



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS  
WASHINGTON, D.C. 20242

September 19, 1968

*Vander*  
IN REPLY REFER TO  
Assistant Commissioner  
Economic Development  
310 W

MEMORANDUM  
RESPECTING  
FEDERAL TRUST RESPONSIBILITIES FOR MANAGING INDIAN FORESTS  
WITH POINTS AND AUTHORITIES IN SUPPORT

SUMMARY AND CONCLUSIONS

I. A Covenant With The Indians:

By the Constitution, as acted upon by the Congress, construed by the courts, effectuated by the Executive Branch of the Government, the Nation entered into a trust arrangement with the Indians and Indian Tribes. It is an executed covenant acted upon by the Indians, who relinquished their vast domain in consideration for assistance from the Nation. That covenant which operates in presenti and in perpetuity, is part of the organic law; it is equal in dignity to all other features of that organic law; it is part of the supreme law of the land.

II. The Trust Has Been And Must Be Fulfilled By The Three Great Branches Of The Government:

The trust arrangement between the Nation and the Indians has been - albeit at times in a faltering manner - and must be carried out in keeping with the Constitutional mandate. Objective of the trust in the ultimate is the betterment of the individual Indian for whom the covenant was entered into on both sides.

III. The Nation's Trust Relationship With The Indians May Be Equated With A Private Trust Relationship Only In The Most General Way:

Stemming from the Constitution; subject to the principles of the separation of powers among the three great Branches of Government, the trust relationship partakes of the elements of a private trust arrangement only in the most general way. As distinguished from the private trust, the officials fulfilling the Nation's fiduciary obligations to the Indians must look to the Constitution, the Congress which makes the laws and appropriates the funds, and to the courts which interpret the laws relating to

Summary and Conclusions -

the trust. They are, moreover, caught up in the milieu of politics - essential to a democracy.

IV. Executive Authority For Fulfillment Of The Trust Has By The Congress Been Invested Almost Entirely With The Secretary Of The Interior And The Commissioner Of Indian Affairs:

Congress has invested the Secretary of the Interior and the Commissioner of Indian Affairs with the responsibility and obligation to carry out the Nation's part of the trust arrangement entered into with the Indians. Performance of that trust has historically related, and now relates, to the entire gamut of human and community life. They are required to perform their duties as agents for the Nation with the highest degree of good faith, solely for the benefit of the Indians.

V. Broad Discretionary Powers Within The Scope Of Their Authority, Resides In The Secretary Of The Interior And The Commissioner Of Indian Affairs And The Officials Acting For Them; They Are Required To Exercise A High Degree Of Care, Skill And Diligence:

Broad discretion resides in the officials to the extent they are authorized and directed by Congress to fulfill the Nation's trust responsibility with the Indians. They are empowered, within their authority, to determine how best to achieve the "goals" for the Indians announced by the President. They are free to carry out Congressional mandates in the exercise of their discretionary powers. They are, however, required to perform their duties with the care, skill and diligence commensurate with their professional capacities. The Judiciary is prohibited from substituting its will for that of the officials charged with the trust obligation when acting within the scope of their authority, although abuse of discretion is subject to judicial restraint.

VI. Federal Trust Responsibilities For Managing Indian Forests Is, Of Course, Within The Purview Of The Nation's Trust Relationship With The Indians; A Single Aspect Of It, And Subject To Principles Reviewed Above:

Indian Forest operation and management is an integral part of the trust relationship between the Nation and the Indians. Congress has established the "sustained-yield" principle as the criterion for administration

of the Indian Forests, reflecting the long range aspect of the trust responsibility. However, the operation and management of the Indian Forests has as its primary objective the Presidential goals for the betterment of the Indians which does not necessarily envision an operation and management for the highest profits which might emanate from the "sustained-yield" principles. All specific factors alluded to in the accompanying memorandum relative to Indian forest management, are within the purview of the trust relationship between the Nation and the Indians.

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MEMORANDUM  
RESPECTING  
FEDERAL TRUST RESPONSIBILITIES FOR MANAGING INDIAN FORESTS  
WITH POINTS AND AUTHORITIES IN SUPPORT

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As directed, a review has been undertaken of the law respecting the "Federal Trust Responsibilities For Managing Indian Forests." Attached is a general outline which was furnished at the time of the original request, setting forth the nature of the problems both general and specific, as they relate to the functions of the Branch of Forestry, Division of Economic Development, Bureau of Indian Affairs.

