

# III

## The Trust Responsibility

### What is the Doctrine of Trust Responsibility?

The Supreme Court confirmed in 2011 that there exists “a general trust relationship between the United States and the Indian people.”<sup>1</sup> During the course of its relations with Indian tribes, the federal government, the Court said, “has charged itself with moral obligations of the highest responsibility and trust, . . . to the fulfillment of which the national honor has been committed.”<sup>2</sup>

Since 1975, Congress has created a number of programs for Indian tribes and their members, and each time it did so, it referenced the federal government’s trust responsibility as a reason for the program’s creation.<sup>3</sup> According to Congress, the Indian Self-Determination and Education Assistance Act, which authorizes Indian tribes to administer a variety of federal programs on Indian reservations, was enacted to promote “the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole.”<sup>4</sup> The Federal Oil and Gas Royalty Management Act, which helps tribes manage their oil and gas reserves, was intended “to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources.”<sup>5</sup> The No Child Left Behind Act contains provisions that benefit Indian and Alaska Native children, which were intended “to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”<sup>6</sup> The Indian Health Care Improvement Act, which provides medical services to Indians, was passed to help fulfill “the Federal Government’s historical and unique relationship with, and resulting responsibility to, the American Indian people.”<sup>7</sup>

The trust relationship originates from the nearly four hundred treaties that the United States signed with Indian tribes between 1787 and 1871.<sup>8</sup> During those years, Indian tribes were militarily powerful and were regarded by the United States as independent nations in the same way that foreign nations were viewed. Although the United States, with its greater population and superior military technology, likely could have overpowered Indian tribes in warfare, victory would have been very costly in human life and resources. To avoid those costs, peace treaties were negotiated. In these treaties, the United States obtained the land it wanted from the tribes and avoided further warfare. In exchange, the federal government reserved parcels of land for these tribes and guaranteed that the United States would respect the independence of the tribes, would protect them and ensure peace with them, and would provide to them food, clothing, supplies, and various services.<sup>9</sup>

For instance, the Treaty of Hopewell, signed with the Cherokee Nation in 1785, guarantees "peace to all the Cherokees" and promises to "receive them into the favor and protection of the United States of America."<sup>10</sup> The Treaty with the Navajo Nation in 1849 guarantees that the tribe, in exchange for the land it was relinquishing, would be placed "under the exclusive jurisdiction and protection of the Government" and that the federal government would ensure "the permanent prosperity and happiness of said Indians."<sup>11</sup> The 1858 treaty with the Yankton Sioux Tribe resulted in the relinquishment of more than 11 million acres of land to the United States. In exchange, the tribe retained less than 450,000 acres, receiving a guarantee from the federal government "[t]o protect the said [tribe] in the quiet and peaceful possession" of its remaining lands.<sup>12</sup> The 1868 treaty with the Eastern Band of Shoshone and Bannock Tribes, which removed more than 44 million acres of land from those tribes, guaranteed "peace between the parties" and assured that the federal government would create a reservation for the tribe and provide the tribe with numerous services, including such things as schools, a sawmill, medical care, a carpenter, a miller, and a blacksmith.<sup>13</sup>

Most of the land mass of the United States was obtained by the federal government through treaties of this nature in which the United States obtained land and peaceful relations in exchange for giving the Indians a set of promises. As a result of these treaties, the federal government acquired a legal duty, as well as a moral obligation, to keep its end of the bargain, now that the Indians have kept theirs.

