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Secretary Ryan Zinke  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

**RE: Transition of the Functions of the Office of Special Trustee into the Bureau of Indian Affairs**

Secretary Zinke,

I submit this letter to you with the intent of ensuring that the duties of the Office of the Special Trustee (“OST”) are returned to the Bureau of Indian Affairs (“BIA”). More specifically, this letter outlines the history leading up to the creation of the OST, its legislative history, and common complaints espoused regarding the shortcomings of the OST, especially from tribal interests. Finally, I conclude this letter by recommending that Indian tribes and individuals will be best served if the functions and responsibilities of the OST are placed back within the BIA when the Office is “sunsetting.”

**I. Background on the Office of the Special Trustee**

The OST was established in 1994 under the American Indian Trust Fund Management Reform Act (“Reform Act”).<sup>1</sup> The OST was created as a temporary agency to improve the accountability and oversee the implementation of management reforms for funds held in trust for the benefit of Indian tribes and individuals.<sup>2</sup> The OST is headed by the Special Trustee, who reports directly to the Secretary of Interior.<sup>3</sup> The Special Trustee has the duty to oversee all trust reform efforts within the BIA, Bureau of Land Management, and the Minerals Management Service.<sup>4</sup>

<sup>1</sup> P.L. 103-412, 108 Stat. 4239, 25 U.S.C. §§ 4001 *et seq.* (1994).

<sup>2</sup> U.S. Government Accountability Office; *Indian Issues: The Office of the Special Trustee has Implemented Several Key Trust Reforms Required by the 1994 Act, but Important Decisions about its Future Remain*; GAO-07-104 (December 2006).

<sup>3</sup> 25 U.S.C. § 4042(a).

<sup>4</sup> 25 U.S.C. § 4043(b).

The Reform Act was developed and enacted in response to the growing realization that the Federal Government had grossly mismanaged tribal and individual Indian beneficiaries' trust assets for decades. In 1996, a class action was filed against the Federal Government alleging the mismanagement of over 300,000 trust accounts for individual Indian beneficiaries.<sup>5</sup> This litigation, the *Cobell* Litigation, squarely proved that, for decades, the Federal Government had been negligently managing thousands of Native American trust accounts. After seventeen years of litigating the issue, the case was settled and the Federal Government paid \$3.4 billion dollars to individual Native Americans.<sup>6</sup>

The legislative history of the Reform Act reflects that that the OST was created to fix the problems that made BIA's management of Indian trust funds and assets woefully inadequate. For example, House Report 102-499 on the BIA's mismanagement of Indian trust funds lists the following deficiencies in the BIA's financial management: (1) inadequate systems for accounting for and reporting trust fund balances; (2) inadequate controls over receipts and disbursements; (3) absence of periodic, timely reconciliations to assure accuracy of accounts; (4) inability to determine accurate cash balances and failure to consistently and prudently invest trust funds and/or pay interest to accountholders; (5) inability to prepare and supply accountholders with meaningful periodic statements of their account balances; (6) absence of consistent, written policies and procedures for trust fund management and accounting; and (7) inadequate staffing, supervision, and training.<sup>7</sup>

In spite of these deficiencies, the Committee on Government Operations never recommended that a new agency or bureau be created to administer and control the Indian trust fund.<sup>8</sup> In fact, the Committee prioritized the BIA's continued responsibility over Indian trust management, recommending that the BIA have adequate time to show demonstrable improvement in the financial management of Indian trust funds and, if that could not be done, for Congress to then consider transferring the administration and control to another department.<sup>9</sup> Furthermore, the prior version of the Reform Act from 1993, titled the Native American Trust Fund Accounting and Management Reform Act ("1993 Proposed Act"), contained no provision for the creation of the OST or any similar office, agency, or bureau.<sup>10</sup> Instead, the 1993 Proposed Act allowed Indians and Indian tribes to submit to the Secretary of Interior plans to demonstrate new approaches for the management of Indian funds held in trust by the United States, including such funds being managed by an Indian tribe should it choose to do so.<sup>11</sup>

This importance of trust management reform from *within* the BIA was stressed by tribal leaders and Indian law practitioners before the Reform Act was passed. The following statement

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<sup>5</sup> GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW*, 343 (6th ed. 2011).

