Underscores Administration's Commitment to Trust Reform in meetings with leaders of Confederated Salish & Kootenai Tribes

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PABLO, Montana – As part of President Obama's commitment to strengthen the government-to-government relationship with tribal nations and fulfill federal trust obligations, Secretary of the Interior Sally Jewell today issued a Secretarial Order reaffirming the Department of the Interior's trust responsibilities to federally-recognized Indian tribes and individual Indian beneficiaries and providing guidance for Interior agencies in carrying out their obligations to them.

"This Order reaffirms the Department's obligations and demonstrates our continuing commitment to upholding the important federal trust responsibility for Indian Country," said Secretary Jewell, who chairs the White House Council on Native American Affairs. "The landmark Cobell Settlement and resolution of nearly 80 other tribal trust management lawsuits under President Obama launched a new chapter in federal trust relations with tribes and individual Indian beneficiaries and reflects our dedication to strengthen the government-to-government relationship with tribal leaders."

The Secretarial Order provides seven principles that apply to all Interior agencies, not just the Bureau of Indian Affairs, including supporting tribal sovereignty and self-determination; protecting tribal lands and resources; building partnerships; practicing responsiveness and timeliness; and seeking legal advice to ensure compliance with the trust responsibility. As federal agencies that make policy affecting Indian tribes and individual Indian beneficiaries, all of the Department's bureaus and offices share the same general federal trust responsibility.

"This Order speaks not only to American Indian tribes, but also to federal employees across the Department, reminding each of them of their important role in fulfilling the trust responsibility," said Assistant Secretary Kevin Washburn. "It acknowledges that each of us working in the federal government has an important responsibility to Indian country and it ultimately takes all of us, working together, to meet our important obligations as a trustee."

The federal trust responsibility, which originates from the unique, historical relationship between the United States and Indian tribes, consists of the highest moral and legal obligations that the federal government must meet to ensure the protection of tribal and individual Indian lands, assets and resources as well as treaty and similarly recognized rights. Among their responsibilities, Interior agencies oversee $4.7 billion in trust funds derived from managing 55 million surface acres and 57 million acres of subsurface mineral estate held in trust for individual Indians, Indian tribes and Alaska Natives. Eleven million acres belong to individual Indians and 44 million acres to tribes. Interior administers more than 119,000 leases for the use of these lands, including oil, gas and mineral extraction, water and energy development, timber harvesting and grazing.

Today's Secretarial Order responds to recommendations of the Secretarial Commission on Indian Trust Administration and Reform, which was established in 2009 as part of the $3.4 billion Cobell Settlement, one of the largest class-action lawsuits in U.S. history. The Commission evaluated the Department's trust administration system and identified potential improvements, urging a renewed emphasis on U. S. obligations so that all federal agencies understand their obligations to abide by and enforce trust duties. The Interior Department has taken a number of steps to address issues raised in the Commission's report, as well as identified actions that the Department will take to improve the trust administration. A new document outlining those reforms is available here.

The Secretary made her announcement during a visit with leaders of the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation in northwest Montana, where she was joined by U.S. Senator Jon Tester; Vincent G. Logan, Special Trustee for American Indians; and Mike Black, Director of the Bureau of Indian Affairs.

"The achievements of the Confederated Salish & Kootenai Tribes demonstrate that the federal trust responsibility often can be best achieved by empowering the tribes – by contracting with them so that they can provide the federal services owed under the trust responsibility," Jewell noted. "The Salish & Kootenai Tribes were among the first to receive full self-governance rights in 1993, assuming key functions of the Bureau of Indian Affairs and Office of the Special Trustee for American Indians and strengthening the economy of their community and the State of Montana."

Interior's Office of the Special Trustee, led by Vincent G. Logan, oversees reforms that have improved the accountability and management of Indian funds held in trust by the federal government. OST provides oversight and coordination of the policies, procedures, systems and practices used by various agencies to manage Indian trust assets. The Obama Administration also has helped to rebuild the federal trust relationship by resolving nearly 80 separate tribal trust management cases, providing $2.6 billion in settlements; and issuing a new federal policy in 2009 on consulting with Indian tribes, setting standards for engaging on a government-to-government basis to ensure agency decisions consider the impacts on affected tribes and their members. With an enrolled membership of about 8,000, the Confederated Salish & Kootenai Tribal Government is the largest employer in Lake County, Montana, with 1,200 employees; infuses $80 million a year into the area economy through a $35 million payroll and $45 million in purchases; and contributes about $317 million annually to Montana's economy. The Secretary's discussions with tribal leaders dealt with several current initiatives, including a cooperative agreement on a Land Buy Back Program to purchase and consolidate fractionated land ownership interests from willing sellers, as well as climate change impacts on tribal natural resources.

