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Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources

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EQUIVOCAL OBLIGATIONS: THE FEDERAL-TRIBAL TRUST RELATIONSHIP AND CONFLICTS OF INTEREST IN THE DEVELOPMENT OF MINERAL RESOURCES

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I. INTRODUCTION

Administrative conflicts of interest have plagued tribes in the development of their resources and the protection of their environment. The federal government, charged with a trust responsibility toward the Indian tribes, is also charged with representing the national interest in the public lands and resources. Where the interests of the tribes and the interests of the public conflict, the federal government is faced with resolving competing claims to resource use and environmental protection.

One of the situations in which the federal conflict of interest may become acute is the development of tribal mineral resources. On the one hand, the Secretary of the Interior is obligated by Congress to determine whether the development of tribal minerals is in the best interests of the tribal owner. On the other hand, the Secretary also represents constituent bureaus such as the Bureau of Land Management (BLM), which may object to tribal mineral development because of the environmental consequences to public lands.[1] The Secretary's resolution of those competing interests raises important issues of administrative conflicts and the federal trust obligation to the Indian tribes.

Much of the law of conflicts of interest between tribal concerns and national values has developed in two contexts: proposed development of federal resources outside Indian country that will have adverse impacts on tribes, and management of water resources shared by tribes and federal projects. The conflicts doctrine developed in these cases has generally permitted the federal government to subordinate tribal interests to public interests, based on the lack of a full fiduciary relationship obligating the government to act in the interests of the affected tribes.

In the case of tribal mineral development, however, the Secretary of the Interior is operating under statutes that require full fiduciary

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1. Public lands are defined statutorily as all lands and interests in lands owned by the United States and managed by the BLM, not including "land held for the benefit of Indians." 43 U.S.C. § 1702(e)(2) (1988); *see also* Marla E. Mansfield, *A Primer on Public Land Law*, 68 WASH. L. REV. 801, 832 (1993).

The conflict would be most apparent in the case of split-estate lands, where the mineral estate was held in trust for the tribe and the surface estate was public land. While multiple split-estate situations exist in Indian country, none appears to involve that particular combination. *See* MARJANE AMBLER, BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT 47 (1990) (listing nine split estate situations existing today). There is, however, at least one instance in which the federal government owns the surface lands over a tribal mineral estate. The Cheyenne River Act of 1954 transferred more than 100,000 acres of the Cheyenne River Sioux Reservation to the United States for the Oahe Dam and Reservoir, reserving all "mineral rights" to the tribe and its members. *See* South Dakota v. Bourland, 113 S. Ct. 2309, 2314 (1993). The federal lands in that case appear to be managed by the Army Corps of Engineers, although the Court noted that the exact nature of the government's title was uncertain. *Id.* at 2314 n.4.

attention to tribal interests. In deciding whether to proceed with proposed development of tribal mineral resources, the Secretary is expressly obligated to act in the best interests of the tribe. And in determining whether a proposed agreement is in the best interests of the tribe, the Secretary is mandated to consider environmental concerns. The Secretary must take account of the impacts on the affected environment, and must determine that the proposed benefits of mineral development outweigh the environmental consequences for the tribe, before the Secretary may determine that mineral development is in the best interests of the tribe.

Where the Secretary, acting as a fiduciary, determines that mineral development is in the best interests of the tribe, particularly given that the determination requires both procedural and substantive consideration of environmental values, that decision should not be subject to competing federal claims. Balancing the tribal interest against public considerations, and in particular subordinating the tribal interest to public interests represented by agencies such as the BLM, violates the Secretary's trust obligations to the Indian tribes.

II. ORIGINS AND DEVELOPMENT OF THE FEDERAL TRUST

The federal trust relationship with the Indian tribes is complex and mutable. Its American legal origins are most commonly traced to the *Cherokee Cases* of the 1830s.[2] In *Cherokee Nation v. Georgia*[3] Chief Justice John Marshall first articulated the guardian-ward comparison and developed the now-famous designation of Indian tribes as "domestic dependent nations" which had acknowledged themselves to be under the

2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220 (Rennard Strickland, ed. 1982); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1215-18 (1975); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1001 (1981) [hereinafter Clinton, *Isolated in Their Own Country*]; Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 423 (1984) [hereinafter *Rethinking the Trust Doctrine*]; John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 U.M.K.C. L. REV. 503, 509 (1991).

The origins of Marshall's concept are themselves uncertain. Professor Collins posits that the Marshall Court "was heir to" the traditions of the English Court of Chancery and the equitable concept of holding those in power to fiduciary standards as the means to prevent or control abuse of power. Richard B. Collins, *Origins and Dimensions of the Trust Relationship Between the Indian Nations and the United States*, 1991 ABA SONREEL Third Annual Conf. on Natural Res. Dev. on Indian Lands 7-1, 7-13 to 7-15 (1991). Professor Clinton notes the practical origins in the colonial appointment of trustees for conquered tribes. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 129-30 (1993) [hereinafter Clinton, *Redressing Conquest*].

3. 30 U.S. (5 Pet.) 1 (1831).

protection of the United States.[4] That protectorate status, Marshall subsequently explained, meant only that the tribes had allied with the United States and received the protection of a more powerful sovereign; nothing in that status affected the "national character" of the tribes themselves.[5] Instead, the tribes remained separate peoples with inherent and federally-protected rights of self-government, rights that barred state authority within Indian territory.[6]

Marshall's guardianship theory was grounded in a general duty of the United States, as the more powerful sovereign, to protect tribal lands and the right of self-government within tribal territories.[7] Over the course of the nineteenth century, however, the theory evolved from the Marshallian ideal of protection to a justification for the exercise of federal power.[8] During the judicial plenary power era, roughly coterminous with the legislative allotment policy,[9] the Court authorized congressional expropriation of tribal governmental authority and tribal lands on the theory that Indians needed the "care and protection" of the federal government.[10] If, in the exercise of that protectorate power, the federal government chose to subject Indians to federal criminal laws[11] or to take tribal lands for homesteaders in violation of express treaty provisions,[12] the Court would not intervene. Instead, given the

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4. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Marshall rejected the Cherokee Nation's argument that it was a foreign nation for purposes of federal jurisdiction. "They may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian." *Id.*

5. Worcester v. Georgia, 31 U.S. (6 Pet.) at 552, 555.

6. *Id.* at 559-61.

7. Chambers, *supra* note 2, at 1219-20; Collins, *supra* note 2, at 7-17.

8. Professor Ball argues that: "The likely origin of the trust doctrine is not Marshall's notion of wardship but the later ethnocentrism that also produced the notions of superiority and unrestrained power." Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 A.B.F. RES. J. 1, 63 (1987).

9. The allotment era was formally ushered in by the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-358 (1988)), and formally terminated by enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified in part at 25 U.S.C. §§ 461-494 (1988)). The judicial plenary power era reached its height as well from the 1870s to the 1930s. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207 (1984).

10. Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903); *see also* United States v. Kagama, 118 U.S. 375, 384 (1886).

11. *See Kagama*, 118 U.S. at 383. In *Kagama*, the Court upheld congressional power to impose the Major Crimes Act on tribes. *Id.* The Major Crimes Act of 1885, 18 U.S.C. § 1153 (1988), provided for federal jurisdiction over enumerated crimes committed by Indians within Indian country, effectively abrogating tribal control over the conduct of tribal citizens.

12. *See Lone Wolf*, 187 U.S. at 554-60. In *Lone Wolf*, the Court held that Congress could unilaterally abrogate a treaty with the Kiowa, Comanche, and Apache Tribes that required the signatures of three-fourths of the adult males for cessions of reservation lands. *Id.* at 564. Congress took the lands by statute for allotment and sale to homesteaders without the required signatures. *Id.* The Court determined that, in the exercise of its plenary power for the care of the Indians, Congress could not be limited by treaty promises, but must be free to act as it saw fit. *Id.*

dependent status of the tribes, the Court would "presume" that Congress had "a moral obligation . . . to act in good faith" in legislating over the tribes.[13] Whether Congress in fact complied with its obligation was a political question.[14]

Over the course of the twentieth century, the symbiotic relationship between the guardianship principles and federal plenary power underwent a second significant change. At the turn of the century, the guardian-ward relationship, the necessity for Congress to act for the protection of the tribes, was asserted as both the source and the justification of plenary power. But seventy-five years later, the trust relationship was asserted as a source of enforceable rights and duties placed on the agencies charged with implementing congressional policy.[15] As one indicator of this change, the Court repudiated many of the most destructive aspects of the plenary power doctrine. The Court ceased to write in overtly ethnocentric terms, and held that Congress' exercise of its power is at least subject to review under constitutional mandates.[16] By 1980, the Court had expressly rejected the doctrine of the plenary power era that congressional action toward tribes was a political question, escaping judicial review.[17] The other primary measure of the twentieth century change was the evolution of a legally-enforceable federal trust obligation to the tribes.[18] With the explosive growth of Indian rights litigation in the late 1960s and 1970s came the judicial development of a cause of action for breach of trust.[19]

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13. *Id.* at 566.

14. *Id.* at 568 (noting that "as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation").

15. *See* Newton, *supra* note 9, at 231-33. Because it is not constitutionally based, the trust doctrine cannot be asserted to prevent or remedy congressional action. *Id.* at 231. Instead, federal trust obligations are enforceable against the executive branch. *Id.* at 232-33.

16. Congressional action may, for example, be reviewed under various provisions of the Fifth Amendment. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980) (takings clause); Morton v. Mancari, 417 U.S. 535 (1974) (equal protection clause). *See generally* Newton, *supra* note 9, at 236-86.

17. *Sioux Nation*, 448 U.S. at 14-15 (noting that "*Lone Wolf*'s presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here").

18. Professor Newton has recently explored the extent to which breach of trust claims are legally enforceable in fact. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 784-817 (1992); *see also* Steven Paul McSloy, *Revisiting the Courts of the Conqueror: American Indian Law Cases in the Federal Circuit and the Court of Federal Claims, 1991-1993*, 43 AM. U. L. REV. 537, 589-608 (1994).

19. Seminole Nation v. United States, 316 U.S. 286 (1942). The Seminole Nation was awarded relief for breach of trust in a case which may mark the transition from the plenary power era view of the federal trust obligation to the modern approach. The Court spoke grandly of the "distinctive obligation of trust," *id.* at 296, and held the federal government to "the most exacting fiduciary standards." *Id.* at 297. Nonetheless, the *Seminole Nation* litigation was brought pursuant to a special jurisdictional act of Congress. *Id.* at 289. Not until the 1970s did the federal courts recognize a general action for breach of the federal trust obligation to tribes. *See* Chambers, *supra* note 2, at 1247 (noting in 1975 that it was still "premature" to state definitively that tribes had a recognized cause of

The Supreme Court defined the parameters of the breach of trust action in the *Mitchell* cases of the early 1980s.[20] In *Mitchell I*, the Court held that the General Allotment Act created only a "limited trust relationship" and therefore did not support an action for breach of trust for alleged federal mismanagement of allottees' timber resources.[21] By contrast, the Court held three years later in *Mitchell II*, the federal statutory and regulatory scheme for timber management did support an action for damages for breach of trust.[22] Unlike the "bare trust" of the General Allotment Act, the timber statutes and regulations placed comprehensive responsibilities on the federal government to manage the timber resources in the best interests of the Indians.[23] The federal government's "elaborate control" over Indian lands and resources, "reinforced by the undisputed existence of a general trust relationship," the Court held, decreed that the United States should be liable in damages for breach of its fiduciary obligations under the timber management scheme.[24]

Functionally, then, the *Mitchell* cases developed a tripartite approach to the federal government's trust relationship with the Indian tribes.[25] First, the federal government has a "general trust" relationship,[26] derived in all likelihood from Marshall's guardianship approach. Although the general trust may be little more than a statement that the government owes general fiduciary obligations to the tribes,[27] it nonetheless represents the historical obligation of the federal government to protect tribal lands and tribal self-government. In consequence, the general trust obligation serves as the source of the restraint on alienation of Indian lands.[28] The modern requirement that the Secretary of the Interior approve leases of Indian lands is an

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action for breach of trust); Ball, *supra* note 8, at 62 ("The trust doctrine is, for the most part, a creation of the 1970s.").

