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**THE LACK OF TRUST IN A TRUST RELATIONSHIP: INDIAN  
AFFAIRS AND THE FEDERAL GOVERNMENT**

*Mya L. Johnson*



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**THE LACK OF TRUST IN A TRUST RELATIONSHIP: INDIAN AFFAIRS AND THE  
FEDERAL GOVERNMENT**

**MYA L. JOHNSON**

## INTRODUCTION

*“The Federal trust responsibility to American Indians is one of the most important as well as most misunderstood concepts in Federal Indian relationships.”<sup>1</sup>*

Imagine if the government controlled everything you owned, everything you loved. “Imagine if the government were responsible for looking after your best interests.”<sup>2</sup> Imagine if the government mismanaged your assets and land, holding you within the reach of poverty and subpar health. This nightmare is the reality for many American Indians, and their only option is to play the hand that is dealt to them by the government.

“Since the founding of this nation, the United States' relationship with the Indian tribes has been contentious and tragic.”<sup>3</sup> The expansion of the United States was the cause of the removal and relocation of many American Indian tribes – some by treaty and some by force.<sup>4</sup> As an exchange for their forced removal, the tribes were promised protection and support by the government through various treaties and laws.<sup>5</sup> It was the Office of Indian Affairs’ responsibility to ensure that the government was fulfilling its duties.

In 1824, the Bureau of Indian Affairs (BIA) replaced the Office of Indian Affairs, which is now within the Department of Interior.<sup>6</sup> BIA agents were assigned as the liaisons between the government (Department of Interior) and the Indian tribes. By the end of the 19<sup>th</sup> century, “the presence of the federal government, through the BIA, became the dominant force in reservation

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<sup>1</sup> *Trust Responsibility*, DEP’T OF THE INTERIOR, [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm\\_FinRpt\\_Ch4-Trust-Responsibility\\_May1977.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm_FinRpt_Ch4-Trust-Responsibility_May1977.pdf) (last visited Dec. 30, 2015).

<sup>2</sup> Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014, 6:07 AM), <http://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/>.

<sup>3</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>4</sup> *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

<sup>5</sup> *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), U.S. COMMISSION ON CIV. RIGHTS <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>6</sup> Chris Edwards, *Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs*, DOWNSIZING THE FED. GOV’T (Feb. 2012), [http://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies#\\_edn50](http://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies#_edn50).

life.”<sup>7</sup> As of now, the BIA provides 562 tribes with federal services.<sup>8</sup> This relationship has not yielded good results due to the inefficiencies, mismanagement, and corruptions on behalf of the BIA since its creation.<sup>9</sup>

In an 1831 Supreme Court case, *Cherokee Nation v. Georgia*, Chief Justice John Marshall characterized the relationship between American Indians and the government as “resembling that of a ward to his guardian.”<sup>10</sup> These bold words established the federal trust doctrine, which designated the government as the trustees of Indian affairs.<sup>11</sup> The purpose of a guardian/ward relationship is for the guardian to protect minors or incompetents.<sup>12</sup> Title to the property belongs to the ward, but the guardian has the sole authority to manage the property without consulting the ward.<sup>13</sup> Whereas in a trustee/beneficiary relationship, the property’s title is split, and requires the consent of both the trustee and the beneficiary for any transactions regarding the property to occur.<sup>14</sup> It is evident that there is still confusion as to the relationship and the duties required on behalf of the government. In the 1800s, categorizing the American Indians as wards may have been acceptable, but there is fear that this misleading term is still being applied in lieu of them actually being beneficiaries.<sup>15</sup>

The government assigned itself the obligation of insuring the survival of the “weak and helpless” American Indian tribes.<sup>16</sup> They felt that it was their duty to protect the tribes since much

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<sup>7</sup> *Id.*

<sup>8</sup> *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), U.S. COMMISSION ON CIV. RIGHTS, <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>9</sup> Edwards, *supra* note 6.

<sup>10</sup> *See Cherokee Nation*, 30 U.S. 1.

<sup>11</sup> Regan, *supra* note 2

<sup>12</sup> *Trust Responsibility*, DEP’T OF THE INTERIOR, [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm\\_FinRpt\\_Ch4-Trust-Responsibility\\_May1977.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm_FinRpt_Ch4-Trust-Responsibility_May1977.pdf) (last visited Dec. 30, 2015).

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

of their mishap fostered from their dealings with the government.<sup>17</sup> Not surprisingly, the mismanagement of this trust relationship has existed since its creation.<sup>18</sup> This illusory trust still exists today, and the government remains responsible for “managing Indian affairs for the benefit of all Indians.”<sup>19</sup> But unfortunately, the government has yet to live up to this responsibility.<sup>20</sup>

The American Indians’ relationship with the government has crippled their society in many ways. They are dependent on the government like an infant to its mother. Compared to the national average, they have a higher poverty rate and unemployment rate, which is mostly due to the government breaching its fiduciary duty to the tribes. The stagnation within the reservations has led to high suicide rates and alcoholism within its youth.