<sup>6</sup> *Id.* at 346.

<sup>7</sup> U.S House Committee on Government Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H. Rpt. 102-499 (1992), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/08/houserept-102-499-1992.pdf>.

<sup>8</sup> *Id.* at 66.

<sup>9</sup> *Id.*

<sup>10</sup> A full copy of the Proposed Act can be found in the Hearing Before the Committee on Indian Affairs on S.925, S. Hrg. 103-225 (1993), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2013/10/22/hear-103-225-1993.pdf>.

<sup>11</sup> *Id.* at 8, § 203.

by Bill S. Fife, the then Principal Chief of the Muscogee (Creek) Nation encapsulates the widely shared tribal position on the importance of improving BIA's trust responsibilities:

Legislation should be enacted to **require the BIA** to be liable for interest lost to account holders due to their inept handling of trust funds and **require the BIA** to handle all trust funds in accordance with fiduciary standards imposed on non-Indians... The Muscogee Nation supports the passage of H.R. 1846 [1993 Proposed Act] in order to **require the BIA to function as a true fiduciary for Indian trust funds**. (emphasis added)<sup>12</sup>

Similarly, Elouise Cobell, the Chairperson of the Intertribal Trust Fund Monitoring Association and the Comptroller of the Blackfeet Indian Nation who spearheaded the *Cobell* litigation, voiced concerns over moving trust funds and responsibilities out of the BIA. She believed that if the trust funds and responsibilities were to be removed from the BIA, it "must be carefully thought out. Any move must bring the funds and the management of them closer to the Indian community so that Indian people will have greater control and can leverage those fund to increase their economic power in their communities."<sup>13</sup>

Government officials largely shared this view that trust funds and trust responsibilities should be maintained and improved within the BIA. Prior to the passage of the Reform Act in 1994, Ada Deer, then Assistant Secretary of Indian Affairs within the BIA, made the following comments discussing the concept of a Special Trustee:

The idea of a Special Trustee has been proposed for the purpose of consolidating authority and accountability for trust fund related issues within the Department. Upon first glance this idea is an attractive one. For the first time ever, one person would be responsible for trust fund and trust asset management, a responsibility that is currently widely disseminated within the BIA and other Interior bureaus, particularly the Bureau of Land Management and the Minerals Management Service.

That being said, however, the Department does acknowledge that a coherent, consistent approach to trust fund administration is essential to providing adequate service to account holders. **We believe that this goal can be achieved within the Bureau of Indian Affairs by ensuring that a direct line of authority exists within the organizational structure of the Bureau.** Currently, the Deputy Commissioner position possesses this line authority.

Furthermore, we are now exploring the possibility of creating a high level position within the Bureau that would be dedicated solely to the administration of trust funds management. (emphasis added)<sup>14</sup>

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<sup>12</sup> *Oversight Hearing Before the Subcommittee on Native American Affairs of the Committee on Natural Resources on H.R. 1846*, Serial No. 103-48 Part I (1993), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2013/09/12/hear-103-48-1-1993.pdf>.

<sup>13</sup> *Id.* at 99.

<sup>14</sup> *Hearing Before the Subcommittee on Native American Affairs of the Committee on Natural Resources on H.R. 1846 and H.R. 4833*, Serial No. 103-48 Part II (1994), available at

Voices opposing the OST may have been further amplified but for the temporary nature of the OST. A plain reading of the Reform Act reflects that the OST was never meant to be a permanent office. To the contrary, the Reform Act provides that the OST is to be terminated once all necessary reforms have been satisfactorily implemented.<sup>15</sup>

