

# Indigenous Rights to Water & Environmental Protection

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## INTRODUCTION

For most of its history, the United States worked to acquire indigenous lands through treaties, agreements, and sometimes through forceful relocation from tribal homelands. Tribes were left with what at the time were thought to be the least-desirable lands. But the Supreme Court has often ruled that federal Indian reservations include valuable implied rights. The reserved water rights doctrine is the most well-developed implied tribal property right, along with access to fish and wildlife, while rights to general environmental protections lag behind. Despite recent pronouncements in international law and some initiatives provided by the Congress and the Exec-

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utive Branch, the United States government has paid scant attention to protection of the environment in Indian country, and has only recently addressed tribal water rights protection in a systematic way.

International law instruments speak of a right to clean water and environmental protection in the indigenous context, but only in aspirational terms. The United Nations General Assembly in 1948 adopted the Universal Declaration of Human Rights (UDHR),<sup>1</sup> which guarantees the right to life, but does not explicitly mention a right to clean water.<sup>2</sup> But a United Nations General Assembly Declaration provides that the “right to safe and clean drinking water and sanitation is a human right that is essential for the full enjoyment of life and all human rights.”<sup>3</sup> Further, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that, “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territory and resources.”<sup>4</sup> The UNDRIP recognizes indigenous rights to environmental protection in several other provisions, but once again, these provisions are merely aspirational. If indigenous tribes are to seek practical redress for environmental problems, redress must be achieved through domestic law.

While its policies have sometimes addressed tribal concerns, the United States has been a world leader in advancing general environmental protection since the 1970s. This is manifested in the Clean Water Act, the Clean Air Act, National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). Though tribes were initially excluded from most of these regulatory regimes, Congress and the executive eventually realized that tribes are governments with inherent regulatory powers over lands and people. Tribes were not to be treated as simply the subject of federal regulations, but along with the states may play an active role in protecting environmental conditions within their jurisdictions. Through a cooperative federalism model, Indian tribes, like states, have an explicit statutory role in administer-

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). In general, there are two classes of international instruments. First, formal agreements such as treaties and covenants are legally binding on nations that ratify them. Second, “declarations, resolutions, and other statements of principle” that are not legally binding but have moral force. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 452 (Newton, et al. eds. 2012), citing *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 816 n. 17 (D.C. Cir. 1987).

<sup>2</sup> Article 25 of the UDHR states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control[.]

See Russell Rutherford, *An International Human Right to Water: How to Secure the Place of People Ahead of Profits in the Struggle for Water Access*, 62 ALA. L. REV. 857, 872 (2011).

<sup>3</sup> The Human Right to Water and Sanitation, G.A. Res. 64/L.63, U.N. Doc. A/64/L.63/Rev.1 (July 28, 2010).

<sup>4</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 29, § 1 (June 29, 2006).

ing the Clean Air Act, Clean Water Act, Hazardous Waste Management Act, Nuclear Waste Management Act, and several other environmental statutes. Where Congress has not explicitly included tribes in the statutory scheme, tribes participate in implementation through administrative directives under NEPA, the ESA, and the Toxic Substance Control Act.<sup>5</sup> However, this recognition of tribes as sovereigns with regulatory powers followed an often racist and paternalistic history on the part of the United States government. Remnants of that paternalism persist and can hamper efforts at environmental protection.

This article examines the rights of Indian nations in the United States to adequate water supplies and environmental protection for their land and associated resources. Part I of this article provides a brief background on the history of federal-tribal relations and the source and scope of federal obligations to protect tribal resources. Part II reviews the source and nature of the federal government's moral and legal obligations to Indian tribes, which are generally referred to as the trust responsibility. Indian reserved water rights and the difficulty tribes experience in protecting habitat needed for healthy treaty resources is discussed in Part III. Part IV reviews the Dakota Access Pipeline controversy and the shortcomings of federal law in protecting tribal reservations and resources. Part V concludes with recommendations for enhanced and improved access to justice as well as substantive changes in the law to advance environmental protection for Indian tribes in the United States.

## I. ORIGINS OF THE FEDERAL-TRIBAL RELATIONSHIP

Federal Indian law<sup>6</sup> has its roots in Western definitions of the relationship between colonizing nations and indigenous populations.<sup>7</sup> During the colonial period, European nations sponsored and authorized various explorers to claim territory while asserting their exclusive right to deal with indigenous peoples in matters related to land and political relations. This approach is called the doctrine of discovery and has several components. First, the doctrine was intended to resolve competition between the European Nations by affording the so-called discovering nation the exclusive claim to territory actually occupied by indigenous peoples.<sup>8</sup> Second, the discovery doctrine

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<sup>5</sup> See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 10.02.

<sup>6</sup> Federal Indian law is the phrase used to denote the body of United States constitutional law, common law, and statutory law that governs the relationships among Indian tribes, the federal government, states, and individuals. It is distinct from "tribal law," which is a term denoting the laws adopted by tribal governments that are applicable to tribal citizens and others within or affecting tribal territories and citizens.

<sup>7</sup> See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 1.02 and Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

<sup>8</sup> See generally Francisco de Victoria, *DE INDIS ET DE IVRE BELLI RELECTIONES*, 130-57 (Ernest Nys ed.) (J. Bates Trans, Carnegie Institution 1917) (orig. ed. 1557) (detailing arguments regarding indigenous rights and Spanish claims to "discovered" areas).

provided that land acquisition from indigenous people was a matter to be resolved between sovereigns and not by individual citizens of the discovering nation.<sup>9</sup> Finally, the indigenous peoples' right to their territory and self-governance was to be respected.<sup>10</sup> Discovery by itself could not affect the legal status of Indian nations as pre-existing sovereigns because tribes were free and independent peoples with well-established economic and political systems.<sup>11</sup> In order to minimize military conflict, the parties dealt with each other through bilateral treaty arrangements as well as less formal agreements.<sup>12</sup>

The United States government followed these international law precepts when it assumed exclusive authority in all matters related to Indian affairs. The Constitution's commerce clause<sup>13</sup> and the treaty power are at the foundation of federal authority in Indian affairs.<sup>14</sup> In the Northwest Ordinance of 1787, the Continental Congress declared that "utmost good faith" should mark the dealings of the United States with indigenous peoples and their property rights.<sup>15</sup> Treaties and agreements resulted in the transfer of massive amounts of tribal land to the United States, and most did not contain explicit provisions limiting development or protecting the environment.<sup>16</sup> Few foresaw the incredible scope of non-Indian development and the massive influx of settlers to the areas west of the eastern seaboard.<sup>17</sup> The tribes, however, generally retained some aboriginal lands for permanent use and occupancy through treaties and other agreements.<sup>18</sup> At the time the United States and tribes made most of these agreements and treaties, land and water were plen-

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 11–13.

<sup>11</sup> PETER C. MANCALL, ENVISIONING AMERICA; ENGLISH PLANS FOR THE COLONIZATION OF NORTH AMERICA 1580–1640 2 (2nd Ed. 2017) (indigenous peoples had their "own political system capable of maintaining internal order and negotiating with outsiders."); JEAN M. O'BRIEN, FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND 2–3 (2010) (discussing complex web of social and political relations among indigenous peoples).

<sup>12</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 14–15.

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>14</sup> U.S. CONST. art. II, § 2, cl. 2. See Gregory E. Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012, 1012 (2015).

<sup>15</sup> Northwest Ordinance (July 13, 1787), art. III, *adopted by Congress*, 1 Stat. 50, 52 (1789). See Peter S. Onuf, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 24 (1987) (non-Indian encroachments into tribal territory "threatened to embroil the frontiers in Indian warfare").

<sup>16</sup> *Cf.* Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109 (ceding territory to the United States, establishing reservations, and retaining the right to hunt and fish in the ceded territory without mention of any conservation protections); Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 405–06 (2006) (noting that while most treaties did not reference legal rights to water, access to water resources was sometimes an important part of treaty negotiations).

<sup>17</sup> See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 668 (1979) ("Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights.").

<sup>18</sup> Tribes subjected to the removal policy constitute a major exception to this statement. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 1.03[4].

tiful. In part for that reason, reservations of land for tribal use and occupancy rarely included any explicit reference to water or water rights, much less to the idea of habitat protection for tribal lands and waters.<sup>19</sup>

Dealing with the problems brought on by the forced co-existence of non-Indian society with the tribes was not easy for the federal government, and disastrous for the tribes. The states in general did not want independent political entities within their borders, while the federal government entered into treaties that purported to protect the sanctity of tribal reservation lands and tribal sovereignty within states. At first, the tribal interests prevailed. In a landmark 1832 decision rejecting Georgia's authority to regulate non-Indians within the Cherokee Indian reservation, the Supreme Court ruled that Indian tribes were "distinct, independent political communities [.]"<sup>20</sup> By then, however, the United States had already placed Indian tribes in a subservient legal position to the federal government, at least with respect to their property. In *Johnson v. M'Intosh*,<sup>21</sup> the Court considered a dispute over property between two non-Indians. One traced his title to a pre-revolutionary war conveyance directly from a tribe, while the other claimed title to the same land by title conveyed by the United States, which had acquired the tribal land by treaty.<sup>22</sup> Following the international law of discovery described above, the Court refused to recognize tribal land transfers unless those transfers complied with the colonizing nation's law.<sup>23</sup> Because the British Crown had not ratified the pre-revolutionary war transaction from the tribe to Johnson's predecessors in title, the courts of the United States did not recognize the tribal conveyance. Thus, any transfer of land from an Indian tribe to a third-party would require federal approval in the form of a treaty or statute.<sup>24</sup> The decision limited tribal autonomy and paved the way for paternalistic aspects of the trust doctrine that remain a defining part of federal-tribal relations today.

Chief Justice Marshall's opinion was not really a bold stroke, nor an early example of judicial activism, because the United States Congress had

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<sup>19</sup> Water rights in the eastern states followed the English common law system of riparian rights under which land owners had the right to the natural flow of all waters coming through and bounding their lands. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* §§ 3.2–3.5 (2011).

<sup>20</sup> *Worcester v. Georgia*, 31 U.S. 515, 558 (1832). The Court also noted that the tribes were regarded "as the undisputed possessors of the soil, from time immemorial." *Id.* The case is discussed below.

<sup>21</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The Court also recognized tribal property rights: "They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . ." *Id.* at 574.

<sup>22</sup> *Id.* at 571–72, 593–94. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1092 (2000) (arguing that the case may have been feigned as there was no actual overlap between the parties' parcels). See generally LINDSAY ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

<sup>23</sup> *Johnson*, 21 U.S. at 592.

<sup>24</sup> *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 238 (1985)

already adopted this principle as positive law.<sup>25</sup> But it did establish that United States federal law required that tribal land titles could be acquired only with consent of the discovering sovereign or its successor, and until so acquired the tribes retained the exclusive right of use and occupancy.<sup>26</sup> This gave the United States a monopoly over the acquisition of land for westward expansion.<sup>27</sup> It also safeguarded the tribes from sharp dealings by unscrupulous land speculators, and provided a uniform means for passing title to tribal lands to federal ownership, and then on to others.<sup>28</sup> By regulating the means of title acquisition, colonizing nations — including the United States — asserted control over the most important aspect of relations between indigenous peoples and the “discoverers.”<sup>29</sup>

The international law of discovery thus served as a foundation for the imposition of other Euro-centric legal rules governing United States-tribal relations. The doctrine at first protected tribal property from the sharp dealings of land-hungry speculators and set the foundation for the federal trust responsibility to Indian tribes. The Supreme Court again invoked international law when it defined the relative bounds of federal, state and tribal authority in *Worcester v. Georgia*.<sup>30</sup> There, the Court considered the state of Georgia’s authority to regulate non-Indian presence within the bounds of the Cherokee Reservation. The legislature provided that “all white persons residing within the limits of the Cherokee nation, . . . without a license or permit from his excellency the governor . . . shall be guilty of a high misdemeanor [sic]” punishable by imprisonment for no less than four years.<sup>31</sup> The Court set aside Samuel Worcester’s conviction under the Georgia statute, reasoning that:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees

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<sup>25</sup> Trade and Intercourse Act of 1790, § 4, 1 Stat. 137–138 (1790). The statute remains in force as codified at 25 U.S.C. § 177. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974) (explicating that the nonintercourse acts put the common law rule of discovery in statutory form).

<sup>26</sup> *Johnson*, 21 U.S. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (“If the right of occupancy of the Walapais was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent’s predecessor took the fee subject to the encumbrance of Indian title.”).

<sup>27</sup> See Robert T. Anderson, *Commentary: Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENVTL. L. & POL’Y. 473, 476–78 (2016).

<sup>28</sup> See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1002–03.

<sup>29</sup> This is not to say that the rules adopted prevented legalized theft of Indian lands by the unilateral breach of Indian treaties that promised permanent homelands. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 553 (1903) (permitting unilateral breach of Indian treaty with no avenue for judicial review); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 272 (1955) (finding that aboriginal title may be taken without compensation as it is not property protected by the Fifth Amendment).

<sup>30</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>31</sup> *Id.* at 523.

themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.<sup>32</sup>

*Worcester* recognized a trust relationship where Indian tribes were owed a duty of federal protection from state and private party incursions on tribal governmental authority, as well as independence within the newly-formed United States. This recognition constitutes the basis of the trust relationship invoked by tribes and the United States to justify federal actions to advance tribal sovereignty and protect tribal property interests. But while *Worcester* placed tribes under the protection of the federal government, the Court also noted that “more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.”<sup>33</sup> Thus, the government-to-government relationship and treaty promises of political allegiance remain at the foundation of the federal-tribal relationship.<sup>34</sup> The protective aspect of the trust, however, was undermined by the fact that it was not voluntary on the part of the tribes. There is no document setting out protective aspects of the trust that would guide the federal government’s actions in Indian affairs. The parameters of the trust are defined by the federal government’s view of what is best and that view shifted dramatically over the course of time.