This article will discuss how the trust relationship between the American Indians and the government has been abused, and thus the trickle-down effect it has had on the American Indian’s economy and health. In Part I, I address several events that have led American Indians to have distrust towards the federal government. In Part II, I go on to discuss how this lack of trust has affected American Indians’ health, education, and economy.

## **I. TIMELINE OF AFFAIRS: THE REASON BEHIND THE MISTRUST**

### ***A. A Land Divided***

In order to encourage westward migration, the American Indian tribes were offered “unsettled lands in the West in exchange for their Indian lands in the East.”<sup>21</sup> The plan for American Indian relocation was soon replaced with efforts to assimilate them into the American culture.<sup>22</sup> Through the General Allotment Act of 1887, also known as the Dawes Act, the

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<sup>17</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

<sup>18</sup> *Cobell*, 240 F.3d at 1086.

<sup>19</sup> *Regan*, *supra* note 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Cobell*, 240 F.3d at 1087.

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

government divided tribal American Indian lands into parcels, and allotted them to individual American Indians with hopes of advancing assimilation.<sup>23</sup> All of this was done against the will of the tribes.<sup>24</sup> “The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”<sup>25</sup> It was assumed that the American Indians would adopt the mainstream culture if they were imputed with the rights and privileges of a property ownership.<sup>26</sup> The government was to hold the allotted lands in trusts for a period of 25 years.<sup>27</sup> Even though the American Indians were the rightful owners of the land, they could not sell or lease their lands without the government’s permission.<sup>28</sup> The General Allotment Act enabled the government to hold legal title to the Indian lands, while the American Indians held equitable title.<sup>29</sup> Ultimately, the government was to hold the “title entirely for the benefit and use of the Indian owners”; at least that was the purpose of the trust relationship.<sup>30</sup> Assimilation may not have been achieved, but between 1887 and 1924, 90 million acres, or two-thirds, of American Indian land transferred to white settlers.<sup>31</sup>

By 1934, the Reorganization Act was enforced as an effort to rectify the mistakes of the General Allotment Act.<sup>32</sup> This Act called for the government to cease the allotment of American Indian lands.<sup>33</sup> Any land that had yet to be allotted was returned to the American Indian tribes, whereas the already allotted lands remained in the government trust.<sup>34</sup> Due to the evolution of

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<sup>23</sup> *Id.*

<sup>24</sup> *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

<sup>25</sup> *Id.*

<sup>26</sup> Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Development Amount to Cultural Assimilation?*, 25 N.M. L. Rev. 23, 23 (1995).

<sup>27</sup> *Cobell v. Norton*, 428 F.3d 1070, 1072 (D.C. Cir. 2005).

<sup>28</sup> *Id.* at 1087.

<sup>29</sup> *Trust Responsibility*, *supra* note 12, at 126.

<sup>30</sup> *Id.*

<sup>31</sup> *Cobell*, 240 F.3d at 1087.

<sup>32</sup> Mika, *supra* note 26, at 29.

<sup>33</sup> *Cobell*, 240 F.3d at 1087.

<sup>34</sup> *Id.*

politicians, the 1934 Act prolonged American Indian's original term of a 25-year trust period to indefinitely.<sup>35</sup> Another purpose of the 1934 Act was to “extend the limits on the sale of American Indian lands, and to authorize the Secretary of the Interior to purchase additional lands or proclaim new reservations for Native American people.”<sup>36</sup> In essence, the government was to “put more land back into the trust on behalf of the tribes,” but since then – over 75 years later -- only 9 million acres have been added.<sup>37</sup> The American Indians are still negotiating for millions of acres, but face the complications of retrieving their land from individuals and corporations that claim ownership over their land.<sup>38</sup>

### ***B. Fiduciary Duty***

*“Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.”<sup>39</sup>*

The government was also given access to the revenues collected from individuals who used the tribal land, assets, and resources.<sup>40</sup> Whenever the government was involved in any revenue-producing transactions, “such as leasing allotted [Indian] lands or selling timber rights,” the revenue generated was to be held in a trust on behalf of that individual American Indian.<sup>41</sup> By 1938, a statute was enacted that allowed the government to transfer trust funds arising from land transactions “from the United States Treasury to banks or to invest them in government (or

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<sup>35</sup> *Id.* at 1072.

