

**LONG-TERM STEWARDSHIP AND  
THE FEDERAL TRUST RESPONSIBILITY:  
INCORPORATING THE DUTIES OWED TO  
AND THE OBLIGATIONS  
OF AMERICAN INDIAN TRIBES  
INTO A LONG-TERM STEWARDSHIP PLAN**

**A WORKING PAPER**

**STATE AND TRIBAL GOVERNMENT WORKING GROUP  
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**Table of Contents**

	<u>Page</u>
<b>I. INTRODUCTION: WHAT IS LONG-TERM STEWARDSHIP?.....</b>	<b>1</b>
A. “Stewardship, in the broadest sense, includes all of the activities that will be required to manage the potentially harmful contamination left on-site after cessation of remediation efforts.” .....	1
B. The National Research Council views stewardship as one-third of the conceptual framework for long-term institutional management.....	1
C. DOE’s Office of Environmental Management is presently responsible for meeting the official goal of “cleanup” of DOE’s waste sites .....	1
D. The RFF Report and the NRC Report both describe activities that will be the minimum necessary to initiate a stewardship program.....	1
E. Both reports caution against dependence solely on these lists for an adequate stewardship program .....	2
F. The NRC Report acknowledges that development of any stewardship program must incorporate five key principles.....	2
G. The remaining components of the structural framework – waste reduction and waste isolation – must be largely the responsibility of the federal government ....	3
<b>II. WHAT ARE THE ROLES AND RELATIONSHIPS OF GOVERNMENTS IN A LONG-TERM STEWARDSHIP PROGRAM? .....</b>	<b>3</b>
A. All governments – federal, state, and tribal – have a compelling interest to protect public health, safety, and welfare.....	3
1. Indian tribes have an important role to play as governments .....	3
2. Indian tribes are uniquely and permanently tied to their lands .....	4
B. History establishes that the federal government bears the greatest responsibility for stewardship.....	4
1. It is the government with the greatest responsibility for the problem.....	4

2.	It is the government with the greatest resources to expend to address the problem .....	5
3.	It is the government with authority to establish uniform goals and cooperative systems.....	5
C.	Indian tribes have generations of experience with federal control and oversight .	5
1.	Tribal government status.....	5
2.	The trust responsibility to federally recognized Indian tribes .....	5
3.	Recognition by the U.S. government of Indian tribal rights.....	7
D.	Incorporating the federal trust responsibility to Indian tribes into long-term stewardship.....	11
1.	Long-term stewardship is the responsibility of all governments .....	11
2.	The DOE obligation to recognize tribal governmental rights, including the right of self-government, requires a substantive tribal role in long-term stewardship .....	12
3.	The obligation to preserve tribal natural resources includes the need to address, use and measure the effectiveness of long-term stewardship ....	12
E.	Accommodating the governmental interests of the federal, state, and tribal governments under existing law: federal preemption .....	12
1.	Plenary policy preemption .....	12
F.	Federal law establishing a long-term stewardship program can accommodate an appropriate role for each affected government .....	14

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**I. INTRODUCTION: WHAT IS LONG-TERM STEWARDSHIP?**

A. "Stewardship, in the broadest sense, includes all of the activities that will be required to manage the potentially harmful contamination left on-site after cessation of remediation efforts." *Long Term Institutional Management of U.S. Department of Energy Legacy Waste Sites*, REPORT OF THE NATIONAL RESEARCH COUNCIL (prepublication copy 2000) at 42 (hereinafter referred to as "NRC Report").

B. The National Research Council views **stewardship** as one-third of the conceptual framework for long-term institutional management of the Department of Energy's (hereinafter referred to as "DOE") waste sites, the remaining two-thirds being **waste reduction** and **waste isolation**. NRC REPORT at viii.