20. United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]; United States v. Mitchell, 463 U.S. 206 (1983) [hereinafter *Mitchell II*].

21. 445 U.S. at 542.

22. 463 U.S. at 226.

23. *Id.* at 224.

24. *Id.* at 225-26.

25. Newton, *supra* note 18, at 801-02.

26. *Mitchell II*, 463 U.S. at 226.

27. Newton, *supra* note 18, at 801. Professor Newton notes that the general trust relationship may also provide the rationale for the canons of construction. *Id.* The canons provide that treaties and statutes enacted for the benefit of Indians are to be construed, and all ambiguities are to be resolved, in favor of the tribes. *See* COHEN'S HANDBOOK, *supra* note 2, at 221-24.

28. Since 1790, congressional consent has been required for the sale or encumbrance of tribal property, as a means of protecting the tribal land base. *See* 1 Stat. 137 (1790). The current version is codified at 25 U.S.C. § 177 (1988).

outgrowth of that general trust responsibility for the protection of tribal lands and resources.[29]

The second type of trust relationship is the "bare" or "limited" trust, exemplified by the General Allotment Act, and restricted to the original purpose of the statute that creates it.[30] A limited trust may be remediable, but it does not give rise to fiduciary duties enforceable generally by actions for damages. Instead, the remedies are restricted to enforcement of the specific purposes of the limited duties.[31] For example, even in the absence of comprehensive federal control, the requirement of secretarial approval of leases will create a limited trust enforceable by an administrative action for cancellation.[32]

The third category of trust relationship is the full fiduciary relationship found in *Mitchell II*. This full trust relationship arises from comprehensive federal management of tribal assets, whether that management is established by comprehensive statutes and regulations or by actual pervasive federal control.[33] This last type of trust relationship, the full fiduciary relationship, is the one which gives rise to enforceable fiduciary duties remediable by actions for damages or other relief for breach of trust.[34]

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29. *See, e.g.*, Indian Mineral Development Act of 1982, 25 U.S.C. § 2102(a) (1988); Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a (1988). *See generally* Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974).

30. Newton, *supra* note 18, at 801-02. In *Mitchell I*, the Court referred to the General Allotment Act as creating "only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 542. In *Mitchell II*, the Court used the term "bare trust" to distinguish the government's obligations under the General Allotment Act from the full fiduciary responsibility under the timber management scheme. 463 U.S. at 224.

31. Newton, *supra* note 18, at 806 (noting that the General Allotment Act should give rise to an enforceable duty on the part of the government to prevent the forced sale of trust allotments for nonpayment of taxes).

32. *See* Wright v. United States, 32 Cl. Ct. 54, 58 (1994) (holding that the regulations governing surface leasing of allotted lands place only "limited duties" such as lease approval on the government and therefore create a right only to a "limited remedy" such as the right to challenge the leases through the administrative process).

33. *See Mitchell II*, 463 U.S. at 224-25; *see also* Newton, *supra* note 18, at 803-06. In most instances, a full fiduciary relationship is established by a statutory and/or regulatory scheme. But occasionally the courts will find a full fiduciary relationship based on the government's assumption of actual pervasive control. *See, e.g.*, White Mountain Apache Tribe of Arizona v. United States, 11 Cl. Ct. 614, 650 (1987) ("[T]he Government established a program of leasing grazing land under permits to non-Indian livestock owners. It was under no obligation to do so. But having undertaken to administer this program, the Government was obligated to act in a fiduciary capacity toward those lands."), *aff'd without opinion*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 1538 (1994).

34. *Mitchell II*, 463 U.S. at 226 ("Given the existence of a [full] trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."); Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1565 & n.3 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as modified, 782 F.2d 855 (10th Cir. 1986) (*en banc*) (action brought in federal district court for declaratory and injunctive relief, based on the government's full fiduciary obligations for mineral development). *See also* Newton, *supra* note 18, at

While the trust doctrine has been frequently criticized as paternalistic and colonialist, its retention today can be justified as a way to protect tribal territories and tribal rights within those boundaries.[35] To the extent that the doctrine actually serves to protect tribal lands, resources, and governmental rights against state and federal intrusion, it remains useful to the tribes. And to the extent that the doctrine places enforceable legal duties on the federal government, it is a source of valuable rights. Nonetheless, although the trust doctrine "ought to mean something real and be enforced with teeth,"[36] it too often does not and is not. The modern trust obligation does not limit what Congress may do,[37] and tribes have been "remarkably unsuccessful" in pursuing legal actions for breach of trust.[38] Despite those substantial drawbacks, however, the trust doctrine remains one of the few constraints on unfettered federal power over the Indian tribes.

III. TRIBAL MINERAL DEVELOPMENT

The particular context here for exploring issues of the federal trust obligation, environmental concerns, and administrative conflicts of interest is that of mineral development. And mineral development in Indian country is governed by extensive statutes and regulations, setting forth the trusteeship obligations of the federal government and the environmental compliance requirements for approval of mineral development projects. These aspects of the federal statutory scheme are considered below.

A. FEDERAL TRUST OBLIGATIONS IN MINERAL DEVELOPMENT

The federal government has enforceable trust obligations with regard to the development of tribal mineral resources. The federal fiduciary responsibility extends to any tribe which owns mineral resources in trust, and thus applies even to tribes which hold a beneficial

784-86 (discussing breach of trust claims in the federal district courts).

35. *See, e.g.*, Clinton, *Redressing Conquest*, *supra* note 2, at 134; Chambers & Price, *supra* note 29, at 1079-80. *But see* Robert Laurence, *A Memorandum to the Class*, 46 ARK. L. REV. 1, 16-17 (1993) (arguing that "in my dream world" tribes would not need the trust doctrine. "A government as sovereign as I want the tribes to be no longer needs the benefits of the trust responsibility.").

36. Laurence, *supra* note 35, at 15.

37. *See* Newton, *supra* note 9, at 285 (noting that "[w]hatever Congress wants, Congress gets"); Ball, *supra* note 8, at 62, 65.

38. Newton, *supra* note 18, at 789.

interest in only the subsurface mineral estate.[39] Tribal mineral resources may be developed today under either the Indian Mineral Leasing Act of 1938[40] or the Indian Mineral Development Act of 1982.[41] While the federal trust obligation with regard to mineral development is well established for mineral leases under the 1938 Act, its parameters for mineral agreements under the 1982 Act are less well-defined.[42]

The 1938 Indian Mineral Leasing Act and its implementing regulations comprise a comprehensive regulatory scheme for the leasing of tribal mineral lands, and thus create enforceable fiduciary duties.[43] The Secretary of the Interior is obligated, in approving 1938 Act leases, to maximize tribal economic returns and to act at all times in the best interests of the tribes.[44] More specifically, the trust duty requires the Secretary to make all decisions in the leasing process according to the best interests of the lessor tribes. Courts have held, for example, that in determining whether to approve a proposed lease[45] or an oil and gas communitization agreement,[46] or in determining the proper method of

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39. *See* 25 U.S.C. § 2102(a) (1988) (authorizing any tribe to enter into a development agreement for mineral resources "in which such tribe owns a beneficial or restricted interest"); 25 C.F.R. § 225.20 (same) and § 225.3 (defining "Indian mineral owner" to include any tribe "that owns a mineral interest in oil and gas, geothermal resources or solid minerals, title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States"). *See also* the Surface Mining Control and Reclamation Act, which defines "Indian lands" as all lands within reservation boundaries, regardless of ownership, "and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9) (1988). This definition includes even off-reservation lands in which the tribe owns either the surface estate or the mineral resources in fee. Valencia Energy Co., 96 Interior Dec. 239, 254 (1989), *aff'd*, New Mexico ex rel. Energy, Minerals & Natural Resources Dept. v. Lujan, 21 Indian L. Rep. 3113 (D. N.M. 1994).

40. 25 U.S.C. §§ 396a-396g (1988).

41. 25 U.S.C. §§ 2101-2108 (1988).

42. *See generally* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 568-71 (1938 Act), 589-92 (1982 Act) (1994).

43. Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir. 1986) (en banc), adopting as modified the dissent in Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563-69 (10th Cir. 1984) (Seymour, J., dissenting) (noting that the federal government's involvement in mineral leasing "is pervasive and its responsibilities comprehensive"). The 1986 modification of Judge Seymour's dissent did not affect her discussion or conclusions on the trust issue. *See also* Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986); Youngbull v. United States, No. 31-88 L, 1990 U.S. Cl. Ct. LEXIS 3, at *19-*23 (Jan. 4, 1990). Under the *Supron* analysis, the mineral leasing statute and regulations create a *Mitchell II* type of full fiduciary relationship. *See supra* text accompanying notes 33-34.

44. *Supron*, 728 F.2d at 1565; *Youngbull*, 1990 U.S. Cl. Ct. LEXIS at *27. *See* 25 U.S.C. §§ 396a-396b; 25 C.F.R. pt. 211 (1994). The Secretary's obligations in this regard are made even more explicit in the proposed new regulations for 1938 Act leases. *See* 56 Fed. Reg. 58,734, 58,737 (1991) (proposed at 25 C.F.R. § 211.1(a)); 56 Fed Reg. at 58,739 (proposed at 25 C.F.R. § 211.20(b)(6)).

45. *Youngbull*, 1990 U.S. Cl. Ct. LEXIS at *27.

46. Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 383, 388 (10th Cir. 1982); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 589 (10th Cir. 1992), *cert. denied sub nom.*, Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes, 113 S. Ct. 1642 (1993).

calculating royalties,[47] the Secretary's decisions are to be predicated upon the best interests of the tribes.

Although standard mineral leases under the 1938 Act are still available to tribes, they are little used today.[48] Most tribes developing mineral resources now prefer the flexibility and potentially greater economic returns of mineral agreements under the Indian Mineral Development Act of 1982.[49] And the 1982 Act expressly requires the Secretary to act "in the best interest of the Indian tribe" in approving or disapproving a mineral agreement.[50] Moreover, the implementing regulations clarify that the fiduciary standard applies whenever the Secretary considers any administrative action which affects the interests of the tribe.[51] In the decisionmaking process, the Secretary is directed to consider any relevant factor, including economic considerations and financial effects, the marketability of the minerals, and the "potential environmental, social and cultural effects" on the tribe.[52]

In addition to this general directive to act in a fiduciary capacity, the 1982 Act and its regulations create an integral role for the Secretary in the development of tribal mineral resources. Before an agreement is entered into, the Secretary is charged, to the extent of "available resources," with providing advice, assistance, and information to tribes that are negotiating mineral agreements.[53] The Secretary is also charged with preparing an economic assessment, including such factors as assurances of due diligence, adequate royalty provisions, and the likelihood of returns comparable to those obtainable through competitive bidding.[54] Similarly, the Secretary is responsible for

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47. *Supron*, 728 F.2d at 1567, 1569.

48. AMBLER, *supra* note 1, at 241; M. Julia Hook & Britt D. Banks, *The Indian Mineral Development Act of 1982*, 7(4) NAT. RES. & ENV'T 11, 52 (1993).

49. 25 U.S.C. §§ 2101-2108. Mineral agreements represent a substantial departure from the standardized leases of the 1938 Act. Under the 1982 Act, tribes may enter into "any joint venture, operating, production sharing, service, managerial, lease or other agreement" for the development of mineral resources. 25 U.S.C. § 2102(a).

50. 25 U.S.C. § 2103(b).

51. 25 C.F.R. § 225.3 (1994) ("*In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take administrative action affecting the interests of an Indian mineral owner.").

52. 25 U.S.C. § 2103(b); 25 C.F.R. §§ 225.3, 225.22(c) (1994). These factors, relevant to whether a proposed mineral agreement is in the best interest of the tribe, are derived from the "all relevant factors" standard developed in a series of Tenth Circuit cases delineating the trust responsibility under the 1938 Act. *See* Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 383, 387 (10th Cir. 1982); Cotton Petroleum Corp. v. U.S. Dep't of Interior, 870 F.2d 1515, 1525 (10th Cir. 1989); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 588 (10th Cir. 1992), *cert. denied sub nom.*, Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes, 113 S. Ct. 1642 (1993); Woods Petroleum Corp. v. Department of Interior, 18 F.3d 854, 858-59 (10th Cir. 1994).