<sup>36</sup> Lawrence Schlam, *Indian Reorganization act of 1934*, ENCYCLOPEDIA.COM (Jan. 2004), <http://www.encyclopedia.com/doc/1G2-3407400166.html>.

<sup>37</sup> *Contemporary Native American Issues*, [http://www.iasb.uscourts.gov/v2\\_community/chpt5.pdf](http://www.iasb.uscourts.gov/v2_community/chpt5.pdf) (last visited Dec. 31, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

<sup>40</sup> *Contemporary Native American Issues*, *supra* note 37, at 5.3..

<sup>41</sup> *Cobell*, 428 F.3d 1070 at 1072.

government-guaranteed) securities,” creating Individual Indian Money (“IIM”) accounts.<sup>42</sup> These actions caused the government to assume the fiduciary obligations of a trustee to the Indian tribes.<sup>43</sup> Their relationship was formed into something more than mere contracting parties when interacting with the one another.<sup>44</sup> In fact, in 1942 the U.S. “charged itself with moral obligations of the highest responsibility and trust” to the Indian tribes.<sup>45</sup>

Over the years, there have been many lawsuits asserted by American Indians against the Government for their mismanagement, corruption, and fraudulent activities in association to their trust funds.<sup>46</sup> Just recently in 2010, after 15 years of litigation, 3.4 billion dollars were awarded to the Indian plaintiffs in *Cobell v. Norton* for mismanagement of their IIM trust funds.<sup>47</sup> With over 500,000 plaintiffs, a class-action suit was filed against the government to compel them to perform their trust obligations.<sup>48</sup> The Cobell case has been deemed “the largest class action lawsuit against the United States in US history.”<sup>49</sup>

Cobell made it apparent that the government did not know the accurate number of IIM accounts or the balances for each account.<sup>50</sup> The Interior Department claimed that only 300,000 IIM accounts existed, covering about 11 million acres, whereas the plaintiffs asserted that over 500,000 trust accounts existed.<sup>51</sup> “Not only was the Department uncertain about the accurate number of accounts [and their balances],” they could not produce any records to establish the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1088.

<sup>44</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

<sup>45</sup> *Id.* at 297.

<sup>46</sup> Edwards, *supra* note 6

<sup>47</sup> Dina Gilio-Whitaker, *The History Behind the Cobell Case*, <http://nativeamericanhistory.about.com/od/Law/a/The-History-Behind-The-Cobell-Case.htm> (last visited Jan. 2, 2016).

<sup>48</sup> *Cobell*, 240 F.3d at 1092.

<sup>49</sup> Gilio-Whitaker, *supra* note 47.

<sup>50</sup> *Cobell*, 240 F.3d at 1089.

<sup>51</sup> *Id.*

proper balances for the IIM accounts.<sup>52</sup> It could not be determined whether beneficiaries of the IIM trust accounts were receiving the right payments.<sup>53</sup> The regularly issued payments from the government to the beneficiaries were in “erroneous amounts—from unreconciled accounts—some of which are known to have incorrect balances.”<sup>54</sup> The government admitted that, “it is entirely possible that tens of thousands of IIM trust beneficiaries should be receiving different amounts of money—their own money—than they [were].”<sup>55</sup> The court in *Cobell* was so disgusted by the acts of the Department that they held the Secretary of Interior and the Assistant Secretary for Indian affairs in contempt on four counts.<sup>56</sup>

The General Allotment Act, imposed by the government, was to blame for this fiasco. This tragedy was the result of land, which originally had one owner, becoming fractioned between hundreds or thousands of individuals.<sup>57</sup> The fractioned land was then categorized as vacant and useless because without 51% approval from all of the owners, no transactions or developments to the land could occur.<sup>58</sup> With so many owners over individual parcels of land, the likelihood of being able to locate and retrieve the consent of the majority was slim to none. It is safe to say that the land was stale and encumbered. With the existence of thousands of IIM accounts, accounting for the Department became a “bureaucratic nightmare and highly costly.”<sup>59</sup> Sadly, the Department did not try to rectify this mishap, but instead attempted to conceal it by simply “sweeping it under the rug”.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Supra* note 8, at 18.

<sup>57</sup> Gilio-Whitaker, *supra* 47.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

*Cobell* is just one of many occurrences of the government undermining its obligations to the American Indians.

In 2011, the Department of the Interior's Inspector General (IG), Mary Kendall, testified to Congress about the “gross program inefficiencies at many levels of Indian Affairs and in tribal management of federal funds.” The IG described, for example, how the BIA funded a fish hatchery at a reservation for 14 years and yet no fish were hatched. Eventually, a BIA official visited the reservation and found that the alleged hatchery was actually a real estate development that the tribes had been funneling taxpayer money into.