The Indian Trust Asset Reform Act (“2016 Act”), passed on June 22, 2016, explicitly addresses the termination and transition of the OST into another agency or bureau within the Department of Interior.<sup>16</sup> Title III of the 2016 Act provides for the dissolution of the OST as it exists today. First, Section 303 of Title III allows the Secretary of Interior to create the position of Under Secretary of Indian Affairs and requires that the Under Secretary would work with the Special Trustee to ensure an orderly transition of the Special Trustee’s functions and the functions of the OST to elsewhere within the Department of Interior.<sup>17</sup> In addition, Section 304 requires the Secretary of Interior to submit, within one year of the date of enactment (i.e. by June 22, 2017), a transition plan and timetable for the termination of the Office of the Special Trustee, to occur not later than 2 years after the date of submission (i.e. no later than June 22, 2019).<sup>18</sup> The 2016 Act reflects the current disposition of the OST.

## **II. Incompatibility of the OST with an Appropriately Administered Trust Relationship**

As described in the previous Section, the OST was established in spite of tribal opposition and the Committee’s recommendations to the contrary. Since implementation, the OST has consistently fallen short in its purported mission of facilitating trust management reform for the benefit of Indians and tribes, justifying the initial widespread opposition to the OST.

The U.S. Government Accountability Office released a report in 2006 noting that the OST itself estimated that almost all key reforms needed to develop an integrated trust management system and provide adequate trust services would be completed by November 2007.<sup>19</sup> Yet, here we are ten years later, and tribal beneficiaries are still afflicted by a piecemeal and overly bureaucratized trust management system administered, in large part, by the OST.

The 2016 Act is, in itself, a testament to the failure of the OST to live up to its expectations. The 2016 Act reflects Congress’s perceived need to establish a concrete timeline for the termination of the OST and transfer of OST duties to elsewhere in the Federal government. However, as the following Sections demonstrate, the substantive shortcomings of trust management reform since the enactment of the Reform Act are not limited to the OST’s inability to meet its objectives and terminate. This Section explains how the existence and operation of the OST for over two decades has had far-reaching implications regarding Federal policy on Indian affairs.

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<https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/31/hear-103-48-2-1994.pdf>.

<sup>15</sup> 25 U.S.C. § 4042(c).

<sup>16</sup> P.L. 114-178. 130 Stat. 432 (2016).

<sup>17</sup> *Id.* at § 303.

<sup>18</sup> *Id.* at § 304.

<sup>19</sup> U.S. Government Accountability Office, *Indian Issues: The Office of the Special Trustee has Implemented Several Key Trust Reforms Required by the 1994 Act, but Important Decisions about its Future Remain*; GAO-07-104, 9 (December 2006).

a. The Federal Government has regarded the OST as a Source of Protection for the Government Rather than as a Genuine Means of Solidifying its Trust Responsibilities.

To reiterate, the OST was created in response to the growing realization that the Federal Government had grossly mismanaged Indians and tribes' trust assets for decades. Instead of focusing on the Federal Government's trust management, however, the OST has emphasized minimizing the United States' liability for its management of trust assets. While the OST was created to fix deficiencies in the BIA in furtherance of enhancing tribal economic welfare, the Federal Government has characterized the OST in terms of how it protects the United States from liability, rather than how it benefits the Indians. For instance, in a 2002 Senate Committee on Indian Affairs hearing on the role of the Special Trustee within the Department of the Interior, Associate Deputy Secretary of the Interior James Cason emphasized the overriding need to "isolate the fiduciary trust responsibilities of the Department into a separate organization."<sup>20</sup> This statement reflects how the Department viewed trust management reform under the Reform Act as a means to the end of circumscribing the Government's longstanding fiduciary obligations toward Indian communities.

Consistent with Cason's interpretation, the Federal Government posed the argument during the *Cobell* Litigation that Congress's intent in the Reform Act was for OST to "determine the proper content and timing of policies and procedures to discharge the [Federal Government's] fiduciary obligations," and to ensure that the United States does not have fiduciary responsibilities over the management of tribal trust funds existing outside of this framework.<sup>21</sup> The D.C. Circuit court rejected this argument on the basis that the Reform Act merely "reaffirmed and clarified preexisting duties" of the United States.<sup>22</sup> Still, the Government's position on this issue reflects its insistence on construing the role of the OST as placing parameters on the Government's liability.

