

**STATEMENT OF MATTHEW L.M. FLETCHER**  
**UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**  
**OVERSIGHT HEARING ON FULFILLING THE FEDERAL TRUST**  
**RESPONSIBILITY: THE FOUNDATION OF THE GOVERNMENT-TO-**  
**GOVERNMENT RELATIONSHIP**

May 17, 2012

**Summary**

Chairman Akaka, members of the Committee, it is a pleasure to testify today on the federal trust responsibility to Indian nations and I say *chi-miigwetch* for inviting me to this hearing.

I am Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. I am a member of the Grand Traverse Band of Ottawa and Chippewa Indians, located in Peshawbestown, Michigan. I am co-author of the sixth edition of *Cases and Materials on Federal Indian Law* (Thomson West 2011) with the late David Getches, Charles Wilkinson, and Robert Williams, and author of *American Indian Tribal Law* (Aspen 2011), the first casebook for law students on tribal law. In 2010, I was elected to the American Law Institute (ALI). My colleague Wenona T. Singel and I currently head up the effort to initiate an ALI restatement or principles project on American Indian Law.

Today, I hope to provide a brief overview of the historic underpinnings of the federal trust responsibility to Indian nations; discuss the current status of the trust relationship in light of the laudable Congressional policy supporting tribal self-determination and the lamentable Supreme Court jurisprudence in the field; and offer a few suggestions on the future of the trust responsibility and Congress's role in dealing with Indian affairs.

The Supreme Court interpreted the meaning of the Indian Commerce Clause and how it interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. M'Intosh*, an early Indian lands case, Chief Justice Marshall held that the federal government had exclusive dominion over land transactions with Indian tribes – exclusive as to

individual American citizens and, implicitly, as to state government. In *Cherokee Nation v. Georgia*, Chief Justice Marshall's plurality opinion asserted that while Indian tribes were not state governments as defined in the Constitution, nor were they foreign nations, they were something akin to "domestic dependent nations." And, finally, in *Worcester v. Georgia*, Chief Justice Marshall confirmed that the laws of states have "no force" in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as "the supreme law of the land."

The latter half of the 19th century and first half of the 20th century was a low point in federal-tribal relations. In cases like *United States v. Kagama*, *Stephens v. Cherokee Nation*, *Cherokee Nation v. Hitchcock*, and *Lone Wolf v. Hitchcock*, the Supreme Court adopted a "guardian-ward" concept of federal-tribal relations. The guardian-ward concept gave license to Congress and the Executive branch to interfere with internal tribal affairs, undermine and even expropriate without just compensation tribal property rights, and to eliminate the ties between tribes and the government during the Termination Era.

The trust responsibility never completely disappeared, however. In 1942, the Supreme Court held in *Seminole Nation v. United States*, that the United States should be held to the most exacting fiduciary duty when handling tribal trust funds. The Court wrote:

*Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.*

In 1970, President Nixon's message to Congress announced a fundamental shift in federal Indian policy – self-determination. The Message renounced the termination policy, established that adherence to the federal trust responsibility would guide federal Indian policy, and proposed a structure to dramatically reduce federal control over tribes – by recognizing greatly increased tribal authority to manage affairs on their reservations as a replacement for federal bureaucratic control.

Congress has generally adhered to the concepts of the trust responsibility in virtually all modern Indian legislation – from 1971 with the Alaska Native Claims Settlement Act to the present with water settlements, and the Tribal Law and Order Act. Appendix 1 lists many of these statutes. There have been no termination acts or similar statutes for over 50 years. This history of Executive and Congressional voluntary adherence to a trust relationship (whether it is designated and discussed under the framework of trust responsibility or not) is the heart of the federal-tribal relationship in modern times. The Solicitor General's decision-making record in acting as the trustee for tribal interests since 1970 before the Supreme Court is *exceptional*. **Appendix 2 of this Statement** lists all of the Supreme Court cases in which the United States

has appeared an amicus. In the vast majority of cases, the government steps up to support the tribal interests in question. **Appendix 3 of this Statement** lists selected cases, usually relating to treaty rights, where the United States has either brought suit on behalf or intervened in favor of tribal interests

But all is not well with the trust responsibility. Conflicts of interest undermine the federal government's duties and the Supreme Court has enabled the government to avoid responsibility for the consequences to Indian country.

Recent important Executive branch conflicts include the following:

- The conflict between the Department of Interior and the National Labor Relations Board over whether the National Labor Relations Act, which is silent as to Indian tribes as employers, applies to tribal casino employment.
- The conflict within the Department of Interior between tribal interests in sacred sites at the San Francisco Peaks and private business interests making artificial snow tainted by fecal matter.
- The conflict within the Department of Interior (and perhaps with the Department of Justice) over administering the Bald and Golden Eagle Protection Act in accordance with the American Indian religious freedoms.

Thank you for your time.

## Statement

Chairman Akaka, members of the Committee, it is a pleasure to testify today on the federal trust responsibility to Indian nations and I say *chi-miigwetch* for inviting me to this hearing.

I am Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. I am the Chief Justice of the Poarch Band of Creek Indians Supreme Court and I also sit as an appellate judge for the Pokagon Band of Potawatomi Indians, the Hoopa Valley Tribe, the Lower Elwha Klallam Tribe, and the Nottawaseppi Huron Band of Potawatomi Indians. I am a member of the Grand Traverse Band of Ottawa and Chippewa Indians, located in Peshawbestown, Michigan. In 2010, I was elected to the American Law Institute (ALI). My colleague Wenona T. Singel and I currently head up the effort to initiate an ALI restatement or principles project on American Indian Law.