In another incident, the BIA spent \$9 million for public ferryboat service in Alaska, but the money was redirected to a private tour boat operation. And in Montana in 2011, 10 people—including BIA employees—were indicted for a decade-long scheme that embezzled \$1.2 million from a tribal lending program operated by the Fort Peck Tribe.

The IG found that in one BIA region, millions of dollars were wasted on road projects that were never competed. She noted that “internal management controls were so broken down that wage-grade employees were earning over \$100,000 a year, with overtime, without explanation.” On one of the road projects, \$2.4 million had been spent, but the IG couldn't find any of the work that was supposed to have been done.<sup>60</sup>

Notwithstanding this trust relationship, much of the American Indian culture and traditions have been lost to the government's expansion and encroachment.<sup>61</sup> Further, Indian tribes have been deprived of their lands and resources by the conduct of the government.<sup>62</sup> The Interior Department, as a trustee, has the obligation of acting in good faith, and violates this duty whenever it does otherwise.<sup>63</sup> Not only has the Interior Department breached its fiduciary duty to the Indian tribes on numerous occasions, it has done so knowingly. The government's unruly conduct towards the

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<sup>60</sup> Chris Edwards, *Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs*, DOWNSIZING the FEDERAL GOVERNMENT (Feb. 2012), [http://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies#\\_edn50](http://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies#_edn50).

<sup>61</sup> Schlam, *supra* note 36.

<sup>62</sup> Edwards, *supra* note 6.

<sup>63</sup> *Manchester Band of Pomo Indians, Inc., v. United States*, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973).

American Indians has been occurring since their first encounter, and has substantially contributed to, “Indian resentment and suspicion of Government programs.”<sup>64</sup>

## II. THE SNOWBALL EFFECT

### *A. How the Trust Relationship Contributes to American Indian Poverty*

*“The tendency of American society to respond foremost to visible problems results in Native Americans being overlooked and, in the minds of many, forgotten.”<sup>65</sup>*

“Today, approximately 2% — or 50 million acres — of the United States is considered tribal land.”<sup>66</sup> Of the 2.9 million American Indians currently living within the U.S., 33% reside within these 50 million acres.<sup>67</sup> The isolation of the Indian reservations causes them to be invisible to the rest of society. American Indians, “rank at or near the bottom of nearly every social, health, and economic indicator.”<sup>68</sup> Their unemployment rates double that of the national average, they have higher poverty rates, and they are behind in education attainment.<sup>69</sup> In 2011, nearly 25% of American Indians on reservations lived in poverty.<sup>70</sup> Their high poverty rate has a positive correlation with their unemployment rate. In 2014, President Obama considered the high poverty rate on the reservations as “a moral call to action.”<sup>71</sup> Federal funding to the reservations has increased over the years, but, “there persists a large deficit in funding American Indian programs

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<sup>64</sup> *Trust Responsibility*, *supra* note 1, at 126.

<sup>65</sup> *Supra* note 8, at 7.

<sup>66</sup> *Contemporary Native American Issues*, *supra* note 37, at 5.2.

<sup>67</sup> Edwards, *supra* note 6.

<sup>68</sup> *Supra* note 8, at xi.

<sup>69</sup> Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, US NEWS (Nov. 27, 2014, 7:00 AM), <http://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery>.

<sup>70</sup> Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECONOMIC POLICY INSTITUTE (Dec. 17, 2013), <http://www.epi.org/publication/bp370-native-americans-jobs/>.

<sup>71</sup> Jens Krogstad, *One-in-Four Native Americans and Alaska Natives are Living in Poverty*, PEW RESEARCH CENTER (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>.

that needs to be paid to eliminate the backlog of unmet American Indian needs.”<sup>72</sup> It was discovered that between 1975 and 2000, funding for the BIA declined by 6 million dollars.<sup>73</sup>

**i. Education: The Lack Thereof**

The decrease in federal funding for the BIA had a direct effect on the American Indian education system. Provisions set centuries ago still impose a duty for the federal government to provide educational services to the reservations.<sup>74</sup> From the 1800s through 1920s, primary control of the American Indian education was vested in the government.<sup>75</sup> The government’s original goal of taking over the American Indian education system was to force assimilation.<sup>76</sup> They wanted to, “Kill the Indian, save the Man.”<sup>77</sup> After this phase ended, from the 1920s through 1970s, the federal government took a back seat, remaining financially involved, and policies were implemented that transferred control of American Indian education to the states and their public schools.<sup>78</sup> Years later this is still the case, but through various policies, American Indians have gained some control over their education system.<sup>79</sup> There are several statutes that allow tribes to operate schools and programs that were once ran by the government.<sup>80</sup> Even though this seems like progress, policy after policy has been implemented without cleaning up the mess from the previous one, causing chaos.<sup>81</sup>

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<sup>72</sup> US Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>73</sup> *Id.*

<sup>74</sup> See *Prince v. Bd. of Educ.*, 543 P.2d 1176, 1184 (N.M. 1975).

