Special Offer! - Civilization and Assimilation (Houses Not Included)

Summer Nelson

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Special Offer! – Civilization and Assimilation
(Houses Not Included)

Summer Nelson*

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“[T]he federal government has long promised that it would assist American Indian tribes in providing housing . . . [W]hen the government took the land in trust, it committed itself to play a major role in housing the trust land’s occupants. We have failed miserably in this duty.”

I. INTRODUCTION

Despite glamorous offers of “civilization” the federal government promised would bring a better life and domestic comforts to American Indians, many needs of Indian people remain unmet. Obliterated tribal infrastructures were never fully replaced, while the government often refutes its obligation to properly provide for Indian people. For several members of the

* J.D. candidate at the University of Montana School of Law, degree expected May 2008. Indian Law Clinic legal intern, member of the Native American Law Student Association, and member of the Montana Public Interest Law Coalition. Many thanks to Professor Ray Cross for his valuable insight and guidance in writing this article, and for encouraging students to evaluate the law and lawyers’ roles, rather than simply accepting things as they are. Thanks also to Professor Maylinn Smith for guidance in the Indian Law Clinic and for teaching about housing issues. Also thank you and best wishes to the plaintiffs, some of whom I met when they came to the law school to share about their situation and their efforts to improve their housing situation, and to the attorneys and other advocates working to remedy the substandard housing situation on the Blackfeet Reservation and elsewhere.

3. For a thorough discussion of needs in areas including health, housing, education, agriculture and law enforcement see U.S. Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country (July 2003) [hereinafter A Quiet Crisis].
4. See, e.g. Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (1989) (determining whether the federal government and/or the tribe were required to bring unsanitary dumps into compliance with applicable laws); White Mountain Apache Tribe of Arizona v. U.S., 26 Cl. Ct. 446 (Cl. Ct.
Blackfeet Nation, the government’s imposed civilization apparently does not include decent, safe and sanitary houses.\(^5\)

Instead of receiving houses with "civilization," Blackfeet residents of the Glacier Homes Housing Project had to purchase their homes, which were "not constructed well" and are "uninhabitable due to toxic mold and dried sewage residues."\(^6\) The residents suffer a host of health problems they believe their homes have caused,\(^7\) including asthma and other respiratory problems, kidney failure, cancer, and more.\(^8\) Their homes were built with arsenic-treated wooden foundations, upon which homes have shifted, leaving cracks for wind and snow to enter.\(^9\) The treated wood has since been banned from use in residential buildings.\(^10\) Other construction defects led to sewage contamination and excess radon levels.\(^11\)

When they fell ill, residents discovered something was missing from their civilization offer, and they sought assistance from both the federal Department of Housing and Urban Development (HUD) and Blackfeet tribal authorities; when the entities denied assistance, the residents filed suit.\(^12\) HUD oversaw and funded construction of the Glacier Homes,\(^13\) directing funds and construction through the Blackfeet Tribal Housing Authority (now Blackfeet Housing).\(^14\) Plaintiffs contended HUD, as a federal agency, violated its trust duty to the Indian people when it directed construction of the substandard homes, and that such violation mandated a legal remedy.\(^15\) The District Court dismissed claims against HUD,\(^16\) reasoning no legal trust duty existed because the government did not have full statutory or regulatory responsibility for the construction project.\(^17\) On appeal, a Ninth Circuit panel (Panel) first affirmed dismissal of claims against

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1992) (discussing duty of federal government to manage trust accounts with funds derived from sales of timber, coal and other reservation resources).


7. McQuillan, supra n. 5.

8. *Marceau*, 455 F.3d at 977.

9. McQuillan, supra n. 5.

10. *Id.*

11. *Id.*


15. *Marceau*, 2004 U.S. Dist. LEXIS 2552 at **3-6 (Plaintiffs also sued Blackfeet Housing and asserted the Blackfeet Tribe waived sovereign immunity when it established its own housing authority to participate in the construction program; while the issue is significant, this article focuses on the claims against HUD regarding the trust relationship between the federal government and Indian people and does not examine the tribal sovereign immunity issue).

16. *Id.* at *4, 18.

17. *Id.* at **7-8.
HUD. Although the Panel recognized HUD's "pervasive" control over the housing project, it held HUD did not exercise control over a tribal resource, and thus the requisite elements of a trust relationship did not exist. The Panel subsequently reheard the case on petition for rehearing, with oral argument in Summer 2007. The Panel issued an amended opinion March 19, 2008. While allowing Plaintiffs' Administrative Procedure Act (APA) claims to proceed, the Panel again held the government had no trust duty to construct or maintain Plaintiffs' homes. This time, Judge Pregerson dissented, recognizing the federal trust duty to provide adequate housing does exist in this case.

