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Indian Trust Responsibility: Protecting Tribal Lands and resources through Claims of Injunctive Relief against Federal Agencies

Mary Christina Wood

THE INDIAN TRUST RESPONSIBILITY: PROTECTING TRIBAL LANDS AND RESOURCES THROUGH CLAIMS OF INJUNCTIVE RELIEF AGAINST FEDERAL AGENCIES

Mary Christina Wood*

I.

Enforcement of the federal trust responsibility[1] is necessary to protect Native America from environmental assault. Traditional lifeways that reach back literally thousands of years are poised in jeopardy along with the natural resources upon which they depend. Across Indian country, many tribes are at the brink of losing their fish and wildlife resources, having their land and water supplies contaminated, or having their sacred sites destroyed forever. At least 317 reservations in the United States are "threatened by environmental hazards."[2] For example, the Confederated Colville Tribes of Washington, the Chippewas of Wisconsin, the Gros Ventre and Assiniboine Tribes of Montana, and several others battle massive mining projects just off reservation boundaries.[3] The Northern Cheyenne Tribe deals with impacts from five coal strip mines, a 2,000-megawatt power plant, and potentially 16,000 new coal methane wells off its reservation.[4] The Pyramid Lake Band of Paiutes and the Klamath, Yakama, Spokane, Salish, and Kootenai Tribes struggle to reclaim enough water in the

* Professor and Director, Environmental and Natural Resources Law Program, University of Oregon School of Law. This essay is based on remarks made to the Federal Bar Association, 28th Annual Indian Law Conference, April 10, 2003, Albuquerque, New Mexico. Footnotes have been added for reference to authorities and materials.

1. For an in-depth examination of the federal trust responsibility, see Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 [hereinafter Wood, *Trust I*]; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109 [hereinafter Wood, *Trust II*]; Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 Envtl. L. 733 (1995) [hereinafter Wood, *Trust III*].

2. Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* 2 (S. End Press 1999).

3. *See Wisc. v. EPA*, 266 F.3d 741 (7th Cir. 2001); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000); *Island Mt. Protectors*, 144 IBLA 168 (1998).

4. Bob Struckman & Ray Ring, *A Breath of Fresh Air*, 35 High Country News 1, 1, 8 (Jan. 20, 2003) (available at <http://www.hcn.org/servlets/hcn.Article?article_id=13658>).

rivers to sustain their fisheries.[5] The Western Shoshones in Nevada confront a proposed nuclear waste dump, as well as the existing fallout from nuclear waste testing on their aboriginal lands.[6] The fishing tribes of the Columbia River Basin urge changes in hydrosystem operations to prevent the salmon species they have relied on for nearly 10,000 years from becoming extinct.[7] The Hopi, Navajo, Sioux, Pueblo, Paiute, Quechan, Blackfeet, Wintu, Zuni, and perhaps dozens of other tribes now fight to protect their sacred sites from desecration.[8] These threats to Indian country are pervasive, and the potential damage is permanent.

In the treaty era, the government promised homelands that could sustain tribal lifeways, governments, and economies. But much of the natural web that supports tribal life and culture occurs beyond the boundaries of Indian country. These lands contain species that tribes hunt and fish for, roots and berries that they gather, headwaters and tributaries that flow into their reservation streams, and sacred sites. These are being destroyed at an unprecedented pace, and the pressure from industrial America is both unyielding and unbounded, coming from corporations that feed on growth. While environmental disease may sooner or later affect everyone in the United States, the impacts on Indian country are magnified, because the land base is the linchpin for tribal survival. The trust responsibility should play a role in protecting tribal lands and resources, but the trust doctrine stands in potential jeopardy today as courts collapse protective trust requirements into statutory standards.

II.

Jerry Meninick, a member of the Yakama Nation, once said in testimony before Congress: "My ancestor . . . who signed the treaty . . . accepted the word of the United States—that this treaty would protect not only the Indian way of life for those then living, but also for all generations yet unborn."[9] His words capture a fundamental premise—the duty of protection—that forms the background of every relinquishment of native property, whether accomplished by treaty, statute,

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5. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974); Michael C. Blumm & 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, 470-78 (1998).

6. *See* Wood, *Trust I*, *supra* n. 1, at 1489, 1489-90 n. 85; Las Vegas Sun, Inc., *Western Shoshone Protest Yucca Mountain Project* <http://www.lasvegassun.com/sunbin/stories/text/2002/may/11/051110478.html> (May 11, 2002).

7. *See* Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 Idaho L. Rev. 1, 1-3 (2000) [hereinafter Wood, *Wildlife Capital Part I*]; Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 Ariz. L. Rev. 197, 227-28 (1998) [hereinafter Wood, *Reclaiming Natural Rivers*] (describing tribal salmon recovery plan).

