Denver Law Review

Volume 83
Issue 4 *Symposium - Borrowing the Land: Cultures of Ownership in the Western Landscape*

Article 10

January 2006

Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources

Curtis G. Berkey

RETHINKING THE ROLE OF THE FEDERAL TRUST RESPONSIBILITY IN PROTECTING INDIAN LAND AND RESOURCES

CURTIS G. BERKEY†

It has been 175 years since Chief Justice John Marshall described the relationship of sovereign Indian tribes to the United States as "resembl[ing] that of a ward to his guardian" because tribes "look to our government for protection" and could "perhaps, be denominated domestic, dependent nations."[1] Fifty years after the *Cherokee* cases, this loosely-drawn analogy, originally based on treaty provisions pledging the protection of the United States to ensure the sovereign rights of certain tribes, had transmuted into the legal and historical fact of literal wardship.[2] In *United States v. Kagama*,[3] the Supreme Court upheld the constitutionality of an act of Congress extending the criminal jurisdiction of the United States over crimes committed by Indians against Indians within Indian country.[4] The power of Congress to govern Indian tribes in this fashion could not be located in any textual provision of the Constitution. Rather, the Court based such power on the "wardship" status of Indian tribes:

> These Indian Tribes *are* the wards of the nation. They are communities dependent on the United States, – dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection . . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties, in which it has been promised, there arises the duty of protection, and with it the power.[5]

The *Kagama* formulation is frequently cited as the basis for the federal government's exercise of extra-constitutional and extra-statutory powers, and commentators and tribal advocates have correctly pointed

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† Mr. Berkey is a partner at Alexander, Berkey, Williams & Weathers LLP and specializes in the area of tribal environmental protection, cultural resource protection, water rights and land claims. He has worked in the field of Indian Law more than twenty-five years, as a staff attorney and the Washington Director of the Indian Law Resource Center, in Washington, D.C. as a senior trial attorney in the Indian Resources Section of the Environment and Natural Resources Division, U.S. Department of Justice, and in private practice. Mr. Berkey thanks Scott Williams for his assistance in the preparation of this Article.

1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
2. *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886).
3. 118 U.S. 375 (1886).
4. *See Kagama*, 118 U.S. at 385.
5. *Id.* at 383-84.

out that this aspect of the so-called trust responsibility has furnished the jurisdictional basis for many of the destructive policies and practices of the United States.[6] Yet, tribes and their attorneys have also relied on the trust responsibility, in particular the lofty rhetoric of a few Supreme Court opinions,[7] to craft a legal theory designed to hold the federal government accountable for management of Indian land and resources, or in approving unwanted development on tribal lands.

Although it is now "undisputed" that there is a "general trust relationship between the United States and the Indian people,"[8] the specific contours of the trust obligation of the United States have been difficult for courts to define. It was not until *United States v. Mitchell*[9] in 1983 that the Supreme Court ruled that the Department of the Interior could be held to account in money damages for its mismanagement of Indian resources.[10] The reason specific applications of the trust obligation have so confounded courts may lie in its murky origins. The guardianship analogy of the *Cherokee* cases does not fit easily into the trusteeship concept of the modern cases.[11] Another possible explanation for the lack of doctrinal clarity may concern the difficulty of applying conventional rules of private trusteeship arrangements to the conduct of federal agencies as trustees, especially when the goal is to hold the United States accountable in damages under the Tucker Act.[12] Then again, more pedestrian concerns may be at play in the judicial reluctance to endorse a legal theory that might subject the federal treasury to a flood of money damage awards.

Mitchell appeared to give new life to efforts to use trust theories and fiduciary standards in Indian rights litigation, although its standard of federal "control or supervision" of trust assets as the prerequisite for trust duties has proven to be exceedingly difficult to meet.[13] With regard to

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6. *See, e.g.*, Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 MICH. J. L. REFORM 899, 950-51 (1998).

7. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (affirming the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.").

8. United States v. Mitchell, 463 U.S. 206, 225 (1983).

9. 463 U.S. 206 (1983).

10. *See Mitchell*, 463 U.S. at 225.

11. *See id.* at 235 n.8 (O'Connor, J., dissenting) ("[T]he duties of a trustee are more intensive than the duties of other fiduciaries.").

