TRUST and Sovereignty

American Indians and the United States Constitution

by Robert Miller, Associate Professor, Lewis & Clark Law School

When Christopher Columbus discovered the New World in 1492, an estimated ten to thirty million native people were living in today's Mexico, United States, and Canada. They lived under governments of varying sophistication and complexity, which were viable and fully operational political bodies controlling their citizens and their territories. These native governments were an important factor in the development of the United States government we live under today.

The European countries that colonized North America dealt with the native tribal governments as sovereign governments, that is, as governments that had independent and supreme authority over their citizens and territories. Especially in the area of the present-day United States, the European powers interacted with American Indian tribal governments through official diplomatic means. Starting with England as early as 1620, and then France, Spain, and Holland, Europeans negotiated with Indian tribes through official government-to-government council sessions and entered treaties that recognized tribal governmental control over the territory of the New World. The European countries wanted to legitimize transactions for acquiring Indian lands through official and legal means by using treaties that other European nations would have to honor. The United States adopted this tradition of dealing with Indian tribes as sovereign governments from the European powers.

The Revolution

When the 13 American colonies decided to rebel against England and seek their independence, they formed the Continental Congress. This war-time body operated from 1774 to 1781 and dealt with Indian tribes on a diplomatic, political basis. They

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signed one treaty with the Delaware Tribe in 1778. The political interest of the United States at that time was to keep the tribes happy with the new American government and to keep Indian tribes from fighting for the English in the American Revolutionary War. To keep the tribes neutral during the war with England, the Continental Congress sent representatives to the tribes bearing many gifts and promises of peace and friendship.

The 13 American colonies then adopted the Articles of Confederation in 1781 and convened a new Congress to manage their affairs. The new Congress also sent diplomatic representatives to the tribes and promised friendship and peace. Ultimately, it signed eight treaties with Indian tribes between 1781 and 1789, including treaties with the Iroquois Confederacy, the Cherokee Tribe, the Shawnee Tribe, and numerous other tribes. However, because the Articles of Confederation did not clearly give exclusive power to Congress to deal with tribes, various states meddled in Indian affairs. As James Madison pointed out in 1784 and 1787, much of the trouble that England and the 13 colonies had suffered with Indian tribes from the 1640s forward arose when individual colonists or colonial governments tried to take Indian lands. Wars between tribes and Georgia and South Carolina, for example, erupted when these states tried to steal Indian lands. These problems led to the formation of a new and stronger United States government, wherein the exclusive power over Indian affairs was

The Doctrine of Discovery

In 1492, European countries, and later the United States, justified their dealings with the natives and American Indian tribes in North and South America under the Doctrine of Discovery. Under this principle, the European country that first discovered a new area, where Christian Europeans had not yet arrived, could claim the territory for their own country. This did not mean that the natives lost the right to live on the land, or to farm and hunt animals on it, but it did mean that the natives could sell their land only to the European country that had discovered them, and that they should deal politically only with that European country. In most situations, the Europeans also enforced the Doctrine of Discovery against each other, because they recognized and agreed to be bound by the principle that the discovering country earned a protected property right in newly discovered territories. The audacity of one country discovering and claiming lands already occupied and owned by American Indians came from the belief that Christians and white Europeans were superior to people of other races and religions.

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When Europeans first came to the New World, they were not strong enough militarily to take the land from the Indian tribes. Thus, they entered treaties with tribes to make the transactions look legal and valid, or they bought the lands they wanted. In addition, some people were influenced by scholars in England and Spain who believed that Indians had a legal right, as free people, to continue to own their lands and that a European country could only take lands by force in an honorable war.

In exercising its control over the continent, the United States also enforced the European Doctrine of Discovery. As the United States Supreme Court stated in 1823, in the case of *Johnson v. McIntosh* (21 US (8 Wheat) 543 (1823) 573-4), the US acquired the sole right to buy lands from Indian tribal governments under the Doctrine of Discovery. Thus, sales of land that Indians had previously made to persons other than to the US government were invalid. Tribes continued to have the right to use and occupy their lands but their governmental sovereign powers were restricted in that they could sell their lands only to the United States.

In upholding this power of discovery for the United States over Indian tribes, the Supreme Court had to ignore its own opinion that Indians possessed natural rights to their lands. In fact, the Supreme Court refused to say why American farmers, "merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess" or to limit tribal rights. Instead, in determining tribal rights to sell their lands, the Court relied on the Doctrine of Discovery and the fact that the United States had defeated some tribes in war to decide that only the United States could buy Indian lands. "Conquest gives a title [to the land], which the Courts of the conqueror cannot deny…" *Johnson v. McIntosh,* 588.

Robert Miller

placed completely in the hands of the federal government. Thus, Indian tribes and their people, as well as the United States's relationship with tribes, are addressed in the US Constitution.

Article I of the US Constitution excludes states and individuals from Indian affairs by stating that only Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes…" The US Supreme Court has interpreted this language to mean that the Congress was granted the exclusive right and power to regulate trade and affairs with the Indian tribes. The very first US Congress formed under our new Constitution, in 1789-1791, immediately assumed this power, and in the first five weeks of its existence it enacted four statutes concerning Indian affairs. In 1789, for example, the new Congress established a Department of War with responsibility over Indian affairs, set aside money to negotiate Indian treaties, and appointed federal commissioners to negotiate treaties with tribes. In July 1790, Congress passed a law that forbade states and individuals from dealing with tribes, and from buying Indian lands.

