

WHAT IS THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TOWARDS REMOVED AND UNREMOVED INDIAN NATIONS?

Ann C. Juliano*

The question of removed and unremoved Indian nations competing with each other arises here in New York in the context of the land claims. There is also a land claim which has been filed in Pennsylvania. There are no federally recognized tribes in Pennsylvania and thus, there is an issue of a removed tribe returning to exercise jurisdiction. This raises the next question: what kind of jurisdiction do returning removed tribes have, and, given that removal policy across the country, can these types of cases arise in any number of states?

When considering the federal government's trust responsibility, one must consider the unique context of the federal government. It has many obligations imposed by statutes and then it has the trust responsibility, which does not spring out of a statute. As I have argued before, the federal government has an inherent conflict when it comes to the trust responsibility because the same government officials are making litigation decisions in actions to benefit tribes and in actions brought by tribes against the government.¹ These officials have to decide what positions to take in litigation and, ultimately, the same people are making those decisions for and against Indian interests. So, I usually think of a conflict in the trust responsibility as a conflict between Indian interests and non-Indian interests. The question here is particularly interesting because it is a question of competing tribal interests. Therefore, determining the government's trust responsibility towards removed and unremoved nations, in some instances, is really a question of determining how the trust responsibility should apply when there are competing tribal interests.

I will not address the questions raised by many here of how the federal government should be involved in the land claim litigation, what they should do in the negotiations, or what they should do in the settlement, other than to say I think it is proper that the federal government either intervene in the ongoing claims to support the tribes or bring claims to support the tribes when there have been illegal

* Professor, Villanova University School of Law. This piece is a transcript of remarks delivered at "Going Home: A Symposium on the Return of Removed Indigenous Peoples" held on Nov. 10, 2003 in Syracuse, NY.

1. Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (Summer 2003).

transactions in the past.

There are two questions to consider in the area of competing tribal interests. First, should the federal government seek to acquire lands, the return of lands for removed nations and/or support tribal jurisdiction over such returned lands? Second, in reaching this decision, should the federal government consider the interests of non-Indians or the interests of the unremoved nations?

To answer those questions, you must start with what are the purposes of trust responsibility, and how should we define the trust responsibility?

There are two ways to view the trust responsibility: affirmatively or negatively. In the affirmative view, when we begin a decision-making process, we ask: What must the federal government do, in this particular situation, to fulfill its trust responsibility? How do we define the obligations upon the federal government?

The negative or defensive way to think about the trust responsibility is: if the government takes this action, or after it has acted, is it liable for breach of trust? Note that I am pretending that the second question does not drive the first question. That is, the government does not take action based solely on whether or not it will be liable for breach of trust. The affirmative method of contemplating the trust responsibility is a more powerful tool for tribal advocates because some Supreme Court cases, which I will discuss later, limit breach of trust actions.

The history and development of the trust responsibility has been reviewed earlier today. Let me reiterate a few simple points. It is generally accepted that the trust responsibility arose from the Cherokee Trilogy cases. In *Cherokee Nation v. Georgia*, Justice Marshall created the guardian-ward relationship.² This relationship imposes some obligations on the federal government because the government serves as a guardian. In *Worcester v. Georgia*, Marshall held that tribes possessed sovereign rights which freed them from state control. In addition, he referred to Indian Nations as taking protection from the federal government.³ The positive view is that the government owes protection to Indian Nations and thus, has some obligations to Indian Nations. The judicial and the executive branches have spent the last 170 years trying to give meaning to these obligations.

With one notable exception, the courts have become increasingly

2. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

3. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

willing to apply private trust principles to the federal government's relationship with Indian nations. In a recent Supreme Court case, *White Mountain Apache*, Justice Souter held that elementary trust law confirms the common sense assumption that a fiduciary, who actually administers trust property, may not allow it to fall into ruin on his watch.⁴ It seems pretty clear. If you are administering a trust as a trustee and dealing with trust property, you have a duty "to preserve and maintain trust assets." The Court reached this conclusion even though the statutes at issue that created this duty on the government did not expressly subject the government to duties of management and conservation. The statute did not explicitly require the government to conserve the assets. The fact that the property was occupied by the United States, as trustee, was enough to obligate the government to preserve property improvements. Thus, the United States has an obligation to preserve and maintain tribal assets, including land and natural resources.

