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THE COMPETENT WARD

Jeremy R. Fitzpatrick*

I. Introduction

In 1887, Congress passed the General Allotment Act (also known as the Dawes Act) in hopes of convincing the American Indian that private ownership of land is superior to the concept of communal property, because the government was becoming increasingly dissatisfied with the reservation policy.¹ The ultimate goal of the legislation was to assimilate Native Americans into a colonized lifestyle. Pursuant to the Act, individual tribal members were allotted parcels of agricultural and grazing land.² However, title to these allotted lands was not conveyed in fee simple absolute, but held in trust for the sole use and benefit of the allottees and their heirs.³ While the role of the Federal government has been transformed over the years, the United States Secretary of the Interior and the Bureau of Indian Affairs (BIA) are ultimately charged with the supervision and management of these “trust” lands.⁴ The benefit of these functions depends on whether the BIA properly performs the services. Although many tribes were more than familiar with an agrarian lifestyle, the federal government’s (through the Bureau of Indian Affairs) poor management and oversight of the development of these lands has offered little benefit and greatly diminished tribal culture.⁵

Moreover, the trust relationship is often difficult to characterize, as the role of the federal government is intended “only to prevent improvident alienation of the allotted lands and assure their immunity from state taxation.”⁶ This note measures the extent of the federal government’s role in managing the resources held in “trust” and tracks the changing government rhetoric

* Third-year student, University of Oklahoma College of Law.
3. Id.
6. Id. at 105-06; see also Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1495 (1994).
regarding Indian policy. Furthermore, this note will discuss the primary reasons for the relationship's failure and suggest methods by which the relationship can be improved.

First, this note discusses many of the events and policies that constitute the background and transformation of the federal government’s Indian policy. Second, reasons for the needed change in the current relationship between the federal government and Native Americans are suggested. Finally, I conclude that no reasonable person can be satisfied with the relationship between Native Americans and the federal government, as it exists today. Because the current relationship has proven to be extremely inefficient and beneficial to neither party, I assert that it is time for Native Americans to manage their own affairs regarding their land and resources currently held in trust.

II. Background

A. Defining the Federal Role

"Federal power over Native Americans derives from a combination of legislative enactments and judicial decisions, which remain at the core of contemporary federal policy.7" Chief Justice John Marshall and the United States Supreme Court began defining this relationship between the federal government and the tribes beginning in 1823, with the opinion in Johnson v. McIntosh, by applying a finder's law analysis to the discovering Europeans claim of title against all other Europeans.8 Thus, the court concluded that the discovering Europeans had the sole right of acquiring the soil from the natives.9 Additionally, Marshall indicated that the Indians' right of occupancy could be terminated by the European sovereign by "purchase or conquest."10

Later, in 1831, Marshall handed down another landmark opinion in Cherokee Nation v. Georgia, which described the tribes as "domestic dependent nations" rather than a "foreign state" within the meaning of Article III, Section 2 of the United States Constitution, the provision that defines federal judicial power.11 Marshall decided that the tribe was a "state," but was not considered a "foreign" state.12 He further characterized the tribes as being
“in a state of pupilage” before defining the relationship as one of guardian and ward. Thus, the court denied the Cherokees’ request for an injunction against the enforcement of a Georgia statute that extended laws of Georgia over Cherokee land and abolished the laws of the Cherokee Nation. Although Marshall sympathized with the tribe, the court refused to hear the case.

Only one year later, in Worcester v. Georgia, a third Marshall opinion was published that described the several Indian nations as “distinct political communities, having territorial boundaries, within which their authority is exclusive,” and excluded the states from power over Indian affairs within those boundaries.14

Thus, the trust doctrine has developed on the premise that the tribes were incompetent and unable to manage their affairs with respect to property ownership. Today, most Indian lands (both tribal and allotted lands) are still held in trust by the Federal government for benefit of the tribe or allottee. Consequently, the Bureau of Indian Affairs (BIA) of the United States Department of Interior is charged with the management function of the trust responsibility. In large part, the BIA supervises and approves or disapproves land and resource development and uses on Indian lands.