12. 28 U.S.C. §1491 (2005). Stating a claim under the Tucker Act requires a showing that a particular statute mandates compensation against the United States for its violation. *Mitchell*, 463 U.S. at 217. No such requirement appears to apply to breach of trust suits against private trustees.

13. *See, e.g.*, Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987) (Individual Indian beneficial owners of mineral interests failed to state a claim against the Secretary of the Interior for underpayment of oil and gas royalties because the Government's fiduciary obligation is met by complying with the leases and applicable statutes and regulations.); United States v. Navajo Nation, 537 U.S. 488 (2003) (rejecting a claim of $600 million in damages arising from Secretary of the Interior's approval of coal lease amendments setting a royalty rate of 12.5% rather than 20% of the lessee's gross revenues. The Court could find no statute or regulation that created a duty enforceable in an action for damages under the Tucker Act). There are dozens of such cases pending today. *See,*

natural resource development on Indian lands, the doctrine of federal trusteeship is relevant in principally two ways: first as a legal theory to obtain injunctive relief to stop the federal government from approving development that Indian tribes and tribal communities oppose; and second, as a legal theory to hold the United States accountable in damages for authorizing development on terms Indian tribes believe are unfair or unreasonable, or for authorizing development that injures significant tribal lands or resources.[14] This Article focuses primarily on the use of the trust doctrine to obtain injunctive relief, although, as explained below, the courts have imported the standard for stating a cause of action for damages into claims for declaratory and injunctive relief.

In light of the preservation goals of the trust responsibility, natural resource protection is a logical field for its use. Although the federal environmental statutes are invariably the core of most Indian environmental cases, in most cases those statutes are inadequate to sufficiently protect the conservation and preservation values and goals of tribes.[15] In particular, the National Environmental Policy Act (NEPA)[16] and the National Historic Preservation Act (NHPA),[17] the most frequently invoked environmental statutes, provide primarily procedural protections designed to ensure a full and complete record on which to assess the impact of federal actions on the environment.[18] These statutes obligate federal agencies to take into account the consequences of their actions on the environment and on historic properties and to consult with the affected parties to ensure that all potential short term and long term environmental effects are considered.[19] In virtually every case, courts note that such statutes do not dictate a particular substantive result.[20]

Indian tribes have resorted to trust theories to fill the gaps left by environmental statutes. The reliance on trust theories for such purposes raises a number of questions: Can the trust responsibility be used to require federal agencies to do more than adhere to the procedural require-

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e.g., Alan R. Taradash, *Tribal and Allottee Trust Asset Cases Pending in 2003: Brief Case Summaries*, *in* COURSE MATERIALS, 28TH ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE 121-29 (2003). The "control or supervision" standard may have been modified by the Supreme Court in *United States v. White Mountain Apache*, 537 U.S. 465, 475 (2003), where the Court ruled that statutory language that property is held "in trust" supports a "fair inference" that an obligation to preserve the property is incumbent on the United States as trustee even if the statute did not expressly subject the Government to specific management duties.

14. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims for Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 364-68 (2003).

15. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 117.

16. 42 U.S.C. §§ 4321-47 (2005).

17. 16 U.S.C. § 470 (2005).

18. *See* 42 U.S.C. §§ 4321-47; 16 U.S.C. § 470.

19. *See* 42 U.S.C. §§ 4321-47; 16 U.S.C. § 470.

20. *See, e.g.*, Northwest Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997) ("NEPA is designed to ensure a process, not a result").

ments of NEPA and NHPA? Is there a legally enforceable obligation on federal agencies to act in the best interests of tribes in decisions that affect the tribe's environment? Is the "general trust relationship" between the United States and tribes merely descriptive or does it impose prescriptive legal duties? To take one concrete example, does the trust responsibility require federal agencies to restore harvestable runs of salmon in the Pacific Northwest, rather than just viable runs?[21]

The federal courts that have addressed these questions have not given consistent answers. Over two decades ago, several cases raised the possibility that the trust responsibility could become an enduring source of authority to enforce the obligation of the federal government to protect tribal natural resources.[22] With few exceptions, however, the efficacy of the trust doctrine in the environmental area has steadily weakened since then, a trend that perhaps mirrors the lamentable state of Indian law in the federal courts generally.[23] The promise of the early cases has thus not been realized.