Although *Worcester* recognized tribal sovereignty, the trust relationship, along with colonizing philosophy, has been used in part to justify national policy disastrous for tribes. Both were used to justify the removal of Indian tribes to western territories.<sup>35</sup> Removal in turn led to further treaty-making detrimental to tribes, including later efforts to force Indians to assimilate into mainstream society.<sup>36</sup> For example, the removal of many eastern tribes to the Indian territory (now Oklahoma) during the 1830s and 1840s was followed by an accelerated period of treaty-making with Indian tribes in the upper-Midwest and west of the Mississippi.<sup>37</sup> The treaties pledged that reservations would be permanent homelands but also had provisions geared to the assimilation of Indians into mainstream agrarian soci-

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<sup>32</sup> *Id.* at 561.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 555 (Cherokee treaty “relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting to the laws of a master”).

<sup>35</sup> See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 41–51. Removal was just that—the physical relocation of Indian tribes to areas west of those settled. While allegedly voluntary, it was in reality forced relocation. *Id.*, at 50. See generally Tim Alan Gattison, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002).

<sup>36</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 71–79.

<sup>37</sup> *Id.*, at 55–69. See Annual Report of Commissioner of Indian Affairs George Manypenny, Senate Exec. Doc. 34-5 (Nov. 22, 1856) (noting that fifty-two treaties with tribes were made within a two-year period).

ety.<sup>38</sup> Through these provisions, communal reservation lands were broken up and allotted to individual Indians as part of this policy of assimilation.<sup>39</sup> Lands considered “surplus” to Indian needs were returned to the public domain by Congress.<sup>40</sup> This process would be repeated as it was nationalized: The Dawes Act of 1887<sup>41</sup> codified this allotment practice. The Act was implemented through individual statutes affecting 118 reservations,<sup>42</sup> which resulted in the loss of approximately 90 million acres of tribal land by 1934.<sup>43</sup> While reservations were originally set aside or reserved under exclusive tribal ownership, the new allotment policies encouraged non-Indians to acquire formal tribal land and allotments that passed out of Indian ownership.<sup>44</sup> This resulted in an influx of non-Indians within reservation boundaries.<sup>45</sup> These policies created a checkerboard pattern of land ownership within reservations and accelerated tribal-state jurisdictional conflicts as non-Indians acquired allotted lands by various means.<sup>46</sup>

Allotment and assimilation policies were formally ended in 1934 with the passage of the Indian Reorganization Act (“IRA”).<sup>47</sup> The IRA contained provisions facilitating the restoration of land to tribal ownership.<sup>48</sup> Federal support for tribal self-government endured, but was interrupted after World

<sup>38</sup> See, e.g., Treaty with the Navajo art. 5, June 1, 1868, 15 Stat. 667 (promising any individual Navajo 160 acres of tribal land if he agreed “to commence farming”); Treaty with the Eastern Band Shoshoni and Bannock arts. 6–12, July 13, 1868, 15 Stat. 673 (referring to agricultural reservations; providing stipends for each Indian farmer; authorizing allotments for farming purposes; and authorizing \$50 to each of the best ten Indian farmers). See *In re General Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) (finding implied treaty promise of water to support farming). See also *Winters v. United States*, 207 U.S. 564, 576 (1908) (“It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people.”).

<sup>39</sup> Treaty with the Crows art. 6, May 7, 1968, 15 Stat. 649; *United States v. Powers*, 305 U.S. 527, 528 (1939) (discussing allotment of Crow Reservation). See also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–12 (1995).

<sup>40</sup> See, e.g., *Nebraska v. Parker*, 136 S.Ct. 1072, 1072 (2016); *Solem v. Bartlett*, 465 U.S. 463, 463 (1984).

<sup>41</sup> General Allotment Act, 24 Stat. 388 (1887).

<sup>42</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1073.

<sup>43</sup> See Royster, *supra* note 39, at 10–12 (1995).

<sup>44</sup> In general, communal tribal lands were divided into parcels of land that were selected by individual tribal members as “allotments,” while unallotted tribal lands were made available for non-Indian acquisition as they were considered “surplus” to tribal and individual Indian needs. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at § 1.04.

<sup>45</sup> *Id.*

<sup>46</sup> For a discussion of the problems, see generally Sarah Krakoff, *Tribal Civil Jurisdiction over Non-members: A Practical Guide for Judges*, 81 COLO. L. REV. 1187 (2010); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 6.02 [2]. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 408 (1989); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 351 (1962); Royster, *supra* note 39.

<sup>47</sup> Indian Reorganization Act, 25 U.S.C. § 461 (1934) (“On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”). See *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

<sup>48</sup> Indian Reorganization Act, 25 U.S.C. § 465 (1934) (allowing Secretary of the Interior to acquire land in trust for Indian tribes). See *Cariceri v. Salazar*, 555 U.S. 379, 379 (2009).



War II when Congress adopted a resolution calling for the “termination” of the federal-tribal relationship with certain Indian tribes.<sup>49</sup> This termination era prompted the passage of several tribe-specific statutes ending the government-to-government relationship between the United States and over 70 federally recognized Indian tribes, transferring jurisdiction over those tribes and their lands to the states.<sup>50</sup> Termination was abandoned in the 1960s, but marked a low point in modern federal Indian policy with devastating effects on the terminated tribes.<sup>51</sup>

As the foregoing summary shows, Indian nations and the United States government have a turbulent, sovereign-to-sovereign relationship evidenced by the Constitution,<sup>52</sup> treaties,<sup>53</sup> agreements,<sup>54</sup> acts of Congress,<sup>55</sup> and court decisions.<sup>56</sup> The United States government is the entity that provides the rule of law in most matters affecting tribal property and political relations with non-Indian and the states. While the United States has at times protected tribal lands and promotes principles of tribal self-government, much of its history is marked by federal policy and behavior that wreaked havoc on tribal societies. Nevertheless, Indian tribes must look to federal law and law-making bodies to protect land, water rights, and Indian tribal sovereignty.<sup>57</sup> The legacy of colonialism places Indian tribes in a special category under federal law,<sup>58</sup> but it is a position subservient to federal authority in most

<sup>49</sup> H. Con. Res. 108, 83d Cong. (1953) (directing the Secretary of the Interior to recommend tribes for termination). See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 1.06, at 95. In general, “[termination] would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled.” Message to Congress on Indian Affairs (July 8, 1970), H.R. Doc. 91-363, at 1 (1970). But see *Menominee Tribe v. United States*, 391 U.S. 404, 404 (1968) (termination of Menominee Indian Tribe did not abrogate tribal rights to hunt and fish free of state regulation).

<sup>50</sup> See Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 3 AM. IND. L. REV. 139, 151 (1977) (table listing terminated tribes).

<sup>51</sup> See generally Charles F. Wilkinson, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57–86 (1986); H.R. Doc. 91-363 (repudiating termination).

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>53</sup> See, e.g., Treaty with the Yakima, June 9, 1855, 12 Stat. 951; Treaty with the Chipewas, *supra* note 16.

<sup>54</sup> See generally *Winters v. United States*, 207 U.S. 564 (1906) (discussing agreement ratified by Congress); CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1986) (discussing treaty substitutes utilized after 1871).

<sup>55</sup> See generally Act of June 30, 1834, c. 161, § 12, 4 Stat. 730 (codified in part at 25 U.S.C. § 177 (1834)) (restricting sale of Indian land without federal approval); American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001–4061 (1994).

<sup>56</sup> See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

<sup>57</sup> See Robert T. Anderson, *Treaty Substitutes in the Modern Era*, in THE POWER OF PROMISES, RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST, 321–38 (Alexandra Harmon ed., 2008); see also CHARLES F. WILKINSON, MESSAGES FROM FRANKS' LANDING: A STORY OF SALMON TREATIES, AND THE INDIAN WAY 11, 14 (2000).

<sup>58</sup> Compare *Talton v. Mayes*, 163 U.S. 376, 382 (1896) (holding that the Fifth Amendment's grand jury requirement does not apply to tribal governmental action), with *United States v. Sioux Nation of Indians*, 448 U.S. 371, 421–24 (1980) (holding that Congress may

areas.<sup>59</sup> This trust doctrine presents a contradiction. On the one hand, tribes rely on the federal trust relationship as a shield that provides protection for tribal rights from state and local incursions. But, on the other, the United States has used the trust relationship to dispossess tribal land, decimate tribal societies, and drive some tribes to political extinction. The next Section describes more positive developments in the modern era, but the expansive federal power over Indian tribes and their property presents crucial context for any assertion of an implied right to environmental protection—and ultimately remains an obstacle to fully-realized tribal self-determination.

## II. IMPLIED RIGHTS TO WATER AND ENVIRONMENTAL PROTECTION

An implied right to environmental protection would not only need to avoid the pitfalls of the trust relationship described above. It would also need to build on the most well-developed implied tribal right: that of reserved water rights. Because Indian treaties in general do not directly address water resources, the tribes and the federal government as trustees assert implied rights to water when necessary to satisfy tribal needs.<sup>60</sup> Indian water rights are property rights held in trust by the United States for the benefit of Indian tribes.<sup>61</sup> The Supreme Court agreed early in the 20th century with the existence of such implied rights. While tribes control access to their reservation lands as landowners, activities on non-Indian lands can adversely affect adjacent tribal water and land. This section explains the nature of tribal rights to water and environmental protection, and the struggle to protect those rights.

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abrogate treaties and take tribal land, but must pay compensation to the tribe under the Fifth Amendment).

<sup>59</sup> See *United States v. Lara*, 541 U.S. 193, 201 (2004) (“Congress’s authority would rest in part, not upon “affirmative grants of the Constitution,” but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as “necessary concomitants of nationality.”); *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (explaining that “it would be a very strained construction of this clause” to use it as the basis of a system of criminal laws “without any reference to their relation to any kind of commerce . . .”).

<sup>60</sup> The rights are “implied” because that is the term used to describe the nature of a right not explicitly mentioned, but clearly necessary to fulfil the objective of a treaty or agreement with an Indian tribe. Thus, where a treaty’s purpose is to establish a farming economy for an Indian tribe in an arid area, a water right is “implied” to fulfill the purpose of the treaty. See *Arizona v. California*, 373 U.S. 546, 599 (1963) (discussing “[t]he question of the Government’s implied reservation of water rights upon the creation of an Indian Reservation”).

<sup>61</sup> *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (Mar. 12, 1990) (“Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”). See also *United States v. Sioux Nation*, 448 U.S. 371 (1980) (holding that takings of recognized Indian title to property requires payment of compensation).

A. *Reservations of Tribal Homelands Include Water Rights.*

The doctrine of discovery and *Johnson v. M'Intosh*<sup>62</sup> both recognized Indian aboriginal title, which includes the right of indigenous peoples to use and occupy their land.<sup>63</sup> In the arid West, the right to use land without a corresponding right to use water is nearly valueless. Yet virtually none of the more than 350 treaties, agreements, or Executive Orders establishing Indian reservations directly address water rights.<sup>64</sup> And nearly a century passed after *M'Intosh* before the Supreme Court considered whether reserved Indian lands included an implied right to water in *Winters v. United States*.<sup>65</sup>

The case was brought by the United States as trustee for the Gros Ventre and Assiniboine Indians, who occupied the Fort Belknap Indian Reservation in Montana pursuant to an agreement ratified by Congress in 1888.<sup>66</sup> Winters was a private irrigator who argued that his water rights were superior to any Indian rights under the state law of prior appropriation. If state law applied, the non-Indians had the better rights because they had actually put water to use for irrigation before the tribes, the determining factor under state law.<sup>67</sup> But the Supreme Court rejected Winter's argument, ruling instead that, at least at the time the reservation was established, the United States reserved the Indian water rights, making the non-Indian rights junior in seniority.<sup>68</sup> The Court reasoned that ceding water to non-Indians would defeat the declared purpose of the tribes and the government: to assimilate Indians into a "pastoral and civilized people."<sup>69</sup> As discussed in Section I, most reservations were established under a government policy holding that Indians should be assimilated into white society, which was dominated by an agrarian economy in the western states.<sup>70</sup> The Act establishing the Fort Belknap Indian Reservation codified the federal assimilation policy by providing that some land would be, "adapted for and susceptible of farming and cultivation

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<sup>62</sup> See discussion *supra* Section I.

<sup>63</sup> See *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *supra* note 21 and accompanying text.

<sup>64</sup> See Anderson, *supra* note 16, at 405–06.

<sup>65</sup> See *Winters v. United States*, 207 U.S. 564, 565 (1906).

<sup>66</sup> Act to Ratify and Confirm an Agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, ch. 213, 25 Stat. 113, 124 (1888) [hereinafter *Act of May 1, 1888*]. The reservation boundaries were marked at the middle of the Milk River. *Id.*

<sup>67</sup> The state law prior appropriation doctrine's mantra is "first in time is first in right." In other words, the first to put water to actual use acquires a right senior to all subsequent users. In times of shortage, the most senior user would receive her full quantum of water while junior uses would be eliminated—beginning with the most junior rights. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1215.

<sup>68</sup> The Indian reserved right would thus date to 1888 if the right was created by the agreement, or earlier if it was the tribe that reserved water held under aboriginal title—a point the court did not decide. See Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 412 (2006).

<sup>69</sup> *Winters*, 207 U.S. at 576.