In the early 1980s, the United States Supreme Court addressed the relationship with regard to alleged breaches of trust by the BIA relating to the management (mismanagement) of timber resources on allotted lands. In these cases, known as Mitchell I and Mitchell II, the plaintiffs argued that the United States had breached its fiduciary duty under the General Allotment Act, and was liable to the individuals for monetary damages. However, the Supreme Court found the General Allotment Act did not impose a fiduciary duty, but rather a limited trust relationship “only for the purpose of preventing improvident alienation and assuring immunity from state taxation.”17 The United States Supreme Court affirmed the Court of Claims remand holding that the individual plaintiffs could recover damages pursuant to a source other than the General Allotment Act, there, the Tucker Act.18 The BIA’s daily supervision of the harvesting and management processes led the court to establish a relationship under which a fiduciary obligation is owed, because

13. Id. at 17.
15. See Wood, supra note 6, at 1478.
the common law trust requirements had been met (e.g., a trustee (United States), a beneficiary (allottees), and a trust corpus (timber lands and resources)).

B. Self-Determination

Beginning in the 1960s, the Executive, Legislative, and Judicial branches of the federal government each recognized, at least to some extent, the rights of self-determination with respect to Indian affairs. However, some argue that any grant of self-determination had been limited to "discrete spheres," and that each branch of the government has violated the federal trust responsibility throughout history.  

Presidents John F. Kennedy, Lyndon B. Johnson, and Richard Nixon each made policy statements, which favored Indian self-determination. Also, President Ronald Reagan rhetorically supported self-determination while making a major policy statement in 1983 that reinforced the Trust obligation. In fact, the Reagan Administration tried to abolish compensation being paid to Indians in claims involving land disputes. Native American advocates were quick to highlight this type of rhetoric by pointing to the fact that the "administration aggressively sought" to unilaterally revoke the funds, a move which would directly impede self-determination.

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, which would allow an Indian tribe (by tribal resolution) to contract with the Secretary of the Interior to perform functions within the organization currently performed by the BIA. Language of the Act supports the Trust doctrine and the policy of self-determination simultaneously:

"Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the

19. Fredericks, supra note 5, at 109-10; see also RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959).
20. Pearce, supra note 7, at 369.
21. Id. at 370.
22. Id. at 371.
Indian people in the planning, conduct, and administration of those programs and services." 23

In addition, the argument exists, that because the courts created the Trust Doctrine, they bear a "special responsibility for upholding it." 24 Although, the courts have issued decisions favorable to Indians that effectively enforce the Trust Doctrine, they have failed to uphold the doctrine for the most part — "opting instead to defer to congressional prescriptions in matters related to Indian powers and laws." 25 Policy matters have been largely inconsistent with federal government action relating to Indian affairs, making it impossible to deduce a uniform practice with respect to modern issues. The government was speaking out of both sides of its mouth. That is, while the goal of the Self-Determination Act was on target, the BIA, having little incentive to aid Indians in gaining the status, actually thwarted any progress in the interest of preserving the number of jobs within the agency.

**C. The Trust Responsibilities**

Native Americans have acquired a unique legal status, and although a special relationship still exists between the federal government and the Native Americans, it is difficult to define the scope of the trust doctrine. Characterized as "fiduciary" in nature, the responsibility may be defined broadly or narrowly, depending upon the context to which the courts are speaking. At the broad end, the duties include "maximizing tribal revenues" and looking out for the "best interests of the tribe." 26 More commonly, however, the relationship is described as that of trustee and beneficiary, where the federal government owes some legally enforceable responsibilities to the tribes and allottees. 27

Even still, the BIA has traditionally been involved in all aspects of the development scheme, including allocating resources, negotiations and contracting, as well as collecting rents and royalties payable to the tribes or allottees. 28 Ideally, tribes and allottees lacking resources and expertise would

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23. Id. (citing 25 U.S.C. § 450a(b) (1988)).
24. Id. at 372.
25. Id. (citing Congress' reductions in territorial sizes of reservation without tribal consent over the past two decades).
27. See id.
28. See Wood, supra note 6, at 1478.
benefit from the Bureau of Indian Affairs' paternalistic involvement, but history has told a different story. 29 Although the BIA's handling of certain duties is a valuable service, tribes and individual Indian landowners only benefit if these services are performed in a timely, efficient, and effective manner. 30

