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A BRIEF HISTORY OF INDIAN TRUST ADMINISTRATION REFORM: WILL THE PAST BE PROLOGUE?

Joseph R. Membrino*±

“If we trace the management of Indian affairs in the Interior Department since 1849, we find much to call for prompt action to remedy existing evils.”¹

ABSTRACT

The Commission on Indian Trust Administration and Reform (Commission) approved its final report on December 10, 2013.² Secretary of the Interior Salazar established the Commission by secretarial order³ as an outgrowth of the Cobell v. Salazar settlement.⁴ The order called for

[A] thorough evaluation of the existing management and administration of the trust administration system to support a reasoned and factually based set of options for potential management improvements. It also requires a review of the manner in which the Department audits the management of the trust administration system, including the possible need for audits of management of trust assets.⁵

This paper summarizes the history of federal Indian trust administration beginning in the 19th century, focusing on the officials whose duty has been to implement evolving

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± This article was inspired by the University of Tulsa College of Law's Ross and Margaret Swimmer Indian Affairs Collection. The collection was acquired by the Maybee Legal Information Center in 2013, and is located on the first floor. The collection provided a substantial portion of the research for this article, and is intended to highlight the collection's value for students and lawyers interested in the history of Indian trust administration.

1. REPORT OF THE COMMISSION APPOINTED TO OBTAIN CERTAIN CONCESSIONS FROM THE SIOUX, GEO. W. MANYPENNY, Chairman, *et al.*, December 18, 1876 (Report of the Sioux Commission), *reprinted in* Annual report of the Commissioner of Indian Affairs to the Secretary of the Interior for the year 1876, at 344 [hereinafter 1876 Annual Report].

2. See Dep't of the Interior, Report of the Commission on Indian Trust and Administration Reform (Dec. 10, 2013), *available at* http://www.doi.gov/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf.

3. See Order from Ken Salazar, United States Secretary of the Interior (Dec. 8, 2009), *available at* <http://www.doi.gov/cobell/commission/upload/2009-12-08-Order-3292.pdf>.

4. Claims Resolution Act of 2010, Pub. L. No. 111-291, Title I § 22, 124 Stat. 3064, 3066 (2010).

5. Salazar, *supra* note 3, at 1.

Indian affairs policy. To a considerable extent the history is told in the words of government officials and representatives.

Since the 19th century, Indian affairs administration has swung between progressive ideals and termination policy. The purpose of this review is to illuminate that history to inform those charged with developing an effective tribal trust administration system that is adapted to tribal sovereignty, self-determination and economic development of natural resources that the United States holds in trust for Indian tribes.

In 1876, the year of the “encounter between the troops and Indians on the Little Big Horn,”⁶ Congress directed President Grant to appoint commissioners to meet with the Sioux Indians. Their mission: Have the Sioux: (1) abandon all claims to land that lay outside their 1868 treaty boundaries; (2) relinquish land within those boundaries, particularly the Black Hills; (3) grant non-Indian right of passage over their retained lands; (4) accept delivery of all supplies from the government at points on their remaining reservation identified by the President; and (5) make further agreements with the government that would lead “the Indians to become self-supporting.”⁷ The Commissioner of Indian Affairs advised the Commission that:

[T]he President is strongly impressed with the belief that the agreement which shall be best calculated to enable the Indians to become self-supporting is one which will provide for their removal, at as early a day as possible, to the Indian Territory, and that the solution of the difficulties which now surround the “Sioux problem” can best be reached by such removal.⁸

Removal, of course, would moot the first four items.

The Sioux Commission’s charge to reduce or eliminate the Indians’—and the government’s—relationship to their land and resources has long been a staple of Indian policy.

The commissioners completed the Report within months of the Little Big Horn battle. Its candor about the government’s role in the “Sioux problem” is striking.⁹ The Report mentioned, but did not dwell on, the emotional impact of the Army’s defeat and loss of life; rather, it called the military campaign that led to the Little Big Horn battle a “useless,” “dishonorable” and “disgraceful” policy.¹⁰

The Report examined evidence of the breach between the words and deeds of the federal government in the conduct of Indian affairs. It contrasted the government’s breach

6. 1876 Annual Report, *supra* note 1, at 23.

7. *Id.* at 333.

8. *Id.*

9. *Id.*

10. The Report of the Sioux Commission states:

Of the results of this year’s war we have no wish to speak. It is a heart-rending record of the slaughter of many of the bravest of our Army. It has not only carried desolation and woe to hundreds of our own hearthstones, but has added to the cup of anguish which we have pressed to the lips of the Indian. We fear that when others shall examine it in the light of history, they will repeat the words of the officers who penned the report of 1868: The results of the year’s campaign satisfied all reasonable men that the war was useless and expensive . . . it was dishonorable to the nation and disgraceful to those who originated it.

Id. at 342-43 (internal quotations omitted).

of faith and promise to the Indian tribes with the Indian tribes' integrity in fulfilling the treaty commitments they had made to the United States. The commissioners showed remarkable courage in this self-criticism. They took the blame.