<sup>70</sup> See discussion *supra* notes 38–40.

and the pursuit of agriculture. . .”<sup>71</sup> But as the *Winters* Court noted, “the lands were arid, and, without irrigation, were practically valueless.”<sup>72</sup> Important to the case was a judicial canon of Indian treaty interpretation: “By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.”<sup>73</sup> For the Gros Ventre and Assiniboine, an agrarian economy could not be successful without water for irrigation.<sup>74</sup> Thus, the Supreme Court ruled that Indian ownership of the reservation included an implied right to water in order to grow crops and for other purposes necessary to effectuate the reservation’s purposes.<sup>75</sup>

The *Winters* Court limited non-Indian water use that interfered with the Indians’ ability to obtain water for irrigation, but did not determine the tribe’s full entitlement to water.<sup>76</sup> In other words, the *Winters* court simply addressed Indians’ right to water for irrigation purposes. The full quantification issue was first considered in *Arizona v. California*, a 1963 case dealing with several Indian reservations located along the Colorado River.<sup>77</sup> The case began as an interstate action to determine the respective states’ rights to the Colorado River, and the United States intervened to assert its own rights and the rights of tribes located along the Colorado. Unlike *Winters*, the Colorado River litigation was part of a multi-state effort to determine the allocation of *all* water available from the river. Thus, the Court was not just resolving a dispute related to current uses as in *Winters*; it also had to devise a method for determining the full measure of the tribes’ entitlement to water. The Court agreed with an appointed Special Master that the federal government created the reservations to establish tribal farming economies. The agricultural activities upon which those economies would depend upon was impossible without irrigation. By looking to past and potential future irrigation uses of the land, the Court in *Winters* approved the use of an irrigable acreage standard to determine a full entitlement to water for present and future needs of the tribes located along the river.<sup>78</sup> In general, the irrigable acreage standard has worked to the benefit of most tribes, although there has been

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<sup>71</sup> *Winters v. United States*, 207 U.S. 564, 566 (1906) (quoting *Act of May 1, 1888*).

<sup>72</sup> *Id.* at 576. The Indian reserved right would thus date to 1888 if the right was created by the agreement, or earlier if it was the tribe that reserved water held under aboriginal title—a point the court did not decide. See Anderson, *supra* note 68, at 412 (2006).

<sup>73</sup> *Winters*, 207 U.S. at 577. The Indian interpretive canons are rooted in Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), and reflect judicial recognition that tribal rights and resources are protected against outside intrusion unless explicitly authorized by Congress. See COHEN HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 116–19.

<sup>74</sup> *Winters*, 207 U.S. at 576 (“[I]t was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions.”).

<sup>75</sup> *Id.* (quoting *Act of May 1, 1888*, ch. 213, 25 Stat. 113, 124 (1888) (noting that Indians had original control of the water “whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization.”).

<sup>76</sup> *Id.* at 565.

<sup>77</sup> *Arizona v. California*, 373 U.S. 546, 641–42 (1963).

<sup>78</sup> *Id.* at 595–601.

some criticism.<sup>79</sup> The Supreme Court has offered no further guidance on the question, although lower courts have applied various quantification standards.<sup>80</sup> The irrigable acreage standard serves as a centerpiece for calculating tribal claims to water, while some lower courts have also found that water was reserved for fisheries and other purposes.<sup>81</sup>

Federal Indian policy in the 1960s was moving out of the “termination” period, which selectively ended the federal trust relationship with some tribes and removed their property from all forms of federal protection.<sup>82</sup> This policy was abandoned in the late 1960s as the federal government rejected the notions of forced assimilation.<sup>83</sup> In 1969, Congress commissioned a bipartisan study of federal water policy,<sup>84</sup> which criticized the federal government’s terrible record of failing to protect Indian water rights.<sup>85</sup> In reaction, the Justice Department commenced a number of lawsuits in federal court to protect and assert Indian water rights.<sup>86</sup> But these federal court lawsuits were largely confounded by a newly-minted abstention doctrine—Colorado River abstention—that resulted in many of the federal cases being deferred to state courts for adjudication.<sup>87</sup> No matter the forum, the Indian reserved rights doctrine is a rule of federal law that state and federal courts alike are bound

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<sup>79</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 19.03 (5)(b).

<sup>80</sup> *See* Anderson, *supra* note 16, at 423–29.

<sup>81</sup> The search for the purposes of a reservation requires a review not only of the text of the treaty or agreement, but also an inquiry into the understanding of the Indians in making the agreement. *See* *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)) (“[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”). In general, the federal courts have followed this interpretative rule and found that some tribes reserved water for fisheries and plant habitats. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1984) (holding water reserved for fishery and marsh habitat); *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff’d in part & rev’d in part*, 736 F.2d 1358 (9th Cir. 1984) (affirming water reserved for fisheries habitat related to water temperature); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (finding water reserved for fisheries habitats); *cf.* In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d at 134 (Wyo. 1988), *aff’d sub. nom.* *Wyoming v. United States*, 492 U.S. 406, 407 (1989) (finding implied treaty promise of water to support farming, but rejecting claims for water for on-reservation fishery, mineral and industrial development, and wildlife) and abrogated by *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998).

<sup>82</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 84–93.

<sup>83</sup> *Id.* at 94–96.

<sup>84</sup> Pub. L. No. 90-515, 82 Stat. 868, 870 (1968) (establishing the National Water Commission tasked with reviewing national water resource problems).

<sup>85</sup> NAT’L WATER COMM’N, WATER POLICIES FOR THE FUTURE 475 (1973). *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1257–58; Anderson, *supra* note 16, at 414–18. For a recent critique, see NAT. RES. COMM. DEMOCRATS, WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES (2016), available at [http://democrats-naturalresources.house.gov/imo/media/doc/House%20Water%20Report\\_FINAL.pdf](http://democrats-naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf) [<https://perma.cc/U83Y-NFRB>].

<sup>86</sup> *See* *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 553–58 (1983). *See, e.g., United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983); *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982).

<sup>87</sup> *See, e.g., Arizona*, 463 U.S. at 571 (directing federal courts in Montana and Arizona to abstain from the adjudication of Indian water rights in favor of state court general stream

to follow.<sup>88</sup> While the forum should not—at least in theory—make a difference to the outcome, state courts have traditionally been hostile forums for Indian rights litigation, and that has held true for the modern water cases.<sup>89</sup>

The few cases up to the 1980s that analyzed tribal water rights dealt, like *Arizona* did, with water rights for agricultural purposes, primarily because the federal policy mentioned above dictated that Indians in the arid West convert to an agricultural economy similar to their non-Indian neighbors. A more recent line of cases better protects other uses of water by recognizing tribal water rights to instream flows. Unlike irrigation, which informs questions like whom can use what water (and how much), instream flows concern questions about water use and pollution. The strength and purity of instream flows affects the quality of bodies of water used, for example, for hunting, fishing, and ceremonial purposes.

The Ninth Circuit addressed rights to instream flows in *United States v. Adair*,<sup>90</sup> a case brought by the United States on behalf of the Klamath Tribes. The court concluded that “one of the ‘very purposes’ of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.”<sup>91</sup> The court accordingly recognized Indian reserved rights to water for fishery habitats, a right important to the many tribes that rely on fisheries’ resources.<sup>92</sup> Water rights for fisheries consist of the right to keep water in lakes and rivers to provide places for fish to spawn, and, for salmon, to travel to and from the ocean. Without habitat for spawning and rearing, fish cannot survive. The water rights reserved for fisheries reflect federal recognition and protection of traditional Indian

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adjudications); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (abstention ordered in federal court litigation in Colorado).

<sup>88</sup> *San Carlos Apache Tribe of Arizona*, 463 U.S. at 571 (“State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.”).

<sup>89</sup> For example, in *In re the General Adjudication of all Rights to Use Water in the Big Horn River System*, 753 P.2d at 134 (Wyo. 1988), *aff’d sub. nom. Wyoming v. United States*, 492 U.S. 406, 407 (1989), the Wyoming Supreme Court narrowly interpreted the Indian reserved rights doctrine. The Court found an implied treaty promise of water to support farming, but rejected claims for water for on-reservation fisheries, mineral and industrial development, and wildlife; and it denied access to groundwater. *Cf.* Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1131 (1977) (“For a variety of reasons, state courts may prove incapable of protecting the important federal policies that underlie the reserved rights doctrine and will deprive the United States and Indian groups of vital water rights.”).

<sup>90</sup> *Adair*, 723 F.2d at 1418.

<sup>91</sup> *Id.* at 1409.

<sup>92</sup> Other cases have followed that reasoning. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 53 (9th Cir. 1981); *State Dep’t of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (*en banc*). *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1224. *See also* Anderson, *supra* note 27 at 485–86 (collecting cases). The instream right held by the tribes is the right to keep water in the river for purposes of fisheries and habitat protection. Water not needed for those purposes is available to the tribe or to others for other uses.

needs,<sup>93</sup> and support traditional Indian economies and cultural uses. In contrast, water for agricultural purposes most often reflects colonial desires to assimilate Indians into an agrarian economy and lifestyle.<sup>94</sup> The recognition of water for traditional uses shows how federal policy sometimes agreed with tribal desires to maintain traditional activities, while also implementing assimilationist policies centered on agriculture.<sup>95</sup>

Whether used for irrigation, fisheries habitat, or other purposes, Indian water rights are considered trust property,<sup>96</sup> and the United States thus has legal obligations to protect that property.<sup>97</sup> However, it often takes decades for litigation to run its course—a course that may be interrupted by failed attempts to negotiate a settlement.

Two suits are emblematic of the arduous and expensive course Indian tribes face in securing their water rights.<sup>98</sup> The San Luis Rey Indian Water Rights Settlement was precipitated by a 1969 suit asserting the rights of five Indian tribes (the Mission Bands are the La Jolla, Pauma, Pala, Rincon, and San Pascual Bands of Mission Indians, each a federally recognized tribe) to roughly 16,000 acre feet of waters in the San Luis Rey River basin in southern California.<sup>99</sup> The suit was part of a dispute going back more than a century and accused “the United States, the Vista Irrigation District, and the city of Escondido of acting in the 1920s to illegally divert 90 percent of San Luis Rey River water to an aqueduct—even though five North County Indian

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<sup>93</sup> See generally *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>94</sup> Of course, many tribes relied on irrigated agriculture for food. See *Arizona v. California*, 373 U.S. 546, 552 (1963) (“The Special Master found that “as long as 2,000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix, Arizona, and that American Indians were practicing irrigation in that region at the time white men first explored it.”).

<sup>95</sup> See *United States v. Adair*, 723 F.2d 1394, 1409–10 (9th Cir. 1983).

<sup>96</sup> The United States holds legal title to the reserved water in trust for the use of the Indian tribes just as the United States lands holds legal title to land in trust for the benefit of particular tribes. See *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (Mar. 12, 1990) (“Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”). While water is not generally owned in that same manner as fee simple ownership of land, the right to use water for various purposes is a protected property right for both out of stream and instream purposes.

<sup>97</sup> Cf. *Nevada v. United States*, 463 U.S. 110, 145 (1983) (Brennan, J. concurring) (“If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. I join the Court’s opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted”). See Ann C. Juliano, *Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003). Cf. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (United States may not be compelled to litigate on behalf of tribe claim it determines to be “meritless”).

<sup>98</sup> Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, Pub. L. No. 114-322, §§ 3605, 3712–24, 130 Stat 1628 (2016) (Blackfeet); *id.* at § 3605 (San Luis Rey).

<sup>99</sup> The five tribes formed an intertribal entity to administer the rights. See SAN LUIS REY INDIAN WATER AUTH., <http://www.slrwa.org> [<https://perma.cc/JXU8-HKXV>].

tribes [the Mission Bands] relied on the water to supply their lands.”<sup>100</sup> The Mission Bands filed the initial suit because the United States had done nothing to protect tribal water use and needs. It took the suit, years of ensuing litigation, and three trips to Congress for the tribes to piece together their settlement and claim their rights to the disputed water—only eventually with the support of the United States, which for years was not forthcoming.<sup>101</sup>

Even when tribal and state parties *can* reach a settlement, Congress may not be willing to take action to ratify the agreement or provide funds needed to make the deal work.<sup>102</sup> The Blackfeet Indian Water Rights Settlement, finally approved by Congress in 2016, was the product of litigation commenced by the United States in the ‘70s and eventually transferred to the Montana state courts as part of a comprehensive adjudication of all waters in Montana.<sup>103</sup> Out of decades of litigation came a 2009 agreement between the Tribe and the State of Montana.<sup>104</sup> The Blackfeet Indian Water Rights Settlement included authorization for approximately \$422 million to implement the Settlement.<sup>105</sup>

Though they each took decades to litigate, both the Blackfeet and San Luis Rey cases in fact bridge hundreds of years of conflict over water use. Both the San Luis and Blackfeet settlements confirmed tribal water rights and provided ways to put the water to use. After establishing reservations for the various tribes, the United States did virtually nothing to protect tribal water rights,<sup>106</sup> and in fact build myriad projects for non-Indians that used water actually reserved for tribal use.<sup>107</sup> The federal government bears responsibility to many tribes for failing protect their water. Despite the 1908 *Winters* precedent, the United States Bureau of Reclamation encouraged non-Indian use of waters reserved by Indian tribes in treaties and agreements.

<sup>100</sup> J. Harry Jones, *Decades of Water Rights Litigation Put to Rest*, San Diego Union at (Dec. 20, 2016), <http://www.sandiegouniontribune.com/communities/north-county/sd-no-water-lawsuits-20161220-story.html> [https://perma.cc/N6K4-W245].

<sup>101</sup> San Luis Rey Indian Water Rights Settlement Act, Pub L. No. 100-675, 102 Stat. 4000 (1988). The San Luis Rey Indian Water Authority’s website contains more information about the litigation and path to settlement. *Litigation*, SAN LUIS REY INDIAN WATER AUTH., <http://www.slrwa.org/litigation> [https://perma.cc/8VAR-KEFZ].