The duty to provide housing for Indian people is not simply a moral duty or social service obligation, but an aspect of the federal government's legal trust responsibility towards its "wards." This duty arises from the government rendering Indian people dependent on its aid, and promising to replace their pre-existing cultures with the comforts and amenities of Anglo civilization. When it undertook to "civilize" Indian people to expedite white settlement, the government obligated itself to ensure Indian people had safe, sanitary and decent housing.

II. CIVILIZING THE AMERICAN INDIAN – RENDERING SOVEREIGNS DEPENDENT

"Our present policy . . . [is to] require them to live upon and cultivate the tracts assigned to them . . . "

"The federal government exercises pervasive control over tribal land, and in so doing, severely limits the tribe's ability to control its own economic development in the area of housing."

18. Marceau, 455 F.3d at 976.
19. Id. at 984.
21. Id. at *1.
22. Id. at **11-22 (Pregerson, J., dissenting).
23. Virginia Davis, A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation 18 Harv. BlackLetter L.J. 211 (Spring, 2002) (examining the long history of promises and programs to provide housing to Indian people and how this history indicates a federal trust duty exists); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (stating relationship between the federal government and Indians resembles that of guardian to wards).
24. Porter, supra n. 2, at 372 ("... encourage them . . . to apply to the raising stock, to agriculture and domestic manufactures, and . . . prove to themselves that less land and labor will maintain them . . . better than in their former mode of living . . . and they will see the advantage in exchanging the [forests] for the means of improving their farms and of increasing their domestic comforts).
"But the federal government held no property... in trust... [and] did not exercise direct control over Indian land, houses, or money... For these reasons... the district court properly dismissed Plaintiffs' claim that HUD violated a trust responsibility."^{28}

"I don’t see much sense in that," said Rabbit. "No," said Pooh humbly, "there isn’t. But there was going to be when I began it. It’s just that something happened to it along the way."^{29}

Something happened along the way to civilizing Indian peoples – the government limited housing options by controlling tribal land, but provided substandard housing when it provided housing at all.^{30} Yet the Panel failed to find a trust duty,^{31} leaving Plaintiffs without the promised amenities of civilization. Based on the history of civilizing efforts, and the network of Indian housing laws, one sees there is not much sense in that.

Civilizations compete, both in definition and in history. One dictionary definition offers civilization is “an ideal state of human culture characterized by complete absence of barbarism and nonrational behavior, optimum utilization of physical, cultural, spiritual, and human resources, and perfect adjustment of the individual within the social framework.”^{32} Civilization, then, seems a lofty goal and perhaps yet unattained by any society. Fortunately for the “civilized,” another definition recognizes its existence in less optimum forms, providing it may be “a particular state or stage of human advance toward civilization.”^{33}

Understanding their civilization as superior,^{34} settlers arrived in North America with the intent “to unite the world and give to those strange lands the form of [their] own.”^{35} Although existing Indian civilizations were diverse and organized, with their own complex political, economic, and military systems,^{36} settlers never recognized the “traditional society made up of real people.”^{37} Instead they saw “savages,”^{38} and only recognized civiliza-

^{28} Id. at *9 (majority).
^{29} http://thinkexist.com/quotation/-i-don-t-seemuchsense-in-that-said-rabbit- no/345935.html
^{30} See e.g. A Quiet Crisis, supra n. 3.
^{31} Marceau, 2008 WL 726445 at *1.
^{32} Webster's Third New International Dictionary Unabridged 413 (Philip Babcock Grove, ed. in Chief, Merriam-Webster, Inc. 2002) [hereinafter Webster's Dictionary].
^{33} Id.
^{34} United States Commission on Civil Rights, Indian Tribes: A Continuing Quest for Survival 17 (June, 1981) (“Europeans, although recognizing certain rights in the tribes, clearly considered themselves superior.”) [hereinafter A Continuing Quest].
^{35} Bernard W. Sheehan, Savagism and Civility: Indians and Englishmen in Colonial Virginia 118 (Cambridge University Press 1980) (a “learned Spaniard” said this of Columbus’s second voyage).
^{36} A Continuing Quest, supra n. 34, at 15; Worcester v. Georgia, 31 U.S. 515, 542-43 (1832) (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”)
^{37} Sheehan, supra n. 35, at 95-96.
^{38} A Continuing Quest, supra n. 34, at 15.
tion where they were able to "perceive some of the traces of civil order they identified with their own manner of life." 39

Settlers did not find Indian civilizations, recognizable or not, necessary to their objective of continental settlement. 40 They planned to depend on their own numbers and culture to survive. 41 "Nonetheless, Indians were important and useful to the early British settlers, who at first were relatively inept at coping with the environment of North America." 42 The Indian peoples generally welcomed the settlers and provided "lifesaving aid" to the early colonies. 43 The assistance was greeted with efforts to make Indian civilizations "the form of their own," reflecting another definition referring to the "act" of civilizing: "the forcing of a particular cultural pattern on a population to which it is foreign." 44