A Major-General of the Army told Sioux Commission reporters that he was "ashamed longer to appear in the presence of the chiefs of the different tribes of the Sioux, who inquire why we do not do as we promised, and in their vigorous language aver that we have lied."¹¹ The Report continues, "Sitting Bull, who had refused to come under treaty relations with the Government, based his refusal in these words . . . 'Whenever you have found a white man who will tell the truth, you may return, and I shall be glad to see you.'"¹²

Sitting Bull captured in a sentence the breach of law and nature that brought such grief to Indian people. More than a century before Sitting Bull spoke those words, Emer de Vattel wrote in *The Law of Nations*¹³:

It is a settled point in natural law, that he who has made a promise to any one has conferred upon him a real right to require the thing promised,—and, consequently, that the breach of a perfect promise is a violation of another person's right, and as evidently an act of injustice as it would be to rob a man of his property. The tranquility, the happiness, the security of the human race, wholly depend on justice,—on the obligation of paying a regard to the rights of others. The respect which others pay to our rights of domain and property constitutes the security of our actual possessions; the faith of promises is our security for things that cannot be delivered or executed upon the spot. There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises. This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties.¹⁴

The framers of the U.S. Constitution knew *The Law of Nations* well, and it has guided the Supreme Court's review of constitutional questions.¹⁵ Nonetheless, *The Law of Nations* was not a good fit with manifest destiny.

Politically, morally, culturally, legally, and philosophically, America had all the tools and rationalizations it needed to remove the human blocks to her manifest destiny. In his first annual message to Congress

11. 1876 Annual Report, *supra* note 1, at 341.

12. *Id.*

13. EMER DE VATTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Joseph Chitty trans., T. & J.W. Johnson & Co. Law Booksellers 1861) (1758) [hereinafter *THE LAW OF NATIONS*].

14. *Id.* at 195-96.

15. "In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's *Law of Nations* and remarked that the book 'has been continually in the hands of the members of our Congress now sitting . . .'" *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).

in 1817, President James Monroe said: “The earth was given to mankind to support the greatest numbers of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort.” The frontiersmen had sounded this theme for two centuries, and Monroe, in the tradition of Jefferson, was not remiss in sounding it again for the nineteenth century. The period of greatest westward expansion, 1815 to 1860, saw 260 treaties signed. Two hundred and thirty of all the treaties between 1789 and 1868 involved Indian lands, 76 called for removal and resettlement, and nearly 100 dealt with boundaries between Indian and white lands primarily.¹⁶

Manifest destiny overwhelmed any inclination government officials may have had to “observe their promises and their treaties” with the Indians.¹⁷ As a result, by 1872, the Commissioner of Indian Affairs was no longer engaged in reconciling the realities of the closing frontier with Vattel’s ideals.

No one certainly will rejoice more heartily than the present Commissioner when the Indians of this country cease to be in a position to dictate, in any form or degree, to the Government; when, in fact, the last hostile tribe becomes reduced to the condition of suppliants for charity. This is, indeed, the only hope of salvation for the aborigines of the continent. If they stand up against the progress of civilization and industry, they must be relentlessly crushed. The westward course of population is neither to be denied nor delayed for the sake of all the Indians that ever called this country their home. They must yield or perish; and there is something that savors of providential mercy in the rapidity with which their fate advances upon them, leaving them scarcely the chance to resist before they shall be surrounded and disarmed.¹⁸

Vattel addressed that “yield or perish” point of view in the treaty context.

Treaties *in which the inequality prevails on the side of the inferior power*—that is to say, those which impose on the weaker party more extensive obligations or greater burdens, or bind him down to oppressive or disagreeable conditions,—these unequal treaties, I say, are always at the same time unequal alliances; for the weaker party never submits to the burdensome conditions, without being obliged also to acknowledge

16. United States Indian Claims Commission Final Report, H.R. Doc. No. 96-383, 96th Cong. 2d Sess., at 1 (1980) [hereinafter Ind. Cl. Comm. Final Report].

17. THE LAW OF NATIONS, *supra* note 13, at 195-96.

18. 1872 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 9, *reproduced in* DOCUMENTS OF UNITED STATES INDIAN POLICY 140 (Francis Paul Prucha ed. 1975) [hereinafter 1872 Annual Report]. This echoed a century later in an infamous rationalization from the Vietnam War, paraphrased as “We had to destroy the village in order to save it.” See Peter Arnett, *Major Describes Move*, N.Y. Times, Feb. 8, 1968, at 14.

the superiority of his ally. These conditions are commonly imposed by the conqueror, or dictated by necessity, which obliges a weak state to seek the protection or assistance of another more powerful; and by this very step, the weaker state acknowledges her own inferiority. Besides, this forced inequality in a treaty of alliance is a disparagement to her, and lowers her dignity, at the same time that it exalts that of her more powerful ally.¹⁹

The Commissioner's yield-or-perish declaration was, ironically, the view of a public official who was benignly disposed toward the Indians and embraced his responsibility as guardian of Indian people. The Commissioner was on their side. Arrayed against his point of view were those like John M. Chivington, who eight years earlier had rallied anti-Indian sentiment, which he used to lead the massacre of Cheyenne at Sand Creek, Colorado: "It simply is not possible for Indians to obey or even understand any treaty. I am fully satisfied, gentlemen, that to kill them is the only way we will ever have peace and quiet in Colorado."²⁰