<sup>102</sup> For example, the tribes of the Fort Belknap Indian Reservation still do not have a final quantification of their water rights, despite having reached a settlement compact with the State of Montana in 2001. *See* Mont. Code Ann. § 85-20-1001. Federal legislation to ratify the Compact was introduced in Congress but did not pass. Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act, S. 1394, 113th Cong. (2013). Efforts at congressional ratification continue.

<sup>103</sup> *See* *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 553–58 (1983) (describing litigation and holding that state courts may adjudicate Indian water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666).

<sup>104</sup> WIIN Act, *supra* note 98, at § 3704.

<sup>105</sup> *Id.* at § 3718.

<sup>106</sup> *See* NAT. RES. COMM. DEMOCRATS, *supra* note 85, at 475.

<sup>107</sup> *See* Anderson, *supra* note 16, at 430 (federal government’s zeal to develop non-Indian irrigation projects “left tribal needs for irrigation, protection of fisheries and wildlife habitat, and domestic consumption to languish”).



Federal litigation support along with financial and political commitments to settle tribal cases is essential to live up to legal obligations owed the tribes. The Secretary's Indian Water Rights Office was established to coordinate support from across the Department for settlements.<sup>108</sup> Despite difficulties in obtaining adequate funding and political support, there have been thirty-two comprehensive Indian water settlements confirmed by Congress,<sup>109</sup> and there are approximately thirty other tribes with federal settlement teams appointed to participate in negotiations that take place in a litigation context.<sup>110</sup>

This implied right to water is closely related to implied rights to environmental protection. A right to use reservation lands and implied rights to water for drinking, irrigation, and fisheries requires that the water be usable, *i.e.*, that it is not so polluted that it is unable to be used. This right is discussed next.

### *B. The Implied Right to Environmental Protection*

As noted above, Indian treaty rights to hunt, fish, and gather are property rights protected under federal law.<sup>111</sup> Two cases, one decided in 1905, the other in 2017, serve as bookends to demonstrate the implied right to

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<sup>108</sup> As described on the Department of Interior's website:

The Secretary's Indian Water Rights Office (SIWRO) is part of the Secretariat as set forth in the Departmental Manual at Part 109, Section 1.3(E)(2). The mission of SIWRO is to manage, negotiate, and oversee implementation of settlements of Indian water rights claims, with the strong participation of Indian tribes, states, and local parties. SIWRO works in concert with tribes and all water stakeholders to deliver long promised water resources to tribes, certainty to all their non-Indian neighbors, and a solid foundation for future economic development for entire communities dependent on common water resources.

*Secretary's Indian Water Rights Office*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/siwro> [<https://perma.cc/684C-7CBS>].

<sup>109</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at §19.05[2].

<sup>110</sup> Federal Indian Water Rights Negotiation Teams for Indian Water Rights Settlements (July 2015) (on file with Secretary of the Interior's Indian Water Rights Office, Department of the Interior, 1849 C Street, Washington D.C.), *available at* [https://www.doi.gov/sites/doi.open.gov.ibmcloud.com/files/uploads/2015-07-28\\_List%20of%20Federal%20Teams\\_SIWRO.pdf](https://www.doi.gov/sites/doi.open.gov.ibmcloud.com/files/uploads/2015-07-28_List%20of%20Federal%20Teams_SIWRO.pdf) [<https://perma.cc/8LWX-G4X5>]. The United States has multiple obligations and it is the states, not the tribes, that have the strongest representation in Congress. Thus, when tribes seek substantial amounts of funding to facilitate Indian water settlements, or to restore tribal lands, they are thrown into a battle for appropriations with myriad other requests from federal agencies, states and others. For example, to even get an Indian water rights bill considered by the relevant committee in the House of Representatives, tribes must obtain a letter from the Department of Justice and Department of the Interior explaining why the expenditure of federal funds is necessary and justified in terms of federal liability for past harm. Letter from Representative Rob Bishop, Chairman, House Resources Committee to Att'y Gen. Jeff Sessions and Sec'y of the Interior Ryan Zinke and (April 27, 2017)(on file with House Resources Committee). This slows an already fraught process.

<sup>111</sup> See *generally* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 405–06 (1968). See also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1156.

habitat protection. *United States v. Winans* involved the right of Yakama Nation citizens to access off-reservation fishing grounds reserved by treaty.<sup>112</sup> Non-Indian landowners objected to the presence of the Indians on land the non-Indians had received from the United States.<sup>113</sup> The Court recognized that the tribes had an implied right of access over privately-held land to exercise treaty fishing rights.<sup>114</sup> A number of lower federal courts have also ruled that protection of Indian treaty rights can preclude federal or state action that could adversely affect those rights by harming species' habitat, or the places at which the tribes are entitled to exercise their rights.<sup>115</sup>

The bookend to *Winans* is a case arising out of the long-running *United States v. Washington* litigation.<sup>116</sup> The *Washington* case was brought by the United States and a number of Indian tribes to force the state of Washington to stop harming salmon habitat. The State owns and maintains a large number of culverts under state roads that impede salmon access to and from areas where salmon reproduce.<sup>117</sup> The culverts prevent as many as 250,00

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<sup>112</sup> *United States v. Winans*, 198 U.S. 371, 377 (1905).

<sup>113</sup> *Id.* at 380.

<sup>114</sup> *Id.* at 381, 384. See Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 9–11 (2017); Anderson, *supra* note 27, at 476–77.

<sup>115</sup> See *N.W. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1521–22 (W.D. Wash. 1996); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1515–16 (W.D. Wash. 1988); *Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (finding duty to protect fish and fishing rights reserved by treaties applies to federal agencies as well as state and local governments; Army Corps of Engineers may not destroy fishing grounds absent authorization by Congress); *No Oilport! v. Carter*, 520 F. Supp. 334, 372–73 (W.D. Wash. 1981) (ordering hearing on whether sedimentation caused by proposed oil pipeline would adversely affect spawning habitat); *Lummi Indian Nation v. Cunningham*, No. C92-1023 (W.D. Wash. 1992). For a recent example of an administrative action to protect tribal treaty rights, see Memorandum for Record: Gateway Pacific Terminal Project and Lummi Nation's Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County, at 28, Pacific International Holdings, LLC, NWS-2008-260 (U.S. Army Corps of Eng'rs., May 9, 2016).

<sup>116</sup> *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017) (amended decision), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018). The State of Washington has consistently fought against Indian treaty rights to fish. *Id.*, at 957–58 (“During the 1960s and early 1970s, in what came to be called the ‘fish wars,’ some Indians fished openly and without licenses in ‘fish-ins’ to bring attention to the State’s prohibitions against off-reservation fishing.”). State reaction to the “fish-ins” sometimes led to violence. See, e.g., *Shots Fired, 60 Arrested in Indian-Fishing Showdown*, SEATTLE TIMES, Sept. 9, 1970; Alex Tizon, *The Boldt Decision / 25 Years—The Fish Tale That Changed History*, SEATTLE TIMES, Feb. 7, 1999, available at <http://community.seattletimes.nwsourc.com/archive/?date=19990207&slug=2943039> [<https://perma.cc/PH8L-BJU6>] (describing the State’s ‘military-style campaign,’ employing ‘surveillance planes, high-powered boats and radio communications,’ as well as ‘tear gas,’ ‘billy clubs,’ and ‘guns’). See also *Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. at 669 (“non-Indians began to dominate the fisheries and eventually to exclude most Indians from participating in it—a trend that was encouraged by the onset of often discriminatory state regulation in the early decades of the 20th century.”).

<sup>117</sup> *Washington*, 853 F.3d at 954.

adult salmon from returning to their natal streams.<sup>118</sup> The court of appeals concluded that “[t]he Indians did not understand . . . that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make . . . such a cynical and disingenuous promise.”<sup>119</sup> The court accordingly upheld the district court’s injunction mandating that the State of Washington repair salmon-blocking culverts over a seventeen-year period.<sup>120</sup> Recognition of this right, along with reserved waters jurisprudence should serve as the foundation for further protection.

### III. AN IMPLIED RIGHT TO ENVIRONMENTAL PROTECTION SUPPORTS THE ABILITY OF INDIAN TRIBES TO PROTECT TRADITIONAL LAND USES AND TO ENGAGE IN PRODUCTIVE USE OF RESERVATION LAND AND WATER.

As discussed in Part I, the federal trust responsibility is a product of colonialism, and the United States is the political successor to the European nations that started the colonizing process. Land acquisition was the federal focus in the 19th Century and was accompanied a consolidation of political power in the federal government that was complete by the advent of the 20th Century. Assimilationist plans and efforts were the norm until about 1934 and were briefly resuscitated during the brief termination period of the 1950s and early 60s. Since about 1970, however, federal Indian policy has been one of “Indian self-determination without termination.” While the termination policy related to the very existence of tribes as governments under federal law, tribal property rights to water and environmental protection depend in large part on federal recognition and protection under the trust doctrine. At the same time paternalistic aspects colonialism persist. The federal government itself defines the scope and ramifications of the trust. While Congress has ample authority to define the trust, it has not done so in any comprehensive way. Consequently, Indian tribes are left to seek definition of the trust in the context of discrete disputes that arise in litigation. The courts, which are part of the federal government, give meaning to the trust in light of the history of colonization. In this way the tribes are forced to seek relief from federal administrative action in a forum created by the colonial process, and controlled by the federal government itself. This need not be a bad thing. As Professor Frickey noted, “[b]y aggressively reading Indian treaties to protect against all but clear tribal cessions,” the Supreme Court provides a normative tool to protect against unthoughtful interference with

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<sup>118</sup> *Id.* at 966 (“If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Tribes for harvest.”).

<sup>119</sup> *Id.* at 964.

<sup>120</sup> *Id.* at 966.

tribal interests.<sup>121</sup> The difficulty lies in getting the courts to apply this tool to enhance environmental protection.

A. *The Trust Doctrine Today.*

Modern federal Indian policy has two seemingly inconsistent features. First, Indian tribes are governmental units with inherent sovereignty; and second, Indian tribes are subject to congressional authority and depend on federal law for insulation from state jurisdiction and interference. The Supreme Court's role in determining the contours of tribal powers and authority has increased substantially in the self-determination era. This is no doubt due in part to Congress's unwillingness to directly address many difficult and broad policy questions. The Indian trust doctrine is at the center of federal policy because the United States actually holds property (Indian land and water) in trust for the benefit of tribes, and because it is a major part of the government-to-government relationship established through bilateral treaties and other arrangements.

In *Cherokee Nation v. Georgia*,<sup>122</sup> the Court described the indigenous tribes as "domestic dependent nations,"<sup>123</sup> a phrase that connoted a dignified status accorded to the family of nations under international law.<sup>124</sup> The Court reasoned that by treaty the Cherokee Nation formally recognized the existence and power of the United States government and placed itself under federal authority and protection. But despite their governmental status, the Cherokee were not considered a "foreign nation" within the meaning of Article III of the Constitution, "not . . . because a tribe may not be a nation, but because it is not foreign to the United States."<sup>125</sup> One year later the Court rejected Georgia's claim of any jurisdiction over the Cherokee Nation's territory and anyone present therein.<sup>126</sup> The Court described the effect of the treaty between the Cherokee and the United States: "They receive the Cherokee nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."<sup>127</sup> The

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<sup>121</sup> Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 443 (2005).

<sup>122</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>123</sup> *Id.* at 17.

<sup>124</sup> *Id.* at 16 ("The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.").

<sup>125</sup> *Id.* at 19.

<sup>126</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress.").

<sup>127</sup> *Id.* at 552.

view that the Cherokee were a dependent *nation* within the boundaries of the United States was supplanted about 50 years later with pejorative descriptive terms that characterized the federal-tribal relationship more like that of a guardian to an under-aged ward: "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."<sup>128</sup> The characterization of tribes as helpless wards is obsolete in the modern Self-Determination era, but remnants of the paternalistic aspect of the trust relationship remain.

Federal law implementing the trust provides important protections like immunity from state and local taxes, but those protections are coupled with a number of limitations on the use of tribal property without federal consent. A prime example is the Trade and Intercourse Act of 1790's restriction on the alienation of Indian land without the consent of Congress.<sup>129</sup> It protects Indian land from involuntary loss and most forms of state regulation and for that reason is generally viewed by tribes as a good thing. On the other hand, use of tribal lands for agricultural purposes, mineral development and other economic development ventures can be stalled if accomplished through leases to third parties because the Secretary of the Interior is required to approve the lease.<sup>130</sup> This is a direct result of the colonial process and the doctrine of discovery which places the federal government in a dominant and supervisory position respecting tribal land and water resources.

President Richard Nixon characterized the nature of the federal-tribal relationship as the "special relationship between Indians and the federal government [which] is the result of solemn obligations, which have been entered into by the United States Government."<sup>131</sup> Congress relied on this characterization of the trust responsibility when it passed over a dozen federal statutes in consultation with Indian tribes to promote economic self-sufficiency, protect tribal natural resources and support the distinct sovereign status of Indian nations and their people.<sup>132</sup> Still, there are frequent com-

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<sup>128</sup> United States v. Kagama, 118 U.S. 375, 383–84 (1886)

<sup>129</sup> It is codified, as amended, at 25 U.S.C. § 177 (2012).

<sup>130</sup> 25 U.S.C. § 415 (2012); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 17.01. Congress has made some recent, positive adjustments in this area. See Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. No. 112-151, § 2, *amending* 25 U.S.C. § 415; At its worst, it was used as a justification for abrogating Indian treaties without consent of the affected tribes. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (finding unilateral breach of treaty permissible; taking tribal reservation land without tribal consent characterized as a "mere change in the form of investment" by a trustee for its ward).