As settlements expanded and conflicts with Indians increased, the government saw two options for ensuring the new arrivals could continue moving west: exterminate the Indians or civilize and assimilate them. 45 George Washington contemplated the expediency and morality of the options before him. He wrote in 1783:

...the Settlement of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other... policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country... In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense, and without that bloodshed. . . . 46

Later, Henry Knox wrote to President Washington addressing the same issue, noting the civilizing effort would require "steady perseverance in a wise system for a series of years." 47 The Continental Congress followed Washington's advice, protecting their own morality and ability to acquire land without excess cost in lives and military expenditures. 48 To support the civilizing effort, they protected against unlawful or forceful takings of

40. A Continuing Quest, supra n. 34, at 16.
41. Id.
42. Id.
43. Id.
44. Webster's Dictionary, supra n. 32, at 413.
45. Mix, supra n. 26.
47. Porter, supra n. 2, at 146, 150 (citing Henry Knox, Letter to President George Washington Outlining an Indian Civilization Policy, July 7, 1789).
48. A Continuing Quest, supra n. 34, at 18.
Indian property, and proclaimed "laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."\footnote{49}

Communal property ownership and use common to many of the Indian nations did not comport with the settlers' views of civilization,\footnote{50} which demanded individual property. Knox wrote in the same letter to George Washington: "were it possible to introduce among the Indian tribes a love for exclusive property, it would be a happy commencement of the business [of civilizing the Indians]."\footnote{51} Another commentator connected houses and property with civilization in commenting some Indians had become "wholly or partly civilized, and owned homes, livestock, and farms..."\footnote{52}

The necessary connection between Anglo style housing and "civilization" reflects another definition of "civilization" which apparently abandons prior definitions' lofty goal, defining civilization simply as "a situation of urban comfort: city life."\footnote{53} Urban, in turn, is defined as "having authority, property, or residence in a city or urban area," or "belonging or having relation to buildings that are characteristic of cities."\footnote{54}

Federal agents\footnote{55} and benevolent societies and missionary organizations\footnote{56} assumed the civilization job. Government actors schemed ways to encourage civilization when the effort proved difficult. For example, Thomas Jefferson urged the Indians to abandon hunting in favor of agricultural and domestic pursuits, asserting they could "prove to themselves that less land and labor will maintain them... better than in their former mode of living," and "they will see the advantage in exchanging [the forest land] for the means of improving their farms and of increasing their domestic comforts."\footnote{57} Others recognized the duty to care for and educate the Indian "wards"\footnote{58} about civilization, and urged the best way to do so was to dismantle the tribal system and give Indians individually owned land for their own homes.\footnote{59}

Senator Dawes, who sponsored the Allotment Act,\footnote{60} urged government duties towards its wards must and would persist\footnote{61} even when the Act gave them citizenship and property. He commented upon this duty: "if he makes

\begin{itemize}
\item \footnote{49} Id.
\item \footnote{50} Sheehan, supra n. 35 at 95.
\item \footnote{51} Porter, supra n. 2, at 150.
\item \footnote{52} A Continuing Quest, supra n. 34, at 19 (quoting Alvin W. Josephy, Jr., The Indian Heritage of America 323 (New York: Alfred A. Knopf 1968)).
\item \footnote{53} Webster's Dictionary, supra n. 32, at 413.
\item \footnote{54} Id. at 2520.
\item \footnote{55} Mix, supra n. 26, at 143.
\item \footnote{56} A Continuing Quest, supra n. 34, at 19.
\item \footnote{57} Porter, supra n. 2, at 372.
\item \footnote{58} Id. at 376.
\item \footnote{59} Id. at 376-79.
\item \footnote{60} 25 U.S.C. Sec. 331-358 (2000).
\item \footnote{61} Americanizing the American Indian: Writings by the "Friends of the Indian" 1880-1900 102-05 (Francis Paul Prucha ed., Harvard University Press 1973) [hereinafter Americanizing].
\end{itemize}
a poor start... and if you... say, I did my duty when I set him on this
course, you fail, you do not comprehend your duty.... If he starts wrong;
if he comes upon the homestead and is left there with no house to put him-
self in. . . .what is to become of him? Houses were clearly contemplated as
part of civilization.

The Blackfeet Nation survived with a rich civilization of its own, hunting
buffalo and following herd migrations with their portable tipi homes until
the government imposed "civilization" upon them. They "were rich; meat
was their staff of life, and they had plenty of it. All that [settlers] traded to
them for their buffalo robes and furs were -except cartridges, knives, and
axes- luxuries that they did not need. . . . So long as they had plenty of buf-
falo for the killing of them, no people anywhere on earth were happier,
more content, than those of the Blackfoot tribes." In 1880, the U.S. Army forcibly removed the Blackfeet Nation to the res-
ervation, confining Blackfeet people for the first time. One Lieutenant
Crouse arrived in March of 1880 at Ford Conrad, "the last trading camp of
the Pikunis." He told the Blackfeet to return to their reservation country
because an area rancher whom Crouse called "Colonel" Henry Brooks,
complained the Blackfeet were killing his cattle. The Blackfeet protested;
they had no need to kill cattle when they had plenty of buffalo, they were
indeed in their country, and would starve if forced onto the reservation be-
cause no buffalo remained there. No one had told the Blackfeet the Presi-
dent eliminated the Fort Conrad area from Blackfeet territory. Despite
their protests, Crouse persisted and convinced the Blackfeet to depart to the
reservation.