I am co-author of the sixth edition of *Cases and Materials on Federal Indian Law* (Thomson West 2011) with the late David Getches, Charles Wilkinson, and Robert Williams, and author of *American Indian Tribal Law* (Aspen 2011), the first casebook for law students on tribal law. This year, I published *The Return of the Eagle: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* (Michigan State University Press), and co-edited *The Indian Civil Rights Act at Forty* with Kristen A. Carpenter and Angela R. Riley (UCLA American Indian Studies Press). I have published articles with *Arizona Law Review*, *Harvard Journal on Legislation*, *Hastings Law Journal*, *University of Colorado Law Review*, *Houston Law Review*, *Tulane Law Review*, and many others. Finally, I am the primary editor and author of the leading law blog on American Indian law and policy, *Turtle Talk*.

I graduated from the University of Michigan Law School in 1997 and the University of Michigan in 1994. I have worked as a staff attorney for four Indian Tribes – the Pascua Yaqui Tribe, the Hoopa Valley Tribe, the Suquamish Tribe, and the Grand Traverse Band. I served as a judicial consultant to the Seneca Nation of Indians Court of Appeals, and as a pro tem judge for the Little River Band of Ottawa Indians Court of Appeals. I am here in my individual capacity and none of my statements today should be treated as official statements.

Today, I hope to provide a brief overview of the historic underpinnings of the federal trust responsibility to Indian nations (Part I); discuss the current status of the trust relationship in light of the laudable Congressional policy supporting tribal self-determination and the lamentable Supreme Court jurisprudence in the field (Part II); and offer a few suggestions on the future of the trust responsibility and Congress's role in dealing with Indian affairs (Part III).<sup>1</sup>

---

<sup>1</sup> DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., AND MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (6th ed. 2011) (hereinafter *GETCHES, FEDERAL INDIAN LAW*) constitutes a significant source for much of the material contained in this Statement. I have also borrowed heavily from several

## I. The Foundations of the Trust Responsibility

The constitutional text provides for two means by which Indian tribes and the United States will interact. First, the so-called Indian Commerce Clause provides that Congress has authority to regulate commerce with the Indian tribes. One of the first acts of the First Congress was to implement the Indian Commerce Clause in the Trade and Intercourse Act of 1790.<sup>2</sup> Second, the federal government's treaty power provides an additional form by which the United States deals with Indian tribes. There are hundreds of valid and extant treaties between the United States and various Indian tribes.

### *The Marshall Trilogy*

The Supreme Court interpreted the meaning of the Indian Commerce Clause and how it interacts with Indian treaties in the so-called Marshall Trilogy of early Indian law cases. In *Johnson v. M'Intosh*,<sup>3</sup> an early Indian lands case, Chief Justice Marshall held that the federal government had exclusive dominion over land transactions with Indian tribes – exclusive as to individual American citizens and, implicitly, as to state government. In *Cherokee Nation v. Georgia*,<sup>4</sup> Chief Justice Marshall's plurality opinion asserted that while Indian tribes were not state governments as defined in the Constitution, nor were they foreign nations, they were something akin to “domestic dependent nations.” And, finally, in *Worcester v. Georgia*,<sup>5</sup> Chief Justice Marshall confirmed that the laws of states have “no force” in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as “the supreme law of the land.”

In each of these three opinions, Chief Justice Marshall recognized moral limitations on the federal government's plenary authority in Indian affairs; for example, in *Johnson v. M'Intosh*, he wrote, “Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.”<sup>6</sup> Other Justices pressed Marshall on the status of Indian tribes in the American Republic, however, focusing on the word “protection”

---

of my other previous writings. I thank Dan Rey-Bear for substantive comments. I also thank Elaine Barr for developing the materials in Appendix 1.

<sup>2</sup> See An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137, now codified as amended at 25 U.S.C. § 177.

<sup>3</sup> 21 U.S. 543 (1823).

<sup>4</sup> 30 U.S. 1 (1831).

<sup>5</sup> 31 U.S. 515 (1832).

<sup>6</sup> *Johnson*, 21 U.S. at 589.

in early Indian treaties.<sup>7</sup> The various Justices debated the meaning of “protection” as being either an invitation to dependence or the recognition of political distinctiveness.

According to Chief Justice Marshall in the *Johnson* case, Indian tribes included characteristics of both “dependent” and “distinct” nations,<sup>8</sup> a sort of middle ground. But in *Cherokee Nation*, writing for “the Court” (but really only for himself and one other Justice),<sup>9</sup> he famously labeled Indian tribes “domestic dependent nations”<sup>10</sup> as a new legal term of art created from whole cloth in order to avoid classifying Indian tribes as either States or foreign nations. In this case, the Chief Justice denigrated Indian tribes a great deal: “[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>11</sup>

Justice Thompson’s dissent in *Cherokee Nation* suggested a different reading of the word “protection.” Drawing on principles of international common law, Justice Thompson found that weaker states signing treaties of protection do not, as a side-effect, lose their sovereignty:

[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state.<sup>12</sup>

All that is required for a weaker state to retain statehood is a reservation of the right to self-government, a staple in American Indian treaties.<sup>13</sup> “Protection” and nationhood are not mutually exclusive.

While Justice Thompson’s definition of “protection” did not win the day in *Cherokee Nation*, the Court in *Worcester*, per Chief Justice Marshall, adopted his analysis. Writing for the Court, Chief Justice Marshall drew upon the relations between Great Britain and the Indian tribes

---

<sup>7</sup> Besides the Cherokee treaties, other Indian treaties the Marshall Court discussed, including the Delaware treaty, used the term “protection” as well. See *Cherokee Nation*, 30 U.S. at 65 (Thompson, J., dissenting); see also *Worcester*, 31 U.S. at 551 (noting that “[t]his stipulation is found in Indian treaties, generally”).