Individual Indians are also mentioned in the Constitution of 1789, Article I, and again in the Fourteenth Amendment to the Constitution, which was ratified in 1868. In counting state populations, to determine how many representatives a state can have in Congress, Indians were, expressly, not to be counted unless they paid taxes. In effect, Indians were not considered to be federal or state citizens unless they paid taxes.

After the Civil War, when citizenship rights were extended through the Fourteenth Amendment to ex-slaves and to "[a]ll persons born or naturalized in the United States," that amendment still excluded individual Indians from citizenship rights, and excluded them from being counted towards figuring congressional representation unless they paid taxes. This demonstrates that Congress still considered Indians to be citizens of other sovereign governments, even in 1868, when the Fourteenth Amendment was adopted. This view was correct because most Indians did not become US citizens until 1924, when Congress passed a law making all Indians US citizens. For many years after 1924, states were still uncertain whether Indians were also citizens of the state where they lived, and in many states Indians were not allowed to vote in state elections.

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American Indian tribes played a major role in the development and history of the United States, and engaged in official, diplomatic governmental relations with other sovereign governments from the first moment Europeans stepped foot on this continent. Indian tribes have been a part of the day-to-day political life of the United States, and continue to have an important role in American life to this day. Tribes continue to have a government-to-government relationship with the United States and they continue to be sovereign governments with primary control over their citizens and their territory. It is no surprise that the relationship between Indian people, tribal governments, and the United States is addressed in the provisions of the United States Constitution.

Treaties and Reservations

In 1789, the United States had only entered a few treaties with European countries, while it had already entered nine treaties with different Indian tribes. The United States ultimately negotiated, signed, and ratified almost 390 treaties with American Indian tribes. The provisions of these treaties were agreed to during formal government-to-government negotiations. The US Supreme Court likened these Indian treaties to contracts between two sovereign nations, stating, in 1905, that United States and Indian treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." Thus, while tribal governments sold some of their rights in land, animals, and resources to the United States for payments of money, goods, and promises of peace and security, the tribes held onto, or reserved to themselves, other lands and property rights. Not surprisingly, these retained lands are called Indian reservations.

In regards to treaty making, Indian tribes are referred to, but are not expressly designated, in Article VI of the Constitution, where it is made clear that all treaties entered by the United States "shall be the supreme Law of the Land."

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Robert Miller is an Associate Professor at Lewis & Clark Law School. He has served as a judge for various Pacific Northwest tribes since 1995 and is now the chief justice of the court of appeals for the Confederated Tribes of the Grand Ronde. He served on the board of the National Indian Child Welfare Association from 1995-2004 and is a past Chair of the Oregon State Bar Indian Law Section. He currently serves on the boards of the Oregon Native American Business Entrepreneurial Network and the Tribal Leadership Forum. Bob is a citizen of the Eastern Shawnee Tribe of Oklahoma.

The Marshall Trilogy and Sovereignty

The three rulings that make up the Marshall Trilogy were made between 1823 and 1832, under Supreme Court Chief Justice John Marshall. The three decisions reaffirm and redefine the constitutional standing and legal basis of a limited form of Indian sovereignty. The logic underpinning the rulings was based on the Doctrine of Discovery. This doctrine is, in turn, based on international law developed by Europeans and dating back to the Crusades.

The doctrine legitimized, in legal theory, the conquest of non-Christian native inhabitants by the presumably superior Christian European powers. Its use by Marshall acknowledged that tribal sovereignty preceded the development of the US Constitution.

The major effect of the Marshall rulings was to place Indian land outside the conventional system of US private property law, but it also subjected the sovereign rights of Indian governments to the discretion of Congress and the federal courts.

The rulings in the Marshall Trilogy also influenced what are known as *Canons of Construction*, or the canons of treaty construction which were established by the courts for the interpretation of treaties with Indian nations. These guidelines call for treaties to be interpreted as understood by the Indians at the time of signing, and include the guiding principle that ambiguities in treaty language should be judged in favor of the tribes.

Rulings and opinions from the 1830s, such as the Marshall Trilogy, eventually influenced many other decisions including the Boldt and Belloni decisions in the 1970s regarding Indian fishing rights. The protection of land, guaranteed in the treaties, was later extended to include the right to use and develop the resources of the land for the economic self-interest of Indian nations.

Over the last century and a half, Congress has eroded the idea of tribal sovereignty with its passage of such laws as the Allotment Act (1887), the House Termination Resolution (1953), PL 280 (1953), and the Indian Gaming and Regulatory Act (1988). More recently, the Courts have also compromised the tribes' ability to govern themselves in civil and criminal matters.

This area of criminal and civil jurisdiction in relation to state jurisdiction is where the tension surrounding Indian sovereignty between tribes, states, and the federal government is playing out in court today. For more on the Doctrine of Discovery please see Robert Miller's sidebar.

The three rulings:
In *Johnson v. McIntosh* (1823) the Marshall court found that the title Indians held to their land was consistent with US property law and was therefore valid regarding all entities except for the federal government—Indians were admitted to be the rightful occupants of land, and could retain possession of it. However, the ruling also reaffirmed that the Indian nations could not convey their land to anyone, such as a foreign country or private individual, without the authorization of Congress.