8. *See* Faith Rogow & Christopher McLeod, *In the Light of Reverence: Teacher's Guide* 6-8 (Sacred Land Film Project 2002); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. Colo. L. Rev. 413, 459-61, 466, 474 (2002); Suzan Shown Harjo, *Indian Country Today, Perspectives, Harjo: Prayers to Protect Salt Mother and Sacred Places* <http://www.indiancountry.com/?1060357108> (Aug. 8, 2003).

9. Wood, *Trust III*, *supra* n. 1, at 769 (internal quotations omitted).

or executive order.[10] In exchange for receiving Indian lands, the government would protect tribes on their retained lands, or reservations, and in some cases would extend protection to traditional uses on off-reservation lands. For example, in 1854-1855, when the federal government negotiated treaties with the fishing tribes of the Pacific Northwest,[11] the tribes agreed to cede the majority of their lands only in exchange for assurances that their fishing rights in these areas would be protected.[12] The government promised this, and on this promise, the tribes of the Pacific Northwest ceded 64 million acres of land to the federal government.[13] Across the country, native reliance on such federal promises of protection was manifest and gave rise to a sovereign trust for the benefit of all tribes.[14] The question is whether these federal promises endure to meaningfully protect tribal resources today.

Certainly the promise of protection is tested by modern industrial society. In the Columbia River Basin, for example, just after treaties were signed, an unprecedented human assault began on the natural resources that supported life throughout the basin. Non-Indians commercially over-fished the salmon.[15]

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10. *See Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995) ("We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise.").

11. *See Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969) (construing such treaties); Blumm & Swift, *supra* n. 5, at 426 n. 91 (listing treaties).

12. *See Wash. v. Wash. St. Com. Passenger Fishing Vessel Assn.*, 443 U.S. 658, 667-68 (1979) ("At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would *forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising.* The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty." (quoting *U.S. v. Wash.*, 384 F. Supp. 312, 381 (W.D. Wash. 1974)) (emphasis added) (internal quotations omitted)). The following clause in the Treaty of Medicine Creek is identical, or nearly identical, to the language used in the other Northwest treaties:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands . . . .

Treaty with Nisquallys (Dec. 26, 1854), 10 Stat. 1132, 1133; *see Wash. St. Com. Passenger Fishing Vessel Assn.*, 443 U.S. at 674 (quoting the treaty and observing similarity among Northwest treaties).

13. *See* Blumm & Swift, *supra* n. 5, at 426.

14. *See Dept. of Int. & Bureau of Indian Affairs v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 11 (2001) ("The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law,' and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus." (quoting *Felix S. Cohen's Handbook of Federal Indian Law* 221 (Rennard Strickland et al. eds., Michie Bobbs-Merrill 1982)) (citation omitted)); *Parravano*, 70 F.3d at 547 ("[T]he Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."); *Morton*, 354 F. Supp. at 257; *N. Cheyenne Tribe v. Hodel*, 12 Indian L. Rptr. 3065, 3066 (D. Mont. 1985); *Klamath Tribes v. U.S.*, 1996 WL 924509 at **7-8 (D. Or. Oct. 2, 1996); *N.W. Sea Farms, Inc. v. U.S. Army Corps of Engrs.*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) ("It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration."); *Island Mt. Protectors*, 144 IBLA at 185 (noting that, apart from statutory laws that may impose trust duties, the Department's "original trust responsibility [requires the agency] . . . to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its . . . decisions").

15. *See* Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* 187-89 (Island Press 1992).

Industry came and, with federal approval and subsidies, ravaged the region—building dams, destroying wetlands, polluting waters, clear-cutting forests, building cities, constructing nuclear and defense facilities, and killing entire stretches of river through mining waste.[16] By 1995, the National Marine Fisheries Service concluded that "[f]ew examples of naturally functioning aquatic systems (watersheds) now remain in the Pacific Northwest."[17] The Columbia River Basin salmon runs, once the largest in the world, declined over ninety percent from historical levels.[18] In a short century and a half, fifty-nine stocks of salmon became extinct in the basin, and another fifty are at high or moderate risk of extinction.[19] This same pattern of ecological devastation impacts tribes across the country.

For the trust obligation to have any force in the contemporary setting, it must be viewed as a property law concept. It is a principle that arises from the native relinquishment of land in reliance on federal assurances that retained lands and resources would be protected for future generations.[20] It bears rough analogy to nuisance and trespass law.[21] Ownership of land carries corollary rights of government protection—the right to seek judicial redress against harm to property. The Indian trust responsibility is protection for property guaranteed on the sovereign level, from the federal government to tribes.