53. 25 U.S.C. § 2106 (1988); 25 C.F.R. § 225.21(a) (1994).

54. 25 C.F.R. § 225.23 (1994).

ensuring the preparation of studies and surveys in compliance with federal environmental laws.[55] Once a mineral agreement is operative, the Secretary continues to have an important role. The Secretary is authorized to conduct audits.[56] All payments pursuant to a mineral agreement are made to the Secretary unless otherwise designated.[57] The Secretary may approve an assignment of a mineral agreement without the consent of the tribe, unless consent is required in the agreement itself.[58] Finally, the Secretary retains the right to issue notices of noncompliance and proposed cancellation.[59]

Despite the central role of the Secretary, the 1982 Act was designed to accord tribes greater control over the development of their mineral resources.[60] Mineral agreements are negotiated by the tribes and mineral development takes place only with tribal consent.[61] The 1982 Act expressly provides that tribes must assume more of the risk if they enter into mineral agreements. While the Secretary remains responsible for ensuring that the agreement is in the best interests of the tribe, the tribe itself is liable for any losses which it sustains under an agreement.[62] Nonetheless, the 1982 Act also expressly provides that the Secretary retains a fiduciary obligation to protect tribes against violations by other parties and that the Act was not intended to "absolve the United States from any responsibility to Indians, including those which derive from the trust relationship."[63]

The 1982 Indian Mineral Development Act thus preserves the federal trust obligations to tribes found under the 1983 Indian Mineral Leasing Act. While the 1982 Act accords tribes greater control over the

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55. 25 C.F.R. § 225.24 (1994). The federal laws with which the Secretary must ensure compliance include the National Environmental Policy Act, the Archaeological and Historic Preservation Act, the National Historic Preservation Act, and the American Indian Religious Freedom Act. *Id.*

56. 25 C.F.R. § 225.26 (1994).

57. 25 C.F.R. § 225.31 (1994). The regulation provides that prior to production, all bonus and rent payments "shall be made" to the appropriate officer of the Bureau of Indian Affairs. *Id.* After production, "all payments due for royalties, bonuses, rentals and other payments under a minerals agreement shall be made to the Secretary or such other party as may be designated." *Id.*

58. 25 C.F.R. § 225.33 (1994).

59. 25 C.F.R. § 225.36(a) (1994).

60. *See generally* Royster, *supra* note 42, at 584-85.

61. 25 U.S.C. § 2102(a) (1988). Not only do tribes initiate the mineral agreement process, but the 1982 Act also provides that the Secretary must give the tribe 30 days notice of the Secretary's decision to approve or disapprove an agreement, along with the Secretary's written findings. *Id.* § 2103(c). The notice requirement was intended to ensure that tribes are fully aware of the benefits and risks of the agreement, and to provide tribes with an opportunity to reconsider. S. REP. NO. 472, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465. During the notice period, before the Secretary's approval is final, a tribe may unilaterally rescind the agreement. Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1460 (9th Cir. 1986).

62. 25 U.S.C. § 2103(e) (1988) (providing that "the United States shall not be liable for losses sustained by a tribe" under an approved mineral agreement).

63. *Id.*

mineral development process, the Secretary's obligations remain detailed and central to that process. Moreover, the Secretary is expressly directed to act in the best interests of the tribes in taking action under the 1982 Act. While the Secretary is not a guarantor of tribal profits,[64] Congress intended the trust obligations to remain intact.[65]

B. ENVIRONMENTAL CONSIDERATIONS IN MINERAL DEVELOPMENT

Federal approval of tribal mineral agreements requires both procedural and substantive consideration of environmental values. Procedural protections arise under the National Environmental Policy Act (NEPA),[66] which requires the preparation of an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[67] Secretarial approval of mineral development on tribal lands constitutes major federal action triggering the NEPA requirement that an environmental study be prepared.[68] Unless an initial environmental assessment results in a

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64. *Id.*; *see also* H.R. REP. No. 746, 97th Cong., 2d Sess. 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3469-70; S. REP. No. 472, 97th Cong., 2d Sess. 12 (1982).

65. 25 U.S.C. § 2103(e) (1988); *see also* H.R. REP. No. 746, 97th Cong., 2d Sess. 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3469-70; S. REP. No. 472, 97th Cong., 2d Sess. 4-5 (1982); 128 CONG. REC. 29400 (1982) (remarks of Sen. Melcher).

For the reasons set out in the text, the 1982 Act and its regulations are distinguishable from the statutes and regulations governing surface leasing of allotted lands. *See* 25 U.S.C. § 415 (1988), 25 C.F.R. pt. 162 (1994). The Court of Federal Claims recently held that the surface leasing scheme does not create a fiduciary obligation enforceable by an action for breach of trust. Brown v. United States, 32 Cl. Ct. 509, 517 (1994); Wright v. United States, 32 Cl. Ct. 54, 57 (1994). In both cases, the court noted that the government's role in surface leasing of allotted lands is limited to approval of leases negotiated by the allottees. *Wright*, 32 Cl. Ct. at 58; *Brown*, 32 Cl. Ct. at 517. The Secretary has no duty to administer the leases or monitor the lessees' performance. *Wright*, 32 Cl. Ct. at 58; *Brown*, 32 Cl. Ct. at 516-17. Moreover, the surface leasing scheme does not require the Secretary to act in the best interests of the Indian owners. *Brown*, 32 Cl. Ct. at 516.

Under the 1982 Indian Mineral Development Act, by contrast, the Secretary's role is far from limited to final review of agreements negotiated by tribes. The Secretary's specific and continuing obligations, along with the express command to act at all times "in the best interest" of the tribes, preserves the federal trust responsibility with respect to tribal mineral resources. *See also Brown*, 32 Cl. Ct. at 516 (discussing the differences between the surface leasing scheme and that for mineral development).

66. 42 U.S.C. §4321 *et seq.* (1988). *See generally* Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991); *see also* James P. Boggs, *NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning*, 19 ENVT'L AFFAIRS 31 (1991).

67. 42 U.S.C. § 4332(C) (1988).

68. Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (establishing that federal approval of leases of Indian lands is major federal action within the meaning of NEPA and specifically noting that "[t]he fact Indian lands are held in trust does not take it out of NEPA's jurisdiction."). Compliance with NEPA is now mandated by the regulations implementing the 1982 Indian Mineral Development Act. 25 C.F.R. § 225.24(a) (1994) (requiring the Secretary to "ensure that all environmental studies are prepared" for mineral agreements "as required by the National Environmental Policy Act of 1969"). The same regulation has been proposed for mineral leases entered into under the 1938 Indian Mineral Leasing Act. 56 Fed. Reg. 58,734, 58,738 (1991) (proposed at 25 C.F.R. § 211.7).

finding that the proposed development will have no significant impact on the environment,[69] the government must prepare an EIS evaluating the environmental effects of the proposed action and discussing possible alternative actions.[70]

The Bureau of Indian Affairs (BIA) is responsible for the preparation of environmental impact statements for proposed development on Indian lands.[71] Where more than one federal agency is involved in the proposed action, the BIA acts as the lead agency, taking primary responsibility for the EIS;[72] other federal agencies with jurisdiction by law or special expertise may be cooperating agencies, entitled to participate in the NEPA process from its inception.[73] In addition to their participation in the preparation of the EIS, cooperating agencies are under a duty to comment on any draft EIS prepared by the lead agency.[74] The lead agency, in turn, is required to assess, consider, and respond to those comments in the final EIS.[75] Agencies with a strong interest in proposed mineral development on Indian lands, such as the Bureau of Land Management, thus have multiple opportunities to participate in and influence the EIS.

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69. 40 C.F.R. § 1501.4 (1994). Environmental assessments are generally conducted only for certain types of proposed actions. Agencies are required to identify those types of actions which normally require the preparation of an EIS and those types of actions, called categorical exclusions, which normally do not require either an EIS or an environmental assessment. *Id.* §§ 1501.4(a), 1507.3(b)(2). Environmental assessments are prepared for any proposed action which does not fall into either category. *Id.* § 1501.4(b).

70. 40 C.F.R. § 1502.1 (1994). For an explanation of the NEPA "screening process" for determining when an EIS is necessary, see Suagee, *supra* note 66, at 396-401. The BIA has determined that certain types of mineral development activities will normally require an EIS: any proposed mining contract or combination of contracts for other than oil and gas which involve either surface coal mines of at least 1280 acres or an annual full production level of 5 million tons or more, or any other new mine of at least 640 acres. *See id.* at 476. The BIA has also determined that the following actions normally require preparation of an environmental assessment: approval of mineral prospecting permits, approval of oil and gas contracts, grant of leases and permits for geothermal exploration and development, and approval of mining contracts encompassing less acreage than needed to trigger an automatic EIS. *Id.*

71. *See, e.g.*, Cady v. Morton, 527 F.2d 786, 790 (9th Cir. 1975); Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977) (both noting that the EIS for development on tribal lands was prepared by the BIA); *see also* County of San Diego v. Babbitt, 847 F. Supp. 768 (S.D. Cal. 1994).

72. 40 C.F.R. § 1501.5(a) (1994) (providing that the lead agency supervises the preparation of the EIS).

73. *Id.* § 1501.6 (1994). An agency has jurisdiction by law if it has "authority to approve, veto, or finance all or part of the proposal." *Id.* § 1508.15. An agency has special expertise if it has "statutory responsibility, agency mission, or related program experience." *Id.* § 1508.26. The BLM is an agency with jurisdiction by law or special expertise for mineral development on public lands. 49 Fed. Reg. 49,750, 49,761 (oil and gas), 49,762 (coal), 49,763 (uranium), 49,764 (geothermal), and 49,777 (non-energy minerals) (1984). When a proposed action will have environmental effects "on a reservation," the governing tribe or tribes "may by agreement with the lead agency become a cooperating agency." 40 C.F.R. § 1508.5 (1994).

74. 40 C.F.R. § 1503.2 (1994). *See also id.* § 1503.1(a)(1) (obligating the lead agency to obtain comments of cooperating agencies), § 1503.1(a)(2)(ii) (obligating the lead agency to request comments from Indian tribes "when the effects may be on a reservation").

75. *Id.* § 1503.4(a).

NEPA, however, is purely a procedural statute. The EIS requirement is intended to prevent uninformed actions, but it does not prohibit actions which may adversely affect the environment. Once a federal agency has complied with the procedural requirements of an environmental assessment or an EIS, the agency is free to decide that "other values outweigh the environmental costs" of the project.[76]

Because NEPA is procedural only, its applicability can present a dilemma for tribes seeking development of tribal lands. NEPA may prove generally advantageous, providing tribes with increased information prior to entering into leases and agreements. With the information provided by an EIS, tribes may choose on an environmentally-informed basis whether to proceed with development activities,[77] particularly projects such as mineral development which necessarily have some adverse impacts on the environment.[78] Nonetheless, NEPA has substantial disadvantages. To the extent that the EIS must consider the adverse environmental consequences of tribal development on lands and resources outside Indian country, it introduces non-Indian considerations into the Secretary's approval process.[79] Moreover, neighboring non-Indian interests may at least delay projects on tribal lands by challenging the adequacy of the EIS in federal court.[80]

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76. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

77. "[T]ribes can use the NEPA process to reach better decisions, at least in the environmental sense. Tribes can also use the NEPA process to make the BIA do likewise." Suagee, *supra* note 66, at 427.

78. *See* Royster, *supra* note 42, at 614-17. For a detailed discussion of the environmental consequences of uranium mining, see Lise Young, *What Price Progress? Uranium Production on Indian Lands in the San Juan Basin*, 9 AM. INDIAN L. REV. 1, 4-23 (1981).