<sup>131</sup> Richard M. Nixon, President of the United States, Special Message on Indian Affairs (July 8, 1970).

<sup>132</sup> See, e.g., Indian Self-Determination and Educational Assistance Act (ISDEA) of 1975, 25 U.S.C. § 450 *et seq.* (amended by the Tribal Self-Governance Acts of 1988, 1994, and 2000, 25 U.S.C. §§ 458aa to 458aaa-18); Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501 *et seq.*; Tribally Controlled Colleges and Universities Act of 1978, 25 U.S.C. § 1801 *et seq.*; Native American Housing Assistance Self-Determination Act of 1996, 25 U.S.C. § 4101

plaints from tribes regarding the federal government's conduct as the dominant partner in this bilateral relationship.<sup>133</sup> The federal government typically defends itself in litigation brought against it by tribes on the ground that it has broad discretion under the trust doctrine to administer tribal assets (including land and water).<sup>134</sup> The federal government also invokes the trust doctrine to suggest that it is liable for damages only under the most narrow of circumstances.<sup>135</sup>

Myriad federal statutes and regulations allow tribal assets to be leased and developed subject to varying degrees of federal oversight and control.<sup>136</sup> When federal management harms tribal resources, or results in meager revenues from those resources, tribes can sue the United States for damages caused if the losses were caused by a breach of fiduciary duties.<sup>137</sup> This happens in cases involving private companies that purchase the right to harvest timber, coal, or other assets from tribal lands.<sup>138</sup> It also occurs when tribes or individual Indian citizens ask the government to account for funds that it holds in trust for them.<sup>139</sup> The suits are possible because Congress waived federal sovereign immunity in the Tucker Act<sup>140</sup> and the Indian Tucker Act.<sup>141</sup>

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*et seq.*; Indian Financing Act of 1974, 25 U.S.C. § 1415 *et seq.*; Indian Forest Resources Management Act, 25 U.S.C. §§ 3101–3120; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721; Tribal Treatment as State under the Clean Air and Clean Water Acts, 42 U.S.C. § 7474(c) (Clean Air Act), 33 U.S.C. § 1377(e) (Clean Water Act); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1931; American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996; Native American Languages Act of 1990, 25 U.S.C. §§ 2901–2906; Native American Grave Protection and Repatriation Act of 1990 (NAGPRA), 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–3013; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 111th Cong. 2d Sess., 124 Stat. 2258, 2261–2301; Violence Against Women Reauthorization Act (HEARTH Act), Pub. L. No. 113-4, Title IX, § 904, 127 Stat. 120 (codified at 25 U.S.C. § 1304). *See* Anderson, *supra* note 27, at 479-482.

<sup>133</sup> *See* DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM (2013), available at [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform\\_FINAL\\_Approved-12-10-2013.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf) [<https://perma.cc/TDL7-A8CQ>]. The Report is discussed more fully in Anderson, *supra* note 27, at 481–82 (2016). The author of this chapter was a member of the Commission and co-author of the Report. *See* Secretarial Order 3292 (Dep't of the Interior, December 8, 2009) (establishing Commission).

<sup>134</sup> *United States v. Navajo Nation*, 537 U.S. 488, 490–92 (2003).

<sup>135</sup> *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 427 (“the [federal] government has argued that no duty should be imposed upon the government not set forth explicitly in statutes and regulations.”).

<sup>136</sup> *See generally*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 17.

<sup>137</sup> *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) (failure to protect timber resources).

<sup>138</sup> *See id.* at 212 (1983) (timber harvests); and *United States v. Navajo Nation*, 537 U.S. at 488 (coal leases).

<sup>139</sup> *See, e.g.*, *United States v. Jicarilla Apache Tribe*, 564 U.S. 162, 165 (2011) (tribal trust funds); *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (individual Indian money accounts).

<sup>140</sup> 28 U.S.C. § 1491 (2012). The Tucker Act waives federal sovereign immunity to allow suits against the United States for damages in non-tort cases.

<sup>141</sup> 28 U.S.C. § 1505 (2012). *See Mitchell*, 463 U.S. at 210 n.8 (“Section 24 of the Indian Claims Commission Act, 28 U.S.C. § 1505, provides tribal claimants the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491.”).

The cases are relatively straightforward when the government's role is similar to a private trustee and is directly managing tribal resources.<sup>142</sup> Problems arise, however, in cases where the government's role is not so clear-cut.

Most cases brought by tribes for money damages are brought under the Indian Tucker Act, which waives federal sovereign immunity.<sup>143</sup> In cases brought under the Act, the Supreme Court has cautioned that an Indian "claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."<sup>144</sup> This standard is vague; thus, the results of tribal suits against the United States to enforce the trust through damages awards are mixed.<sup>145</sup> To recover money damages for a breach of trust, tribes must demonstrate that there is a textual basis in statute to conclude that Congress assigned an administrative function to a federal agency, and intended that money damages be available for a breach of that duty.<sup>146</sup> In *United States v. Navajo Nation*,<sup>147</sup> the Court considered claims that the Secretary of the Interior and the Bureau of Indian Affairs ("BIA") failed to act in the Navajo's best interest in the renewal of an expired coal lease between the Navajo and the Peabody Coal Company. The substance of the claim rested on the Indian Mineral Leasing Act, which requires the Secretary of the Interior to approve tribal coal leases.<sup>148</sup> The tribe claimed that it ended up agreeing to a lower royalty rate because the Secretary of the Interior had secretly tipped the balance in favor of Peabody Coal.<sup>149</sup> The Court concluded that the Secretary's duty as spelled out in text was simply to approve the proposed tribal lease or not, and his faithless behavior toward his tribal beneficiary breached no statute or regulation.<sup>150</sup> According to the Court, because Congress intended to maximize tribal control over mineral leasing decisions, the federal trust responsibility imposed no additional duties on the BIA beyond the bare requirement to approve or disapprove the proposed lease. On the opposite end of the spectrum is *United States v. Mitchell*,<sup>151</sup> where the BIA breached specific statutory and regulatory duties governing on-reservation

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<sup>142</sup> See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 5.05[4][a].

<sup>143</sup> A tribe may bring suit when its "claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims[.]" 28 U.S.C. § 1505.

<sup>144</sup> *United States v. Mitchell*, 463 U.S. 206, 216–17 (1983) (internal quotations and citations omitted).

<sup>145</sup> See Anderson, *supra* note 27, at 483–85

<sup>146</sup> *Id.*

<sup>147</sup> *United States v. Navajo Nation*, 537 U.S. at 493.

<sup>148</sup> *Id.* at 506–07.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Justice Souter dissented, arguing that the case should be allowed to proceed to trial because the facts support "the Tribe's claim that the Secretary defaulted on his fiduciary responsibility to withhold approval of an inadequate lease accepted by the Tribe while under a disadvantage the Secretary himself had intentionally imposed." *Id.* at 520 (Souter, J., dissenting).

<sup>151</sup> See *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

timber production.<sup>152</sup> The Court concluded that because the BIA exercised nearly complete control over all aspects of timber production, “the statutes and regulations at issue in this case clearly establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources . . . .”<sup>153</sup> Breach of the duty to provide an appropriate return on timber resources, and regenerate the forest for future income from timber sales was remedied by a damages award.

The trust cases place tribes in a difficult position. While removing federal domination from the trust relationship is desirable, it presents to tribes the difficult choice of remaining subject to substantial federal oversight (like ultimate lease approval authority), while at the same time losing the ability to hold the federal government accountable for faithless actions so long as federal agencies do the bare minimum required by statute and regulation.

The most recent word from the Supreme Court on the nature of the trust comes from two cases that do not bode well for judicial enforcement of the trust in damages-related litigation. The first, *United States v. Jicarilla Apache Nation*, involved the production of documents related to trust fund management that the United States had refused to release to the tribe based on attorney-client privilege.<sup>154</sup> The dispute arose in a case where the underlying claim was brought under the Tucker Act for alleged mismanagement of funds held by the United States in trust for the Tribe.<sup>155</sup> In *Jicarilla*, the Court rejected the request to overcome the attorney-client privilege for documents developed by Interior Department lawyers for trust management purposes.<sup>156</sup> The tribe argued that under the common law of trusts, the documents were not privileged at all because they related to managing assets held in trust for the beneficiary.<sup>157</sup> The claim was rejected on the ground that the federal-tribal trust was less deserving of protection than a private trustee relationship because the “Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”<sup>158</sup> The second case, *Menominee Indian Tribe of Wisconsin v. United States*,<sup>159</sup> involved an effort to escape a missed statute of limitations in a case for money damages under the

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<sup>152</sup> *Id.* at 220.

<sup>153</sup> *Id.* at 226 (internal quotations omitted). See *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 469 (2003) (federal government liable for allowing trust property it actually used and occupied to fall into disrepair).

<sup>154</sup> *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 165–66.

<sup>157</sup> *Id.* at 168.

<sup>158</sup> *Id.* at 165. As Justice Sotomayor pointed out in dissent, the common-law trust supported release of communications between the Government and its attorneys relating to trust fund management. *Id.* at 188 (Sotomayor, J., dissenting). Justices Ginsburg and Breyer concurred in the judgment based on their concern that the Court had gone too far in holding that the Government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.” *Id.* (Ginsburg, J., concurring).

<sup>159</sup> 136 S.Ct. 750 (2016).



Contract Disputes Act.<sup>160</sup> The court unanimously rejected equitable tolling arguments and rebuffed arguments that the federal trust responsibility could override the explicit language of the statutes. In so doing, the Court repeated the limiting statement from *Jicarilla* that “any specific obligations the Government may have under that relationship are ‘governed by statute rather than the common law.’”<sup>161</sup> In other words, common law trust principles had no role to play in determining federal obligations because the Court read the statute of limitations as a stand-alone provision unaffected by the Indian trust doctrine. In an earlier case imposing liability, however, the Court noted that “[w]hile the premise to a Tucker Act claim will not be lightly inferred, a fair inference will do.”<sup>162</sup> The court did not elaborate upon what might constitute a “fair inference,” but its citation to *Mitchell* indicates that substantial federal control over a tribal asset may be required.<sup>163</sup>

The next question is whether the courts should use (or can be compelled to use) Indian trust principles as part of the law applied to guide agency conduct in actions brought under the Administrative Procedures Act (APA). This is really the central issue when tribes seek federal support when the United States is leasing its land, or permitting activities on those lands and waters that affect tribal natural resources and people.

The cases raising this question typically involve the federal government’s administration of non-Indian water projects, or permitting actions affecting water or other public land resources that affect Indian water rights, or habitat important for tribal use—whether on or off tribal lands.<sup>164</sup> In the typical case, federal land managers or permitting agencies are acting pursuant to statutes that do not directly reference Indian tribal lands or other rights, and tribes want more protective action taken than may be required on the face of the statute or regulations.

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<sup>160</sup> *Id.* at 753–54.

<sup>161</sup> *Id.* at 757.

<sup>162</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003) (internal quotations and citation omitted).

<sup>163</sup> *See id.* (internal citations omitted) (“The two *Mitchell* cases give a sense of when it is fair to infer a fiduciary duty qualifying under the Indian Tucker Act and when it is not. The characterizations of the trust as ‘limited’ or ‘bare’ distinguish the Allotment Act’s trust-in-name from one with hallmarks of a more conventional fiduciary relationship. On the other hand, the newest member of the Court, Justice Gorsuch, noted in a recent breach of trust opinion that the Court has said “we *may* refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning.” *Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013) (emphasis in original). Then-Judge Gorsuch also noted that “within the narrow field of Native American trust relations statutory ambiguities must be ‘resolved in favor of the Indians.’” *Id.* (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)).

<sup>164</sup> *See infra* notes 177–78.

*B. The Role of the Indian Trust Doctrine in Federal Administrative Actions Affecting Tribal Resources and the Environment.*

As discussed above, common law trust principles and the Indian trust doctrine come into play when the federal government exercises pervasive control over tribal property. The harder questions relate to the role of the trust when federal agencies implement statutes that do not explicitly target tribal property or sovereignty interests but may implicate these interests in practice. This can occur when the federal government permits mining activity in an area near a reservation and linked to the tribe's watershed. It can also occur when the agencies issue permits for construction activity in the context of rights of way across federal land or waters. Tribes have forceful arguments that the federal government has a heightened responsibility when its actions affect tribal property interests, including water rights, and other land-based values like sacred areas on or near Indian reservations. So far, however, most courts have refused to find enforceable trust claims by tribes absent a direct and imminent negative impact on tribal resources.<sup>165</sup> That failure is inconsistent with the federal trust responsibility, and courts should hold agencies to a higher standard under these circumstances in order to protect tribal citizens and tribal territories.

Most Indian tribes in the lower forty-eight states are located in the western states, and are near federal public lands and federal water projects.<sup>166</sup> Road construction and other activities in national forests can have detrimental impacts on tribal religious practices.<sup>167</sup> Bureau of Reclamation projects may compete directly with the water needs of tribal fisheries and Indian reserved water rights.<sup>168</sup> In such cases, federal agencies may focus on issues directly related to private party use of federal lands and waters, but affected

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<sup>165</sup> See *infra* notes 179–84.

<sup>166</sup> See CAROL HARDY VINCENT, ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7–8, Table I (2017) (listing federal land ownership by state). There are 567 federally recognized Indian tribes in the United States. *Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915 (2017). For a list of tribes by state, see NAT'L CONFERENCE OF STATE LEGISLATURES, *Federal and State Recognized Tribes*, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [https://perma.cc/ABH7-8JCF].