Unfortunately, the trust responsibility has not been clearly characterized as a federal doctrine of property law. Judges, attorneys, and scholars often describe the trust duty of protection as a principle deriving from a guardian-ward relationship between the federal government and tribes. This paternalistic characterization has its origin in an analogy made by Chief Justice Marshall in *Cherokee Nation v. Georgia*,[22] where he commented that the tribes were "domestic dependent nations,"[23] whose "relation to the United States resembles that of a ward to his guardian."[24] A sovereign trust duty of protection should not at all

16. *Id.* at 192-93; Wood, *Trust I*, *supra* n. 1, at 1491-94.

17. Natl. Marine Fisheries Serv., *Proposed Recovery Plan for Snake River Salmon* V-1-2 (U.S. Dept. Com. 1995) (citation omitted).

18. *See* Wood, *Trust III*, *supra* n. 1, at 763 n. 145.

19. *See id.* at 764.

20. *See* Report on Trust Responsibilities and the Federal Indian Relationship, Final Report to the American Indian Policy Review Commission 51 (1976) (noting trust obligation was a "significant part of the consideration" for the native cessions of land to the United States (quoting Memo. from Reid P. Chambers, Assoc. Sol. for Indian Affairs, U.S. Dept. Int., to Int. Sol. & Sec. of Int., *Attributes and Legal Obligations Encompassed within Secretary of Interior's Trust Responsibilities to American Indians* (Jan. 18, 1974)) (internal quotations omitted)).

21. *See* Or. Denying Defs.' Mot. Dismiss at 6-7, *Gros Ventre Tribe v. U.S.*, CV 00-69-M-DWM (D. Mont. issued Jan. 29, 2001) (copy on file with *Tulsa Law Review*). In reviewing a claim by tribes alleging that the Bureau of Land Management violated its trust obligation toward the tribes in allowing mining operations near tribal lands, the *Gros Ventre* court found the case "more analogous to one brought by a homeowner for relief from unauthorized encroachments on her property as a result of an agency's actions than . . . to one brought by a third party with standing to challenge an administrative decision." *Id.*

22. 30 U.S. 1 (1831).

23. *Id.* at 17.

24. *Id.*; *see U.S. v. Kagama*, 118 U.S. 375, 383-84 (1886) ("These Indian tribes *are* the wards of the nation.... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

depend on a guardian-ward relationship. The public trust doctrine in environmental law involves a sovereign trust model, but with no guardian-ward aspect.[25] Chief Justice Marshall recognized the autonomy of tribes within a sovereign trust framework in *Worcester v. Georgia*,[26] when he commented: "This relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving the *protection* of one more powerful: *not* that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[27] This language in *Worcester*, rather than the guardian-ward description in *Cherokee Nation*, provides an appropriate wellspring for the common law trust duty towards tribes.

It is difficult to ignore the fact that many courts today still mention the guardian-ward relationship as the source of the federal Indian trust responsibility.[28] But these courts generally parrot language from earlier opinions. Such rhetoric is likely to continue as long as tribal lawyers link the trust responsibility to the guardian-ward relationship. Those who believe that the trust doctrine can be useful today in protecting tribal rights could begin purging the trust responsibility of paternalistic guardian-ward language. Tribal lawyers can assert the trust duty in clear and forceful terms by referring to the "sovereign trusteeship" rather than the guardian-ward relationship to describe the basis of that protection owed tribes on a sovereign level.[29]

III.

The context for enforcing the essential trust promise of protection has changed much in the last 150-200 years since treaty times. Bringing meaning to the trust responsibility in the modern setting involves an understanding of the actions presenting ecological threats to tribes and the legal structure in which those actions are otherwise sanctioned. In the early periods, federal protection was needed to secure reservation lands against the intrusions of white settlers.

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25. The public trust doctrine and the Indian trust doctrine are in the same "genre" of implied sovereign property rights. *See* Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 Vt. L. Rev. 355, 392-93 (2001). The public trust doctrine arose from an early case, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), in which the Supreme Court found by implication a "trust" on submersible lands that were of critical value to the public. *See id.* at 393-94. The "trust" amounted to a retained property right, held by the public, in lands that were later transferred to a private party. *See* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 Envtl. L. 515, 516-17 (1989) (noting that public trust doctrine recognizes public property rights in the form of easements that burden private ownership of particular resources). Though unique in its formulation, the Indian trust doctrine bears analogy to the public trust doctrine as a property law concept. It can be thought of as a broadly implied servitude over lands conveyed by tribes to maintain natural characteristics essential to paramount tribal interests. *See* Wood, *supra* n. 25, at 391-97.

26. 31 U.S. 515 (1832).