I would argue that the more fundamental trust asset that the United States has is a duty to protect tribal sovereignty and tribal jurisdiction. Others have reached the same conclusion. One argued that, under the Cherokee cases, the chief objective of the trust responsibility is to protect tribal status as self-governing entities.⁵

Therefore, as trustee, the federal government should seek to protect the tribes from encroachment by States, should vigorously defend tribes against the exercise of state authority in Indian country, and, of course, should seek to enforce the law. In doing so, the federal government should seek to establish and protect tribal sovereignty and do so in a way to best protect tribal sovereignty. This is where the *City of Sherrill* case comes in.⁶

In the *City of Sherrill* case, the Second Circuit Court affirmed the lower court's decision that the Oneida Indian Nation of New York's purchase of fee-land within its historic reservation, recognized by the 1794 Treaty of Canandaigua, is exempt from state and municipal taxes. Taxation turns on the question of whether or not the properties are in Indian country. Under well-established case law, reservation land is Indian country. It is land set aside by the federal government for Indian use thereby meeting the definition of Indian country. The purchase of the land even in the absence of the United States taking the land into

4. See U.S. v. White Mt. Apache Tribe, 537 U.S. 465 (2003).

5. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

6. See *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2003).

trust, re-establishes the property as reservation land. Because the federal government never ended the reservation status of the land, the land remains as Indian country. The Second Circuit rejected an argument that the land has to be taken into trust for it to be tax-exempt. Further, the Second Circuit rejected arguments that the reservation had been disestablished because the Court found there was no clear Congressional intent to disestablish.

This case provides the federal government with a means to establish an expanding tribal jurisdiction base, without having to take land into trust. Of course, other Indian nations, which are signatories to the 1794 Treaty, may face different results because of the differing treaty language, different evidence, and the possibility of Congressional intent to disestablish.

Now, at this point, I have not discussed the interests of non-beneficiaries to the trust relationship. Under private trust law principles, the interests of non-beneficiaries should not come into play in the government's decision-making in reference to Indian Nations. In representing a beneficiary, the government should be thinking solely of the best interests of the beneficiary.

This leads me to the negative or defensive use of the trust responsibility. If the United States takes a particular position or a particular action, when does that decision amount to a violation of the trust responsibility such that would require the payment of money damages? In a pair of cases, the Supreme Court held that in order to receive money damages, there has to be a substantive right that can be interpreted as giving rise to a claim for money damages.⁷ There must be a comprehensive statutory scheme or the assumption of elaborate control by the government over the property of Indians.

There is no statutory scheme dealing with competing tribal interests. In fact, the land into trust provisions that I am going to talk about in a minute, simply require the consideration of certain factors. The statutes do not say anything about what decision you should reach. There is nothing specific in statute or regulations that would allow a tribe to sue for any particular decision the United States makes with regard to competing tribal interests, in terms of money damages. You could get equitable relief, but not money damages.

The Supreme Court discussed breach of trust and the concept of competing interests in the *Nevada* case.⁸ The Court said that the

7. See *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

8. See *Nevada v. United States*, 463 U.S. 110 (1983).

government may fulfill its obligation to represent Indian tribes in litigation even if Congress has obliged it to represent other interests as well. This case involved water rights where, because the United States was representing other statutorily-imposed interests, it did not ask for as much water for the tribe as it should have. The tribe sought to re-open that decree years later and the Supreme Court said that Congress told the Department of the Interior that it must represent Indian and non-Indian interests. Thus, there is no disabling conflict. The Justice Department has interpreted this holding to mean that there is never a conflict when you deal with competing interests. That is sort of a mantra the Justice Department has. In *Nevada*, there is no conflict. I have lots to say on *Nevada* and the government's use of *Nevada*, but that is for another time.