79. NEPA's implementing regulations simply provide that an EIS should "describe the environment of the area(s) to be affected." 40 C.F.R. § 1502.15 (1994). The areas affected by tribal mineral development, or indeed any project giving rise to the necessity for an EIS, will not necessarily be confined to Indian country. Certainly in the case of a split tribal-federal estate, or in the case of contiguous tribal and federal tracts, the EIS would necessarily consider environmental impacts on the federal lands. *But see* COHEN'S HANDBOOK, *supra* note 2, at 531 (noting that to the extent the Secretary of Interior must consider effects on non-Indian lands, the Secretary's "trust duty may be compromised and a conflict of interest created between his duty to Indians and his more general duties as head of the Department of the Interior."). *See generally* the discussion *infra* in section V.

80. *See, e.g.*, County of San Diego v. Babbitt, 847 F. Supp. 768 (S.D. Cal. 1994) (challenging the adequacy of the EIS prepared for the Campo Solid Waste Management Project, a tribal project to construct and operate a solid waste disposal facility). Federal courts have expressly rejected the argument that only the affected tribe has standing to challenge noncompliance with NEPA regarding development of tribal minerals. Cady v. Morton, 527 F.2d 786, 792 (9th Cir. 1975). Nonetheless, attempts to prevent or delay mineral development through NEPA challenges are not confined to non-Indians. *See, e.g.*, Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) (members of the Navajo Tribe challenged the adequacy of the EIS for uranium mining on tribal lands).

If the agency finds that the proposed action will have no significant environmental impact and therefore does not prepare an EIS, that finding may also be challenged in court. Both challenges are procedural. If the court rules against the federal agency, the agency will be ordered to prepare an

In addition to the procedural consideration mandated by NEPA, the 1982 Indian Mineral Development Act regulations specify substantive consideration of environmental values. Before approving a mineral agreement, the Secretary must determine that it "does not have adverse cultural, social, or environmental impacts sufficient to outweigh its expected benefits to the Indian mineral owners."[81] Federal regulations thus require the Secretary to make a substantive determination that the environmental impacts of mineral development are less important than the putative benefits to the tribe.

While the wording of the regulation is less than clear concerning the extent of the environmental impacts which the Secretary is to consider, the context clarifies that it is the environmental impact on the tribe and its resources rather than the impacts on the surrounding environment generally. The regulations were proposed to meet multiple federal goals: "to fulfill [the federal] trust responsibility by providing adequate provisions to ensure the protection of the trust resources," to benefit the Indian mineral owners and remove barriers to development, and "to provide the Tribes as much freedom as possible to make their own determination" on the development of mineral resources.[82] In order for the Secretary to accomplish these objectives, the regulations provide in part that the Secretary must balance the adverse environmental impacts against the expected benefits. If the Secretary is required, or even permitted, to balance the expected tribal benefits against the environmental impacts occurring outside the tribe's Indian country, the agency fails in its goals of benefitting the tribal mineral owners and promoting tribal freedom of choice in the development of mineral resources.

The 1982 Act thus requires the Secretary to consider the environmental impacts of mineral development in both procedural and substantive aspects. As part of the trust responsibilities outlined by the Act and its regulations, the Secretary must take the "hard look" at environmental impacts mandated by NEPA. The environmental impacts, in turn, inform the Secretary's decision whether to approve a proposed mineral agreement and the tribe's decision whether to proceed. Moreover, the Secretary is obligated to disapprove a proposed mineral agreement if the environmental impacts on the tribe will outweigh the expected benefits of the development. The Secretary's failure to take

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EIS or to correct deficiencies in the original EIS. Once the agency has done so, it is nonetheless free to arrive at the same substantive determination that it made initially.

81. 25 C.F.R. § 225.22(c)(2) (1994).

82. 56 Fed. Reg. 58,734, 58,734-35 (1991).

any of these steps mandated by the 1982 Act and its regulations should be remediable by an action for breach of trust.

IV. THE FEDERAL TRUST AND CONFLICTS OF INTEREST

Conflicts of interest are inherent in the federal administrative structure. The federal government is not only the trustee for the tribes, but the representative of the public interest as well. While conflicts of interest can arise within any department[83] or between departments,[84] conflicts are most striking in the Department of the Interior. The Department of the Interior is charged with representing both the interests of the tribes on the one hand,[85] and a variety of public interests in lands and resources on the other.[86] Where tribal and public interests in the use of resources collide, the Department is nonetheless obligated to act on behalf of the tribes and at the same time to pursue programs and policies undertaken for the public interest.[87]

One of the principal duties of any trustee is the duty of undivided loyalty to the interests of the beneficiary, and the corollary that a trustee should subordinate its interests to those of the beneficiary.[88] And one of the principal questions raised by the federal administrative structure is the extent to which those trustees' duties can or should be preserved in conflicts situations.[89] On a number of occasions, the federal courts have

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83. One agency that frequently experiences these conflicts is the Justice Department, which is charged with representing both tribal and federal interests in certain water rights adjudications. Reid Peyton Chambers, *Conflicts of Interest in the Administration of the Federal Trust Responsibility*, *in* Indian Trust Counsel, Hearings Before the Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs, United States Senate, 92d Cong., 1st Sess. 203 (1971).

84. For example, the Interior Department and the Justice Department have disagreed on occasion over the extent to which Indian reserved rights to water should be pursued in litigation. *See* Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 19-20 & n.74 (1992).

85. *See* 25 U.S.C. §§ 1, 2 (1988). The Bureau of Indian Affairs, charged with the daily administration of Indian interests, is a subagency of Interior. *Id.* § 13 (1988).

86. *See* 43 U.S.C. § 1457 (1988). Congress has charged Interior with the administration of public lands, mines, reclamation projects, fish and wildlife, national parks, and petroleum conservation. *Id.* Subagencies within Interior such as the Bureau of Land Management, Bureau of Reclamation, and Bureau of Mines are the entities representing interests most often at odds with tribal interests.

87. COHEN'S HANDBOOK, *supra* note 2, at 228; Reid Peyton Chambers, *A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources*, Prepared for the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary of the United States Senate 2 (1971).

88. The duty of loyalty obligates a trustee "to administer the trust solely in the interest of the beneficiary." RESTATEMENT OF TRUSTS (Second) § 170. *See also* COHEN'S HANDBOOK, *supra* note 2, at 227.

89. Commentators have generally argued that the application of fiduciary principles is particularly necessary in conflicts situations, where political pressure on behalf of the non-Indian interests can be intense. *See* COHEN'S HANDBOOK, *supra* note 2, at 228; Chambers, *supra* note 87, at 3-4; Adele Fine, Comment, *Off-Reservation Enforcement of the Federal-Indian Trust Responsibility*, 7 PUB.

grappled with the proper role for Interior and other federal agencies in conflict of interest cases. The cases tend to address two sets of circumstances in which administrative conflicts arise. One situation involves proposed federal resource development or other federal action taken outside Indian country which will affect tribal rights and resources. The other involves conflicting claims to water, which has the characteristic of being simultaneously both an on- and an off-reservation resource. The following sections look at these conflict of interest situations.

A. OFF-RESERVATION FEDERAL DEVELOPMENT

The off-reservation development cases primarily address the question of whether the federal government, as trustee for the tribes, can develop federal resources in a way that harms tribal interests. In response, the courts have noted that statutes and regulations governing off-reservation federal actions do not create any full fiduciary relationship with the tribes. Against that backdrop, the courts have created essentially a two-tiered approach to the federal government's trust duties to tribes in undertaking off-reservation activities. First, the government must consider the environmental impacts on any affected tribe as a separate concern. But second, having done so, the government may generally meet its trust responsibility if it complies with the mandates of the applicable environmental laws. Having considered the tribal interests separately, the agency is entitled to balance those tribal interests against the competing interests. In deciding whether to proceed with off-reservation federal development, the government is thus entitled to weigh the adverse impacts on the tribe against public and national interests.

The government's obligation to separately consider impacts on the tribes arises under both the applicable federal statutes and the federal trust obligation. In *Northern Cheyenne Tribe v. Hodel*,[90] for example, the tribe challenged federal coal leases for several tracts of land that lay in close proximity to the reservation on three sides. The environmental

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LAND. L. REV. 117, 132 (1986).

90. 12 Indian L. Rep. 3065 (D. Mont. 1985). The district court entered an order voiding the coal leases at issue, but subsequently amended its injunction to suspend rather than void the leases. *Id.* On appeal by the tribe from the amended injunction, the Ninth Circuit held that the injunction should be further modified and remanded for that purpose. Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988). The lessees then moved to void the leases and the district court granted their motion. Northern Cheyenne Tribe v. Lujan, 804 F. Supp. 1281 (D. Mont. 1991). In that 1991 opinion, the district court noted that its original holding that the government had violated NEPA, the Federal Coal Leasing Act Amendments, and the trust obligation to the tribes (the issues discussed here in the text) had not been addressed or disturbed by the appellate court. "This holding stands today as the law of the case." *Id.* at 1285.

impact statement for the coal leases made little mention of the tribe or its land, and the concerns of the Northern Cheyenne Tribe were "largely ignored."[91] The government argued that it had considered the impacts on the tribal members "simply as people affected" by the leases, but the court rejected the government's position.[92] The Northern Cheyenne Tribe was "culturally discrete," with a government and economy that "differ substantially" from neighboring off-reservation communities.[93] Because reservation communities are not "similarly situated" to off-reservation areas, the government was obligated under NEPA to consider the unique impacts of coal development on the tribe.[94] The government's failure to consider the impacts on the tribe as a tribe rendered the EIS inadequate.[95]

Moreover, the court held, separate consideration of the impacts on the tribe was mandated by the federal trust obligation. The government's trust duty extends to federal actions taken off-reservation which impact the tribe.[96] That duty, the court said, "at the very least" requires the Secretary to "investigate and consider" the impacts of off-reservation development on the tribe as a separate entity.[97] The court rejected the government's argument that its trust obligation to the tribe was lessened because coal development was in the national interest. Instead, the court found that the trust responsibility was even more crucial in situations where the agency's conflict was between tribal interests and other goals for which political pressures might lead the agency to compromise the rights of the tribe.[98] In consequence, the court held that the Secretary had violated duties created both by federal statute and the federal trust responsibility to the tribe.[99]

As noted, those duties include the obligation to investigate and take account in the decisionmaking process of the impacts on the tribe as a

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91. *Id.* at 3068. The tribe's concerns centered on the social, cultural, and economic disruption of the coal leases, not the impacts on the natural or physical environment. *Id.* at 3066. But NEPA regulations define effects or impacts broadly to include not only ecological effects, but also "aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b) (1994). While economic or social effects are not sufficient in themselves to trigger the need for an EIS, they must be considered when an EIS is prepared. *Id.* § 1508.14; *Northern Cheyenne*, 12 Indian L. Rep. at 3067.

92. *Northern Cheyenne*, 12 Indian L. Rep. at 3068.

93. *Id.* at 3068-69.

94. *Id.* at 3069.

95. *Id.* The court also held that because the Federal Coal Leasing Act Amendments required the Secretary to consider the socioeconomic impacts on the tribe, the government was also in violation of that act. *Id.* at 3069-70.

96. *Id.* at 3070-71.

97. *Northern Cheyenne*, 12 Indian L. Rep. at 3071.

98. *Id.*

99. *Id.* at 3074.

separate entity from the surrounding non-Indian environment. If the investigation reveals no substantial impacts on the tribe, then proceeding with federal off-reservation development does not violate any fiduciary obligation. For example, in *Nance v. Environmental Protection Agency*,[100] the Crow Tribe claimed that the EPA had violated the federal trust obligation when it approved redesignation of air quality for the abutting Northern Cheyenne Reservation, on the ground that the redesignation would adversely affect coal development on Crow lands.[101] The court found that EPA had specifically considered whether strip mining on the Crow Reservation would be affected by the redesignation, and had concluded that it would not.[102] Having considered the concerns of the Crow Tribe, and determined that the off-reservation action would have no effect on Crow coal development, the EPA fulfilled the federal trust obligation to the Crow Tribe.[103]

Similarly, the Supreme Court determined in *Amoco Production Company v. Village of Gambell* that because oil and gas exploration on the outer continental shelf would "not significantly restrict" Alaska Native subsistence uses, the federal government could proceed with the lease sales.[104] Alaska Native villages claimed that the federal leases

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100. 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.* Crow Tribe of Indians v. Environmental Protection Agency, 454 U.S. 1081 (1981). *Nance* is, of course, an oddity in the off-reservation conflicts cases. First, the federal government was not engaged in development which might be harmful to tribal interests, but in environmental protection activities. And second, the federal activity which was off-reservation for the Crow Tribe was on-reservation for the Northern Cheyenne Tribe. The court in fact noted that the federal government was faced with "conflicting fiduciary obligations" to the two tribes. Because the court found, however, that no harm would result to the Crow Tribe from the Northern Cheyenne redesignation, it also found no breach of fiduciary duty to the Crow Tribe. *Id.* at 711-12.