<sup>8</sup> *Johnson*, 21 U.S. at 596 (“The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies....”).

<sup>9</sup> *Cherokee Nation*, 30 U.S. at 15 (Marshall, C.J.).

<sup>10</sup> *Id.* at 17 (Marshall, C.J.).

<sup>11</sup> *Id.* (Marshall, C.J.).

<sup>12</sup> See *Cherokee Nation*, 30 U.S. at 53 (Thompson, J., dissenting).

<sup>13</sup> See *id.* at 54-55 (Thompson, J., dissenting) (“They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character.”).

pre-Revolutionary War to find that “protection” meant what the Indians would have thought it meant – “It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.”<sup>14</sup> So it was with the British crown as it is with the American government, Chief Justice Marshall added – “The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.”<sup>15</sup>

Chief Justice Marshall ended with his famous dictum, “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of congress.”<sup>16</sup>

### ***The Guardian-Ward Relationship (1835-1970)***

Chief Justice Marshall’s view that Indian tribes were “distinct political communities” residing on lands where state law “can have no force” did not prevail for long.<sup>17</sup> The latter half of the 19th century and first half of the 20th century was a low point in federal-tribal relations. In cases like *United States v. Kagama*,<sup>18</sup> *Stephens v. Cherokee Nation*,<sup>19</sup> *Cherokee Nation v. Hitchcock*,<sup>20</sup> and *Lone Wolf v. Hitchcock*,<sup>21</sup> the Supreme Court adopted a “guardian-ward” concept of federal-tribal relations.<sup>22</sup>

The Supreme Court’s review of Congressional acts in this area reached an extreme level of deference when it held in *Lone Wolf v. Hitchcock*<sup>23</sup> that challenges to Congressional authority to regulate Indian affairs were foreclosed by what is now referred to as the political question doctrine.<sup>24</sup> Lower courts followed the Supreme Court’s lead in cases like *United States v. Clapox*,<sup>25</sup> where the court held that Indian reservations were a kind of school for Indian people to learn how to become civilized.

---

<sup>14</sup> See *Worcester*, 31 U.S. at 552.

<sup>15</sup> *Id.* at 551.

<sup>16</sup> *Id.* at 561.

<sup>17</sup> See *Mitchel v. United States*, 34 U.S. 711 (1835) (returning to the dependency rhetoric).

<sup>18</sup> 118 U.S. 375 (1886).

<sup>19</sup> 174 U.S. 445 (1899).

<sup>20</sup> 187 U.S. 294 (1902).

<sup>21</sup> 187 U.S. 553 (1903).

<sup>22</sup> See generally Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224-29 (1975); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1068-75 (1974); Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 195-99 (1940).

<sup>23</sup> 187 U.S. 553 (1903).

<sup>24</sup> *Id.* at 565-66.

<sup>25</sup> 35 F. 575 (D. Or. 1888).

The guardian-ward concept gave license to Congress and the Executive branch to interfere with internal tribal affairs, undermine and even expropriate without just compensation tribal property rights, and to eliminate the ties between tribes and the government during the Termination Era. For example, Congress adopted allotment of Indian lands as national policy in 1887. President Theodore Roosevelt referred to the allotment policy in 1901 as “a mighty pulverizing engine to break up the tribal mass.”<sup>26</sup> It was enormously effective in reducing the tribal land base. From 1887 when Congress adopted this policy until 1934 when it ended the policy, two-thirds of tribal land holdings moved into non-Indian ownership.<sup>27</sup>

Congress also experimented with extending state jurisdiction into Indian country. In 1953, Congress passed House Concurrent Resolution 108, calling for the eventual termination of services and programs to tribal governments. Congress then began the process of choosing individual Indian tribes and terminating them. Congress targeted tribes mostly in California, Oregon, Utah, Oklahoma, and Wisconsin for termination, which consisted of cutting off federal appropriations, disbanding tribal government, and privatizing tribal businesses.<sup>28</sup> President Kennedy informally put the practice on hold and by 1973 Congress had formally ended the termination era by restoring the Menominee Tribe to full status as a federally recognized tribe.<sup>29</sup> Not all terminated tribes have been restored, however.

During the Termination era, Congress enacted several statutes that served the process of termination. In 1953, Congress enacted a statute commonly known as Public Law 280 that extended state criminal and civil adjudicatory jurisdiction into Indian country in several states, most notably in California, without tribal consent.<sup>30</sup> Other states had the option of accepting jurisdiction over Indian country.

The trust responsibility never completely disappeared, however. In 1942, the Supreme Court held in *Seminole Nation v. United States*,<sup>31</sup> that the United States should be held to the most exacting fiduciary duty when handing tribal trust funds:

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. ... In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. *Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with*

---

<sup>26</sup> ROBERT BERKHOFFER, JR., *THE WHITE MAN’S INDIAN* 175 (1978).

<sup>27</sup> See Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 831-32 (2004).

<sup>28</sup> For a list of termination acts, see GETCHES, *FEDERAL INDIAN LAW*, *supra* note 1, at 204-05.

<sup>29</sup> 25 U.S.C. §§ 903-903f.

<sup>30</sup> Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, *codified in relevant part at* 18 U.S.C. § 1162. See also 28 U.S.C. § 1360(a) (parallel civil provision).

<sup>31</sup> 316 U.S. 286 (1942).

*moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.* Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.<sup>32</sup>

While tribal trust breach claims were occasionally successful, for the most part tribal efforts to challenge the federal government's administration of tribal assets were not.<sup>33</sup>

## **II. The Current State of the Trust Responsibility**

### ***The Self-Determination Era (1970-Present)***

In 1970, President Nixon's message to Congress announced a fundamental shift in federal Indian policy – self-determination.<sup>34</sup> The Message renounced the termination policy, established that adherence to the federal trust responsibility would guide federal Indian policy, and proposed a structure to dramatically reduce federal control over tribes – by recognizing greatly increased tribal authority to manage affairs on their reservations as a replacement for federal bureaucratic control. Specifically, President Nixon wrote:

In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can best be fulfilled. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.<sup>35</sup>

The Nixon Administration and later Administrations proposed and oversaw the adoption of numerous statutes in which Congress finally allowed Indian tribes to take over federal Indian

---

<sup>32</sup> *Id.* at 296-97 (emphasis added).

<sup>33</sup> *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 27 (1955); *Sioux Tribe v. United States*, 316 U.S. 317 (1942).

<sup>34</sup> Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d. Sess. (1970); 116 Cong. Rec. 23258.

<sup>35</sup> *Id.*

affairs programs.<sup>36</sup> The various Self-Determination Acts include the Indian Self-Determination and Education Assistance Act<sup>37</sup> and the Native American Housing Assistance and Self-Determination Act.<sup>38</sup> These Acts implement a federal-tribal relationship first proposed by Interior Secretary Collier during the debates leading up to the Indian Reorganization Act of 1934.<sup>39</sup> Congress also took steps to encourage tribal economic development with the enactment of statutes such as the Indian Finance Act of 1974,<sup>40</sup> the Indian Tribal Government Tax Status Act of 1982,<sup>41</sup> and the Indian Gaming Regulatory Act of 1988.<sup>42</sup> Congress enacted legislation supporting tribal law enforcement, the development of tribal courts, and perhaps the most controversial Indian affairs statute in the era, the Indian Child Welfare Act,<sup>43</sup> requiring the transfer of state court cases involving Indian child custody to tribal courts. **Appendix 1 of this Statement** includes a list of selected Congressional Acts adopted during the period of the federal self-determination policy.

The relationship between Indian tribes and the federal government is best described as a trust relationship, with the United States acting as a trustee to tribal interests. The give and take of the trust relationship often is under the surface, out of the sight of courts and many policymakers.<sup>44</sup> From the vantage point of history, the 1970 Nixon Message did something novel by emphasizing the trust responsibility, recognizing the Government's frequent conflicts of interest, and directing Executive officials to devise ways to be faithful to the trust responsibility and where feasible avoid conflicts of interest. This conception of the trust responsibility has been variously observed in subsequent Administrations over the past four decades, but it has often been a significant force in Executive Branch policy and no subsequent Administration has explicitly deviated from it.<sup>45</sup>

Congress has generally adhered to the concepts of the trust responsibility in virtually all modern Indian legislation – from 1971 with the Alaska Native Claims Settlement Act<sup>46</sup> to the

---

<sup>36</sup> See generally Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191 (Kenneth R. Philp, ed. 1986).

<sup>37</sup> Pub. L. 93-638, 88 Stat. 2203 (1975), *codified at* 25 U.S.C. § 450 *et seq.*

<sup>38</sup> Pub. L. 104-330, 110 Stat. 4017 (1996), *codified at* 25 U.S.C. § 4101 *et seq.*

<sup>39</sup> See H.R. 7902, 73rd Cong., 2nd. Sess., Tit. I, § 4(i) (authorizing Indian tribes “[t]o exercise any other powers now or hereafter delegated to the Office of Indian Affairs, or any officials thereof, ... and to act in general as a Federal agency in the administration of Indian Affairs...”), *reprinted at* VINE DELORIA, JR., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 10 (2002).

<sup>40</sup> Pub. L. 93-262, § 2, Apr. 12, 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*

<sup>41</sup> Pub. L. 97-473, Title II, § 202(a), Jan. 14, 1983, 96 Stat. 2608, *codified as amended at* 26 U.S.C. § 7871.

<sup>42</sup> Pub. L. 100-497, 102 Stat. 2467, *codified at* 25 U.S.C. §§ 2701 *et seq.*

<sup>43</sup> Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069, *codified at* 25 U.S.C. § 1901 *et seq.*

<sup>44</sup> I thank Reid Chambers and Doug Endreson for this point.

<sup>45</sup> *E.g.*, Memorandum for the Heads of Executive Departments and Agencies (Nov. 5, 2009) (President Obama), *available at* <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>. For a laundry list of other administrative materials on tribal consultation in the last several administrations, see Thomas Schlosser, Orders and Policies Regarding Consultation with Indian Tribes, *available at* <http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribe.htm>.

<sup>46</sup> Pub. L. 92-203, 85 Stat. 688 (Dec. 18, 1971), *codified at* 43 U.S.C. § 1601 *et seq.*

present with water settlements,<sup>47</sup> and the Tribal Law and Order Act.<sup>48</sup> There have been no termination acts or similar statutes for over 50 years. This history of Executive and Congressional voluntary adherence to a trust relationship (whether it is designated and discussed under the framework of trust responsibility or not) is the heart of the federal-tribal relationship in modern times.

### ***The Difficulty in Enforcing the Trust Relationship***

However, what is most visible in the trust relationship are the cases involving tribal efforts to enforce the trust relationship. Tribal-federal disagreements over the enforceable duties under the trust relationship likely will continue to generate significant litigation in the coming years.