The Sioux Commission wound up its report with recommendations for remedying the "existing evils" in the management of Indian affairs. Prominent among them were that:

Our Indian affairs should be managed by an independent department. It ought to have at its head one of the first men of the nation, whose recommendations would be heeded, and who, as a member of the Cabinet, could confer with the heads of the War and Interior Departments, and devise such wise and just plans as would equally protect the rights of the Indians and our own citizens. We are painfully impressed with the fact that most of our Indian wars have not only been cruel and unjust to the savage, but have largely grown out of conflicts of jurisdiction between different departments of the Government. The head of the Department of the Interior is already burdened with five distinct bureaus, viz, Pension, Patent, Land, Education, and Indian. He cannot give to Indian affairs that patient attention which is necessary to success.²¹

In conclusion, your commission respectfully urge that every effort shall be made to secure the ratification and faithful fulfillment of the agreement which we have made by direction of the Government with this hapless people. We entered upon this work with full knowledge that those who had heretofore made treaties with these Indians had seen their promises broken. We accepted the trust as a solemn duty to our country,

19. THE LAW OF NATIONS, *supra* note 13, at 201 (emphasis in original).

20. JOSEPH CUMMINS, *THE WORLD'S BLOODIEST HISTORY: MASSACRE, GENOCIDE AND THE SCARS THEY LEFT ON CIVILIZATION* 97 (2010).

21. 1876 Annual Report, *supra* note 1, at 346. A cabinet post for Indian Affairs was not created. A century later in 1977, however, a Secretarial Order established the position of Assistant Secretary Indian Affairs that reported directly to the Secretary. The roster of Interior agencies has changed but the conflicts remain. In addition to the Bureau of Indian Affairs, today's Interior Department includes the Bureau of Indian Affairs, Fish and Wildlife Service, National Park Service, Geological Survey, Bureau of Reclamation, Bureau of Land Management, Minerals Management Service, and Office of Surface Mining, Reclamation & Enforcement.

to the perishing, and to God. *The Indians trusted us.*²²

For the Sioux Commission, the takeaway was that the superior power of the federal government, including its plenary constitutional authority over Indian affairs, had not been and would not be an effective foundation for government-to-government relations in the absence of the trustee being trustworthy.

In a decade, Indian affairs policy made its way from Indian disarmament to the General Allotment Act.²³ The twin goals of allotment were assimilation of Indians to agrarian pursuits and disposal of the surplus lands that assimilation would make available to non-Indians. The allotment era lasted nearly a half-century. During that period:

Indian land holdings were reduced from approximately 137,000,000 acres to less than 50,000,000 acres. Of the area that remained in Indian ownership a large part was desert or mountainside. The grazing land and farming land still owned by the Indians had seriously deteriorated as a result of overgrazing, the plowing of sod that should never have been broken, reckless timber-cutting and the emigration of the topsoil by various aerial and water routes to points east and west.²⁴

The wealth of the Gilded Age following the Civil War produced philanthropists who supported reformers and intellectuals in the progressive era that began with Theodore Roosevelt's presidency in 1901. They included society leaders drawn to preserving the cultures of the many nationalities whose immigrants to the United States peaked in numbers between 1880 and 1914. John Collier, who had been introduced to New York's salons and the artists' and writers' colonies of Santa Fe and Taos, was among those who "discovered" the Pueblos' customs, traditions and culture. Collier concluded that the Pueblo ways "demonstrated how organized groups of people, joined together in community life, could save mankind from the negative consequences of the industrial age."²⁵

However, Indian land issues arose in territorial New Mexico with conflict over Pueblo land titles. The 1848 Treaty of Guadalupe Hidalgo had confirmed Spanish land grants that had vested title in New Mexico Pueblos to 700,000 acres. Substantial portions of that land had been sold to non-Indians who were under the impression that the land was freely alienable. The Supreme Court eventually determined that as a condition to entering the Union in 1912, New Mexico had to surrender all jurisdiction over Indian lands whose title derived from the United States. Nonetheless, "a threat of armed conflict existed between the Indians, Anglos, and Spanish settlers. In the winter of 1922, violence had been narrowly averted"²⁶

Collier and his cohort²⁷ used the issues exposed by the Pueblo land dispute to open

22. *Id.* at 346 (emphasis added).

23. Act of February 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 348 (2006)).

24. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 86 (1942).

25. KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920-1954, 24 (1977).

26. *Id.* at 28.

27. This cohort included the two-million member General Federation of Women's Clubs, Eastern Association on Indian Affairs, New Mexico Association on Indian Affairs, Sunset Magazine, American Indian Defense Association, and the Chicago Indian Rights Association. These groups found themselves in conflict with the more conservative Indian Rights Association and the National Advisory Committee, also known as the Committee of

a broad effort for reform in Indian policy that encompassed Indian self-governance, education and health care. They challenged Indian affairs administration, which they perceived to have:

[D]eveloped a tendency to impose upon all Indian tribes a uniform pattern of general laws and general regulations. This tendency was commonly justified in terms of administrative efficiency and economy, and to this justification there was sometimes added the thought that Indian treaties; special statutes, and regional differences were all outworn relics which had to be sacrificed in the march of national progress. The effect, however, of this policy of ignoring the special rights . . . of the tribes was to cause tremendous and widespread resentment among the Indians. The Indians found Indian and white champions. Protest against mistreatment of the Indian led to many investigations. A survey was conducted by the Institute for Government Research at the request of Secretary [Hubert] of Interior Work. The results of this study, published under the title: "The Problem of Indian Administration," [Meriam Report]²⁸ gave direction for more than a decade to Indian reform.²⁹