Lower courts have held that *Nevada* holds merely that the duty of undivided loyalty that the private trustee has does not apply to the United States because it simply cannot. The federal government has too many responsibilities to apply these particular private trust principles. If you combine *Mitchell* and *Nevada*, consideration of non-Indian interests or consideration of competing tribal interests does not amount to a breach of the trust responsibility. The negative concept of the trust responsibility does not provide any aid in determining what the government's response should be to competing tribal interests.

Let us then return to the affirmative concept of the trust responsibility. If the affirmative obligation of the trust responsibility is to protect tribal assets and to expand and protect tribal jurisdiction, the United States should pro-actively take land into trusts. By taking land into trust, the federal government will help tribes avoid the fight of whether or not land is Indian country. The main provision for taking land into trust is 25 U.S.C. §465, wherein the Secretary of Interior is authorized to exercise her discretion to acquire any interest in lands for the purpose of providing lands for Indians. Under the statute and implementing regulations, title is taken in the name of the United States in trust for the tribe. The land is exempt from State and local taxation. The land may be acquired for a tribe in trust status when it is located within the exterior boundaries of the tribe's reservation, within the reservation or adjacent thereto, when the tribe already owns an interest in the land, and when the Secretary determines that the acquisition is necessary for tribal self-determination, economic development, or Indian housing.⁹ An important factor, then, is if the property is located

9. 25 C.F.R. Pt. 151.

within the boundaries of the tribe's reservation. This factor requires a definition of "reservation." The *City of Sherrill* case tells us that any land within a non-disestablished reservation should be considered a reservation. The regulations say an Indian Reservation is any area of land over which the tribe is recognized by the United States as having jurisdiction. It is, to say the least, a circular argument.

When the land is within a reservation, the Secretary has to consider numerous factors. The important one for our discussion is: if you are acquiring land that is in fee status, you have to consider the impact on the State and the municipalities resulting from the removal of the land from the tax rolls.¹⁰ Then, you have to contemplate the jurisdictional problems and potential conflicts of land use which may arise.¹¹ Thus, these factors take into account interests of non-Indian and possibly interests of competing tribes.

If the land to be acquired is off reservation, the Secretary has to consider the same criteria plus the location of the land relative to State boundaries and its distance from the tribe's reservation.¹² The greater the distance from the tribe's reservation the land is the greater scrutiny the Secretary shall give to the tribe's justification of anticipated benefits. Further, the Secretary has to notify State and local governments and give them comment time of the potential impact on jurisdiction, taxes, and special assessments.¹³ Thus, there are different considerations if the land is off reservation.

To summarize then, under the statute and these regulations, the Secretary has to consider jurisdictional problems, tax issues, and has to treat reservation land differently from off reservation land.

A second method to acquire land in trust is under the Indian Gaming Regulations Act (IGRA). IGRA prohibits tribes from gaming on lands acquired by the Secretary after October 17th, 1988, unless the lands are within or contiguous to a reservation (again raising the question of what counts as a reservation) or the tribe can show that the gaming establishment would be in the best interests of the tribe and its members and not detrimental to the surrounding community.¹⁴ In addition, the Secretary must consult with local officials, including officials of nearby tribes, and the governor of the state has to concur.¹⁵

10. 25 C.F.R. § 151.10(e).

11. 25 C.F.R. § 151.10(f).

12. 25 C.F.R. § 151.11(b).

13. 25 C.F.R. § 151.11(d).

14. 25 U.S.C. § 2719(b)(1)(A).

15. 25 U.S.C. § 2719(b)(1)(A).

In other words, the Secretary has to consider non-Indian and competing tribal interests but the statute does not say what the result should be. The Secretary has to consult these parties but the statute does not say what happens if they all oppose it. This is simply a question of administrative procedure. If you can prove the Secretary did not consult these parties, then you can prove the Secretary violated procedure. However, it does not help with our initial question of how the United States is supposed to make its decision of what to do under the trust responsibility.

Case law that deals with competing tribal interests almost always arises in the context of intervention or in the context of indispensable parties. Is there someone who really has to be in this lawsuit? If they are not in this lawsuit, can we still go forward with this lawsuit? As a result, we have cases where the United States is suing or is being sued over action taken with respect to a particular tribe. In essence, the federal government does something with respect to a particular tribe, and another tribe seeks to intervene or argues that an absent tribe is indispensable, but cannot be joined because of their sovereign immunity.