Evidence indicates the buffalo's demise was part of the calculated efforts
to "civilize" the Indians and render them dependent on the federal govern-
ment. For example, United States Representative James Throckmorton
stated in 1876: "There is no question that, so long as there are millions of
buffaloes in the West, so long the Indians cannot be controlled, even by the
strong arm of the Government. I believe it would be a great step forward in

62. Id. at 104 (citing Proceedings of the Fifth Annual Meeting of the Mohonk Conference of the
Friends of the Indian 1887) (emphasis added).
63. John C. Ewers, The Blackfeet: Raiders of the Northwestern Plains 9-16 (University of Okla-
64. James Willard Schultz [Apikuni], Blackfeet and Buffalo: Memories of Life Among the Indians
65. Hana Samek, The Blackfoot Confederacy 1880-1920: A Comparative Study of Canadian and
U.S. Indian Policy 42 (University of New Mexico Press 1987).
66. Schultz, supra n. 64, at 26, 33.
67. Id. at 33.
68. Id. at 33-34.
69. Id. at 34.
70. Id.
the civilization of the Indians and the preservation of peace on the border if there was not a buffalo in existence.\textsuperscript{71}

The Blackfeet people "remained buffalo Indians until there were no more buffalo."\textsuperscript{72} Confined and without buffalo, the Blackfeet Nation’s food source, shelters, and all their cultural amenities were deemed obsolete\textsuperscript{73} in the face of the new civilization imposed upon them. "With the disappearance of the buffalo, the entire confederacy became dependant on the largess of the Canadian and American governments."\textsuperscript{74}

Despite their confinement and losses, in 1880 the Blackfeet "showed virtually no progress toward becoming ‘civilized.’"\textsuperscript{75} This troubled the government, and Washington questioned John Young, the Indian agent then assigned to the area.\textsuperscript{76} Young explained food rations were inadequate and the Blackfeet had to leave the confines to hunt for provisions.\textsuperscript{77} In response, and with pressure from ranchers complaining the Blackfeet were hunting their cattle, the government sent a delegation in 1883.\textsuperscript{78} The delegation reported the Indians were in "wretched" condition and urged the government to provide aid, but it pursued another result - a decrease in the reservation’s size.\textsuperscript{79} To this end, the delegation reported the Blackfeet "were quite willing to part with a portion of the reservation in exchange for supplies, implements, houses, and cattle."\textsuperscript{80} The following winter six hundred Blackfeet people starved to death. Although Young had urged officials to provide sustenance, they "never indicated that they paid the slightest attention to [Young’s] field reports."\textsuperscript{81} The winter of 1883-1884 thus became known as "Starvation Winter."\textsuperscript{82}

In 1855, Blackfeet leaders had signed a treaty with the federal government.\textsuperscript{83} The treaty proclaimed the Blackfeet Nation’s dependence on the

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72. Samek, \textit{supra} n. 65, at 37.
73. Curly Bear Wagner, a Blackfeet historian, commented the "whole system centered around buffalo" including food, shelter, clothing, and toys. \textit{Long Ago in Montana}, video produced by Sally Thompson, 2006 University of Montana Regional Learning Project, and Montana Office of Public Instruction.
74. Samek, \textit{supra} n. 65, at 40.
75. Id. at 37.
76. Id. at 42.
77. Id.
78. Id. at 43.
79. Id. at 43-44.
80. Id. at 44 (citing \textit{Indian Tribes of Northern Montana}, Senate Doc. 255, 58\textsuperscript{th} Cong., 2d sess., 1904, serial 4592) (emphasis added).
81. Id. at 41.
82. Id. at 44.
\end{flushright}
federal government\textsuperscript{84} and set forth ways the government would provide for the Blackfeet people. The government agreed to pay sums of money over ten years to aid "in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and \textit{in any other respect promoting their civilization}.\textsuperscript{85} The Blackfeet thus became a once rich sovereign rendered dependent on the federal government. They would require entirely new infrastructure to replace their loss - food, shelter, and the "domestic comforts" of civilization.\textsuperscript{86}

III. HOUSING PROGRAMS AS CIVILIZING AGENTS – WORKING FOR THE PROMISE

"There is no way of reaching the Indian so good as to show him that he is working for a home."\textsuperscript{87}

Despite the logic that shelter is necessary to "civilization," government promises and efforts to civilize Indian people have failed to provide Indians decent housing.\textsuperscript{88} Belatedly, the government undertook to fulfill promises made when negotiating treaties,\textsuperscript{89} by implementing housing statutes and programs, beginning with the United States Housing Act of 1937 (USHA).\textsuperscript{90}