The relationship between tribes and the United States, the Supreme Court stated in 1831, "resembles that of a ward to his guardian."<sup>14</sup> That phrase should be interpreted, not in the sense that Indians were incapable of managing for themselves (which, clearly, was not the case then or now), but in the

sense that the United States had pledged its word to assist and protect them. Tribes had placed their faith in the United States to fulfill the guarantees made to them in exchange for their land. This principle—that the federal government has a duty to fulfill its promises—is known as *the doctrine of trust responsibility*.<sup>15</sup> This doctrine “has been a cornerstone of federal Indian law for nearly 200 years.”<sup>16</sup>

### What is a Trust?

There are many different types of trusts but, in essence, a trust is created whenever one party places something of value under the control of a second party for the benefit of a third party. For example, parents may deposit money a trust bank account to be used solely for the purpose of their children’s education.<sup>17</sup> The person (or entity) who holds the trust property is called the *trustee*, while the person for whom the trust is created is called the *beneficiary*.

### What are the Duties of a Trustee?

Whenever a trustee agrees to hold something of value for a beneficiary, the law generally imposes on the trustee a *fiduciary* responsibility with respect to that property.<sup>18</sup> This means that, at a minimum, the trustee is obligated to remain loyal to the beneficiary; to act in the beneficiary’s best interests; to act with all the skill, care, diligence, and expertise at his or her disposal; and to preserve, protect, and maintain the trust property.<sup>19</sup>

### What does the Doctrine of Trust Responsibility Require of Federal Officials?

Many Indians today are reluctant to place faith in, and rely on, the doctrine of trust responsibility. This is understandable, given what happened to Indians on this continent—and to native peoples around the world—in the name of “guardianship.” Beginning in the fifteenth century, European nations started colonizing the globe, subjugating native peoples and confiscating their land. These acts, the Europeans said at the time, were necessary because God had directed them to “civilize” non-Christians “for their benefit,” which required placing them and their property in a state of guardianship.<sup>20</sup> Franciscus de Victoria (1480–1546), probably the most influential Spanish thinker of the period, developed legal principles that helped justify Spanish conquest. Victoria “espoused a guardianship principle: a Christian nation’s duty is to civilize and Christianize the backward people of the New World.”<sup>21</sup> Relying on such principles, European nations “civilized” the indigenous population of the New World by subjugating them and stealing their resources. Millions of people were pauperized and had their land confiscated in the name of guardianship.

Soon after it gained its independence from Great Britain, the United States developed a similar theory, known as Manifest Destiny. Under this theory, expansion westward was divinely inspired, and white settlers had both a right and a duty to take land from the "savages" and put that land to "proper" use. Consistent with Manifest Destiny, the federal government developed a version of guardianship similar to the one that had been fashioned by Europeans. The federal government viewed itself as the guardian and trustee of Indian land and Indian people, and as having a duty to "civilize" the Indians. As discussed throughout this book, the United States implemented numerous policies harmful to Indians and tribes in the name of "helping" them, such as placing tribal land and resources under the control of federal officials, selling tribal land within Indian reservations to non-Indians, subjecting Indians to federal criminal prosecution, prohibiting Indians from engaging in various religious practices, and allowing religious missionaries to remove Indian children from their homes and to place them in boarding schools outside the reservation.

Indians have good reason, therefore, to be suspicious of the doctrine of trust responsibility. However, the trust doctrine and the immense power that goes with it can be used for good or bad. It can be a shield to protect Indians or a sword to hurt them. Although it was used to justify a host of harmful actions against Indians until the 1960s, since then Congress has largely repudiated its negative applications.

Rather than apply the trust doctrine negatively—in which it is viewed as a source of federal power *over* Indians—the trust doctrine today is viewed positively, that is, as a source of federal responsibility *to* Indians. The trust doctrine creates two sets of duties, one broad, one specific. Broadly, the trust doctrine requires the federal government to support and encourage tribal self-government, self-determination, and economic prosperity, duties that stem from treaty guarantees to "protect" Indian tribes and provide assistance to them.<sup>22</sup> "A cornerstone of this [trust] obligation," a federal appellate court noted in 2008, "is to promote a tribe's political integrity."<sup>23</sup> A 1977 Senate report expressed this obligation as follows:

The purpose behind the trust doctrine is and always has been to ensure 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.<sup>24</sup>

A broad application of the trust doctrine, as one commentator has stated, "transcends specific treaty promises" and imposes a duty to promote tribal sovereignty and economic self-sufficiency.<sup>25</sup>

In addition to the federal government's broad duty to enhance tribal sovereignty, the government has a specific duty under the trust doctrine to faithfully perform those tasks expressly set forth in these federal treaties. A treaty, as explained in the next chapter, has the same dignity as a federal law, and must be obeyed and enforced.

