TRUST RESPONSIBILITY AND THE COORDINATION OF ABORIGINAL ISSUES IN THE UNITED STATES: POTENTIAL APPLICATIONS IN CANADA

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Nature of the trust

The United States' approach to meeting its legal obligations to First Nations differs from Canada's approach in a number of important aspects. Federal case law as well as recent Congressional legislation and administrative practice have reinforced the principle that "trust responsibilities" apply to all federal officials and to every federal activity affecting Indian tribes. Instead of channeling more funding into the Bureau of Indian Affairs, moreover, Congress has concentrated on developing special Indian offices and programs elsewhere throughout the federal Executive structure, and amending general federal revenue-sharing legislation to include Indian tribes as beneficiaries--largely on the same footing as the states. In law and practice, then, Indian tribes are being treated more like the states as a matter of funding, and in terms of routine intergovernmental coordination activities and policy consultations.

Coordination

Since the 1970s, Executive coordination of Indian policy has been nominally entrusted to the Assistant Secretary of the Interior--Indian Affairs, by custom an American Indian, whose junior Cabinet rank gives him/her relatively high visibility and leverage in Washington. The key federal departments involved in Indian programs and services have also recently formed a policy sub-committee under the auspices of the White House Domestic Policy Council. In actuality, the power behind Indian policy coordination since the 1970s has been Congress, acting through its Senate Committee on Indian Affairs. The Committee has served as a gatekeeper for all federal Indian legislation, and has coordinated the reflection of Indian tribes' concerns in the work of other legislative committees. It has also maintained Executive accountability, not only through conducting frequent public oversight hearings, but through its customary authority to vet the budgets of federal agencies where there may be implications for Indian tribes. The Senate Committee serves as the social hub and political clearinghouse for Indian leaders in Washington, and is generally more aware and more responsive to Indian concerns than the White House. The Committee has a largely Indian staff to set and manage its policy agenda.

Continuing challenges

The scale and complexity of the growth of Indian aid programs, as well as the rapid diversification of Indian tribes' relationships with federal agencies, continues to create new challenges. Tribal leaders' direct access to the federal budgeting process through the Committee on Indian Affairs has proven to be a reasonably satisfactory solution. It has evolved from working relationships between Senators and tribal leaders, furthermore, rather than being imposed on tribes by the White House. To the extent that the Senate Committee's power relies heavily on the annual budgeting process, however, the Indian policy agenda in Washington has arguably been preoccupied with programs and devoted too little attention to broad social, political and jurisdictional issues. Those issues, frequently involving tribal-state relationships, tend to be left to the courts. At the community level, moreover, Washington's focus

on program diversification has overwhelmed tribal leaders with a staggering array of funding options--nearly $5 billion divided amongst 206 program windows during the current fiscal year. This embarrassment of riches (to borrow from the poet John Donne) strains the ability of the smaller Indian tribes to take full advantage of federal dollars.

Applicability

Some aspects of the American experience are applicable to Canada, whilst others reflect differences in our two countries' constitutional frameworks. The possibility of involving First Nations directly in a "gate keeping" legislative committee similar to the Senate's Committee on Indian Affairs should be given favourable consideration. A legislative committee may serve Aboriginal interests even more effectively within a Westminster system of government than in the American system, with its sharper separation of the legislative and executive functions. Indeed, representation in Parliament was one of the major objectives of First Nations during the First Ministers Conferences on Aboriginal issues in the constitution, and was included in the ill-fated Charlottetown Accord. It would also be appropriate for Canadian authorities to adopt the American position on the pervasive character of the "trust"--that is, its applicability to all official actions, not merely to activities under the Aboriginal affairs portfolio.

On the other hand, some fundamental differences between Canadian and American federalism must be taken into account. The United States has become highly centralized in fact, albeit not always in theory. A centralized federal system is consistent with locating the "trust" in the central government. Centralization has worked to the advantage of Indian tribes in the United States by giving Washington the power, and the resources, to satisfy Indian tribes' aspirations. Canada has been more decentralized than the U.S. historically, and the efforts of the Trudeau, Mulroney, and Chrétien Governments to strengthen Canadian federalism through constitutional revisions and political accords have reaffirmed the relative weakness of Ottawa. Federal mechanisms cannot achieve the same results for Aboriginal Peoples in Canada as they have achieved in the United States. Instead, a Canadian solution must rely heavily on the assumption of fiduciary responsibilities by provinces, and on the adoption of provincial-level intergovernmental arrangements that share power and resources directly with First Nations.

Part One
Trust Responsibility and Accountability in U.S. Law

Nature of the "trust"

Fifty years before the Supreme Court of Canada ruled that a trust-like "fiduciary responsibility" arises when agents of the Crown assume control of Indian assets,[1] the U.S. Supreme Court had held that the United States is financially accountable for its management of Indian lands, and must manage those lands strictly for Indians' benefit.[2] The nature and scope of U.S. federal "trust responsibility" to Indian tribes has been litigated extensively.

The U.S. Supreme Court originally characterized the relationship between Indian tribes and the United States as resembling "that of a ward to his guardian."[3] For nearly a century, "guardianship" was conceived as primarily a limitation on Indians' freedom, rather than a limitation on federal government power over Indians.[4] When Congress authorized a number of Indian tribes to sue the United States for land claims in the 1920s, however, the U.S. Supreme Court upheld the final awards on the grounds that the assumption of federal guardianship is "subject to limitations inhering in such a guardanship."[5] The U.S. courts have repeatedly warned federal officials that they are "bound by every moral and equitable consideration to discharge [this] trust with good faith and fairness,"[6] and that they are subject to "moral obligations of the highest responsibility and trust," as well as "the most exacting fiduciary standards."[7] The U.S. trust doctrine nevertheless leaves federal officials with considerable good-faith discretion to determine what is in Indians' best interests.[8]

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[1] *Guerin v. The Queen*, [1994] 2 S.C.R. 335.

[2] *United States v. Creek Nation*, 295 U.S. 103 (1935).

[3] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[4] *E.g. Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641 (1890).

[5] *United States v. Creek Nation*, 295 U.S. at 110. After erroneously excluding some Creek lands reserved by treaty from a survey, federal officials sold the lands to settlers. The Creeks won compensation. Also see *United States v. Seminole Nation*, 299 U.S. 417 (1937).

[6] *United States v. Payne*, 264 U.S. 446, 448 (1924).

[7] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

[8] *United States v. Mason*, 412 U.S. 391 (1973); *Parravanov v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), *cert denied* 518 U.S. 1016; *Keen v. United States*, 981 F.Supp. 679 (D.D.C. 1997) (BIA decision to resume control of a tribal law enforcement program).

The U.S. Supreme Court originally conceived of Congress as the guardian or trustee of Indian tribes, albeit acting through the President.[9] Towards the end of the 19th Century, the Supreme Court upheld very broad Executive discretion in Indian affairs, rendering the President and federal agencies--principally the Bureau of Indian Affairs (BIA)--effectively the trustee, and treated Executive decisions as largely non-reviewable.[10] Since the 1960s, Executive discretion has gradually been restricted, and U.S. court decisions have characterized the trust as a burden on all actions by federal officials. Since 1975, moreover, Congress has adopted the practice of referring expressly to trusteeship in new Indian legislation (see Annex I), strongly implying the existence of underlying rights to services and benefits.

Practical consequences of the trust

According to U.S. federal case law, "trust responsibility" has four major practical applications. The Executive Branch--the President and the federal administrative agencies under the direction of the President--owe a general duty of loyalty to Indian tribes, and must protect the interests of Indian tribes when implementing all federal laws and programs.[11] In the exercise of specific statutory duties towards Indians, furthermore, federal agencies may be held to the same strict fiduciary standard of care as would apply to a private trustee.[12] All Executive Branch decisions affecting Indian interests are subject to a "presumption of reviewability" by the federal courts,[13] and the courts will construe all federal laws and treaties liberally in Indians' favour.[14]

The Executive's duty of loyalty to Indian tribes does not prohibit federal officials from balancing

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[9] See *Cherokee Nation v. Georgia*, *supra*.

[10] *Lone Wolf v. Hitchcock*, *supra*, supported by broad Congressional grants of power and responsibility to the BIA such as the Snyder Act of 1921, 42 Stat. 208, codified at 25 U.S.C. 13.

[11] *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1973), *reversed* 499 F.2d 1095 (D.C.Cir. 1974), *cert. denied* 420 U.S. 962 (1975) (allocating irrigation water from a federal reclamation project); *Coomes v. Adkinson*, 414 F.Supp. 975 (D.S.D.1976) (selecting bids for grazing leases on tribal lands); *United States v. Creek Nation*, *supra*, 295 U.S. at 110.

[12] Most recently, *Red Lake Band of Chippewa Indians v. Barlow*, 834 F2d 1393 (8th Cir. 1987), *modified in part* 846 F.2d 474 (federal forest-management program on reservation must benefit tribe); *Assiniboine and Sioux Tribes of Fort Peck v. Montana Board of Oil & Gas Conservation*, 792 F.2d 782 (9th Cir. 1986) (strict federal liability for mismanaging mineral revenues). The applicable federal statute need not refer expressly to a "trust" as long as it clearly assigns the stewardship of a tribal asset to federal officials *United States v. Mitchell*, 463 U.S. 206, 225-226 (1983); *Inter-Tribal Council of Arizona Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995).

[13] *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), overruling *Morrison v. Work*, 266 U.S. 481 (1924). In practical terms, this means that the reviewability of agency actions affecting Indians is not limited by the Administrative Procedure Act, 5 U.S.C. 551 et seq. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (waiving usual APA requirement of exhaustion).

[14] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians"). Also *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) (treaties and statutes "to be construed, so far as possible, in the sense which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people'"); applied e.g. in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 642 (1970); *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968).

Indian interests with non-Indian interests,[15] or bar them from complying with state laws against Indians' wishes,[16] or make them insurers against losses arising from tribal governments' business decisions.[17]

A breach of trust may be grounds for compensation, or for some form of equitable relief such as injunction or mandamus. As early as 1919, U.S. courts enjoined the sale or lease of tribal lands without express Congressional authority.[18] Federal officials can be ordered to take legal action to protect Indian interests,[19] and to implement legislatively-authorized programs.[20] Indeed, the Bureau of Indian Affairs unsuccessfully sought to overturn a number of tribal elections in the 1980s on the grounds that such an extraordinary power was necessarily implied in the agency's duty to protect trust assets.[21]

There is no question of the applicability of the trust doctrine to federal decisions affecting Indian property.[22] The applicability of trust principles to the administration of federal social programs has not yet been fully settled, however. Federal services authorized by Congress must actually be delivered,[23] and an agency director's decision affecting the eligibility of certain Indians for federal services must be

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[15] *Nevada v. United States*, 463 U.S. 110, 128, 142-143 (1983) (Congress can direct agencies to balance Indian interests with public interests in water allocation). Also see *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970), *cert. denied* 400 U.S. 942 (1970) (use of Indian appropriations to irrigate non-Indian farms); and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (national energy policy). Federal agencies may also favor some groups of Indians over others in the allocation of benefits. *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993); *Morton v. Ruiz*, 415 U.S. 199, 237-238 (1974).

[16] *United States v. Mason*, 412 U.S. 391, 398-399 (1973) (federal decision to comply with state tax laws).

[17] E.g. *Fort Belknap Indian Community v. United States*, 679 F.2d 24 (Ct.Cl. 1982), *cert denied* 103 S.Ct. 1186 (1983).

[18] *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Cramer v. United States*, 261 U.S. 219 (1923).

[19] *Joint Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D. Me.), *affirmed* 528 F.2d 370 (1st Cir. 1975); but compare *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.*, 353 F.Supp. 1098 (D.Ariz. 1972). In other cases, compensation was awarded for federal failure to take protective action, e.g. *United States v. Oneida Nation of New York*, 477 F.2d 939 (Ct.Cl. 1973); *Pechanga Band of Mission Indians v. Kacor Realty Inc.*, 680 F.2d 71 (9th Cir. 1982), *cert. denied* 103 S.Ct. 817 (1983).

[20] *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) (licensing businesses within Indian reservations pursuant to 25 U.S.C. 261-262); but see *United States ex rel. Keith v. Sioux Nation Shopping Center*, 634 F.2d 401 (8th Cir. 1980).

[21] See, e.g., *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).