In USHA, Congress set forth government policy to assist all low-income persons in obtaining "decent, safe, and sanitary dwellings."\textsuperscript{91} While not specific to Indian housing, HUD developed an innovative approach to fulfill the government's obligation to provide Indian housing under USHA - the Mutual Help Homeownership Opportunity Program (MHHOP).\textsuperscript{92} MHHOP houses were to be built "at the lowest possible cost."\textsuperscript{93}

By requiring Indians to work for their home, the government might finally "reach" the Indian, serving civilization and making good on past housing promises. To participate in the program, homebuyers had to contribute land, labor or materials, and make monthly payments in line with their income.\textsuperscript{94} Additionally, HUD required the tribe to establish its own

\textsuperscript{84.} \textit{Id.} at art. 11 ("The aforesaid tribes acknowledge their dependence on the Government of the United States").  
\textsuperscript{85.} \textit{Id.} at art. 10 (emphasis added).  
\textsuperscript{86.} Porter, \textit{supra} n. 2, at 372.  
\textsuperscript{87.} \textit{Id.} at 378-79 (quoting Merrill E. Gates, \textit{Land and Law as Agents in Educating Indians, 1885}).  
\textsuperscript{88.} Davis, \textit{supra} n. 23, at 211.  
\textsuperscript{89.} \textit{Id.}  
\textsuperscript{90.} 42 U.S.C. Sec. 1437 et seq. (1976).  
\textsuperscript{91.} \textit{Id.}  
\textsuperscript{92.} 24 C.F.R. Sec. 805 (1979).  
\textsuperscript{93.} \textit{Marceau,} 455 F.3d at 989 (Pregerson, J., concurring) (citing \textit{U.S. Dept. of Hous. & Urban Dev., Manual 7440.1: Interim Indian Housing Handbook} 3-40 (1976)).  
\textsuperscript{94.} 24 C.F.R. Sec. 805.408, 805.416(a)(1)(ii); \textit{Marceau,} 455 F.3d at 977.
Indian Housing Authority (IHA) to funnel funds and "cooperate" in the construction project.95

While requiring an IHA to "cooperate," HUD regulations control the IHA's role. A "sample" tribal ordinance to establish the requisite IHA could not be modified "except as indicated by footnotes in Appendix I or with specific written approval from HUD."96 The footnotes allow few changes, thus most of the "sample" language was mandatory.97 HUD dictated IHA establishment,98 purpose,99 management,100 and powers,101 as well as dictating the types of housing projects the IHA could develop.102

HUD oversaw and controlled construction, allowing the IHA to request a production method from a list of HUD's approved methods, ultimately leaving the decision to HUD.103 HUD had to approve each step, while the IHA generally accomplished the project.104 HUD also governed design of the houses.105

USHA has undergone alterations since MHHOP was developed under it. The Indian Housing Act of 1988106 moved Indian housing programs into their own title within USHA.107 In 1994, the Native American Housing and Self-Determination Act of 1996 (NAHASDA) replaced the Indian Housing Act and established the Indian housing block grant program.108 "NAHASDA and its implementing regulations now provide the exclusive mechanism for controlling HUD's role in Indian public housing."109

Congress recognized explicitly in NAHASDA the duty to provide houses created under prior housing statutes and programs and other government actions:

"... the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people; the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeco-

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95. 24 C.F.R. Sec. 805.101(a)(1); 24 C.F.R. Pt. 805 App. I, art. VIII.
96. 24 C.F.R. Sec. 805.109(d).
99. Id. at art. II.
100. Id. at art. IV.
101. Id. at art. V.
102. 24 C.F.R. Sec. 805.103.
103. 24 C.F.R. Sec. 805.203.
104. 24 C.F.R. Sec. 805.203.
105. 24 C.F.R. Sec. 805.212.
nomic status so that they are able to take greater responsibility for their own economic condition; providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status. . . .”

From the MHHOP, involving Indians in the bargain to obtain the promised housing element of civilization, to NAHASDA and its express declaration of housing as an aspect of the federal trust duty, the civilization effort and trust duty continues.

IV. LAW OF TRUST DUTY – NETWORK OF LAWS AND A FAIR INERENCE

"It is beyond question our most solemn duty to protect and care for, to elevate and civilize them. We have taken their heritage, and it is a grand and magnificent heritage. Now is it too much that we carve for them liberal reservations out of their own lands and guarantee them homes forever?"  

Modern trust law sits against the backdrop of the “domestic dependent” status of tribes imposed by the Supreme Court in 1831, declaring “their relation to the United States resembles that of a ward to his guardian.” Conversely to this relationship, the Court “has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.” It holds the government to “the most exacting fiduciary standards.”  

