



COALITION OF LARGE TRIBES

Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe • Walker River Paiute Tribe

August 2, 2023

Tribal Interior Budget Council
Convened at
Seneca Niagara Resort & Casino
310 4th Street
Niagara Falls, NY 14303

Mr. Wizipan Little Elk Garriott
Principal Deputy Assistant Secretary, Indian
Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

VIA HAND DELIVERY by Hon. Frank Star Comes Out, President, Oglala Sioux Tribe,
Alternate Tribal-Interior Budget Council & voting Member Coalition of Large Tribes

**Re: COLT Urges Treaty Rights Focus in Federal
Budget Process**

Dear Sirs:

Although President Biden has taken many positive steps for the protection of Treaties and Tribal Sovereignty, the actions by his Department of Justice have and are continually stripping the Treaties that are considered the law of the land and the rights and the Tribal Sovereignty they expressly preserve. DOJ's wrongful approach to Treaties and Tribal Sovereignty should not infect the federal Budget process.

In *Rosebud Sioux Tribe v. United States*, the Department of Justice argued that health service provided to Native Americans is "gratuitous," and not part of the Trust requirement relating back to the Treaties. In *Oglala Sioux Tribe v. United States*, DOJ argued that federal officials cannot be forced to send the Tribe more money to combat a purported "public safety crisis" on the Pine Ridge Reservation despite the specific law enforcement obligations in the Treaties.

This shows DOJ's continued efforts to deny the Treaties & Tribal Sovereignty through the federal courts. We disagree with DOJ's approach, and we are concerned that TIBC and the Department of the Interior must avoid any further legal errors and disrespect of Treaty rights. Specifically, the Budget process should disregard the U.S. Supreme Court's narrow water rights decision in *Navajo Nation v. United States*. That controversial holding—wherein the Court did exactly what the Biden DOJ asked them to do—does not apply to land issues, Budget issues, Tribal consultation, or any other subject-matter. It's basically apples and oranges. COLT strongly disagrees with the Court's decision, and notes



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that in any event, it applies only to the Navajo Nation's claim for injunctive relief on water planning, and does not affect other Treaty Tribes, as every Treaty is unique.

It is imperative we remind the U.S. Government that Treaties are the Law of the Land and that Treaties and Sovereignty are "cornerstones" of the Budget process and federal Indian policy. Congress and the President are vested with Treaty authority and the Budget process must follow the Treaties.

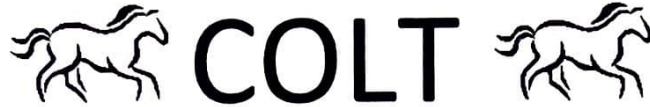
The Biden-Harris Campaign pledged:

Joe Biden understands that tribal sovereignty and self-governance, as well as honoring the federal trust responsibility to Tribal Nations, should be the cornerstones of federal Indian policy. As President, Biden will build on the efforts of the Obama-Biden Administration, which were instrumental in rebuilding trust, good faith, and respect for the tribal-federal relationship.

[Biden-Harris Plan for Tribal Nations | Joe Biden for President: Official Campaign Website \(gitpa.org\)](#) (emphasis supplied).

President Biden echoed this commitment in his very first days in office:

American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. **It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.** The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and



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climate change — all of which disproportionately harm Native Americans.

January 26, 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships | The White House (emphasis again supplied).

Yet despite these good words, the Biden-Harris Department of Justice has undermined Tribal Sovereignty and the Trust responsibility incessantly, including advancing anti-Sovereignty, anti-Trust responsibility arguments which the U.S. Supreme Court accepted in its narrow 5:4 decision in *Arizona v. Navajo Nation*, 599 U.S. __ (2023):

To be sure, this Court’s precedents have stated that the United States maintains a general trust relationship with Indian tribes, including the Navajos. *Jicarilla*, 564 U. S., at 176. **But as the Solicitor General explains**, the United States is a sovereign, not a private trustee, meaning that “Congress may style its relations with the Indians a trust without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is limited or bare compared to a trust relationship between private parties at common law.” *Id.*, at 174 (internal quotation marks omitted). Therefore, **unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not “apply common-law trust principles” to infer duties not found in the text of a treaty, statute, or regulation.** *Id.*, at 178. Here, nothing in the 1868 treaty establishes a conventional trust relationship with respect to water.