C. DOE's Office of Environmental Management is presently responsible for meeting the official goal of "cleanup" of DOE's waste sites. However:

[N]o matter how much money DOE spends, some hazards will remain at over two-thirds of these sites. This is due, in large part, to the nature of the contamination, and the lack of proven cleanup and treatment technologies. Thus, referring to DOE's effort as a "cleanup" program is somewhat of a misnomer. In fact, hazards remaining at some DOE sites will require attention for many centuries to come.

K.N. Probst and M.H. McGovern, *Long-Term Stewardship and the Nuclear Weapons Complex: The Challenge Ahead*, RESOURCES FOR THE FUTURE REPORT 1998, at 1-2, (hereinafter referred to as "RFF Report").

D. The RFF Report and the NRC Report both describe activities that will be the minimum necessary to initiate a stewardship program, but neither report can give any certainty that the goal of cleanup will be accomplished merely by having all of these activities in a long-term stewardship program.

1. The RFF Report at p. viii states:

Broadly speaking, stewardship refers to physical controls, institutions, information, and other mechanisms needed to ensure protection of people and the environment, both in the short and long

term, after the cleanup of the weapons complex is considered “complete.” The likely elements of a stewardship program are:

- Site monitoring and maintenance;
- Application and enforcement of institutional controls;
- Information management; and
- Environmental monitoring.

2. The NRC Report considers the following elements to be necessary to the stewardship prong of the structural framework:

- Institutional controls (generally use and access restrictions);
- Conducting oversight, and, if necessary, enforcement;
- Gathering, storing and retrieving information about residual contaminants and conditions on site, as well as about changing off-site conditions that may affect or be affected by residual contaminants;
- Disseminating information about the site and related use restrictions;
- Periodically reevaluating how well the total protective system is working;
- Evaluating new technological options to reduce or eliminate residual contaminants or to monitor and prevent migration of isolated contaminants; and
- Supporting research and development aimed at improving basic understanding of both the physical and sociopolitical character of site environments and the fate, transport and effects of residual site contaminants.

E. Both reports caution against dependence solely on these lists for an adequate stewardship program.

1. “The notion of stewardship carries with it something more, however, than simply a list of tasks or functions to be implemented. It connotes a sacred responsibility to protect human health and the environment for future generations.” RFF REPORT at ix.

2. “Stewardship activities entail on-going, periodic, if not continuous actions by people. Issues with stewardship include not only *what* will be done, but *how* and *when* it will be accomplished, and *by whom*. [W]hile activities are the most visible component of stewardship, they rest upon legal, financial, and organizational structures and social and political factors that must work well for these activities to be conducted as expected.” NRC REPORT at 42.

F. The NRC Report acknowledges that development of any stewardship program must incorporate five key principles:

1. Plan for uncertainty.
2. Plan for fallibility.

3. Develop substantive incentive structures.
4. Undertake scientific, technical, and social research and development.
5. Seek to maximize follow-through on phased, iterative (repetitive), and adaptive long-term approaches.

These principles apply the humble notion that long-term stewardship is a means of dealing with human and scientific uncertainty, that shades of gray that are far more prevalent than stark black/white contrast of certainty.

**G.** The remaining components of the structural framework—waste reduction and waste isolation—must be largely the responsibility of the federal government. DOE must consult with state, tribes and other stakeholders on these issues as well. Stewardship requires more interaction by all involved governments and a more active role for tribal governments.

## **II. WHAT ARE THE ROLES AND RELATIONSHIPS OF GOVERNMENTS IN A LONG-TERM STEWARDSHIP PROGRAM?**

**A.** All governments—federal, state, and tribal—have a compelling interest to protect public health, safety, and welfare.