In the Message dated March 6, 1968, the President has this to say relative to the Country's obligation to the Indians: <sup>1/</sup>

"Our goal must be:

"--A standard of living for the Indians equal to that of the country as a whole.

"--Freedom of Choice: An opportunity to remain in their homelands, if they choose, without surrendering their dignity; an opportunity to move to the towns and cities of America, if they choose, equipped with the skills to live in equality and dignity.

"--Full participation in the life of modern America, with a full share of economic opportunity and social justice."

Reference is also made to a document dated February 28, 1968, entitled "Prospectus Of The Indian Timber Issue Study." In that <sup>1/</sup> 114 Cong. Rec. No. 36 (March 6, 1968), pp. S 2311-2316.

"Prospectus" it is stated that the objectives of the study, of which this review is a part - " \* \* \* is to analyze the benefits of the forestry program in the Bureau of Indian Affairs to basic Bureau objectives and to review the method of financing the program." From that source this statement is also taken:

"The three basic objectives of the Bureau of Indian Affairs are:

- "1. Higher Indian standards of living.
- "2. Assumption by Indians and Indian tribes of the responsibility for managing their own funds and other resources.
- "3. Political and social integration of Indians into American life."

Flowing from the above quoted goals announced by the President; from the stated objectives of the Bureau of Indian Affairs, is this unavoidable conclusion: There has been set forth a determination by the Executive Branch of the Government; an interpretation of the "Trust Responsibility" of the Nation and the Bureau with the prime responsibility to the American Indians, including but in no sense limited to the nature, measure and extent of the "Federal Trust Responsibilities For Managing Indian Forests," to which this consideration is primarily directed.

In the succeeding phases of these comments the source of the authority pursuant to which the Nation is invested with the responsibility and benefits flowing to it as Trustee for the Indians and Indian Tribes will be reviewed. That trusteeship as it pertains to the three great branches of the Government - the Legislative, Executive and Judicial - will be discussed in some detail.



Constitution is the Source of the Authority for the Trust  
Relationship Between the Nation and Indians and Indian Tribes

Genesis of the relationship between the Nation, the Indians and Indian Tribes stems from the very earliest moments of the discovery of the Americas and their colonization. Great Britain and the other great powers of the sixteenth and seventeenth centuries established their relationships with the Indians who occupied the lands which each claimed in the New World. Treaties with the Indians were frequently entered into purporting to guarantee the integrity of the lands which were retained by the Indians as their homes and abiding places. By reason of Britain being the principal source of the laws ultimately to govern this Nation, its declarations in regard to the Indians warrant comment. The Crown emphasized through its representatives that the Indians were entitled to justice and that "The boundaries of your hunting-grounds will be accurately fixed, \* \* \*."<sup>2/</sup> Continuing from the same authoritative and historic reference, this summary of England's relationship with the Indians is set forth:

<sup>2/</sup> Worcester v. Georgia, 31 U. S. 515, 546 (1832).

"The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says, 'Lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but as you know that, as your white brethren cannot feed you when you visit them, unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them.'"

"Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

"This was the settled state of things when the war of our revolution commenced." (Emphasis supplied) <sup>3/</sup>

It is noteworthy that Great Britain acknowledged the rights of the Indians; that they were in good conscience and justice to be respected. Yet there was no hesitancy on the part of Britain to impose its will by force upon them.

Spain, it is reported, refused to enslave the Indians and acknowledged their ownership of the lands which they occupied. The Dutch and early colonists respected the Indian rights, treating with them as the owners of their lands. <sup>4/</sup> It is, of course, a historical fact that William Penn took cognizance of the rights of the Indians and paid them for their lands. However, it is evident that for the most part the conflict between good conscience and greed for the Indian lands, in the ultimate, was resolved in favor of greed. Moreover, that conflict between sound moral principles and the desire for Indian lands undoubtedly contributed to this observation by the Supreme Court:

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." (Emphasis supplied) <sup>5/</sup>

<sup>3/</sup> Worcester v. Georgia, 31 U. S. 515, 548 (1832).