The Allotment Act led to the modern framework for federal trust duties over Indian land and resources, which was articulated in a pair of cases referred to as Mitchell I and Mitchell II. With the Allotment Act, tribal lands were divided into individual parcels, to be held “in trust” by the federal government.  

In Mitchell I, the Supreme Court declared the government’s trust responsibility under the Allotment Act a limited one. Plaintiffs, Quinault Indian allottees, asserted the government breached its trust obligation under the Act when it mismanaged timber resources on allotted lands. Because the

110. 42 U.S.C. Sec. 4101(3)-(5).
112. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
114. Id. at 297.
118. 25 U.S.C. Sec. 348.
120. Id. at 536-37.
Act left use and management of the land to the allottees, and did not impose a duty upon the government to manage timber resources, the Court held no claim for breach of fiduciary duty existed.\textsuperscript{121} However, such a duty could be found in other sources of substantive law.\textsuperscript{122}

Revisiting the question in \textit{Mitchell II}, the Court held other laws did create a fiduciary duty for which allottees had a claim against the government for breach.\textsuperscript{123} Specifically, detailed regulations and government supervision over timber management supported an actionable trust duty.\textsuperscript{124} The Court indicated where the government controls or manages resources, a trust duty arises similar to a common law trust,\textsuperscript{125} where the three elements of such trust are present: the government trustee, Indian beneficiaries, and a tribal resource that the government controls.\textsuperscript{126} The Court indicated tribal resources include timber, lands, or funds.\textsuperscript{127}

Trust language or purpose in governing laws provides further evidence an actionable trust relationship exists.\textsuperscript{128} Substantive laws need not explicitly state damages are an available remedy.\textsuperscript{129} The "sacred trust" relationship between Indians and the federal government, and Congress' intent to remedy the plight of Indians caused by government mismanagement, supports finding the trust duty is present.\textsuperscript{130} If substantive laws can "fairly be interpreted" as mandating compensation from the government, an actionable trust duty exists.\textsuperscript{131}

The Court further developed the "fair inference" rule in two subsequent cases, \textit{White Mountain}\textsuperscript{132} and \textit{Navajo III}.\textsuperscript{133} In \textit{White Mountain}, substantive laws directed the government to hold "in trust for the White Mountain Apache Tribe" a former military post on the reservation,\textsuperscript{134} and the government exercised actual control by occupying the building for a time.\textsuperscript{135} The trust language of the substantive laws, and government's actual control, created the fair inference of a money-mandating claim, thus an actionable trust relationship existed.\textsuperscript{136}

Contrarily, in \textit{Navajo III}, the Court held no duty existed based on the Indian Mineral Leasing Act (IMLA), but indicated a "network" of laws be-

\begin{itemize}
  \item 121. \textit{Id.} at 542-43.
  \item 122. \textit{Id.} at 538.
  \item 123. \textit{Mitchell II}, 463 U.S. at 228.
  \item 124. \textit{Id.} at 224.
  \item 125. \textit{Id.} at 220, 225.
  \item 126. \textit{Id.} at 225.
  \item 127. \textit{Id.}
  \item 128. \textit{Id.} at 220, 224-25.
  \item 129. \textit{Id.} at 225.
  \item 130. \textit{Id.} at 220-21.
  \item 131. \textit{Id.}
  \item 134. \textit{White Mountain}, 537 U.S. at 474-75.
  \item 135. \textit{Id.} at 475.
  \item 136. \textit{Id.} at 477.
\end{itemize}
beyond the IMLA may create such a duty. IMLA’s purpose supported tribal self-determination and control over lease negotiation with third parties, and provided the government merely an “approval role.” IMLA’s purpose and the Nation’s control, in contrast to laws with trust language and purpose, was insufficient alone to sustain an actionable trust duty.

On remand, however, the Federal Circuit Court of Appeals held the network of governing laws beyond IMLA did create a fair inference a trust duty existed which mandated damages for breach. The network included treaties, executive orders, and statutes containing trust language, which provided the necessary basis of a general trust relationship. Treaty language indicated a purpose "to secure the permanent prosperity and happiness of said Indians," while statutes obligated the government to conserve and improve Indian resources in order to advance treaty purposes and improve the condition of the Indian people.

Upon this background of trust language and purposes, the government was also vested with control over mining resources and operations through regulations accompanying IMLA. The government’s control was sufficient to provide a fair inference of a money-mandating trust claim. For example, the regulations established “detailed performance standards” for coal mining operations. Additional responsibilities “included approving and disapproving permits, inspection and enforcement, protecting non-coal resources, approving and disapproving coal exploration and mining plans, administering mining leases, collecting and accounting for royalties, and furnishing copies of notices and orders to mineral owners.”