Slip Op. at 9 (emphasis supplied). The damage wrought by the Department of Justice is both disheartening and shocking and COLT believes, utterly wrong on the law as Justice Gorsuch’s dissenting opinion in *Arizona v. Navajo Nation* exactingly explains.¹ COLT urges the Biden-

¹ Justice Gorsuch observed:

After misreading the Navajo’s request and applying the wrong analytical framework, the Court errs in one last way. It reaches the wrong result even under this Court’s Tucker Acts framework. The second step of the analysis—using “trust principles” to sort out the damages the United States owes, *Navajo II*, 556 U. S., at 301—clearly has no purchase in this



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Harris Administration to disavow the anti-Sovereignty, anti-Trust responsibility legal machinations of DOJ and, at a minimum, leave them at the courthouse door.

Quite simply, the policy determinations of the Administration are a separate matter and the United States' solemn Treaty obligations for adequate Indian Country budgets persist regardless of the scope of the general, widely-recognized Trust responsibility of the United States to Tribal Nations.

Under our Constitution, "all Treaties made" are "the supreme Law of the Land." Art. VI, cl. 2. Congress can pass laws to implement those treaties, *see, e.g., Bond v. United States*, 572 U. S. 844, 851, 855 (2014), and the Executive Branch must act in accordance with them, *see, e.g., Fok Yung Yo v. United States*, 185 U. S. 296, 303 (1902). A treaty is "essentially a contract between two sovereign nations." *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675 (1979). COLT Tribes' Treaties with the United States contain numerous obligations for the United States to provide healthcare, law enforcement, economic development and other supports that manifest in modern form the Federal Budget. The United States must honor its Treaty obligations and emphasize them in the Budget process.

context. (Another tell that the Tucker Acts frame-work itself has no purchase.) But what about the first step? Historically, this Court's cases have distinguished between regulatory schemes that create "bare trusts" (that cannot sustain actions for damages) and a "conventional" trust (that can make the government "liable in damages for breach" under the Tucker Acts). *White Mountain Apache Tribe*, 537 U. S., at 473-474; *see ante*, at 9. A close look at those decisions suggests that, even under them, the Tribe's claim should be allowed to proceed.

Take *Mitchell II* as an example. There, this Court allowed a claim for money damages relating to the mismanagement of tribal forests. On what basis? A patchwork of statutes and regulations, along with some assorted representations by the Department of the Interior. 463 U. S., at 219-224. In holding this showing sufficient to support an action for money damages, this Court observed that, "where the Federal Government takes on or has control" of property belonging to a Tribe, the necessary "fiduciary relationship normally exists . . . even though nothing is said expressly" about "a trust or fiduciary connection." *Id.*, at 225 (internal quotation marks omitted). Further, where the federal government has "full responsibility" to manage a resource or "elaborate control" over that resource, the requisite "fiduciary relationship necessarily arises." *Id.*, at 224-225 (emphasis added). Statements by the United States "recogniz[ing]" a fiduciary duty, the Court explained, can help confirm as much too. *Id.*, at 224.

(Gorsuch, J., dissenting, Slip Op. at 24).



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In the Budget context, the Biden-Harris Campaign also pledged to:

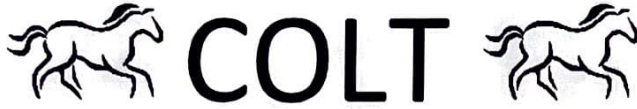
Ensure fulfillment of federal trust and treaty obligations including by working to address chronic underfunding of unmet federal obligations to Indian Country. Biden will launch a budget task force under the White House Council on Native American Affairs and Office of Management and Budget (OMB), in consultation with tribes, that seeks to understand chronic funding shortfalls and **deliver recommendations to fully fund the federal government’s trust and treaty obligations.** This work will include reviewing the ability to make Indian Country funding advanced or mandatory, instead of discretionary to provide tribes with the certainty and predictability they need.

Increase and ensure stable funding for the Indian Health Service. The Indian Health Service (IHS) has been underfunded for decades. And, as the only major federally funded health care provider that does not receive advance appropriations or significant mandatory funding, the IHS consistently faces the uncertainty of the federal budget process. **Biden has called for dramatically increasing funding for IHS and making that funding mandatory.**

[Biden-Harris Plan for Tribal Nations | Joe Biden for President: Official Campaign Website \(gitpa.org\)](https://www.gitpa.org).

COLT calls on the Biden-Harris Administration to honor their promises and the contractual obligations the United States made in Treaties with Tribes, including with dramatic funding increases and mandatory funding in the federal Budget process for the Bureau of Indian Affairs. Our Treaties require nothing less.

To begin this process, the Office of Policy, Management and Budget (PMB) should be required to meet regularly with TIBC and the Secretary’s Tribal Advisory Committee (STAC).



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Respectfully,

Hon. Marvin Weatherwax, COLT Chairman
Councilman, Blackfeet Nation Tribal Business Council

Hon. Frank Star Comes Out, Alternate TIBC Great Plains
Representative; President, Oglala Sioux Tribe;
COLT Voting Member