

**MODERNIZING THE TRUST: REDEFINING THE UNITED STATES-TRIBAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP AND ADVANCING TRUST ASSET REFORM**

**DRAFT - FOR DISCUSSION PURPOSES ONLY**  
**Subject to Tribal Leader Review, Revision, and Approval**  
**Revised April 27, 2015**

**KEY PRINCIPLES OF INDIAN TRUST MODERNIZATION**

**Defining the Federal Trust Responsibility for the 21<sup>st</sup> Century** – The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Indian Tribes were anachronistic and would gradually disappear. As a result, the current trust model requires a comprehensive overhaul to modernize federal Indian policy in a manner that is consistent with self-determination and rooted in retained inherent sovereign authority as opposed to an approach that presumes that Tribes have been granted their sovereign rights. A new model must be based on fulfillment by the United States of treaty obligations and the recognition and support of tribally-driven solutions. No branch of the Federal Government should be permitted to unilaterally decide whether to comply with treaties and other legally-binding agreements.

This new paradigm should follow the spirit of the Indian Reorganization Act and President Johnson's and President Nixon's Special Messages to Congress on Indian Affairs. It is time to establish a trust model that reflects a true nation-to-nation partnership built upon diplomacy that will strengthen federal trust administration, enhance federal-tribal relations, and promote and protect tribal sovereignty, all with the goal of building and sustaining prosperous tribal communities. These key elements of Indian trust modernization should guide legislative reform and simultaneous administrative improvements.

In return for Indian Tribes ceding millions of acres of land that make the United States what it is today, the United States has recognized and must protect the tribal right to self-government, to exist as distinct peoples on their own lands, as well as remaining Indian trust assets. The Constitution, treaties, statutes, Executive Orders, and judicial decisions all recognize the United States' fundamental trust relationship with tribal nations. Under this relationship, the United States has certain legal trust obligations to Tribes, which govern the federal government's administration of Indian trust property and shape its nation-to-nation relations with Tribes.

The United States' legal obligations for the administration, management, and accounting of Indian trust property have been the subject of significant litigation and many executive branch policy statements. The United States administers on behalf of Indians a wide array of trust property, including land, natural resources, and funds. The Department of the Interior's Secretarial Commission on Indian Trust Administration and Reform in 2013 urged a renewed emphasis on fiduciary obligations for this trust administration.

The United States' trust obligations also shape its special nation-to-nation relations with Indian Tribes. The United States carries out many functions on behalf of Tribes, including involvement in water rights disputes, appraisals and probate, congressional funding, and government

contracting and compacting. Trust obligations should affect the outcome when there is a dispute between tribal interests and other interests. The trust obligation includes supporting inherent tribal sovereignty. As governments, Tribes must deliver a wide range of critical services, such as education, workforce development, public safety, infrastructure, and healthcare to their citizens. Tribes have the capability as governments to oversee their own affairs and serve their citizens. As such, they should be in parity with states and local governments.

This paper lays out basic principles for trust modernization. It also identifies specific ways to implement these principles in both the short- and long-term, by both administrative and legislative means.

**I. Strengthen Trust Standards – Adopt Implementing Laws and Regulations.** As President Nixon recognized 45 years ago, the United States government acts as a legal trustee for the land and water rights of Indian Tribes and their members, and these rights are of critical economic importance to Indian Tribes. Moreover, the second recommendation of Congress’s own American Indian Policy Review Commission in 1977 was that Congress should reaffirm and direct all executive agencies to administer the trust responsibility consistent with a set of specific legal principles. More recently, Secretary of the Interior Bruce Babbitt issued a Secretarial Order that outlined principles for the proper discharge of these trust responsibilities, and those principles were later codified in the Department of the Interior Manual. Also, in 2013, after a two-year review, the Department of the Interior’s Secretarial Commission on Indian Trust Administration and Reform as its first recommendation urged that the United States government clarify that: (1) all federal agencies have a trust responsibility to Indians; (2) this trust responsibility demands a high standard of conduct; and (3) each agency is to place Indian interests before those of the agency and outside parties.

Since then, Secretary of the Interior Sally Jewell has issued a Secretarial Order that outlines additional guiding principles for honoring the trust responsibility. The next logical step is to comply with federal consultation requirements to develop and promulgate regulations to ensure that all future administrations (including all departments, offices, bureaus, and agencies) fulfill their trust responsibilities. The Secretary should finalize these regulations after full consultation with Indian country, even as the Obama Administration and Congress develop and enact legislation to codify these trust standards in statute.