D. Enforcing Trust Responsibilities: Cobell v. Norton

Perhaps, some of the most telling facts are those underlying the current Cobell v. Norton class-action lawsuit now pending in U.S. District Court in Washington, D.C. 31 In Cobell, the class is made up of approximately 500,000 American Indians and their heirs (individual allottees) in an action for accounting of up to $40 billion. 32 The fact is, no one knows how much is owed, but royalties for grazing, timber and oil and gas operations were lost, stolen and went uncollected until this suit was filed in 1996. Since 1999, after much discovery and testimony was had, United States District Judge Royce Lamberth has held both Secretary of Interior Babbitt and Secretary of Interior Norton along with Treasury Secretary Robert Rubin in contempt of court for repeated delays in document production and misrepresentations under oath. 33 "As a result of more than a century of malfeasance, the United States government has no accurate records for hundreds of thousands of the Indian beneficiaries nor of billions of dollars owed the class of beneficiaries covered by the lawsuit." 34 It seems very difficult to argue that the federal government, as trustee, has not breached its duties owed when it is impossible to account for past rents and royalties due to the beneficiary. While it is unlikely that the federal government will ever be able to accurately account for past due amounts, the Indian plaintiffs should hope for a fair settlement and force the entire system "to reform in a way that empowers people to make use of their assets"..."It's not money we're talking about here, but freedom." 35

32. Id.
33. Id.
34. Id.
III. Analysis

Non-Indian resources developers are continuously faced with substantial risks under the trust doctrine. In addition to tribal immunity from suit, tribal regulations and potential tribal court jurisdiction, a non-Indian developer will often be troubled by the "potential for one-sided trust duty interpretations and resulting remedies." Moreover, unnecessary restrictions on the conveying and leasing of land will often inhibit resource development with respect to allotted land, all the same. The trust doctrine must be transformed in order for tribes to preserve their culture and provide resources to their members. Capable individual allottees should enjoy the unbridled right to contract to develop or alienate their land. "To the degree the trust relationship is properly characterized as that of guardian and ward, common law principles contemplate that the guardianship applies 'only when and for so long as the ward is lacking legal capacity.' Therefore, some mechanism should be implemented in order to determine whether Native Americans desiring to manage their affairs are competent and capable of doing so. Moreover, reasonable standards should be set in order to measure one's capacity. Although, the guardian-ward analogy does not match all aspects of federal-tribal relations (e.g., it is the ward and not the guardian who retains title to the subject property), such a relationship entertains the idea that "the ward will begin to take responsibility" for its own affairs, at some point. Furthermore, if the relationship is characterized as that of trustee and beneficiary, a change is still in order. "Where a trust is created for a beneficiary and the purpose of the trust is to deprive him of management of the property on account of a legal, physical, or mental disability, and that disability is subsequently removed, the beneficiary can compel termination of the trust." Thus, any allottee or competent tribe should be allowed to compel termination of the trust, and competency may be determined on a case-by-case basis. However, the government should defer to the tribe or individual allottee and offer advice only when such input is solicited.

39. See Slade, supra note 26, at 2A-32 (citing 3 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 337.5, at 2464 (2d ed. 1956)).
A. Sovereignty and Self-Determination

It may be argued that Native Americans have achieved a greater degree of self-determination in some areas, but I do not view self-determination or sovereignty in terms of degrees. I choose to define "sovereignty" and the closely related term, "self-determination," quite simply, as the freedom to choose one's own political, economic, cultural and social future. Although I do not believe this freedom to be absolute, you either have the freedom or you don't. Of course, I would limit the applicability of the term to those "possessing a territory, a population, a government, financial and natural resources, an economy, a culture, a language, and the like." These qualities must be recognized, both internally and externally, to a substantial degree. That is, the people must recognize their own sovereignty, and other peoples must recognize that people's sovereign belief, as well. The greater the degree of external recognition, the stronger the assertion of sovereignty.