101. *Id.* at 710-11. The redesignation was from Class II, which permits a moderate amount of deterioration in air quality, to Class I, which permits very little. *Id.* at 705; *see* 42 U.S.C. § 7473 (1988).

102. 645 F.2d at 706, 711.

103. *Id.* at 711. The court noted that in hindsight, the agency finding was incorrect. *Id.* At the time the Northern Cheyenne proposed to redesignate the air quality, strip mining was not one of the categories of air pollutant sources that required a preconstruction review to determine whether the source would violate air quality. *Id.* at 706. During the pendency of the Northern Cheyenne petition, Congress amended the Clean Air Act to require preconstruction review for any source emitting in excess of 250 tons of any air pollutant. *Id.* The court, however, determined that EPA was not obligated to take the amendments into account, for three reasons. First, it was unclear whether fugitive emissions from strip mining would be subject to the amended regulations. Second, it was unclear at what point Congress was so certain to enact the proposed amendments that the EPA should take account of them. And third, all of the agency action preliminary to final approval, including hearings and comments, had been taken prior to enactment of the amendments. *Id.* at 707-08. The fact that EPA's assessment of no impact on Crow coal development may have been wrong in light of subsequent events, however, "does not affect the answer to the question of whether the fiduciary responsibilities were fulfilled in the first place." *Id.* at 711. In fact, the Crow Tribe was correct that Northern Cheyenne redesignation would adversely affect Crow development plans. The redesignation "contributed to the demise" of Crow plans for coal gasification plant and a coal-fired power plant. AMBLER, *supra* note 1, at 184.

104. 480 U.S. 531, 544 (1987). The issue in *Village of Gambell* was whether the Alaska Natives

violated the Alaska National Interest Lands Conservation Act (ANILCA), which requires the government to "evaluate the effect" of leases on Native subsistence uses and needs.[105] The Court noted that ANILCA does not prohibit federal actions which adversely affect subsistence uses, but rather establishes a procedure that requires consideration of the impacts.[106] The Secretary is expressly permitted to weigh the development of energy resources against subsistence uses and to reconcile those competing public and tribal interests.[107] If the Secretary determines that development of federal lands is necessary and takes steps to ameliorate harm to subsistence uses, the federal development can proceed despite significant adverse impacts on subsistence uses.[108] In this case, the Secretary of the Interior determined that neither preliminary nor exploration stage activities would have any significant effect on subsistence uses; the Secretary also found that although development and production activities could significantly restrict subsistence uses in limited areas for limited periods in the event of a major oil spill, those activities were unlikely to occur.[109] Accordingly, since the oil and gas leases would have no significant impact on subsistence uses, the exploration would not be enjoined.[110]

The Ninth Circuit reached an identical conclusion based on trust doctrine principles in *North Slope Borough v. Andrus*.[111] The Inupiat people challenged a federal lease sale of oil and gas properties in the outer continental shelf on the ground of potential damage to the Bowhead whale. The Bowhead whales, protected under the Endangered Species Act, are crucial to the Inupiat subsistence lifestyle. Not only do the Bowhead constitute an important food source, but the culture of the tribe revolves around whaling, and in particular the hunt for the Bowhead.[112] The Inupiats claimed that the oil and gas leases threatened both the whale species and Inupiat subsistence and culture. The court specifically determined that the Secretary of the Interior was entitled to balance the interests of the Inupiat against other public concerns, and

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were entitled to a preliminary injunction, not whether the government had met its fiduciary obligations. Nonetheless, the analysis is instructive.

105. *Id.* at 535 & n.2; *see* ANILCA § 810(a), 16 U.S.C. §3120(a). If the leases will significantly restrict subsistence use, the government must determine that the restriction is "necessary" and must ensure "reasonable steps" to minimize the adverse impacts. *Id.* § 3120(a)(3).

106. 480 U.S. at 544.

107. *Id.* at 545-46.

108. *Id.*

109. *Id.* at 538-39.

110. *Id.* at 546.

111. 642 F.2d 589 (9th Cir. 1980).

112. *Id.* at 593.

that no one interest should have a veto over the Secretary's decision.[113] The court then found that the Secretary gave "purposeful attention" to the concerns and needs of the Inupiats and followed advice aimed at easing potential adverse impacts on them.[114] The court also found that the Secretary had complied with the Endangered Species Act.[115] Having complied with the Act and having specifically considered the interests of the Inupiats, the court held, the Secretary had satisfied the limited trust obligation owed to the tribe.[116]

In other cases as well the courts have held that federal compliance with applicable environmental laws constitutes compliance with the trust obligation. In *Havasupai Tribe v. United States*,[117] for example, the tribe challenged a Forest Service plan of operations for a uranium mine on federal lands. The proposed site of the mine was land sacred to the Havasupai people.[118] The court noted, and the tribe conceded, that the Forest Service had addressed in detail the tribe's religious concerns in the final environmental impact statement.[119] Having done so, having taken the requisite "hard look" at the impacts of the proposed action, the agency had complied with NEPA.[120] And, having complied with NEPA, the Forest Service met "any general fiduciary duty it may have had" to the tribe.[121]

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113. *Id.* at 612-13.

114. *Id.* at 612.

115. *Id.* at 607.

116. The court noted that no statute, treaty, or executive order created a trust obligation to the Inupiat people with regard to the Bowhead whale. In consequence, the federal trust obligation to the tribe was a limited trust only. *Id.* at 611-12. The court then apparently equated the limited trust obligation with the Secretary's obligations under the Endangered Species Act on the ground that the concerns of the Inupiat people were "parallel" to those of the environment. *Id.* at 612. Because "the substantive interests of the Natives and of their native environment are congruent," the Secretary's protection of the latter under the Endangered Species Act constituted protection of the former under the federal trust responsibility. *Id.*

117. 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd sub nom.*, Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991), *cert. denied sub nom.*, Havasupai Tribe v. United States, 112 S. Ct. 1559 (1992). The tribe did not appeal the holdings discussed in the text.

118. *Id.* at 1476.

119. *Id.* at 1493, 1498-99. The tribe did argue that the Forest Service could have made a greater effort. *Id.* The court noted, however, that the agency repeatedly requested specific information on Havasupai religious practices and that the tribe, for religious reasons, refused to provide more detailed information. *Id.* at 1499-1500. Under those circumstances, the court found that the Forest Service "took every reasonable step" to address the tribe's religious concerns. *Id.* More recently, the Tenth Circuit disagreed that similar actions by the Forest Service were reasonable. Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995). In *Sandia*, the tribe indicated to the Forest Service the existence of traditional cultural properties under the National Historic Preservation Act, but repeadedly declined to provide the Forest Service with specific information. *Id.* at 859-60. The court noted that secrecy is crucial to the tribe's religious and cultural practices. *Id.* at 861. The court therefore concluded that the Forest Service, based on the information communicated to it and the reasons why the Pueblo did not provide more specific information, did not make a reasonable effort to identify the properties. *Id.* at 861-62.

120. *Id.* at 1500.

121. *Id.* at 1489.

In a similar action, the Hopi Tribe and the Navajo Medicinemen's Association challenged recreational development of national forest lands because the lands were sacred to both tribes.[122] The court found that the Forest Service had not violated its trust responsibility to the tribes. That duty was defined by the American Indian Religious Freedom Act (AIRFA), which requires only that federal agencies take account of Indian religions in developing their policies and procedures.[123] Because the Forest Service evaluated its development plan with the aim of protecting Hopi and Navajo religion, the agency complied with AIRFA.[124] And because the agency complied with AIRFA, it also complied with any fiduciary duty or obligation which that statute imposed on the federal government.[125] Once again, the court noted that the federal government may weigh the interests of the tribe against the interests of the off-reservation development on federal lands, and that nothing in AIRFA required that tribal concerns "always prevail to the exclusion of all else."[126]

The off-reservation development cases thus form a pattern. None of the statutes applicable in the cases created a full fiduciary relationship between the government and the tribes. The statutes rather created at most a limited trust, an obligation on the part of the government to specifically consider the impacts of the proposed federal action on the tribe as a separate entity. Once the agency expressly evaluated and considered the tribe's concerns, however, it had met its trust obligations. The agency was then free to balance the concerns of the tribes against other national interests, and to find that the non-tribal interests prevailed.

B. WATER RESOURCES CONFLICTS

The law of administrative conflicts is most notorious in the context of water resources. Here the conflict of interest involves a common resource, the availability of an often-limited water supply, rather than an off-reservation activity that will impact tribal interests within Indian country. Many of the cases dealing with water law conflicts have focused on the federal government's dual representation of both tribal and federal interests in the course of litigation. In those cases, the courts

122. Hopi Indian Tribe v. Block, 19 ERC (BNA) 1215 (D.D.C. 1981).

123. *Id.* § C. [Section C of the opinion was omitted from the Environmental Reporter Cases (ERC); the full text of the opinion is available on LEXIS, Genfed Dist file.] AIRFA thus did not create a full fiduciary relationship between the federal government and the tribes. *Id.* at 1219-20.

124. *Id.* § C [omitted from ERC reporter].

125. *Id.* at 1220.

126. *Id.* § C [omitted from ERC reporter]. The court also made the same finding regarding consideration of tribal religious interests under NEPA. *Id.* at 1221.

have refused to find any harm to tribal interests from the fact of dual representation, noting that Congress has authorized the government to act simultaneously on behalf of both tribes and federal concerns. In other cases, the courts have focused on whether harm has occurred to tribal interests from the government's dual obligations regarding water. Where the tribe can show actual or likely harm, the courts will hold the government to its fiduciary obligations. But where the harm is not clear, or as in dual representation, not present, the courts are dismissive of tribal claims of conflict of interest.

The federal government is responsible for litigating tribal rights to water. Under its general trust obligation, the government has authority both to bring water rights claims on behalf of the tribes and to bind the tribes in the litigation.[127] In the McCarran Amendment of 1952, Congress waived the sovereign immunity of the United States, permitting the federal government to be joined as a party in general stream adjudications in state court.[128] Although the McCarran Amendment does not abrogate tribal sovereign immunity and therefore does not permit the involuntary joinder of tribes as parties, the Supreme Court has held that the amendment does permit state courts to adjudicate the tribes' water rights by exercising jurisdiction over the federal government.[129] As a result, the litigation of tribal rights to water in both federal and state courts is almost exclusively in the hands of federal litigators.[130]

The federal government is also responsible for litigating the water rights of federal projects and federal lands. In both federal and state courts,[131] the United States is obligated to assert the water rights of a

127. *See* Arizona v. California, 460 U.S. 605, 626-27 (1983) (original action in the Supreme Court in which the United States intervened on its own behalf as well as on behalf of the tribes); Nevada v. United States, 463 U.S. 110, 135 (1983) (action brought by United States on behalf of tribe).

128. 43 U.S.C. § 666 (1988); *see* United States v. District Court in and for Eagle County, 401 U.S. 520 (1971).

129. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566 n.17 (1983).

130. One commentator notes that even though the Wind River Tribes were parties to the general stream adjudication of the Big Horn River, transcripts showed that the courts "looked principally to the [federal] government's attorneys to defend the reserved rights doctrine." Membrino, *supra* note 84, at 18 (referencing the case of *In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court sub nom.*, Wyoming v. United States, 492 U.S. 406 (1989)).

