to appoint traders to Indian tribes and to adopt appropriate regulations. This statute became an issue in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001), where the Navajo Nation and the United States argued that Atkinson was subject to tribal taxes by virtue of being an Indian trader. The Supreme Court found that “[a]lthough the regulations do not ‘preclude’ the Navajo Nation from imposing upon ‘Indian traders’ such ‘fees or taxes it may deem appropriate,’ the regulations do not contemplate or authorize the hotel occupancy tax at issue here. 25 C.F.R. § 141.11.” *Id.* at n.10. Interior should amend the 25 C.F.R. Part 140 regulations to expressly authorize such taxes. Rulemaking to support tribal taxes to protect programs and property is needed.

BIA should amend the recently enacted 25 C.F.R. Part 162 to require BIA to recover possession of Indian land when it has been trespassed. For example, § 162.023 now states that BIA “may take action to recover possession” This discretion damages the trust relationship, and it allows people to trespass on Indian land with impunity.

E. Hold Consultations with Tribal Councils and Staffs Regarding Changes in Law.

Interior should hold regular consultation meetings with tribal councils and staffs when there are changes in law impacting Indian Country. Tribes must be informed about the effects of new laws in order to properly govern. These consultations should take place on reservations, so affected tribal members may attend as well.

Thank you.