<sup>167</sup> See, e.g., *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439, 442 (1988) (tribal challenge to Forest Service road construction in sacred area of National Forest); *Navajo Nation v. United State Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (*en banc*) (Forest Service permit for use of reclaimed sewage water for artificial snow-making in sacred area of National Forest); *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 723 (9th Cir. 2009) (gold mining project on the side of sacred Mt. Tenabo in Nevada).

<sup>168</sup> See *Nevada v. United States*, 463 U.S. at 113–16 (conflict between Reclamation project and water rights needed for tribal fishery habitat); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) (same); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 254 (D.D.C. 1972) (Secretary obliged under trust doctrine to exercise discretion in favor of tribal water rights); *Gila River Pima-Maricopa Indian Cnty. v. United States*, 684 F.2d 852, 861–62 (Ct. Cl. 1982) (failure to take action to protect tribal water rights prior to 1905 appropriation was breach of trust). See also Juliano, *supra* note 97, at 1309.

Indian interests may not get careful consideration because a statute and/or a regulation does not directly address Indian rights. In such a case, any effect on tribal rights may be viewed as incidental and therefore less important.<sup>169</sup> For its part, the federal Bureau of Land Management has jurisdiction over roughly 250 million acres of land,<sup>170</sup> and its management decisions frequently affect Indian property rights.<sup>171</sup> Indian tribes can bring suit under the APA to challenge final agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>172</sup> The most difficult cases arise when agencies are carrying out statutes and implementing regulations that were not intended to address the rights of Indian tribes, but nevertheless may have a profound effect on tribal rights and interests.

While APA actions may include claims for injunctive or declaratory relief, the question is whether the Indian trust doctrine provides law that may be applied to compel agencies to take action to prevent harm to tribal resources.<sup>173</sup> The most complete analysis of the issues faced by tribes in efforts to obtain robust enforcement of a trust duty to ensure the “best interests” of the tribes is set out in an article by Professor Mary Wood.<sup>174</sup> She argues that courts should engage in “enhanced scrutiny of agency action” in the trust asset context,<sup>175</sup> and that “courts should devise a substantive test to prioritize native property and treaty resources in conflict situations involving off reser-

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<sup>169</sup> See generally Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 343–48 (1995).

<sup>170</sup> VINCENT ET AL., *supra* note 166, at 4. This BLM also administers the subsurface mineral estates of 700 million acres. *Id.*

<sup>171</sup> See, e.g., *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (suit over effect from two cyanide heap-leach gold mines located on BLM land upriver from the Tribe’s reservation).

<sup>172</sup> 5 U.S.C. § 706 (2016).

<sup>173</sup> The most prominent modern breach of trust case is *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), which was a class action seeking an accounting for thousands of owners of Individual Indian Money accounts. The court denied the federal government’s motion to dismiss for lack of jurisdiction, holding that “section 702 of the Administrative Procedure Act waives federal officials’ sovereign immunity for actions ‘seeking relief other than money damages involving a federal official’s action or failure to act. 5 U.S.C. § 702. Insofar as the plaintiffs seek specific injunctive and declaratory relief—and, in particular, seek the accounting to which they are entitled—the government has waived its sovereign immunity under this provision.” *Id.* at 1094. Declaratory relief is authorized by 28 U.S.C. § 2201. See *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967) (allowing declaratory judgment action to proceed prior to actual enforcement of regulation). See Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 18.4, p. 1700–02 (discussing actions for declaratory and injunctive relief as an important supplement to statutory review under the APA). 3 ADMINISTRATIVE LAW & PRACTICE § 8:33 (3d ed.) (Supreme Court “agreed with the general observations that the APA’s judicial review provisions should be given generous and hospitable interpretations.”). The waiver does not include actions for damages. *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006) (federal district court could not hear claims for damages caused by substandard federal housing).

<sup>174</sup> 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, 222–33 (1995).

<sup>175</sup> *Id.* at 225.

vation conduct.”<sup>176</sup> Such a doctrine would depart from that of *Chevron* deference<sup>177</sup> to agency implementation of statutes affecting tribal property rights and related treaty resources.<sup>178</sup> Professor Wood and others argue that the trust responsibility should allow courts to more closely scrutinize agency actions affecting tribes than they otherwise would be permitted to do under *Chevron*.<sup>179</sup> The few decisions that addressed the question are discussed below.

For the most part, tribal claims challenging agency action brought under the APA and founded on trust responsibility theories have not been successful, and thus leave tribes with only the protection of statutes and regulations with no special consideration of the federal trust responsibility. Courts have generally looked only at whether the agency followed applicable statutes and regulations. For example, in *Gros Ventre and Assiniboine Tribes v. United States*, the tribes “filed suit claiming that the government breached its trust responsibility to the Tribes by approving, permitting, and failing to reclaim” mines alleged to leach cyanide into the tribe’s water supply.<sup>180</sup> The govern-

<sup>176</sup> *Id.* at 231.

<sup>177</sup> *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens’s Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1028–33 (2010).

<sup>178</sup> Some courts have ruled that the agency deference can be limited when a statute directly addressing Indian rights or property is at issue. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (“This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but ‘from principles of equitable obligations and normative rules of behavior,’ applicable to the trust relationship between the United States and the Native American people.”). See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at § 2.02 n. 65 (collecting cases where Indian law canon trumps *Chevron* deference). See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 78 (2008) (“[A]lthough the Supreme Court has not squarely addressed the relationship between *Chevron* and the Indian liberal construction canon, a number of courts of appeals have followed the Supreme Court’s general canon case law, holding that the Indian canons, as well as the presumption against preemption, the avoidance canon, and other construction rules, each trump *Chevron*’s deference regime in this manner.”); Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies’ Duty to Interpret Legislation in Favor of Indians*, 11 ST. THOMAS L. REV. 15 (1998). See also *Texas v. United States*, 497 F.3d 491, 525 (5th Cir. 2007) (Dennis, J., dissenting) (noting “that when the two principles of deference are in conflict, the Indian canon trumps the *Chevron* doctrine, requiring deference to the interpretation that is most favorable to the Indian tribes.”); Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495 (2004).

<sup>179</sup> See Anderson, *supra* note 27, at 485-87. The cases discussed all involved federal permitting actions that had a significant and direct effect on Indian off-reservation treaty rights. The harder cases are presented when the effect on Indian rights is less direct, which can lead agencies to do little more than comply with administrative or statutory consultation policies. See Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. OF L. REFORM 417, 420 (2013).

<sup>180</sup> *Gros Ventre Tribe v. United States*, 469 F.3d 801, 806 (9th Cir. 2006). The tribe had success in its challenge at the Interior Board of Land Appeals. Island Mountain Protectors, National Wildlife Federation, Assiniboine and Gros Ventre Tribes, and Fort Belknap Community Council, 144 IBLA 168, 203 (1998), 1998 WL 344223 (“Review of the record leads to the conclusion that BLM did not fully observe its trust responsibility to the Tribes” in decision related to acid mine drainage.). See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at § 5.05[3][c].

ment defended itself on the ground that it had followed federal law. The Ninth Circuit panel first faulted the tribes for conflating actions attacking final agency action under the APA with common law breach of trust claims,<sup>181</sup> stating that without “a specific duty . . . placed on the government with respect to Indians, [the trust] responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”<sup>182</sup> Further emphasizing its point, the court attacked the tribe’s claim that the BLM failed “to fully reclaim the mines and restore the quantity and quality of the Tribes’ water resources.”<sup>183</sup> It called this claim “no different from that which might be brought under the generally applicable environmental laws available to any other affected landowner, subject to the same statutory limitations.”<sup>184</sup> This line of reasoning was extended to a challenge to the EPA’s regulation of air quality near the Hopi Indian Reservation, where the tribe argued that the agency failed to protect Hopi interests: “To the extent the Hopi contend the trust relationship required the United States to put their interests above all others, we have rejected that position.”<sup>185</sup> This judicial approach leaves the protection of tribal water rights, as well as the environment surrounding reservation resources, to general federal statutes and regulations—without regard to the federal government’s heightened responsibility for actions potentially affecting tribal property interests.

Other tribes have been more successful in litigating the trust responsibility under the APA. In 1973, a federal court made the most prominent decision invoking the federal trust to shape agency action in a way favorable to an affected tribe.<sup>186</sup> The Pyramid Lake water rights dispute concerned the federal government’s Newlands Irrigation Project, which was built at a time when federal policy favored diverting water to large storage projects for delivery to desert lands.<sup>187</sup> The Project was designed to deliver over 400,000

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<sup>181</sup> *Gros Ventre*, 496 F.3d at 808–09. The court discussed, but did not resolve, the question whether the APA’s waiver of immunity applied only to situations where there was final agency action, or if breach of trust claims could be brought as part of a claim for declaratory or injunctive relief. See *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 793 (9th Cir. 1986) (“This Court has held that [APA] section 702 does waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331.”).

<sup>182</sup> *Id.* at 806 (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573–74 (9th Cir. 1998)). The court also stated that because “the government’s general trust obligations must be analyzed within the confines of generally applicable statutes and regulations, we reject the suggestion to create by judicial fiat a right of action Congress has not recognized by treaty or statute.” *Id.* at 803.

<sup>183</sup> *Id.* at 811.

<sup>184</sup> *Id.*

<sup>185</sup> *Hopi Tribe v. EPA*, 851 F.3d 957, 960 (9th Cir. 2017).

<sup>186</sup> *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973)

<sup>187</sup> See generally DANIEL W. MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2002); MARC REISNER, CADILLAC DESERT (1986).

acre feet of water for irrigation of arid lands in Nevada.<sup>188</sup> The Project, however, did not account for the needs of the Pyramid Lake Indian Tribes, whose aboriginal home included both Pyramid Lake and water needed for fisheries purposes in the lake.<sup>189</sup> In filing suit, the Tribe contended “that the regulation delivers more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake located on the Tribe’s reservation.”<sup>190</sup>

The court ruled that the Secretary’s decision was arbitrary and capricious under the APA because it lacked justification in the record, as well as failed to adequately control wasteful non-Indian use over which the Secretary had regulatory authority.<sup>191</sup> “In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.”<sup>192</sup> The decision is significant in that it relied on the trust doctrine as a guide and limit on the exercise of agency discretion.<sup>193</sup> In *Northern Cheyenne Tribe v. Hodel*, the court upheld a challenge to coal leasing adjacent to the Northern Cheyenne Reservation in the Powder River Basin.<sup>194</sup> The agency had failed to provide separate consideration of tribal interests through consultation required by federal leasing regulations.<sup>195</sup> On remand, the district court adhered to its ruling setting aside the leases, and observed “that the Secretary has a special trust relationship with the Tribe, rising to the level of a fiduciary responsibility.”<sup>196</sup>

As discussed further below, the effort to use the trust doctrine to force a robust consideration of tribal interests beyond the statutory minimum did not meet with success in a recent high-profile case.

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<sup>188</sup> WM. JOE SIMONDS, BUREAU OF RECLAMATION, THE NEWLANDS PROJECT (1996), available at <https://www.usbr.gov/projects/pdf.php?id=142> [<https://perma.cc/ENE9-XPWR>].

<sup>189</sup> *Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. at 254.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 257–59.

<sup>192</sup> *Id.* at 256.

<sup>193</sup> The Pyramid Lake Paiute Tribe and United States’ effort to reopen a prior decree to assert water for fisheries that had been omitted by the federal government in the prior litigation was rejected. *Nevada v. U.S.*, 463 U.S. 110, 142 (1983) (“where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.”). See *Northern Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (“Although the Secretary also has duties to all United States citizens, ‘[t]he Secretary’s conflicting responsibilities and federal actions taken in the “national interest” . . . do not relieve him of his trust obligations.’”).

<sup>194</sup> 851 F.2d 1152 (9th Cir. 1988).

<sup>195</sup> *Id.* at 1157.

<sup>196</sup> *Northern Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (citations omitted). The case, however, turned on the failure to follow the regulations requiring tribal consultation, and not on an independent federal trust obligation ground.

## IV. BROKEN TREATIES AND THE DAPL CONTROVERSY.

The Dakota Access Pipeline (DAPL) is an oil pipeline construction project designed to transport oil from North Dakota to Illinois. It is a project largely immune from federal regulation except when crossing federal property or waters of the United States. Thus, DAPL required federal approval in order to cross the Missouri River at a reservoir, Lake Oahe, just one-half mile from the Standing Rock Sioux Reservation in North Dakota.<sup>197</sup> Public controversy surrounded the project due to tribal objections and massive on-site protests in the autumn of 2016. Because the project did not cross the Standing Rock Reservation, tribal property interests were not directly implicated and concerns about the effects of a potential spill could only be addressed through the federal permitting action related to the river crossing. Legal challenges to the project took shape in the context of permits required under the Clean Water Act<sup>198</sup> and the Rivers and Harbors Act.<sup>199</sup> In addition, the Mineral Leasing Act required that the Army Corps of Engineers issue an easement to cross the river.<sup>200</sup> Those permits, in turn, triggered application of other federal laws, including the National Environmental Policy Act (NEPA)<sup>201</sup> and the National Historic Preservation Act (NHPA).<sup>202</sup> The Tribes' challenge was ultimately unsuccessful, but is an excellent case study on the role of the trust doctrine in the construction of a project located just outside a reservation. The colonial process is on full display in this context, as well as the limited role of the trust doctrine in the judicial review process.

1. *Federal Acquisition of Sioux Territory*

The controversy over construction of the Dakota Access Pipeline cannot be understood without a brief review of the history of relations between the Sioux Nation and the United States in the second half of the 19th century.<sup>203</sup> The legal path to Sioux dispossession began with the assertion of exclusive federal power to acquire Indian lands in the name of the United

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<sup>197</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 12–13 (D.D.C. 2016) (hereinafter *Standing Rock I*). There are three other reported decisions involving the project: *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017) (hereinafter *Standing Rock II*); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 249 F. Supp. 3d 516 (D. D.C. 2017) (hereinafter *Standing Rock III*); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017) (hereinafter *Standing Rock IV*).