In 1980 in *Northern Slope Borough v. Andrus*,[24] Native villages in Alaska and several environmental organizations challenged the decision of the Department of the Interior to lease offshore areas in the Beaufort Sea for oil and gas development.[25] The plaintiffs' principal objection was that the leasing would jeopardize the Bowhead and Gray whale populations and other animal species that were used by Alaska Natives for subsistence purposes.[26] The plaintiffs' theories of relief included the trust responsibility and various environmental statutes.[27]

The district court accepted the villages' argument that the statutes designed to protect animals from extinction impose a trust responsibility on the Federal government to "protect the Alaskan Natives' rights of subsistence hunting."[28] Noting that the trust responsibility does not "transcend the statutes creating that responsibility," the court nonetheless relied on the trust doctrine to buttress the Government's statutory duties:

> [The trust responsibility] serves three purposes, to wit: (1) it precludes the use of environmental statutes to undermine the subsistence

21. *See* Charles F. Wilkinson, *Indian Tribal Rights and the National Forest: The Case of the Aboriginal Lands of the Nez Perce*, 34 IDAHO L. REV. 435 (1998) (discussing the Nez Perce Tribe's relationship with the United States Forest Service and the Forest Service's duty to protect treaty rights and noting the conflict between the tribe and the Forest Service over the standard required by the United States to provide harvestable runs of salmon).

22. *See, e.g., Mitchell*, 463 U.S. at 225.

23. *See* North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980) (epitomizing the weakening of the trust doctrine in the environmental area). *See also* Wood, *supra* note 15 at 211-12 (noting that some courts in regard to public lands have "insisted that a trust duty off the reservation be predicated on express language in a statute, treaty, executive order.").

24. 486 F. Supp. 332 (D.D.C. 1980).

25. *See id.*

26. *Id.* at 340-41.

27. *Id.* at 344-47.

28. *Id.* at 344.

> cultures, (2) it requires the Secretary to be cognizant of the needs of the Inupiat culture, and (3) it demands of the Federal government (and thus the courts) rigorous application of the environmental statutes to protect the species necessary for the Inupiats' subsistence.[29]

Applying these standards, the court upheld the Native villages' claims under NEPA and the Endangered Species Act, because of deficiencies in the Environmental Impact Statement and the biological opinion adopted under the Endangered Species Act to reduce the likelihood that leasing would jeopardize endangered species.[30]

The Court of Appeals affirmed the district court's interpretation of the trust responsibility, but reversed its conclusion that the trust obligations had not been met.[31] The court concluded that the Secretary of the Interior had "fulfilled his trust obligation" by giving "purposeful attention to the special needs of the Inupiats" and "obvious consideration" to their fears of the impact of the leasing on their subsistence needs.[32] The court further relied on the fact that the Secretary followed the advice and recommendations of an assistant secretary "which were aimed at easing any adverse impacts on the Inupiats."[33] The court cautioned, however, that the trust responsibility does not give the Native villages "an overriding veto staying the Secretary's hand with respect to other public concerns."[34]

The second promising case was *Northern Cheyenne Tribe v. Hodel*.[35] There, the Tribe sought to overturn the decision of the Department of the Interior to sell coal leases on lands adjacent to the Tribe's Reservation.[36] The Tribe's primary concern was that the Department failed to adequately consider and mitigate the adverse social, economic and cultural effects of the lease sale on the tribe.[37] The Tribe argued that the decision to sell the leases violated the trust obligations of the Department, as well as NEPA and the Federal Coal Leasing Act.[38]

The district court ruled that the trust responsibility or "special relationship" is an independent source of legal duty on the Department to consider and mitigate the potential impacts of the lease sale on the Tribe.[39] The court held that the trust obligation was violated:

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29. *Id.*
30. *Id.* at 362.
31. North Slope Borough v. Andrus, 642 F.2d 589, 614 (D.C. Cir. 1980).
32. *Andrus*, 642 F.2d at 612.
33. *Id.*
34. *Id.* at 613.
35. [1985] 12 Indian L. Rep. (Am. Indian Lawyer Training Program) 3065 (D. Mont. 1985).
36. *Hodel*, [1985] 12 Indian L. Rep. (Am. Indian Lawyer Training Program) at 3065.
37. *Id.* at 3066.
38. *Id.* at 3067-71.
39. *Id.* at 3070.

> Ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in the decisional process leading to the sale of the Montana tracts violated this trust responsibility. Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider the impacts of his action upon a potentially affected Indian tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary's obligations are any less than this would be to render the trust responsibility a *pro forma* concept absolutely lacking in substance.[40]

More recently, the courts have taken a more jaundiced view of the trust responsibility as a source of independent duties in environmental cases. The hostility of federal courts to trust arguments in the environmental area can be illustrated by four recent cases. In *Morongo Band of Mission Indians v. Federal Aviation Administration*,[41] the Ninth Circuit Court of Appeals ruled, *inter alia*, that the Government's duty under the trust responsibility is discharged by its compliance with its duties under the environmental statutes.[42] In that case, the Tribe challenged a new aircraft arrival route into Los Angeles that would traverse the Morongo Reservation and harm the Tribe's religious and cultural practices that required quiet reservation areas.[43] Rejecting the Tribe's argument, the court ruled that the Government's trust duties were coterminous with its statutory duties:

> Thus, although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.[44]

The Ninth Circuit followed a similar approach in *Skokomish Indian Tribe v. Federal Energy Regulatory Commission*.[45] There, the Skokomish Tribe sought judicial review of FERC's denial of its application for a permit to develop a hydropower facility on the North Fork of the

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40. *Id.* at 3071.

41. 161 F.3d. 569 (9th Cir. 1998).

42. *Morongo Band*, 161 F.3d at 574.

43. *Id.* at 572.

44. *Id.* at 574. The court mistakenly relied on *Mitchell* for the proposition that trust duties arise only if the Government has assumed "elaborate control" over the trust property. *Id. Mitchell* did not require elaborate control as the prerequisite for trust duties; rather, only "control or supervision" over trust assets is required. Brown v. United States, 86 F.3d 1554, 1561 (Fed. Cir. 1996) ("The Supreme Court [in *Mitchell*] did not qualify 'control or supervision' with modifiers such as 'significant,' 'comprehensive,' 'pervasive,' or 'elaborate.' Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty.").

45. 121 F.3d 1303 (9th Cir. 1997).

Skokomish River in Washington State.[46] The Tribe intended to ensure that future development on the River would be consistent with its goal to restore the fishery that had been devastated by an existing hydro-electric project dam.[47] FERC rejected the Tribe's application on the ground that it conflicted with the relicense application of the existing facility.[48]

The Court of Appeals upheld FERC's decision on the ground that it had properly concluded that the applicable regulations barred the Tribe's application.[49] With little analysis, the court rejected the Tribe's argument that FERC had "ignored its trust responsibility toward [the Tribe]."[50] Conceding that the Government's trust responsibility "consists of acting in the interests of the tribes," the court nonetheless concluded that the doctrine required no more than compliance with the applicable statutes and regulations.[51] The court noted that FERC "exercises this responsibility in the context" of the Federal Power Act (FPA) and endorsed FERC's practice of refusing to "afford Indian tribes greater rights than they would otherwise have under the FPA and its implementing regulations."[52] As a result, the trust responsibility does not compel acceptance of a tribal application that is barred by FERC regulations.

The third illustrative case is *Miccosukee Tribe of Indians of Florida v. United States*.[53] In that case, the Tribe brought breach of trust claims against the Department of the Interior and Army Corps of Engineers for their failure to alleviate hurricane-related flooding on three parcels of tribal land.[54] As manager of Everglades National Park, the federal government had the capability to substantially reduce the level of flooding inundating tribal lands.[55] The district court rejected the claims.[56] The court culled from the applicable case law the following governing principle: "[D]espite the general trust obligation[s] of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements."[57] The court's review of the applicable statutes and regulations failed to identify specific enforceable duties to protect the Tribe's land from flooding.[58]

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46. *Skokomish Indian Tribe*, 121 F.3d at 1304.
47. *Id.* at 1305.
48. *Id.*
49. *Id.* at 1306.
50. *Id.* at 1308.
51. *Id.*
52. *Id.* at 1308-09.
53. 980 F. Supp. 448 (S.D. Fla. 1997).
54. *Miccosukee*, 980 F. Supp. at 451.
55. *See id.* at 453, 455, 457.
56. *Id.* at 463.
57. *Id.* at 461.
58. *Id.*