27. *Id.* at 555 (emphases added).

28. *See U.S. v. White Mt. Apache Tribe*, 537 U.S. 465, 474 n. 3 (2003) (recognizing the general trust relationship between tribes and the United States as one of "a ward to his guardian" (quoting *Cherokee Nation*, 30 U.S. at 17) (internal quotations omitted)).

29. *See* Wood, *Trust I*, *supra* n. 1, at 1498 (describing the "sovereign trusteeship" as "embod[ying] a strong presumption of native sovereignty . . . premised on a model of federal-tribal relations organized around a paradigm of native separatism").

Today, federal protection is needed to shield Indian country from environmental threats coming primarily from corporate industry and the government itself. Federal agencies have a tremendous impact on Indian country through their land management and regulatory implementation of federal environmental laws, under which they permit a variety of private activities that degrade the environment.

Unlike historical times, there is now a detailed statutory environmental scheme to control actions that harm the environment—a scheme that includes the Clean Water Act,[30] the Clean Air Act,[31] the Safe Drinking Water Act,[32] the Endangered Species Act,[33] the National Environmental Policy Act,[34] and more. This federal statutory structure obscures the role of the trust doctrine in protecting native lands and resources, because there is a tendency to assume that the multitude of environmental laws will protect Indian country. There is a basic problem with this assumption. These statutes, and the regulations implementing them, were promulgated to meet the interests of the majority, not tribes. The Clean Water Act, for example, allows discharges of pollutants that may be acceptable to the majority population, but not acceptable for water quality that supports tribal drinking water, fishing, or cultural use. The land management statutes governing Forest Service and Bureau of Land Management activities routinely allow destruction of federal land where sacred sites are located.[35] Environmental statutes generally do not protect uniquely tribal resources.

Carrying out the Indian trust duty of protection in the contemporary setting requires prioritizing the trust responsibility in the missions of agencies acting under statutory law. Court decisions make clear that the entire federal government is blanketed by the trust responsibility, and that every federal agency, not just the Bureau of Indian Affairs, must fulfill the trust responsibility in implementing statutes.[36] While agency officials have no authority to deviate from explicit statutory mandates, all environmental statutes give broad discretion to the agencies. Most agencies could establish higher levels of protection, but choose not to because the interests of the majority do not demand it. The challenge for tribal lawyers is to analyze these statutes, find the pockets of discretion that they contain, and define the duty of protection that is required to safeguard tribal property interests.

Professor Catherine O'Neill wrote a thorough article in which she demonstrated how an agency should carry out the trust duty of protection within a

30. Pub. L. No. 95-217, 91 Stat. 1566 (1977).
31. Pub. L. No. 88-206, 77 Stat. 392 (1963).
32. Pub. L. No. 93-523, 88 Stat. 1660 (1974).
33. Pub. L. No. 93-205, 87 Stat. 884 (1973).
34. Pub. L. No. 91-190, 83 Stat. 852 (1970).
35. *See generally* Zellmer, *supra* n. 8.
36. *See Parravano*, 70 F.3d at 546 ("This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole."); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981); *N.W. Sea Farms*, 931 F. Supp. at 1519 ("This [trust] obligation has been interpreted to impose a fiduciary duty owed in conducting 'any Federal government action' which relates to Indian Tribes." (quoting *Nance*, 645 F.2d at 711)).

complex statutory scheme.[37] She addressed the standards set by the U.S. Environmental Protection Agency under the Clean Water Act for discharges of dioxin and other pollutants and found that these standards failed to protect tribal interests, in part because they still allowed for considerable bioaccumulation of toxins in fish tissue.[38] She pointed out that, because tribal consumption of fish is much higher than that of the average American, standards that might be protective of the majority's interests were not protective of Indian interests.[39] She identified the agency's discretion to change the standards and argued that the trust responsibility required such a change.[40] This work has been instrumental and serves as an example of how to bring meaning to the trust responsibility within a detailed statutory structure. Indeed, many agencies have embarked on a process to define their trust obligation within the context of their governing statutes. A leading example is the joint issuance of a Secretarial Order on fulfilling trust responsibilities in Endangered Species Act implementation by the Departments of Commerce and Interior, an effort that involved many tribes.[41]

IV.

The potency of the trust responsibility in protecting native lands and resources depends ultimately on its reception in the courts. In that setting, the federal trust responsibility takes the form of a common law duty to protect tribal property and resources. There is strength in that form of law, as compared to statutory law. As the Supreme Court of Oregon put it long ago: "The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life . . . ."[42]

The common law is a powerful and unique tool in the protection of Indian property, because it allows judges to formulate legal principles to carry out the intent of the treaties or other agreements. It was under the authority of common law that the Supreme Court upheld a share of up to fifty percent of the harvestable fish for the treaty tribes in *Washington v. Washington Passenger Fishing Vessel Association*,[43] and found an implied water right associated with reservation lands in *Winters v. United States*.[44] When tribal attorneys seek to

37. Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 Stan. Envtl. L.J. 3 (2000).