**II. Strengthen Tribal Sovereignty – Empower Each Tribe to Define its Path.** Since 1968, every Congress and President has recognized that tribal governments are the entities best suited to meet the needs of their communities. This is because they are more directly accountable to the people they represent, more aware of the problems their communities face, and more agile in responding to changing circumstances. Empirical research also has confirmed that empowering tribal governments through a meaningful recognition of tribal sovereignty is the best way to increase economic development in Indian country. This does not just mean authorizing Tribes to administer federal programs under 638 contracts or self-governance compacts, even though that remains valuable. We must move beyond helpful but piecemeal approaches directed at specific functions or program, and start providing Indian Tribes with real decision-making in the management of their own affairs and assets. This should include, but not be limited to, allowing each tribe to decide for itself the specific role that it wants to play in the management of its own trust assets. One tribe may want to manage some or all of its assets itself

with no federal interference. Another may wish to continue to have those assets managed by a federal system. Tribes have different capabilities, goals, and concerns and all of those should be respected by the federal government and its federal policies and systems.

**III. Strengthen Federal Management – For Trust Assets Still Subject to Federal Control.** Today, a number of federal agencies continue to institute policies that affect all Indian Tribes and allottees. This “one size fits all” approach ignores the unique differences between the individual Tribes and the unique government-to-government relationship each Tribe has with the United States under its own treaties and other agreements. Unfortunately, many of these federal solutions never get changed or abolished, even when the Tribes and a federal Commission point out their shortcomings and recommend improvements. For example, Congress established the Office of Special Trustee to provide *temporary* oversight to improve federal trust management. Now, more than twenty years later, OST has become a separate bureaucracy which remains despite its apparent completion of its purpose and repeated calls to reintegrate Indian trust asset management to be more efficient, effective, and accountable. This is a significant drag on critical tribal and allottee resource use and development. Also, while the United States has settled *Cobell* and most tribal trust cases, and actively sought to reduce its trust fund management through those settlements, OST still employs hundreds of people and as of fiscal year 2015 has a budget of approximately \$139 million.

**IV. Strengthen Federal-Tribal Relations – One Table with Two Chairs.** Like the National Council on Indian Opportunity that President Johnson established and President Nixon expanded, the new White House Council on Native American Affairs provides an invaluable opportunity for candid and frank discussions of ways to improve the lives of Native people in America. However, as was recognized by two Presidents and Congress decades ago, Indian Tribes must have a seat at the table if this entity and its efforts are to be successful. Indian Tribes’ own leaders understand their communities, their needs, and their obstacles. They are therefore in the best position to make recommendations on how to address their problems, and to help develop federal approaches which will achieve the best results, in the shortest time possible, without wasting federal resources. Regardless of the role Tribes chooses to play in the management of their own assets, their opinions should be sought, respected, and listened to. For all these reasons, regular, coordinated, and meaningful high-level engagement is essential if the federal government is going to properly develop, coordinate, and improve federal policies affecting tribal nations.

**V. Strengthen Federal Funding and Improve Its Efficiency – A Pillar of the Trust Responsibility.** None of the above proposals can succeed without sufficient and effective federal funding, which for far too long has been lacking in Indian programs and services. Federal funding is disturbingly deficient for trust administration, services, infrastructure, and contract support costs, all of which are required by treaties, statutes, and federal trust duties. Continuing these funding policies will exacerbate Indian needs, stifle tribal economies, increase federal costs, and set the stage for the next generation of *Cobell* and tribal trust mismanagement claims. Moreover, as the Department of the Interior’s Secretarial Commission on Indian Trust Administration and Reform and the Department of Justice’s Advisory Committee on American Indian and Alaska Native Children Exposed to Violence have both recently recognized, treaties and the trust responsibility are not discretionary. Accordingly, Congress and the Administration

should increase funding for federal Indian programs and services to the level necessary to fulfill the federal government's fiduciary responsibilities to Indian Tribes and their members and reclassify trust administration, services, and programs as non-discretionary. Finally, because federal Indian affairs funding is provided in fulfillment of clear legal and historic obligations, those federal dollars should not be subject to "means testing" or other inapplicable standards developed unilaterally by the Congress or federal officials.

**Intent of this Document.** This document is largely comprehensive in the sense of identifying many, if not most, of the challenges and principles relative to the nature and evolution of the federal-tribal trust relationship. As a practical matter and given the rhythms and vagaries of the legislative process, it is also true that at any given time, legislation may be pending in Congress or initiatives being pursued in federal agencies that address one or more—but not all—of the challenges and principles outlined above. In these cases, this document should be not understood to mean that all of the principles must be included in such legislation or administrative initiatives. Instead, this document assumes that, depending on the circumstances, any one, some, or all of the principles outlined above may be pursued as appropriate opportunities present themselves, whether administrative or legislative.