Ultimately, the Government has responded to litigation over its mismanagement of trust funds by allocating a greater number of resources to the OST, in spite of the fact that the OST was created as a temporary office to improve the functionality of existing trust management mechanisms. In 2007, the Vice-President of the Midwest Region of the National Congress of American Indians testified that the budget for the OST had grown to \$150 million as a response to the litigation efforts of trust beneficiaries.<sup>23</sup> Little has changed since that time. For fiscal year 2017, even after the 2016 Act providing for the termination of the OST had been introduced in Congress, the OST requested a budget of \$140.4 million.<sup>24</sup> This practice further demonstrates the Federal Government's insistence on treating the OST as a means of protecting the trustee rather than the beneficiaries. The Government continues to funnel substantial funds toward the management of monetary trust assets as a means of mitigating the liability which was exposed throughout the

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<sup>20</sup> *Hearing before S. Comm. On Indian Affairs on the Role of the Special Trustee within the Department of the Interior*, 107<sup>th</sup> Cong. 20 (2002) (statement of James Cason, Associate Deputy Secretary of the Interior).

<sup>21</sup> *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

<sup>22</sup> *Id.*

<sup>23</sup> *Backlogs at the Department of the Interior: Land into Trust Applications; Environmental Impact Statements; Probate; Appraisals and Lease Approvals: Hearing before the S. Comm. On Indian Affairs*, 110<sup>th</sup> Cong. (2007) (statement of Robert Chicks, Vice President, National Congress of American Indians, Midwest Region).

<sup>24</sup> *See*, Budget Justification and Performance Information for Fiscal Year 2017, Office of the Special Trustee for American Indians, U.S. Dep't. of Interior, available at [https://www.doi.gov/sites/doi.gov/files/uploads/FY2017\\_OST\\_Budget\\_Justification.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_OST_Budget_Justification.pdf).

*Cobell* litigation. As explained further in Subsections b and c below, this methodology has come at a great cost to the Indian beneficiaries the OST was purportedly designed to protect.

b. The OST has Driven a Debilitating Wedge between the Federal Government's Management of Monetary and Non-Monetary Assets

The Federal Government's trust responsibility to Indians and tribes includes not only the management of monetary assets, but also the management of non-monetary assets, such as land and natural resources, which are essential to the health, integrity, and economic welfare of the beneficiaries. The Trust Reform Act bifurcated the management of tribal trust assets to create a system whereby the OST manages monetary tribal trust funds while management of non-monetary trust assets remains primarily the responsibility of the BIA. This bifurcation runs contrary to the OST's goal of integrating trust management into a unified system

The Government's continued allocation of funds to a separate agency dedicated exclusively to the management of monetary trust assets dilutes funding that would otherwise be dedicated to managing non-monetary assets. In doing so, the Government ignores the reality that, for many individual Native Americans and tribes, monetary and nonmonetary assets are inextricable: their monetary trust assets are derived from their nonmonetary trust assets, while the continued maintenance and development of non-monetary assets requires adequate management of trust assets.

By artificially dividing the management of nonmonetary and monetary trust assets, the Department of Interior must deal with the confusion, miscommunication, and inefficiency of coordinating the management of trust assets between two agencies. Interior Department officials have acknowledged that coordinating trust responsibilities between agencies hinders the Department's ability to fulfill its trust responsibility obligations. During Senate hearings on the management of Indian tribal trust funds, one Department member acknowledged that "the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department."<sup>25</sup> In a 2005 hearing before the Senate Committee on Indian Affairs, Tex G. Hall, President of the National Congress of American Indians and Chairman of the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation, conveyed tribes' dissatisfaction with this bifurcated management system:

We did not want a bureaucracy that separates the management of our lands from all of the activities that take place on our lands. What has instead evolved is a two-headed bureaucracy that would never make any decision and would take resources from other important programs of the BIA and really limit services to Indian recipients.