The relationship between Native Americans and the federal government should provide Native Americans, as a group, "political, economic, and socio-cultural equality with the rest of . . . society" that allows them to retain their identity as Indians. This right of equality should be recognized as inherent, and not as a concession or privilege from the federal government.

B. Transforming the Relationship

In order to achieve sovereignty, the relationship cannot go unchanged. Whether the relationship is abandoned or modified, a change is in order. Farmers and ranchers are greatly disadvantaged by little access to capital for tools and improvements needed for trust land development, because trust land cannot be sold or mortgaged. Additionally, individual trust lands are often shared by many individuals due to the inheritance rules for individual trusts, thus the administrative costs associated with land management are increased and can make management uneconomical. Research has shown that "trust

41. Porter, supra note 40, at 102.
42. Id.
43. Id.
44. See Pearce, supra note 7, at 384.
45. Id.
47. Id.
lands both individual and tribal produce only about half the value of fee simple lands on a per acre basis," because the inefficiencies of federal control are only mimicked. By converting trust lands to fee simple ownership by the tribes or individuals, optimal economic growth can be achieved. One writer claims that this proposal does not conflict with the cultural integrity of Native Americans, because there is a long tradition of private property in some Indian cultures. I do not believe that Native Americans have to choose between economic growth and cultural preservation, but should be afforded that freedom, nonetheless.

However, it has also been argued that fee simple ownership, while economically promising, may destroy tribal land bases in the longer term, because they will be forced to sell or assign development rights associated with the land in order to function economically. Moreover, if the land base is destroyed, a critical element underlying the sovereignty argument for Native Americans will be lost. This argument is based on the notion that Native Americans will be forced to choose economic growth over cultural preservation, and alienate the land and resources in order to provide for their needs and the needs of their dependents. This notion is evidenced in the case of Babbitt v. Youpee, where individual Indians and several tribes successfully challenged Section 207 of the Indian Land Consolidation Act. The Act provided for "undivided fractional interests in allotted land, passed by devise or descent, to [escheat] to the tribe if the interest represented less than two percent of the total acreage in the parcel and earned less than $100 in any of the five years prior to the date of the decedent's death." The plaintiffs in the Youpee case chose "the economic desirability of individual over tribal land holdings and [acknowledged] the need for maintenance of the tribal land base." Thus, Native Americans have voiced their concerns regarding the trust relationship involving Indian lands and the almost inevitable loss of land and sovereignty should the trust relationship be terminated. However, the trust doctrine, as it exists today, "discourages investment and jeopardizes economic development," because the federal government is able to invalidate leases of Indian land that may not be in the best interest of the tribe.

48. Id. (quoting TERRY L. ANDERSON, SOVEREIGN NATIONS OF RESERVATIONS?: AN ECONOMIC HISTORY OF AMERICAN INDIANS 126 (1995)).
49. Id. (citing ANDERSON, supra note 48, at 144).
50. Id. at 234.
51. Id.
52. Id.
53. Id.
54. Id. at 228.
Obviously, this power has ultimately hindered economic development on Indian lands, as developers fear losing their investment due to reliance on contracts that can be later voided. Therefore, Native Americans must find a way to balance the economic interests as sovereign nations with their interests in protecting their land bases and cultures.\textsuperscript{55} That is, Native Americans (individuals and tribes) should have the ability to choose which interests they wish to compromise, even if they wish to compromise their land base (and ultimately their sovereignty).\textsuperscript{56} “Perhaps that is true freedom for a people.”\textsuperscript{57}

The Indian Self-Determination and Education Assistance Act of 1975 allows the Secretary of Interior to contract with Indian tribal organizations for the performance of functions normally assigned to the Bureau of Indian Affairs.\textsuperscript{58} This is allowed upon request by a tribe pursuant to a tribal resolution.\textsuperscript{59}