[22] *Tonkawa Tribe v. Richards*, 75 F.3d 1039 (5th Cir. 1996). See, e.g., *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583 (10th Cir. 1992) (mineral leasing); *Navajo Tribe v. United States*, 364 F.2d 320, 322-324 (Ct.Cl. 1966) (mineral leasing); *United States v. Mitchell*, 463 U.S. 206 (1983) (forestry); *Menominee Tribe v. United States*, 101 Ct.Cl. 10, 19-20 (1944) (forestry); *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980) (forestry); *Navajo Tribe v. United States*, 624 F2d 981 (Ct.Cl. 1980) (forestry); *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973) (tribal trust funds); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct.Cl. 1975) (tribal trust funds); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994) (approval of a tribal business-management contract); *Pueblo of Santa Ana v. Hodel*, 663 F.Supp. 1300 (D.D.C. 1987) (tribal business lease).

[23] *Duncan v. United States*, 667 F.2d 36 (Ct.Cl. 1981), *cert. denied* 103 S.Ct. 3569 (1983) (compensation for failure to install water and sewer lines as directed by Congress).

facially reasonable,[24] but it is unclear whether inadequate or incompetent services give rise to an action for breach of trust.[25] Several recent decisions collapse the federal trust into a duty to consult with tribal leaders before modifying or withdrawing programs or services.[26] At least one federal appeals court has upheld a more substantive responsibility to protect Indians' health, however, ordering federal officials to allocate available funds to the remediation of a health hazard.[27]

Federal courts have applied the trust doctrine to Congress as well as the Executive. Congress is limited by what is generally referred to as the "tied-rationally" standard, which emanates from the Fifth Amendment Due Process Clause.[28] To accord with Due Process, Congressional legislative power over Indian affairs must be exercised in a manner which is consistent with the source of that power, which is to say the "trust relationship." Hence Congress cannot simply confiscate Indian lands for the benefit of non-Indians.[29] Congress can decide what is the best use of Indian lands or funds,[30] however, and in the exercise of that power Congress can simply terminate programs or services to individual tribes,[31] or to particular classes of Indian tribal members.[32] Since the source of Congressional power over Indians is the historical *political* relationship between Indian tribes and the United States, furthermore, Congress must base Indian rights and services on individual Indians' membership in politically recognized tribes, and not upon the beneficiaries' race.[33]

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[24] E.g. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *St. Paul Intertribal Housing Board v. Reynolds*, 564 F.Supp. 1408, 1413 (D.Minn 1983); *Tooahnippah v. Hickel*, 397 U.S. 598, 610 (1970); *Greene v. Babbitt*, 943 F.Supp. 1278 (W.D.Wa. 1996) (duty of impartiality of officials involved in review of Indians' claims for federal services).

[25] See e.g. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct.Cl.), *cert. denied* 400 U.S. 819 (1970) (inadequate health services); *Meyers v. Board of Education*, 905 F.Supp. 1544 (D. Utah 1995) (right to education).

[26] E.g. *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986) (consultation prior to the closure of BIA office on the reservation satisfied trust responsibility); *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395 (D.S.D. 1995) (duty to consult prior to a reduction in BIA staffing); compare *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (federal officials failed to consult adequately with tribal leaders before re-assigning reservation employee).

[27] *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (holding the BIA liable for removing toxic waste from Indian land), and *Blue Legs v. Environmental Protection Agency*, 732 F.Supp. 81 (D.S.D. 1990) (preventing federal officials from paying for the clean-up from funds allocated for other Indian environmental protection activities).

[28] *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974); *Delaware Tribal Business Commitee v. Weeks*, 430 U.S. 73, 84-85 (1975).

[29] *United States v. Sioux Nation*, 448 U.S. 371 (1980).

[30] *Delaware Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

[31] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

[32] *United States v. Jim*, 409 U.S. 80 (1972).

[33] *Morton v. Mancari*, 417 U.S. 535, 555 (1974) ruled that exclusively "Indian" programs do not violate the Fourteenth Amendment prohibition against racial discrimination because "Indian tribes" are a political rather than racial category. Also see *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979), *cert. denied* 444 U.S. 870 (1979). Compare *Rice v. Cayetano*, 120 S.Ct. 1044 (2000), distinguishing programs for Native Hawaiians as race-based.

Operational locus of the trust

Federal courts generally agree that the federal trust applies to *every* federal agency, whether or not it has expressly been delegated responsibility for Indian matters.[34] All agencies must consider the impacts of their actions on the interests of Indians, although agency liability for adverse impacts on Indians may be limited in the absence of an express statutory statement of the agency's duties to tribes.[35] In other words, all agencies must take explicit account of tribes' interests, but an agency need not give *highest priority* to Indians--nor is it *financially accountable* for injuries to Indians--unless Congress has established such a priority in legislation.

Congress has enlarged the scope of federal trust responsibility legislatively. Beginning with the 1975 Indian Self-Determination and Education Assistance Act, most new statutes relating specifically to Indian tribes have included references to a "special relationship" or "trust relationship" as both a source of federal authority, and as a justification for legislative intervention (Annex I). Thus far, the Congress has associated "trust" language with post-secondary education; adequate health care; adequate housing; the physical safety and "best interests" of Indian children; the conservation of Indian reservation forests, agricultural lands, range land, and energy resources; and the maintenance of tribal cultures, languages, and "sovereignty."

Congress has explicitly associated "trust responsibility" with six federal departments (Education, Energy, Health & Human Services, Housing & Urban Development, Interior, and Labor)[36] and expressly directed them to coordinate at least some of their special Indian programs.[37] The federal Department of Justice initially objected to the insertion of "trust" references in legislation on the grounds that they imply the existence of general, substantive economic, social, and cultural rights that can be enforced independently of legislation. Whether legislative references create substantive rights--for example, the right to educational assistance or adequate health care--has not been tested in the U.S. courts, however, and it is possible that they will eventually be dismissed as mere political boilerplate.

The "trust" language in the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) is particularly strong, and it appears to leave little room for doubt that Congress has assumed an obligation to ensure the adequacy of Indian housing ("affordable homes in safe and healthy

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[34] See e.g. *Navajo Tribe v. United States*, 364 U.S. 320 (Ct.Cl. 1966); *Pyramid Lake Paiute Trive v. Morton*, 354 F.Supp. 252 (D.D.C. 1973); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *Skokomish Tribe v. Federal Energy Review Commission*, 121 F.3d 1303 (9th Cir. 1997) (FERC must make decisions consistent with interests of affected Indian tribes); Parravanov v. Babbitt, 70 F.3d 539 (9th Cir. 1995).

[35] *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9th Cir. 1998); *Brown v. United States*, 42 Fed.Cl. 538 (Fed.Cl. 1998).

[36] Department of Education (post-secondary education, 25 U.S.C. 2504; employment training, 25 U.S.C. 3403); Department of Energy (program support, 25 U.S.C. 3501 et seq.); Department of Health & Human Services (Indian health programs, 25 U.S.C. 450g; substance abuse and employment training programs, 25 U.S.C. 2411, 3403); Department of Housing & Urban Development (housing subsidies, 25 U.S.C. 4101 et seq.); Department of the Interior, as shown in Annex I; Department of Labor (employment training programs, 25 U.S.C. 3403).

[37] Coordination of energy programs (Departments of Energy and Interior, 25 U.S.C. 3503-3504); coordination of Indian employment training programs (Departments of Education, Health & Human Services, Interior, and Labor, 25 U.S.C. 3403); coordination of substance-abuse programs (Departments of Health & Human Services and Interior, 25 U.S.C. 2411).

environments"). Ultimately, the courts must rule on the extent to which this obligation is being met and what remedies--if any--exist for a breach. Judging from the recent case law outlined above, U.S. courts will tend to focus on the administration of NAHASDA and subsequent federal enactments in the field of Indian housing--that is, whether programs are designed and financial resources distributed in a manner that is procedurally fair, and substantively consistent with Indians' best interests as Indians' conceive of their interests.

It is possible that Congressional failure to appropriate adequate funding for Indian programs will be challenged in the future. There are no U.S. precedents for judicial mandamus against the legislature; while the courts may rule that legislation is unconstitutional and therefore void, they have never directed the national legislature to enact laws, or appropriate funds. The only remedy currently available in U.S. law for Congressional failure to provide the resources necessary to comply with its "trust responsibility" would appear to be applying for compensation in the U.S. Court of Federal Claims.[38] Congress routinely appropriates funds to pay judgments rendered against the federal government for other kinds of liability adjudicated by the claims court. In the case of Indian tribes, however, there is precedent for Congress to attach conditions to the use of claims judgment funds.[39]

State responsibilities

Congressional power and responsibility in Indian affairs is said to be "plenary," in the sense that it extends to all aspects of the United States' relationship with Indian tribes, and generally pre-empts the authority of the several states to exercise jurisdiction over Indian tribes' internal affairs.[40] In the world of mobility and economic integration in which contemporary Native Americans actually live, however, there are no sharp boundaries between tribal and state interests. According to the 1990 federal census, a majority of American Indians live off-reservation, and a majority of people living on Indian reservations in the U.S. are non-Indians. Both tribes and states provide services to Indian and non-Indian residents of Indian reservations, and to Indians residing off-reservation. The impact of an assertion of state authority "on the right of reservation Indians to make their own laws and be ruled by them"[41] is a matter of degree except in cases where Congress has made it clear that either state or tribal jurisdiction must take priority as a matter of federal policy.[42]

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[38] Since 1966, Indian tribes have enjoyed explicitly legislated standing to pursue claims against the United States in federal courts pursuant to 28 U.S.C. 1362. Federal legislation that undermines Indian tribes' property rights gives rise to justiciable Fifth Amendment claims, e.g. *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987). Since the Fifth Amendment also protects tribes' interests in federal benefits, *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), it would seem to follow that an unreasonable withdrawal of benefits would be actionable as a Fifth Amendment "taking" of tribal property.

[39] *Delaware Business Committee v. Weeks, supra.*

[40] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

[41] Ibid., quoted with approval in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

[42] *Bracker, op. cit.*, 448 U.S. at 144-145. See e.g. *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982) (federal scheme for Indian education preempted state authority over school construction); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (federal scheme for regulating trade with Indians preempted state business taxes within Indian lands). Factors which may be considered in cases where Congressional intent is not plain include the relative impacts of the regulated activity on the state and the tribe, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), and the

One consequence of Congress' assertion of plenary power over Indian affairs has been relieving the states of the primary legal obligation to provide any special services to Indians *qua* Indians, although many states have nonetheless done so. Special state Indian programs are not regarded as a fulfillment of the United States' trust responsibility to Indian tribes, however, and (at least since 1953)[43] neither the President nor Congress has argued that federal programs for Indians are unnecessary because the same services or benefits are already available from the states.

As citizens of the United States and of the states in which they live,[44] Indians are nevertheless entitled under the Equal Protection Clause of the Fourteenth Amendment to the same state privileges, benefits, and services as other citizens, without discrimination, whether they are living on reservations or non-reservation lands.[45] The fact that a federal agency such as the BIA provides a particular service directly to reservation Indians does not excuse the states from providing the same service to Indians who request it.[46] Thus states must serve Indians equally as citizens, not specially as Indians.

Growing conflicts between federal, state and tribal responsibilities have led to the negotiation of tribal-state compacts for the delivery of social services. Only two federal laws expressly authorize such intergovernmental agreements,[47] but Indian tribes have successfully asserted inherent residual sovereign authority to compact with neighbouring States.[48]

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extent to which the state has provided relevant benefits or services, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

[43] In House Concurrent Resolution 108 (August 1, 1953), 67 Stat. B132, Congress resolved to end the federal "wardship" of Indians and make them equal and indistinguishable citizens of the states. After selectively "terminating" the political status of a number of Indian tribes, authorizing the states to assume civil and criminal jurisdiction over Indian reservations if they wished (few did) in Public Law 280 of August 15, 1953 (67 Stat. 588), and beginning the transfer Indian schools and hospitals to the states, Congress repented of this policy, and it was criticized by both political parties in the 1960 federal elections.

[44] Since the Act of June 2, 1924, ch. 233 (43 Stat. 253), which expressly reserved the special rights and benefits of Indians *qua* Indians. Also see *United States v. Nice*, 241 U.S. 591 (1916) (Indian citizenship not inconsistent with federal protection).

[45] See e.g. *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) and Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948) (right to vote in state elections); Shirley v. Superior Court, 109 Ariz. 510, 513 P.2d 939 (1973) *cert. denied* 415 U.S. 917 (1974) (right to hold state office); *Arizona ex. rel State Board of Public Welfare v. Hobby*, 221 F.2d 498 (D.D.C.ir. 1954) and *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 (1954) (right to receive state welfare benefits); *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (1975) and *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N.M. 1973) (right to attend state-funded public schools).