<sup>75</sup> Melody McCoy, *Federal Indian Law and Policy Affecting American Indian and Alaska Native Education 2* (Oct. 2000), <http://www.narf.org/wordpress/wp-content/uploads/2015/01/purple.pdf>.

<sup>76</sup> See US Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, 82 (July 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> McCoy, *supra* note 74, at 19.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 23.

<sup>81</sup> See *id.*

Confusion within the American Indian education system was displayed in *Meyers by & Through Meyers v. Board of Educ.* Plaintiffs, American Indians within a reservation in Utah, wanted to compel the defendants, a school district in Utah, to provide secondary education to the children within the reservation.<sup>82</sup> The reservation was isolated from the rest of the society, and at the time, only education for grades K-8 was provided to children within the reservation.<sup>83</sup> For those who attended secondary school, they had to, “reside in BIA dormitories near public schools or live with friends or relatives near public schools,” outside of the reservation.<sup>84</sup> The defendants asserted that they had no obligation to educate the American Indians within reservations, and that that duty belonged to the federal government and the tribes.<sup>85</sup> The defendants argued that since the government, through the BIA, has a duty to educate within reservations, its duty to educate was preempted by federal law.<sup>86</sup>

Requiring students to travel or stay away from home in order to obtain secondary schooling that the BIA provided was not seen as an equivalent education.<sup>87</sup> If a child could not make the commute, they would be deprived of their education, which is equivalent to not providing an education at all.<sup>88</sup> The defendants claimed there were too many complications when trying to provide educational services within the reservations because they: (1) could not force the American Indians to relinquish the lands necessary to build a school; (2) could not enforce attendance laws without the consent of the tribes; (3) could not gather water from the reservations for the schools to utilize.<sup>89</sup> The court reasoned that this excuse did not release the defendants of their duty to

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<sup>82</sup> *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1551 (D. Utah 1995).

<sup>83</sup> *Id.* at 1555.

<sup>84</sup> *Id.* at 1552-53.

<sup>85</sup> *Id.* at 1551.

<sup>86</sup> *Id.* at 1562.

<sup>87</sup> *Id.* at 1555.

<sup>88</sup> *Id.* (citing *Prince v. Bd. Of Educ.*, 543 P.2d 1176, 1184 (N.M. 1975)).

<sup>89</sup> *Id.* at 1558.

provide education within the reservations, and to do so was possible with the cooperation of the tribe.<sup>90</sup>

The court found that the defendants had a duty to provide adequate education to children residing within reservations, regardless of the government's duty. It is indeed true that the government has a legal and moral obligation to provide an education for children residing within American Indian reservations, but a state's duty is not preempted by the government's duty.<sup>91</sup> No statute or law existed that expressly preempted state law when it came to American Indian education.<sup>92</sup> The only time that state law may be preempted is when, "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>93</sup> The deciding factor would be whether the state law and federal law had a consistent goal.<sup>94</sup> In this case, there was no conflict between the two. Both have the common goal of providing adequate education to children within the American Indian reservations. As discussed earlier, the federal government remained financially involved with the American Indians' education system, while the states and tribes became responsible for the policies enforced.<sup>95</sup>

Like *Meyers*, many states have a misunderstanding of their duty to the Indian reservations, and have attempted to escape their responsibility to the Indian tribes when federal substitutes were available.<sup>96</sup> States cannot avoid their responsibility to provide services to the American Indian tribes just because the federal government has supplied services for decades.<sup>97</sup> The government,

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<sup>90</sup> *Meyers*, 905 F. Supp. at 1558.

<sup>91</sup> *Id.* at 1562.

<sup>92</sup> *See id.* at 1563.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.* at 1564.

<sup>97</sup> *Id.*

states, and Indian tribes all share a duty in providing services within reservations, and the duty of one does not relive the duty of another.

