



Trust Reform, Natural Resources & Land

A Special Report Prepared by:

Democratic Policy Committee

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Trust Reform

The United States government has a broad trust responsibility to Indian tribes and individual Indians that has been shaped by formal treaties and agreements and precedent between the United States and Indian nations. This trust relationship obligates the federal government to protect tribal self-government, provide certain services to Indian communities, and exercise the highest degree of fiduciary responsibility toward Indian lands and resources. The United States holds legal title to lands held in trust for individual Indians as well as Indian tribal governments. The revenues from trust lands are also held in trust by the United States for the benefit of individual Indians and Tribal governments.

Indian Trust Litigation. For many years, there have been allegations that the federal government has been unable to account for billions of dollars it holds in trust for Indian tribes and individual Indians. Ultimately, individual Indian money account holders filed a class action lawsuit (*Cobell v. Norton*) to seek an accounting of funds held in trust by the United States. As part of the litigation, the Secretary of the Interior submitted a plan to the District Court proposing a reorganization of the Department's trust fund management structure, including the duties of the Office of Special Trustee and the Bureau of Indian Affairs. The Secretary's proposal was widely opposed by Indian country, primarily on the grounds that the Secretary had failed to consult with tribal governments prior to submitting the plan to the court as required by an Executive Order imposing a mandate on tribal consultation for federal agencies.

In response to tribal opposition, the Secretary agreed to establish a joint Interior-Tribal Task Force on Trust Reform, and for over a year, discussions and negotiations were conducted between tribal leaders and high-level officials at the Department of the Interior. The Task Force process broke down when Department representatives indicated that the government was not willing to discuss the establishment of legally enforceable statutory standards that would serve to guide the administration of the United States' trust responsibility for Indian lands and resources.

Trust Standards. In March 2003, the U.S. Supreme Court issued its ruling in *Navajo Nation v. United States*, stating that unless a statute specifically details the nature and extent of the federal government's trust responsibilities in a given area, and unless a statute also provides for a legally enforceable remedy for breach of the government's trust responsibility, a tribal government has no recourse against the United States.

Tribal government leaders have urged Congress to address the Supreme Court's ruling in the *Navajo Nation* case by adopting statutory standards for the administration of the government's trust responsibility—notwithstanding strong opposition in the Executive branch. In testimony before the Senate last year, the Bush Administration proposed that in lieu of the overarching trust responsibility, the government enter into a "trust instrument" with each tribal government that would spell out the respective legal rights and responsibilities of the contracting parties.

In the same testimony, the Bush Administration also argued that the authority of Congress to legislate in the field of Indian affairs under the Indian Commerce Clause is no longer plenary in nature, but rather is constrained by the regulatory criteria that are applied to petitioning tribal groups in the federal acknowledgment process. In other words, if a federally recognized tribe cannot satisfy each of the seven criteria that are applied to petitioning tribal groups, Congress lacks the constitutional authority to enact legislation for the benefit of that tribe.

Bush Administration Efforts To Redefine U.S. Trust Obligations. Tribal leaders and scholars believe that certain new policies advanced by the Bush administration will have a corrosive effect on the trust relationship, diminish the federal trust responsibility, and possibly lead to tribal termination. These observers cite the Administration's proposals to "privatize" the provision of health care services to Indians, "outsource" the administration of schools now operated by the Bureau of Indian Affairs, and "waive sovereign immunity" in business transactions with energy development on Indian lands. These moves are viewed in combination with the Administration's opposition to the establishment of trust standards and their reluctance to follow established procedures relating to the federal government's trust responsibilities.

Congressional Trust Reform Efforts. The Daschle, Johnson, McCain-trust reform bill, *American Indian Trust Fund Management Reform Act Amendments Act of 2003* (S. 1459) introduced in the 108th Congress reflects tribal concerns about the current Bureau of Indian Affairs (BIA)/Office of Special Trustee reorganization initiatives. Representatives Mark Udall (D-CO) and Nick Rahall (D-WV) introduced a companion version in the House. Last year, the House Appropriations Committee tried unsuccessfully to legislatively force settlement of the *Cobell v. Norton* litigation. This effort sent a strong signal to authorizing committees to step up their efforts to find alternative ways to settle the case.

Senator Daschle introduced the *Indian Trust Pay Equity Act of 2004* (S. 1540) to prepare for settlement of tribal trust assets in anticipation of mediation. The Campbell-Inouye bill, the *Indian Money Account Claim Satisfaction Act of 2003* (S.1770), which would establish a settlement tribunal, was not well received by Indian Country or the Administration. In the end, the Interior Appropriations conference passed a controversial, and potentially unconstitutional, midnight rider that undermined the *Cobell* case by delaying for one year any action in favor of the plaintiffs. Mediation discussions have begun between the National Congress of American Indians(NCAI), the *Cobell* plaintiffs' lawyers, and the Interior and Justice Departments.

Senators Daschle and Johnson, in the spirit of good government-to-government relations, introduced a bill (S. 2523) in support of a Great Plains Tribal Chairman's Association and Rocky Mountain regional proposal to halt the BIA /Office of the Special Trustee reorganization for one year so that the tribes within those regions can submit agency specific plans that better addresses their needs. Serious allegations were raised this past spring when Alan Balaran resigned as the court-appointed Special Master in the *Cobell* case. These disturbing allegations prompted the introduction of the *American Indian Commission on Trust Holdings Act* (S. 2770) by Senator Daschle. This bill would establish a commission with Native American representation independent of the Executive and Legislative branches to investigate the Balaran charges.

