

Disclaimer

"The information represented in the following slides concerning the federal tribal trust responsibility are the representations of Mr. Frank Perniciaro, a Bureau of Reclamation employee, and do not necessary represent the views, guidance and policies of the Bureau of Reclamation or the Department of the Interior. If there are any questions about the contents of this presentation please direct them to Mr. Frank Perniciaro, telephone (916) 978-5113 or email at fperniciaro@mp.usbr.gov "

Trinity Adaptive Management Working Group Meeting,
Weaverville California, March 22, 2006

Federal Tribal Trust Responsibilities

Presented by: Frank Perniciaro, MP Region Native Affairs Program Manager
Mid-Pacific Regional Office, Sacramento California

Today's Discussion Topics:

- Origins of the Federal Trust Responsibility.
- Legal Framework for the Trust Responsibility.
- Sovereignty and the G2G Relationship.

Origins of the Federal Trust Responsibility

Early Dealings between the U.S. and Indian Nations resulted in treaties to build alliances or to end hostilities.

Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, letter, November 21, 1978

The Constitution (1787)

Article VI – "... And all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; ..."

Article III Northwest Ordinance 1787 (Stat. 50, 52) Est. by 1st Constitutional Congress:

"The utmost in good faith shall always be observed toward the Indians, their lands and property shall never be taken from them without their consent, and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded on justice and humanity shall from time to time be made for preventing wrongs done to them, and for preserving peace and friendship with them."

"In virtually all these treaties, the U.S. promised to extend its protection to tribes".

"The tribes ceded vast acreages of land and concluded conflicts on the basis of the agreement of the U.S. to protect them ..."

Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, letter, November 21, 1978

" . . . The mere passage of time cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians [treaty] rights are preserved and protected under the supreme law of the land, do not depend on state law, and are distinct from the rights and privileges held by non-Indians . . ."

U.S. Circuit Judge Noel P. Fox in Chippewa v. Michigan 1979

"In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands . . . leaving them a dependent people needing protection against the selfishness of others . . . the United States assumed the duty of furnishing that protection, and with it the authority to do all that is required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic." Board of County Commissioners v. Seber, 318 U.S. 705, 715 (1943)

How Many Treaties Did Tribes and the U.S. Sign?

Legal Framework for the Federal Trust Responsibility

- Marshall Supreme Court Decisions, 1831-1832.
- Four Corner Stones of Indian Law.
- U.S. Duty of Protection to Tribes.

Cherokee Nation v. Georgia (1831)

- "neither states nor foreign nations"
- "domestic dependent nations"
- "in a state of pupilage"
- stand as a "ward to his guardian"

Worcester v. Georgia (1832)

- Tribes separate & distinct political communities.
- Tribes sovereign over lands retained.
- Treaties intended to ensure land-based, traditional existence.
- Duty of protection in return for land cessions to the U.S.

Four Cornerstones of Indian Law

1. Indian tribes have powers of self-government.
2. The independence of Indian tribes is subject to the power of Congress.
3. The power to regulate Indian tribes is wholly federal.
4. The federal government has a responsibility for the protection of Indian tribes. (William C. Canby, Jr., American Indian Law, 1988)

U.S. Duties of Protection to Tribes

The nature of this protection (Trust responsibility) has evolved in the courts. (F. Cohen, Handbook of Federal Indian Law, Section 3.c.)

Important Point:

There is no single law or statute that articulates or instructs the federal official about how to carry-out this trust responsibility.

“That the U.S. stands in a fiduciary relationship to American Indian tribes, is established beyond question. The specific scope and content of the trust responsibility is less clear.”

Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, letter, November 21, 1978

Fiduciary Duty

In Pyramid Lake Paiute Tribe v. Morton, 354 F Supp. 252 (D.D.C. 1972), the court held that the Secretary of the Interior – as trustee for the Indians – was obliged to discharge his potentially conflicting duty to administer Reclamation statutes in a manner which does not interfere with Indian rights. The court restrained diversions because the Secretary’s activities failed “to demonstrate an adequate recognition of his fiduciary duty to the Tribe” DOJ chose not to appeal the ruling. Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, letter, November 21, 1978

What is this Fiduciary Duty?