In *Cherokee Nation v. Georgia* (1831) Marshall held that the Cherokee Nation had shown that it was indeed a state by virtue of its self-government and its treaty relationship with the United States, but he rejected the argument on the part of the Cherokee that their nation was foreign to the United States, since their lands were wholly within the US. Later cases generally accepted Marshall's description of Indian tribes as "domestic dependent nations." Marshall held that the relationship between the United States and the Cherokee Nation resembled that of a guardian to its ward and that, although the tribes could not negotiate with foreign powers, this did not divest the tribe of its right to self-government. Under this ruling, Indian tribes lost independence, but retained their distinct political identity as sovereign powers to govern their own territory and people.

Marshall's opinion is the basis for what is known as the *trust responsibility,* also known as the *trust doctrine,* between the US government and federally recognized tribes. This doctrine or concept, though not easy to define, has governed much of the official relationship between the tribes and the federal government. *(Carol Barbero discusses trust responsibility in her interview entitled "Trust Responsibility, Education, and the Indian Health Service," in this issue of Oregon's Future—Ed.)*

In 1832, in the third ruling of the trilogy, *Worcester v. Georgia,* the Marshall Court ruled that states are excluded from exercising their regulatory or taxing jurisdiction in Indian country. In this way, Marshall's opinion reaffirmed tribal sovereignty and the plenary power of Congress (which means that federal treaties and statutes prevail over state law). The ruling, however, also limited Indian sovereignty by reasserting that such sovereignty was subject to federal jurisdiction.

Jay Hutchins, Executive Editor

INTERVIEW

Trust Responsibility, Education, and Indian Health Services

Carol Barbero, Attorney with Hobbs, Straus, Dean & Walker, LLP, answers questions from *Oregon's Future*

Trust responsibility seems to explain the US government's legal and moral obligation to Indians. We cover the obligations regarding fishing rights in other articles in this issue, but can you define trust responsibility to explain Indian expectations of services such as education and healthcare?

CB: There is no single definition of the United States's trust responsibility to Indian tribes. This term is used to describe the truly unique relationship between the United States and the indigenous nations who inhabited the North American continent prior to the creation of the United States as a sovereign political entity. Those indigenous nations remain distinct political sovereigns today, but subject to the dominant sovereign—the US.

The US has a special responsibility to tribes—usually referred to as a *trust responsibility.* This extends to political, economic, and social interaction between the federal government and Indian tribal governments. It can encompass activities as diverse as control over Indian property, resource management, support for tribal governmental structures, assistance with economic development and tribal self-sufficiency, law enforcement on reservations, and the responsibility to provide social services such as healthcare, education, housing, income assistance for the poor, and child welfare.

The trust responsibility has its underpinnings in the ceding of vast tracts of land by tribes and the treaties through which this was accomplished. So, the US's obligation to provide healthcare and education to Indian people had its origins in the treaties that ended hostilities between the federal government and tribes. These treaties promised support for social, educational, health, and welfare needs of Indian people. In 1831, Chief Justice John Marshall described tribes as "domestic dependent nations" whose relationship with the United States "resembles that of a ward to his guardian." *(See "The Marshall Trilogy" in this issue for more information —Ed.)*

So, how did this lead to the creation of the Indian Health Service?

CB: The old War Department initially handled Indian relations, but in the mid-nineteenth century responsibility for Indian affairs was transferred from military to civilian authorities—specifically to the Interior Department. For over a century, Indian health was the responsibility of the Bureau of Indian Affairs within that department. In 1954, however, following a comprehensive review of the woeful state of Indian health, Congress enacted a law known as the *Transfer Act,* to transfer Indian health responsibility to the Public Health Service (PHS) in what was then called the Department of Health, Education & Welfare (HEW), expecting that the PHS was better capable of providing health services. HEW has since been re-named the Department of Health and Human Services (DHHS).

Today, the United States continues its obligation to provide federal programs for Indian healthcare delivery primarily through the Indian Health Service (IHS), an agency in the DHHS that funds health programs for approximately 1.6 million Indian people, who live on or near reservation areas in over 30 states. These IHS-funded programs are the only source of healthcare for Indian people in many of those locations. The Indian Health Service, as a distinct agency within the department, was created not long after the transfer of authority occurred and recently celebrated its 50th anniversary.

Are Indians eligible for Medicare and Medicaid?

CB: Yes, Indian people have always been eligible for these programs to the same extent as non-Indians who meet the eligibility requirements. But, the programs operated by IHS and Indian tribes have not always been allowed to collect reimbursement from Medicare and Medicaid. Thus it was difficult, and often impossible, for Indian people to use their Medicare or Medicaid benefits, particularly in areas where IHS or tribal programs were the only source of healthcare.

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In 1976, Congress amended the laws to allow Indian hospitals to bill Medicare for services to their Medicare patients, and to

allow Indian health facilities to bill Medicaid. Subsequent Medicare amendments now make it possible for IHS and tribal facilities to bill for all Medicare covered services. As you know, Medicare is totally federally-funded, while Medicaid is funded in part by the federal government, and in part by the states.

Congress has expressly recognized in law that the federal government's trust responsibility to Indian people makes these schools a federal obligation.

I understand that the Medicaid payment system is different for Indians.

CB: Yes, the Medicaid law says that the cost of services provided in an IHS or tribal facility to an Indian enrolled in Medicaid is to be paid 100 percent by the federal government, and that no state match is required. Congress did this recognizing that Indian health is the full responsibility of the United States.

Will the current Administration's attempts to curtail federal Medicaid spending affect Indian health?

CB: Yes, some of the Administration's proposals would reduce the amount of Medicaid revenues IHS and tribal health programs are now able to collect from that program, unless language to protect the Indian health system is included in the legislation. This is very troubling because Indian health programs rely heavily on Medicaid payments to support their services.