However, Professor Porter writes: “Tribal self-determination is denied whenever the United States asserts its trust responsibility and imposes its view of ensuring the well-being of the Indian nations.”\textsuperscript{60} Porter also describes the federal trust responsibility as two-faced, as it serves to protect the Indian nations from “external threats and [regulates] internal affairs.”\textsuperscript{61} The trust responsibility can be characterized as fully consistent with the treaty-based conceptions of protection when exercised to shield Native Americans from the states and other external threats.\textsuperscript{62} But fundamental rights of “Indigenous self-determination” are violated when the trust responsibility is exercised to interfere with internal tribal affairs.\textsuperscript{63} The BIA’s role must be changed completely. Some believe that the notion that tribes are unable to manage their affairs with respect to property ownership is slowly being “eclipsed” in this current era of self-determination, because Native Americans desire the freedom to control development of their land and resources.\textsuperscript{64} However, Slade contends that any modification of the trust doctrine must be carefully thought

\textsuperscript{55}. \textit{Id.}
\textsuperscript{56}. \textit{Id.} at 236.
\textsuperscript{57}. \textit{Id.}
\textsuperscript{59}. \textit{Id.}
\textsuperscript{61}. \textit{Id.}
\textsuperscript{62}. \textit{Id.}
\textsuperscript{63}. \textit{Id.} at 950-51.
\textsuperscript{64}. \textit{See} Slade, \textit{supra} note 26, at 2A-33.
through, because the doctrine serves as the foundation of the relationship. I agree, by suggesting that the trust responsibility should be removed, we run the risk that the federal government may swing the pendulum the other way and tighten existing restrictions. Even still, I believe this risk is less substantial than it has been in the past, and the Cobell v. Norton case may strengthen the suggestion that Native Americans should be free to manage their own affairs, especially when the federal government has failed repeatedly to do so. Moreover, the current litigation may present a perfect opportunity for the Court to step in and modify the relationship.

I believe it is time for Native Americans to manage their own affairs regarding their land and resources currently held in trust. This is precisely what policymakers wished to achieve with the implementation of the Indian Self-Determination and Education Assistance Act of 1975. The legislation was met with controversy, however, because the previous Indian policy was Termination. Even still, the Self-Determination Act allowed for the Indian nations “to assume, under the terms of a negotiated funding contract with the federal government, a share of the administrative responsibilities and resources otherwise assumed by the BIA.” Consequently, the BIA was charged with determining which contracts would receive funding, and this ensured that the policies and responsibilities of the federal government would still be performed by the Indian nations. “Policymakers greatly underestimated how difficult it would be to extricate the BIA from the lives of Indian people.” This is ultimately why the Self-Determination Act has been unsuccessful.

Notwithstanding the fact that Native Americans should enjoy the fundamental right to govern their own affairs, it is extremely expensive and inefficient for the United States to manage Indian affairs. The federal government has spent billions of dollars managing and controlling Indian nations, and it has lost and mismanaged upwards of an estimated $40 billion in rents and royalties due to individual allottees alone. It is difficult to argue that any party is benefiting from the trust relationship, whether it is the United States taxpayer, the Native American, or the resource developer. “The current controversy regarding accounting for trust funds raises the question whether allottees are better served by the United States’ performing these services without charge than they would have been had the allottees handled the

65. See Porter, supra note 60, at 964.
66. Id.
67. Id. at 965.
68. Bullard, supra note 35.
accountings at their own expense." In fact, it appears that the only people benefiting are those who hold jobs with the BIA. Moreover, the BIA has struggled to survive since the Self-Determination Act was passed in 1975.

[The BIA] did not like, and still does not like, the idea that Indian people can take care of themselves and that they as nations have a sovereign right to do so. Having been established upon just the opposite premise — that it is the federal government's exclusive prerogative and responsibility to manage Indian affairs — the BIA resisted the implementation of the Self-Determination Act and the contracting of funds and programs to the Indian nations. Implementation of the Act was hampered by a large bureaucracy that had no incentive or desire to facilitate success when faced with the prospect of losing jobs and power.