38. *Id.* at 7-8, 16-18.

39. *Id.* at 36-54. Professor O'Neill also pointed to cultural effects on tribes associated with contaminated fish. *Id.* at 14-16.

40. *Id.* at 54-69, 105.

41. *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, Jt. Secretarial Or., No. 3206 (Dept. Int. & Dept. Com. June 5, 1997) (available at <http://elips.doi.gov/elips/sec_orders/html_orders/3206.htm>); *see* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063 (1997) (reprinting Order and discussing process leading to issuance of Order).

42. *In re Hood River*, 227 P. 1065, 1086 (Or. 1924).

43. 443 U.S. at 685-89.

44. 207 U.S. 564, 576-77 (1908).

protect Indian resources by bringing *statutory* claims, they put the court in an entirely different position. In that situation, the court is not creating common law, but rather, is interpreting the will of Congress, a will most often geared to majority interests.

When the trust doctrine is used to protect Indian property from federal agency action, it is nearly always cast as a claim under the Administrative Procedure Act (APA).[45] The APA allows anyone to sue an agency for action that is arbitrary, capricious, "or otherwise not in accordance with law,"[46] including the common law. APA claimants generally seek injunctive relief in federal district court, challenging agency action that is carried out within a statutory regime. Accordingly, the tribal lawyer must argue that the agency is bound by the trust responsibility to use its discretion within that statutory regime to protect tribal interests unless doing so conflicts with the actual statutory language.[47] The successful cases for tribes are those in which the judge clearly identifies the discretion in the statute, understands the Indian interest, and recognizes that the Indian interest demands protection greater than that normally provided by the agency.

In a 1996 case, for example, the Klamath Tribe was successful in halting timber sales planned by the U.S. Forest Service on forest lands that supported treaty deer herds.[48] In that case, the district court of Oregon ruled that the government had a "substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend."[49] In *Pyramid Lake Paiute Tribe v. Morton*, the court held that the Secretary of Interior had to send all water in the Truckee River not otherwise obligated by contract or decree, to Pyramid Lake to support a tribal fishery.[50] In *Northern Cheyenne Tribe v. Hodel*, the district court rejected the Bureau of Land Management's proposal to lease federal lands for coal development just outside the Northern Cheyenne reservation because coal mining would have adverse environmental, social, and economic effects on the tribe.[51] The court stated: "[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."[52] The court held firm despite the federal government's contention that the national interest in developing coal overshadowed the trust duty towards the tribe, stating:

> The Secretary's conflicting responsibilities ... do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even

45. 5 U.S.C. § 702 (2000).

46. *Id.* § 706(2)(a).

47. *See N.W. Sea Farms*, 931 F. Supp. at 1519-20 (noting that the general trust obligation constitutes "'law to apply' consistent with *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985)").

48. *Klamath Tribes*, 1996 WL 924509 at **7-10.

49. *Id.* at *8 (quoting *Morton*, 354 F. Supp. at 256).

50. 354 F. Supp. at 256.

51. 12 Indian L. Rptr. at 3071, 3074.

52. *Id.* at 3071.

> more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.[53]

In two more recent cases, the agencies themselves have set a greater standard to protect Indian interests in fulfillment of their trust responsibility, and the courts have upheld the higher standard under authority of the trust doctrine. In *Northwest Sea Farms v. U.S. Army Corps of Engineers*, the federal district court upheld the Corps' refusal of a permit for a fish farm because such an activity could interfere with the treaty fisheries of the Lummi Nation and Nooksack Tribes.[54] The Corps of Engineers found its pocket of discretion in Section 10 of the Rivers and Harbors Act;[55] the Corps could deny a permit that conflicted with the public interest, and it construed "public interest" to include the protection of treaty rights.[56] The district court solidly supported this interpretation, holding that the fiduciary trust duty formed a legal mandate within the statute.[57] And in *Parravano v. Babbitt*, a case decided in 1995, the Ninth Circuit upheld an emergency regulation issued by the Department of Commerce to curtail non-Indian fishing under the Magnuson Fishery Conservation and Management Act (Magnuson Act)[58] in order to protect the salmon runs for the Hoopa Valley and Yurok Tribes.[59] The court found that the government's trust duty of protection toward tribal fisheries amounted to "any other applicable law" which the Secretary of Commerce must take into consideration when establishing fishery standards under the terms of the Magnuson Act.[60]

V.