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THE SECRETARY OF THE INTERIOR

WASHINGTON

ORDER NO. 3335

Subject: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries

Sec. 1 Purpose

In 2009, Secretary's Order No. 3292 established a Secretarial Commission on Indian Trust Administration and Reform (Commission). The Commission issued its Final Report and Recommendations in December 2013, which sets forth its views and recommendations regarding the United States' trust responsibility. In response to the report, this Order sets forth guiding principles that bureaus and offices will follow to ensure that the Department of the Interior (Department) fulfills its trust responsibility.

Sec. 2 Authority

This Order is issued pursuant to the U.S. Constitution, treaties, statutes, Executive Orders, and other Federal laws that form the foundation of the Federal-tribal trust relationship and in recognition of the United States' trust responsibility to all federally recognized Indian tribes and individual Indian beneficiaries.

Sec. 3 Background

The trust responsibility is a well-established legal principle that has its origins with the formation of the United States Government. In the modem era, Presidents, Congress, and past Secretaries of the Interior have recognized the trust responsibility repeatedly, and have strongly emphasized the importance of honoring the United States' trust responsibility to federally recognized tribes and individual Indian beneficiaries.

a. Legal Foundation. The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States forman y recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else." Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen's Handbook of Federal Indian Law§ 5.04[3] (Nell Jessup Newton ed., 2012); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

The U.S. Supreme Court has repeatedly opined on the meaning of the United States' trust responsibility. Most recently, in 2011, in United States v. Jicarilla, the Supreme Court recognized the existence of the trust relationship and noted that the "Government, following 'a humane and self-imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been committed.'" The Court further explained that "Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. In other cases, we have found that particular 'statutes and regulations ... clearly establish fiduciary obligations of the Government' in some areas. Once federal law imposes such duties, the common law 'could play a role.' But the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities."' United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324-25 (2011)(internal citations omitted). While the Court has ruled that the United States' liability for breach of trust may be limited by Congress, it has also concluded that certain

obligations are so fundamental to the role of a trustee that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee. "This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets."' United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)(internal citations omitted).

b. Presidential Commitments to the Trust Responsibility. Since this country's founding, numerous Presidents have expressed their commitment to upholding the trust responsibility. In the historic Special Message on Indian Affairs that marked the dawn of the self-determination age, President Nixon stated "[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government ... [T]he special relationship ... continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American." Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. President Obama established a White House Council on Native American Affairs with the Secretary of the Interior serving as the Chair. President Barack Obama, Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013). The Order requires cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities." See also President Barack Obama, Memorandum on Tribal Consultation (Nov. 5, 2009); President George W. Bush, Executive Order No. 13336, American Indian and Alaska Native Education (Apr. 30, 2004); President William J. Clinton, Public Papers of the President: Remarks to Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George H.W. Bush, Public Papers of the President: Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (Jun.14, 1991); President Ronald Reagan, American Indian Policy Statement, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983); President Gerald L. Ford, Public Papers of the President: Remarks at a Meeting with American Indian Leaders (July 16, 1976); President Richard M. Nixon, Public Papers of the President: Special Message on Indian Affairs (July 8, 1970); President Lyndon B. Johnson, Public Papers of the President: Special Message to the Congress on the Problems of the American Indian: "The Forgotten American" (March 6, 1968).

c. Congress. Congress has also recognized the United States' unique responsibilities to Indian tribes and individual Indian beneficiaries. Recently, Congress passed a joint resolution recognizing the "special legal and political relationship Indian tribes have with the United States and the solemn covenant with the land we share" and acknowledged the "long history of depredations and ill-conceived polices by the Federal government regarding Indian tribes" and offered "an apology to all Native peoples on behalf of the United States." 111th Cong. 1st Sess., S.J. Res 14 (Apr. 30, 2009). Congress has expressly and repeatedly recognized the trust responsibility in its enactments impacting Indian Affairs. See, e.g., Indian Education and Self-Determination and Assistance Act of 1975; Tribal Self-Governance Amendments of 2000; American Indian Trust Fund Management Reform Act of 1994; Federally Recognized Indian Tribe List Act of 1994; Tribally Controlled Schools Act of 1988 and Indian Education Act of 1972; Indian Child Welfare Act of 1978; Indian Mineral Development Act of 1982; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).

d. The Department of the Interior. The Department likewise has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has been vested with the authority to perform certain specific trust duties and manage Indian affairs.

The Bureau of Indian Affairs (BIA) was transferred from the War Department to the Department in 1849. Congress delegated authority to the Department for the "management of all Indian affairs and of all matters arising out of Indian relations[,]" 25 U.S.C. § 2 (2014); see also 25 U.S.C. § 9 (2014); 43 U.S.C. § 1457. The BIA became 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.