1. Indian tribes, have an important role to play as governments. There is not one stewardship task, as outlined in the two reports, that can adequately be accomplished without significant involvement of Indian tribal governments. The activities list from the NRC Report is used as it is more specific than the RFF Report.

a. For tribes, their natural resources base includes tribal lands, migratory resources that enter onto tribal lands, and off-reservation resources recognized in treaties. It is essential that tribes and the federal government institute and maintain institutional controls to protect these resources.

b. Similarly, oversight and enforcement on or near the tribal natural resources base requires active tribal participation in those activities.

c. Gathering, storing, and retrieving information about residual contaminants and changing off-site conditions that may affect or be affected by residual contaminants also requires tribal participation as it is likely that some tribes will, as a whole, be more closely linked to the aspects of the environment, such as groundwater and migratory animals, and, therefore, more sensitive to changing conditions.

d. Dissemination of information is a key component of any stewardship program.

Information should be directed to the people and organizations who have a need to know because (1) they are responsible for

implementing or enforcing the site's institutional management plan, (2) they could be harmed by failures of the plan, or (3) they are part of a larger community with an interest in the plan's success. People in the first category would include federal, tribal, state or local officials or private companies with legal responsibilities for the plan. They need to know what they are protecting, how long it must be protected, and for what reasons. People in the second category would include site users as well as others such as well drillers, farmers, or hunters who might need to be informed of use restrictions. People in the last category might include, for example, members of the medical community needing to know the extent to which local people are drinking contaminated groundwater or eating contaminated fish. The last category might also include concerned individuals or organizations that unofficially monitor the site to ensure that use restrictions are observed and that the site's management plan is being properly implemented.

NRC REPORT at 44. Tribes are the most experienced governments within the United States at maintaining the dissemination of information over time. This is particularly true where the tribes have existing mechanisms for protecting the public from dangers that have existed for centuries. The NRC Report notes that solutions to assure conveyance of information for at least centuries will require a profound cultural shift. NRC Report at 44. Tribes can provide significant guidance to other governments in this area.

e. Tribal involvement in periodic reevaluation of how well the total protective system is working is essential to ensure that tribal concerns are taken into consideration in deciding whether the protective system is working. If it is not working for tribes, it needs to be reevaluated.

f. **Consultation** with tribes when evaluating new technological options to reduce or eliminate residual contaminants or to monitor and prevent migration of isolated contaminants must take place **before** the options are selected, not afterwards.

g. Any research and development aimed at improving basic understanding of both the physical and sociopolitical character of site environments must include the relationship of tribal peoples to the site, and the natural resources at the site.

2. Indian tribes are uniquely and permanently tied to their lands. In most instances, tribes do not have alternative sources for vital land and water. Tribal people cannot just move away from contaminated groundwater and still retain all their rights as tribal people on their own lands. Therefore, Indian tribes have the most compelling interest in the making any stewardship program succeed.

**B.** History establishes that the federal government bears the greatest responsibility for stewardship because of the plenary and exclusive federal control over nuclear activities. The federal government must take the lead in establishing and enforcing a stewardship program that has the greatest chance of the fewest failures:

1. It is the government with the greatest responsibility for the problem.

2. It is the government with the greatest resources to expend to address the problem.

3. It is the government with authority to establish uniform goals and cooperative systems for reaching those goals that respect the powers and responsibilities of both tribal and state governments.

C. Indian tribes have generations of experience with federal control and oversight, often referred to as the “federal trust responsibility.” Wide variations in federal policies through the years provide tribes with a level of experience unknown to federal and state governments in assessing the strength and weaknesses of a stewardship program.

1. Tribal government status. The federal government has a trust responsibility to tribes, an obligation to recognize and protect the governmental status of tribes, which obligation the federal government performs on behalf of all the people of the United States. Indian tribes can offer unique insight into what is necessary for an effective stewardship program for tribal governments.

2. The federal trust responsibility to federally recognized Indian tribes.

a. The genesis of the federal trust responsibility: The underpinnings of the federal trust responsibility to Indians have existed since the fifteenth and sixteenth centuries. Beginning in Spain, debates raged throughout Europe on the question of what rights indigenous people had in relation to colonizers. Doctrines of international law were developed to address the question. **The debate resolved that the indigenous people did have certain rights, today referred to as “aboriginal” rights.** These rights were recognized by the British and Spanish governments.

Discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

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The rights thus acquired being exclusive, no other power could interpose between [the discoverer and the natives]. “In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired, they were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion[.]”

*County of Oneida, New York, et al. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (citing to *Johnson v. M’Intosh*, 8 Wheat. 543, 573-74 (1823)). Since the adoption of the U.S. Constitution, **Indian relations are the exclusive province of federal law.**

b. *Johnson v. M'Intosh*, 8 Wheat. 543, 573-74 (1823), established that under the international law concept referred to as the "Discovery Doctrine," **the United States is obligated to recognize (1) tribal rights to natural resources, and (2) the right of the tribes to self-governance, free from state regulation.** This federal obligation is often referred to as the "Federal Trust Responsibility" to Indians.

c. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) was the first Supreme Court opinion to expand on the rudimentary language in *Johnson, supra*, to **explicitly acknowledge the political status of an Indian tribe as a "distinct political society."** In relation to the United States, the Court stated that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations" and characterized the relationship as resembling "that of a ward to his guardian."

d. **With the federal government as "trustee" for tribes, tribal rights become a type of federal right** – a right that the federal government is obligated to recognize and protect. This was made clear in the case of *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832). The State of Georgia attempted to assert regulatory authority over non-Indians residing in the Cherokee Territory by requiring them to obtain a state license to be in Cherokee Territory. The right at issue in that case was the right of the Cherokee Nation to be free from regulation by the State of Georgia. "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."

e. **The United States is therefore obligated to conduct its dealings with Indians pursuant to the highest fiduciary standards.** As for recognition of Indian tribes as governments, in *Williams v. Lee*, 358 U.S. 217 (1959) the Supreme Court unanimously ruled that state courts did not have jurisdiction over a civil claim by a non-Indian against an Indian resulting from a transaction that took place on Indian land. "Absent a governing act of congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them." In relation to the tribal resource base, the United States has the responsibility of protecting tribal trust property and assisting the tribe in resource development and management for the sole use and benefit of the tribes. Tribal trust resources include, but are not limited to, land, timber, water, cultural resources, and reservation fisheries.

f. **Federal authority over tribes through the trust relationship is not without limit.** In Felix Cohen's *INDIAN LAW* there is a discussion of *Shoshone Tribe v. United States*, 299 U.S. 476 (1937):

*Shoshone Tribe* was an action in the Court of Claims for money damages against the United States because it had settled another tribe, the Arapahos, in the Wind River reservation, which had been reserved exclusively for the Shoshones by treaty. Congress had subsequently ratified the location of the Arapahos on the reservation. Holding such statutes to be unlawful on the ground that they did not provide compensation to the Shoshones, Justice Cardozo said: "[p]ower to control and manage the property and affairs of Indians for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty," but concluded that this power does not extend to taking

tribal lands without providing compensation by observing that “[s]poliation is not management.”

[Emphasis added.] 299 U.S. at 497-98.

In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), the Supreme Court held that congressional action in relation to tribal property is subject to judicial review under the due process clause of the Fifth Amendment to the United States Constitution. Congressional action must be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” 430 U.S. at 85. See, also, *United States v. Sioux Nation*, 448 U.S. 371, 100 S.Ct. 2716 (1980). The Fifth Amendment and trust law only protects federally recognized tribal property. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). As discussed in further detail below, there are several ways in which the United States “recognizes” tribal property.

3. Recognition by the United States government of Indian tribal rights.

a. Tribes’ inherent sovereign rights. Federally recognized rights derive not from a federal grant but are held by tribes by virtue of their political status. These include:

- (1) The right of self-governance.
- (2) The power to exclude from tribal lands.
- (3) The right to use the land and resources without interference.
- (4) Rights to transient resources (water, fish, wildlife, air), thereby having claims to resources not permanently located on tribal lands.
- (5) Any other rights found not to be taken by a federal action.

b. Tribal treaty rights - Treaties recognize and/or modify inherent tribal rights. United States Supreme Court Justice Thurgood Marshall wrote the following:

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government.