The American Indian education system cannot be successful without each entity fulfilling their duty. On one hand, the government has failed to provide adequate funding to support American Indian education.<sup>98</sup> On the other hand, states have withheld their services and resources from Indian reservations, because of either the lack of interests or the misunderstanding of their duty. In 2002, the Department of Education (DOE) created a budget that averaged \$200 per American Indian student.<sup>99</sup> Whereas, the National Indian Education Association (NIEA) estimated that \$250 per student was necessary.<sup>100</sup> However, the \$50 increase would not have had a substantial impact since inadequate funding has been an issue for decades.<sup>101</sup> The absence of state assistance in American Indian education has created professional isolation for teachers and substandard physical facilities.<sup>102</sup> At one point, full-time educators of the American Indian children made half the salary of full-time educators of the non-Indian children.<sup>103</sup>

Subpar teaching conditions and opportunities pose difficulties in retaining quality educators, thus creating challenges for the American Indian students. Statistics show that American Indian students perform “three grade levels below their white peers in reading and mathematics.”<sup>104</sup> They are also “237% more likely to drop out of school, and 207% more likely to be expelled” when compared to white students.<sup>105</sup> Only 7 out of every 100 American Indian

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<sup>98</sup> US Commission on Civil Rights, *supra* note 75, at 14.

<sup>99</sup> *Id.* at 89.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Striving to Achieve: Helping Native American Students Succeed* (2008), <http://www.ncsl.org/research/state-tribal-institute/striving-to-achieve-helping-native-american-stude.aspx>.

<sup>105</sup> *Id.*

students will obtain a bachelor's degree.<sup>106</sup> Whereas 34 out of every 100 white students will earn a bachelor's degree.<sup>107</sup>

## ii. Unemployment

Since 2008, American Indians have experienced double-digit employment rates.<sup>108</sup> On some reservations, unemployment rates have reached an astronomical rate of 85%.<sup>109</sup>

Reservations have access to a plethora of natural resources, but the General Allotment system developed in 1887 has contributed to a complex property system that prohibits development and growth.<sup>110</sup> One reservation claims to have 9 billion tons of coal sitting underneath it, going untapped.<sup>111</sup> The issue with property rights keeps investors away because they fear facing complicated legal issues. Without “individual property rights, you can't build, you can't be bonded, you can't pass on wealth. A lot of small businesses never get started because people can't leverage property [to raise funds].”<sup>112</sup> The reservations have the potential to create jobs and opportunities, but there is fear that these heights will never be reached. Until the federal trust system is reformed, tribes will not be able to utilize their natural resources; thus they are incapable of creating more employment opportunities and financial resources.<sup>113</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Bryce Covert, *The Unemployment Rate for Native Americans Has Been Over 10 Percent for Five Years*, THINK PROGRESS (Oct. 29, 2013, 3:43 PM), <http://thinkprogress.org/economy/2013/10/29/2855951/unemployment-native-americans/>.

<sup>109</sup> US Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>110</sup> Krogstad, *supra* note 71.

<sup>111</sup> Regan, *supra* note 2.

<sup>112</sup> *Id.*

<sup>113</sup> Austin, *supra* note 70.

### iii. Mismanagement of Resources

American Indians within reservations face limited economic opportunities due to the continuing policy failures set forth by the government.<sup>114</sup> As the case *Cobell* displayed, the BIA's mismanagement of the IIM accounts deprived American Indians from their rightfully owned financial resources.<sup>115</sup> These resources could have been applied in areas where the BIA's federal funding was falling short.<sup>116</sup>

The mismanagement of resources is the biggest factor in American Indian poverty and distrust for the government. In *Confederated Tribes of the Colville Reservation v. United States*, the plaintiffs, the Confederated Tribes, sued the government for compensation for the use of their land to generate power to the Grand Coulee Dam, a federal dam.<sup>117</sup> Congress gave the United States "all the right, title, and interest of the Indians," and the Secretary of Interior was to determine just compensation for the lands taken.<sup>118</sup> The Confederate Tribe was given \$63,000 for 300 acres of their land.<sup>119</sup> The Tribe asserted that the government failed to pay for the "water power values" associated with the taking of their land, and violated the "fair and honorable dealings" clause of the Indian Claims Commission Act.<sup>120</sup> The government claimed that the fair and honorable dealings clause did not apply because they had sovereign constitutional power to "exercise navigational servitude" since they were aiding navigation for the public good.<sup>121</sup> In layman's terms, the government was attempting to dismiss their moral obligation to the Indian tribes through exerting its sovereign power. The Federal Circuit Court held that even though the government was

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<sup>114</sup> *The Poverty Cycle*, <http://indianyouth.org/american-indian-life/poverty-cycle> (last visited Jan. 4, 2016).

<sup>115</sup> US Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> See *Confederated Tribes of the Colville Reservation v. United States*, 964 F.2d 1102 (Fed. Cir. 1992).

<sup>118</sup> *Id.* at 1105.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1106.