<sup>198</sup> 33 U.S.C. §§ 1311(a), 1342(a), 1344 (2016).

<sup>199</sup> 33 U.S.C. § 403 (2016).

<sup>200</sup> 30 U.S.C. § 185 (2016).

<sup>201</sup> 42 U.S.C. § 4332 (2016).

<sup>202</sup> 54 U.S.C. § 3001010

<sup>203</sup> The phrase “Great Sioux Nation” is used to denote the Sioux bands, including the Standing Rock Sioux, who signed the Fort Laramie Treaty of 1868. John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT'L RESOURCES J. 40, 42 n.10 (2001).

States.<sup>204</sup> An 1851 peace treaty recognized Sioux tribal territory, that included much of the present day Dakotas, and parts of Wyoming and Nebraska.<sup>205</sup> The peace did not last long once non-Indian settlement into the area began in earnest.<sup>206</sup> The Powder River War between the Sioux and the U.S. Army took place between 1865 and 1867 and was prompted by continuing non-Indian trespass and depredations into tribal territory. The war ended when General William Tecumseh Sherman led a peace commission to the engage in negotiations.<sup>207</sup> The product of those negotiations was the Treaty of 1868 that guaranteed a vast territory was to forever remain a tribal reservation.<sup>208</sup> The peace was short-lived due to the United States' duplicity. As recounted by the Supreme Court:

Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory. In a letter dated November 9, 1875, to [Brigadier General] Terry, [Lt. General] Sheridan reported that he had met with President Grant, the Secretary of the Interior, and the Secretary of War, and that the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners, "it being his belief that such resistance only increased their desire and complicated the troubles." *Id.*, at 59. These orders were to be enforced "quietly," *ibid.*, and the President's decision was to remain "confidential." *Id.*, at 59-60 (letter from Sheridan to Sherman).<sup>209</sup>

The destruction of George Armstrong Custer's forces at the Little Big Horn was followed by an increased United States military effort and eventual defeat of the Indian forces. Despite the failure to obtain the consent of  $\frac{3}{4}$  of the adult males as required by the 1868 Treaty, an 1877 "agreement" ceding the Black Hills to the United States was approved by Congress.<sup>210</sup> No compensation was provided by Congress.

<sup>204</sup> See *supra* text accompanying notes 28-35; HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 48 (recounting the removal of tribes and the Trail of Tears).

<sup>205</sup> Treaty of Fort Laramie with the Sioux, etc., 11 Stat. 749, art. 5 (1851).

<sup>206</sup> Some Sioux who resided in southwest Minnesota became incensed by white settler encroachments on their territory, which led to conflicts resulting in a mass public hanging of 38 Santee Sioux men after "military trials" reported to last about five minutes each. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 66. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 187-88 (7th prtg. 1983).

<sup>207</sup> DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 145-46 (1970).

<sup>208</sup> United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).

<sup>209</sup> *Id.* at 378.

<sup>210</sup> *Id.* at 382; An Act: To ratify an agreement with certain bands of the Sioux Nation of Indians, and also with the Northern Arapaho and Cheyenne Indians., ch. 72, 19 Stat. 254, 264 (1877). An act of Congress ended treaty-making in 1871. An Act: Making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirty, eighteen hundred and seventy-



If lands are recognized as tribally owned by the United States through treaty, statute, or other action, they are protected by the Just Compensation Clause of the Fifth Amendment.<sup>211</sup> However, even if the land is held by treaty provision, this protection may mean little. In *Lone Wolf v. Hitchcock*, the Supreme Court held that the federal government has the power to amend an Indian treaty without tribal consent,<sup>212</sup> and that such action was not subject to judicial review.<sup>213</sup> While this unilateral authority was not clear before *Lone Wolf*, the United States had often used the threat of force and other coercion to obtain Indian “agreement” to land cessions.<sup>214</sup> The Court did not even address whether the United States owed compensation to the Sioux Nation for land taken from them under the 1877 Act until the dispute finally reached the Supreme Court in 1980.<sup>215</sup> The Court ruled that the taking was subject to judicial review and thus limited *Lone Wolf*, but upheld the action taken by Congress in 1877 to abrogate the Fort Laramie Treaty of 1868.<sup>216</sup> While the Fifth Amendment required that compensation be paid, the Sioux Nation rejected the payment—though the rejection could not undo the taking of the property.<sup>217</sup> The Sioux tribes have continued to press for the return of at least some of their ancestral lands taken during the treaty period,<sup>218</sup> as well as land taken in the twentieth century by a flood control project on reserva-

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two, and for other purposes, ch. 120, 16 Stat. 544, 571 (1871) (codified at 25 U.S.C. § 71 (2016)).

<sup>211</sup> HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 1004–12. *Cf.* Tee-Hit Ton Indians v. United States, 348 U.S. 272 (1955) (Alaska Native lands in Tongass National Forest not protected by Fifth Amendment because title not recognized by treaty or statute).

<sup>212</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903) (finding “power exists to abrogate the provisions of an Indian treaty” without tribal consent). This aspect of *Lone Wolf* remains the law. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 395.

<sup>213</sup> *Lone Wolf*, 187 U.S. at 567–68.

<sup>214</sup> *See* Ann Laquer Estlin, *Lone Wolf v. Hitchcock: The Long Shadow, in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880’S 215, 216 (Sandra L. Cadwalader & Vine DeLoria, Jr., eds., 1984) (quoting Commissioner of Indian Affairs’ statement to tribal leaders that “babies [will] die from the cold” if tribes did not sign proposed agreement to cede most of their reservation).

<sup>215</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980). Even though the Supreme Court took the case, the only relief available was for money damages. The United States as the colonizing power sets the terms for which it may be sued and lawsuits for the return of tribal land are not allowed against the United States in most circumstances.

<sup>216</sup> *Id.* at 424 (1980) (“[T]he 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.”).

<sup>217</sup> *See* LaVelle, *supra* note 203, at 64–68 (2001); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1644–45 (2000) (both discussing the refusal to accept the Supreme Court’s money damages award). Once funds are paid into the treasury in satisfaction of an Indian Claims Commission judgment, the United States’ trust obligations and tribal title to the land are extinguished. *United States v. Dann*, 470 U.S. 39, 50 (1985). There are administrative and congressional avenues for the return of land, but after tribal title is extinguished the property is generally treated as if it were any other federal public land.

<sup>218</sup> *See* LaVelle, *supra* note 203, at 267–68.

tion land, which included a loss of 56,000 acres at Standing Rock.<sup>219</sup> The federal government's treatment of the tribes had created animosity and distrust.<sup>220</sup> This pattern continued with the U.S. Army Corps of Engineers' approval of an oil pipeline crossing the river and passing near the Standing Rock Reservation.<sup>221</sup>

## 2. *The DAPL Controversy*

The DAPL controversy centers on an oil pipeline that now crosses Lake Oahe, a reservoir formed by a dam on the Missouri River one-half mile north of the Standing Rock Sioux Indian reservation in North Dakota. The DAPL project is a 1,200-mile domestic oil pipeline built to move over 500,000 gallons of crude oil from North Dakota through South Dakota and Iowa, to Illinois.<sup>222</sup> One might think that a multi-state project to carry a toxic substance would require an extensive federal appraisal, safety, and permitting process. Not so here. Domestic oil pipelines, unlike natural-gas pipelines, require no general approval from the federal government.<sup>223</sup> Here, because ninety-nine percent of DAPL's route is on private land, there is almost no permitting required from the federal government.<sup>224</sup> But, the pipeline does cross several hundred federally regulated waters along its route. For this aspect of the project the company needed permits under the Clean Water Act<sup>225</sup> or the Rivers and Harbors Act.<sup>226</sup> Those permits, in turn, triggered application of other federal laws, including the National Environmen-

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<sup>219</sup> Pick-Sloan Flood Control Act of 1944, 58 Stat. 887. *See Impact of the Flood Control Act of 1944 on the Indian Tribes Along the Missouri River Before the Senate Comm. on Indian Affairs*, 110th Cong. 25–56 (2007) (Statement of Ron His Horse is Thunder, Chairman, Standing Rock Sioux Tribe).

<sup>220</sup> *See generally Impact of the Flood Control Act of 1944 on the Indian Tribes Along the Missouri River Before the Senate Comm. on Indian Affairs*, 110th Cong. 25–56 (Nov. 1, 2007) (Statement of Ron His Horse is Thunder, Chairman, Standing Rock Sioux Tribe).

<sup>221</sup> While pipeline proponents argued that chances of a spill were small, there were reports of spills even before the line was fully operational. *See, e.g., Dakota Access Pipeline and a Feeder Line Leaked More Than 100 Gallons in March*, GUARDIAN (May 22, 2017), available at <https://www.theguardian.com/us-news/2017/may/22/dakota-access-pipeline-oil-leak-energy-transfer-partners> [<https://perma.cc/SFE8-QZ74>].

<sup>222</sup> *Standing Rock I*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

<sup>223</sup> Congress asserted authority to comprehensively regulate natural gas production, sale and transportation in the Natural Gas Regulation Act of 1938, 15 U.S.C. § 717 (2016) (“Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”). *See Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 466 (1950). There is no comparable statute authorizing federal regulation of oil pipelines. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d at 7 (“Domestic oil pipelines, unlike natural-gas pipelines, require no general approval from the federal government. In fact, DAPL needs almost no federal permitting of any kind because 99% of its route traverses private land.”).

<sup>224</sup> *Standing Rock I*, 205 F. Supp.3d at 7.

<sup>225</sup> 33 U.S.C. §§ 1311(a), 1342(a), 1344 (2016).

<sup>226</sup> 33 U.S.C. § 403 (2018).

tal Policy Act (NEPA)<sup>227</sup> and the National Historic Preservation Act (NHPA).<sup>228</sup>

The Standing Rock Sioux Tribe filed suit in July 2016 to stop the completion of the pipeline, and the Cheyenne River Sioux Tribe intervened to join the challenge.<sup>229</sup> The Standing Rock Sioux Tribe's Complaint described the federal government's course of dealing with the Tribe:

The reservation established in the 1851 Treaty of Fort Laramie included extensive lands that would be crossed by the proposed pipeline. The Tribe has a strong historical and cultural connection to such land. Despite the promises made in the two Fort Laramie treaties, in 1877 and again in 1889, Congress betrayed the treaty parties by passing statutes that took major portions of this land away from the Sioux. In 1889, Congress stripped large portions of the Great Sioux Reservation that had been promised to the Tribe forever, leaving nine much smaller Sioux reservations, including Standing Rock.<sup>230</sup>

Zeroing in on the requirement of the NHPA,<sup>231</sup> the Tribe sought a preliminary injunction premised on the U.S. Army Corps of Engineers' (the permitting agency) failure to adequately consult with the Tribe.<sup>232</sup> The duty to consult is a procedural step intended to provide information to inform the permitting agency of the potential consequences of its action, and implementing regulations attach special concern to permits that affect sites with "religious or cultural significance to an area affected by a permit."<sup>233</sup> The Corps' alleged failure was closely examined by the district court, which rejected the preliminary injunction request in September 2016.<sup>234</sup> The court determined that the Army Corps had adequately consulted with the tribes through a series of meetings that took place before issuing the permit in July of 2016.<sup>235</sup>

An onsite protest to the action was reminiscent of late-1960s activism and rooted in outrage over a project that seems calculated to skirt the legal

<sup>227</sup> 42 U.S.C. § 4332 (2018).

<sup>228</sup> 54 U.S.C. § 3001010 (2018).

<sup>229</sup> *Standing Rock I*, 205 F. Supp.3d at 24–25.

<sup>230</sup> Complaint at 8, *Standing Rock I*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 16-1534).

<sup>231</sup> *Standing Rock I*, 205 F. Supp. 3d 4, 24–25 (D.D.C. 2016)

<sup>232</sup> *Id.* at 27.

<sup>233</sup> Federal agencies are required to consult with tribe on matters covered by the National Historic Preservation Act. 54 U.S.C. §§ 306108, 302706 (2018). *See* 36 C.F.R. § 800.2(c)(2)(ii)(D) (2018) ("Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part."). Consultation is also required under regulations implementing the National Environmental Policy Act, 40 C.F.R. §§ 1501.2 (d)(2), 1501.7(a)(1), and the Endangered Species Act. *See* Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act (June 5, 1997).

<sup>234</sup> *Standing Rock I*, 205 F. Supp.

<sup>235</sup> *Id.* at 20–22.

authority of the tribe and the federal government. But the project could not escape public attention driven by tremendous concerns about the effect of a pipeline leak, as well as on-site construction that might impair or be offensive to use of important tribal religious and cultural resources. Efforts to block the Dakota Access oil pipeline from crossing the Missouri River near the Standing Rock Sioux Reservation brought attention to water security, environmental justice, and tribal rights issues.<sup>236</sup> Thousands of citizens from around the United States camped in the vicinity of the proposed construction to protest against the project.<sup>237</sup>

At the time of the protests in September of 2016, the Obama Administration was on the verge of issuing the easement to cross Lake Oahe, the final step needed to allow the pipeline crossing near the Standing Rock Sioux to be built. Instead, in response to months-long actions which were heavily covered in the national press,<sup>238</sup> Assistant Secretary of the Army Jo-Ellen Darcy ordered an in-depth analysis of the project by the Army Corps due to potential harmful effects on treaty resources.<sup>239</sup> The Darcy Memorandum noted that the Army Corps had not disclosed several reports regarding spill potential, environmental justice, and alternate routes in order to circumvent further analysis and consultation with the tribe.<sup>240</sup> Accordingly, she ordered the Army Corps to conduct a full Environmental Impact Statement considering at least: 1) alternative locations for the pipeline crossing; 2) oil spill risk analysis taking into account effects on tribal water rights and hunting and fishing rights; and 3) further analysis or tribal treaty rights in Lake

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<sup>236</sup> See Lynda Mapes, *Dakota Access Pipeline Put on Hold as Government Studies Tribe's Concerns*, SEATTLE TIMES, NOV. 14, 2016, <http://www.seattletimes.com/seattle-news/environment/dakota-access-pipeline-put-on-hold-as-government-studies-tribes-concerns>, [https://perma.cc/USD2-D6CK]; Robinson Meyer, *The Legal Case for Blocking the Dakota Access Pipeline*, ATLANTIC, SEPT. 9, 2016, <https://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/> [https://perma.cc/9QKK-KYYK].