131. As noted, the McCarran Amendment authorized the determination of federal water rights in the course of state court general stream adjudications. *Colorado River Water Conservation Dist.*, 424 U.S. at 809-13; *San Carlos Apache Tribe*, 463 U.S. at 566 n.17.

variety of federal entities, including reclamation projects,[132] as well as to claim reserved water rights for federal reservations.[133]

In any given water adjudication, then, the United States may be asserting both the rights of the tribes and the rights of federal projects or federally-reserved lands to the same source of water. That dual representation has dual difficulties. First, the federal government historically gave preference to the development of water resources for non-Indian use, and particularly for non-Indian agriculture, to the detriment of the tribes.[134] If tribes are concerned that the federal government also gave preference in litigation to non-Indian federal water rights, that concern "cannot be dismissed as implausible on its face."[135] Second, given the over-appropriated state of many western streams, the government may well be placed in a position where vigorously pursuing the rights of one client may reduce the amount of water available to satisfy the rights of another. In particular, since tribal rights to water tend to predate most non-Indian uses,[136] zealous litigation of tribal rights to water may leave insufficient water available for other federal uses once senior non-reserved rights are satisfied. In either case, federal representation of conflicting interests in water resources would appear to violate the trustee's duty of undivided loyalty.[137]

Nonetheless, the Supreme Court held that where Congress has required the federal government to represent both tribal and federal interests in water rights litigation, the government cannot be held to the standards of a private trustee.[138] In *Nevada v. United States*, the federal

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132. *See* Nevada v. United States, 463 U.S. 110, 127-28 (1983) (noting the federal government's obligation to protect the rights of the Newlands Reclamation Project, based on the government's title to the Project's water rights and the Reclamation Act of 1902).

133. *See* Cappaert v. United States, 426 U.S. 128, 138-42 (1976) (addressing reserved water rights for the Devil's Hole National Monument); United States v. New Mexico, 438 U.S. 696, 698-705 (1978) (addressing reserved water rights for the Gila National Forest).

134. *See* NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT 474-75 (1973); LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 21-23 (1991).

135. White Mountain Apache Tribe v. Hodel, 784 F.2d 921, 925 (9th Cir. 1986), *cert. denied*, 479 U.S. 1006 (1986).

136. Depending upon the source of tribal water rights, the priority date for tribal rights is either "time immemorial," United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), or the date the tribe's reservation was created. Arizona v. California, 373 U.S. 546, 600 (1963); Winters v. United States, 207 U.S. 564, 577 (1908). *See generally* Judith V. Royster, *A Primer on Indian Water Rights*, 30 TULSA L.J. 61, 70-71 (1994). In one case, a court refused to determine whether the Mescalero Apache Tribe had a priority date of time immemorial because a priority date based on the tribe's 1852 peace treaty would give the tribe the senior water right in the area in any case. New Mexico *ex rel.* Martinez v. Lewis, 861 P.2d 235, 238 (N.M. App. 1993), *cert. denied*, 858 P.2d 85 (N.M. 1993).

137. *See* Chambers, *supra* note 87, at 2.

138. Nevada v. United States, 463 U.S. 110, 142 (1983). The *Nevada* decision has been the subject of considerable scholarly criticism. *See, e.g.*, Roger Florio, *Water Rights: Enforcing the*

government itself attempted to reopen a 1944 water decree to assert additional water rights on behalf of the Pyramid Lake Paiute Reservation.[139] The government argued that because it had represented both the tribe and a federal reclamation project in the litigation, there was no adversity of interest between the claimants, and that without adversity, the decree could not be binding as between the tribe and the reclamation project.[140] The Supreme Court, however, determined that the interests were sufficiently adverse. Not only had the federal government pleaded the claimants' interests separately, but the reclamation interests had also been represented after 1926 by the local irrigation district.[141]

The Court dismissed the argument that the federal conflict of interest obviated the necessary adversity. While it recognized that the federal government owed "a strong fiduciary duty" to the tribe and more specifically a duty to represent the tribe in water rights litigation, the Court expressly refused to hold the government to the standards of a private fiduciary.[142] Where Congress requires the federal government to act both as a trustee for the tribes and as a representative of reclamation projects, the government does not owe a duty of undivided loyalty to the tribes. The Court found it "simply unrealistic" that the government could not, as required by Congress, represent both interests adequately.[143]

In *Nevada*, the government and the tribe as intervenor had argued specifically that the government breached its trust responsibility to the tribe by failing to assert a tribal water right for the maintenance of the Pyramid Lake fishery.[144] The district court in the *Nevada* litigation recognized that water for fishery maintenance created a direct "conflict of purposes" with the government's assertion of significant water rights for the reclamation project.[145] Nonetheless, the district court found that the government resolved the conflict within the executive branch by "political and policy decisions" to ignore the fishery right.[146] The

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Federal-Indian Trust After Nevada v. United States, 13 AM. INDIAN L. REV. 79, 94 (1975) (noting that *Nevada* "effectively sever[ed] water adjudication from the government's trust responsibilities"). The most succinct statement of the general reaction belongs to Professor Laurence: "*Nevada v. United States* goes. The government needs to be told to get serious about the prevention of conflicts of interest." Laurence, *supra* note 35, at 16.

139. *Nevada*, 463 U.S. at 113.

140. *Id.* at 137-39.

141. *Id.* at 140.

142. *Id.* at 128, 142.

143. *Id.* at 128. *See also* Arizona v. California, 460 U.S 605, 627 (1983).

144. The government did assert and obtain a water right for the tribe for irrigation. *Nevada*, 463 U.S. at 117-18.

145. *See id.* at 137-38 n.15 (quoting the district court's findings).

146. *Id.* at 138 n.15.

Supreme Court noted that this finding "reflects the nature of a democratic government this is charged with more than one responsibility."[147] The Court also subsequently noted that the Pyramid Lake Paiute Tribe had been compensated for the loss of its fishery water right, in the amount of $8 million.[148]

One of the central factors in the Court's decision in *Nevada* was the need for finality and certainty in water rights. The Court noted that the adjudication resulting in the 1944 decree was intended by all parties to be a comprehensive determination of water rights. Not only the parties to the litigation, but subsequent appropriators on the stream, relied upon the 1944 decree as finally and definitively setting the water rights of the parties to that decree.[149] However persuasive that point may have been in *Nevada*, in which the government sought to reopen the decree nearly thirty years after it was entered, it should carry no weight when a tribe raises the federal conflict of interest in an on-going or anticipated water rights suit. Nonetheless, the federal courts have rejected tribal claims of conflicts during the course of litigation. In *White Mountain Apache Tribe v. Hodel*,[150] the tribe claimed that the federal government could not adequately represent it in water rights litigation because the government intended to subordinate tribal claims to claims for reclamation projects.[151] The court noted that the tribe's allegation was "serious" and not necessarily "implausible on its face," but nonetheless refused the tribe any relief.[152] If the tribe wished to protect its own interests rather than rely solely on the federal government, the court said, it should intervene in the litigation.[153]

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147. *Id.*

148. *Id.* at 135 n.14. *See* Pyramid Lake Paiute Tribe v. United States, 36 Ind. Cl. Comm. 256, 269 (1975) (approving a compromise settlement awarding the tribe $8 million in damages for not having received all of the water it was entitled to under its water rights). One of the stipulations of the settlement was an agreement by the tribe and government that "no water rights reserved for the Pyramid Lake Indian Reservation have been lost, diminished or taken by reason of anything that has happened or been done between 1859 and the present." *Id.* at 261. The settlement was entered into after the Indian Claims Commission determined that the creation of the Pyramid Lake Reservation impliedly reserved water for the maintenance of the lake and the fishery; that the tribe "did not receive as much water as could have been beneficially used;" and that the federal government had an obligation to the tribe to preserve the waters and fisheries of Pyramid Lake. Northern Paiute Nation v. United States, 30 Ind. Cl. Comm. 210, 215, 217-18 (1973).

149. 463 U.S. at 143-44.

150. 784 F.2d 921 (9th Cir. 1986), *cert. denied*, 479 U.S. 1006 (1986).

151. White Mountain Apache Tribe v. Hodel, 784 F.2d 921, 923, 925 (9th Cir. 1986), *cert. denied*, 479 U.S. 1006 (1986).

152. *Id.* at 925.

153. *Id.* at 924-25. The tribes' ability to intervene in water rights litigation has not always been protected. The Pima Tribal Council attempted to intervene in 1935 to protest a consent decree that had been stipulated to by the United States and submitted to the federal court for approval. Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852, 860 n.5 (Ct. Cl. 1982). The federal

Nevada and *White Mountain* in concert leave tribes with no option other than acceptance of government representation. The court in *White Mountain* refused to hear the merits of the tribe's claim of conflict of interest, noting that it "cannot be determined in advance of the fact."[154] But the Court in *Nevada* held that it also cannot be determined after the fact. In other words, a tribe cannot assert federal conflict of interest prior to final determination in a water rights suit because the claim is premature, and cannot assert federal conflict of interest subsequent to final determination because of res judicata and the particular need in water rights for finality and certainty.

Courts consistently offer tribes the promise of a breach of trust action if the federal government fails to properly represent tribal interests,[155] but damages in breach are not water rights.[156] Moreover, breach of trust based on a federal conflict of interest is difficult to prove. For example, in *Fort Mojave Indian Tribe v. United States*,[157] the tribe claimed damages for breach based on the government's allegedly inadequate representation of the tribe's water rights in the litigation that led to the Supreme Court's 1963 decision in *Arizona v. California*.[158] The tribe claimed that the government's conflict of interest in *Arizona*[159] led the government attorneys to omit more than 26,000 irrigable acres from the tribe's asserted water rights.[160] The court dismissed the tribe's action, noting that more than thirty years had elapsed since the alleged breach.[161] As a result, witnesses were deceased or their memories were hazy, and documents had been destroyed.[162] Documents that were still

government opposed the intervention, in part on the ground that the tribe was already represented, and the court in fact denied the request to intervene. *Id.*

Whether tribes today have a right to intervene under Fed. R. Civ. P. 24(a), or may merely be permitted to do so at the discretion of the court under Rule 24(b), is not entirely clear. The Tenth Circuit has held that a tribe has a right to intervene in situations where a conflict of interest exists between the tribe and other interests of the federal government. New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). But the *Aamodt* court also noted that "[t]he claim that the Pueblos are adequately represented by government counsel is not impressive." *Id.* Since the Supreme Court subsequently held that government representation *is* adequate, even where conflicts exist, it is not certain whether tribes may continue to intervene as of right.

154. 784 F.2d at 925.

155. *Id.*; *see also supra* note 148 (discussing the Pyramid Lake Paiute's breach of trust action against the United States).

156. Damages can, at least in theory, be used to purchase water rights if a market exists. But any additional purchased rights would be state-law appropriation rights, subject to state regulation and administration, and undoubtedly with a far more recent priority date than tribal reserved rights.

157. 32 Fed.Cl. 29 (Cl. Ct. 1994).

158. 373 U.S. 546 (1963).

159. The case was an original action in the Supreme Court filed by Arizona to determine rights to the waters of the Colorado River. The United States subsequently intervened, *id.* at 551 n.3, to assert reserved water rights for five Indian reservations as well as national forests, recreational and wildlife areas, and "other government lands and works." *Id.* at 595.

160. *Fort Mojave*, 32 Fed.Cl. at 32-33.

161. *Id.* at 34.

162. *Id.* at 33-34.

in existence "often do not explain why the government took the actions that it did."[163] The only solid evidence the tribe could point to was a 1975 memorandum by a government attorney in the *Arizona* litigation who was removed from the case in the mid-1950s. The attorney alleged that the government had a conflict of interest and specified the tribal acreage that the government omitted at trial.[164] The court apparently gave little or no weight to that memorandum because it held that, since the tribe was "unable to provide significant additional evidence" to support the conflict of interest claim, the tribe "simply failed to demonstrate" an actionable breach of trust by the government.[165]

Tribal claims for damages for breach of trust based on federal conflicts of interest outside the litigation context have not fared much better. One of the themes of the litigation conflicts cases is the notion that the tribes do not suffer any harm from federal representation of both tribal and federal claims.[166] Even where federal representation was less than aggressive, courts have excused the impact on tribal water rights as representing simple calculation errors or "cautious litigation strategy."[167] Similarly, courts have been dismissive of tribal complaints that federal authorities improperly gave preference to non-Indian water projects to the detriment of the tribes, in the absence of proof that the tribes suffered actual harm.