The BIA has evolved dramatically over the last 185 years from an agency implementing past policies of allotment and assimilation, to a bureau charged with promoting and supporting Indian Self-Determination. In addition, several other bureaus and offices within the Department were created for or have specific duties with respect to fulfilling the trust responsibility, such as the Bureau of Indian Education, Office of the Assistant Secretary- Indian Affairs, Secretary's Indian Water Rights Office, Office of the Special Trustee for American Indians, Land Buy-Back Program for Tribal Nations, Office of Historical Trust Accounting, Office of Natural Resource Revenue, Office of Appraisal Services, and Office of Minerals Evaluations. All of these programs support and assist federally recognized tribes in the development of tribal government programs, building strong tribal economies, and furthering the well-being of Indian people. As instruments of the United States that make policy affecting Indian tribes and individual Indian beneficiaries, the Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, and the Department's other bureaus and offices share the same general Federal trust responsibility toward tribes and their members. In an extended legal opinion regarding the meaning of the trust responsibility, former Department of the Interior Solicitor Leo M. Krulitz concluded that "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property." Memorandum from Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, at 2 (Nov. 21, 1978). This opinion remains in effect today. In exercising this broad authority, past Secretaries have acknowledged that the Department's relationship with Indian tribes and individual Indian beneficiaries is guided by the trust responsibility and have expressed a paramount commitment to protect their unique rights and ensure their well-being, while respecting tribal sovereignty. See e.g., Secretary's Order 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011); Secretary's Order 317 5, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993); Secretary's Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997); Secretary's Order 3215, Principles for the Discharge of the Secretary's Trust Responsibility (Apr. 28, 2000); Secretary's Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001). The Department has also sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.

Sec. 4 A New Era of Trust

During the last few decades, the trust relationship has evolved. In the Era of Tribal Self-Determination,

the Federal trust responsibility to tribes is often fulfilled when the Department contracts with tribal governments to provide the Federal services owed under the trust responsibility. Because tribal governments are more directly accountable to the people they represent, more aware of the problems facing Indian communities, and more agile in responding to changes in circumstances, tribal governments can often best meet the needs of Indian people. In sum, the Federal trust responsibility can often be achieved best by empowering tribes, through legislative authorization and adequate funding to provide services that fulfill the goals of the trust responsibility.

In recent decades, the trust relationship has weathered a difficult period in which Indian tribes and individual Indians have resorted to litigation asserting that the Department had failed to fulfill its trust responsibility, mainly with regard to the management and accounting of tribal trust funds and trust assets. In an historic effort to rebuild the trust relationship with Indian tribes, the Department recently settled numerous "breach of trust" lawsuits. This includes Cabell v. Salazar, one of the largest class action suits filed against the United States, and more than 80 cases involving Indian tribes. Resolution of these cases marks a new chapter in the Department's history and reflects a renewed commitment to moving forward in strengthening the government-to-government relationship with Indian tribes and improving the trust relationship with tribes and individual Indian beneficiaries.

As part of the Cabell Settlement, the Department established a Secretarial Commission on Indian Trust Administration and Reform in 2009 through Secretary's Order No. 3292. The Commission issued its final report in December 2013. The report highlighted the significance of the Federal trust responsibility and made recommendations to the Department on how to further strengthen the commitment to fulfill the Department's trust obligations. The Commission urged a "renewed emphasis on the United States' fiduciary obligation" and asserted that this "could correct some [issues], especially with respect to ensuring that all federal agencies understand their obligations to abide by and enforce trust duties.

" As a response to the Commission's recommendation, this Order hereby sets forth seven guiding principles for honoring the trust responsibility for the benefit of current and future generations.

Sec. 5 Guiding Principles

Pursuant to the long-standing trust relationship between the United States, Indian tribes and individual Indian beneficiaries and in furtherance of the United States' obligation to fulfill the trust responsibility, subject to Section 6 below, all bureaus and offices of the Department are directed to abide by the following guiding principles consistent with all applicable laws. Bureaus and offices shall:

Principle 1: Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.

Principle 2: Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.

Principle 3: Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

Principle 4: Work in partnership with Indian tribes on mutually beneficial projects.

Principle 5: Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to

the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 6: Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility.

Sec. 6 Scope and Limitations

a. This Order is for guidance purposes only and is adopted pursuant to all applicable laws and regulations.

b. This Order does not preempt or modify the Department's statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility obligations of Department employees.

c. Nothing in this Order shall require additional procedural requirements related to Departmental actions, activities, or policy initiatives.

d. Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

e. Should any Indian tribe(s) and the Department agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

f. This Order is intended to enhance the Department's management of the United States' trust responsibility. It is not intended to, and does not, create any right to administrative or judicial review or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person.

Sec. 7 Expiration Date

This Order is effective immediately and will remain in effect until it is incorporated into the Department Manual, or is amended, suspended, or revoked, whichever occurs first.