[46] *Prince v. Board of Education*, supra note 45; *Piper v. Big Pine School District*, 193 Cal. 664, 226 P. 929 (1924); *Grant v. Michaels*, 94 Mont. 452, 23 P.2d 266 (1933). But compare *White v. Califano*, 437 F.Supp. 543 (D.S.D. 1977), *affirmed* 581 F.2d 697 (8th Cir. 1978) (state mental hospital not obliged to honour tribal court commitment order).

[47] Section 109 of the Indian Child Welfare Act of 1978, Public Law 95-608, codified at 25 U.S.C. 1919, and section 110 of the Indian Gaming Regulatory Act of 1988, Public Law 100-497, codified at 25 U.S.C. 2710.

[48] Subject only to the requirement of administrative approval by the Secretary of the Interior where required by statute (in the case of tribal trust lands or trust funds) or a tribe's constitution. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993).

Part Two
The Contemporary Division of Labour in Federal Indian Programs

Besides adding "trust" commitments to special Indian legislation since 1975, Congress has increasingly included tribes as beneficiaries of general federal grant-in-aid laws, often specifying that tribes are entitled to the same treatment as states and local governments for the purposes of formula funding and block grants. A representative sample of such laws appears in Annex II. As a result, the number of federal departments and subagencies that finance tribal governments has grown rapidly, and tribes' primary dependence on the BIA has waned.[49] At the same time, a growing proportion of federal Indian services, previously provided directly by BIA and IHS, have been contractually delegated to tribal governments under the Indian Self-Determination Act (as amended by the Tribal Self-Governance Act), which authorizes tribes to assume control of federal functions.

Table 1 summarizes the federal aid dollars that were available to Indian tribal governments in the last fiscal year organized by federal departments, agencies, and their subagencies, and then by functions or purposes.[50] A total of 206 funding programs are shown, together with an estimate of the dollars available to tribal government applicants. In addition, Table 1 identifies several large programs that make transfer payments directly to individuals, including American Indians, without first passing those funds through states, local governments, or Indian tribes. Under "Type" of funding, "A" identifies programs targeted to Indian tribes; "B" indicates programs which include Indian tribes as well as states and/or local governments as beneficiaries; programs in the "C" category are also available to non-governmental organizations such as universities and community groups; and "D" represents direct transfer payments to individuals. The "A" and "B" programs are those for which Indian tribes are eligible because of their status as Indian governments.

Indian tribes receive the total funding appropriated by Congress for "A" programs. Many "B" programs are allocated by a needs-weighted formula, while others, like all of the "C" programs, are competitively based on the quality of applicants' proposals as well as needs. Since the agencies rarely report their program expenditures by categories of beneficiaries,[51] reasonably conservative assumptions have been made as to the proportion of funds that Indian tribes would have been able to secure had they

[49] In U.S. administrative parlance, "departments" are the administrative organizations represented by members of the Cabinet. They are divided into "subagencies." There are also a number of "independent agencies" supervised by directors who report to the President, but do not sit in the Cabinet. Departments can be reorganized by the President by Executive Order without Congressional approval, but the independent agencies are creatures of Congressional legislation, and can be reorganized only in accordance with specific statutory authority.

[50] The source of data is General Services Administration, *Catalog of Federal Domestic Assistance, Fiscal Year 2000*, which is available on-line at http:\\www.cfda.gov.

[51] Indian tribes' actual share of competitive dollars in the 1970s has been determined by coding agencies' manual or computer records of all of the individual grantees obtained through the Senate Committee on Indian Affairs—but was a time-consuming and expensive undertaking. See Russel L. Barsh and Katherine Díaz-Knauf, "The Structure of Federal Indian Programs in the Decade of Prosperity, 1970-1980," *American Indian Quarterly* 8(1):1-35 (1984). More recent studies of federal aid to Indian tribes, such as Roger Walke, *Federal Programs of Assistance to Native Americans; A Report Prepared for the Senate Select Committee on Indian Affairs*, Senate Committee Print No. 102-62 (December 1991), are largely based upon estimates using the same kinds of assumptions that have been made here.

applied for them. The default estimator has been one percent--the American Indian proportion of total U.S. population. In the case of programs targeting poverty, discrimination, geographical isolation, and social disadvantages, it has been assumed that Indians comprise *three* percent of the target population.

The relative contributions of different federal departments and agencies to an estimated $4.87 billion in 1999-2000 tribal government funding in 1999-2000 are visualized in Figure 1 (all figures are in U.S. dollars). These are the "A," "B" and "C" programs from Table 1. Figure 2 adds the estimated federal transfer payments directly to individuals, for a total federal fiscal flow to Indians and Indian tribal governments of $9.46 billion during the past fiscal year. The area of each circle is proportional to the fiscal contribution of each federal department and agency.

Figure 3 shows overlaps in the functional responsibilities of the relevant departments and agencies. Coded lines connect agencies which fund similar functions and activities, such as health care, education and environmental protection. The potential for coordination problems and policy conflicts is obvious.

Specialized offices

At present there are eight special federal subagencies and offices specially designated to provide financial aid and services to Indian tribal governments:

- ❏ Department of Education (ED)
  - ➥*Office of Indian Education*
- ❏ Department of Health and Human Services (HHS)
  - ➥*Indian Health Service (IHS)*
  - ➥*Administration for Native Americans (ANA)*
- ❏ Department of Housing and Urban Development (HUD)
  - ➥Office of Native American Programs (ONAP)
- ❏ Department of the Interior (DOI)
  - ➥*Bureau of Indian Affairs (BIA)*
  - ➥*Office of the Special Trustee for American Indians (OST)*
- ❏ Department of Labor (DOL)
  - ➥*Indian and Native American Employment & Training Program (INAP)*
- ❏ Environmental Protection Agency
  - ➥*American Indian Environmental Office*

These eight subagencies currently account for two-thirds of all federal Indian-related spending.[52] The Departments of Agriculture, Defense, Energy, and Justice also provide special programs for Indian tribes, and have adopted formal protocols for consulting regularly with tribal leaders. The Department of Commerce's Economic Development Administration (EDA) maintained an Indian desk in the 1970s,

[52] *Fiscal Year 2000 Budget*, Hearing Before the Senate Committee on Indian Affairs, Senate Hearing 106-8 (1999), at 314.

with outlays as large as ONAP and INAP, but its role in tribal affairs was phased out in the 1980s.[53]

The Interior Department

The Interior Department alone consists of nine subagencies, all of which have responsibilities that directly affect Indian lands and resources:

➥Bureau of Indian Affairs (BIA)	➪*Indian trust lands, waters, wildlife*
➥Bureau of Land Management (BLM)	➪*federal rangeland*
➥Bureau of Reclamation (BOR)	➪*irrigation and flood control*
➥U.S. Fish and Wildlife Service (USFWS)	➪*wildlife and fisheries*
➥U.S. Geological Survey (USGS)	➪*geological research, geographical databases*
➥Minerals Management Service (MMS)	➪*supervision of mining on federal lands*
➥National Park Service (NPS)	➪*national parks-monuments-sites*
➥Office of Surface Mining Reclamation and Enforcement (OSMRE)	➪*coal mine supervision and restoration*

Subagencies' responsibilities necessarily overlap as a simple matter of biophysical reality; it is physically impossible to separate efforts to manage water (BOR), grazing (BLM), mining (MMS/OSM), animals (FWS), and cultural resources (NPS) in real ecosystems or landscapes. Coordinating this one department's 66,000 employees continues to be a formidable challenge.

Pursuant to the 1993 Results Act,[54] the Interior Department defined its mission as: "to protect and provide access to our nation's natural and cultural heritage and honor our trust responsibilities to tribes."[55] These goals overlap and may conflict. Natural resources worth some $20 billion are extracted every year from lands under the supervision of Interior Department subagencies, including tribal trust lands, and land managers cannot avoid balancing wildlife conservation, scenic and cultural preservation, revenue maximization, and implementation of the rights and development preferences of Indian tribes.[56]

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[53] E.g. *Toward Economic Development for Native American Communities*, Committee Print, Joint Economic Committee, 91st Cong. 2d Sess. (1969), at 356-369. Executive Order 11625 collapsed EDA's Indian programs into an Indian Business Development Center within the Department of Commerce's Minority Business Development Administration, and truncated its Indian spending to $2 million. IBDC was subsequently discontinued, and EDA no longer delivers targeted Indian programs.

[54] The Government Performance and Results Act of 1993 obliges all federal departments to set specific goals and objectives, adopt strategic plans for achieving their goals and objectives, identify factors which may affect their ability to achieve the goals they have set, and describe methods they have used and plan to use to monitor and evaluate the achievement of their goals.

[55] General Accounting Office, *Results Act: Observations on the Department of the Interior's Draft Strategic Plan*, Report No. RCED-97-207R (July 18, 1997), at 2. Full-text versions of all GAO reports are available online at http:\\www.gao.gov.

[56] General Accounting Office, *Major Management Challenges and Program Risks: Department of the Interior*, Report No. OCG-99-9 (January 1, 1999), chapter 1.

The land-management functions of Interior Department agencies also overlap with the statutory responsibilities of a number of other federal departments and agencies, in particular:

- ❑ Department of Agriculture (USDA)
  - ➥Animal & Plant Health Inspection Service ➪private farm/range
  - ➥U.S. Forest Service (USFS) ➪federally-owned forests
  - ➥Natural Resources Conservation Service ➪farm/range soils and wildlife
- ❑ Department of Commerce
  - ➥National Oceanic & Atmospheric Administration (NOAA)[57] ➪marine fisheries
- ❑ Department of Defense (DOD)
  - ➥U.S. Army Corps of Engineers ➪shorelines, dams and rivers
- ❑ Department of Energy (DOE) ➪uranium mining and disposal
- ❑ Environmental Protection Agency (EPA) ➪water, air, solid waste
- ❑ Federal Emergency Management Agency (FEMA) ➪natural disasters

The separation of range management and forest management into two separate Cabinet-level federal departments (for example) is an historical artifact that continues to pose practical problems for effective ecosystem-scale conservation. Environmental protection functions are distributed among five subagencies at Interior (BIA, BLM, BOR, FWS, NPS) and Interior's separate Office of Environmental Policy Compliance, as well as USDA, and the EPA. Activities affecting shorelines, or the banks or flow of navigable rivers, requires the approval and continuing supervision of the Army Corps of Engineers.

The U.S. federal government owns approximately 650 million acres, or nearly one-third of the total surface land area of the fifty States. Of these 650 million acres, 95 percent are managed by USFS, BLM, NPS, and FWS, and the geographical areas under the jurisdictions of these four subagencies largely overlap.[58] Another 100 million acres fall within Indian reservations, where the authority for land management rests principally in Indian tribal governments and the BIA. Indian reservations typically either contain, or border some federally-owned lands, creating a situation in which tribes must cooperate with several federal land-management subagencies, as well as the land-management authorities of the surrounding State. Federal land-management agencies typically serve different socioeconomic interests (farmers, miners, developers, recreational wildlife users), and may operate under conflicting statutory guidelines.

Although the Interior Department's BIA is legislatively the lead federal agency in the fulfillment of trust responsibilities to Indian tribes,[59] its functions overlap with the functions of most other Interior

[57] Pursuant to Public Law 89-304, anadromous fisheries management and grant programs are jointly administered by NOAA and USFWS.

[58] GAO, *Results Act*, op. cit., at 6; also GAO, *Management Challenges*, op. cit., chapter 1.1.

[59] As provided by 25 U.S.C. sections 2 and 9.

subagencies, and with those of most other federal departments and agencies. As shown in Figure 1, the federal departments and independent agencies most heavily invested in Indian tribal government today (collectively providing 99 percent of tribes' federal aid) are:

- ❏ Department of Agriculture (USDA)
- ❏ Department of Education (ED)
- ❏ Department of Health and Human Services (HHS)
- ❏ Department of Housing & Urban Development (HUD)
- ❏ Department of Justice (DOJ)
- ❏ Department of Labor (DOL)
- ❏ Department of Transportation (DOT)
- ❏ Environmental Protection Agency (EPA)

In 1994, moreover, Congress responded to evidence of widespread loss and waste of Indian trust funds, minerals, and lands by creating an Office of the Special Trustee for American Indians separated administratively from BIA. In 1997 the Special Trustee submitted a strategic plan to Congress, but the Interior Department did not support it, forcing the Special Trustee and Interior into negotiations that continue today.[60]

In several recent reports, the General Accounting Office (GAO), functionally equivalent to the Auditor General of Canada, has highlighted coordination problems within the Interior Department, and between the Interior Department and other federal agencies with responsibility for lands and natural resources, such as the Department of Agriculture.[61] A threshold problem, according to GAO, has been the failure of the Interior Department to define the goals of its subagencies precisely, to identify specific linkages between its subagencies' functions and goals, or to maintain adequate management information systems for the purpose of coordination and evaluation. GAO also reported that the Interior Department has been slow to respond to criticism of these "serious deficiencies" in management.