### How can a Statute Create a Trust Responsibility?

It is easy to understand how a treaty can create a trust responsibility. In most Indian treaties, for instance, the tribe exchanged land for a set of promises, including a promise that the federal government would protect the tribe and its reservation. Therefore, the tribe has a right to have those promises kept.

No similar exchange occurs when Congress enacts a statute, and therefore it is not as apparent how a statute can create a trust responsibility. For two reasons, statutes can, and frequently do, create trust responsibilities. First, statutes are the vehicles by which Congress creates the programs and services necessary to fulfill its treaty promises. As explained in the next chapter, Congress ended treaty making with Indian tribes in 1871. Once that happened, the primary means by which Congress could satisfy its treaty commitments was by enacting laws that created programs or services for Indians and tribes. The Supreme Court recently noted that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."<sup>26</sup> Thus, these statutes should be viewed as extensions of the treaties.

Second, Congress has passed laws that place Indian property in the hands of federal agencies, and which require the agencies to manage that property in a certain fashion. Courts have recognized that these laws necessarily impose a fiduciary duty on the agency to manage those tribal resources wisely, in the tribe's best interests, and in the manner instructed by Congress.<sup>27</sup> Whenever Congress removes the tribe's ability to manage its own resources and confers that power on a federal agency, courts "must infer that Congress intended to impose on [that agency] traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary."<sup>28</sup> In short, it is now clear, as one federal court recently stated, that "the trust relationship arises out of statutes."<sup>29</sup>

Indeed, the Supreme Court has established the principle, consistent with the purpose of the trust doctrine, that doubtful expressions in treaties or statutes regarding the duty of federal officials to assist Indians must be interpreted liberally

in favor of the Indians.<sup>30</sup> As a result of "the unique trust relationship between the federal government and Native Americans," if an ambiguity in a treaty or statute "can reasonably be construed as the Tribe would have it construed, it must be construed that way."<sup>31</sup> Thus, federal officials, as a result of the trust doctrine, should interpret their responsibilities broadly and assist Indians and tribes to the maximum extent allowable under the treaties and statutes they are implementing.

### **Can the Federal Government's Trust Responsibility be Enforced by the Courts if it is Being Violated?**

It depends on whether that duty is being violated by Congress or by a federal agency. As discussed in Chapter V, the Supreme Court has held that Congress has plenary power to regulate Indian affairs and, therefore, courts may not order Congress to undertake any particular action on behalf of Indians or tribes. With respect to Congress, then, the trust responsibility is a moral and ethical, rather than a legally enforceable, duty.<sup>32</sup> In fact, if Congress decides to terminate an Indian program—or even terminate an Indian tribe—a federal court has no authority to prevent it.<sup>33</sup> Indians thus must rely on the good faith of Congress to keep the promises that Congress made more than a century ago in exchange for Indian land and peaceful relations.

However, Indians and tribes *can* compel federal officials to perform the duties that Congress has delegated to them. Although Congress has the authority to modify a trust relationship, administrative agencies do not. Federal officials must faithfully execute their trust duties, and courts must carefully scrutinize their actions.<sup>34</sup> Federal agencies responsible for implementing this nation's Indian programs have an "overriding duty . . . to deal fairly with Indians,"<sup>35</sup> and their actions must be judged by the "stricter standards" that apply to a fiduciary.<sup>36</sup>

### **What Standard Should be used in Determining Whether the Federal Government has Fulfilled its Trust Responsibilities?**