<sup>4/</sup> Federal Indian Law, page 164.

<sup>5/</sup> United States v. Kagama, 118 U. S. 381 (1886).



Chief Justice Marshall labored greatly in an effort to analyze that "anomalous \* \* \* character \* \* \*," when he determined that an Indian Tribe was neither a State nor a foreign nation when the Cherokees sought to invoke against Georgia the Highest Court's jurisdiction.<sup>6/</sup> On the subject - of the unique relationship - he stated:

"The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."

He then summarized as follows:

"Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."<sup>7/</sup> (Emphasis supplied)

While the Supreme Court was tacitly admitting that the Nation's relations with the Indians were nebulous - to say the least - there was at least agreement that it was the Nation and not the States which had the responsibility to resolve the problems. That determination stemmed from the failure of the Colonies and then the States to establish the proper rapport with the Indians.

<sup>6/</sup> Cherokee Nation v. Georgia, 30 U. S. 1, 15 (1831).

<sup>7/</sup> Ibid., 30 U. S. 1, 17 (1831).

It was recognized at the Constitutional Convention that the ambiguous language and wholly inadequate provisions in the Articles of Confederation could not be tolerated. There it was provided that:

"The United States in Congress assembled shall also have the sole and exclusive right and power of regulating \* \* \* the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated \* \* \*." <sup>8/</sup>

James Madison in the Federalist had this to say about the last quoted provision when urging the adoption of our Constitution:

"The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the Legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its Legislative jurisdiction, can be regulated by an external authority without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case, in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain." <sup>9/</sup>

In lieu of the wholly objectionable language of the Articles of Confederation, this provision was adopted as a part of the Constitution of the United States of America:

<sup>8/</sup> Articles of Confederation, 1777, Article IX.

<sup>9/</sup> Federalist and Other Constitutional Papers, Scott, page 236.

"Section 8: The Congress shall have Power:

"To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; \* \* \*." 10/

Swept away by that clause of the organic law are all doubts as to the plenary power of the Nation in regard to its relationship with the Indians. These statements made in a keystone opinion, reflect the nature and breadth of the above quoted Constitutional provision:

"That instrument [the Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes.

\* \* \*

"By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post-offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers. This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and, at other times, by enactments of congress. In this respect they have been placed, by the federal authority, with but few exceptions, on the same footing as foreign nations." 11/

Based on the review of the fundamental law giving rise to the trust relationship between the United States and the Indians together with the construction placed upon it by the Supreme Court, the nature and breadth of that trust responsibility will now be considered.

10/ Constitution of the United States, 1787, Article I, Sec. 8, Cl. 3.  
11/ Worcester v. Georgia, 31 U. S. 515, 559; 580-581 (1832).



Stemming from the Constitution, the Unique Trust Relationship  
Between the Nation and the Indians is Part of the Organic Law  
and is the "Supreme" Law of the Land

(a) Supreme Law of the Land necessarily embraces  
the Trust Obligations to the Indians:

As reviewed above, the duties, responsibilities and benefits to the Nation in connection with its Trust relationship with the Indians stems from this proviso of the organic law:

"Section 8: The Congress shall have Power:

"To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; \* \* \*." 12/

Any consideration of the Constitutional powers of the United States of America respecting Indians or the development, utilization, and conservation of their timber resources necessarily entails a discussion of the nature of the National Government. On the subject this statement has been made: "The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."<sup>13/</sup>

A correlative principle of Constitutional law, equally important as the tenet enunciated in regard to the character of the powers of the United States, is that the Constitution "and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

12/ Constitution of the United States, 1787, Article I, Sec. 8, Cl. 3.

13/ Cooley's Constitutional Limitations, 8th ed., Carrington, vol. 1, Chap. II, p. 11.

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." <sup>14/</sup> By that provision it is manifest that the framers of the Constitution intended to establish a government, sovereign in its sphere of delegated authority. <sup>15/</sup> That sound doctrine underlies the Nation's trust relationship with the Indians which must be contemplated in the light of that "supreme" authority.