"Historically, Interior has been a highly decentralized agency [that] has allowed its subagencies, for the most part, to develop their own systems and processes for managing their programs," the GAO concluded.[62] "A number of cross-cutting issues need to be addressed" throughout the Department "to prevent duplication and overlap" of programs.[63] "The increases in effectiveness and efficiency resulting

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[60] GAO, *Management Challenges*, op. cit., chapter 1.4; GAO, *Financial Management: Recommendations on Indian Trust Fund Strategic Plan Proposals*, Report No. GAO/AIMD-98-37 (November 26, 1997).

[61] GAO, *Results Act*, op. cit., and *Management Challenges*, op. cit. Also see National Academy of Public Administration, *A Study of Management and Administration: The Bureau of Indian Affairs* (August 1999), an independent study commissioned by BIA in response to Congressional and tribal criticism of inefficiency.

[62] GAO, *Results Act*, op. cit., at 6; *Management Challenges*, op. cit., chapter 1.1; also see chapter 1.3.

[63] GAO, *Results Act*, op. cit., at 3, 6.

from improved coordination would be substantial," GAO concluded, although admittedly this would necessitate an agreement on "how to balance differing objectives for various uses of federal lands over the short and long terms"--a substantial obstacle to reform.[64]

"Interior lacks adequate systems and financial and program information to effectively manage and budget for Indian programs," moreover, such as information of social conditions and community needs.[65] "Management of the $3 billion Indian trust fund has long been characterized by inadequate accounting and information systems, untrained and inexperienced staff, poor recordkeeping and internal controls, and inadequate written policies and procedures."[66] These technical deficiencies also continue to be barriers to improving inter-agency coordination.

Some other major players

Although USDA implements only two special legislative mandates in the field of Indian welfare, representing about $62 million annually,[67] Indians and Indian tribes are eligible to compete with non-Indians and states for more than $4.8 billion annually in grants and loans through ten general needs-based USDA rural development programs. USDA's major role historically on Indian reservations has been the distribution of farm surplus food products as "commodities" (rations), influencing the food preferences and nutritional health of generations of reservation Indians.[68]

Two agencies within HHS are specially dedicated to Indian programs: IHS and ANA. Physicians for Indian reservations were employed by BIA until 1955, when responsibility for Indian health care was transferred to the U.S. Public Health Service (PHS), a uniformed officer corps that offered an alternative to military service. IHS gradually evolved a distinct identity and built substantial network of clinics and hospitals. Since 1975, it has been transferring its facilities and healthcare services to tribal governments in accordance with the Indian Self-Determination Act. ANA was established within HHS by the Native

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[64] GAO, *Management Challenges*, op. cit., chapter 1.1. This is a problem of long standing. Presidential Commission on Indian Reservation Economies, *Report and Recommendations to the President of the United States* (November 1984), Part 2 at 42; *Management of Indian Natural Resources; Report of the Comptroller General*, Committee Print, Senate Committee on Interior & Insular Affairs, 94th Cong. 2d Sess. (1976); American Indian Policy Review Commission, *Task Force Seven: Reservation and Resource Development and Protection* (1976), at 89-90.

[65] GAO, *Results Act*, op. cit., at 6; *Management Challenges*, op. cit., chapter 1.2. According to these reports, Interior had failed to develop adequate information systems to inventory the natural and cultural resources under its jurisdiction generally, and to monitor their condition.

[66] GAO, *Management Challenges*, op. cit., chapter 1.4. BIA has also been criticized for arbitrariness in its allocation of funds among the 558 Indian tribes recognized politically by the United States. *Tribal Allocations by BIA Fiscal Year 1999*, Hearing Before the Senate Committee on Indian Affairs, Senate Hearing 105-507 (1998).

[67] An Indian reservation food-distribution program under section 4 of the Food Stamp Act of 1977, 7 U.S.C. 2011-2031, as amended, and the Indian Land Acquisition Loans program under the Loans to Indian Tribes and Tribal Corporations Act of 1970, Public Law 91-229, 25 U.S.C. 488.

[68] Although not always for the best. Fats and sugar made up a large proportion of commodities (including the ever-popular peanut butter and loaves of process-cheese), and no account was taken of the prevalence of lactose and sucrose intolerance among Native Americans. See Russel L. Barsh, "Chronic Health Effects of Dispossession and Dietary Change: Lessons from North American Hunter-Gatherers," *Medical Anthropology* 18(1):135-161 (1999).

American Programs Act of 1974 (Public Law 93-644), and assumed the role of filling program gaps in BIA. ANA continues to fund a wide range of tribal activities, from projects to restore Indian languages, to research supporting the federal acknowledgment of Indian tribes.[69] ANA's investment in federal recognition of "new tribes" has often put it in direct political conflict with BIA, as the agency entrusted with making recognition decisions.

Three other HHS agencies have become significant contributors to Indian tribal governments. The Administration on Children, Youth, and Families administers programs aimed at disadvantaged or vulnerable children, including victims of homelessness and abuse; its estimated current contribution to Indian tribes is $724 million, or 15 percent of all federal flows through tribal governments (comparable to the total HUD funding for Indian tribes). The relatively new Substance Abuse and Mental Health Services Administration delivers an estimated additional $45 million annually to tribal governments, and the Administration on Aging a further $17 million. Together, these three HHS agencies provide nearly as much tribal program funding as the BIA.

In 1961, the Department of Housing and Urban Development (HUD) determined as a matter of policy that low-income families on Indian reservations should receive special attention under the Housing Act of 1937, and eventually developed 14 separate programs to support Indian tribal housing authorities through formula funding as well as competitive project grants.[70] NAHASDA collapsed most of HUD's Indian programs into a single needs-weighted annual tribal block grant. Although it has a predominantly urban constituency, HUD has become a major player in Indian reservation economies, distributing more than $4 billion to tribal governments in the 1990s. HUD maintains a specialized unit to coordinate with Indian tribes, its Office of Native American Programs.

The Environmental Protection Agency (EPA) has routinely delegated regulatory functions to Indian tribes under its "treatment as a State policy," which identified tribes as "the primary parties for setting standards, making environmental policy decisions and managing programs on reservations."[71] EPA's policy was strengthened in 1994 by removing the requirements of State comment or approval in most cases.[72] Tribes may use this delegated authority to set water quality standards that exceed federal and state requirements.[73] In accordance with the Indian Environmental General Assistance Act of 1992, moreover, EPA has established an American Indian Environmental Office as a coordinating unit as well

[69] As outlined in *Native American Programs Act of 1974*, Hearing Before the Senate Committee on Indian Affairs, Senate Hearing 105-141 (1997), at 6-11.

[70] See General Accounting Office, *Native American Housing: Information on HUD's Funding of Indian Housing Programs*, Report No. RCED-99-16 (November 1998).

[71] Office of the Administrator, *EPA Policy for the Administration of Indian Programs on Indian Reservations* (1984).

[72] EPA, *Final Rule, Indian Tribes, Eligibility for Program Authorization*, 59 Fed.Reg. 64,339 (1994).

[73] *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied* 118 S.Ct. 410, 422-423 (1997); both cases refer to the underlying sovereignty of Indian tribes. But see *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995), *affirmed on other grounds* 99 F.3d 1439 (9th Cir. 1996), questioning tribal authority over a municipal landfill on fee-patent lands within a reservation's boundaries.

as a direct funder of tribal programs.[74]

System-wide coordination

In an April 29, 1994 memorandum, President Clinton affirmed the responsibility of all federal agencies to take account of the concerns of Indian tribes in all decisions affecting tribal interests, "in a knowledgeable, sensitive manner respectful of tribal sovereignty."[75] Clinton laid out the principles to be followed by the heads of every federal department and agency, *inter alia*:

- "to consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect [them];"
- to "assess the impact of Federal Government plans, projects, programs, and activities" on Indian tribes and "assure that tribal government rights and concerns are considered;"
- "take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments" on such matters;
- to "work cooperatively with other Federal departments and agencies" to improve the coordination and delivery of programs and services to Indian tribes; and
- to ensure that all subagencies and programs under their supervision are aware of, and comply with these principles.

As an immediate result of the "government-to-government" order, most federal departments and agencies adopted formal protocols for periodic consultations and administrative cooperation with tribal governments.[76] No systematic evaluation of the implementation of Clinton's order has been undertaken, but tribal leaders continue to express dissatisfaction to the Senate Committee on Indian Affairs.

Despite the rapid growth of Indian programs outside of BIA since the 1950s, a Working Group on American Indians and Alaska Natives was only recently struck within the White House Domestic Policy Council as an attempt at coordinating Indian policies and programs throughout the Executive Branch. Meeting quarterly, the Working Group is chaired by the Secretary of the Interior, and its objectives appear to be limited to assuring that federal agencies consult with Indian tribal leaders and consider tribal priorities in accordance with the Clinton Administration's "government-to-government" policy. Its efficacy remains to be demonstrated.

BIA's nominal leadership role

A century ago, the Bureau of Indian Affairs enjoyed almost total control of Indians and Indian reservations. Today, ten members of the federal Cabinet and the administrators of several independent

[74] Public Law 102-497, as amended by Public Law 103-155.

[75] The White House, Memorandum for the Heads of Executive Departments and Agencies, "Government-to-Government Relations with Native American Tribal Governments," April 29, 1994.

[76] See, for example, U.S. Fish and Wildlife Service, "The Native American Policy," June 28, 1994, "supports the authority of Native American governments to manage, co-manage, or cooperatively manage fish and wildlife resources," pledges funding and technical support for the development of tribal conservation programs, and establishes guidelines for entering into formal agreements with individual tribes.

federal agencies oversee programs designed to fulfill federal responsibilities to Indian tribes. More than 20 departments, agencies, and subagencies engage in rule-making with regard to Indian tribes.

Power balances and competition among federal agencies have been driven in part by changes in the size and structure of the federal Indian budget. Overall, Congressional spending on Indian tribes has declined in real terms since the 1980s, and lagged behind the Clinton Administration's efforts to restore federal human-development efforts generally.[77] The BIA budget gained some ground in 1990-1991 with the launch of several new legislative initiatives, but later fell again, resulting in the loss of roughly one-third of the agency's personnel. As a whole, the Indian Health Service budget has been the most stable, and programs subsidizing economic growth (infrastructure, businesses, and training) the least stable.[78] One constant during the past decade has been the sheer scale of HHS and DOL expenditures relative to the budget of the BIA, however. Although BIA asserts its primacy in the Indian field, its fiscal effort has long been dwarfed by other federal departments and agencies.

For more than a century, the BIA policy was made by the Commissioner of Indian Affairs, but in the 1970s Congress approved the creation of a post of Assistant Secretary of the Interior--Indian Affairs. Operational supervision of the BIA was entrusted to Deputy Assistant Secretaries. It was argued that an Assistant Secretary would carry greater influence in the Capitol, and strengthen the ability of the BIA to protect Indian rights and coordinate relevant federal programs. By custom, every Assistant Secretary—Indian Affairs has been a tribal member.

The power of the Assistant Secretary—Indian Affairs to manage the BIA alone is significantly curtailed by the Office of Management and Budget (OMB) in the White House, which oversees federal agencies' budgetary requests, staff recruitment, and output evaluation, primarily from the perspectives of cost-containment and transparency. The power of the Assistant Secretary is also considerably limited by middle managers within BIA itself, who not only enjoy civil service tenure and greater experience in Washington politics and BIA operations than any political appointee, but also have routine access to the ears and opinions of Indian tribal leaders. When President Clinton's first-term nomination of Ada Deer as Assistant Secretary—Indian Affairs was reviewed by Congress, for example, Deer promised to carry out sweeping reforms and quickly transfer all BIA operations to tribal governments. Tribes themselves eventually rejected her program. The current Assistant Secretary, Ken Gover, an unabashed champion of tribal sovereignty, has been forced repeatedly to apologize to Congress for the BIA.

Gover has nonetheless argued that his office is still the real federal power centre for Indians, and has called upon tribal leaders to view the BIA as their best friend in Washington:[79]

> The Tribes and the Bureau of Indian Affairs are linked. The BIA represents the government to government relationship we all hold dear, and even when there are differences and problems between the BIA and Tribal governments, we are still linked. What is good for the Tribes is good

[77] Barsh and Díaz-Knauf, op. cit.; *Fiscal Year 2000 Budget*, Hearing Before the Senate Committee on Indian Affairs, Senate Hearing 106-8 (1999), 321-323.

[78] *Bureau of Indian Affairs' Capacity and Mission*, op. cit., at 45-51.