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<sup>25</sup> Management of Indian Tribal Trust Funds: Hearing on the United States' Trust Relationship with the Sovereign Governments of Indian Country Before the Senate Comm. On Indian Affairs, 107<sup>th</sup> Cong. 145 (2002) (statement of James Carson, Assoc. Dep. Sec'y of the Interior and Neal A. McCaleb, Assistant Sec'y of the Interior for Indian Affairs).

To make matters worse, this delineation of roles has become muddled in recent years, as the OST has taken on the responsibility of appraising Indian trust land and trust property.<sup>26</sup> For example, in 2002, the Secretary of the Interior executed Secretarial Order No. 3240, which “realign[ed] the Indian lands valuation and appraisal functions from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee.” In furtherance of this “realignment,” the OST has assumed responsibility over land appraisals under the DOI’s Land Buy Back Program, which was established to implement the land consolidation provisions of the *Cobell* settlement. This responsibility marks a deviation from the OST’s focus on managing trust funds. To establishing a bifurcated trust management framework, only to subsequently operate contrary to that framework, lends itself to further confusion, miscommunication, and duplication of efforts between these two separate bureaucracies.

This bifurcation of responsibilities has also undermined the Federal Government’s policy of tribal self-determination. On July 8, 2015, the Senate Committee on Indian Affairs held an oversight hearing to discuss the need to modernize the Federal Government’s trust responsibility to tribes in order to provide tribes a greater opportunity to manage their own resources and economic affairs.<sup>27</sup> Among the senators, tribal leaders, and advocates who testified during this hearing, one prevalent theme expressed was the need to minimize bureaucratic obstacles to tribes exercising self-governance. By complicating the bureaucratic framework for trust asset management, the OST has obstructed this path toward reconciliation between the Federal trust responsibility and tribal self-determination.

During the July 8, 2015 hearing, both the Committee Chairman and the Vice-Chairman of the Coeur d’Alene Tribe testified regarding the duplicative management functions of the BIA and OST. Speaking to the current framework for trust asset management, Chairman Barrasso testified as follows:

It is clear that the Office of Special Trustee was never meant to be a long-term office at the Department of the Interior. As it stands, there is a duplication of efforts within Interior that is burdensome, confusing and costly.<sup>28</sup>

Hon. Ernest L. Stensgar, Vice Chairman of the Coeur d’Alene Tribe, expounded upon Chairman Barrasso’s statement, testifying on how the burden of these duplicative functions falls upon the Indian and tribal beneficiaries seeking merely to participate in their own economic development:

We recognize the management functions of OST in the finances of the trust dollars. But we are concerned with the duplication of going to the Bureau of Indian Affairs and the Office of Special Trustee when we are looking at appraisals or any land transactions. We may have a venture in progress and all of a sudden we come to a dead stop while we untangled who is responsible, and whose signature we need to carry on that business. It is very difficult, to say the least.<sup>29</sup>

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<sup>26</sup> United States Department of the Interior, Order No. 3240 (2002).

<sup>27</sup> *A Path Forward: Trust Modernization and Reform for Indian Lands: Hearing before the S. Comm. on Indian Affairs*. 114<sup>th</sup> Cong. (2015).

<sup>28</sup> *Id.* at 2 (statement of John Barrasso, Committee Chairman).

<sup>29</sup> *Id.* at 17 (statement of Ernest L. Stensgar, Vice-Chairman of the Coeur d’Alene Tribe).

As this testimony reflects, duplication of responsibilities between the OST and the BIA has exacerbated the very bureaucratic obstacles to self-determination which both Congress and Indian tribes seek to minimize.