Could you explain how all this affects Indian children?

CB: All children—both Indian and non-Indian—who meet the eligibility requirements for Medicaid can be enrolled in that program, which provides health insurance to low-income individuals. Congress was concerned, however, that there were still a large number of low-income children who are not Medicaid-eligible and who have no health insurance.

Thus, Congress established the Children's Health Insurance Program (CHIP) in 1997. This program is funded with a combination of federal and state dollars. The legislation required that states assure access by Indian children to the CHIP program. To achieve access to CHIP, the federal Centers for Medicare & Medicaid Services (CMS) issued a regulation that prohibits any state from imposing cost-sharing requirements on children who are members of federally recognized Indian tribes, because cost-sharing is a barrier to access. The law and regulation are based on the unique relationship between the US and the tribes.

Origins of the Federal Trust Responsibility

The federal trust responsibility to Indians, and the related power to exercise control over Indian affairs in aid of that responsibility, is rooted in the United States Constitution—most significantly the Indian Commerce Clause, the Treaty Clause, and the exercise of the Supremacy Clause. The Constitution contains no explicit language that establishes or defines the trust relationship. Rather, the parameters of the trust responsibility have evolved over time through judicial pronouncements, treaties, Acts of Congress, Executive Orders, regulations, and the ongoing course of dealings between the federal government and Indian tribal governments.

Chief Justice John Marshall established the legal foundation for the trust responsibility in 1831...

The earliest formal dealings between the Federal government and Indian tribes were undertaken through treaty-making. The treaty objectives, from the United States's perspective, were essentially two-fold; cessation of hostilities to achieve/maintain public peace, and acquisition of land occupied by tribal inhabitants. Tribes, too, doubtless had a peace-making motive, but in return for the land they relinquished to the more powerful federal government, tribes also obtained the promise expressed or implied of support for the social, educational, and welfare needs of their people. These treaties/promises were the first expression of the federal government's obligation to Indian tribes.

Initial recognition that a trust responsibility existed came from the courts. In the landmark case of *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), Chief Justice John Marshall established the legal foundation for the trust responsibility by describing Indian tribes as "domestic dependent nations", whose relationship with the United States "resembles that of a ward to his guardian." *Id.* at 17. That theme—and the duty of the federal sovereign to Indian tribes—was carried forward some 50 years later when in *United States v. Kagama,* 118 U.S. 375, 384 (1886), the Supreme Court acknowledged that tribes are under the protection and care of the United States. *(See "The Marshall Trilogy" in this issue for more information—Ed.)*

Carol Barbero

How does education fit into the trust responsibility?

CB: The BIA funds 184 elementary and secondary schools in over 20 states for Indian children. These schools are federally-funded; they are not part of any state public school system. A variety of federal aid-to-education laws also contain funding set-asides for the BIA system schools. Congress has expressly recognized in law that the federal government's trust responsibility to Indian people makes these schools a federal obligation. The BIA system, however, enrolls perhaps 10 percent of school-age Indian children. The other 90 percent are educated in state public schools.

...President Nixon's 1970 Special Message to Congress, which kicked off what became known as the *Indian Self-Determination Era.*

Do public schools receive specific assistance for their Indian students?

CB: Yes, the Indian Education Act (IEA) provides formula grants to local educational agencies based upon the enrollment of Indian students. BIA-funded schools also receive funding under this act. The purpose of these IEA formula grants is to meet the unique educational and culturally related academic needs of American Indian and Alaska Native students.

In addition, certain public schools receive federal funding from the Impact Aid program for their federally connected children—such as Indian children who live on an Indian reservation or trust land, and children from families who live on military bases. The theory of the Impact Aid program is that local property taxes used to support public schools do not apply on Indian and military lands, so the federal government supplies funds to help finance the operation of these schools.

Trust responsibility is an unusual arrangement blending the two ideas of sovereignty and protection. It's as if the courts and the constitution are empowering the tribes but treating them like children or, as you mentioned earlier, wards. Could you explain why Indians retain so much of what is perceived as privilege or rights than minorities in general? For example, I think a lot of people do not understand* Indian Preference, *which is used to give preference to Indians for jobs in the BIA and the Indian Health Service. It even allows preference for private hiring and contracting on or near Indian reservations.

CB: It is important to recognize when speaking of the relationship between the US and the tribes, that the term *Indian* is a political rather than racial classification. Indians are not merely a minority group; tribes are sovereign governmental entities—nations within a nation, if you will. The Supreme Court made the vital distinction of political rather than racial classification in the historic decision *Morton v. Mancari* in 1974. The Court was called upon to determine whether the BIA's statutorily-ordered Indian hiring preference was a violation of the prohibition against racial discrimination in federal hiring, contained in the Civil Rights Act. The Court said that as long as a law calling for special treatment of Indians, "can be tied rationally to the fulfillment of Congress's unique obligations toward the Indians", these laws will stand because the special legislation is intended for Indians in their political capacity. The Court recognized that the BIA's Indian hiring preference was intended to further the trust obligation, and to "reduce the negative effects of having non-Indians administer matters that affect tribal life."

(Please see JD Williams's entry on Indian Preference in the glossary and Barbero's sidebar "Supreme Court and Preferential Treatment"—Ed.)

We have covered much of the history leading up to the Self-determination era in this issue of the magazine and in the glossary. Self-determination really describes the current era. Could you explain how the Indian Self-determination and Education Assistance Act (ISDEAA) is supposed to work?