The fourth example of the failure of the trust doctrine as a source of protection for tribal environments is *Gros Ventre Tribe v. United States*.[59] In that case, the Tribes of the Fort Belknap Reservation sought an injunction ordering the Bureau of Land Management to reclaim and restore abandoned gold mining sites located adjacent to the Tribes' Reservation in Montana.[60] The Tribes relied in part on the federal government's trust responsibility to protect tribal land and resources, which had been poisoned by the mines, as the source of the legal duty to clean up and restore the mining sites.[61] The district court rejected this theory because it could find no "judicial support for the notion that the trust obligation can be enforced independently of some other source of law."[62]

In recent years, trust arguments have been successful only in cases where the federal agency is defending actions taken to benefit Indian tribes.[63] In such cases, the trust responsibility fills the gap left by ambiguous authorizing statutes.[64] *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*[65] is an example. There, a salmon farm operator sued to enjoin the Corps' decision to deny a permit to farm the treaty fishing grounds of the Lummi Nation.[66] The farm operator argued that the Corps may not deny the permit solely on the ground that the project will be located in waters where the Lummi Nation has treaty fishing rights.[67] The Corps responded that its trust responsibility required it to consider Indian treaty rights in its decision.[68] The court accepted the Corps' argument. The court concluded that the trust responsibility requires that the Government take appropriate action to ensure that Indian treaty rights are "given full effect" and that such rights are "not abrogated or impinged upon."[69] Such action is required even though the Corps' reliance on treaty rights is not specifically authorized by its own regulations.[70]

Northwest Sea Farms is an exception to the rather dismal fate of the trust responsibility in recent Indian environmental cases. Judicial reluc-

59. 344 F. Supp. 2d 1221 (D. Mont. 2004).
60. *Gros Ventre*, 344 F. Supp. 2d at 1224-25.
61. *See id.* at 1226.
62. *Id.* at 1227.
63. *See* Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102-03 (9th Cir. 1986) (discussing how the Secretary of the Interior acted with intentions to protect the needs of all Indian groups); *Lincoln v. Vigil*, 508 U.S. 182, 194-95 (1993) (discussing how the trust relationship had a priority to protect a broad class instead of a subgroup); *Northwest Sea Farms, Inc. v. United States*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).
64. *See Northwest Sea*, 931 F. Supp. at 1520.
65. 931 F. Supp. 1515 (W.D. Wash. 1996).
66. *Northwest Sea*, 931 F. Supp. at 1518-19.
67. *Id.* at 1519.
68. *Id.*
69. *Id.* at 1520.
70. *See* Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) (stating that the Secretary of Commerce did not act arbitrarily in construing the trust responsibility as requiring the reformation of fishing recommendations of the Pacific Fishery Management Council in order to guarantee that the Yurok Tribe and the Hoopa Valley Tribe would receive their fair share of the salmon harvest).

tance to impose substantive trust duties on federal agencies can perhaps be attributed to the following factors: (1) judicial confusion about the different legal standards for stating a claim for damages against the United States under the Tucker Act and a claim for injunctive relief under the Administrative Procedures Act; (2) the inherent difficulty of courts determining the "best interests" of tribes; (3) concern that substantive fiduciary obligations may become an "Indians always win" rule; (4) the general direction of federal Indian law to rely on statutes and treaties, rather than federal common law, for the rule of decision; and (5) the misconception that the rationale for the trust responsibility – the need for federal protection – may have lost some of its force in light of the economic gains a number of tribes have achieved through gaming success. Although no court has expressly articulated these reasons, the trend of recent results in the Indian trust cases appear to justify such inferences. Each of these reasons is discussed below.

First, courts have failed to acknowledge and apply the distinction between stating a cause of action for damages against the United States under the Tucker Act and stating a cause of action for declaratory and injunctive relief against federal agencies under the Administrative Procedures Act.[71] The failure to appreciate this distinction has resulted in the erroneous rule that the federal government satisfies its trust obligations if it complies with applicable statutes, unless a statute or treaty imposes specific duties apart from such statutes.[72] The distinction is important because, as noted, a damages claim requires a showing that a particular statute can be fairly read as mandating compensation against the United States for its violation, whereas an equitable claim under the Administrative Procedures Act requires only a showing that the federal agency action is "not in accordance with law" or "arbitrary [and] capricious."[73] It is simply wrong to import the showing of a specific statutory basis for damages to equitable claims that are not seeking such relief.