The Supreme Court has given definition to the federal trust responsibility in two cases dealing with the government's liability for its management of Indian natural resources, *United States v. Mitchell I*<sup>49</sup> and *United States v. Mitchell II*.<sup>50</sup> The two cases involved a claim for money damages by members of the Quinault Tribe for federal mismanagement of the timber on their allotments. In *Mitchell I*, the Court held that the allottees had not established liability under the General Allotment Act, because it contemplated that "the allottee, and not the United States, was to manage the land." The Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."<sup>51</sup>

In *Mitchell I*, the Court remanded the case to determine whether liability could be based on statutes other than the General Allotment Act. The Claims Court found an enforceable duty in the Indian timber management statutes and in *Mitchell II* the Supreme Court agreed:

In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.<sup>52</sup>

The Supreme Court has retreated from many of the broader statements in *Mitchell II*,<sup>53</sup> but still utilizes the analytic structure articulated in that decision. For example, in *United States v.*

---

<sup>47</sup> For a chart detailing the dozens of Congressionally-ratified Indian water rights settlements, see GETCHES, FEDERAL INDIAN LAW, *supra* note 1, at 828-29.

<sup>48</sup> Pub. L. 111-211, Title II, 124 Stat. 2263 (July 29, 2010).

<sup>49</sup> 445 U.S. 535 (1980).

<sup>50</sup> 463 U.S. 206 (1983).

<sup>51</sup> *Mitchell I*, 445 U.S. at 542-43.

<sup>52</sup> 463 U.S. at 224.

<sup>53</sup> *E.g.*, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2322-23 (2011) ("The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the

*White Mountain Apache Tribe*,<sup>54</sup> the Court affirmed a multi-million dollar judgment in favor of the Tribe where the federal government had promised to transfer ownership of several federal buildings on the reservation to the Tribe, but instead allowed the buildings to rot and decay before the transfer.<sup>55</sup>

Most recently, the Supreme Court in *United States v. Jicarilla Apache Nation*,<sup>56</sup> suggested that the federal government's enforceable trust obligations could be limited to express Congressional statements accepting a trust obligation, while reaffirming the existence of a "general" trust:

We do not question "the undisputed existence of a general trust relationship between the United States and the Indian people." ... The Government, following "a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust," ... obligations "to the fulfillment of which the national honor has been committed" .... Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose.  
...

In other cases, we have found that particular "statutes and regulations ... clearly establish fiduciary obligations of the Government" in some areas. ... Once federal law imposes such duties, the common law "could play a role."<sup>57</sup>

However, as Justice Sotomayor noted in her dissent, the real question in future years is whether (and to what extent) the existence of the "general trust" has any import.<sup>58</sup> She concluded:

But perhaps even more troubling than the majority's refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government's fiduciary obligations to Indian tribes. By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the

---

Indians a "trust," ... that trust is defined and governed by statutes rather than the common law. *See United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (Navajo I) ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions").

<sup>54</sup> 537 U.S. 465 (2003).

<sup>55</sup> *But see Navajo Nation I*, 437 U.S. 488 (reversing a \$600 million judgment against the government for alleged trust violations under the Indian Mineral Leasing Act); *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) (Navajo II) (reversing a \$600 million judgment against the government for alleged trust violations under other statutes).

<sup>56</sup> 131 S. Ct. 2313.

<sup>57</sup> *Id.* at 2324-25 (citations omitted).

<sup>58</sup> *See id.* at 1340 (Sotomayor, J., dissenting).

communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.<sup>59</sup>

### ***The Impact of the Executive Branch's Conflicts of Interest on Supreme Court Litigation***

*Jicarilla Apache Nation* is merely one case in a long line of cases and agency decisions involving conflicts. The Departments of Justice and Interior routinely are forced to make decisions that otherwise constitute a serious conflict of interest between their duties to the federal government and to Indian tribes.<sup>60</sup> Suits such as the long-running *Cobell* litigation exposed the weaknesses of the Executive branch in administering the trust responsibility.

Recent important Executive branch conflicts include the following:

- The conflict between the Department of Interior and the National Labor Relations Board over whether the National Labor Relations Act, which is silent as to Indian tribes as employers, applies to tribal casino employment.<sup>61</sup>
- The conflict within the Department of Interior between tribal interests in sacred sites at the San Francisco Peaks and private business interests making artificial snow tainted by fecal matter.<sup>62</sup>
- The conflict within the Department of Interior (and perhaps with the Department of Justice) over administering the Bald and Golden Eagle Protection Act in accordance with the American Indian Religious Freedom

---

<sup>59</sup> *Id.* at 2343 (Sotomayor, J., dissenting).

<sup>60</sup> *E.g.*, *Nevada v. United States*, 463 U.S. 110 (1983); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1972). *See generally* Ann C Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003).

<sup>61</sup> *Compare* Letter from Patrice H. Kunesh, Deputy Solicitor – Indian Affairs, Dept. of Interior to Lafe Soloman, Acting General Council, National Labor Relations Board (Dec. 7, 2011), *available at* <http://turtletalk.files.wordpress.com/2011/12/nlrb-12-7-11.pdf> (arguing that the NLRA does not apply to the casino operations of the Saginaw Chippewa Indian Tribe), *and* Letter from Edith R. Blackwell, Associate Solicitor, Dept. of Interior to Robert Meisburg, General Council, National Labor Relations Board (Jan. 15, 2009), *available at* <http://turtletalk.files.wordpress.com/2009/03/interior-solicitor-opinion-letter.pdf> (arguing that the NLRA does not apply to the casino operations of the Little River Band of Ottawa Indians), *with* *Soaring Eagle Casino Resort*, National Labor Relations Board, Division of Judges (No. 7-CA-53586) (March 26, 2012), *available at* <http://turtletalk.files.wordpress.com/2012/04/administrative-law-judges-decision.pdf> (holding that the NLRA does apply).