[79] "From Fear to Hope; Speech by Assistant Secretary Kevin Gover to the National Congress of American Indians, October 6, 1999, Palm Springs, CA." Full text available from the BIA on-line at http:\\www.doi.gov/bia/ncaikg99.htm.

> for the Bureau and when the Bureau is diminished, the federal-tribal government to government relationship is also diminished.… The BIA is the Tribes' greatest supporter, because the BIA is made up of tribal people. 93% of the employees of the Bureau of Indian Affairs are American Indians.... I have found the employees of the BIA to be some of the most dedicated people ever to serve this government, and some of the most vocal advocates of tribal rights and fervent workers for the betterment of Indian communities that I have ever seen.

Gover attributes BIA inefficiency to Clinton-era budget cuts, assuring tribal leaders that BIA will do everything feasible to support them within the resources available to them.[80] He maintains that the BIA "must assume a stronger role in coordinating federal Executive Branch policy towards the Tribes," and evolve from a supervisory and human-services role into an "information clearinghouse and source of expertise" for tribal governments.[81] BIA would concentrate in future on "ensuring consistent federal agency acknowledgement of their agencies' responsibilities to tribes," through consultation and program commitments.

The argument that the BIA is tribes' primary spokesman inside the Beltway has long persuaded tribal leaders to oppose the elimination of the agency, as was proposed by Secretary of the Interior James Watt in the early years of the Reagan Administration. It was more compelling, perhaps, before the creation of the Senate Committee on Indian Affairs in the 1970s gave tribal leaders an alternative, and arguably higher-level source of access to federal money and policy. The Committee has become a persistent and uncompromising critic of the BIA.

Congress' role in Indian policy

Congressional initiatives on Indian policy were relatively infrequent until the 1970s. Major new laws were enacted on a generational scale, roughly once every 25 years. Decisions regarding policy and implementation were largely left to the Executive (in effect, to BIA), and Congress was mainly involved in reviewing the annual BIA budget request. From 1946 to 1975, the House and Senate each maintained a sub-committee on Indian affairs attached to their respective standing committees on Interior & Insular [i.e. overseas federal territories] Affairs. From 1932 to 1975, nearly all major policy legislation, such as the Indian Reorganization Act, the Indian Claims Commission Act, and the Indian Self-Determination Act, was initiated by the White House on the advice of the Commissioner of Indian Affairs.

The Senate Committee on Indian Affairs developed from Congressional reaction to the sweeping reforms of Indian policy proposed by Richard Nixon. (It is indeed ironic that a President so tarnished by

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[80] BIA has redefined its mission in the past as a means of deflecting Congressional criticism of waste and inefficiency. Russel L. Barsh, "The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense," *American Indian Law Review* 7:1-50 (1980); Russel L. Barsh, "Progressive-Era Bureaucrats and the Unity of Twentieth-Century Indian Policy," *American Indian Quarterly* 15(1):1-17 (1991).

[81] *Bureau of Indian Affairs' Capacity and Mission*, Hearing Before the Senate Committee on Indian Affairs, Senate Hearing 106-79 (1999), at 39-40.

charges of abuses of power should have catalyzed some of the century' crucial Indian-policy reforms.)[82] Shortly after taking office as President in 1968, Nixon criticized the policy since 1953 of "terminating" Indians' special legal status, embraced the goal of tribal "self-determination" and promised to introduce bills in Congress on tribal self-government, Indian economic development, and federal accountability for its trust management of Indian assets. Only two of Nixon's bills were enacted--the Indian Financing Act of 1974 and the Indian Self-Determination Act of 1975. Congress also struck a bipartisan American Indian Policy Review Commission composed of several American Indian leaders as well as members of Congress,[83] and provisionally re-established a Senate Select Committee on Indian Affairs that has since become a permanent standing committee of the Senate.[84]

Like Canada's Royal Commission on Aboriginal Peoples, the American Indian Policy Review Commission tabled an exhaustive study of Indian conditions and hundreds of recommendations. Unlike RCAP, however, the U.S. policy review commission had a means of implementing its recommendations through a legislative body, the Select Committee on Indian Affairs.

Senator James Abourezk of South Dakota, an outspoken advocate of Indian tribal rights, was the chairman of the policy review commission and the first chairman of the Select Committee. He used his influential status on the Select Committee to introduce bills implementing key provisions of the review commission report, and to establish the Committee firmly as a gatekeeper for all Congressional activity affecting Indian tribes. Under Abourezk's leadership, the committee secured a customary prerogative of initiating all new Indian policy legislation.

The policy role of the Senate Committee continued to evolve through practice. Throughout the Reagan years, dominated by trickle-down economic thinking and steep reductions in social spending, Senator Daniel Inouye of Hawaii chaired the Senate Committee.[85] In comparison to Abourezk, Inouye was fiscally and socially conservative and adopted a lower-profile political style. Under his leadership, the committee developed a large, predominantly Native professional staff and devoted much more of its energy to budgetary matters: a growing number of line-item appropriations for individual Indian tribes, and inserting amendments into general program legislation and budgetary authorizations to give tribes access to a growing number of sources of federal dollars. The Inouye era ended with a rush of important Indian-policy legislation--among them the Native American Graves Protection and Repatriation Act of 1990--during the relatively more moderate Bush Administration.

Although Democrats regained the Presidency in 1992, Republicans secured a large majority in

[82] The previous rush of Indian reforms--the "Indian New Deal"--was associated with Franklin Delano Roosevelt's progressive Commissioner of Indian Affairs, John Collier, a former New York social worker and Indian-rights activist who supervised the BIA from 1932 to 1946.

[83] American Indian Policy Review Commission, *Final Report* (Washington, D.C.: Government Printing Office, 1976).

[84] Standing House and Senate Committees on Indian Affairs had been abolished by the Legislative Reorganization Act of 1946 (60 Stat. 612) as part of the sweeping post-war federal austerity measures that included "termination" of Indian tribes.

[85] By custom, the chairman of the Senate Committee is a senator from a state with a large Native population. Senator Inouye, a Japanese-American, developed particularly strong professional relationships with Indian leaders, and (contrary to early predictions) helped build the case for federal recognition of Native Hawaiians as entitled to many of the same rights and benefits as American Indians and Alaskan Natives.

Congress. John McCain, who narrowly lost the Republican Presidential nomination in 2000, was vice-chairman of the Select Committee during the Bush years, and Republican control of the Senate elevated him to the chairmanship.[86] Fiercely critical of mismanagement, corruption and abuses of power in tribal governments--before becoming the chairman, he chaired a sub-committee investigating tribal officials--McCain shifted some of the committee's efforts back to policy legislation. McCain's influence can be seen in the Tribal Self-Governance Program, which began as a demonstration project involving a small number of Indian tribes that received unrestricted block funding in exchange for commitments to fiscal accountability.[87] A growing number of tribes are choosing this funding option, which essentially offers tribes modest administrative savings in exchange for safeguards such as routine audits.

Ben Nighthorse Campbell of Colorado, one of only three Indians to serve in the Senate since the 1920s, became the chairman of the Senate Committee on Indian Affairs in 1997. His appointment to the chair symbolizes the committee's evolution into Indian tribes' primary power-base in Washington.

The Committee has served as a gatekeeper for all federal Indian legislation, and has coordinated the reflection of tribes' concerns in the work of other legislative committees. It has also enforced a high degree of Executive accountability, not only through conducting frequent public oversight hearings, but through its customary authority to vet the budgets of federal agencies where there may be implications for Indian tribes. Federal agencies must justify their Indian-related spending (or lack thereof) publicly to the Senate Committee at rather adversarial hearings where tribal leaders also testify and dominate the agenda in close collaboration with the committee's staff. The Senate Committee's offices are the social hub and political clearinghouse for Indian leaders in Washington, and it is probably fair to say that the committee staff are generally better aware of tribal leaders' concerns than the White House or BIA.

The Senate Committee's largely Indian staff manages its policy agenda. As a rule, Congressmen from heavily Indian states are likely to retain at least one Indian legislative assistant to liaise with the Senate Committee. Similarly, the members of the Senate Committee often have a Native staffer in their personal offices in Washington, and retain other Indian staffers to mind their interests in the offices of the committee. Many also employ Indian staff at their district (riding) offices. All together, Indian staff of Members and the Senate Committee represent a visible and significant policy voice on Capitol Hill.

The power of the Senate Committee has been reduced somewhat by Congressional procedural reforms during the second Clinton term that have led to more co-management of bills by committees with overlapping jurisdictions, as well as an increase in the assertiveness of House of Representatives committees, including the House sub-committee on Indian affairs. It was infrequent, until the past few sessions of Congress, for Indian legislation to be initiated on the House side.

Significant weaknesses

[86] By custom, each Congressional committee has "majority" and "minority" members roughly in proportion to the voting strength of each political party in the house. The chairman is the senior majority member, the vice-chairman is the senior minority member, and they appoint majority and minority staff counsel to supervise the legislative agenda of the committee.

[87] Self-Governance only applies to funds distributed by the BIA, i.e. roughly one-fifth of the total federal funds for which tribes are eligible--the same funds previously made available to tribes under Indian Self-Determination Act contracts with BIA.

As noted earlier, the sheer scale and complexity of present-day federal programs for Indian tribal governments poses a formidable coordination challenge, which the BIA and Interior Department appear to have limited technical capacity to overcome. Despite the nominal role of the Assistant Secretary of the Interior—Indian Affairs as the Executive "czar" for Indian policy, the most effective coordination at present comes from the Senate Committee on Indian Affairs.

To the extent that the Senate Committee's power relies heavily on the annual budgeting process, the Indian policy agenda in Washington has arguably been preoccupied with programs and devoted too little attention to broader social, political, and jurisdictional issues. Those issues, frequently involving tribal-state relationships, tend to be left to the courts. Conflicts between states and tribes over taxation, regulatory jurisdiction, and transborder resources (especially water), continue to be litigated frequently —and at considerable expense. This pattern is understandable. The Senate Committee may function as a policy platform for Indian tribes, but its members are still elected every six years in their home states. Federal spending priorities and program criteria are much less controversial than policy decisions which may affect the legislative powers and jurisdiction of state governments.

A fundamental issue left by Congress to the BIA has been the determination of which groups of Indians constitute "Indian tribes" for the purposes of self-government, intergovernmental coordination, and eligibility for federal programs and services. Until 1978, when the BIA adopted explicit criteria and administrative procedures for such determinations,[88] the status of individual Indian groups was reviewed *ad hoc* by BIA lawyers (the Office of the Associate Solicitor--Indian Affairs) unless Congress chose to intervene legislatively. More than 100 petitions for review have been filed by Indian groups since 1978, and only one-fourth have been resolved. Congress has debated establishing an independent commission for the recognition of Indian tribes since 1980, but thus far has been unable to agree on policy. It may be significance that Congressional inaction has been, to some extent, a reflection of a disagreement over recognition policy among Indian leaders themselves.

Tribal economics also play a role in shaping Indian policy through the Senate Committee. Since the Indian Gaming Regulatory Act of 1988, a small number of Indian tribes--not more than 3 percent of the total—have gained considerable financial power to lobby Congress. Other Indians have begun to complain that gaming tribes are monopolizing the national Indian legislative agenda. At the community level, moreover, Washington's focus on funding-program diversification has overwhelmed tribal leaders with a staggering array of funding options--nearly $5 billion divided amongst 206 program windows in the current fiscal year. This embarrassment of riches (to borrow a simile from the poet John Donne) strains the ability of the smaller Indian tribes to take full advantage of federal dollars. Many small U.S. tribes have compensated for their size by forming service-delivery consortia, such as the Northwest Intertribal Court System and Northwest Indian Tribal Fisheries Commission, or by entering in service-delivery compacts with state governments.

Although several U.S. Indian reservations are larger than Prince Edward Island, and the Navajo Nation is half the size of New Brunswick (with a resident population larger than PEI), most of the 558

[88] See 25 C.F.R. Part 83. The criteria have withstood a challenge to their substantive fairness, *Miami Nation v. Babbitt*, 887 F.Supp. 1158 (N.D.Ind. 1995), but have failed a procedural Due Process challenge, *Green v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), and in June 2000 the Assistant Secretary--Indian Affairs told the Senate Committee that the BIA was simply financially and technically incapable of doing justice to the remaining unresolved petitions.

federally-recognized Indian tribes in the United States are very small in terms of population and land. The modal U.S. Indian tribe has roughly a thousand members and a land base of fewer than 100 square kilometres, comparable to most Canadian First Nations. Fewer than 25 U.S. tribes receive substantial profits from casinos, and fewer than 25 profit from mining. On the whole, U.S. Indian programs and policies have traditionally been adapted to medium and smaller tribes rather than the few geographical or economic giants, on the grounds that the giants are more capable of supporting themselves. This may conceivably change as a result of the casino industry, however.