In these cases, the courts have held that where there are several tribes involved, the United States cannot adequately represent the absent tribes. One example is a fish management plan that covers a whole bunch of treaty tribes and a challenge to the management plan by one tribe.¹⁶ Also, there are 23 other absent tribes who are not involved in the lawsuit. The court held that the government could not represent the interests of the absent tribes because the interests all conflict among themselves. The government cannot represent the interests of those absent tribes; therefore, the court dismissed the whole lawsuit.

In another case, there was a plan for a distribution of funds from land that had been held for three different tribes.¹⁷ The three tribes sued in various permutations over different claims. The court said the government could not represent all tribes and that whatever the allegiance the government owes to the tribes as trustee is necessarily split among the three competing tribes.

Perhaps most on point is in a gaming case, in which the Wyandotte Tribe asked for land to be taken into trust, the Secretary approved it, and other tribes sued to stop the land from being taken into trust.¹⁸ Since the

16. *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990).

17. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986).

18. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001).

Wyandottes were not in the case, the Appellate Court addressed whether they had to be brought into the case and, since they cannot be brought into the case because they have sovereign immunity, whether the case should be dismissed. The court said their ability to conduct gaming on their land will only survive if all of the Secretary's determinations are upheld. The Secretary's interest in defending his determinations is virtually identical to the tribe's interest, and therefore, the case may proceed. Even though the tribes who brought the case and the Wyandottes are in conflict, the Secretary can still go forward and represent the Wyandottes.

These cases tell us that the United States cannot represent competing tribes when there is a conflict between tribes and then we allow tribes to intervene to represent their own interests. But again, how to formulate a decision to interfere in the first place remains unclear.

So, what are the options for the United States in trying to formulate a decision in the first place? First, I think that the United States should not take sides between tribes, but sometimes it has to. When one tribe asks for an action and another tribe opposes the action, the United States has to make a decision.

If we reconfigure the situation and say that a tribe asks for some action and a non-Indian interest opposes it, how much weight should the non-Indian interest have under private trust principles? None. Non-tribal interests should have no weight in the consideration of what the trustee should do for its beneficiary. It should only determine what is in the best interests of the beneficiary without contemplating other interests, unless required to do so under those regulations I mentioned. Sometimes the federal government is required to consider other interests. If it is not required to do so, it should not.

You could take the same approach to competing tribal interests. The United States should only contemplate the interest of the tribe requesting the action to the exclusion of other tribal interests. However, the United States has a trust responsibility to all tribes. It really should contemplate what is in the best interests of all tribes. The question then is: as we contemplate all tribes, is there any principled way to order the obligations between removed and unremoved tribes?

You could argue that the United States has made its priorities clear through treaties. Some tribes were allowed to stay, some tribes were not. The obligation is to protect the rights granted under the treaties. However, you could also argue that the U.S. is responsible for removing tribes and, therefore, should support a return to indigenous lands.

Further, it is wrong to suggest that tribes should not act to protect

their own self interests by opposing operations which would impact them economically. To do so would require, through some sense of racial solidarity, a subjugation of interests that we do not require from other sovereigns. We do not expect New York to consider what is in the best interest of Connecticut before it does anything. So why should we expect tribes to adopt that approach?

At bottom, the United States should not decide between competing interests based on a tribe's economic advantage. This is not an appropriate use of the trust responsibility. The United States should consider what is in the best interests of the tribe at issue. To the extent other tribes object, then the United States should consider the effect on the objecting tribes' sovereignty and jurisdiction, with an eye towards, at all times, expanding, improving and strengthening tribal jurisdiction and sovereignty. The loss of economic advantage should not play a deciding role.