CB: If a tribe elects to directly operate a program funded by the BIA or IHS, it passes a resolution and submits an application to the agency for a contract. The Act directs the agency to award the contract, and significantly limits the reasons for which a contract application can be declined. This is quite different from the way the government usually issues contracts for procurement of goods and services, where the agency involved has total discretion whether or not to award a contract. The objective of the Act is to foster and facilitate self-determination in program operations by any tribe who chooses to take over a program. The tribal operator is to be supplied with both program and administrative funds to carry out the contract.

Is there a difference between self-determination and self-governance?

CB: Self-governance is one method for exercising a tribe's self-determination rights. Initially, the only vehicle used for assumption of a program by a tribe under the ISDEAA was a contract between the tribe and the BIA or IHS. As a result of amendments made to the Act in recent years, a tribe with a successful history of contract operations can convert to the use of a self-governance compact to operate the programs it has assumed. The compact vehicle is intended to provide greater flexibility for the tribal operator and less bureaucratic involvement from the federal agency.

How does trust responsibility remain consistent through different administrations in the federal government?

CB: All recent presidential administrations, through Executive Orders or Special Memoranda, have recognized the existence of a special relationship between the United States and Indian tribes. The most well-known of these is President Nixon's 1970 Special Message to Congress, which kicked off what became known as the *Indian Self-Determination Era.*

While each President's pronouncement has its own focus and used its own terminology, all recognized that the federal government has a unique relationship with Indian tribal governments. President Clinton's 2000 Executive Order, which has been endorsed by the George W. Bush Administration, requires consultation with tribes when an agency is formulating and implementing policies with tribal implications.

Could you explain more about what the term* consultation *really means?

CB: *Consultation* is the term used for a formal process through which an agency solicits and receives policy input from tribal leaders. The

Department of Health & Human Services's Tribal Consultation Policy, for example, requires each operating division within the department to have "an accountable process to ensure meaningful and timely input by tribal officials in the development of policies that have tribal implications."

How smoothly did implementation of ISDEAA go?

CB: After the ISDEAA (Indian Self-determination and Education Assistance Act) was signed into law in early 1975, tribes and tribal organizations immediately began to submit contract proposals to assume operational control of BIA and IHS-funded programs. But the path was not smooth. The ISDEAA approach to federal contracting—where the agency was directed to contract with a requesting tribe or tribal organization—was a novel, and uncomfortable concept for federal agencies accustomed to controlling Indian programs. Bureaucracies were resistant to the loss of jobs that would result from the assumption of tribal authority. Delays in taking action on contract requests and disputes over appropriate funding amounts frustrated the law's objectives.

To overcome problems, Congress amended the act more than a dozen times, enacting sweeping amendments in 1988 and again in 1994. Congress ordered the IHS and the BIA to create a single set of ISDEAA regulations and to develop them through a negotiated rulemaking process designed to encourage maximum Indian participation. The resulting regulations, drafted by federal and tribal personnel, were published in 1996. They now serve as a model achievement for tribes and the federal agencies with whom they relate.

The 1994 Amendments established the idea of self-governance, which we talked about already. This concept gave tribes the option to assume BIA and other Interior Department programs using a compact that put more authority in the hands of the tribe and less in the federal bureaucracy. The success of self-governance at the Department of the Interior, soon led to enactment of a self-governance option for tribal operation of health programs funded by the IHS. This year, IHS will supply over $1 billion to support 102 compacts with tribes.

Thank you very much. Your expertise on this subject will be very helpful to our readers.

Carol L. Barbero is a partner in the Washington, D.C. office of Hobbs, Straus, Dean & Walker, LLP, a law firm that specializes in the practice of American Indian law. She has worked in the Indian law field for more than 25 years, with a primary focus on Indian health, including Indian health program participation in the Medicare and Medicaid programs; Indian education; and Indian self-determination. Ms. Barbero is a 1979 graduate of Georgetown University Law School.

The Supreme Court and Preferential Treatment

The Indian preference for hiring, sanctioned by the Supreme Court in *Morton vs. Mancari,* is only one of the many activities the Court has held as rationally related to the United States' unique obligation toward Indians. The Court has upheld a number of other activities that single out Indians for special or preferential treatment, for example:

- The right of for-profit Indian businesses to be exempt from state taxation: *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 479-80 (1976);
- Fishing rights: *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 673 n 20 (1979);
- The authority to apply federal law instead of state law to Indians charged with on-reservation crimes, *United States v. Antelope,* 430 U.S. 641, 645-47 (1977).

The Court in *Antelope* explained its decisions in the following way:

The decisions of this Court leave no doubt that federal legislation, with respect to Indian tribes, although relating to Indians as such, **is not based upon impermissible racial classifications.** Quite the contrary, classifications singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the federal government's relations with Indians. (*Antelope,* 430 U.S. at 645; emphasis added).

Carol Barbero

Rational Relation

There are three key standards of review used in Constitutional Law; the mere rationality standard, the strict scrutiny standard, and the middle-level review standard.

The easiest one to satisfy is the "mere rationality" standard. Under this standard, the court will uphold a governmental action as long as the government is understood to be pursuing a legitimate governmental objective. Any type of health, safety, or general welfare goal will be found to be legitimate. There also is a second aspect of this standard called "rational relation". Under this standard of review there has to be a minimally rational relation between the means chosen by the government and the stated objective. In other words the stated objective, (in this case meeting an obligation of the US government to a sovereign entity), and the way this obligation is met needs to make sense; they need to be rationally related.