Although Indian tribes appear to have been able to advance their interests effectively through the Senate Committee with respect to special Indian programs and services, it should be borne in mind that nearly half of the federal funds flowing to Indian tribes are administered directly by the Social Security Administration (Figure 2). Tribal coordination and policy involvement in Social Security Act programs has been limited, thus far, but there are no structural or legal barriers in the way of developing a "trust" relationship with the Social Security Administration in future. Indian tribes simply have relatively little incentive to intervene on social security policies, because the operation of social security programs will almost certainly remain federal--not decentralized to states and tribes.

Likewise, Indian tribes continue to benefit substantially from state-government social programs and services, in most instances without any formal coordination mechanisms. Some states have created a governor's council on Indian affairs, or legislative committees on Indian affairs, but few have gone as far as Washington State in signing an omnibus agreement with tribal leaders to apply the "government-to-government" principle to all state agencies (Washington's "Centennial Accord" in 1989). According to Tara Blair, who currently coordinates the Washington State initiative from the governor's office, and Washington State tribal leaders, it will take many more years to complete the negotiation of agreements in specific areas of regulatory jurisdiction and program delivery. The major areas of responsibility that are already coordinated under Washington State's initiative are fisheries and wildlife conservation, child welfare, and family services.

Furthermore, states rather than tribes ordinarily have jurisdiction over non-Indians, non-member Indians, and lands owned in fee simple within the boundaries of Indian reservations.[89] This entangles state and tribal regulatory jurisdiction to the point that tribal-state coordination can be more crucial for government efficiency than tribal-state coordination.

Indian interest in state politics has been relatively poor since the 1930s.[90] There is a perception that "trust responsibility" is lodged exclusively in the federal government, and that Indian participation in state governments weakens tribal sovereignty. States' unwillingness to acknowledge a responsibility to contribute to the prosperity of Indian tribes (as distinguished from their Fourteenth Amendment duty to serve individual Indians without discrimination) reinforces Indians' perception of the states as falling outside of treaties and outside of the "trust." From a human-development perspective, the distance that

[89] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 1919 (1978); *Montana v. United States*, 450 U.S. 544 (1980); *Brendale v. Confederated Tribes of Yakima Indian Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).

[90] Russel L. Barsh, "Plains Indian Agrarianism and Class Conflict," *Great Plains Quarterly* 7(2): 83-90 (1987); compare Russel L. Barsh et al., "The Prairie Indian Vote in Canadian Politics 1965-93: A Critical Case Study from Alberta," *Great Plains Research* 7(1):3-26 (1997).

still separates states and tribes can be seen as a significant weakness of the U.S. model.

Part Three
Applicability to Canada: A Comparative Overview

A number of constitutional principles and structures distinguish American from Canadian public administration generally, and they shed light on the development and limitations of the U.S. approach to conducting "government-to-government" relationships with Indian tribes.

In principle, Canada and the U.S. share a model of federalism in which the central government exercises supremacy over constitutionally delineated subjects, such as national defence and currency, and defers to the states or provinces in other fields. In practice, the American federal government has leveraged its monopoly of certain functions--in particular, its very broad regulatory powers under the Commerce Clause of the Constitution--to gain effective domination of state policies in most respects. The U.S. Civil War, and the extraordinary expansion of federal social programs and regulatory activity during the Depression, served to extend and reinforce federal supremacy, in fact and in laws. Indeed, today, proponents of "state rights" are regarded as an extreme wing of conservative (Republican) thinking. Americans expect a degree of uniformity of laws and social services nationwide, and pay far more attention to events in Washington than at their state capitols.

By contrast, the federal and provincial governments in Canada are relatively equal in powers. Although Ottawa grew in proportion to the provinces from the 1930s to 1960s, largely in connection with assuming more of the expense of social programs, Canadian federalism continues to be a negotiated balancing act in which the larger provinces enjoy a decisive voice. To the extent that it arose historically from fiscal leverage, central government influence has declined since 1984 as the result of federal fiscal austerity.

American Indian tribes have benefited historically from a strong central government. Indian tribes are a federal responsibility under the Commerce Clause of the Constitution, which entrusts to Washington the regulation of commerce with among the several states, with foreign nations, and "with the Indian tribes." From the outset, then, federal responsibilities to Indian tribes are tied to Washington's key powers over all levels of the economy, and are framed explicitly in terms of inter-governmental relationships (with states, foreign nations, and the Indian tribes) rather than the administration of social programs. As significant, perhaps, is the reference to "treaties" in the Supremacy Clause, which recognizes federal laws and treaties as "the supreme law of the land." In the U.S. Constitution, then, Indian treaties are the supreme law of the land, inextricably linked with federal supremacy in the Commerce Clause. In Canada, First Nations' aboriginal and treaty rights are "recognized and affirmed" without attaching them to a power capable of enforcing them.

Under the U.S. doctrine of federal pre-emption the courts resolve any doubt over constitutional power in favour of Washington. Thus, "in the absence of explicit [Congressional] statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, ... or where the state law at issue conflicts with federal law, ... or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives."[91] While Canadian law prohibits Ottawa from legislating on subject headings allocated to

[91] *Northwest Central Pipeline Corp. v. State Corporate Commissioners*, 489 U.S. 493, 509 (1989).

the provinces in section 92 of the *Constitution Act, 1867*, as amended, U.S. law bars the states from enacting laws of any kind that frustrate the intent of Congress to fulfill the federal government's constitutional mandate.

The U.S. Supreme Court has repeatedly stressed that Indian tribes are not mere instrumentalities of the federal government, and that they exercise residual elements of inherent sovereignty rather than delegated federal powers.[92] The Supreme Court nevertheless applies essentially the same reasoning to tribal-state jurisdictional disputes as it applies in federal-state disputes.[93] In effect, U.S. law permits Indian tribes to pre-empt state jurisdiction, so long as tribes do so in furtherance of legitimate internal tribal objectives. This affords tribes considerable bargaining power *vis-a-vis* state governments. At the same time, it reinforces tribal leaders' conception that they are part of the federal level of government, and enjoy inherent supremacy over the states.[94]

The U.S. constitutional and administrative framework for Indian programs differs from current Canadian practice in five general aspects, all of them derived from the characteristic U.S. approach to federal supremacy:

1. Federal legislative supremacy *vis-a-vis* the state governments is firmly established, and federal responsibilities towards Indian tribes are more broadly "plenary," pre-emptive, and fully delineated. As a corollary, the jurisdiction of Indian tribal governments over their internal affairs is broader, more effectively pre-emptive, and more distinct from the federal and state spheres.

As noted above, U.S. Indian tribes have been beneficiaries of the overall pattern of centralization of power and responsibility in Washington. In Canada, the persistent tendency towards decentralization and "co-operative federalism" has blurred the boundaries between federal, provincial, and First Nations jurisdiction, often resulting in gaps in program responsibility and accountability. To the extent that First Nations depend principally upon Ottawa for advocacy and resources, and continue to view the provinces with suspicion and mistrust, their expectations conflict with contemporary Canadian administrative and fiscal realities. Canada's provinces have enjoyed a considerable measure of freedom from responsibility for Aboriginal Peoples, and have not been eager to assume a larger fiscal role. Unless Canada moves in the direction of U.S.-style federalism, Ottawa alone will be unable to satisfy the rights and needs of First Nations, First Nations will lag considerably behind their provincial neighbours in socioeconomic terms, and provincial governments will pay a high social and fiscal price in the long term.

2. Although the trust is not enforceable against the several states, the burden on the federal government itself is pervasive. All federal decision makers owe Indian tribes a duty of consideration and favour in all of their decisions; they must take Indian interests into account and make an effort to accommodate them. Wherever federal officials exercise some form of stewardship of Indian assets or programs under legislation, moreover, they may be held to strict fiduciary standards of loyalty. There is also a basis in U.S. case law for going beyond procedural fairness and the careful stewardship of assets,

[92] See especially *United States v. Wheeler*, 435 U.S. 313, 323, 328 (1978).

[93] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980); *Rice v. Rehner*, 463 U.S. 713, 719-720 (1983).

[94] As discussed above in Part Two, however, states may also exercise jurisdiction within Indian reservations.

and finding a positive duty to provide Indians services and resources such as education and health care.

In Canada, fiduciary obligations arguably attach to both the provincial and federal Crowns, as they are relatively equal and co-legislative in their effect on Aboriginal Peoples. The Supreme Court's *Sparrow* and *Marshall* decisions suggest that both Crowns owe a general duty of consideration to First Nations, wherever federal or provincial actions may infringe upon the enjoyment of aboriginal or treaty rights.[95] The Supreme Court's *Guerin* decision imposes a strict fiduciary standard of loyalty on officials actually in control or custody of First Nations' assets.[96] To this extent, the evolving state of Canadian law parallels the established U.S. doctrine of "responsibility," but with the peculiarly Canadian element of shared or complementary federal and provincial roles.

3. Since 1975, U.S. Indian tribes have joined the mainstream of federal revenue-sharing programs. They are increasingly defined by federal legislation as equivalent to state governments with respect to federal formula grants, competitive project grants, and the administration of federally-funded transfer payments to individual beneficiaries. These fiscal windows provide Indian tribal governments with resources comparable, on a needs-weighted per capita basis, to the resources enjoyed by the states. In addition, participation in general federal inter-governmental revenue-sharing and regulatory programs has given Indian tribes a direct stake in mainstream federal social policy issues, such as welfare reforms.

American Indian self-government is largely financed from the same federal fiscal programs, and by the same spectrum of federal agencies, as the state governments (Figures 1 and 2). In 1965, nearly all federal resources and services for Indian tribes were provided by the BIA and IHS. Today, the BIA and IHS provide barely half of Indian tribes' federal funds and services, because tribes have gained access to additional resources from most other federal agencies. Although new special Indian-policy offices have been established within agencies such as HUD and EPA, Indian tribes are increasingly "piggy-backing" their interests on general federal social legislation, rather than lobbying for separate, special program authorizations. By comparison, Aboriginal Canadians are still largely dependent on DIAND, and lack standing to participate in the federal equalization programs that fund the human development and well-being of Canadians generally.

Continued separation of the Aboriginal and non-Aboriginal funding streams in Canada arguably fosters conflict between Aboriginal Peoples and the provinces. First Nations have little interest in issues such as adequate federal financing of the Canada Health Act, because they expect to continue to rely on separate fiscal channels--albeit channels that do not run very deep. Instead of regarding themselves as sharing the broader federal-level objectives of the provinces in greater federal fiscal responsibility and greater decentralization of decision making on social policy, First Nations understandably tend to think of their fiscal linkages with Ottawa as unrelated to provincial concerns, except insofar as there is some upper limit to the total largesse that Treasury Board can distribute.

It may be argued that the United States is a larger and wealthier country that can afford to widen the scope of its administrative involvement in Indian issues and diversify its fiscal contributions to tribal authorities. In actuality, total U.S. financial flows to tribal governments amount to less than $5,000 per

[95] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Marshall*, [1999] 3 S.C.R. 456, 533.

[96] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

tribal member, which is comparable to current per capita Canadian federal spending on First Nations (in real terms). The U.S. federal government employs nearly 6,000 civil servants to manage special Indian programs; Canada employs about 4,200 at INAC, which serves two-thirds as many Native people. Thus the U.S. approach has *not* been accompanied by a significant increase in direct funding or personnel.

4. As a result of the mainstreaming of federal trust obligations in the federal government, most federal agencies have adopted Indian consultation protocols, and many have also established special tribal liaison offices. While the Assistant Secretary of the Interior—Indian Affairs is nominally the focal point for Indian policy in Washington, and the American Indian working group of the White House Domestic Policy Council is nominally the primary federal coordination mechanism, guaranteed access to federal decision makers gives tribal leaders the opportunity to impose their own coordination and priorities on the federal Executive. Indeed, it would be fair to say that internal federal coordination has proven so unsatisfactory, since the rapid expansion of federal aid programs for Indians 30 years ago, that Congress and the White House have actively encouraged tribes to assume policy leadership. Across-the-board tribal access to the directors of federal programs allows Washington the privilege of assuming that tribes will get the programs and policies they want.