The trust responsibility not only extends to government management of resources such as those at issue in the Mitchell, Navajo Nation, and White Mountain cases, but also to management of tribal funds. In 1942, the Seminole Nation sued the federal government to recover funds the government mismanaged in violation of a treaty obligation to manage trust funds for the benefit of the Indian wards. The Court stated "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 . . . should

137. Navajo, 537 U.S. at 504-06.
138. Id. at 493-94.
139. Id. at 494, 508.
140. Id. at 493.
141. Navajo Nation v. United States, 501 F.3d 1327, 1330 (Fed. Cir. 2007).
142. Id. at 1340-1341.
143. Id. at 1345.
144. Id. at 1341, 1345.
145. Id.
146. Id. at 1341-42.
147. Id. at 1342.
therefore be judged by the most exacting fiduciary standards." Similarly, in *Cobell*, individual Indian plaintiffs sued the federal government over mismanagement of monies in individual Indian trust accounts. The district court disdained the mismanagement as inexcusable, especially because “the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States . . . the purpose of the . . . trust was to deprive plaintiffs’ ancestors of their native lands and rid the nation of their tribal identity.” Plaintiffs sought an accurate accounting of trust money, and the court held the plaintiffs entitled to relief.

In summary, special obligations are owed the Indian people by the federal government, based on the guardian-ward relationship and the involuntary nature of Indians’ status as wards. Where the government pervasively controls a tribal resource, and a network of laws indicate a trust purpose or policy exists in that management, a fair inference arises for Indian parties to recover damages from the government for breach of its trust duties.

V. TRUST LAW APPLIED – THE FEDERAL GOVERNMENT’S TRUST DUTY TO PROVIDE SAFE, SANITARY AND DECENT HOUSING TO THE BLACKFEET PEOPLE

“‘Perhaps it hasn’t [a moral],’ Alice ventured to remark. ‘Tut, tut, child!’ said the Duchess. ‘Everything’s got a moral, if only you can find it.’”

“We have a moral duty, if not a legal duty, to remedy the harm caused to these Plaintiffs.”

Judge Pregerson found the moral obligation, and then the legal obligation, to the Blackfeet plaintiffs. But the Panel failed to find the federal government’s legal obligation to provide safe, sanitary and decent housing to the Blackfeet plaintiffs. However, the legal duty does exist, if only one can find it. It is found in the network of laws governing construction of Plaintiffs’ homes, framed by federal government promises to house Indians as part of their “civilization” as they relinquished land and resources.

The promise and obligation to provide decent housing began at least when the civilizing efforts began. The government knew such efforts

149. *Id.* at 296-97.
151. *Id.* at 6.
152. *Id.* at 6-7.
153. Lewis Carroll, *Alice’s Adventures in Wonderland* Ch. IX Mock Turtle’s Story (MacMillan and Co. 1865).
155. *Id.* (“We have a moral duty, if not a legal duty, to remedy the harm caused to these Plaintiffs.”)
158. *Marceau*, 455 F.3d at 988.
CIVILIZATION AND ASSIMILATION

would be sustained and would require instilling in the Indians an appreciation for individual property, and it provided them with amenities to replace their lost culture. The government "induced countless Indians to give up their old homes by the promise of assistance in building new ones."

Just as treaty obligations supported an actionable trust duty in *Navajo Nation*, and in *Seminole*, the Blackfeet Treaty of 1855 supports the actionable trust duty to provide housing to the Blackfeet people. The treaty in *Navajo Nation* was "to secure the permanent prosperity and happiness" of the Nation, and the Blackfeet Treaty likewise promised to "promote [the Blackfeet's] civilization." Both are imbued with a sense of trust responsibility to compensate for the Indians giving up land, resources, and a level of sovereignty through the treaties. More explicitly, the government apparently negotiated housing directly, evidenced by the delegation report in 1904 Senate Documents.

Actions to civilize followed the promises, and the MHHOP was another civilizing attempt. Such programs began to "focus" the trust relationship established through the treaties and other aspects of the civilizing process. With the MHHOP, Plaintiffs were induced to work for their homes, harkening back to the belief that "there is no way of reaching the Indian so good as to show him that he is working for a home."

The MHHOP sought to carry out in Indian Country the direction of USHA to provide "decent, safe and sanitary" housing to low-income people, providing the government pervasive control over the housing projects, as the Panel acknowledged. HUD's control is at least as involved as the government's control over mining resources through the network of laws in *Navajo Nation*. The regulations in that case established "detailed performance standards" and required government approval over several aspects of mining operations. Here, regulations controlled the role and performance of the involved IHA, governed the methods and design of the housing, and required HUD approval throughout construction. The regu-

159. See e.g. Porter, supra n. 2, at 150.
161. Davis, supra n. 23, at 211.
162. *Navajo Nation*, 501 F.3d at 1330, 1341, 1345.
165. *Navajo Nation*, 501 F.3d at 1345.
167. Davis, supra n. 23, at 211
169. 24 C.F.R. Sec. 805.408; 455 F.3d at 977.
172. *Marceau*, 455 F.3d at 984.
173. *Navajo Nation*, 501 F.3d at 1341-42.
174. 24 C.F.R. Secs. 805.108-109; 805.203; 805.212; Appendix I.
lations provide sufficient control for the government to be held liable for breach of its resultant trust responsibilities.