<sup>62</sup> *See Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

Act, the Religious Freedom Restoration Act, and the National Environmental Policy Act.<sup>63</sup>

However, it should be noted that the federal government's decision-making record in acting as the trustee for tribal interests since 1970 before the Supreme Court is *exceptional*. **Appendix 2 of this Statement** lists all of the Supreme Court cases in which the United States has appeared an amicus. In the vast majority of cases, the government steps up to support the tribal interests in question. **Appendix 3 of this Statement** lists selected cases, usually relating to treaty rights, where the United States has either brought suit on behalf or intervened in favor of tribal interests. Of course, there are cases not included in these lists where the government chose not to participate where its participation could have been helpful to tribal interests.

There are also many Supreme Court cases where the federal government must defend against Indian or tribal trust breach claims, as well as Fifth Amendment takings claims and other civil claims. Many of these cases are listed in **Appendix 4 of this Statement**. These cases highlight the unusual character of the conflicts faced by the government. In fact, last month, the government argued two Indian law cases before the Supreme Court over two weeks. In one case, the government vigorously sought to restrict the ability of Indian tribes to seek money damages against it (*Salazar v. Ramah Navajo Chapter*) and, the next week, the government sought to defend its decision to take land into trust for an Indian tribe (*Salazar v. Patchak*). These are not direct conflicts, to be sure, but it cannot be lost upon the Supreme Court that the United States literally sought an expansive view of the trust relationship a mere week after seeking to restrict it.

As a result of these inherent and repeated series of conflicts, the ability of the United States to act as a trustee on behalf of tribal beneficiaries is severely undercut. The government's success rate in front of the Supreme Court normally is astoundingly high, and that success rate extends to the cases where the government opposes tribal interests. When the government favors tribal interests, the Court treats the government just like any other private party, and offers the government *no deference whatsoever*. In fact, a recent study of federal agency success rates in the federal courts suggests that the Bureau of Indian Affairs receives almost no deference from federal courts and succeeds before the Court barely half the time.<sup>64</sup> The government's success rate in Indian affairs cases is 51.6%, whereas the overall agency win rate is 68.8%.

---

<sup>63</sup> Compare Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 et seq. with American Indian Religious Freedom Restoration Act, 42 U.S.C. § 1996; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (RFRA); and National Environmental Policy Act, 42 U.S.C. § 4321 et seq. See *United States v. Wilgus*, 538 F.3d 1274 (10th Cir. 2011) (balancing the federal government's compelling interest in protecting eagles with religious freedom of non-Indians); *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (rejecting challenge to conviction under Eagle Act by American Indian under RFRA).

<sup>64</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1145 (2008).

Consider, for example, the New York Indian land claims. In 2005, the Supreme Court decided the third in a line of cases involving the claims of the Oneida Indian Nation – *City of Sherrill v. Oneida Indian Nation of New York*.<sup>65</sup> In two prior cases, the United States and the Oneida Indian Nation had been the plaintiffs in the land claims brought against the State of New York and various local governmental subdivisions, establishing a federal common law cause of action to assert land claims in the first case and winning on the merits of the land claims in the second case.<sup>66</sup>

*Sherrill* involved the reacquisition of the land in fee by the Oneida Indian Nation within its reservation boundaries. Under common law principles of federal Indian law, the Treaty of Canadaigua, and the federal Trade and Intercourse Act, the Nation asserted that it was not required to pay property taxes to the local jurisdictions for this land. The Second Circuit agreed with the Nation on this theory, and the City of Sherrill sought certiorari to review the decision. The United States was not a party to the lower court proceedings, but the Conference requested the views of the Solicitor General (SG). The SG opined that the petition should be denied, but the Court granted cert anyway. Then, the SG participated as amicus and split time during oral argument with the Oneida Indian Nation’s counsel, but the Court ruled against the Nation on the merits. The Court ignored the legal theories the parties briefed altogether, instead deciding against the Nation on grounds raised only by amici supporting the petitioner – the equitable defenses of laches, acquiescence, and impossibility.<sup>67</sup> Moreover, the Court applied those defenses not to the Nation, but to the United States itself as trustee for the tribe. The Court’s broad language strongly implied that these equitable defenses would henceforth apply to *any* Indian claim not directly tied to Indian treaty rights.

Shortly after the Court issued the *Sherrill* decision, the Second Circuit dismissed the entire bevy of land claims asserted by the Cayuga Indian Nation of New York, a tribe similarly situated to the Oneida Indian Nation, which had long relied upon the same legal theories that had been successful for the Oneidas.<sup>68</sup> The United States, already a party to the Cayuga Indian Nation’s land claims, brought a petition for certiorari. The Court denied the petition without comment.<sup>69</sup> Similarly, after the Second Circuit dismissed the land claims brought by Oneida Indian Nation in 2010,<sup>70</sup> the SG petitioned the Supreme Court for review, only to be denied once again (this time over dissents from Justices Sotomayor and Ginsburg).<sup>71</sup> The New York land

---

<sup>65</sup> 544 U.S. 197 (2005).

<sup>66</sup> *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 414 U.S. 661 (1974) (Oneida I); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) (Oneida II).

<sup>67</sup> See Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009).

<sup>68</sup> 413 F.3d 266 (2d Cir. 2005).

<sup>69</sup> See *United States v. Pataki*, 547 U.S. 1128 (2006) (No. 05-978); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006) (No. 05-982). See Kathryn E. Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375 (2011).

<sup>70</sup> See *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 617 F.3d 114 (2d Cir. 2010).

<sup>71</sup> See *United States v. New York*, 132 S. Ct. 452 (2011) (No. 10-1404); *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 132 S. Ct. 452 (2011) (No. 10-1420).

claims cases are the most remarkable instances where the interests of the United States, coinciding with tribal interests, failed spectacularly before the Supreme Court. Usually in cases involving tribal interests where the federal government sides with the tribes, it is the tribal interests that have the most to lose.

