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Will Tribes ever be able to "Trust" their Federal Trustee?

by David Wilkins

It is widely reported that the federal government has a trust relationship with the Indian peoples of this land, one of many distinctive features of the indigenous/federal relationship. Despite the importance of this concept, legal and political commentators and, surprisingly, federal policy makers, have radically conflicting definitions of what the trust relationship actually means.

Definitional confusion, of course, creates ambiguity, thus allowing chaos to reign supreme in the tribal-federal relationship. This is a tragedy because the idea of trust originally arose out of the massive land exchanges between tribal nations and the United States.

In other words, tribes, in agreeing to sell most of their lands (voluntarily or by coercion) to the federal government, "trusted" the words of the federal officials inscribed in treaties who pledged that the U.S. would always provide for the needs of indigenous nations until both parties mutually agreed otherwise.

Furthermore, with the concept being so ambiguous it means that tribal nations can never rest assured that their legal and treaty rights as "trust beneficiaries" will be protected in a consistent manner by the very government that is legally and morally obligated by treaty and constitutional law to be acting in the tribes' best interest as their "trustees."

Notwithstanding the existence of treaties and the trust doctrine, the sovereign rights of Indian tribes continue to be violated with a great deal of regularity. One might even say that the one thing tribes can "trust" is that the U.S. will find some way to abridge their rights.

A few recent examples of such trust violations include: Senator Slade Gorton's recent attacks on tribal sovereign immunity; the Bureau of Indian Affairs' mismanagement of Indian trust funds; and the Congress' (and states) ongoing efforts to restrict Indian gaming operations, tax tribal resources, reduce Indian educational benefits, curtail hunting and fishing treaty entitlements; and the Supreme Court's decision in February in the Yankton Sioux

case which served to "diminish" the Yankton reservation's size, thus weakening tribal territorial sovereignty.

How and why can the federal government, given its constitutional obligations, engage in (and condone in state actions) such assaults when the federal trust doctrine (under its most widely understood definition) clearly spells out that such actions will not be tolerated? These aggressive federal and, increasingly, state challenges to the trust relationship, erupt or are allowed to fester in part because there is no constitutionally agreed upon or fully enforceable definition of what the trust doctrine entails. To give some examples of how diversely the doctrine is defined:

In other words, tribes, in agreeing to sell most of their lands (voluntarily or by coercion) to the federal government, "trusted" the words of the federal officials inscribed in treaties who pledged that the U.S. would always provide for the needs of indigenous nations until both parties mutually agreed otherwise.

Some maintain that the trust doctrine is merely a moral judgment on the part of the federal government in how it normally chooses to act towards tribal nations.

Others suggest that the trust doctrine entails a protectorate relationship, with the federal government having willingly assumed a trustee stance vis-a-vis tribal beneficiaries in which the govern-

ment is obligated to protect tribes from all enemies and provide a brace of short and long term economic, social, and cultural programs in fulfilling treaty commitments and to raise the standard of living of Indian peoples.

Still others argue that the notion of a trust relationship is merely a legal metaphor that is used primarily to disadvantage tribes by allowing Congress (or its delegates, such as states) and the Bureau of Indian Affairs to wield virtually unrestrained federal power over Indian lands and resources, over tribal governmental status, and over the rights of individual Indians.

Finally, some assert that the trust doctrine creates legally enforceable duties for federal officials and is the principle of positive or constructive force that holds the government in check and acts at times as a restraining device on federal, state, and private actions which might otherwise endanger Indian rights and resources.

Amazingly, one can find ample historical, legal, and political evidence to support each of these definitions. President Clinton, however, recently provided an understanding of trust that is generally consistent with what Indian peoples understand it to mean: "The federal government has a unique legal

relationship with Native American tribal governments as set forth in the constitution of the United States; treaties, statutes, and court decisions" and that his administration would seek to act "in a knowledgeable, sensitive manner respectful of tribal sovereignty."

One of the major constitutional problems Indians face in being closely connected to the federal system of governance via the treaty and trust arrangements, however, is that even though the president is elected by the entire nation (and tribal nations usually look first to the president in the hope that he will express policy that recognizes and affirms their sovereignty), the Courts, the States, and even the personnel of the federal bureaucracy act as if they have been empowered to construct and follow their own definitions of trust - if they even acknowledge its existence - which may not embrace and sometimes are directly at odds with what the president and Congress have declared.

As tribes and the federal and state governments careen towards the new millennium, the three parties must find a way to arrive at a definition of trust which melds with the historical and treaty record - a record which generally acknowledged that the federal government, via the Commerce Clause and the Treaty Clause, had assumed a protectorate stance on behalf of all Indian nations.

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As the tribes' protector from all enemies, domestic and foreign, the federal government, Vine Deloria, Jr. has asserted, must adjust its domestic law and the behavior of its citizens to ensure that its institutions and its citizens do not intrude upon the activities and the political rights of the Indian nations.

This understanding of trust, while in evidence at various times in American Indian history, has yet to be consistently implemented. Nevertheless, it is a definition most compatible with the basic principles of American liberal democracy and tribal sovereignty.

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