*McClanahan v. Arizona State Tax Comm’n*, 411 U.S.164 (1973). Treaties are agreements between the United States and an Indian tribe that generally limits or takes away powers. An Indian treaty is the supreme law of the land and is binding on federal agencies until Congress limits or abrogates the treaty. U.S. Const., Art. 6; *Antoine v. Washington*, 420 U.S. 194 (1975). Any treaty, including one between the U.S. and an Indian tribe, is basically a contract between two sovereigns. *Washington v. Washington State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

The United States government has a trust responsibility to protect Indian treaty rights. See, e.g., *U.S. v. Eberhardt*, 789 F.2d 1354, 1363 (9<sup>th</sup> Cir. 1986); see also *Joint Bd. of Control of Flathead Irrigation Dist.*, 862 F.2d 195, 198 (9<sup>th</sup> Cir. 1988). This trustee status extends not just to the Interior Department and BIA, but to all federal departments and agencies. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9<sup>th</sup> Cir. 1995). The U.S. Supreme Court has summed up the government's duty:

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as described in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Seminole v. U.S.*, 316 U.S. 286, 296 (1942). Under this standard, the United States has a fiduciary obligation to act in a manner that protects the rights guaranteed in the Treaty, be it the exclusive control of lands or rights that attach to a particular resource without regard to control of the land.

The trust responsibility has been specifically applied to federal activities affecting off-reservation tribal resources. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 345 F.Supp. 252 (D.D.C. 1973)(diversion of water to irrigation project endangered fish habitat). The U.S. has a duty to remain loyal to the tribes' best interests even in the face of conflicting obligations to other federal projects. *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065 (D.Mont.1985), remanded for modification of injunction, 851 F.2d 1152 (9<sup>th</sup> Cir. 1988). The initial treaties were primarily real estate transactions.

By virtue of the federal trust responsibility, federal courts borrowed from common law rules of construction applicable to contracts between entities with unequal bargaining power to create special rules applicable to the interpretation of treaties between the United States and Indian tribes.

- (1) Treaties are to be interpreted as the Indians who participated in the treaty-making process understood them. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).
- (2) Rights can only be taken away by explicit language or where it is clear from history and the surrounding circumstances. *Menominee Tribe v. United States*, 391 U.S. 404 (1968)
- (3) Treaties are to be liberally interpreted to accomplish their protective purposes, with ambiguities construed in favor of the Tribe. *Carpenter v. Shaw*, 280 U.S. 363 (1930)

Treaties can recognize tribal rights to lands and associated natural resource base of that land, and treaties can recognize tribal rights to resources located outside tribal lands. Three such tribal rights are discussed below.

## Fishing Rights

The Stevens Treaties of 1855 between the Columbia Plateau tribes and the United States secure to all enrolled tribal members of the party tribes “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them.” *See, e.g.,* Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Article III. This perpetual right is an interest in property, whether it is exercised on or off the tribes’ reservations. *U.S. v. Winans*, 198 U.S. 371 (1905). Such interest does not depend on title to real property itself, but is instead a reserved right of occupancy for the purpose of fishing. The Treaties of 1855 were grants of rights from the tribes to the federal government and the scope of those grants are construed “as understood by the Indians at the time.” *U.S. v. Washington*, 520 F.2d 676 (9<sup>th</sup> Cir.1975); *U.S. v. Oregon*, 302 F.Supp. 899 (D.Or.1969).

Federal courts have also characterized off-reservation treaty fishing as a “usufructory” right, or a “profit a prendre.” *Kennedy v. Becker*, 241 U.S. 556, 562 (1916); *see also, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7<sup>th</sup> Cir.1983). It is essentially an easement for the use of the fisheries resource. *See* Michael C. Blumm and Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407, 435 (1998). “Usual and accustomed” fishing sites encompass “every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from then usual habit of the tribe, and whether or not other tribes then also fished in the same waters.” *U.S. v. Washington*, 384 F.Supp. at 332.