The Meriam Report contributed to the reform movement that ended the allotment era, and proved to be the foundation for Indian affairs policy in the New Deal, particularly its most significant legislative achievement, the Indian Reorganization Act.³⁰

The Indian Reorganization Act was a flawed product that failed to meet the needs of a diversified population, but it did stop land allotment and set up mechanisms for self-government, as well as providing needed credit facilities and allowing the Indians time to define their role in American society.³¹

The Meriam Report also endorsed the idea of an Indian Claims Commission to redress claims born of the fact that "[t]he American right to buy always superseded the Indian right not to sell. The white man's superior power allowed this policy, and *pro forma* use of the treaty conformed to his Anglo-Saxon tradition and concern for the law. For the Indian the legality of it all was of little comfort."³² Congress established the Indian Claims Commission in 1946.³³ The 176 tribes recognized at that time filed 600 claims for damages

One Hundred, which had been appointed by Interior Secretary Hubert Work. The Committee of One Hundred included "educated Indians, missionaries, scientists, conservatives, reformers, and most of the Board of Indian Commissioners. Notable guests included Bernard Baruch, the public-spirited capitalist; Oswald Villard, economic radical and pacifist; and the fundamentalist politician William Jennings Bryan." *Id.* at 49-50.

28. Also known as the Meriam Report after the director of the Institute for Government Research, Lewis Meriam.

29. COHEN, *supra* note 24, at viii.

30. Act of June 18, 1934, § 16, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461).

31. PHILP, *supra* note 25, at 244.

32. Ind. Cl. Comm. Final Report, *supra* note 16, at 1.

33. Act of August 13, 1946, Pub. L. No. 79-726, ch. 959, 60 Stat. 1049 (1946) (formerly codified as amended at 25 U.S.C. §§ 70-70v-2 (1976), but omitted from current Code because the Indians Claims Commission was terminated on Sept. 30, 1978).

based on violations of treaties and agreements between the United States and the tribes.³⁴

Perhaps the best example of the judiciary's contribution to Indian reform during the New Deal is *Seminole Nation v. United States*.³⁵ The Supreme Court confirmed that a fiduciary relationship existed between the government and the Indians who had chosen to "yield" rather than "perish."³⁶

[T]his 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 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.³⁷

In compiling a list of Indian cases spanning nearly a century, the Department of Justice has identified *Seminole Nation* as one of only two New Deal era Indian law decisions deemed to be "significant."³⁸

Collier was appointed Commissioner of Indian Affairs in 1933. Reaction against the direction of his New Deal reforms was swift and intense. "[T]he House Indian Affairs Committee became the focus of anti-New Deal sentiment. Members of this Committee preferred the abolition of the bureau [of Indian affairs] and the Indians' rapid assimilation into the white community."³⁹ A lobbying campaign was raised in Washington, D.C., against Collier. The American Indian Federation was a prominent adversary. Organized in 1934 by "Indians from all parts of the country who disliked Collier's policies, the federation had a membership of approximately 4,000 persons. Its constitution stressed intertribal cooperation and the need to uphold "American civilization and citizenship."⁴⁰ Supporters and members of the American Indian Federation sought to discredit Collier as tending toward "Communism instead of Americanism" and "favor[ing] atheism."⁴¹ Moreover, Collier's American Civil Liberties Union membership proved to the Federation that he lacked fitness to hold public office.⁴²

In the years following World War II, the theme of assimilation took deeper root and flowered as termination in the Eisenhower presidency. In 1947 the United States Senate

34. Ind. Cl. Comm. Final Report, *supra* note 16, at 5. The Indian Claims Commission terminated in 1978; remaining pending claims were transferred to the Court of Claims.

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

36. *Id.* at 297.

37. *Id.* at 296-97 (internal citations omitted).

38. See *Significant Indian Cases*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/enrd/3104.htm>. The other New Deal "significant" decision is *Creek Nation v. United States*, 318 U.S. 629 (1943). While *Seminole Nation* found federal liability for breach of trust, a year later *Creek Nation* held the United States blameless as trustee for *Creek Nation* losses.

39. PHILP, *supra* note 25, at 170.

40. *Id.* at 170-171.

41. *Id.* at 172.