Jay Hutchins, Executive Editor

INDIAN TRUST FUNDS: Where Are The $$?

by John Echohawk,
Executive Director, Native American Rights Fund

In 1996, the Native American Rights Fund (NARF) filed the largest lawsuit in our history, a class action on behalf of 500,000 individual Indian money account holders against the Departments of Interior and Treasury. NARF's action seeks to require the United States to provide a full and fair accounting of all trust funds belonging to individual Indian beneficiaries and to require the government to correct account balances in accordance with the accounting. Although there are also tribal funds held in trust by the government, this lawsuit only involves the funds held in trust for individual Indians. The lawsuit also seeks to force the United States, as trustee, to fix the broken trust management system used to manage, administer, and account for the funds of individual Indian money account holders, the beneficiaries.

Interior officials have known for decades: that the accounting systems for lands allotted to individual Indians, held in trust by the United States, were inaccurate.

Documents discovered through litigation disclosed what Interior officials have known for decades: that the accounting systems for lands allotted to individual Indians, held in trust by the United States, were inaccurate. Millions of dollars each year, for grazing, mining, logging, oil and gas production, or other purposes, were not reaching beneficiaries. Past Congresses and Administrations have promised to fix the many problems, but little progress has ever been made. The leases for such use were negotiated and approved by the federal government. Income from these leases—money belonging to individual Indians—was supposed to be deposited in the US Treasury and checks issued to landowners. *(Please see sidebar "Historic Basis".)*

The Synar Report

In 1988, Congress held hearings on the mishandling of Indian trust funds and in 1992 the House Committee on Government Operations issued a report entitled *Misplaced Trust: the Bureau of Indian Affairs's Mismanagement of the Indian Trust Fund.* The report is often referred to as the "Synar Report" after crusading Representative Mike Synar (D-OK) who tirelessly pursued Indian trust reform. The report stated that Interior had made no genuine effort to address the extraordinary mismanagement and has willfully disobeyed Congressional mandates aimed at forcing Interior to correct Indian trust management practices.

Based largely on the findings of the Synar Report, Congress enacted the Indian Trust Fund Management Reform Act of 1994. Among other things, it established an Office of the Special Trustee for American Indians within the Department of the Interior. A Special Trustee heads the Office, but was given no final decision-making authority. Interior vigorously opposed the Act and ever since has built roadblocks to prevent the Special Trustee from instituting any meaningful reform. When Interior did not request any funds to implement the Act and Congress did not force any funds on them to carry out the Act, it became apparent to the Native American Rights Fund that the political branches of government were never going to resolve the problem without being forced to comply with the law by the judicial branch of government.

The case is proceeding in Federal District Court in Washington, D.C. and is being presided over by Judge Royce C. Lamberth. Judge Lamberth's hopes that the federal government would agree on a settlement gradually faded as the attempts at settlement negotiations failed and the government began denying and resisting every effort made to reform the trust and obtain an accounting. However, as the litigation has proceeded, we have won every phase.

The Nitty Gritty

In Phase I of the case the individual Indian beneficiaries were represented by NARF and private co-counsel. The Court held that the

The Native American Rights Fund and Other Players

The Native American Rights Fund had long understood that the trust fund case could be brought, but filed it in 1996 only after seeing that all political avenues for resolving the problem were exhausted. Even then, it was hoped that the federal government would see it as an opportunity to enter into a consent decree to finally comply with its trust responsibilities in an orderly fashion. Elouise Cobell, who had been active in the Synar hearings and passage of the 1994 Act, is the lead plaintiff in the case. A member of the Blackfeet Indian Tribe in Montana, she helped organize the Blackfeet National Bank. For 13 years, she served as Treasurer of the Tribe and has also served as Controller. She is now Project Director of the Individual Indian Money Trust Correction, Recovery, and Capacity-Building Project of the Blackfeet Reservation Development Fund. Together, the Blackfeet Reservation Development Fund and the Native American Rights Fund have raised the funds necessary to sustain the litigation, but are in continuing need of support.

...head of the Trust Asset and Accounting Management System (TAAMS), one of the main subprojects of trust reform at Interior, which stated that trust reform was "imploding."

government was in breach of its trust responsibilities in eleven separate respects. The Court ordered the government to take steps necessary to reform the system and retained jurisdiction for at least five years to ensure that reform would be carried through. Judge Royce C. Lamberth also ordered the government to commence a historical accounting of all individual Indian trust funds and to report quarterly to the Court with respect to their trust reform and accounting efforts.

The government appealed immediately. However, in February 2001, the US Court of Appeals for the District of Columbia unanimously upheld Judge Lamberth's authority to closely monitor Interior's reform efforts and held that the US does indeed have an obligation to account for every dollar from the inception of the trust. The then-new Bush Administration was just taking office at that time, promising to make trust reform a high priority. Perhaps as a result of that commitment, the Bush Administration did not ask the US Supreme Court to review the decision of the Court of Appeals that affirmed Judge Lamberth's decision.

More Government Misconduct

After the Court of Appeals decision, a memorandum surfaced from the then head of the Trust Asset and Accounting Management System (TAAMS), one of the main subprojects of trust reform at Interior, which stated that trust reform was "imploding." A Court-appointed monitor found that the actual accounting had not progressed in any material respect and in fact had remained stagnant. The Court monitor also found that Interior's seven quarterly reports it had given the Court did not accurately reflect the status of the TAAMS computer development or the Bureau of Indian Affairs (BIA) data cleanup, the other main subproject of trust reform.