### **III. The BIA is the Appropriate Agency to Assume the Functions of the OST upon Sunset.**

The above-referenced shortfalls of the OST could all be substantially rectified by transferring OST functions into the BIA. American Indian tribes have a long record of viewing the BIA as their main, and perhaps only, advocate in the Federal bureaucracy. In a legal landscape mired in uncertainty as a result of Congress's so-called "plenary power" over Indian affairs, the BIA has become "emblematic of the federal government's commitment to tribal sovereignty and the individual well-being of Native Americans."<sup>30</sup> Although transferring the duties of the OST to the BIA will not reverse decades of inadequate trust asset management, the BIA is the appropriate agency to take on the critical task of administering trust management reform in accordance with the contemporary principles underlying the United States' trust responsibility over Indians.

Transferring OST duties into the BIA simply makes sense from a policy standpoint. At a fundamental level, the BIA is the right fit for reconciling the United States' trust responsibility with the need to promote self-determination. As Secretary Sally Jewell recently stated in Secretarial Order No. 3335, The BIA has been the "principal actor in the relationship between the Federal Government and Indian Tribes, and later Alaska Native Villages, exercising administrative jurisdiction over tribes, individual Indians, their land and resources."<sup>31</sup> Secretary Jewell went on to describe the evolution of the BIA from "an agency implementing past policies of allotment and assimilation, to a bureau charged with promoting and supporting Indian self-determination."<sup>32</sup> This description of the BIA's historical and contemporary role in Indian affairs encapsulates the fact that the BIA has been the linchpin in administering an ever-evolving Federal policy over Indians for nearly two centuries while maintaining the core trust relationship between the United States and Indians.

Additionally, transferring OST duties into the BIA would reintegrate monetary and nonmonetary trust asset management. The BIA could work with tribes and individuals throughout the integrated cycle of using non-monetary assets to expand monetary assets, and vice versa. . . . Allowing one agency to oversee the entire trust management process is more efficient for the Department of the Interior, and easier for tribes and individuals wading through the bureaucratic process. As described in the previous Sections, the bifurcated trust management regime perpetuated by the OST has proven to be an obstacle to tribes and Indian beneficiaries wishing to utilize their trust assets as a tool for economic development. Monetary and nonmonetary trust assets play an essential and interrelated role in tribal economic development, and placing management responsibilities over both types of assets within the purview of a single agency will eliminate the muddled bureaucratic framework that has ultimately resulted from this bifurcation of duties.

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<sup>30</sup> Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. Pub. L.* 1, 9 (2004).

<sup>31</sup> United States Department of the Interior, Order No. 3335 (2014).

<sup>32</sup> *Id.*

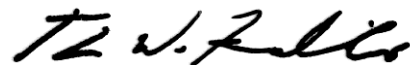


Finally, the very infrastructure of the BIA promotes the policy of self-determination. The OST only has two primary offices to conduct financial management and other administrative functions – its headquarters in Washington D.C. and its office in Albuquerque, New Mexico. The BIA, on the other hand, has twelve Regional offices, nearly 100 agencies and field offices located throughout the country, and approximately 10,000 employees.<sup>33</sup> The geographic breadth of the BIA’s infrastructure has proven conducive to developing a constructive rapport between regional BIA offices and local Indian communities. Since trust fund management reform must proceed in accordance with the policy of allowing self-governing tribes and individual Indians to participate meaningfully in their own economic development, it is logical that trust fund management duties should fall upon an agency who routinely emphasizes local rapport over centralization.

#### **IV. Conclusion**

The OST’s efforts since the implementation of the Reform Act have helped lay the groundwork for the ultimate task of bringing the Federal Government’s management of Indian trust assets in line with the Government’s fiduciary duties toward Indians and tribes. However, the OST has fallen short not only on its goal of implementing an integrated system of trust asset management, but also on managing trust assets in a manner consistent with Federal policy. In light of the imminent “sunsetting” of the OST and transfer of OST responsibilities elsewhere within the Department, we urge you to consider transferring the duties and functions of the OST to the agency which is best equipped to bring the vision of OST to fruition. Based upon the foregoing, we are confident that the BIA is the appropriate agency to assume this responsibility. We sincerely thank you for your time and consideration.

Sincerely,



Thomas W. Fredericks

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<sup>33</sup> Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. Pub. L.* 1, 16 (2004).