Within a specific context of the New York land claims, the U.S. has backed away from the position of seeking ejection of individual landowners. District court judges are not allowing ejection as a remedy against landowners and they will not allow the addition of individual landowners.¹⁹ Money damages are the replacement remedy, which we have heard from some speakers here today is not an acceptable remedy. But purchasing land in the claim area is exactly what Judge McCurn envisioned when he awarded money damages. In the *Cayuga* case, the Court held:

As the Court envisions it, eventually, the Cayugas will have the financial means to purchase land within the claim area from willing sellers. When that is done, the Cayugas will, once again, have a homeland where their culture can thrive and they can reach their objectives such as economic, political and cultural development, which can be reached without ejecting thousands upon thousands of landowners.²⁰

The U.S. should support the use of money damages by claimant tribes, including supporting removed tribes by purchasing land in the claim area. Such support will encourage the establishment of Indian country and encourage tribal jurisdiction.

In the case known as the *Moe Lake* case: "This case pits one group of Indian tribes, who hope to open a new gambling facility, against

19. See e.g., *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000).

20. *Cayuga Indian Nation of New York v. Cuomo*, 1999 WL 509442 (N.D.N.Y. 1999).

another tribe that currently runs another gambling facility nearby.”²¹ Two tribes formed a partnership with a non-tribal entity to acquire a struggling greyhound track and asked Interior to take the property into trust. Another tribe had a reservation nearby and opposed the racetrack. That tribe predicted that the proposed casino would have a detrimental impact on the gaming revenues it derived from its two casinos and the loss of revenue would harm the quality of life on the reservation.

The Bureau of Indian Affairs (BIA) area office decided that IGRA §2719 had been met, so the government could take the land into trust. At this point, federal elected officials and the other tribes got involved. They expressed concern about the effect of the new casino and met with higher ranking BIA officials. Interior then told the partnership that it failed to demonstrate that the new casino would not have a detrimental impact on the surrounding community. The partnership filed suit. This case led to a special prosecutor and an investigation of various employees at Interior. There was a settlement agreement, under which Interior withdrew the opinion. Interior agreed to restart the administrative review and explicitly rejected reliance on the competition by the proposed casino and casinos of other tribes as determinative factor.

I argue that Interior should never have asked, in determining if this particular statute was met, whether some other tribe's casino is going to suffer economically. I do not mean to suggest that an economic loss of advantage does not affect sovereignty and jurisdiction in the ability to help people on the reservation, but that is not an appropriate consideration for the United States.

A second example: The new Ho-Chunk Nation Compact with Wisconsin requires the state not to concur with any positive determination made by the Secretary of Interior that an application meets IGRA when the Ho-Chunks have notified the State that the operation of the proposed establishment will cause a substantial reduction of their gaming revenues at any of the Ho-Chunk Nation's gaming facilities. Unless the tribe that wants to open up the new facility has entered into a binding indemnification agreement with the Ho-Chunk Nation to compensate it for loss of revenue, the Ho-Chunk Nation is relieved of its obligations to make payments to the State if the State concurs without this indemnification agreement.

Two tribes filed suit against Interior based on this Compact, arguing it is unlawful to allow one tribe to interfere with another tribe's

21. See *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000).

efforts by giving the right to be free from economic competition. These two tribes are seeking off-reservation casinos and the United States either affirmatively approved this Compact or let it go into effect without action. Again, I do not think this is appropriate. It is picking between competing tribes and doing it based on economic advantage.

The Senecas have the same kind of non-compete exclusive rights to gamble within a 25-mile radius in their Compact. There is an exception for two non-compacting tribes. The State may negotiate with these tribes to establish a gaming facility. However, these two tribes argue it is a violation of the trust obligation of the United States to include provisions that explicitly restrict the economic opportunities that are available to them. Secretary Norton allowed this to take effect without secretarial action. In doing so, she agreed that by approving the Compact, the Department would essentially ratify an agreement that has the effect of restricting the economic opportunities of the Tonawanda Band and Tuscarora Nation. She argued, however, it does not violate trust obligations because the tribe has no legal right to off-reservation gaming under IGRA. She notes that future compacts may pit tribe against tribe. So, I think that these two Compacts violate the trust responsibility, by which I do not mean that there is an ability to seek money damages, but that the United States is inappropriately considering the interests of a competing tribe.

The United States, in considering removed and unremoved nations' interests, should contemplate what is best for the purpose of strengthening and supporting tribal jurisdiction and tribal sovereignty. If that means that the federal government has to ignore what is going to happen to another tribe's casino, then so be it.