Through the treaties, the tribes retained regulatory and enforcement powers over tribal members’ fishing at all usual and accustomed fishing places, whether on or off their reservations. *Settler v. Lameer*, 507 F.2d 231, 237 (9<sup>th</sup> Cir.1974). Most tribal fishing regulations designate fishing seasons, allocate fishing sites, prohibit fishing in certain areas, maintain a tribal identification system, specify fishing methods and gear, and provide for tribal enforcement and penalties. *See e.g.,* REVISED YAKAMA NATION CODE (RYC), Ch. 32.01.

## Hunting and Gathering Rights

The Stevens Treaties of 1855 secure all enrolled tribal members the privilege of hunting and gathering on “open and unclaimed lands.” *See, e.g.,* Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Article III. Through this reserved right, enrolled tribal members may hunt and gather traditional foods and medicines at any time of the year on any of the lands ceded to the federal government, including those outside the exterior boundaries of reservations. *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953); *State v. Stasso*, 172 Mont. 242, 563 P.2d 562 (1977).

The term “open and unclaimed lands” refers to publicly owned lands. *See e.g., Confederated Tribes of the Umatilla Reservation v. Maison*, 262 F.Supp 871, D.Or.1966(national forests considered open and unclaimed); *State v. Buchanan*, 1387 Wn.2d 186, 978 P.2d 1070 (1999)(state-owned wildlife management lands considered open and unclaimed). Lands that have been permanently reserved and withdrawn from future public settlement for the purposes of wildlife protection and preservation are no longer “open and unclaimed.” *U.S. v. Hicks*, 587 F.Supp. 1162 (D.Wash.1984)(Indian hunting of elk in national park held “inconsistent with the purpose” for which park created by Congress).

## Grazing Rights

The Stevens Treaty of 1855 with the Walla Walla, Cayuse, and Umatilla Tribes and Bands of Indians, Treaty of June 9, 1855, Art. 1, 12 Stat. 945, in addition to preserving off-reservation fishing, also preserved “the privilege of hunting and gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens.” “Unclaimed lands” would likely include public domain lands, and might also include state lands that are not set aside for management inconsistent with grazing purposes. Many public domain lands suitable for grazing were made parts of national parks, national forests or declared grazing units under the Taylor Grazing Act. In some cases these lands were later placed under the authority of the Department of Energy and its predecessors.

Unlike the state regulation addressed in the *Umatilla* case (see above), withdrawal of lands for national forests or Taylor Grazing Act units is federal action. The test applied by the Ninth Circuit in deciding whether federal action established an intent to terminate inherent tribal rights even in the absence of a treaty was whether the federal action was inevitably inconsistent with continued inherent rights, citing to *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941); *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, (1886); *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574, (1821). Where there is an explicit treaty right, any diminishment must meet a higher standard.

The Taylor Grazing Act, 43 U.S.C. §§315-315r, authorized the Department of the Interior to create grazing districts, effectively withdrawing those lands from the public domain. Even so, in *United States v. Dann*, 706 F.2d 919, 932 (9<sup>th</sup> Cir. 1983) (“*Dann II*”), *reversd on other grds*, 470 U.S. 39 (1985), the federal court of appeals held that declaration of a grazing unit does not extinguish the aboriginal or “inherent” right.

We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope. We do not find such an expression by implication in the Act's specific exclusion of Indian reservations. In any event, in the absence of a clear expression of congressional intent to extinguish title, the granting of a patent by the government and the acceptance of leases from that patentee have been held not to extinguish aboriginal title, *Cramer v. United States*, 261 U.S. 219, 234, 43 S.Ct. 342, 346, 67 L.Ed. 622 (1923), and the same rule has been applied to other grants, e.g., *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 7 S.Ct. 100, 30 L.Ed. 330 (1886); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1821). The grantee in such cases takes subject to the Indian right of occupancy. *Id.* We see no reason why the far more equivocal act of granting a grazing permit should effect an extinguishment.