Therefore, it may be impossible to reconcile the trust doctrine with a self-determination policy, because the proper incentives are not in place. That is, as long as the BIA has authority to approve or disapprove certain contracts relating to the development of Indian lands, Native Americans will be unable to obtain that freedom. Slade argues, "It would be a folly to do away with the trust responsibility in a stroke." Further, he recognizes (and I agree) that few tribes and individual mineral owners are ready to assume full responsibility for their lands and minerals. However, I contend that there are many, many more non-Indian landowners (and more specifically mineral owners) who are less capable of managing their affairs, but those people rely primarily on the courts to ensure good faith and fair dealing with respect to development contracts. The fact is, the great majority of mineral owners know very little about the exploration and production industry, but most have enough sense to seek legal advice before agreeing to a contract.

Moreover, I recognize that Native Americans bear a special relationship to the federal government and are afforded greater protections in dealings relating to the land, but the stigma associated with such protections may be more harmful and serve to oppress Native Americans further into the future. However, non-Indian developers and creditors will surely look to Indian lands as a last resort for investment due to the difficult bureaucratic processes involved in reaching an agreement. More specifically, developers should not

70. See Porter, supra note 60, at 965 (citations omitted).
fear that Indian landowners might misuse the trust doctrine in order to back out of agreements found to be less favorable than originally thought.

C. Indian Mineral Development Act

Both tribes and individual Indian mineral owners have negotiated agreements and determined the underlying terms themselves over the past fifteen years.  
72 That is, the BIA’s role has diminished significantly in more recent years. The Indian Mineral Development Act (IMDA) has eliminated many obstacles and offered flexibility in the leasing and contracting stage of mineral development.  
73 Pursuant to the Act, tribes are allowed to adopt terms that reflect each party’s interests, because form leases and competitive bidding are no longer required.  
74 The IMDA expressly provides that Secretarial approval may be conditioned only upon compliance with the National Environmental Policy Act, which requires that an Environmental Assessment be had prior to development.  
75 Apparently, it is a rare instance when the BIA recommends or insists upon more favorable terms. Perhaps, the BIA’s role has been transformed from manager to advisor, where the agency assists Native Americans in the process when needed and ensures that the requisite studies are done in compliance with federal regulations. This approach should be taken with respect to all land transactions, and the Federal government should defer to the tribes or individual allottees in the decision-making process.

IV. Conclusion

Colonization began in the late 1800s with the passing of the General Allotment Act. Suffering tribal economies and poverished living conditions instigated the change by those friendly to Native Americans. However, the plan proved to be the most devastating piece of Indian legislation in the history of the United States. Since then, the Federal government’s relationship to Native Americans has primarily been paternalistic. Chief Justice John Marshall, perhaps, is more responsible than any other for the government’s assuming this guardianship role, due to his characterization of the tribes as being “in a state of pupilage.”  
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72. Id. at 2A-30.
73. Id. at 2A-24.
74. Id.
75. Id. (stating that NEPA compliance is required before the Secretary may validly approve a minerals agreement).
The relationship between the American Indian and the Federal government has become increasingly difficult to characterize, but may be changing for the better, as indicated. Although the Indian Self-Determination and Education Assistance Act of 1975 was intended to give more freedom to desiring tribes and individual allottees, the BIA was more interested in preserving its jobs than in loosening its grip on Indians with respect to property ownership. In recent years, the BIA has taken somewhat of a hands-off approach when it comes to transactions such as mineral leasing. That is, the agency has assumed a more support-oriented role rather than its traditional management responsibilities. The current Cobell litigation presents the court with a unique opportunity to re-define the responsibilities of the federal government with respect to Native Americans and their land. This only seems appropriate since the court defined the relationship in the first place. Moreover, the Executive branch of the federal government has proven, all too often, that it is unable to properly manage the corpus of the trust. Native Americans should compel termination of the trust, and demand that the federal government assume a supporting role with respect to property ownership. The current relationship has proven to be extremely inefficient and beneficial to neither party, as the federal government has spent billions of tax dollars and mismanaged billions of dollars in rents and royalties due to individual allottees alone.

Any interested person should be uncomfortable with the existing relationship, and insist that the BIA’s role be transformed to that of a support staff rather than manager. It is time for the Native Americans to manage their own affairs regarding their land and resources.