"The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust

property." Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, letter, November 21, 1978

In managing Indian property the Supreme Court has held officials of the U.S. to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards"

Seminole Nation v. United States, 316 U.S. 286, 2960297, (1942); ref. in letter from Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, November 21, 1978

"Reduced to its essence, the trust responsibility, whether created by treaty, statute or regulation, requires the federal government to manage Indian resources to (1) avoid waste, and (2) produce benefits for the Indians."

Katherine Ott Verburg, Phoenix Field Solicitor, DOI, July 2003

The United States has this fiduciary duty of protection for how many tribes?

Elements of the Fiduciary (Trust) Duty

- Trust responsibility shared by all federal agencies.
- Obligation to consult when tribal lands or resources are affected by federal action.
- Duty of protection not necessarily limited to specific statutory obligations.
- Agencies have broad discretion to consider duty.
- Discretion exercised to protect tribal resources will be upheld.

**Tribal Sovereignty and the
Government-to-Government
Relationship**

**What are the Characteristics of
Sovereignty?**

The power to govern.
The right to govern.
To govern territory and peoples.
To be recognized and respected by
other sovereigns.
To be recognized by those over whom it
is exercised – government by the
governed.

ABA Journal March 2000, Sovereignty and Survival by R. A. Monette, page 64

“Perhaps the most basic principle of all
Indian law, supported by a host of
decisions, is that those powers which
are lawfully vested in an Indian tribe
are not, in general, delegated powers
granted by expressed acts of
Congress, but rather inherent powers
of limited sovereignty which have
never been extinguished.” Felix S. Cohen,
Handbook of Federal Indian Law: 1982 Edition, p. 231

“The basic distinction that sets
American Indians apart from other
groups of people in the United States is
their historic existence as self-governing
peoples whose sovereign status
preceded that of the United States . . .”

Joely De La Torre Tribal Court Record, Vol. 11. Issue 1, 2000

“That Congress has in certain
ways regulated the manner and
extent of the tribal power of self-
government does not mean that
Congress is the source of that
power.” United States v. Wheeler, 435 U.S. 313 (1978)

Tribal Sovereignty

Indian tribes retain all governmental powers except those:

1. Relinquished in treaties.
2. Unilaterally abrogated by Congress.
3. Inconsistent with their status.

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

What is the Government-to-Government Relationship?

“The Government-to-Government relationship is a bilateral recognition of the sovereignty of the respective parties. As such, it is a concept that draws upon many of the principles found in international law and diplomacy.”

Protocol Guidelines: Consulting with Indian Tribal Governments, USBR, February 3, 1998, page 5

Elements of the Government-to-Government Relationship:

- Respectful of tribal sovereignty.
- Open and candid.
- Trustee may fully incorporate tribal views in its decision-making processes.
- Confidential, unless otherwise provided by applicable law, regulation or Administration policy . . .

DOI Manual, Part 512, Chapter 2: Departmental Responsibilities for Indian Trust Resources, Section 4.B, Procedures

Government-to-Government Relationship Guidelines:

- Ensure that the appropriate senior manager is present.
- Address tribal leaders using appropriate terms.
- Be mindful of tribal preferences in conducting communications.
- Consider the development of agreed-upon principles for conducting interactions.

Protocol Guidelines: Consulting with Indian Tribal Governments, USBR, February 3, 1998, page 6

Three Things To Remember about Our Discussion

- Tribes have an inherent right to self-government which predates the Republic.
- Through treaties, tribes ceded vast tracts of land to the U.S. in return for peace and protection.
- The federal government has a legally enforceable duty to protect tribes and must consult when its actions affect tribal governments.