The Supreme Court recognized nearly seventy years ago that activities undertaken by the federal government pursuant to its trust obligations must "be judged by the most exacting fiduciary standards."<sup>37</sup> Under that standard, the government has a duty to act in good faith, to remain loyal to the beneficiary, and to use its expertise in the beneficiary's behalf.<sup>38</sup>

Many members of the general public sometimes question why Indians receive services free of charge from the federal government, including certain medical and education benefits. The doctrine of trust responsibility demonstrates, however, that Indians are not receiving "free" services. Rather, these services were *prepaid*. Tribes relinquished their homelands and agreed to move peacefully to much smaller territories in exchange for these services. Therefore, as

Senator Byron Dorgan stated in 2007 regarding the importance of funding Indian health-care programs: "This is not an option; it's a trust responsibility, [and] we need to own up to our responsibility."<sup>39</sup>

As a result of treaties and statutes, the federal government has created numerous types of trusts in which Indians and tribes are the beneficiaries. Each trust creates its own set of fiduciary duties. For instance, when a treaty promises (as most treaties do) that the federal government will protect tribal land, this guarantee prevents federal officials from selling or otherwise disposing of that land except in limited situations;<sup>40</sup> from diverting water away from that land, thereby rendering it less habitable;<sup>41</sup> and from denying Indians the ability to access or use that land.<sup>42</sup> Similarly, when a federal statute places Indian property, such as oil, gas, minerals, or timber, under the strict control and management of federal officials (as some statutes do), the federal government thereby acquires fiduciary duties to manage those trust resources wisely and in the best interests of the Indian beneficiaries.<sup>43</sup>

However, as the Supreme Court explained in 2011, the federal government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."<sup>44</sup> In other words, one must look to the applicable statute (or treaty) to determine whether a trust has been created. The federal government can create any type of trust it wishes when it creates an Indian program. While Indian tribes have an interest in obtaining trust services, "the Government has its own independent interest in the implementation of federal Indian policy," and it has the final word in determining whether to create a trust responsibility and, if so, its scope.<sup>45</sup> The federal government is entitled to fashion an Indian program—and its trust relationship with Indian tribes—however it wishes, and "the Government has often structured the trust relationship to pursue its own policy goals."<sup>46</sup> In other words, "the trust relationship has been altered and administered as an instrument of federal policy,"<sup>47</sup> and as noted earlier, Indians must rely on the integrity and honor of the United States to administer programs in the best interests of the Indians.

### **In What Ways can a Tribe Benefit from having a Trust Relationship with the United States?**

In many ways. Congress, in furtherance of its trust responsibilities, has created numerous programs and services for the benefit of Indians and tribes. These include housing, medical, land development, education, loan, and employment programs. Virtually every federally recognized tribe receives significant financial and technical assistance under one or more of these programs, and some tribes would suffer severe economic hardship without this assistance. A number of these federal programs are discussed later in this book.

### What Remedies May a Court Grant When a Federal Agency is Violating its Trust Responsibilities?

Congress has passed a number of laws that authorize Indians and tribes to seek remedies from a court when a federal agency is violating its trust responsibilities. These laws are discussed in Chapter XVIII. As a result of these laws, when an agency is violating its trust duties, courts must issue effective remedies.

What constitutes an effective remedy will vary with the situation. For instance, if a federal agency has announced plans to construct a dam that will jeopardize tribal fisheries, the tribe will want to obtain an injunction to prevent those injuries from occurring.<sup>48</sup> On the other hand, if a federal agency has already injured a trust resource, such as by mismanaging tribal oil and gas resources, the tribe will want to obtain damages to compensate for the loss.<sup>49</sup> Both types of remedies—injunctive relief to prevent future injury and damages to compensate for past injury—are available from federal courts. As a result of the higher burdens imposed on the government by their trust obligations, federal courts have “substantial latitude,” one appellate court recently noted, to fashion effective remedies for mismanagement of Indian trust resources.<sup>50</sup>