Second, courts may be reluctant to get into the thorny problem of discerning the best interests of tribes under the trust responsibility, especially because the tribes themselves are often divided about the proper course of action in the environmental area. Commentators have noted this dilemma.[74] Even resorting to the original principles of federal Indian law, such as protection of tribal sovereignty and cultural autonomy, may

71. Examples of these cases include: Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471, 479 (9th Cir. 2000); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 573-74 (9th Cir. 1998); Gros Ventre Tribe v. United States, 344 F. Supp. 2d 1221, 1225-27 (D. Mont. 2004); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 882-84 (D. Ariz. 2003). For criticism of this line of cases, *see* Wood, *supra* note 14, at 363-68.

72. *See* Wood, *supra* note 14, at 364-65.

73. 5 U.S.C. § 706(2)(a) (2005).

74. *See, e.g.*, Wood, *supra* note 15, at 126 ("Virtually any rendition of the 'best interests' standard will fail to resonate with every tribe and every tribal member," because the tribal community is enormously diverse.).

not be particularly helpful in divining whether a proposed federal action promotes the affected tribe's "best interests." Is it the best interest of tribal sovereignty to authorize and locate a solid waste dump on tribal land?[75] To be sure, courts should not shrink from the responsibility of deciding hard cases or giving force to the trust responsibility, solely on the ground that the issue presents difficult choices. But it is up to the tribes and their advocates to develop a coherent formulation of the "best interest" standard under the trust responsibility, a standard that courts can apply with reason and predictability.[76]

Third, courts may be concerned that enforcement of trust duties which are not directly tied to statutory or treaty provisions is a slippery slope leading to a rule that tribal litigants will always prevail.[77] As the Federal Circuit Court of Appeals has pointedly noted: "That there is such a general fiduciary relationship does *not* mean that any and every claim by [an Indian party] necessarily states a proper claim for breach of the trust."[78] Especially if the "best interest" standard is a subjective test depending on the tribes' own articulation of their interests, courts may be concerned about endorsing a standard that has few limits.

Fourth, the pronounced trend in federal Indian law generally away from reliance on federal common law toward specific statutes and treaties as the rule of decision may have influenced the trust doctrine's failings in the environmental area.[79] The dominance of a textualist judicial philosophy in the U.S. Supreme Court, as exemplified by *Bourland* and similar cases, has made the application of a common law trust obligation problematic.[80] This trend makes it more difficult for tribes and their advocates to overcome the presumption of the *Mitchell* line of cases that trust duties must be based on specific language in statutes, regulations or treaties that give the Government control or supervision over Indian land or resources.

Fifth, anecdotal evidence that a few select tribes have realized economic gains from gaming enterprises may lead courts to question

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75. *See* Backcountry Against Dumps v. EPA, 100 F.3d 147, 148 (D.C. Cir. 1996).

76. Nance v. EPA, 645 F.2d 701, 704 (9th Cir. 1981) is an example of the difficulty of determining where the best interests of the tribes lie. In that case, the court had to decide whether EPA's redesignation of the Northern Cheyenne Reservation from Class II to Class I under the Clean Air Act violated EPA's trust obligation to the neighboring Crow Tribe, which claimed that its development plans were adversely affected by the redesignation. *Nance*, 654 F.2d at 710-11. The court concluded that because the trust obligations conflicted and that there was a "strong possibility that the Crow tribe would not be prejudiced at all . . . , we cannot say that there was a breach of the fiduciary duty to the Crow." *Id.* at 711-12.

77. *Morongo*, 161 F.3d at 574; *Pawnee*, 830 F.2d at 191.

78. *Pawnee*, 830 F.2d at 191.

79. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 695 (1993) ("Having concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty.").

80. *See, e.g.*, *Bourland*, 508 U.S. at 687-94.

whether the underlying rationale for the trust responsibility—that the tribes literally need protecting by the federal government—holds true today. This skepticism ignores the reality that the great majority of tribes still suffer from inordinately high rates of poverty. In the tribal immunity context, the U.S. Supreme Court has questioned whether tribes still need the protection that doctrine affords:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.[81]

Although the Court upheld the Tribe's immunity in the commercial context in that case, the Court's misgivings about following a doctrine that some members of the Court believe has lost its historic rationale could signal a similar re-examination about the need for the trust responsibility.[82]

In the current hostile legal climate, arguments that the trust responsibility requires federal agencies to act in the best interests of tribes, independent of their statutory duties, are likely to be greeted with skepticism. The difficult task of developing practical and workable solutions requires coordinated efforts by Indian tribes, lawyers, and scholars. At a minimum, trust-related arguments in this area stand a better chance of success if they are based on a tribal consensus about the core values that the trust responsibility should preserve and protect. A few modest suggestions are offered here in order to focus thinking toward litigation strategies that might bear fruitful results.