Based on these Court monitor reports which confirmed findings we had previously uncovered, we filed a series of motions to initiate further contempt of court proceedings which were granted.

In September 2002, Judge Lamberth found Secretary Norton and new Assistant Secretary for Indian Affairs Neal McCaleb in contempt of court for having engaged in litigation misconduct by failing to comply with the Court's order in December 1999 to initiate a historical accounting project. The Court also found the Secretary and Assistant Secretary to be in contempt for committing a fraud on the Court by concealing Interior's true actions regarding the historical accounting project, failing to disclose the true status of the TAAMS, filing false and misleading quarterly status reports regarding TAAMS and BIA data cleanup, and making false and misleading representations regarding computer security of individual Indian trust data.

Where Do We Go From Here?

In addition to the contempt charges, the Court ordered a Phase 1.5 trial which started May 1, 2003. With the conclusion of the contempt trial, it became clear that the Court, prior to the Phase II trial, had to consider granting further injunctive relief with respect to the fixing the system portion of the case and the historical accounting project. The plaintiffs were also able to propose their own plans to the Court on these matters.

In conformity with the order, we filed an accounting plan which demonstrated that the universe of unaccounted for dollars in present value is $137 billion. As plaintiffs we argued that this amount was owed pursuant to trust law where all presumptions are against the trustee as an evidentiary matter. The government had the opportunity to show with competent evidence that they had made disbursements to the correct beneficiary and the $137 billion would be reduced accordingly.

The government stated nothing new in their accounting plan submitted on January 6. They still started from the proposition that all information in their database was correct when there was ample evidence and their own admissions that no data had ever been verified. They still used a statistical sampling methodology and limited the period of the accounting. They did not account for past beneficiaries, including the deceased or those whose accounts were opened after the class of all individual Indian beneficiaries was certified by the Court.

As for trust reform plans, plaintiffs submitted a proposed order justified and detailed by an implementation plan which, if adopted, will begin the process

The Historic Basis for the Trust Fund Lawsuit

The problems surrounding the Indian trust funds scandal have been in the making for more than 100 years. In 1887, Congress enacted the General Allotment Act that called for the division of some tribal lands among individual tribal members. The Act gave some tribal members 40, 80, 160, or 320 acre parcels of land. These allotted lands are held in trust by the United States. Any leases of these lands to third parties for grazing, mining, logging, oil and gas production, or other purposes were negotiated and approved by the federal government. Income from these leases —money belonging to individual Indians —was supposed to be deposited in the US Treasury and checks issued to landowners. This income forms the core of the individual Indian money accounts held in trust by the government, but much of it was never collected, managed, distributed, and accounted for properly. The historic and present mismanagement of these individual Indian trust funds by the government is the basis for the lawsuit.

Management of the trust is the responsibility of the Department of the Interior and the Treasury Department, serving as trustee-delegates of the United States. Accurate account balances cannot be provided to Native Americans who are legally entitled to this money and count on it for basic necessities. There is no accounts receivables system; therefore the government does not know when to collect monies owed beneficiaries for the sale or lease of their resources or land. Still today, accounts are routinely and arbitrarily closed and more than 40,000 accounts containing more than $40 million are without accurate addresses or names.

of creating a trust management system. We argue that the Court should essentially adopt our proposed remedial order as a structural injunction that the government would have to follow.

John E. Echohawk, a *Pawnee*, is the Executive Director of the Native American Rights Fund. He was the first graduate of the University of New Mexico's special program to train Indian lawyers, and was a founding member of the American Indian Law Students Association while in law school. John has been with NARF since its inception, having served continuously as Executive Director since 1977. He has been recognized as one of the 100 most influential lawyers in America by the National Law Journal since 1988 and has received numerous service awards and other recognition for his leadership in the Indian law field. He serves on the Boards of the American Indian Resources Institute, the Association on American Indian Affairs, the National Committee for Responsive Philanthropy, Natural Resources Defense Council, and the National Center for American Indian Enterprise Development. B.A., University of New Mexico (1967); J.D., University of New Mexico (1970); Reginald Heber Smith Fellow (1970-72); Native American Rights Fund (August 1970 to present); admitted to practice law in Colorado.

Trust Fund Update

After a century of deceit, nine years in court and over a billion dollars spent in legal fees by the federal government, the Indian plaintiffs in the *Cobell vs. Norton* case are beginning to see some accounting of Indian Trust monies promised to them.

Even though judgements and appeals have been upheld, the federal defence strategy has been to impede the legal process rather than account for the discrepancies in the Individual Indian Money (IIM) account held in trust for individual Indians by the Interior Department. Here are a few recent examples of legal wrangling.

The case has been overseen by Regan appointed US District Judge Royce Lamberth. He has been an advocate for the government playing by the rules for over nine years, and has been upheld by the court of appeals on major substantive issues.

...incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past...

In a recent opinion Lamberth wrote, "For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few."

Because of this statement, last August the government's legal team requested a new judge be selected for the case. The three-judge panel, which was to have heard the government's request for Lamberth's removal, has now referred the matter to a second panel of judges, who won't likely hear the request until spring.