Although the Panel recognized the pervasiveness of the government's involvement, it failed to recognize the houses and funds as tribal resources to serve as the trust corpus element. Yet the Supreme Court in *Mitchell II* referred to tribal resources as Indian timber, lands, and funds, and the resource management at issue in both *Seminole* and *Cobell* was Indian funds. On rehearing, the Panel appeared to recognize the houses as resources, but held no trust duty existed because the government offered grants but held no Indian property "in trust." The Panel downplayed HUD's role, focusing on tribal involvement and the fact tribes were not required to participate in MHHOP. The Panel missed the fact that promises were made and actions undertaken to civilize, and thus house, the Blackfeet Indians. The government's control limited opportunities for housing, rendering federal assistance through programs such as MHHOP the only means by which many Indians could obtain the housing portion of their "civilization." The funds HUD provided for the houses are so inextricably intertwined with Plaintiffs' opportunities to obtain housing that it would be disingenuous to claim the funds are not a tribal resource. Both monetary and technical assistance for the housing construction was conditioned on operating under HUD's control, and the government controlled both funds and housing construction.

In its first opinion, the Panel mistakenly focused on maintenance duties rather than construction duties, holding the IHA and NAHASDA did not "add to the management responsibilities of HUD" and thus did not satisfy *Mitchell* analysis. While the Plaintiffs were charged with maintenance duties, the Panel itself recognized the faultiness was in the homes' construction. In its amended opinion, the Panel skirted this issue by stating no statute required the government to construct homes. This fails, again, to consider civilization efforts and promises, and the forced dependence on the government for housing. It further fails to give weight to the regulations governing construction, under which HUD's funding and technical assistance gave the government pervasive control over the housing pro-

175. *Marceau*, 455 F.3d at 984.
179. Id. at **8-9 (emphasis added).
181. *Marceau*, 455 F.3d. at 988 (Pregerson, J., concurring).
182. 24 C.F.R. § 805.101(a)(1); *Marceau*, 455 F.3d. at 984.
183. *Marceau*, 455 F.3d at 985.
184. Id.; 24 C.F.R. Sec. 805.418(a)(1).
185. *Marceau*, 455 F.3d at 977.
similar to the network of laws governing coal mining and leasing in *Navajo Nation*. Plaintiffs had to submit to HUD’s control over the housing project in order to obtain the houses promised when civilizing efforts began; no other options were feasible.

Congress explicitly codified the government’s duty to provide houses to Indian people when it passed NAHASDA. Although Plaintiffs’ homes were built prior to NAHASDA, the language of that act indicated the trust duty already existed and was derived through treaties – such as the Blackfeet Treaty of 1855 – and a “general course of dealing” with tribes. Thus, the civilizing efforts and the holding of land in trust, which rendered Indian people dependent on the government for housing, show that a trust duty exists.

The special relationship between the federal government and Indian people demands the government be held “to the most exacting [] standards” as it interacts with the “dependent and sometimes exploited people.” The federal government, through HUD, violated its duty to Plaintiffs when it funded, and directed and approved construction of the Glacier Homes, which the Panel acknowledged were “not constructed well” and as a result were “uninhabitable.”

VI. CONCLUSION – REMEDY FOR THE FAILURE TO PROVIDE DECENT, SAFE AND SANITARY HOUSING

While likely no civilization has obtained the lofty definition of an ideal state with optimum utilization of all types of resources, surely the government’s promise of Anglo civilization for Indian people included the promise of decent housing. It must, if civilization is alternatively defined as “urban comfort” with references to property and buildings. In light of demolished tribal infrastructures, and federal government coercion and promises of a better life complete with the comforts of Anglo civilization, the government should be responsible for breaching its trust responsibilities to the *Marceau* plaintiffs when it directed and funded construction of their substandard Glacier Homes.

Articulating the promises not only in treaties, but later codifying the duty through housing statutes and programs such as MHHOP, the government focused its trust duty such as to rise to the level of a fiduciary duty. The
Indians were to receive housing as one aspect of the civilization imposed upon them, but something happened along the way – the government failed to provide houses at the same time it restricted the Indian people from developing their own housing market and infrastructure. The Panel did not, but could have remedied this moral and legal wrong, by holding the government to "the most exacting [] standards" required by the Supreme Court's *Seminole* decision. Plaintiffs deserve, legally, the requested monetary damages and "injunctive relief in the form of repair or replacement of the homes." To allow otherwise would simply perpetuate the government's miserable failure to fulfill its duty to house the Indian occupants of trust land – those subject to the policy of "civilization."

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199. *Marceau*, 455 F.3d at 988-89 (Pregerson, J., concurring) ("Once again, when the government took the land in trust, it committed itself to play a major role in housing the trust land's occupants. We have failed miserably in this duty.").