

The Trust Responsibility

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Current Status of The Trust Doctrine: Washburn Article

“After more than two centuries of persisting side-by-side with the federal government, tribal governments in the United States today have more authority and relative economic power than any time since the earliest days of that relationship. Tribes have been experiencing a renaissance, not just economically, but culturally and governmentally. How did this come to be?”

Kevin Washburn, “What the Future Holds: The Changing Landscape of Federal Indian Policy,” 130 Harv. L. Rev. 200 (2017)

The Evolution of The Trust Doctrine

“The obligations under the federal trust responsibility have evolved from a paternalistic model in which the federal government provides services and programs and makes decisions for impoverished Native Americans, to an understanding that the trust responsibility obliges the federal government to support and revitalize tribal governments and even advocate and protect tribal sovereign powers.”

Washburn, at p. 201.

Statutes: Examples

- Indian Tribal Justice Support Act (25 U.S.C. § 3601):

"(1) there is a Government-to-Government relationship between the United States and each Indian tribe; [and]
(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."

Federal Oil and Gas Royalty Management Act (30 U.S.C. § 1701):

Noting that one purpose of this law is "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas reserves."

Statutes (cont.)

Indian Health Care and Improvement Act
(25 U.S.C. § 1601):

"Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."

Origin of The Trust Responsibility

Between 1776 and 1871, Congress entered into nearly 400 treaties with Indian tribes. Indian tribes were very powerful during this time. The purpose of nearly all of these treaties was to obtain Indian land at the least cost to the federal government.

In exchange for Indian land, the government typically promised that it would set aside a reservation for the tribe, and would guarantee and respect the tribe's sovereignty on, and control over, that land.

Origin (cont.)

Virtually every treaty assured the Indians that they would be protected by the United States.

Treaty of Hopewell with the Cherokee Nation (1785):

The United States guarantees "peace to all the Cherokees" and promises "to receive them into the favor and protection of the United States."

Origin (cont.)

Treaty with the Navajo Nation (1849):

The United States guarantees that the tribe would be placed "under the exclusive jurisdiction and protection of the Government" and the federal government will ensure "the permanent prosperity and happiness of said Indians."

Treaty with the Yankton Sioux Tribe (1858):

The tribe relinquished claim to 11 million acres of land in exchange for a guarantee from the federal government "to protect the said [tribe] in the quiet and peaceful possession" of its remaining territory.

Origin (cont.)

"Protection" does not imply domination, control, or surrender of sovereignty.

As the Supreme Court stated in *Worcester v. Georgia*, 31 U.S. 515 (1832) with respect to the Treaty of Hopewell: "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....A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government."

Scope of The Trust Responsibility

Two ways of interpreting the scope of the trust responsibility:

1. Narrow interpretation: only those duties expressly set forth in treaties or statutes. (This is the least the government must do.)
2. Broad interpretation:
 - (a) Support tribal self-government.
 - (b) Promote tribal economic independence.
 - (c) Enhance tribal political and cultural well-being.
 - (d) Safeguard tribal trust resources.

Four Principles of The Trust Doctrine: Washburn Article

“It is now clear that . . . the trust responsibility” incorporates four principles: (1) “the obligation to protect the inherent sovereignty that tribal governments never ceded;” (2) “the notion that the United States should not interfere with internal tribal matters;” (3) “the United States must never take an action affecting Indian tribes without first consulting with them;” and (4) “the obligation to foster and protect tribal self-governance.”

Washburn, at p. 214.

The Trust Responsibility Standard

The federal government's dealings with Indian tribes must "be judged by the most exacting fiduciary standards."

Seminole Nation v. United States,
316 U.S. 286, 297 (1942).

"[T]he law is well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity."

Lincoln v. Vigil, 508 U.S. 182, 194 (1993).

A fiduciary standard is the highest standard in the law of trusts.

Statutes Can Create Trust Responsibilities

"Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."

Rice v. Cayetano, 528 U.S. 495, 519 (2000)

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

COURT CASE

Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 590-91 (10th Cir. 1992), cert. denied, 507 U.S. 1003 (1993).

"Since the proposed plan was reasonable and appropriate, Woods argues, the Secretary's approval was within his discretion. [Woods'] argument completely ignores the fiduciary relationship between the Secretary and the Tribe. When the Secretary is obligated, as in this case, to act as a fiduciary, then his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary."

Evolution From the Courts to the Political Branches

“While courts have narrowed the legal enforceability of the trust responsibility to tribes, the political branches have expanded the meaning of the trust responsibility. . . . In some ways, meaningful fulfillment of the federal trust responsibility has been relocated from the courts to the political branches.”

Washburn, at p. 200.

USDA Departmental Regulation 1340-007 (3/14/08)

“The United States Government has a unique, legal and political relationship with Indians and their tribal governments through treaties, statutes, court decisions, and the United States Constitution. The United States Government has obligations under treaties and statutes to protect and maintain the land, resources, and traditional used areas of Indians.”

Congress: Only a Moral Obligation

As just explained, the doctrine of trust responsibility creates legally enforceable obligations for federal agencies: they must perform the duties Congress has assigned to them, and with the highest degree of care.

However, as to Congress, the trust doctrine creates only a moral obligation. The trust doctrine is not legally enforceable on Congress. Congress can destroy a trust relationship (and even terminate an Indian tribe) or enhance that relationship, at its discretion.

The Challenge of The Trust Doctrine

“As the formerly paternalistic trust responsibility gives way to a new federal policy favoring tribal self-governance, the role of the federal government on Indian reservations will continue to be debated and modified. During the coming decades, federal policymakers and courts will be forced to decide, in a range of areas, whether the federally supported tribal renaissance justifies more federal oversight of tribal decisions or, in the alternative, stronger allegiance to norms of respect for tribal sovereignty.”

Washburn, at p. 232.