In November 2005, Interior Secretary Gale Norton's department produced a brochure to assure the public that her department has made major progress in cleaning up its decades of mishandling the trust accounts of an estimated 500,000 Native Americans. The rebuttal brochure, produced by the Indian plaintiffs in the *Cobell vs Norton* class action lawsuit, charges that the department's brochure "is deceptively inaccurate from beginning to end."

Despite the continued stalling tactics by the federal government's defence team *(see daily updates at www.indiantrust.com)*, some progress has been made. Based on a significant court victory in 1999 and affirmed in 2001 in which the Appeals court held that the government was in breach of its trust duties, the named plaintiffs have sought an interim award of expenses and attorneys' fees in the amount of $14,528,467.71 under the Equal Access to Justice Act (EAJA). Under EAJA, a party that has won its case in whole or in part is called the "prevailing party" and if the criteria of EAJA are met, that party is eligible for an award of expenses and attorneys fees paid by the government. The Plaintiff's Petition for Interim Fees was filed on August 17, 2004 and a comments period runs through December 15, 2005—there are no speedy steps to this legal process.

Valerie Brockbank for Oregon's Future

Whale Hunting and Treaty Rights

by Elizabeth Woody

First, I must concede strong bias of my own. I love animals, whales and other marine mammals, like the dolphin and sea otter. I marvel at their abilities to thrive in unknown territory, a place I am not part of. I am progeny of the first inhabitants and believe in the unity of native tradition, and feel a high regard for animal and plant life. I have been raised in the flagrant environmentalist perspective of the northwest region. While I have 1/32 "other" blood quantum, European and Hawaiian, my claim is only genetically relevant to these other lands. Even from this vantage, I cannot presume to speak for those who hunt or those who oppose them.

The Makah tribal groups, Neah Waatch, Tsoo-Yess and Osett, negotiated the 1855 Treaty of Neah Bay with the Governor of the Washington Territory, Isaac I. Stevens (representing the US Department of Interior). The Ocean was and is part of Makah's traditional territory. In Article Six of the treaty they retained rights to hunt whale, other marine mammals, and fish in *usual* and *accustomed* places. In Article Two they ceded lands. The Makah are the only tribe in the United States to retain the right to hunt whale.

In modern times the gray whale has been close to extinction, but not at the hands of the Makah who voluntarily suspended whaling in the 1920's. The Makah believed they would cease to exist as a people if there were no gray whales left. Prior to the voluntary moratorium, the Makah claimed to have hunted whale for 2,000 years. By 1993 the California gray whale had recovered to pre-whaling numbers and was removed from the Endangered Species List in 1994. The Makah chose to exercise their right to hunt.

The Makah are the only tribe in the United States to retain the right to hunt whale.

(The Marine Mammal Protection Act of 1972 (MMPA) prohibits, with certain exceptions, the taking of marine mammals in US waters and by US citizens on the high seas, and the importation of marine mammals and marine mammal products into the US—Ed.)

The International Whaling Commission (IWC), the National Oceanic and Atmospheric Administration (NOAA), and the Makah Tribal Council entered a formal and mutual agreement on October 23, 1998 that states the Makah's five-year aboriginal subsistence quota will be shared out of a possible 620 whales(a number previously established) with the indigenous people of Chikotka, Russia. The development of the ceremonial and subsistence whale hunts will occur over a period of five years and rotate amongst the tribal whaling families of the reservation. The Makah do not plan on taking the maximum allowable harvest. Specifically, only migrating whales will be hunted, not mothers and calves. The Makah entered into an agreement with the US Department of Commerce and the IWC in 1997 to not commercialize their whaling. The Makah conferred with a "world class marine biologist and an esteemed veterinarian" on conduct of the hunt to reduce suffering.

Approximately 250 animal rights groups and 27 conservation organizations have opposed the hunt. However, the two largest of such groups, the Sierra Club and Greenpeace, did not oppose the Makah. They will not oppose an indigenous nation without proper research. In opposing extinction, environmental degradation, and other patterns of power abuse, these two groups have researched the legal and moral issues concerning native peoples, coupled with their relationships with species and plant life. Significantly the coalition of Affiliated Tribes of Northwest Indians supported the Makah Tribe.

In all cases of reviewing legitimate sources and processes, the Makah acted on their own volition, with conscious regard for the world politics, the status of gray whales, and the United States's political requirements. It took several years of building these relationships for the Makah to politically reinstate their ceremonial and subsistence hunt of the gray whale. The Makah Nation completed their first whale hunt in 1999 within a flux of media and violent protesters. After 70 years the Makah returned to a population of twenty two thousand gray whales. There are some 2,000 Makah people; about half live on the reservation. The whale-hunting ceremony is rehabilitating a relationship, a core food source for a nation. The people, the animal, the system, all tell us through their indications, we are imperiled and so removed from the source and processes of life. The whales represent a cohesive reconciliation with tribal structure and history.

Elizabeth Woody is an enrolled member of the Confederated Tribes of the Reservation at Warm Springs, Oregon. The tribes are descendents of the tribes of the Middle Columbia River, the Wasco, Watlala, Wayampum, Tenino, Tygh, and Walla Walla tribes. Celilo Falls Village is a place along the Columbia River that is well remembered as a significant fishery for her maternal grandmother's people. She is also born for the Bitter Water clan of the Dine people. Ms. Woody works at Ecotrust. She writes poetry, prose and creative non-fiction. Her awards include an American Book Award, the PNBA William Stafford Memorial Award for Poetry, and J.T. Stewart Award for Social Activism through writing, and received an AIO/Kellogg Ambassadors Fellowship.