Respecting the powers conferred upon the National Government, Chief Justice Marshall who, as stated above, first declared the Trust relationship between the Indians and the Nation, had this to say about the Constitutional authority: "If any one proposition could command the universal assent of mankind, we might expect it would be this -- that the government of the Union, though limited in its powers, is supreme within its sphere of action." <sup>16/</sup> Specifically in regard to the cited clause of the Constitution, Justice Marshall continued: "It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied <sup>17/</sup> in it, that the expression of it could not make it more certain." He stated: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it.

<sup>14/</sup> Constitution of the United States, Article VI, Cl. 2.

<sup>15/</sup> United States v. California, 332 U. S. 19 (1946).

<sup>16/</sup> McCulloch v. Maryland, 17 U.S. 315, 405 (1819).

<sup>17/</sup> Ibid., 17 U.S. 315, 427 (1819).

Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends."<sup>18/</sup> Moreover, the Federal Government is not only supreme in fulfilling its delegated responsibility, it is free to accomplish the ends for which it was established, without interference from the States.

Having delineated the broad scope of the Nation's delegated powers, it is essential briefly to review the manner in which those powers are to be exercised under the Nation's system of checks and balances, which it must be observed, has resulted in contradictions in fulfillment of the trust obligations.

(b) Separation of Powers:

In the performance of its delegated authority it does not matter whether the United States is fulfilling its trust responsibility, or assisting in the development of the arid west, or acting in furtherance of commerce between the States, or endeavoring to prevent aggression, its acts are all of equal dignity. That conclusion is premised upon the decision of the Supreme Court of the United States in which it declared: "The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental."<sup>19/</sup>

Three paramount branches of the Federal Government, the Legislative, Executive and Judicial, exercise the powers conferred

<sup>18/</sup> McCulloch v. Maryland, 17 U.S. 315, 424 (1819).

<sup>19/</sup> Federal Land Bank v. Bismarck Co., 314 U.S. 95, 102 (1941).



upon it by the Constitution.<sup>20/</sup> Regarding the division of the powers of government as prescribed by the provisions of the Constitution, Justice Story stated: "The object of the Constitution was to establish three great departments of government; \* \* \*. The first to pass laws, the second, to approve and execute them, and the third to expound and enforce them."<sup>21/</sup> Admittedly, "The Federal Constitution nowhere declares that the three branches of the Government shall be kept separate and independent."<sup>22/</sup> Nevertheless, in speaking of the separation of powers under the Constitution of the United States the Supreme Court emphasized: "In the main, \* \* \* that instrument [the Constitution] the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another."<sup>23/</sup> Thus it is recognized that the respective branches of

<sup>20/</sup> Those branches are defined by that document as follows: "All legislative Powers herein granted shall be vested in a Congress of the United States, \* \* \*;" (Article I, Section 1). "The executive Power shall be vested in a President of the United States of America;" (Article II, Section 1). "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Article III, Section 1).

<sup>21/</sup> Martin v. Hunter, 14 U. S. 304, 328 (1816).

<sup>22/</sup> Ex Parte Grossman, 267 U.S. 87, 119 (1924).

<sup>23/</sup> Kilbourn v. Thompson, 103 U.S. 168, 191 (1880).

government must exercise the powers with which they have been invested and may not encroach upon the area of authority conferred upon the others.

A concomitant principle is the prohibition against the delegation by those branches of government of the powers conferred upon them by the Constitution. That principle has been repeatedly applied in regard to the powers vested in Congress. This statement respecting the general subject is particularly pertinent: "It is a cardinal principle of our fundamental law, inherent in our constitutional separation of the government into three departments and the assignment of the law making function exclusively to the legislative department, that the legislature cannot abdicate its power to make laws, or delegate this power to any other department or body."<sup>24/</sup> On the subject the Supreme Court of the United States commented as follows: "Congress cannot transfer its legislative power to the State - by nature this is non-delegable."<sup>25/</sup>

Congress Has Invested the Secretary of the Interior and the Commissioner of Indian Affairs with the Power and Obligation to Exercise the Functions of the Executive Branch of the Government in Fulfilling the Trust Relationship of the Nation with the Indians

Executive power - the power to act, to administer the trusteeship - resides almost exclusively with the Secretary of the Interior.