The clash of different sets of environmental standards, one tailored to the majority society, and the other necessary to sustain native lifeways, will produce many complex issues in the application of trust duties to the natural resources context. Unfortunately, development of the trust doctrine to protect uniquely tribal interests has been stymied due to several cases that equate tribal interests with statutory standards. These opinions conclude that if the agency abides by the statute, it is protecting the Indian interest as well. The courts in these cases essentially collapse trust standards into statutory standards. This is a dangerous trend. When judges equate trust standards with statutory standards, they eliminate the role of the trust responsibility in protecting uniquely tribal interests, and Indian law itself moves towards assimilation because the one potentially powerful tool for protecting unique native interests becomes interpreted as merely

53. *Id.* (citation omitted).
54. 931 F. Supp. at 1521-22.
55. 33 U.S.C. § 403 (2000).
56. *N.W. Sea Farms*, 931 F. Supp. at 1518.
57. *Id.* at 1520.
58. Pub. L. No. 94-265, 90 Stat. 331 (1976).
59. 70 F.3d at 547-48.
60. *Id.*

a majority standard. And more broadly, when courts define common law duties according to statutory standards, they diminish their own role in protecting native rights, and the balance of power shifts towards Congress. It is vital to keep the common law alive as a reservoir of native rights.

A muddled line of cases interpreting the trust doctrine in the context of APA claims has established precedent that, unless cleared up soon, may extinguish any effective use of the trust doctrine in preventing agencies from harming tribal property interests. This line of cases builds from a basic confusion between the two contexts in which the trust responsibility is enforced against agencies. One context involves tribes seeking injunctive relief under the APA in federal district court.[61] This is an important context because injunctive relief seeks to stop damage before it happens. The second context involves tribes seeking monetary damages against the BIA for mismanaging their lands. Those suits are brought in the Court of Federal Claims under the Tucker Act[62] or the Indian Tucker Act.[63] All four of the major Supreme Court cases dealing with the federal trust obligation arose out of this damages context, causing it to receive far more attention than the equally important context of injunctive relief.[64]

The Tucker Act statutes and the APA have very different requirements for establishing claims. Both of the Tucker Acts require express law supporting claims for damages against the United States.[65] The Indian Tucker Act requires that claims be based on express law found in the Constitution, statutes, executive orders, or treaties.[66] The Tucker Act requires that claims be based on the Constitution or a statute, regulation, or contract.[67] The Supreme Court has stressed that the express source of law supporting either Tucker Act claim must "fairly be interpreted as mandating compensation by the Federal Government for

61. For a discussion of cases brought in this context, see text accompanying *supra* notes 47-60.

62. 28 U.S.C. § 1491(a)(1) (2000).

63. *Id.* § 1505.

64. *White Mt. Apache*, 537 U.S. 465; *U.S. v. Navajo Nation*, 537 U.S. 488 (2003); *U.S. v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"); *U.S. v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*").

65. The Tucker Act allows individuals to pursue monetary claims against the federal government. The Act extends to claims by allottees on Indian reservations. The Indian Tucker Act allows tribes to sue the federal government for damages. *See Mitchell II*, 463 U.S. at 211-12.

66. The Indian Tucker Act provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the *Constitution*, *laws* or *treaties* of the United States, or *Executive orders* of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (emphases added).

67. The Tucker Act provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the *Constitution*, or any *Act of Congress* or any *regulation* of an executive department, or upon any *express or implied contract* with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. § 1491(a)(1) (emphases added).

the damage sustained."[68] Trust enforcement under the APA is much broader than under the Tucker Acts, because there is no requirement of premising a claim on a statute or some other source of express law.[69] Due to the critical differences between the Tucker Acts and the APA, courts should treat trust cases arising under these statutes separately, so as to develop two distinct prongs of the overall trust doctrine.

The *Pyramid Lake*, *Northern Cheyenne*, *Northwest Sea Farms*, *Klamath*, and *Parravano* cases form one clear prong of the trust doctrine and accept broad common law assertions of the trust responsibility within the context of claims for injunctive relief under the APA.[70] Cases arising under the Tucker Acts form the other prong.[71] But recent decisions have ignored the different contexts in which trust claims are brought, applying Tucker Act restrictions to claims brought under the APA. These holdings require a statute or other source of express law to support a trust claim brought under the APA. The approach is erroneous, because the APA does not have the restrictive language found in the Tucker Acts.