42. *Id.* at 172-73.

eliminated the Indian Affairs Committee and assigned jurisdiction over Indian affairs to the Interior and Insular Affairs Committee.⁴³ In 1953 Public Law 280 authorized states, in their discretion and without tribal consent, to impose certain state laws on Indians.⁴⁴ Congress also adopted House Concurrent Resolution 108 announcing the policy of Congress to end the ward-guardian relationship and begin termination of certain tribes.⁴⁵ In that context, the Department of the Interior replaced Cohen's Handbook of Federal Indian Law in 1958 with a very different version, entitled Federal Indian Law. It cast off the scholarship and values of Cohen's work and stated bluntly in its introduction that "[t]ermination of Federal supervision emerges here as a program, not merely an indefinite objective."⁴⁶

The late 1960s and early 1970s brought a revival of progressive values and with it the War on Poverty. Termination soon gave way to the rise of self-governance policy in a remarkably seamless transition for Indian affairs from the Democratic Johnson Administration to the Republican Nixon Administration. In 1970, President Nixon formally rejected termination policy to promote "self-determination without termination."⁴⁷ In 1968 Congress effectively set aside Federal Indian Law and authorized a revision and reprinting of the Handbook of Federal Indian Law. The revision was published in 1982.⁴⁸ In the meantime, the Department of the Interior's Office of the Solicitor replaced the 1958 Federal Indian Law with a University of New Mexico facsimile reprint in 1971 of Cohen's 1942 Handbook of Federal Indian Law.

In 1977 the Senate reestablished its Committee on Indian Affairs as a temporary select committee. The Committee achieved permanent status in 1984. As noted above, 1977 also saw the establishment of the office of Assistant Secretary for Indian Affairs in the Department of the Interior.⁴⁹ Together these events represented a new direction in the administration of Indian affairs.

The 1960s, 1970s and 1980s produced legislation, administrative actions and judicial decisions on myriad issues affecting tribal rights and Indian policy, and witnessed historic battles over reserved water and fishing rights. The successful defense of tribal interests during that time owed much to vigorous advocacy by the federal trustee.

In one case involving water and fishing rights of the Pyramid Lake Paiute Tribe, Interior Department officials attempted to repudiate on appeal the Assistant Secretary for Indian Affairs' position that the Department should exercise its discretion for the benefit of the tribe and an endangered species in managing operation of a reclamation project.⁵⁰ The Justice Department, which rarely rejects an agency head's litigation recommendation, did just that and prevented the abandonment of the government's fiduciary duty to the tribe.⁵¹

43. See generally, Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 831 (1946).

44. Pub. L. No. 280 (1953) (codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-26; 28 U.S.C. § 1360).

45. See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

46. United States Department of the Interior, FEDERAL INDIAN LAW 3 (1958).

47. Richard Nixon, Special Message to the Congress on Indian Affairs, July 8, 1970, available at <http://www.presidency.ucsb.edu/ws/?pid=2573> (last visited June 25, 2014).

48. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ix (2012). A revision of the 1982 edition of the Handbook of Federal Indian Law was published in 2005. *Id.*

49. 1872 Annual Report, *supra* note 18.

50. Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Justice, 750 F.2d 117 (D.C. Cir. 1984).

51. Political attempts to persuade the federal government to forfeit its trust responsibility played out vividly in the Pyramid Lake litigation in a letter from Nevada senator Paul Laxalt to Attorney General William French Smith, both of whom were close friends and allies of President Reagan.

Protection of tribal interests remained contentious; political pressures tested the strength and durability of the federal trust relationship on matters of sovereignty, self-governance, resources, gaming, land tenure and health care.

A faithful trustee can prevent the Indian interest from being misunderstood or undermined, and thereby diminish the possibility that the non-Indian interest may prevail unfairly. Indian tribes . . . need the federal government as an ally and an advocate.⁵²

. . . So long as the federal trustee is absent or neutral in . . . conflicts, the effect is much the same as if the government were formally an adversary to the tribal interest.⁵³

As the 20th century drew to a close, one event tested the federal trust relationship in ways that none had foreseen. It may well prove to be as traumatic for the federal trust relationship with Indian country at the beginning of the 21st century as was the transition from the New Deal to termination in the middle of the last century. The event was the *Cobell* litigation.⁵⁴ The court of appeals, in one of the several opinions issued in that litigation, summarized the case as follows:

Beneficiaries of Individual Indian Money trust accounts, as a class, sued the Secretary of the Interior and other federal officials, in their official capacities, for breach of fiduciary duty in the management of those accounts. In an earlier appeal, we affirmed the district court's holding that the officials, who serve as trustee-delegates for the federal government, had breached their fiduciary duties . . .⁵⁵

Dear Bill

RE: ALPINE APPEAL

While it's fresh on my mind . . .

--This has immense political overtones out there. All those ranchers--who are ours--feel they're finally going to get some relief from this Administration. To have to go through the legal expense and a hassle of an appeal will be a real "downer" for them.

--On the merits this case should not be appealed. [District Judge] Bruce Thompson wrote a helluva sound decision which will not be overturned. These poor ranchers should not be compelled to cough up additional legal fees. They've contributed substantially enough already.

--If [Solicitor General Rex [Lee]'s shop thinks the Indians can intervene, let them. Even have Justice assist in fulfillment of whatever fiduciary responsibility exists, if any. Then at least the monkey won't be on our political backs.

--Lastly, this would be a badly needed signal--that in a proper case the Attorney General will overrule the careerists in Justice who have never been with us and will never be.

Thanks for listening, old friend.

Letter from Senator Paul Laxalt to Attorney General William French Smith (Oct. 7, 1981) (emphasis in original). Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 20 n.76 (1992).

52. Membrino, *supra* note 51, at 21.

53. *Id.* at 23.

54. See *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

55. *Id.* at 1133.