Another example of the declining fortunes of the federal government before the Supreme Court is in the tribal jurisdiction cases. Despite the support of the SG in several cases, tribal interests have not been able to persuade the Supreme Court that nonmembers can be subject to tribal regulatory or adjudicatory authority.<sup>72</sup> These cases are explicitly questions of federal common law with nary an Act of Congress applicable.<sup>73</sup> Congress could easily fix this question, but proposals have not gone far.

Some of these cases are heartbreaking. In 2008, the Supreme Court decided *Plains Commerce Bank v. Long Family Land & Cattle Co.*<sup>74</sup> Once again, the SG participated as amicus favoring the tribal interests and shared oral argument time, this time arguing that the federal government's practice of guaranteeing loans to tribal businesses provided a sufficient federal interest to favor tribal court jurisdiction over a non-Indian-owned bank that had foreclosed over Indian lands in a racially discriminatory manner. The Supreme Court did not share the SG's views on the significance the federal loan guarantee program, and found that the Cheyenne River Sioux Tribe had no jurisdiction over the bank.

Another major blow to both the United States and their tribal trustees was *Dept. of Interior v. Klamath Water Users Protective Assn.*<sup>75</sup> There, the government and the Klamath Tribe in Oregon had shared documents prepared in anticipation of litigation over the limited water resources of the Klamath River. Opponents of the tribe sought to FOIA those documents, and the government rejected the claim because they were prepared for litigation purposes. The Supreme Court broadly interpreted the Freedom of Information Act and narrowly construed the trust relationship between the government and tribes to reject the government's reasoning.

Perhaps the most disruptive case in modern federal Indian law is *Carcieri v. Salazar*,<sup>76</sup> in which the Supreme Court held that the Department of Interior cannot take land into trust for Indian tribes not "under federal supervision" in 1934. There, the SG argued strenuously in favor of Interior's 70-plus-year interpretation of the Indian Reorganization Act, the federal government's position as trustee for Indian tribes, and the historical purposes of the Act, only to be bluntly rejected by the Supreme Court, 8-1. The decision is incredibly disruptive, as this

---

<sup>72</sup> E.g., *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

<sup>73</sup> See generally *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9 (1987).

<sup>74</sup> 128 S. Ct. 2709 (2008).

<sup>75</sup> 532 U.S. 1 (2001).

<sup>76</sup> 129 S. Ct. 1058 (2009).

Committee knows.<sup>77</sup> A decision against the government in *Salazar v. Patchak* would allow individuals to challenge Interior Department trust land acquisitions under the Administrative Procedures Act in circumvention of the federal immunity barrier expressed in the Quiet Title Act.<sup>78</sup>

### III. The Future of the Trust Responsibility

Congress has plenary authority in the exercise of its trust responsibility. Since 1970, with only limited and arguable exceptions, Congress has spoken strongly in favor of tribal self-determination and the preservation of treaty rights and other Indian rights. The Executive branch also has been supportive, but the federal agencies still find themselves mired in difficult conflicts on occasion. The Supreme Court, however, currently is not supportive of tribal interests, as the results of the Indian cases going back two or three decades attests.

Congress is in the enviable position of reasserting itself as the primary policymaking entity in the federal government. While there likely are more specific proposals on the question of the trust responsibility, a clear restatement of the general trust responsibility of the federal government to Indian nations could be an important step. Such a statement could help to reorient the agencies and the judiciary toward a stronger acknowledgment of Congress's primacy as lead policymaker in Indian affairs.

Congress can work to resolve many of the key questions in the trust relationship – namely, the conflicts of interest between the various federal agencies by recognition of the provisions of the United Nations Declaration as a policy matter. Congress should have no trouble tying a restatement of the federal government's general trust responsibility to multiple non-controversial provisions of the United Nations Declaration on the Rights of Indigenous Peoples. Many illustrative provisions are reprinted in **Appendix 5 of this Statement**.

*Miigwetch.*

---

<sup>77</sup> See The *Carcieri* Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country, Oversight Hearing before the Senate Committee on Indian Affairs (Oct. 13, 2011).

<sup>78</sup> See *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir.), *cert. granted*, 132 S. Ct. 845 (2011).

## **Appendix 1 – Selected Acts of Congress in Indian Affairs Since 1970**

American Indian Probate Reform Act of 2004

American Indian Religious Freedom Act of 1978

American Indian Trust Fund Management Reform Act 1994

Coal Leasing Amendments 2005

“Duro Fix” (1991 Amendments to the Indian Civil Rights Act)

Indian Arts and Crafts Act of 1990

Amendments 2011

Indian Dams Safety Act 1994

Indian Education Act 1972

Indian Elementary and Secondary School Assistance Act 1970

Indian Employment, Training, and Related Services Demonstration Act 2000

Technical Corrections 2000

Indian Environmental Regulatory Enhancement Act of 1990

Indian Environmental General Assistance Program Act 1977

1992 amendments

1996 amendments

Indian Financing Act of 1974

1984 amendments

1988 amendments

2002 amendments

Indian Health Care Improvement Act 1976

1992 amendments to the Indian Health Care Improvement Act extended the Title III self-governance demonstration to the IHS and IHS programs.

Technical corrections 1996

Tribal Self-Governance Amendments of 2000—Title V of the Act, making tribal self-governance permanent within the IHS

The amendments of 2000 also added Title VI to the Act, requiring that the Secretary of HHS “conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency [HHS].” This Title applies to non-IHS programs administered by the Department. Title VI also delineates what the Secretary must consider in conducting the study and requires a joint federal/tribal stakeholder consultation process.