Reference in that regard is made to this Congressional enactment:

"There shall be at the seat of government an executive department to be known as the Department of the Interior and a Secretary of the Interior, who shall be the head thereof."<sup>26/</sup>

<sup>24/</sup> Panama Refining Co. v. Ryan, 293 U.S. 388 (1934), note 79 L.ed. 476.

<sup>25/</sup> Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1919).

<sup>26/</sup> 5 U.S.C. 481.

Invested in the Secretary of the Interior are the broad powers of administration, including but not limited to, the authority to issue required regulations, to direct the officers and agents of the Department in fulfillment of legal responsibilities and otherwise to carry out the will of Congress. <sup>27/</sup> Congress has, moreover, "charged" the Secretary of the Interior "with the supervision of public business relating to the following subjects: \* \* \* 10. Indians \* \* \*." <sup>28/</sup> Congress has likewise provided that: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." <sup>29/</sup>

There have been reviewed the salient features of the Constitutional and Congressional investitures of power in the Secretary of the Interior and the Commissioner of Indian Affairs. Here it is essential to allude to an all-important element in the exercise of Executive authority.

Freedom from Restraint in the Proper Exercise of  
Invested Discretionary Powers in Fulfilling the  
Trust Relationship as to the Administration of  
Indian Forests

Underlying sound administration by the Secretary of the Interior and the Commissioner of Indian Affairs of the Indian forests are these precepts of the law:

<sup>27/</sup> 5 U.S.C. 22.

<sup>28/</sup> 5 U.S.C. 485.

<sup>29/</sup> 25 U.S.C. 2; See also 25 U.S.C. 1, 1A.



"The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions \* \* \* which are, by the constitution and laws submitted to the executive, can never be made in this court." 30/

On repeated occasions the right of the Secretary of the Interior freely to exercise discretionary power invested in him has been sustained. On the subject of the Secretary's broad authority the Highest Court has stated: "The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of 31/ the Interior, and such discretion cannot be reviewed by the courts."

The broad powers of the Executive Branch in carrying out the will of Congress was reviewed in detail in the Sandoval Case involving the Pueblo Indians: "'\* \* \* it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.'"

"\* \* \* the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of

30/ Marbury v. Madison, 5 U. S. 137, 170 (1803).

31/ United States v. Ide, 277 Fed. 373, 382 (CA8, 1921); affirmed 263 U. S. 497 (1924).

guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling. \* \* \* If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."<sup>32/</sup>

In summary, this general authoritative statement, as to the freedom from review of the proper exercise of discretionary power by officials, will control in regard to the administration, protection, and preservation of the Indian Forests under this Nation's trust responsibility:

"The judiciary may not encroach upon or usurp the executive function. Encroachment cannot be accomplished by judicial review of purely executive powers.

"Closely akin to the problem of judicial encroachment upon executive power is the situation in which an attempt is made to obtain judicial interference in executive functions. It is a general rule that the courts are without the power to interfere in the performance of executive duties, particularly where the executive must exercise discretion in the performance of constitutional or statutory powers; the courts have no general supervising power over the proceedings and actions of the various administrative departments of the government and will not interfere with conclusions of the executive department, fairly arrived at and with substantial evidence in support, and in the bona fide exercise of its discretion, whether the action is upon

<sup>32/</sup> United States v. Sandoval, 231 U.S. 28, 46-47 (1913).

mixed questions of law and fact, or of law alone, until the final accomplishment of matters pending before them.<sup>33/</sup>

Further in summary respecting the independence of the official charged with discretionary responsibility - here the manner in which Indian Forests are to be administered - the same authoritative source has this to say:

"In accordance with the general rule, the courts will not interfere with executive action relating to executive, administrative, political, military, naval, international, or territorial matters, or matters relating to immigration, internal revenue, the enforcement of law, or the removal of officers."<sup>34/</sup>

This caveat must be kept in the foreground: There must not be an abuse of that discretion or the failure to exercise it, as in the case of the Menominee timber blow-down.<sup>35/</sup>

Standard of Diligence Required in Administering  
the Trust Estate - here the Indian Forests

There has been reviewed above, based upon the Constitutional concepts of the separation of powers among the three great branches of Government, the freedom that an official in the Executive Branch enjoys in the fulfillment of his responsibilities. It is important that the private trustee is similarly free from restraint in the absence of abuse of his discretion. From the American Law Institute, Trusts, this statement on the subject is taken:

<sup>33/</sup> 16 Am. Jur.2d, Constitutional Law, Sec. 224, p. 467-468.