Two Supreme Court cases decided in the early 1980s addressed the question of when an Indian tribe may be awarded money damages from the United States for violating a trust responsibility. In 1980, in *United States v. Mitchell* (“*Mitchell I*”),<sup>51</sup> tribal members on the Quinault Indian Reservation filed a lawsuit seeking damages against the United States on the grounds that the Department of the Interior had mismanaged timber resources on the tribe’s trust land in violation of duties imposed by the General Allotment Act of 1887 (GAA).<sup>52</sup> The Supreme Court acknowledged that the GAA created a “limited” trust relationship between the federal government and Indian tribes, but because the GAA said nothing about managing or protecting a tribe’s timber resources or even implied such a duty, the Court held that the Quinaults could not obtain a remedy under the GAA for the mismanagement of their timber.<sup>53</sup> The Court therefore returned the case to the lower court to consider whether some other statute might provide a basis for a financial remedy.

The lower court found other grounds for a monetary remedy, and the Supreme Court reconsidered the case in 1983 in *United States v. Mitchell* (“*Mitchell II*”).<sup>54</sup> The lower court based its decision in favor of the Quinaults on federal laws that imposed strict duties on federal officials to manage Indian timber resources. These laws required federal officials to determine who may harvest the timber and under what conditions, to collect a fair price from those harvesting the timber, to pay the proceeds to tribal members, and to ensure reforestation of the areas harvested. These laws, the Supreme Court agreed, gave the federal government “comprehensive” and “elaborate” control over



Indian forestry.<sup>55</sup> However, nothing in these laws expressly conferred a right to recover damages, and the Department of the Interior argued that the tribe therefore was not entitled to compensation even if agency officials had mismanaged the tribe's forestry. The Court rejected that argument, holding that these laws created an enforceable trust. Congress had placed valuable property belonging to the Quinaults in the hands of the Department of the Interior, thus creating a fiduciary relationship. Even though these laws did not expressly confer a right to damages for mismanagement, they "can fairly be interpreted as mandating compensation" for violations of the government's fiduciary obligations.<sup>56</sup> "Given the existence of a trust relationship," the Court said, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."<sup>57</sup>

The principle announced in *Mitchell I* and *Mitchell II* has become known as the "*Mitchell doctrine*." When a law confers on the government pervasive and comprehensive control over a tribal resource, a fiduciary duty is created with respect to the management of that resource, and the government can be held liable in damages for mismanagement.<sup>58</sup> In this situation, a money-mandating remedy may be inferred even if the law does not create an express right to damages.

The Supreme Court has applied the *Mitchell doctrine* in three subsequent cases, two of which were decided in 2003 and one in 2009. In *Navajo Nation v. United States* (2003),<sup>59</sup> the Navajo Nation alleged in a lawsuit that the Secretary of the Interior, in order to assist a coal company, had given the tribe false and misleading information in a deliberate effort to induce the tribe to accept less money from that company for its coal than what the tribe likely could have received from a different company. The tribe relied on the Secretary's advice and entered into an unfair contract with a coal company, the lawsuit contended, and the tribe was seeking damages from the federal government to compensate for the lost income. According to the tribe, federal statutes imposed a trust duty on the Secretary to remain loyal to the Indians with respect to the management of Indian coal, a responsibility that the Secretary violated.

The Supreme Court ruled against the tribe. The Court examined the statutes cited by the tribe and found nothing in those laws conferring on the federal government broad managerial control over Indian coal. The government's only role under these laws, the Court found, was to approve or disapprove the tribe's leasing decision. The government did not manage the resource, negotiate the lease, or dictate the terms of the lease. Therefore, the Court said, the statute did not create a fiduciary duty. Consequently, the Court said, even if the Secretary had deceived the tribe, the tribe could not recover damages against the federal government, as there had been no violation of a trust responsibility.