<sup>121</sup> *Id.*

exercising its legal authority, if their conduct is deemed to be less than fair or honorable to the Confederate Tribes, then they would still be held to the standard set forth in the fair and honorable dealings clause.<sup>122</sup> After being remanded, there was a legislative settlement, and the Tribe was awarded \$53 million for past damages.<sup>123</sup>

How can a society who is forced to rely on the federal government thrive and survive when the government continuously cheats them morally and financially? More recently, in *Shoshone Indian Tribe v. United States*, the Indian Tribe brought an action against the government for breaching its fiduciary duty, once again.<sup>124</sup> The Indian Tribe granted ceded lands to the government, and the government agreed to act as a trustee on the Tribes behalf.<sup>125</sup> It was later discovered that the ceded land contained valuable oil and natural resources.<sup>126</sup> The Act of 1916 was enforced, and the government was allowed to lease the ceded lands for production.<sup>127</sup> The government, as the trustee, was to hold proceeds from the leases for the benefit of the tribes.<sup>128</sup> The Tribes authorized the conversion of their leases several times under the advisement of the government.<sup>129</sup> After misfortune, the Tribes accused the government of making misstatements of facts regarding the conversion of their leases.<sup>130</sup> The government misinformed the Tribe that the conversions would not have a negative economic impact, and leases would have the same royalty payments.<sup>131</sup> This turned out not to be the case: the plaintiffs were in fact harmed. The Tribe questioned, “whether the government was making decisions in line with its duty as a trustee to

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<sup>122</sup> *Id.* at 1113.

<sup>123</sup> *Fair and Honorable Dealings*, THE UNITED STATES DEP’T OF JUSTICE, <http://www.justice.gov/enrd/fair-and-honorable-dealings> (last updated May 12, 2015).

<sup>124</sup> *Shoshone Indian Tribe v. U.S.*, 672 F.3d 1021, 1026 (Fed. Cir. 2012).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1031.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1032.

make as good a bargain for the [Tribes] as a prudent and informed oil and gas operator would make for himself.”<sup>132</sup> Unfortunately, the Federal Circuit Court ruled that the statute of limitations had run. This case, nonetheless, successfully depicts the fraudulent activities the government engaged in.<sup>133</sup>

These abovementioned cases are a few of thousands that illustrate the negative impact that the government has on the Indian tribe’s economy when they breach their fiduciary duty. These cases are settling for millions of dollars; millions of dollars that could have promoted more jobs and resources within the American Indian community. Since the 1800s, the government has mismanaged American Indian funds and resources -- ultimately contributing to their unsustainable economy.

### ***B. Health Disparities: The War Against Suicide***

The federal government has a responsibility to provide members of federally recognized tribes certain rights, protections, and services, including health care. “Many of the youth residing within reservations have to face poverty, unemployment, and alcoholism on a daily basis, and are twice as likely as any other race, to die before the age of twenty-four.”<sup>134</sup>

Suicide is the second leading cause of death for ages 15 to 24 on the reservations.<sup>135</sup> Native teens experience a suicide rate that is almost four times the national average, a rate that is higher than any other population.<sup>136</sup> Suicide contagion is a major factor that promotes others to commit

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<sup>132</sup> *Shoshone Indian Tribe v. U.S.*, 672 F.3d 1021, 1026 (Fed. Cir. 2012).

<sup>133</sup> *Id.* at 1032.

<sup>134</sup> Sari Horwitz, *The Hard Lives — and High Suicide Rate — of Native American Children on Reservations*, THE WASHINGTON POST (Mar. 9, 2014), [https://www.washingtonpost.com/world/national-security/the-hard-lives--and-high-suicide-rate--of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28\\_story.html](https://www.washingtonpost.com/world/national-security/the-hard-lives--and-high-suicide-rate--of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html).

<sup>135</sup> *Suicide Among American Indians/Alaskan Natives*, SUICIDE PREVENTION RESOURCE CENTER, [http://www.sprc.org/sites/default/files/migrate/library/AI\\_AN%20Sheet%20Aug%2028%202013%20Final.pdf](http://www.sprc.org/sites/default/files/migrate/library/AI_AN%20Sheet%20Aug%2028%202013%20Final.pdf) (last visited Oct. 23, 2016).

<sup>136</sup> *Native American Youth 101*, THE ASPEN INSTITUTE, [http://www.aspeninstitute.org/sites/default/files/content/upload/Native%20American%20Youth%20101\\_higres.pdf](http://www.aspeninstitute.org/sites/default/files/content/upload/Native%20American%20Youth%20101_higres.pdf) (last visited Jan. 3, 2016).

suicide.<sup>137</sup> Contagion occurs when a suicide within the community triggers others to attempt or complete suicide.<sup>138</sup> For every suicide, there are six direct survivors, and survivors of suicide are three times more likely to commit suicide themselves.<sup>139</sup> Since reservations are small towns, and tribal members are often related, whether closely or distantly, up to 25 direct survivors or even an entire community can be affected by a suicide.<sup>140</sup>