Congress authorized billions of dollars to settle *Cobell* in 2010.⁵⁶ With liability determined and damages paid, Indian beneficiaries fairly could expect their trustee to resume the fiduciary relationship and put the breach of trust behind them. Whether that expectation will be met is an open question.

To understand why requires looking behind the court of appeals bland summary of the *Cobell* case. *Cobell* involved rancorous, 14-year litigation that spanned three presidencies and included contempt proceedings against cabinet and sub-cabinet officials in both Democratic and Republican administrations. Moreover, ten years into the case, a court of appeals made an extraordinarily rare decision to remove the presiding judge after accepting the federal government's argument that no judge who "has viciously and baselessly denounced a cabinet department and its leadership as villainous racists could properly oversee its activities and adjudicate further claims."⁵⁷ Among statements by the removed judge were descriptions of "Interior as an agency whose 'spite' has led it to turn its 'wrath' on trust beneficiaries and engage in 'willful misconduct,' 'iniquities,' 'scandals,' 'dirty tricks,' and 'outright villainy.'"⁵⁸ The court of appeals concluded that "an objective observer is left with the overall impression that the district court's professed hostility to Interior has become so extreme as to display clear inability to render fair judgment."⁵⁹

No court should have had to reach such judgments about federal agencies charged with responsibility for Indian affairs had those agencies been faithful to Executive Order 13175.⁶⁰ Issued by President Clinton in the midst of the *Cobell* litigation, the Executive Order included this instruction: "Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."⁶¹ The ideal of Executive Order 13175 foundered, however, on the reality of the *Cobell* litigation.

In the *Cobell* era, both political parties and a generation of cabinet officials, policy appointees, agency employees and government attorneys no longer acted as if moved—as Interior Department Solicitor Nathan Margold put it in his 1940 introduction to the Handbook of Federal Indian Law—to "appreciate the significance of the problem of Indian rights for the cause of democracy here in the United States and throughout the Western Hemisphere."⁶²

Federal officials, at every level and across administrations, have reoriented themselves as trustees. In transactions with Indian tribes over their trust resources, these officials now insist on outcomes that circumscribe or eliminate the trust relationship. One means to that end is the decision by recent administrations to frame their negotiations with tribes in terms of a decision in a 1968 decision also deemed "significant" by the Department of Justice. The case, *Three Affiliated Tribes of the Fort Berthold Reservation v.*

56. See Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010).

57. *Cobell v. Kempthorne*, 455 F.3d 317, 331 (D.C. Cir. 2006) (internal citations omitted).

58. *Id.* at 333.

59. *Id.* at 335 (internal citations omitted).

60. Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000), available at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

61. 65 Fed. Reg. at 67250.

62. COHEN, *supra* note 24, at vii.

United States,⁶³ arose in the termination era when courts were addressing Indian claims against the United States for compensation. The *Fort Berthold* court observed:

Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

. . . Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.⁶⁴

In effect, as a defense to a tribe's monetary claim, the United States took the Fifth Amendment compensation standard and weakened its application to the federal trustee's actions in disposing of tribal lands on the theory that the value was close enough to be fair even if it wouldn't have passed muster under Fifth Amendment jurisprudence.⁶⁵

Federal negotiators in the *Cobell* era have converted substitution theory from a shield to a sword for use in preempting future claims and limiting the trust relationship. The Gila River Indian Community Water Rights Settlement Act of 2004 is an example.⁶⁶ That act authorized the federal government to implement an agreement to settle Indian reserved water rights claims. (It was enacted a year after the Secretary of the Interior had weathered charges by the *Cobell* plaintiffs that she was in criminal contempt of court and had committed fraud on the court.)⁶⁷ Section 206 of the act states: "The benefits realized by the Community, Community members, and allottees under this title shall be in complete replacement of and substitution for, and full satisfaction of, all claims"⁶⁸

The act occupies 36 pages in the Statutes at Large; 14 pages—40 percent—are waiv-

63. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968).

64. *Id.* at 691. The Supreme Court adopted the Fort Berthold analysis in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

65. The 2005 edition of the Handbook of Federal Indian Law provides this commentary on *Fort Berthold*:

The ruling is troubling because it deprives Indian nations of a remedy if it can be shown that Congress made a "good faith effort" to provide full value for the land. This defense is not available in the non-Indian context; there, when Congress takes property, it must pay fair market value, not merely make a good faith effort to do so. Rather than a subjective test based on congressional intent of good faith, the takings clause in the non-Indian context applies an objective test based on the market value of the land. If Congress effectively deprives a tribe of control of its property, full compensation should be paid.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1027 n.38 (2005).

66. Pub. L. No. 108-451, 118 Stat. 3499 (2004).

67. *Cobell v. Norton*, 334 F.3d 1128, 1149-50 (D.C. Cir. 2003).

68. Gila River Indian Cmty. Water Rights Settlement Act of 2004, Pub. L. No. 108-451, 118 Stat. at 3507 (2004).

ers and limitations on the federal trust relationship with the Gila River Indian Community.⁶⁹ In a statute for the benefit of Indians, Congress saw to it that 40 percent of its text protected the trustee from the beneficiary. The Crow Tribe Water Rights Settlement is another example where substitution is used to seal the deal.⁷⁰

“Indian Country Today” recently published a statement by five southern California Mission Indian Bands about their water rights struggles with the federal trustee.⁷¹

[T]he La Jolla, Pala, Pauma, Rincon and San Pasqual Bands, located in northern San Diego County, are asking the federal government to settle a 100-year old problem created when it gave away their water rights.