First, arguments that rely on the trust obligation to require a more rigorous consideration of the impacts of federal projects on tribal environments may find a more favorable reception by courts instructed to look for a statutory grounding for trust duties. For example, the trust obligation can more sharply focus the NEPA analysis on the special concerns of tribes for the welfare of the environment.[83] The trust responsi-

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81. Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751, 758 (1998) (citation omitted).

82. *Kiowa*, 523 U.S. at 757-58.

83. The decision of the Interior Board of Land Appeals in *Island Mountain Protectors*, 144 I.B.L.A. 168, 168 (1998) is an example. In that administrative appeal, the Board vacated the decision of the Bureau of Land Management (BLM) to approve expansion of the Zortman and Landusky Mines adjacent to the Fort Belknap Reservation of the Assiniboine and Gros Ventre Tribes. *See Island Mountain Protectors*, 144 I.B.L.A. at 185, 202-03. Among the grounds for vacatur was the

bility can require the agency to treat Indian communities as tribes, rather than merely as interested parties, or citizens of the affected area. NEPA requires a "hard look" at the environmental consequences of proposed federal action.[84] The federal trust obligation can help turn a soft glance, which agencies too often give actions affecting tribal environments, into a genuinely hard look. Careful and thoughtful articulation of the continuing need for adherence to trust standards in this area can strengthen the duty of federal agencies to rigorously apply the environmental statutes to Indian country. The rhetoric of fiduciary obligations can perhaps become the reality of legal protection for tribal environmental values and goals.

Second, the trust responsibility may be useful as a means to require the federal government to consult with tribes where the statutory duty to do so is ambiguous. In an unreported decision, the U.S. District Court for Oregon enjoined federal timber sales in the Winema and Fremont National Forests that would have damaged natural habitat and resources on which the Tribe depended.[85] The court found that the U.S. Forest Service had violated its duty arising from the trust responsibility to consult with the Klamath Tribes to ensure that the Tribe's treaty rights will be protected.[86]

These approaches, while holding some promise, may be too limited for those tribes that must rely on the trust responsibility for a source of substantive legal duties, for want of other efficacious legal theories to protect their rights. For these tribes, enhanced procedural rights through trust-infused environmental review or consultation processes may not be enough to protect their land and resources from harm.[87] For them, a more ambitious approach is needed to empower the trust doctrine with genuine legal protections. In light of the courts' reluctance to embrace an expansive view of the trust responsibility in equitable actions, the development of a cohesive theory of the trust doctrine as a source of sub-

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BLM's violation of the trust responsibility owed the Tribes. *Id.* The Board characterized the trust obligation as requiring consultation with the Tribes in order to "identify, protect, and conserve trust resources, trust assets, and Tribal health and safety." *Id.* at 185. The scope of this duty arguably exceeded the BLM's duty to consult and consider environmental consequences under NEPA.

84. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

85. Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *1, *9-10 (D. Or. Oct. 2, 1996).

86. *Id.* at *7-10.

87. A recent example is Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation, No. C 02-02006 SBA (N.D. Cal. Mar. 8, 2005) (order of dismissal) (Yurok Tribe as Plaintiff-intervenor). The district court there dismissed the Yurok Tribe's claims that the Bureau of Reclamation had violated the federal trust responsibility to protect the Tribe's fishery by refusing to provide Klamath River flows sufficient to avoid the massive fish kill that occurred on the Tribe's Reservation in the fall of 2002. *Pac. Coast Fed'n of Fishermen's Ass'n*, No. C 02-02006 SBA, at 0-1. The court concluded that Reclamation had no trust duty to provide such flows because there could be no violation of the trust responsibility because no source of "positive law" could be identified that imposed specific fiduciary duties on Reclamation with regard to the operations of the Klamath Irrigation Project, which controlled the River flows. *Id.* at 17.

stantive law will be challenging. Law reform of this kind should be based on the fundamental principle that federal law should honor and protect the unique relationships of Indian tribes to their land and natural environment. That surely was the premise of the trust doctrine originally and it should be the basis of future efforts to give it genuine legal meaning today.