Witnessing and living in poverty, diminishing health, and lack of jobs causes the American Indian youth to feel useless. They see the conditions of their communities but see no way to make a contribution. 20% of American Indian adolescents confess to thinking daily about certain sorrows.<sup>141</sup> Many have decided they will not live long under these conditions, which in their opinion is a reason to commit suicide.<sup>142</sup> The youth who have survived suicide attempts express that they wanted a break from their problems, or “just a little time off”.<sup>143</sup>

American Indians tend to have more serious mental health disorders that are related to suicide, including anxiety, substance abuse, and depression. Mental health services are not easily accessible to American Indians residing within reservations due to, “lack of funding, culturally inappropriate services, and mental health professional shortages and high turnover.”<sup>144</sup> Access to health care facilities is limited because of “rural locations of reservations and challenges in recruiting and retaining health care providers and administration personnel.”<sup>145</sup> Nearly one in three

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<sup>137</sup> *Suicidal Behavior Among American Indian and Alaska Natives*, <http://www.omhmentalhealthepwony.org/SuicidalityAmericanIndiansAlaskaNatives.htm> (last visited Jan. 5, 2016).

<sup>138</sup> *Id.*

<sup>139</sup> Cindy Uken, *Suicide Victims' Loved Ones Often Suffer Guilt, Thinking 'If only I had ...'*, BILLINGS GAZETTE (Feb. 10, 2013) [HTTP://BILLINGSGAZETTE.COM/NEWS/STATE-AND-REGIONAL/MONTANA/SUICIDE-VICTIMS-LOVED-ONES-OFTEN-SUFFER-GUILT-THINKING-IF-ONLY/ARTICLE\\_CD2F464B-7DFE-51BC-AE4B-B3F531839C0F.HTML](http://BILLINGSGAZETTE.COM/NEWS/STATE-AND-REGIONAL/MONTANA/SUICIDE-VICTIMS-LOVED-ONES-OFTEN-SUFFER-GUILT-THINKING-IF-ONLY/ARTICLE_CD2F464B-7DFE-51BC-AE4B-B3F531839C0F.HTML).

<sup>140</sup> *Id.*

<sup>141</sup> Stephanie Woodard, *Suicide Epidemic for American Indian Youth: What More Can be Done?*, NBC NEWS (OCT. 10, 2012, 6:11 AM) [http://investigations.nbcnews.com/\\_news/2012/10/10/14340090-suicide-is-epidemic-for-american-indian-youth-what-more-can-be-done](http://investigations.nbcnews.com/_news/2012/10/10/14340090-suicide-is-epidemic-for-american-indian-youth-what-more-can-be-done).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Suicide Among American Indians/Alaskan Natives*, *supra* note 133, at 5.

<sup>145</sup> *Native American Youth 101*, *supra* note 134, at 3.

American Indians are uninsured due to the lack of federal funding and the limited access to employer-sponsored coverage.<sup>146</sup> Federal funding is limited to those who are registered with a federally recognized tribe.<sup>147</sup> As for employer-sponsored coverage, it is not easily accessible because American Indians have high unemployment rates, and if they are employed it is typically with a low-wage job that doesn't offer health care coverage.<sup>148</sup> If help is provided and available, many American Indians have a distrust of federal and state governments.<sup>149</sup> American Indians fear utilizing the government's resources because utilizing those resources represents the "white man's" system and culture.<sup>150</sup> American Indians rate their traditional healer's advice more than 60% higher than their physician's advice.<sup>151</sup>

### III. CONCLUSION

It is clear that the trust relationship has not allowed American Indians to benefit as beneficiaries. The desire to assimilate the American Indians has left them in despair and isolated from the rest of the country physically, financially, and mentally. The federal government applied for a job that it was not qualified for, and it has yet to relinquish the position. Until the government's relationship with American Indians is reformed, the American Indians will remain the invisible minority.

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<sup>146</sup> Samantha Artiga, Rachel Arguello, & Philethea Duckett, *Health Coverage and Care for American Indians and Alaska Natives*, THE HENRY J. KAISER FAMILY FOUNDATION (Oct. 7, 2013), <http://kff.org/disparities-policy/issue-brief/health-coverage-and-care-for-american-indians-and-alaska-natives/>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *To Live to See the Great Day that Dawns: Preventing Suicide by American Indian and Alaska Native Youth and Young Adults*, U.S. DEP'T. of HEALTH and HUMAN SERVICES, [http://www.sprc.org/sites/sprc.org/files/library/Suicide\\_Prevention\\_Guide.pdf](http://www.sprc.org/sites/sprc.org/files/library/Suicide_Prevention_Guide.pdf) (last visited Jan. 4, 2016).

<sup>151</sup> *Id.*