In *Gila River Pima-Maricopa Indian Community v. United States*,[168] for example, the tribes claimed that the government failed to protect tribal water rights against upstream diversions by non-Indian irrigators. The Court of Claims held that because the Gila River Reservation was created to protect the existing agricultural community against white incursions, the United States had undertaken a special relationship for the protection of the tribes' water supply.[169] That special relationship, in turn, obligated the federal government, once upstream diversions interfered with the supply of water to the reservation, to take action to end the diversions or to supply the tribes with an alternative source of

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163. *Id.* at 34.

164. *Id.* at 32.

165. *Fort Mojave*, 32 Fed.Cl. at 32.

166. Nevada v. United States, 463 U.S. 110, 128 (1983) (finding no breach of any governmental duty to the tribes "solely by representing potentially conflicting interests without the beneficiary's consent").

167. Arizona v. California, 460 U.S. 605, 628 n.21 (1983).

168. 684 F.2d 852 (Ct. Cl. 1982).

169. *Id.* at 861-62. Because this action was brought under the fair and honorable dealings clause of the Indian Claims Commission Act, the tribe had to show a "special relationship" rather than a trust relationship in order to recover damages. *See* Newton, *supra* note 18, at 776-84 (discussing the fair and honorable dealings clause).

water.[170] However, the court determined that the United States had met its obligation as of 1905, when Congress appropriated $50,000 to begin an irrigation project on the reservation.[171] Eventually, under the irrigation projects authorized in 1905, the tribes were able to irrigate more acreage than they could have irrigated under the erratic natural flow conditions that existed prior to white settlement and diversion.[172] Accordingly, the court held, after the appropriation in 1905, the tribes suffered no injury from the on-going upstream diversions.[173]

Similarly, the court dismissed claims by the Gila River tribes that in the years prior to 1946, the government's lease policy required lessees to obtain an off-reservation source of water, and that consequent off-reservation pumping lowered the water table under the reservation and depleted groundwater needed for irrigation of tribal lands.[174] The Claims Court held that although groundwater is a valuable resource and groundwater use had "substantially" lowered the water table throughout central Arizona, including the tribes' reservation, the tribes had not shown any injury. The tribes failed to show that the off-reservation pumping deprived them of any water which they could have beneficially used at the time.[175]

In another case, the court termed the tribe's injury "conjectural."[176] In *White Mountain Apache Tribe v. United States*, the tribe claimed that the government managed the flow of the Salt River to benefit a reclamation project located downstream of the White Mountain Reservation, and consequently diverted water from the tribe.[177] The court quoted extensively from Interior Department documents of 1913 that noted the government's conflict of interest and posited that the government "would be bound to fulfill its engagements in respect to the

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170. 684 F.2d at 863.

171. *Id.* at 858, 863.

172. *Id.* at 861-63.

173. *Id.* at 863. The court did hold the federal government liable for its failure to take action prior to 1905, and remanded to the trial division to determine the appropriate amount of damages. *Id.* at 865. The court used 1905 as the cut-off date for injury even though that year represented only the appropriation for an irrigation project, and not the actual supply of water to offset upstream diversions. *Id.* at 863.

174. Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660, 697 (1986), *aff'd*, 877 F.2d 961 (Fed. Cir. 1989).

175. *Id.* at 701. On appeal, the Gila River tribes argued that the Claims Court erred in deciding the issue because the tribes had raised it only in order to rebut the government's proposed findings of fact. *Id.* at 964. The Federal Circuit determined that the tribes' assertion was "untrue," and therefore, because the tribes had not challenged the Claims Court's decision on the merits, let the lower court holding stand. *Id.* at 964-65.

176. White Mountain Apache Tribe of Arizona v. United States, 11 Cl. Ct. 614, 642 (1987), *aff'd without opinion*, 5 F.3d 1506 (Fed. Cir. 1993) (opinion published at 20 Indian L. Rep. 2156 (1993)), *cert. denied*, 114 S. Ct. 1538 (1994).

177. *Id.* at 627.

Reclamation project, even though by doing so it was hampered in the use of the water for the Indian Reservation."[178] The court agreed with the tribe that Interior "failed to understand the law" of reserved rights, under which the tribe's earlier priority date gave it first right to the water.[179] The court even agreed that federal management of the reclamation project was marked by "incompetence and maladministration, especially regarding balancing the interests of the tribes on the Gila River reservation in favor of land speculators."[180]

Nonetheless, citing *Nevada v. United States* for the proposition that the federal government may simultaneously fulfill obligations to both tribes and reclamation projects,[181] the court held that the White Mountain Apache Tribe had failed to prove that the government either diverted the tribe's water to downstream users or otherwise interfered with the tribe's reserved rights to water.[182] The court found that the government at no time prevented the tribe from diverting water for use on the reservation.[183] Moreover, it determined that any harm resulting from federal mismanagement of the reclamation project was inflicted not only on the White Mountain Apache Tribe, but also on other tribes and on non-Indian farmers.[184] Because persons other than the tribe suffered harm from the government's emphasis on the reclamation project, the

178. *Id.* at 633.

179. *Id.* at 638.

180. *Id.* at 629.

181. *White Mountain Apache*, 11 Cl. Ct. at 628 (citing Nevada v. United States, 463 U.S. 110 (1983)).

182. *Id.* at 644. The White Mountain Apache Tribe also claimed damages for harm caused to its rangeland by non-Indian overgrazing pursuant to a permit system established by the federal government. The tribe claimed that the government carried out a policy of overgrazing "for the purpose of increasing the flow of water from the reservation for the benefit of downstream users." *Id.* at 648. The court found that because the government "initiated and condoned" the conditions that led to overgrazing and erosion, it was liable for damages for breach of fiduciary duty. *Id.* at 659. The court expressly rejected, however, the contention that the government had deliberately done so in order to increase the water available to the downstream reclamation project. The court found that at most, the tribe proved only that the government was aware of some of the consequences of its actions. *Id.* at 661. In a subsequent case to recover damages for the government's failure to obtain adequate grazing fees, the tribe's expert witness discovered documentary evidence of collusion between non-Indian ranchers and the Fort Apache Agency Superintendent, including a 1912 letter discussing the superintendent's forced resignation. White Mountain Apache Tribe of Arizona v. United States, 25 Cl. Ct. 333, 335 (1992). Although that evidence may have been relevant to the tribe's claims concerning the state of the rangeland, the Claims Court expressly restricted its use to the grazing fees phase of the litigation. *Id.* n.2.

183. *White Mountain Apache*, 11 Cl. Ct. at 642. The court also found that the government was under no affirmative obligation to develop irrigation facilities for the tribe. *Id.* Its only obligation, apparently, was negative: a duty not to interfere rather than a duty to assist. *See* McSloy, *supra* note 18, at 601-02.

184. *White Mountain Apache*, 11 Cl. Ct. at 629.

court apparently determined that no conflict of interest between the reclamation project and the tribe's interests existed.[185]

Where a tribe can show actual harm from the government's conflicting obligations, however, the courts are willing to hold the government to fiduciary standards. In *Pyramid Lake Paiute Tribe v. Morton*,[186] the tribe challenged water allocation regulations as arbitrary and capricious. The federal government had established regulations for delivery of water to the Truckee-Carson Irrigation District for the following year. Water provided to the District is diverted from the Truckee River upstream of Pyramid Lake and the Paiute Reservation that encompasses it. The Truckee River is virtually the only source of water for the Lake; over the years, reduced flows had lowered the lake level by some seventy feet, caused erosion and salinity problems, and forced the native Pyramid Lake fish species onto the endangered species list.[187]

In setting regulations for how much water could be diverted from the Truckee, the Secretary of the Interior took recommendations and advice from a variety of sources, including agencies representing both the tribe and the Bureau of Reclamation, and made a "judgment call" on allocation of the water.[188] The court held not only that a judgment call was arbitrary and capricious decisionmaking in violation of the Administrative Procedures Act,[189] but also that the Secretary's failure to comply with the trust obligation to the tribes was an abuse of discretion.[190] The court held the government to "'the most exacting fiduciary standards'" in determining how much water would be diverted away from Pyramid Lake.[191] It was not enough for the government to assert the tribe's water right in court; the government was obligated to preserve water for the tribe to the fullest extent consistent with

185. The argument is reminiscent of the old pregnancy discrimination case. Even though only women can become pregnant, discrimination on the basis of pregnancy is not gender discrimination but discrimination between a class of pregnant women and a class of men plus non-pregnant women. General Electric Co. v. Gilbert, 429 U.S. 125 (1976), *reversed by* the Pregnancy Discrimination Act, 42 U.S.C. § 2000(h) (1988). The Claims Court apparently decided that if the government wrongfully diverted tribal plus other water to a reclamation project, the government therefore manifested no conflict of interest between pursuing the tribe's rights and those of the reclamation project.

186. 354 F. Supp. 252 (D.D.C. 1972). As noted earlier, the Claims Court held that the Gila River tribes were entitled to recover for the years during which the federal government did nothing to protect the tribes' water supplies against upstream non-Indian diversions. Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852, 863 (Ct. Cl. 1982). The *Gila River* case, however, was not an instance where the federal government had conflicting obligations to tribal and federal water rights. Instead, it was a case of a direct conflict between upstream state-law water users and the downstream tribe.

187. *Pyramid Lake*, 354 F. Supp. at 255.

188. *Id.* at 256.

189. *Id.*

190. *Id.* at 257.

191. *Id.* at 256 (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

contractual obligations to the Irrigation District.[192] A judgment call, the court held, was calculated to "placate temporarily conflicting claims" to the water, and not to fulfill the trust obligation to the tribe.[193] Accordingly, the court ordered the Secretary to repromulgate the regulations.

The central feature in the federal courts' approach to tribal claims of conflict of interest thus seems to be whether the conflict has caused or will cause some measurable injury to the tribe. Where at least the likelihood of harm is clear, as in *Pyramid Lake*, the courts will hold the government to strict fiduciary standards in resolving the conflicting claims to the water resource. Where the likelihood of harm is conjectural or unproven or otherwise not clear, the courts will lend little credence to tribal claims of federal conflict of interest. The primary difficulty with those cases is the courts' crabbed view of what constitutes injury. In particular, the *Nevada*-based refusal to see the mere fact of dual representation or dual obligations as injury leaves tribes with only the after-the-fact alternative of a damages action for breach of trust if the government's conflict can subsequently be shown to have caused actual injury. Only in the rare instances where tribes can show probable harm from conflicts inherent in on-going management of water resources, such as *Pyramid Lake*, will tribes be able successfully to assert the trust doctrine against the federal government. Absent that showing, tribes cannot prevent the federal government from weighing and reconciling its competing obligations rather than focusing on its fiduciary duty to the tribes.

V. CONFLICTS OF INTEREST IN TRIBAL MINERAL DEVELOPMENT

Much of the law of conflicts of interest as it has developed in the cases concerning off-reservation development and access to water resources is simply inapplicable to conflicts over the development of tribal resources. Use of the doctrines developed in those situations would, for a number of reasons, unduly prejudice tribal interests and subject tribal resource decisions to control by public interests. Most important, the development of tribal minerals, unlike the development of off-reservation resources or the general management of water resources, is based on a full fiduciary relationship with the tribes. Because of that full fiduciary relationship, the balancing approach of the off-reservation

192. *Pyramid Lake*, 354 F. Supp. at 256-57.
193. *Id.* at 257.

cases is inappropriate. The Secretary is obligated under the mineral development scheme not to weigh tribal interests against public values, but to act in the best interests of the mineral owning tribes. Moreover, nothing in the mineral development scheme places dual obligations on the government; nothing requires it to represent both tribal and competing public interests in decisions concerning the mining of tribal resources. Even to the extent that NEPA can be read as placing dual obligations on the Secretary to consider both tribal and competing environmental values, permitting non-tribal interests to block development of tribal mineral resources would result in actual harm to the tribes.