The tribes want to know why senior staff of the departments of Interior and Justice are ignoring the President’s policy to honor federal trust responsibilities. . . .

“Central to the federal refusal is an attempt to avoid or limit their trust obligations to the tribes and future protection of our water supply,” said Bo Mazzetti, vice president of the San Luis Rey Indian Water Authority, and chairman of the Rincon Band of Luiseño Indians.

. . . Local lawmakers say they want the federal government to approve the agreement. “It is in the interest of all parties, including the federal government, to enact a comprehensive settlement with respect to Indian water rights on the San Luis Rey River,” said Rep. Darrell Issa in a statement. “The Departments of Justice and Interior should move forward immediately to achieve a final settlement agreement.”

The basis for the policy of congressional settlement of Indian water rights disputes is that in almost all situations, the federal government created the conflict between tribes and their neighbors by encouraging and subsidizing water development for non-Indians with little or no regard for Indian water rights and the Winters Doctrine.

. . . “So the federal agencies, which really created the dispute in the first place, now have become the stumbling block to the final settlement, and it is a serious problem,” said retired Rep. Packard, who has remained as a consultant for the tribes and the two water agencies.

He believes the federal government wants to rid itself of its responsibil-

69. *Id.* at 3507 (satisfaction of claims); *id.* at 3508 (waiver and release of claims).

70. Crow Tribe Water Rights Settlement Act of 2009, Pub. L. No. 111-291, § 409, 124 Stat. 3097, 3108 (2010).

71. *San Luis Rey Water Rights Challenge – A 100 Year Old Struggle*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 22, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/22/san-luis-rey-water-rights-challenge-100-year-old-struggle-148305>.

ity to provide water to the reservations, including helping to defend Indian water rights.⁷²

Yet another example is the Klamath Basin Restoration Agreement (KBRA).⁷³ The rights and interests claimed by Oregon and California, federal agencies, Indian tribes, local governments, farm communities, hydropower generation, and environmental interests in Klamath River water exceed the available water supply. Dramatic and tragic evidence of this emerged when in 2001 the federal Bureau of Reclamation allocated nearly all of its irrigation water supply to benefit protected species of fish and associated Indian rights. Irrigators protested, engaged in civil disobedience and sued the government without success. In 2002, however, the Bureau of Reclamation succumbed to political pressure, including intervention by Vice-President Cheney.⁷⁴ The Bureau changed course; it ignored the needs of the fish and the prior rights of Klamath Basin Indian tribes and allocated water to irrigation. Tens of thousands of fish in that fall's spawning migration died in severely degraded habitat conditions. It was the largest adult salmon kill in history.

The KBRA is the product of negotiations that consumed years. Its goal was to reconcile competing demands on the Klamath River. The Hoopa Valley Tribe participated in the KBRA negotiations but after examining the science used as the basis for water allocation in the agreement, the Tribe concluded that the fishery restoration outcomes could not be realized and decided not to be a party to the KBRA.

Non-federal parties signed the KBRA on February 18, 2010, though federal agency officials could not become parties without enactment of authorizing legislation. Legislation for that purpose was introduced in the 112th Congress.⁷⁵ Both the KBRA and the proposed legislation would authorize the Secretary of the Interior to ignore the Hoopa Valley Tribe's decision and substitute the Secretary's judgment for the Tribe's in disregard of Executive Order 13175, which President Obama had reaffirmed just four months earlier.⁷⁶ The Hoopa Valley Tribe opposed the legislation, which did not pass.

The National Congress of American Indians (NCAI) and the Affiliated Tribes of Northwest Indians (ATNI) have noted these developments in the Obama Administration and enacted resolutions expressing disagreement with the policy they represent.⁷⁷

72. *Id.*

73. See Bureau of Reclamation, U.S. Dep't of the Interior, Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (2010), archived at <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Basin-Restoration-Agreement-2-18-10signed.pdf> (last visited June 25, 2014).

74. See *Klamath Basin Fish Kill*, HISTORY COMMONS, http://www.historycommons.org/timeline.jsp?timeline=the_bush_administration_s_environmental_record&bush_env_specific_issues_and_cases=bush_env_klamathBasin (last visited June 25, 2014).

75. See H.R. 3398, 112th Cong. (2010); S. 1851, 112th Cong. (2010).

76. On Nov. 5, 2009, President Barack Obama issued a Presidential Memorandum directing each agency to submit a detailed plan of action describing how the agency will implement the policies and directives of Executive Order 13175. See WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

77. See Support for Sovereign Authority of Tribes to Enter into Water Agreements, NCAI Resolution #PSP-09-051 (2009), available at http://www.ncai.org/attachments/Resolution_APWmAwdreCweisQhtiVZDJWZO-DRdlHSgyFiKHInbpIMaYQytbvW_PSP-09-051_final.pdf ("NCAI does hereby oppose any policy of the U.S. to terminate the rights of, or impose adverse consequences upon, a tribe that chooses to retain its water rights instead of settling on terms desired by the Federal Government."); Support for Executive Order Prohibiting Federal Employees from Advocating Reduction of Trust Responsibility, NCAI Resolution #SAC-12-017, available at

In the 113th Congress, after substantial revisions that further eroded tribal trust fishery benefits, the Klamath settlement legislation was reintroduced as S. 2379, and again referred to the Energy and Natural Resources Committee without an opportunity for review in the Indian Affairs Committee. When the Energy and Natural Resources Committee failed to approve S. 2379, the bill was reintroduced as S. 2727, which was assigned to the Finance Committee. Both bills remained pending as of the publication of this article.