The American Indian Lands Title Report Commission was established in the 106th Congress to address the land title status reports pertaining to ownership and activity on individual allotments and tribal trust lands. The House and Senate have appointed Commissioners but the Bush Administration has not. The Commission cannot begin its work until all Commissioners have been appointed.

The Senate passed the *American Indian Probate Reform Act of 2003* S. 1721, a bill to make amendments to the *Indian Land Consolidation Act of 2000*. Sponsored by Senators Campbell, Inouye and Daschle, this bill addresses land fractionation on Indian lands, which is a key component of trust reform.

Natural Resources

Indian Energy and Natural Resource Development. Household energy bills are a significant burden for many Native Americans. Native American households spend, on average, 4 percent of their family income on electricity, with the poorest households paying nearly 20 percent. Also, 14.2 percent of households located on reservations are without electricity altogether—compared to 1.4 percent of all U.S. households. High energy costs often result from poor construction, poor insulation and high occupancy, common features in the homes of the poorest tribal families.

At the same time, much of Indian country has tremendous energy potential. For example, the Great Plains contain enough wind energy potential to power the entire East Coast. The development and use of these resources, especially those that are renewable and culturally appropriate, must be encouraged throughout Indian country.

On July 31, 2003, the Senate passed the *Energy Policy Act of 2002*, which was written by Democrats that, among other things, would establish a comprehensive Indian energy program at the Department of Energy to assist tribes in developing their resources, build energy infrastructure on Indian lands, and assist with energy production and transmission, which is one of the biggest obstacles facing tribal energy development. The Democratic legislation also contains tax incentives for renewable energy that will benefit tribes. Alternatively, the Republicans proposed an energy bill that would be highly problematic for tribes. It would discriminate against tribes in hydroelectric re-licensing proceedings by not allowing them to appeal conditions intended to protect Indian lands, Indian treaty rights, and natural resources in proceedings before federal regulators. The legislation would essentially allow only industry to notice such appeals. In addition, the Republican bill would not allow tribes to participate on an equal basis with industry in a new process to set alternative mandatory conditions and fishway prescriptions for hydroelectric licenses. Instead, the hydropower industry would be permitted to write alternative conditions and fishway prescriptions that must be included in hydroelectric licenses if threshold standards are met. The net effect of these provisions would create a process where the license applicant is given preferential treatment to the detriment of tribes, their treaty rights, and the general public. Senate Democrats believe this is the wrong set of priorities and will not force Native American tribes to choose between Indian Energy projects and traditional tribal sovereignty protections.

Rural Water in Indian Country. The *Water Resources Development Act* is scheduled for reauthorization during this Congress. However, the Administration is currently making concerted efforts to reduce or eliminate funding for rural water projects. These targeted reductions are reflected in the President's *Fiscal Year 2005 budget*. Water and sewage assistance in the Rural Community Advancement Program of the Department of Agriculture would receive a cut of \$11 million (46 percent) for *Fiscal Year 2005*. This program provides loans and grants for drinking water and waste disposal systems for Tribes. A similar program for Alaska rural and Native villages would be cut by \$16.2 million, or 58 percent. The Indian Land and Water Claims Settlements would receive a \$25.8 million, or 43 percent, cut in *Fiscal Year 2005*. Senate Democrats believe that everyone should have clean, quality drinking water that is affordable.

Drought and Disaster Assistance. This is the third year in a row farmers and ranchers across Indian Country face devastating drought conditions. Over the last several years, predominately in the western United States, many counties with large native populations have experienced production losses of 30 to 95 percent. Two years ago, many states were designated federal disaster areas, and many of these same Indian farmers and ranchers continue to suffer from this extreme weather. Senate Democrats have consistently called upon the Administration and Congress to support funding for the American Indian Livestock Feed and Assistance Program, which would do much to assist tribal farmers and ranchers who are experiencing severe economic losses due to the prolonged drought.

Country-Of-Origin Labeling (COOL). Two years ago, Congress overwhelmingly approved country-of-origin labeling. Consumers around the world want to know more than ever where their food comes from and that it is safe. COOL is good for American Indian ranchers and farmers in Indian Country, because it will encourage consumers to purchase Indian-produced goods. Currently, USDA offers voluntary labeling. However, a mandatory program should have been implemented by September 2004. In 2003, the House of Representatives included a provision in its *Agriculture Appropriations bill* barring the Secretary of Agriculture from implementing the mandatory COOL program. Senate Democrats are leading the effort to reinstate COOL.

Bovine Spongiform Encephalopathy (BSE- Mad Cow Disease). Last year, Canada announced a confirmed case of BSE. Accordingly, USDA halted all cattle, beef, sheep and goat imports from Canada until further notice. Secretary Veneman has since announced that USDA will no longer prohibit the importation of hunter-harvested wild ruminant products intended for personal use, and will begin to accept applications for import permits for certain products from Canada. Senate Democrats have urged the Secretary not to lift the ban until she can ensure that it is lifted in a manner that does not adversely impact domestic cattle markets, including tribal producers.

Land

Fee To Trust. Tribally owned land can be put into trust, that is, held by the federal government for a particular tribe and, therefore, taken off the local tax rolls. Land purchased by a tribe is not automatically put into trust. A tribe must apply with the BIA to enter land into trust. For a brief step-by-step description of the established process to enter land into trust, known as a “Fee-to-Trust Acquisition,” please see “Indian Trust Land: Fee to Trust/Payment in Lieu of Taxes” on page 33. The process varies slightly depending on whether the acquisition was mandated by Congress or whether the land lies within or outside of reservation boundaries.