<sup>34/</sup> 16 Am. Jur.2d Constitutional Law, page 470.

<sup>35/</sup> The Menominee Tribe of Indians, 101 Ct. Cls. 22 et seq. (1944).



"Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." 36/

From that same source, the criteria which determine whether the trustee has fulfilled his obligation, are taken:

"In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries." 37/

Respecting the exercise of administrative discretion, this statement has also been made: "The trustee may be given discretion whether to exercise a power or not to exercise it; and where he is directed to exercise a power, the time and manner of its exercise may be left to his discretion. The discretionary power may relate to the business administration of the trust, or it may relate to the distribution of income or principal.

"To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. The court will not substitute its own judgment for his." 38/

36/ American Law Institute, Trusts, Section 187, page 479

37/ Ibid, Section 187, pp. 480-481.

38/ III Scott on Trusts, 3d ed., Section 187, p. 1501.

It is important to observe, however, that the courts are explicit in the manner in which the trustee must perform: "Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This [exercise of discretion] ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment."<sup>39/</sup>

General criteria as to the care, diligence, and skill required by the Commissioner of Indian Affairs and other officials in administering Indian Forests, are at best instructive. On the general proposition the American Law Institute states: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and

if the trustee has greater skill - [here professional foresters, accountants, tax experts, contract negotiators, administrators, lawyers] - than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has."<sup>40/</sup>

A concomitant proposition - again most general - is that, "The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property."<sup>41/</sup> He is, moreover - in keeping

<sup>39/</sup> III Scott on Trusts, 3d ed., Section 187, p. 1501.

<sup>40/</sup> American Law Institute, Restatement, Trusts, Section 174.

<sup>41/</sup> Ibid., Section 175.

with his skill, here professional skill - " \* \* \* under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."<sup>42/</sup>

It will be recalled in Menominee that the Congress in its consent that the National Government could be sued, declared, among other things:

"At the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations."<sup>43/</sup>

From the findings, conclusions and the judgment in the last cited decision it is evident that the broad precepts of the law reviewed above were applied against the United States of America. As a consequence great care must be taken to assure compliance with the concepts, thrusts, tone and temper, both as to the Congressional enactment set forth above, irrespective of its narrow application, and the decision which emanated from it.

In a companion case to that last cited, the court had this to say with respect to the performance of the trust responsibility owing by the United States to the Indians:<sup>44/</sup>

"We further think that the provision of Section 3 of the jurisdictional act concerning the principles applicable to an 'ordinary fiduciary' add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee.

<sup>42/</sup> American Law Institute, Restatement, Trusts, Section 176.  
<sup>43/</sup> The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 22, 23 (1944).  
<sup>44/</sup> The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 10, 19 (1944).



In Seminole Nation v. United States, 316 U.S. 286, Mr. Justice Murphy, speaking for the Supreme Court said

'\* \* \* this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'

Because of the nature of the relationship between the Nation and the Indians, stemming from the Constitution, it is impossible sensibly to equate the obligations which primarily reside with the Secretary of the Interior in the management of Indian Forests, and those of private trustees.<sup>45/</sup> The breadth of the Secretary's responsibilities in that regard is set forth in the goals declared by the President and quoted on the first page of this consideration. The Secretary's obligation is not, of course, limited to the Presidential pronuncio. Rather - by reason of the separation of powers discussed above - the Secretary must look to the will of Congress as spelled out in legislation; to the decisions of the courts which reflect the Nation's trust as viewed by the Judicial Branch of our Government.