As suggested above, this places a substantial burden on tribal governments to keep up with new legislation and program budgets, and tends to shift power to the few tribes that can afford to maintain a high level of representation "inside the Beltway." There has been no effective national organization of Indian tribes since the early 1980s—arguably as a direct result of intensified inter-tribal competition for the fast-growing cornucopia of federal program dollars.[97] Thus the increased complexity of monitoring and making effective use of federal program windows has given *some* tribes much more influence over policies and program design. This environment has also strengthened Indian professional and technical organizations, such as the National American Indian Tribal Court Judges Association, that can organize nationally to lobby intensely on relatively narrow policy issues.[98] Issue-focused lobbying organizations can have the expertise and persistence to promote good inter-agency coordination in their specific field of concern, although their work may undermine *inter-disciplinary* coordination. The Council of Energy Resource Tribes (CERT), the American Indian Fish & Wildlife Society, and the American Indian Higher Education Consortium (AIHEC) may have somewhat different views on environmental issues, and tend to focus advocacy on different federal programs and agencies. In short, national Indian politics, like all U.S. politics, has become increasingly fragmented along the lines of issues, which makes coordination within government more difficult.

Canada's national and regional Aboriginal associations remain relatively strong, not in the least because it suits Ottawa and the provinces to simplify consultations and negotiations by keeping the table relatively small. This convenient arrangement will no longer be tenable should Canada follow the U.S.

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[97] Russel L. Barsh, "Indian Policy at the Beginning of the 1990s: The Trivialization of Struggle," pages 55-69 in Fremont J. Lyden and Lyman H. Legters, eds., *American Indian Policy; Self-Governance and Economic Development* (Westport, CT: Greenwood Press, 1994). The President of the National Congress of American Indians (NCAI) nevertheless continues to be accorded a certain customary pride of place by speaking after the Assistant Secretary of the Interior at Congressional hearings.

[98] NAITCJA was instrumental in establishing all of the current Department of Justice funding programs, as well as domestic violence and abuse programs in HHS. The first major lobbying success by an Indian professional organization was the Indian Child Welfare Act of 1978, the work of the National Association of American Indian and Alaska Native Social Workers.

example and "mainstream" the Crown's fiduciary obligations, leading to a proliferation of programs and consultations throughout the federal and provincial governments. Organizations such as AFN will have to yield some power to issue-focused Aboriginal associations, and to wealthier and more assertive First Nations. At the same time, mainstreaming the fiduciary obligation serves an important political purpose by bringing the consideration of Aboriginal rights and interests inside the decision making of every unit of government, instead of putting one or two lead "Indian departments" into continual conflict with the rest of the public service. Extending the "trust" throughout government will strengthen the protection of Aboriginal rights and increase the fiscal resources available to Aboriginal authorities, but it will tend to erode the centralization of Crown-Aboriginal policy dialogues.

Civil servants familiar with the considerable levels of time and expenses currently committed to various consultative and diplomatic "tables" with Aboriginal Peoples will recoil at the prospect of *more* parties and possibly more tables. On the other hand, it is well to consider the level of frustration felt by the parties at existing tables, on account of federal representatives' limited mandates. Negotiation often involves only INAC, and only INAC resources and authorities are on the table. Committing *all* relevant federal and provincial departments to a "government-to-government relationship" would vastly improve the *productivity* of diplomatic tables.

5. Indian policy coordination is chiefly by the Senate Committee on Indian Affairs, which is to say by Congress rather than the Executive. The Senate Committee exercises this coordinating role *inter alia* by determining which bills involving Indian issues go to the floor of the Senate, by vetting the federal budget insofar as it affects Indian tribes and Indian social programs, and by conducting oversight hearings and investigations on the fulfillment of the federal government's trust responsibilities to Indian tribes. These functions provide the Senate Committee with the best overview in Washington of policies and programs for Indians—as well as effective power to influence federal agency decision makers.

Indian tribes are not unique in their reliance on the legislative process. The state governments rely heavily on their state Congressional delegations to promote their interests at the federal level, rather than relying on the federal Cabinet, or on high-level meetings between state officials and the President. It is a core characteristic of the American scheme of government that states' Congressional delegations serve (in effect) as the states' embassies in Washington. Any legislation that related to a particular state, such as authorization of a federal construction project, must be cleared through that state's delegation as a matter of long-standing custom. States traditional increase their leverage in Washington by capturing the chairmanships of important Congressional committees.[99] In the 1960s and 1970s, Washington State enjoyed power in Congress far disproportional to its population or wealth because its Senators--Warren Magnuson and Henry M. "Scoop" Jackson--had used their seniority to win control of the committees on Appropriations and on Interior & Insular Affairs. Party discipline is weak in the U.S. system; members of Congress are somewhat more loyal to their constituents at home. Hence a platform within Congress tends to be more valuable in the long term than access to the Executive.[100]

[99] House and Senate procedural reforms in the 1980s weakened the privileges of seniority and encouraged the rotation of committee chairmanships, somewhat reducing the concentrations of individual power that previously characterized Congress.

[100] The loyalty of state Congressional delegations tends to be bipartisan; the Senators may be Republicans and the Members of the House a mix of Republicans and Democrats, for instance, but they will all coordinate their activity closely with their state's Democratic governor—and treat their governor as nearly as important as the President.

Indian tribes use the Senate Committee on Indian Affairs in much the same way as the states use their Congressional delegations. For all practical purposes, the members of the Senate Committee serve as a national Indian tribal Congressional delegation.[101] They are appointed to the committee from states with large Native populations such as Arizona, Montana, Oklahoma, South Dakota, Alaska, and Hawaii. Native Americans represent a relatively small proportion of the electorate of these states (between 5 and 15 percent), but the realities of contemporary U.S. politics are that federal elections are usually decided by margins even smaller. It is in federal candidates' political self-interest to court tribal leaders in those states where the Indian vote could tip the scales of an election. Tribes in states such as Arizona are fully aware of this factor, and devote substantial energy to building political relationships with Congressmen from their state. A growing number of Indian tribes also make financial contributions to the campaigns of members of their state Congressional delegations, and to other friendly or responsive Congressmen.

By original design the Senate is more stable than the House of Representatives. However, unlike its Canadian namesake, the Senate has the authority and initiative to take the lead on a majority of social policy issues. The Senate also has greater influence on the President than the House, because the Senate enjoys the Constitutional prerogative of "advice and consent" on all Presidential political appointments, including Cabinet posts, agency directors, and judges. A strong Senate Committee, accessible to Indian leaders, is often able to trump the Assistant Secretary—Indian Affairs and go directly to the President or override Executive policies legislatively.

There is no black-letter constitutional prohibition to the establishment of similar mechanisms at the federal and provincial levels in Canada. Party discipline in the Westminster system is a custom, not an element of the formal constitutional compact. Parliament is free to adopt legislation, conventions or procedural rules that accord privileges of initiative and oversight to particular standing committees such as a special committee on Aboriginal Peoples. The same is true of the provincial assemblies. Bringing the Aboriginal policy debate fully and openly into the legislature may prove to be more economical and more democratic than continuing reliance of INAC-led administrative consultations and negotiations—and more effective in satisfying Aboriginal Peoples' demands for a meaningful voice in policy.

[101] Some larger tribes have established permanent offices in the Capitol, and most tribes retain Washington attornies to lobby Congress on their behalf, but tribal leaders also personally visit the Senate Committee, and the Washington and home-district offices of its members on a regular basis. The National Congress of American Indians, which was organized in the 1940s and continues to maintain an offices in the Capitol, was the most representative and influential Indian voice in Washington until the Senate Committee was established in the 1970s. Since then, it has been seated (figuratively) at the Committee's elbow.

Conclusions and Recommendations

In conclusion, *under Canadian conditions*, fiduciary obligations should apply to all federal *and provincial* Crown officials (avoiding the necessity of disentangling federal and provincial jurisdictions). There should be a systematic effort to ensure that every federal and provincial department incorporates Aboriginal needs and concerns in its work, not only by adopting protocols providing Aboriginal leaders with *direct access to all ministerial decision makers*, but by including Aboriginal authorities in revenue sharing and regulatory coordination *on the same footing as other government authorities*.

Coordination, transparency and accountability would be strengthened if Aboriginal leaders have direct access to Parliament and to provincial legislative assemblies through *special standing committees* that enjoy *genuine powers of initiative and oversight*. Although this mechanism will not enjoy as much power within a Westminster system as it does in the U.S. Congress, it will nonetheless prove superior in terms of satisfying Aboriginal aspirations, and improving policy coordination, than an administrative or ministerial alternative.

Annex I
Affirmations of Trust Responsibility in Special Indian Legislation

1975
Indian Self-Determination and Education Assistance Act

"Congress declares its commitment to the maintenance of the Federal Government's unique and continuing *relationship with and responsibility to* the Indian people" (25 U.S.C. 450a); it also refers to "the Federal government's historical and *special legal relationship* with, and resulting responsibilities to, American Indian people," and to the "Federal responsibility for and assistance to education of Indian children" (25 U.S.C. 450(a), 450(b)(2)).

1976
Indian Health Care Improvement Act

"Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's *historical and special legal relationship* with, and resulting responsibilities to, the American Indian people" (25 U.S.C. 1601); "[I]t is the policy of this Nation, in fulfillment of its *special responsibilities and legal obligation* to the American Indian people, to meet the national goal of providing the highest possible health status to Indians ..." (25 U.S.C. 1602).

1978
Indian Child Welfare Act

"Recognizing the *special relationship* between the United States and the Indian tribes and their members and the *special responsibility* to Indian people, the Congress finds [that the Congress] has *assumed the responsibility for the protection and preservation* of Indian tribes and their resources" and further "that the United States has a direct interest, as trustee, in protecting Indian children" (25 U.S.C. 1901).

1986
Indian Alcohol and Substance Abuse Prevention and Treatment Act

"Congress finds and declares that ... the Federal Government has a historical relationship and *unique legal and moral responsibility* to Indian tribes and their members [and that] included in this responsibility is the treaty, statutory, and historical obligation to assist the Indian tribes in meeting the health and social needs of their members" (25 U.S.C. 2401).

1988
Tribally-Controlled Schools Act

"The Congress recognizes the *obligation of the United States* to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational services" and "declares its commitment to the maintenance of the Federal Government's *unique and continuing trust relationship* with and responsibility to the Indian people" through greater Indian control of education (25 U.S.C. 2502(a), 2502(b)); the Act also notes "the Federal Government's historical and special legal relationship with, and resulting responsibilities to, Indians," as well as "the inherent authority of Indian nations" to control their own programs (25 U.S.C. 2501(1)).

1990

Native American Languages Act

"The Congress finds that... the United States has the responsibility to act together with Native Americans to ensure the survival of the[ir] unique cultures and languages," and that "special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities" (25 U.S.C. 2901).

National Indian Forest Resources Management Act

"The Congress finds and declare that... the United States has a trust responsibility toward Indian forest lands," and the Secretary of the Interior therefore should contribute to Indian forest management "in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners" (25 U.S.C. 3101, 3102).

Indian Child Protection and Family Violence Prevention Act

Congress refers to "the historical and special relationship of the Federal Government with Indian people," and (like the Indian Child Welfare Act, (like 25 U.S.C. 1901), finds that "the United States has a direct interest, as trustee, in protecting Indian children" (25 U.S.C. 3201(1)(F)).

1992

Higher Education Tribal Grant Authorization Act

"The Congress finds that" financial aid for Native American post-secondary students constitutes a "part of the Federal government's continuing trust responsibility to provide educational services to American Indians and Alaska Natives" (25 U.S.C. 3302(7)).

Indian Energy Resources (Chapter 26 of Public Law 102-486)

The Secretary of Energy shall "involve and consult with Indian tribes to the maximum extent possible and where appropriate and shall do so in a manner that is consistent with the Federal trust and the Government-to-Government relationships between Indian tribes and the Federal Government" (25 U.S.C. 3502).

1993

Indian Tribal Justice Act

"The Congress finds and declares that-- there is a government-to-government relationship between the United States and each Indian tribe; the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and that Indian tribes "possess the inherent authority to establish their own form of government, including tribal justice systems" (25 U.S.C. 3601). Congress also declares that nothing in this act shall be construed to "encroach upon or diminish in any way the inherent sovereign authority of each tribal government," or to "diminish the trust responsibility of the United States to Indian tribal governments" (25 U.S.C. 3631).

1993

American Indian Agricultural Resource Management Act

"The Congress finds and declares that--the United States and Indian tribes have a government to government relationship," and that accordingly "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes" (25 U.S.C. 3701). The act also refers to "trust responsibility" in two other provisions (25 U.S.C. 3702(1) and 3712(a)).

1996

Native American Housing Assistance and Self-Determination Act

"The Congress finds that ... there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people; [and that] through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people" (25 U.S.C. 4101(2) and 4101(3)).

Congress moreover finds that "the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status," and that "providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status" (25 U.S.C. 4101(4) and 4101(5)).