The judicial error confusing the two prongs of trust enforcement traces back through the caselaw to a 1980 case decided by the District of Columbia Circuit, *North Slope Borough v. Andrus*.[72] In that case, the Inupiat people of Alaska sued the Secretary of Interior, arguing that federal oil leasing in the Beaufort Sea would threaten the bowhead whale population that they hunted, and therefore would violate the Secretary's trust responsibility.[73] This was a suit seeking injunctive relief.[74] In unfortunate language that launched the present confusion, the court applied *Mitchell I* (a Tucker Act case) and held:

> "A trust responsibility can only arise from a statute, treaty, or executive order"; in this respect we are governed by the recent Supreme Court decision in *United States v. Mitchell* holding that the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute.

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68. *Mitchell II*, 463 U.S. at 216-17 (quoting *U.S. v. Testan*, 424 U.S. 392, 400 (1976)) (internal quotations omitted). The Supreme Court has also indicated that the federal government's "elaborate control" over tribal property may support a claim under both Tucker Acts. *See White Mt. Apache*, 537 U.S. at 474; *Mitchell II*, 463 U.S. at 209, 225. This control theory, however, is generally not applicable where the government is taking action off the reservation, thereby incidentally affecting, rather than directly controlling, tribal property.

69. *See* 5 U.S.C. § 706(2)(a) (granting general authority to courts to set aside agency action "not in accordance with law"); text accompanying *supra* n. 46.

70. *Parravano*, 70 F.3d at 547; *Morton*, 354 F. Supp. at 257; *N. Cheyenne Tribe*, 12 Indian L. Rptr. at 3066; *Klamath Tribes*, 1996 WL 924509 at **7-8; *N.W. Sea Farms*, 931 F. Supp. at 1520 ("It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration."); *see Island Mt. Protectors*, 144 IBLA at 185 (noting that, apart from statutory laws that may impose trust duties, the Department's "original trust responsibility [requires the agency] . . . to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its . . . decisions").

71. *See White Mt. Apache*, 537 U.S. 465; *Navajo Nation*, 537 U.S. 488; *Mitchell II*, 463 U.S. 206; *Mitchell I*, 445 U.S. 535.

72. 642 F.2d 589 (D.C. Cir. 1980).

73. *Id.* at 592-93.

74. *Id.* at 592.

> We have no specific provision for a federal trust responsibility in any of the statutes argued to us.... By confining the extension of "trust responsibility," however defined and whatever the source, to the area of overlap with the environmental statutes, the district court was arguably consistent with the Supreme Court's rationale in *United States v. Mitchell*. Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.[75]

This judicial misstep is rather astonishing because it amounts to applying the strict requirements of one statute (the Tucker Act) to a case premised on an entirely different statute (the APA) lacking such restrictive language.[76] The *Mitchell I* holding (upon which the *North Slope* court relied) was tied to the express language in the Tucker Act.[77]

Unfortunately, once a mistake takes hold in one case, it becomes stare decisis that judges rely upon in deciding future cases, and can thereby metastasize through an entire body of caselaw. The misapplication of the trust doctrine originating in *North Slope* has now found its way into Ninth Circuit law, blurring the critical distinction between the two prongs of trust enforcement. In a 1998 case, the Morongo Band of Mission Indians brought a claim under the APA against the Federal Aviation Administration for situating a flight path into the Los Angeles airport directly over canyons on the reservation where tribal members conducted traditional ceremonies.[78] The court applied *Mitchell II* (a case arising

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75. *Id.* at 611-12 (quoting *N. Slope Borough v. Andrus*, 486 F. Supp. 332, 344 (D.D.C. 1980)) (alteration and footnotes omitted).

76. For further discussion, see Wood, *Trust II*, *supra* n. 1, at 117-21.

77. *Mitchell I*, 445 U.S. at 538, 546. In *Mitchell I*, the Court emphasized:

> The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. § 1491, which gives that court jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress."
>
> . . .
>
> The General Allotment Act . . . cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act.

445 U.S. at 538, 546. In *Mitchell II*, the Court stated:

> [I]n *United States v. Mitchell* [*I*], . . . this Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States.... [W]e held that the Act creates only a limited trust relationship. The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof....
>
> Thus, for claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.
>
> . . .
>
> The question in this case is . . . whether the statutes or regulations at issue can be interpreted as requiring compensation.

463 U.S. at 217-18 (quoting 28 U.S.C. § 1491) (citations omitted).

78. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 572 (9th Cir. 1998).

under the Tucker Act) and concluded: "[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."[79] Other decisions also appear to take this approach.[80] Moreover, the Department of Justice is now perpetuating this mistake in defending the government in an APA suit over a mine that threatens tribal resources.[81] The prerequisite of finding a specific statutory trust duty presents a barrier to effective litigation brought by tribes seeking to protect their lands and resources. With the exception of some historic preservation laws, environmental or natural resources statutes do not impose specific duties towards tribes.