Contrast the Secretary's obligation in carrying out the Nation's trust with that of the private trustee whose obligation is to administer a forest for private successive beneficiaries. The latter official can normally look to a single document or court order and from it ascertain with reasonable certainty the nature, extent and measure of his responsibility. He is not, as is the Secretary, caught in the milieu of politics, which is an essential element in

<sup>45/</sup> See attached "Federal Trust Responsibilities For Managing Indian Forests," paragraphs 1 and 2.

our democratic form of government. When a private trustee in administering forest lands for successive beneficiaries, " \* \* \* could properly cut so much of the timber as represents the annual growth, the proceeds of which are payable as income to the life beneficiary" and it was found he " \* \* \* cut more than the annual growth and it was held that the proceeds should be apportioned, the life beneficiary receiving such portion as represented the annual growth". Resolution of the trustee's error was accomplished by investment of the proceeds from the sale of the timber in excess of annual growth, for the beneficiaries who were entitled to the forest income after the termination of the trust for the life beneficiary. <sup>46/</sup> Hence by an elemental process of accounting, the trustee, through court direction, was assisted in fulfilling his trust obligation, according to the successive beneficiaries that to which they were entitled.

Neither the Secretary nor the Commissioner, with their accountability to both the Congress and the courts, would in all probability attain so easy an accommodation. However, these facts do not in any sense abridge the principles respecting their powers to exercise discretion free from restraint or interference by the courts when they act within the authority conferred upon them.

On that background reference is now made to the specifics of the problem of administering, preserving and protecting the Indian Forests as set forth in the attached memorandum entitled "Federal Trust Responsibilities For Managing Indian Forests."

<sup>46/</sup> III Scott on Trusts, 3d ed., Section 239.3, p. 2046.

Comments on Specific Activities Respecting  
Administration of Indian Forests

General criteria respecting the measure of care, skill and diligence required of a trustee in the performance of his responsibilities as they relate to the Secretary of the Interior, the Commissioner of Indian Affairs, and other officials, have been reviewed. Complexities - not barriers - in fulfilling the Nation's trust responsibilities have been discussed. It has been pointed out that in the task of administering Indian Forests there is a broad area of discretion which must be properly exercised within the realm of statutory and decisional law. Compliance with those criteria accords freedom to determine the proper course to pursue in attaining the broad goals announced by the President which are identical in substance with the objectives of the Bureau of Indian Affairs.

Guidelines have been established by the Congress in regard to the Indian Forests. They are controlling. Primarily the Congress has declared:

"§ 466. Indian forestry units; rules and regulations

"The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes. June 18, 1934, c. 576, § 6, 48 Stat. 986." 47/

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47/ 25 U.S.C. 466.



Answer to inquiries and propositions to which this consideration is primarily directed is the explicit mandate to the Secretary of the Interior that "the operation and management of Indian forestry units" be "on the principle of sustained-yield management \* \* \*." It is observed that "sustained-yield" is a term of art to which the following accepted connotation has been ascribed:

"Yield, sustained.

- "1. As applied to a policy, method, or plan of forest management, implies continuous production with the aim of achieving, at the earliest practicable time, an approximate balance between net growth and harvest, either by annual or somewhat longer periods.
- "2. As applied to forest and range management, implies measures which will maintain the productive capacity of the land.
- "3. As applied to a forest, refers to one which is under sustained-yield management.
- "4. In forest finance, refers to a forest property, the current income from which is equal to the interest on its capital value; if equality is achieved on an annual basis, the property is characterized as an annual sustained yield property; if by longer periods, as a periodic sustained yield property." 48/

A review of the rules and regulations issued by the Secretary of the Interior reveals compliance with the Congressional mandate respecting sustained yield.

Although profit is one of the objectives of the rules and regulations, by reason of the Nation's trust the Indian forestry

48/ Forestry Terminology - A Glossary of Technical Terms Used in Forestry by The Society of American Foresters, Copyright 1958 3d ed. (1964).

49/ 25 C.F.R. 141.3.

operation and management contemplate far more. In that regard the "Objectives" provide for: "The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform."<sup>50/</sup>

That objective comports fully with the Presidential goals and the functions of the Bureau of Indian Affairs. It is, nevertheless, clear beyond question that "sustained-yield" - at a profit - does not necessarily promote a better way of life for the individual Indian, which, in the ultimate, is the sole reason for the Nation's trust responsibility. Quite obviously the forest program is to be administered to the end that there is a coalescence among the factors which contribute to the advancement of the Indians who are entitled to proceeds derived from the forests. It encompasses those Indians who today enjoy the benefits of the forestry program, including training in operation and maintenance, and job opportunity, with the successive generations yet to be born who are likewise beneficiaries under the trust. Though the Secretary has directed adherence to "sound silvicultural principles"<sup>51/</sup> he has nevertheless declared those sound practices to be in accordance with the "Objectives" one of which is quoted above.