To a considerable degree, the existing law of administrative conflicts is based on judicial findings that no full fiduciary duty exists between the federal government and the affected tribes. In the off-reservation development cases, the lack of any full fiduciary relationship was a centerpiece of the courts' approach. None of the statutes governing off-reservation federal activities created general enforceable duties to the tribes. At most, the courts consistently held, the off-reservation statutes created some sort of limited trust that obligated the federal government to consider the impacts on the tribe as a separate concern in the federal decisionmaking process. Similarly, in the water resources cases, courts have generally rejected the notion that the federal government owes tribes any full fiduciary duties with respect to tribal water rights.[194] The government may have some limited trust responsibilities, including the obligation to represent tribes in litigation and the negative duty not to interfere with the development of tribal water supplies, but it does not have the full fiduciary relationship that would require the government to put its obligations to the tribes above its obligations to off-reservation water projects.[195]

In the case of mineral development, however, the government does have a full fiduciary relationship with tribal mineral owners. The trust obligation with respect to mineral development requires much more than consideration of tribal interests or a negative duty not to interfere with tribal development. It requires the government to act affirmatively in the best interests of the tribes, particularly in the determination whether to

194. The exception was the *Gila River* situation, where the court found that the government had undertaken a special relationship with respect to tribal irrigation water because the reservation was created specifically to preserve the tribes' agricultural way of life. *See supra* notes 168-73 and accompanying text (discussing Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct. Cl. 1982)).

195. The primary exception, discussed below, is the case of Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972). *See generally* text accompanying notes 186-93 (discussing *Pyramid Lake*).

approve a mineral agreement.[196] The starting point of any analysis of potential conflicting obligations surrounding mineral development, then, must be the full fiduciary relationship created by the mineral development statutes and regulations rather than the limited trust relationship created by environmental statutes or the federal common law of tribal water rights.

Accordingly, the balancing approach of the off-reservation conflicts cases is inappropriate. That balancing approach is predicated on the fact that the federal statutes governing off-reservation development of federal resources create at most a limited governmental duty to the tribes. The cases addressing tribal rights in off-reservation federal activities generally require the federal government to give separate consideration to tribal interests, but little more. Once the federal government has taken a particularized look at the impacts on the affected tribes, it is permitted to balance those impacts against the public interest. The full fiduciary relationship created by the mineral development scheme, by contrast, requires much more of the Secretary than a mere consideration of tribal interests. The Secretary is specifically directed by Congress to act in the best interests of the tribes, not merely to weigh those interests against competing public values. When the federal government acts with respect to tribal minerals, its obligation is thus not to reconcile competing interests, but to act as a trustee for the benefit of the mineral owners.

For much the same reason, the "two shoulders" approach[197] of the water rights cases is also inapplicable. In the case of mineral development, Congress has not obligated the Secretary to represent both tribes and competing public concerns. Instead, the mineral development scheme provides that the Secretary's obligation is to the tribes. Congress has directed the Secretary to act in the best interests of the mineral owning tribes, not to represent conflicting concerns. The only possible conflicting obligation mandated by Congress arises under NEPA. In the preparation of an environmental impact statement for tribal resource development, the Department of the Interior will necessarily consider the environmental impacts on affected non-Indian lands and communities, including nearby public lands represented by the Bureau of Land Management. But the obligations imposed under NEPA are procedural. Congress has mandated only that the Department take the requisite hard

196. 25 U.S.C. § 2103(b) (1988).

197. *See* Nevada v. United States, 463 U.S. 110, 128 (1983) (noting that "Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands").

look at the relevant environmental impacts, and not that Interior "represent" in any substantive sense the environmental values of the public.

Moreover, even to the extent that Congress has imposed dual obligations on the Secretary under NEPA, the Secretary's denial of tribal mineral development in order to appease non-Indian interests would cause actual harm to the tribes. The 1982 Indian Mineral Development Act was designed for two primary purposes: "to further the policy of self-determination" and "to maximize the financial return" to the tribes.[198] The dual-obligations approach would result in actual harm to both of those interests. First, the 1982 Act was intended to further tribal self-determination by according tribes greater control over mineral development. But that tribal control would be undermined by according a virtual veto to competing public interests, resulting in actual harm to a tribal interest specifically promoted by Congress. Second, mineral development is a major source of economic development for mineral-owning tribes. Not only do tribes receive revenues such as bonuses, rents, and royalties, but tribes also may tax the non-Indian share of production.[199] Tribes also can bargain in the mineral agreements for benefits such as job training and education, employment preferences, tribal subcontracting, and the like.[200] If the Secretary denies development of mineral resources, the impacts on tribal economies may be severe. Based on these factors, the likelihood of actual harm to tribal interests is substantial, and the Secretary should thus be barred from giving weight under NEPA to competing non-Indian claims.

If much of the law of administrative conflicts is inappropriate to resolve the government's competing obligations to tribal mineral development and environmental protection of public lands, the approach used in *Pyramid Lake* offers a resolution.[201] In that case, the court ruled that the Secretary was obligated to resolve conflicting claims to water consistent with the trust obligation to the tribe. Because the Secretary failed to ensure that water not contractually obligated elsewhere was delivered to the reservation for preservation of Pyramid Lake and its fisheries, the court held that the Secretary had "fail[ed] to demonstrate

198. S. REP. NO. 472, 97th Cong., 2d Sess. 2 (1982). Similarly, the goals of the 1938 Indian Mineral Leasing Act included assistance in achieving the Indian Reorganization Act purpose of revitalizing tribal governments and promotion of tribal economic development by ensuring tribes the greatest return on their minerals. S. REP. NO. 985, 75th Cong., 1st Sess. 2-3 (1937); H.R. REP. NO. 1872, 75th Cong., 3d Sess. 1-3 (1938).

199. *See* Royster, *supra* note 42, at 566-67, 586-87, 606-11.

200. *Id.* at 587-88.

201. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972). *See supra* text accompanying notes 186-93.

an adequate recognition of his fiduciary duty to the Tribe."[202] The court specifically rejected the theory that the Secretary could make a judgment call in an attempt to reconcile tribal and public interests in the water.[203] A similar approach was taken in one of the few cases to consider an on-reservation conflict of interest within the Interior Department. In *Navajo Tribe of Indians v. United States*,[204] an oil and gas lessee discovered helium-bearing gas which the oil company had no interest in producing. The company subsequently assigned its lease to the Bureau of Mines, an agency within the Department of the Interior; the tribe was not informed of the company's intent to surrender the lease or of the assignment itself until after the assignment was effective.[205] The Bureau of Mines noted the wartime need for helium, and expressed its desire to avoid "complications" that would arise if the tribe were involved in the transaction.[206] The court held that the government had violated its trust obligations to the tribe, obligations which were "even greater" when the adverse party was an agency of the Department of the Interior.[207] The court specifically found that the government's actions violated the federal trust duty to the tribe, even though those actions may have been in the national interest.[208]

The only appropriate standard for administrative conflicts of interest in mineral development is that suggested by *Pyramid Lake* and *Navajo Tribe*. The government's primary obligation in the development

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202. *Id.* at 257.

203. *Id.* at 256.

204. 364 F.2d 320 (Ct. Cl. 1966).

205. Navajo Tribes of Indians v. United States, 364 F.2d 320, 323 (Ct. Cl. 1966).

206. *Id.* The assignment took place in December of 1942. *Id.*

207. *Id.* The court found the situation "somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." *Id.* at 324.

208. *Id.* at 323-24. A similar situation arose over exploration for uranium on the Navajo Reservation during World War II. Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227, 249 (1985). In order to benefit national defense and the Manhattan Project, the federal government authorized the survey and mapping of Navajo lands without informing the tribe, obtaining the consent of the tribe, or compensating the tribe. *Id.* at 249-51. The court found that although the government's actions arguably violated a private fiduciary's duty of loyalty, after Nevada v. United States, 463 U.S. 110 (1983), the government was no longer held to private fiduciary standards in conflicts situations. 9 Cl. Ct. at 251-52. In the *Navajo Tribe* case, the court determined that the federal government was faced with conflicting obligations to the tribe and to national defense, and was therefore not bound by a strict duty of loyalty. *Id.* at 252. The court also, however, went out of its way to explain that the Navajo Tribe had suffered no injury from the government's actions. The court concluded, in fact, that the uranium exploration "equally promoted the purposes of the trust arrangement between plaintiff and defendant regarding the leasing of lands for mining purposes." *Id.* at 253. In addition, the court found that the tribe itself had recognized that the promotion of national defense interests "could serve plaintiff's interests as well." *Id.* at 254. The case thus follows the pattern established in the off-reservation conflicts cases, *see supra* part IV: where the federal action does not result in any actual injury to the tribe, the government is entitled to balance the tribal interests against other public concerns and to find that the national concerns outweigh the trust obligation to the tribe.

of tribal mineral resources is to the tribes. That obligation, arising from the full fiduciary relationship created by the mineral development scheme, requires the government to put the interests of the tribes above the public interest. The government may not engage in judgment calls or in attempts to reconcile the conflicts between tribal and public interests. In particular, where other interests represented by the Department of the Interior are in conflict with tribal interests, the Secretary must act scrupulously to protect the best interests of the tribes.[209]

In any given instance, of course, bureaus such as Land Management may have legitimate environmental concerns regarding the development of tribal mineral resources. But the regulations governing mineral agreements under the 1982 Indian Mineral Development Act mandate compliance with NEPA,[210] which in turn mandates a hard look at the environmental consequences of the proposed action. The Bureau of Land Management or any other affected agency is entitled to participate in the NEPA process and to comment on the draft EIS prepared by the Bureau of Indian Affairs. Agencies representing interests in competition with tribal interests thus have several opportunities to make their environmental concerns known and to have those concerns addressed in the EIS.

The information revealed by the EIS process is available to the tribes before the decision to proceed with a mineral agreement is final. Tribes thus take into account, in determining whether they wish to develop their mineral resources, the environmental impacts on both the tribal and neighboring non-tribal environment. If a tribe believes that the environmental consequences of a proposed mineral agreement are too serious, it can withdraw its initial consent. If a tribe believes that the benefits of mineral development justify proceeding despite the known environmental impacts, the agreement goes to the Secretary of the Interior for approval.

As a preliminary step to approving any mineral agreement, the Secretary must determine that the environmental consequences of the agreement do not outweigh its expected benefits for the tribe.[211] The regulations thus specify precisely what the Secretary's obligation is: the Secretary is to balance the environmental impacts on the tribe against the economic and other benefits to the tribe. If the benefits outweigh the environmental impacts on the tribe, the Secretary may approve the

209. *See Navajo Tribe*, 364 F.2d at 323.
210. 25 C.F.R. § 225.24 (1994).
211. 25 C.F.R. § 225.22(c)(2) (1994).

proposed mineral agreement as in the best interests of the tribe. If the Secretary also balances the interests of the tribe against the environmental consequences to public lands, the Secretary may potentially reject mineral development that is in the best interests of the tribes on the ground of environmental impacts on non-Indian interests. That balancing of tribal concerns against public interests, when the governing statutes specify that the best interests of the tribes should control the Secretary's decision, violates the federal fiduciary obligation to the mineral owning tribes. The Secretary has no authority under the statutes to subordinate the best interests of the tribes to public values or the national interest.

VI. CONCLUSION

Development of tribal mineral resources creates the potential for conflicts of interest within the Department of the Interior, pitting tribal interests in development against environmental concerns for public lands and resources. In most of the cases involving similar conflicts of interest, the federal government is authorized to represent the dual interests and to balance the tribal interests against competing public concerns, in significant part because the situations do not impose full trust duties on the government. The federal statutes and regulations governing mineral development, however, create a full fiduciary relationship obligating the Secretary of the Interior to act in the best interests of the tribes, and the best interest determination requires full consideration of the environmental impacts on the tribes as well as full compliance with the National Environmental Policy Act. Because environmental values are fully considered in the determination whether mineral development is in the best interests of the tribes, and because the Secretary's statutory obligation is to the tribal interests, any further balancing of competing concerns over environmental impacts on public lands would violate the federal trust obligation to the tribes. In determining whether to approve development of tribal mineral resources, the Secretary's obligation is to the tribal mineral owners and not to a balancing of tribal and public interests.