Indian Gaming Regulatory Act of 1988

Indian Land Consolidation Act of 1983

Indian Mineral Development Act of 1982

Indian Self Determination and Education Assistance Act

Tribal Self Governance Demonstration Project Act 1991

In 1994, Congress amended the Act to create a permanent self-governance authority in BIA.

1996 amendments to allow tribes to take over control and management of programs in the DOI outside the BIA.

Indian Tribal Economic Development and Contract Encouragement Act of 2000

Indian Tribal Energy Development and Self Determination Act 2005

Indian Tribal Government Tax Status Act of 1982

Native American Housing Assistance and Self Determination Act of 1988

Native American Housing Assistance and Self Determination Reauthorization 2002

National Indian Forest Resources Management Act 1990

Omnibus Indian Advancement Act 2000

Tribal Law and Order Act of 2011

## **Appendix 2 – Supreme Court Cases Since 1970: Federal Government’s Position**

### **Supporting Tribal Interests as Amicus**

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)

McClanahan v. Arizona State Tax Commission, 411 U.S. 154 (1973)

Tonasket v. Washington, 411 U.S. 451 (1973) (per curiam)

Mattz v. Arnett, 412 U.S. 481 (1973)

Puyallup Tribe, Inc. v. Dept. of Game, 414 U.S. 44 (1973)

County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 414 U.S. 661 (1974)

Antoine v. Washington, 420 U.S. 194 (1975)

DeCoteau v. District Court, 420 U.S. 424 (1975)

Bryan v. Itasca County, 426 U.S. 373 (1976)

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)

Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165 (1977)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)

Idaho ex rel. Evans v. Oregon and Washington, 444 U.S. 380 (1980)

Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980)

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980)

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)

Rice v. Rehner, 463 U.S. 713 (1983)

Solem v. Bartlett, 465 U.S. 463 (1984)

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984)

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985)

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985)

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)

Duro v. Reina, 490 U.S. 676 (1990)

Oklahoma Tax Commission v. Citizen Potawatomi, 498 U.S. 505 (1991)

County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992)

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993)

South Dakota v. Bourland, 508 U.S. 679 (1993)

Hagen v. Utah, 510 U.S. 399 (1994)

Dept. of Taxation and Finance v. Milhelm Attea, 512 U.S. 61 (1994)

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

South Dakota v. Yankton Sioux Tribe, 522 U.S. 322 (1998)

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751(1998)

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

C&L Enterprises v. Citizen Potawatomi, 532 U.S. 411 (2001)

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)

Nevada v. Hicks, 533 U.S. 353 (2001)

Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Colony, 538 U.S. 701 (2003)

Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005)

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)

Plains Commerce Bank v. Long Family Land and Cattle Co., 556 U.S. 316 (2008)

**Opposing Tribal Interests as Amicus**

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985)

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987)

Arizona Dept. of Revenue v. Blaz Construction Co., 526 U.S. 32 (1999)

El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999)

South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Florida, 541 U.S. 95 (2004)

### **Appendix 3 – Selected Cases in Which the United States Served as Trustee to Tribal Interests**

Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976)

Cappaert v. United States, 426 U.S. 128 (1976)

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)

Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979)

United States v. Clarke, 445 U.S. 253 (1980)

Andrus v. Glover Construction Co., 446 U.S. 608 (1980)

Montana v. United States, 450 U.S. 544 (1981)

Arizona v. California, 460 U.S. 605 (1983)

Nevada v. United States, 463 U.S. 110 (1983)\*

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983)

Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765 (1984)

Oneida Indian Nation of N.Y. v. Oneida County, N.Y., 470 U.S. 226 (1985)

Wyoming v. United States, 492 U.S. 408 (1990)

Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)

Arizona v. California, 530 U.S. 392 (2000)

Dept. of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001)

Idaho v. United States, 533 U.S. 262 (2001)

United States v. Lara, 541 U.S. 191 (2004)

Carcieri v. Salazar, 555 U.S. 379 (2008)

Salazar v. Patchak, \_\_\_ U.S. \_\_\_ (2012) (pending)

---

\* *Nevada* involved a federal conflict of interested in which the Supreme Court relieved the government of its trust obligations to Indian tribes where an Act of Congress authorizes the government to act to the detriment of the tribal trust beneficiary. *See Nevada*, 463 U.S. at 128 (“The Government does not ‘compromise’ its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.”).

**Appendix 4 – Selected Cases in Which the United States Defended against Tribal or Indian Trust Breach or Other Claims**

United States v. Southern Ute Indians, 402 U.S. 159 (1971)

Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)

United States v. Jim, 409 U.S. 80 (1972)

United States v. Mason, 412 U.S. 391 (1973)

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)

United States v. Mitchell, 445 U.S. 535 (1980)

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)

United States v. Mitchell, 463 U.S. 206 (1983)

United States v. Dann, 470 U.S. 39 (1985)

United States v. Mottaz, 476 U.S. 834 (1986)

United States v. Cherokee Nation, 480 U.S. 700 (1987)

Hodel v. Irving, 481 U.S. 704 (1987)

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)

Lincoln v. Vigil, 508 U.S. 182 (1993)

Babbitt v. Youpee, 519 U.S. 234 (1997)

Chickasaw Nation v. United States, 534 U.S. 84 (2001)

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)

United States v. Navajo Nation, 537 U.S. 488 (2003)

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005)

United States v. Navajo Nation, 556 U.S. 287 (2009)

## **Appendix 5 – Selected Provisions of the United Nations Declarations on the Rights of Indigenous Peoples**

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

\*\*\*

### Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

### Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

\*\*\*

### Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

\*\*\*

## Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

\*\*\*

## Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

## Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

\*\*\*

## Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

## Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

\*\*\*

#### Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

#### Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

#### Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

#### Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

\*\*\*

#### Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

\*\*\*

#### Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.