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<sup>50/</sup> 25 C.F.R. 141.3 (3).  
<sup>51/</sup> 25 C.F.R. 141.4.

It is abundantly clear from the rules and regulations that the operation and maintenance of the Indian Forests is but one of many facets of the broad program undertaken by the Nation, prime purpose of which is the human being and his betterment, including but not limited to the all-important aspect of human dignity. On that basis there will be assessed the elements set forth in the "Federal Trust Responsibilities For Managing Indian Forests":

a. Timber sale administration; b. Forest protection, including fire protection; c. Forest plans and surveys, including growth studies; d. Forest development, including reforestation, thinning and pruning. Each of the items is most assuredly an imperative activity in regard to Indian Forests. There may be others.

Reference is made in the attached memorandum respecting the Federal Trust Responsibilities to: (1) recreation, fish, wildlife and watershed values; (2) establishment of Indian lumber enterprises increasing employment; (3) forest activities on timbered allotments.<sup>52/</sup> Those activities, it is understood, are part of the overall forestry program discussed above. It is, of course, very basic that the United States may not use Indian forest, lands or water for non-Indian purposes, for the reason that a trustee may not act in regard to the property of the "ward for the benefit of the guardian."<sup>53/</sup>

It is clear that all of the activities are essential, not only in regard to the present Indian beneficiaries but, as noted above,

<sup>52/</sup> Federal Trust Responsibilities For Managing Indian Forests, 3 c, e, f.

<sup>53/</sup> Squire v. Capoeman, 351 U.S. 1, 8 (1955).

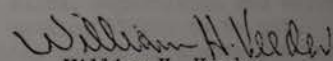


the successive beneficiaries yet to come. In substance the forestry activities are of necessity directed towards the present and in perpetuity.

It is free from doubt that the trust relationship, having its genesis in the Constitution, is a covenant between the Nation and the Indians that is an integral part of this Country's organic law, having equal dignity with all other features of it. The forest activities are a part of the fulfillment of the trust obligation, all as reviewed above.

Conclusion

The conclusions are summarized in the opening pages of this consideration.

  
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Enclosure

### FEDERAL TRUST RESPONSIBILITIES FOR MANAGING INDIAN FORESTS

To best serve the purpose, it would be desirable for a comprehensive definition of the trust responsibilities to explain each of the following:

1. The customary or common law responsibilities of a private trustee charged with management of property, citing special circumstances relating to forest lands.
2. The special trusteeship responsibilities of the Federal Government with respect to forest land and income of Indian tribes and individuals. Where they differ from those of a private trustee, the differences should be identified by citing appropriate statutory or other references.
3. The Federal Government's trusteeship responsibilities specifically related to the performance of the various activities of the Bureau's forestry program. The principal activities are:
  - a. Timber sale administration, including pre-sale cruises and appraisals, advertisement of sales, supervision and enforcement of contract provisions, marking timber to be cut, scaling or otherwise determining volume of timber cut and removed, and collecting and accounting for payments received from the sales.
  - b. Forest protection, including all fire prevention, suppression, and emergency suppression activities, hazard reduction, administration of fire protection contracts with other agencies, forest pest control, and forest law enforcement.
  - c. Forest plans and surveys, including growth studies, determination of allowable cuts and preparation of detailed forest management plans, based on principles of sustained yield, and considering recreation and fish and wildlife potentials, and watershed values.
  - d. Forest development, including reforestation, afforestation, timber stand improvement such as thinning and pruning, and site improvement.

- e. Encouraging and assisting in the establishment of Indian logging and wood-using enterprises, and increasing Indian employment.
- f. Other activities, related to overall management of Indian forest properties. These include: work related to recreational activities, improvement of fish and wildlife habitat, and cruises for supervised sales of timbered allotments.

It may be necessary to consider allotted lands separate from tribal lands.

Determination of expenditures directly related to trusteeship responsibilities will be a basic consideration in the study.