It is vital to clear up the confused direction of the trust doctrine in order to eliminate the ill-founded barrier tribes now face when enforcing the general trust responsibility through claims for injunctive relief. It is important to develop the doctrine along two prongs reflecting the very different requirements of the

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79. *Id.* at 574; *see Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (rejecting arguments that FERC "must afford Indian tribes greater rights than they would otherwise have under the [Federal Power Act] and its implementing regulations").

80. *See Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) ("Federal agencies owe a fiduciary responsibility to Native American tribes. In the absence of a specific duty, this responsibility is discharged by 'the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" (quoting *Morongo Band*, 161 F.3d at 574) (citations omitted)); Or. Denying Defs.' Mot. Dismiss at 4, *Gros Ventre Tribe v. U.S.*, CV 00-69-M-DWM (D. Mont. issued Jan. 29, 2001) ("The United States' trust obligations are content-less unless a statute, regulation, or treaty supplies the imperatives."). In *Island Mountain Protectors*, however, the court noted:

> In addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility.... BLM had a trust responsibility to consider and protect Tribal resources. "[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."
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> . . .
>
> While the trust responsibility created by environmental laws may be "congruent" with other duties they impose, the enactment of those laws does not diminish the Department's original trust responsibility or cause it to disappear. BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its [decision approving expansion of the mine].

144 IBLA at 184-85 (quoting *N. Cheyenne*, 12 Indian L. Rptr. at 3071) (citations omitted).

81. *See* Defs.' Mot. S.J. at 11-12, *Gros Ventre Tribe v. U.S.*, CV 00-69-M-DWM (D. Mont. filed Dec. 11, 2002) (on file with *Tulsa Law Review*). There, the government argued:

> Under [*Mitchell I* and *Mitchell II*], agencies have a general "trust relationship" with a particular Indian Tribe, but not "any fiduciary management duties" or "a "[sic]fiduciary relationship" with it, where a treaty or other federal law (1) establishes the general objectives and standards of a trust and (2) does not specify how the trust's objectives will be achieved by particularized methods or standards of care....
>
> In the absence of a specific duty that has been placed on the government with respect to the [tribes], the United States' general trust responsibility is discharged by compliance with general regulations and statutes not specifically aimed at protecting Indian tribes. Thus, the United States owes no fiduciary duty to the [tribes] apart from its obligations under the statutes applicable to the permitting, operating, and reclamation of the Zortman and Landusky mines.

Id. (citations omitted).

statutes underlying the two types of trust claims—claims for equitable relief under the APA and claims for damages under the Tucker Act. The recent *Navajo Nation*[82] and *White Mountain Apache*[83] cases provide new Supreme Court precedent that tribal attorneys can refer to in defining these distinct prongs in order to turn the tide of precedent back to an enforceable trust obligation in the APA context. Both cases arose under the Indian Tucker Act.[84] While neither case presents language distinguishing the Tucker Acts from the APA,[85] the Court stated repeatedly and emphatically in both cases that the requirement of finding a statutory basis for the trust (damages) claims derives directly from the language of the Tucker Act or Indian Tucker Act.[86] Tribal lawyers in trust cases now pending before federal district courts should use the Supreme Court's pronouncements in *Navajo Nation* and *White Mountain Apache* as an opportunity to distinguish Tucker Act damages claims from APA claims for injunctive relief. Tribal lawyers should clarify that claims brought under the APA may rely on a common law trust duty interjected as an interstitial obligation within a statutory scheme lacking explicit trust language.

VI.

The Indian trust doctrine is perhaps the only source of law that can protect the natural landscapes, animals, and waters that sustain tribalism. This is a pivotal point in the history of many tribes—a time that will determine whether ancient lifeways associated with natural resources will survive into the future. Tribal lawyers carrying the message of the sovereign trust to judges, agency officials, and the public should have as their guiding compass the purest moral foundation of the trust: the sacred promise, made to induce massive land cessions, that the retained homelands would be protected to support tribal lifeways and generations into the future. This fundamental promise of sovereign trust should be a focal point for courts hearing claims for injunctive relief to protect tribal lands and resources. Courts should invoke their equitable authority to restrain the majority of society and its industry from bringing to ruin the natural systems sustaining Native America.

82. 537 U.S. 488.
83. 537 U.S. 465.
84. *See id.* at 468; *Navajo Nation*, 537 U.S. at 502.
85. Such language would be dicta because the cases did not involve any claims for injunctive relief.
86. *See White Mt. Apache*, 537 U.S. at 472; *Navajo Nation*, 527 U.S. at 503-05, 514.