706 F.2d at 932.

c. Other federal actions that expand or diminish tribal rights. Indian treaties, as in treaties with foreign nations, are generally the same as federal statutes. They can be modified or repealed by later federal action. If a federal statute abrogates part of an international

treaty, it is the statute, not the treaty that becomes the governing law of the United States. This principle was first applied to a treaty with an Indian tribe in *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871). The Court upheld a federal tax on tobacco sold within the Cherokee territory even though a prior treaty with the Cherokee tribe guaranteed an exemption. Where the United States does take away a treaty right, unlike aboriginal title that has not been formally recognized, an Indian tribe is entitled to monetary compensation. Any claim for some different form of compensation will have to be found in the language of a particular treaty.

In the late 19<sup>th</sup> century the United States decided that the executive branch could not enter into any more treaties with Indian tribes. Therefore, many rights now are now protected by federal statutes. Courts generally apply the same rules of construction applicable to Indian tribal treaties to statutes enacted for the benefit of Indian tribes or people.

(1) Explicit abrogation. Explicit abrogation can be found in the legislation in the 1950's that terminated the federally recognized status of some tribes. The language used was :

[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

25 U.S.C.A. §899 (1954), *repealed* 25 U.S.C.A. §903a(b) (1973).

(2) Implicit abrogation. Implicit abrogation through federal laws of general applicability is a relatively new development in federal Indian law. In *United States v. Dion*, 476 U.S. 734, 738-740 (1986) the United States Supreme Court held that a federal statute of general application, the Eagle Protection Act, abrogated a treaty hunting right. The Court stated:

What is essential [to find abrogation] is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

(3) Federal statutes, as with treaties, can recognize and protect tribal rights, even outside tribal lands. The Native American Graves Protection and Repatriation Act 25 U.S.C.A. §§ 3001, et seq., recognizes that some things of sacred or cultural significance to Indian tribes can be reclaimed by tribes if on federal lands or in institutions which receive federal funding.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) recognizes Indian tribes, as well as states, as "trustees of natural resources" for purposes of natural resource liability of the United States. 42 U.S.C. 9607.

d. Federal courts have decided that certain tribal rights and powers are inconsistent with domestic nation status: *Johnson v. McIntosh* -- tribal involvement with foreign nations independent of United States inconsistent with dependent sovereign status; *Oliphant v.*

*Suquamish Tribe* -- tribal exercise of criminal jurisdiction over non-Indian inconsistent with dependent sovereign status.

D. Incorporating the federal trust responsibility to Indian tribes into long-term stewardship.

1. Long-term stewardship is the responsibility of all governments and, at the same time, there is an overarching federal responsibility to respect the governmental powers of tribes. Without a cooperative system grounded in respect among governmental entities, there will be no structural base for stewardship activities to rest upon. Furthermore, in the absence of such respect, the federal and state governments do not benefit from the tribal expertise essential to an adequate stewardship program that will have the fewest failures.

2. The DOE obligation to recognize tribal governmental rights, including the right of self-government, requires a substantive tribal role in long-term stewardship. Federalism does not require the sacrifice of tribal self-government; rather it can, and must, embrace it.

3. The obligation to preserve tribal natural resources includes the need to address, use and measure the effectiveness of long-term stewardship tools on tribal resources. These include institutional controls such as:

- a. Land use restrictions.
- b. Zoning.
- c. Monitoring.
- d. Selecting appropriate remediation.

E. Accommodating the governmental interests of the federal, state, and tribal governments under existing law: federal preemption.