To date, leaders from 17 Tribes in 6 States have written to the Senate Energy and Natural Resources and Indian Affairs Committees opposing the provisions of the legislation that would unilaterally compromise the rights of the Hoopa Valley Tribe.⁷⁸ They view the legislation as an unacceptable policy precedent for similar erosions of their rights and sovereignty.

On August 20, Secretary of the Interior Sally Jewell published Secretarial Order 3335⁷⁹ in response to the Commission's December 2013 Final Report and Recommendations. Order 3335 sets out seven guiding principles⁸⁰ to which all Interior agencies are

http://www.ncai.org/attachments/Resolution_OiYtinseQhMNeZeVwIxrroYPRfbsDvKYDaLjIlmRPPRbBP-BEzKf_SAC-12-017.pdf ("a disturbing trend is apparent in actions of employees of the Interior Department who advocate reduction or limitation of trust responsibilities such as placing a five year limit on the time during which tribal funds may be held in trust; and . . . employees of the Department of Justice have advocated positions in court that would improperly limit or terminate the United States' trust obligations concerning federal management of tribal trust funds and resources; and . . . employees of the Interior Department have drafted and advocated legislation which would terminate the United States' trust obligation pertaining to protections of tribal trust resources and senior tribal water rights. NOW THEREFORE BE IT RESOLVED, that the NCAI opposes the action of federal employees to limit or abolish federal trust responsibilities to protect tribal funds and natural resources; and . . . the NCAI hereby petitions the President to issue an Executive Order barring federal employees from proposing or advocating reductions of the United States' existing trust responsibilities; and . . . the NCAI hereby petitions relevant Congressional committees to exercise their oversight authority to help ensure that the Executive Branch brings the same honor to fulfilling and defending its trust responsibilities that the United States had when these commitments were first made so many years ago as the foundation of the federal-tribal government-to-government relationship[.]"). *See also* ATNI Resolution #09-63 (on file with author) and ATNI Resolution #12-64, available at http://www.atntribes.org/sites/default/files/res_12_64.pdf, to the same effect as the NCAI resolutions.

78. *See, e.g.*, Letter in opposition to S. 2379 from Gaa Ching Ziibi Daawaa Anishinaabek Little River Band of Ottawa Indians, to John Tester, Chairman of the U.S. Senate Committee on Indian Affairs, John Barasso, Vice Chairman of the U.S. Senate Committee on Indian Affairs, Mary L. Landrieu, Chair of the U.S. Senate Committee on Energy and Natural Resources, Lisa Murkowski, Ranking Member of the U.S. Senate Committee on Energy and Natural Resources, Ron Wyden, Chairman of the U.S. Senate Committee on Finance, Orrin G. Hatch, Minority Chairman, U.S. Senate Committee on Finance (Aug. 14, 2014) (on file with the Tulsa Law Review). Similar letters have been sent by the Port Gamble S'Klallam Tribe, Confederated Tribes and Bands of the Yakama Nation, Nisqually Tribal Council, Quileute Tribal Council, Organized Village of Kake, Bear River Band of Rohnerwille Rancheria, etc. (these and similar letters on file with the Tulsa Law Review).

79. U.S. Secretary of the Interior Sally Jewell, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (Aug. 20, 2014) available at, <http://www.doi.gov/news/loader.cfm?csModule=security/getfile&pageid=561791> and <http://www.bia.gov/cs/groups/public/documents/text/idc1-027607.pdf>.

80. Principle 1: Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.

Principle 2: Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.

Principle 3: Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

Principle 4: Work in partnership with Indian tribes on mutually beneficial projects.

Principle 5: Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 6: Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

instructed to adhere.

CONCLUSION

The statutes and executive orders that introduced and implemented self-determination and self-governance remain a strong foundation for an effective fiduciary relationship between Indian tribes and the federal government. To fulfill their promise, Congress and the Executive Branch need to heed the alarms sounded by NCAI and ATNI in the aftermath of *Cobell* about the defensiveness and unilateralism in policy-making that are eroding the trust relationship and bringing about the subordination of tribal rights in trust assets to other interests. These elements in the ongoing conduct of Indian affairs programs cannot be reconciled with the policies announced by Congress and successive presidents in recent decades.

It remains to be seen whether Secretarial Order 3335 represents a new era in Indian trust administration. For the Congress and the Executive Branch to respond to NCAI, ATNI, and the Commission with clear and strong corrective action will take far less courage than predecessor commissions displayed in assessing the causes of conflict and carnage on the frontier, confronting the black-listing and red-baiting of progressive reforms in the era of the New Deal and Cold War, and reversal of termination policy in the last decades of the 20th century.

Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility. *See Id.*