Annex II
Federal Grant-in-Aid Laws Directly Benefiting Indian Tribes

Abandoned Infants Assistance Act of 1988
Agriculture & Consumer Protection Act of 1973
American Battlefield Protection Act of 1996
Carl D. Perkins Vocational & Technical Education Act of 1999
Child Abuse Prevention, Adoption & Family Services Act of 1998
Child Care & Development Block Grant Act of 1990
Children's Justice & Assistance Act of 1986
Clean Air Act of 1963 (as amended by Public Law 95-95)
Clean Water Act of 1977 (as amended by Public Law 95-217)
Community Economic Development Act of 1981
Community Opportunities, Accountability, and Training & Educational Services Act of 1998
Comprehensive Environmental Response, Competition & Liability Act of 1980 (CERCLA)
Consolidated Farm & Rural Development Act of 1972 (as amended by Public Law 102-142)
Cooperative Forestry Act of 1978
Defense Authorization Act of 1988
Department of Energy Organization Act of 1977
Elementary & Secondary Education Act of 1965 (as amended by Public Law 103-382)
Energy Conservation & Production Act of 1976
Energy Security Act of 1980
Family Violence Prevention & Services Act of 1992
Federal Agriculture Improvement & Reform Act of 1996
Federal Insecticide, Fungicide & Rodenticide Act of 1974
Federal Oil & Gas Royalty Act of 1982
Food & Agriculture Act of 1977 (as amended)
Food, Agriculture, Conservation, and Trade Act of 1990
Food Security Act of 1985
Great Lakes Critical Programs Act of 1990
Health & Human Services Act of 1986
Health Professions Education Parterships Act of 1998
Housing & Community Development Act of 1996 (P.L. 104-104)
Job Training Partnership Act of 1982
Missing, Exploited & Runaway Children Protection Act of 1999
Museum & Library Services Act of 1996
National Affordable Housing Act of 1990
National Agricultural Research, Extension, & Teaching Policy Act of 1977
National Energy Conservation Policy Act of 1978
National Security & Military Application of Nuclear Energy Authorization Act of 1976
Nuclear Waste Policy Act of 1982
Older Americans Act of 1965 (as amended by Public Law 100-175)
Personal Responsibility & Work Opportunity Reconciliation Act of 1996
Omnibus Parks & Public Lands Management Act of 1996
Preventive Health Amendments of 1984

Public Health Service Act (as amended by Public Law 104-299)
Public Works & Economic Development Act of 1965 (as amended by Public Law 105-393)
Resource Conservation & Recovery Act of 1976
Safe Drinking Water Act of 1974
State Energy Efficiency Programs Improvement Act of 1990
Superfund Amendments & Reauthorization Act of 1986
Surface Mining Control & Reclamation Act of 1977
Toxic Substances Control Act of 1973
Victims of Crime Act of 1984
Violent Crimes Control & Law Enforcement Act of 1994

Table 1.

FEDERAL FLOWS OF FUNDS THROUGH INDIAN TRIBES 1999-2000

By Departments and Subagencies (All Figures in Millions of U.S. Dollars)

Sources, codes, and assumptions: *See text, page 10. Data are organized as follows—figures in $millions; estimated tribal shares of less than $100,000 are not shown.*

Agency or Subagency				
Functional area of program(s)	*Types of beneficiary*	*Number of programs*	*Total funds (actual)*	*Tribal share (actual/est.)*

DEPARTMENT OF AGRICULTURE (USDA)

Animal & Plant Health Inspection Service				
Wildlife inspection	B	1	2.7	-
Cooperative Extension Service				
Minority scholarships	C	1	1.0	-
Farm Service Agency				
Tribal land acquisition	A	1	1.0	1.0
Food and Nutrition Service (FNS)				
Food distribution	A	1	75.0	75.0
Food distribution	B	3	2,215.5	66.5
Food distribution	D	1	6,021.4	480.6
Natural Resources Conservation Service				
Forestry conservation	B	1	9.7	0.1
Wildlife habitat	B	2	44.7	0.4
Farm and range conservation	C	1	206.8	2.1
Rural Housing Service				
Rural housing	B	1	0.4	-
Rural Business Service				
Rural business	B	3	1,279.4	12.8
Rural Utilities Service				
Waste disposal systems	B	1	1,276.4	12.8
		17	11,134.0	651.3

DEPARTMENT OF COMMERCE (DOC)

Economic Development Administration (EDA)				
Development planning	B	2	30.2	0.3
Economic adjustment	B	1	137.0	1.4
National Oceanic & Atmospheric Administration (NOAA)				
Fishery conservation	C	4	21.0	0.2
National Telecommunications & Information Administration				
Telecommunications facilities	B	1	23.6	0.2
		8	211.8	2.1

DEPARTMENT OF DEFENSE (DOD)

Minority procurement	A	1	0.0	0.0
Economic adjustment assistance	B	3	29.2	0.3
			29.2	0.3

DEPARTMENT OF EDUCATION (ED)

Office of Education Research & Improvement				
Training teachers	B	2	341.5	3.4
Office of Adult & Vocational Education				
Indian adult education	A	1	4.1	4.1
Indian vocational education	A	1	12.9	12.9
Office of Elementary & Secondary Education				
Low-income schools	B	1	7,732.4	232.0
Tribal schools	A	1	2.0	2.0
Indian education	B	1	62.0	62.0
Computer literacy	B	1	425.0	4.2
Office for Special Education & Rehabilitative Services				
Indian vocational rehabilitation	A	1	17.3	17.3
		9	8,597.2	307.7

DEPARTMENT OF ENERGY (DOE)

Office of Civilian Radioactive Waste Management				
Nuclear waste disposal	B	1	9.4	0.3
Office of Energy Efficiency				
Weatherization for low-income	B	1	124.8	3.7
Office of Environmental Management				
Nuclear waste disposal	B	1	4.1	0.1

		3	138.3	4.1

DEPARTMENT OF HEALTH & HUMAN SERVICES (HHS)

Office of the Secretary				
Teen pregnancy studies	C	1	1.0	-
Administration for Children, Youth & Families				
Tribal jobs projects	A	1	7.6	7.6
Tribal environment protection	A	2	4.3	4.3
Child care centers	B	2	3,167.0	95.0
Women's shelters	B	2	79.9	2.4
Youth shelters	B	1	14.9	0.4
Abandoned infants	B	1	12.2	0.4
Social services	B	2	526.7	15.8
Low-income energy costs	B	1	1,272.5	38.2
Welfare payments	B	1	18,665.7	560.0
Administration on Aging				
Tribal programs for elders	A	1	16.6	16.6
Administration for Native Americans (ANA)				
Native languages	A	1	2.2	2.2
Native programs	A	1	34.9	34.9
Agency for Toxic Substances & Disease Registry				
Emergency preparedness	B	1	1.0	-
Toxicology research	B	2	3.0	-
Centers for Disease Control (CDC)				
Preventive health	B	3	401.8	4.0
Health Resources & Services Administration (HRSA)				
Health care for the homeless	B	1	80.0	2.4
Health professions training	C	1	15.9	0.2
Indian Health Service (IHS)				
Indian health care	A	4	1,499.5	1,499.5
Indian health training	A	4	9.8	9.8
Indian health research	A	2	3.6	3.6
National Institutes of Health (NIH)				
Minority health training	B	1	50.9	1.5
Office of Minority Health				
Minority health training	C	1	6.4	0.2
Minority health care	C	3	10.3	0.3
Substance Abuse & Mental Health Services Administration				
Abuse prevention & treatment	B	1	1,505.8	45.2
Abuse prevention & treatment	C	1	12.0	0.1
		42	27,405.5	2,348.6

DEPARTMENT OF HOUSING & URBAN DEVELOPMENT (HUD)

Office of Community Planning & Development				
Local infrastructure	B	1	7.5	0.2
Home rent/purchase subsidies	B	2	1,701.3	51.0
Youth vocational training	C	1	42.5	0.4
Office of Lead Hazard Control				
Toxic clean-up	C	1	10.0	0.1
Office of Native American Programs (ONAP)				
Tribal infrastructure	A	1	67.0	67.0
Tribal housing construction	A	3	588.8	588.8
Office of Public and Indian Housing				
Housing project maintenance	B	1	2,851.0	85.5
Social services	B	2	61.5	1.8
		12	5,329.1	794.8

DEPARTMENT OF THE INTERIOR (DOI)

Bureau of Indian Affairs (BIA)				
Tribal welfare	A	1	76.9	76.9
Tribal housing	A	1	16.1	16.1
Tribal family services	A	3	45.1	45.1
Tribal schools	A	7	326.4	326.4
Tribal colleges	A	2	28.6	28.6
Indian higher education	A	1	27.6	27.6
Indian adult education	A	1	2.2	2.2
Indian vocational education	A	1	0.5	0.5
Indian employment	A	1	8.2	8.2
Tribal self-governance	A	3	354.8	354.8
Tribal justice systems	A	3	72.9	72.9
Tribal economic development	A	3	6.4	6.4
Tribal leasing and mining	A	2	2.3	2.3
Tribal farming and irrigation	A	3	20.8	20.8
Tribal forestry	A	1	13.0	13.0
Tribal fish and wildlife	A	2	28.1	28.1
Tribal road maintenance	A	1	6.6	6.6
Tribal infrastructure	A	2	2.3	2.3
Tribal environmental pro	A	2	8.6	8.6
Tribal rights protection	A	6	2.8	2.8
Bureau of Land Management (BLM)				
Mining royalty management	A	1	0.4	0.4
Fish & Wildlife Service (FWS)				
Tribal wildlife management	A	1	0.3	0.3

National Park Service (NPS)				
Repatriation (NAGPRA)	A	1	2.5	2.5
Parks and recreation planning	B	1	0.6	-
Museum technology	C	1	0.9	-
Office of Surface Mining Reclamation & Enforcement				
Mine reclamation	B	1	145.3	4.4
U.S. Geological Survey (USGS)				
GIS data management	C	1	1.8	-
		53	1,460.2	1,047.0

DEPARTMENT OF JUSTICE (DOJ)

Office of Community-Oriented Policing Services				
Community policing	B	1	1,203.0	12.0
Police recruitment	B	1	5.5	0.1
Office of Justice Programs (OJP)				
Tribal justice systems	A	1	11.5	11.5
Local justice systems	B	4	556.8	5.6
Crime victim compensation	A	1	2.0	2.0
Domestic violence	A	1	8.8	8.8
Office of Juvenile Justice & Delinquency Prevention				
Tribal juvenile justice	A	1	10.0	10.0
		10	1,797.6	50.0

DEPARTMENT OF LABOR (DOL)

Employment & Training Administration (ETA)				
Indian employment	A	2	42.1	42.1

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Transit Administration				
Public transit systems	B	2	2,263.7	22.6
Federal Aviation Administration (FAA)				
Airport improvement	B	1	1,681.0	16.8
National Highway Traffic Safety Administration				
Highway safety	B	1	148.8	1.5
Office of Small & Disadvantaged Business Utilization				
Minority procurement	B	1	1.1	-
Research & Special Programs Administration				
Emergency preparedness	B	1	8.5	0.1
			4,103.1	41.0

SOCIAL SECURITY ADMINISTRATION (SSA)

Pensions	D	4	360,326.7	3,603.3
Unemployment benefits	D	1	50,425.0	504.2
Social-services research	C	1	9.7	0.1
		6	410,761.4	4,107.6

ENVIRONMENTAL PROTECTION AGENCY (EPA)

Office of the Administrator				
Community partnerships	B	2	221.6	2.2
Environmental research	C	1	506.5	5.1
Environmental training	C	1	38.5	0.4
American Indian Environmental Office				
Tribal environmental protection	A	1	42.5	42.5
Office of Prevention, Pesticides & Toxic Substances				
Pollution prevention	B	4	39.6	0.4
Environmental justice	C	3	3.2	-
Office of Radiation				
Radon screening	B	1	8.2	0.1
Office of Solid Waste & Emergency Response				
Pollution prevention	B	2	1.0	-
Toxic site rehabilitation	B	4	223.0	2.2
Office of Water				
Pollution prevention	B	4	121.1	1.2
Pollution remediation	B	1	200.0	2.0
			1,405.2	56.1

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Indian employment discrimination/TERO	A	1	1.6	1.6

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

Emergency preparedness	B	1	4.3	0.1

NATIONAL ENDOWMENT FOR THE HUMANITIES (NEH)
NATIONAL FOUNDATION FOR THE ARTS & HUMANITIES (NFAH)

Tribal libraries	A	1	2.6	2.6
Arts and culture programs	C	4	37.3	0.4
		5	39.9	3.0