1. Plenary policy preemption: Areas where, as a matter of public policy as established in the U.S. Constitution or federal statute, it is inconsistent with federal interests for state government to act, and therefore the state action is invalid under the Supremacy clause of the U. S. Constitution.

a. Where no federal statute exists, preemption is based on the U.S. Constitution alone:

(1) Article I, Section 10, Clause 3 of the U.S. Constitution prohibits a state, without the consent of Congress, to enter into any agreement or compact with another state or with a foreign power. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court concluded that, if a compact is with a foreign nation, it interferes with the treaty-making power which is conferred entirely on the general government; if with other states, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution.

(2) In Article I, Section 8, the powers of the Congress are set forth, one of which is the power to declare war. “The war powers in the Constitution are in an area where the Congress traditionally wields supreme plenary power, a power that Congress jealously protects from any abridgement by the states.” *Peel v. Florida Department of Transportation*, 443 F.Supp. 451, *affirmed* 600 F.2d 1070 (1977).

(3) Article I, Section 8, gives the Congress power to regulate interstate commerce. Even when Congress has not enacted a statute regulating commerce, if a state directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interest over out-of-state interests, statute may be struck down as violative of the commerce clause without further inquiry. When a state statute has only an indirect effect on interstate commerce and regulates evenhandedly, examination is required of whether state’s interest is legitimate and whether burden on interstate commerce clearly exceeds local benefits. *Heely v. Beer Institute, Inc.*, 491 U.S. 324 (1989).

(4) Congress’ plenary power over Indian tribes and the federal trust responsibility to Indian tribes is derived from the war power, the treaty-making power, the “Indian Commerce Clause,” and the prohibition on states found in Article I, Section 10, Clause 3, of the U.S. Constitution. In *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court unanimously ruled that state courts did not have jurisdiction over a civil claim by a non-Indian against an Indian resulting from a transaction that took place on Indian land. “Absent a governing act of congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them.”

b. Examples where a federal statute exists:

(1) *Campbell v. Hussey*, 368 U.S. 297 (1961): The Supreme Court found that provisions of the Georgia Tobacco Identification Act were barred by the 1935 Federal Tobacco Inspection Act. Georgia argued that the state law merely supplemented the federal statute. The Supreme Court held that there was no issue as to whether Georgia’s law conflicts with the federal law. The Court concluded that Congress, in legislating concerning the types of tobacco sold at auction, preempted the field. “Complementary state regulation is as fatal as state regulations which conflict with the federal scheme.”

(2) *Pennsylvania v. Nelson*, 350 U.S. 497 (1956): The Supreme Court held that a conviction for “sedition against the United States” under a state sedition law was barred by several federal laws. The Court concluded: “Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan.”

(3) *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the United States Supreme Court addressed the authority of states over Indian tribes where there was a treaty and several applicable federal statutes prohibiting state action. The federal statutes, the Trade and Intercourse Acts, were described as “manifestly consider[ing] the several Indian nations as distinct political communities having territorial boundaries, within which their authority is exclusive.” 31 U.S. (6 Pet.) at 557. “The Cherokee nation, then, is a distinct community, occupying its own

territory, with boundaries accurately described, in which the laws of Georgia can have no force□.” 31 U.S. (6 Pet.) at 561.

(4) *Chlorine Institute, Inc., v. California Highway Patrol*, 29 F.3d 495 (9<sup>th</sup> Cir. 1994): California Highway Patrol regulations for shipments of chemicals were found to impose substantial requirements additional to those imposed by the United States Department of Transportation and therefore were preempted under the Hazardous Materials Transportation Uniform Safety Act as creating an obstacle to accomplishment of Congress’ goal of uniform national regulation of hazardous materials transportation.

(5) *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9<sup>th</sup> Cir. 1994): The Hazardous Materials Transportation Uniform Safety Act waives tribal sovereign immunity from suit seeking to determine whether tribal regulation of hazardous materials is preempted by that federal statute.

- F. Federal law establishing a long-term stewardship program can accommodate an appropriate role for each affected government.

Any adequate stewardship program must be based on “legal, financial, and organization structures and social and political factors that must work well.” NRC REPORT at 42.