<sup>237</sup> See Ariel Zambelich & Cassi Alexandra, *In Their Own Words: The Water Protectors of Standing Rock*, NAT'L PUB. RADIO (Dec. 11, 2016), available at <https://www.npr.org/2016/12/11/505147166/in-their-own-words-the-water-protectors-of-standing-rock> [https://perma.cc/KX36-RETZ].

<sup>238</sup> See Jack Healy & Nicholas Fandos, *Protesters Gain Victory in Fight Over Dakota Access Oil Pipeline*, N.Y. TIMES, DEC. 4, 2016, available at <https://www.nytimes.com/2016/12/04/us/federal-officials-to-explore-different-route-for-dakota-pipeline.html>.

<sup>239</sup> Memorandum from Jo-Ellen Darcy, Ass't. Sec. of the Army (Civil Works), On Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota (Dec. 4, 2016) [hereinafter *Darcy Memorandum*]. The Solicitor of the Department of the Interior simultaneously released an Opinion regard how tribal rights should have been considered in the process. Dep't of the Interior, Solicitor's Opinion, M-37038 on Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline (Dec. 4, 2016). The opinion was withdrawn without analysis on February 4, 2017, and later replaced with a cursory explanation of the withdrawal. Dep't of the Interior, Solicitor's Opinion M-37037, Withdrawal of M-37038 "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline" (July 7, 2017).

<sup>240</sup> *Darcy Memorandum*, supra note 239. The *Darcy Memorandum* also noted that the decision to delay granting the easement had initially been made on September 9, 2016, and reiterated on November 14, 2016.

Oahe.<sup>241</sup> This was all to be done as part of the compliance with Section 185 of the Mineral Leasing Act,<sup>242</sup> allowing rights of way across federal property.<sup>243</sup>

Yet President Trump, a mere three days after taking office, issued a Memorandum directing that permitting be expedited in accord with existing law.<sup>244</sup> The Army Corps reviewed its prior actions and determined that its prior environmental analysis from July 2016 was adequate, and issued the easement needed to finish the pipeline.<sup>245</sup> In the meantime, the litigation continued, with a number of intervenors and the Standing Rock Sioux Tribe raising religious freedom arguments to challenge the pipeline's completion and transport of oil.<sup>246</sup> Like the NHPA claim, the religious freedom arguments were rejected in the district court so that the way was cleared for oil to be flowing through the pipeline. Although the court had now denied preliminary injunctions based on the NHPA<sup>247</sup> and religious freedom grounds,<sup>248</sup> it had not dealt with the merits of the underlying claims.<sup>249</sup>

After nearly a year of intense litigation, the court ruled on the merits of the NEPA challenge and the merits of the claims under the MLA and RHA, holding that the Corps' decision failed to adequately consider the impacts of an oil spill on fishing and hunting rights and on environmental justice, and "did not sufficiently weigh the degree to which the project's effects are likely to be highly controversial in light of critiques of its scientific methods and data."<sup>250</sup> However, the court also rejected the Standing Rock argument that the Corps violated the "federal trust responsibility to protect the Tribe's Treaty rights."<sup>251</sup> It reasoned that in the absence of a specific duty imposed by treaty, statute or regulation, the Army Corps satisfied the federal trust responsibility when it complied "with general regulations and statutes not specifically aimed at protecting Indian tribes."<sup>252</sup>

<sup>241</sup> *Id.*

<sup>242</sup> 30 U.S.C. § 185(a) (2018).

<sup>243</sup> A notice of intent to conduct a more extensive environmental analysis was made in the waning days of the Obama Administration. *See* Notice of Intent To Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request for an Easement To Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543 (Jan 18, 2017).

<sup>244</sup> Presidential Memorandum on the Construction of the Dakota Access Pipeline (Jan. 24, 2017).

<sup>245</sup> *Standing Rock II*, 239 F. Supp. 3d 77 (D.D.C. 2017).

<sup>246</sup> "The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments . . . ." *Id.* at 82.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> In *Standing Rock III*, the court ruled on whether a number of documents should be included in the administrative record over the objections of the pipeline company. 249 F. Supp. 3d 516 (D.D.C. 2017).

<sup>250</sup> *Standing Rock IV*, 255 F. Supp. 3d 101, 147 (D.D.C. 2017).

<sup>251</sup> *Id.* at 143–45.

<sup>252</sup> *Id.* at 144 (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 574 (1998)).

Meanwhile, the oil continued to flow and the court ordered additional briefing on the appropriate remedy.<sup>253</sup> For its part, the pipeline company viewed the Corps' decision as "a potentially lawful action in need of better explanation," and claimed that shutting down and potentially restarting DAPL poses a greater risk to the environment than allowing the pipeline to continue to function.<sup>254</sup> The tribes, on the other hand, wanted the decision to grant the easement vacated and reconsidered under the proper legal standards — including the determination of whether the agency should have conducted an Environmental Impact Statement (EIS), which the agency is generally obligated to complete before a permitted action is allowed go forward.<sup>255</sup> If not, the tribes pointed out, procedural violations of statutes and regulations have no consequence.<sup>256</sup> The court rejected the tribes' arguments, and explained that "because there was a 'serious possibility' that the Corps will be able to substantiate its prior conclusions, the Court finds that vacatur is not the appropriate remedy in this case."<sup>257</sup> The tribes persisted and requested certain conditions, which were received favorably and imposed by the court: "Plaintiffs request three specific conditions during the remand period: (1) the finalization and implementation of oil-spill response plans at Lake Oahe; (2) completion of a third-party compliance audit; and (3) public reporting of information regarding pipeline operations."<sup>258</sup>

After nearly a year of litigation, it was a change in administration that turned the tide in favor of pipeline proponents. Whether the agency needed to prepare a full EIS was, according to the court, a close question. Had the agency adhered to its January 2017 decision to conduct a more complete environmental analysis,<sup>259</sup> it might be well on its way to a final decision with all of the tribal issues at least fairly accounted for in the analysis. The Obama Administration treated the decision as discretionary, thus giving the incoming Trump Administration the leeway to change the federal position.<sup>260</sup> Thus, despite the public outcry and over a year of litigation, oil is flowing

<sup>253</sup> *Cf. id.* at 112 ("Whether Dakota Access must cease pipeline operations during that remand presents a separate question of the appropriate remedy, which will be the subject of further briefing.")

<sup>254</sup> Brief of Dakota Access, LLC. Regarding Remedy at 2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (July 17, 2017).

<sup>255</sup> Brief of Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe Regarding Remedy at 1–2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (Aug. 7, 2017).

<sup>256</sup> *Id.*

<sup>257</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. CV 16-1534 (JEB), WL 4564714, at \*12 (D.D.C. Oct. 11 2017).

<sup>258</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. CV 16-1534 (JEB), 2017 WL 6001726, at \*3 (D.D.C. Dec. 4, 2017).

<sup>259</sup> Notice of Intent to Prepare an Environmental Impact Statement, 82 Fed. Reg. 5,543 (Jan. 18, 2017). See *Standing Rock IV*, 255 F. Supp. 3d 101, 119–120 (D.D.C. 2017).

<sup>260</sup> President Trump did not explicitly dictate the outcome as his memorandum asked the that pipeline construction be allowed "consistent" with federal law. Construction of the Dakota Access Pipeline, 82 Fed. Reg. 11129, 11130 (Feb. 17, 2017).

through the pipeline — an unsatisfactory outcome for the tribes. The district court continues to monitor the situation pursuant to its remand to the agency.

#### V. THE FUTURE OF INDIGENOUS RIGHTS PROTECTION IN THE UNITED STATES

This article began by exploring the international law roots of American Indian law, along with modern declarations of the right to water and a safe, clean environment. Unfortunately, the international declarations are only aspirational at this time, and the international law regarding indigenous rights historically was a tool for acquisition and exploitation of indigenous territory and peoples. United States domestic law concerning Indian affairs is rooted in international law, and maintains the central colonial feature that indigenous peoples are subject to the law of discovering sovereign and its successors.<sup>261</sup> Substantive treaty rights to water and environmental protection have been implied by the courts and are generally protected from harmful federal, state, and private activity unless authorized clearly by Congress. Problems arise when there are development projects permitted near tribal lands and peoples that may affect tribal resources. In those cases, like DAPL, tribes understandably want to influence the parameters of the project, or have an outright veto. Federal law provides meager consultation rights under procedural statutes like NEPA and the NHPA. Veto power is non-existent for projects not directly and demonstrably affecting tribal property

Some hope is provided by an outgrowth of international law's doctrine of discovery known as the federal trust responsibility. Duties rooted in that responsibility extend to the federal government as a whole, and can be used to help shape actions affecting Indian tribes. This responsibility includes duties to protect tribal assets and property from damage by third parties.<sup>262</sup> Thus, all federal agencies shoulder the same consultation and trust responsibilities to be aware of tribal interests, to consult with tribes to identify such interests, and then to take tribal views seriously when presented with tribal input.<sup>263</sup> As one commentator notes, however, existence of the trust responsibility has not prevented massive damage to natural resources upon which tribes depend. "In recent decades, federal agencies have developed a myriad of "government to government" relationships with tribes and have created

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<sup>261</sup> See *supra*, Part I.

<sup>262</sup> See *Parravano v. Babbitt*, 70 F.3d 539, 546–47 (9th Cir. 1995) ("[Commerce] Secretary Brown issued emergency regulations to conserve salmon runs and to ensure consistency with 'any other applicable law,' which includes the Tribes' federally reserved fishing rights.").

<sup>263</sup> Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). See also President Barack Obama, Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,879 (Nov. 5, 2009) (reiterating Exec. Order No. 13,175 and ordering all agency heads to report to OMB with detailed plans for compliance with Exec. Order No. 13,175); Exec. Order, 78 Fed. Reg. 39,539 (June 26, 2013) ("This order establishes a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities.").

policies to carry out their trust obligation. Such policies, however, have generally failed to ensure protection of tribal interests.”<sup>264</sup>

The DAPL litigation demonstrates the effect of marrying the information gathering aspects of NEPA with substantive treaty rights and environmental justice concerns. Serious agency and judicial consideration brings public attention to actions affecting tribal rights and resources. The process can also serve to slow down substantive decision making, which can have a value in its own right. It is difficult to assess how the massive demonstrations at Standing Rock influenced the process. Those demonstrations were clearly important to the Obama Administration—which initially set the stage for completion of the pipeline over tribal objections. However, even when the Army Corps under President Obama changed course, it did so in a way that was dismissive of the tribes’ legal arguments.<sup>265</sup>

The procedural aspects of environmental law and tribal consultation rights under federal law can only go so far. The procedural rights stand in stark contrast to cases litigated on the merits of interference with substantive treaty rights and habitat protection.<sup>266</sup> Indian water rights, recognized by the Supreme Court in 1908, received virtually no protection until a concerted effort to assert and protect them was commenced by the United States in the 1970s.<sup>267</sup> Similarly, federal assistance protecting habitat important to tribes is a recent phenomenon. Tribes can bring administrative actions, or litigate in their own right to protect tribal property and treaty resources, but the importance of federal government backing cannot be overstated.

The shortcomings of the DAPL litigation, however, can be used to spur further debate as to whether increased substantive protections should be recognized in litigation, or by Congress. The former avenue is fact dependent and case-by-case, while the latter seems all but impossible in the current political climate. There is, however, no alternative to continued advocacy on the part of the tribes using the available tools. Indigenous peoples will remain in their homelands and the United States government is here to stay as well. As noted earlier, the Continental Congress declared in 1787 that “utmost good faith” should mark the dealings of the United States with indigenous peoples and their property rights. That United States has only

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<sup>264</sup> Mary Christina Wood & Zachary Welcker, *Tribes As Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 387–88 (2008). Professor Wood provides a scathing review of the United States’ actions toward tribal interests. “The federal government has ignored its trust obligation time and time again and actively resists any judicial enforcement of the trust in pending court cases. Litigation to protect harvest resources has failed largely due to the deference courts give to agencies.” *Id.* at 393 (footnotes and citations omitted).

<sup>265</sup> *Standing Rock IV*, 255 F. Supp. 3d 101, 117 (D.D.C. 2017) (Army Corps agreeing to do an EIS, but describing it as a “policy decision” and claiming that prior approvals did “comport[ ] with legal requirements.”).

<sup>266</sup> See Parravano, *supra* note 262, at 547, and cases cited *supra* note 115.

<sup>267</sup> See *supra* Part III.



sporadically acted in “good faith” in the hard cases is no reason to cease efforts to enforce that early promise.

When pressed in litigation, the federal government routinely rests on the narrow standard of the trust damages cases and resists tribal efforts for court orders shaping agency action.<sup>268</sup> Lower federal courts recently have looked only to see whether federal agency action challenged by tribes satisfied the applicable statutes and regulations. Commentators have criticized courts for failing to distinguish between the standards applicable to damages cases and those seeking prospective relief,<sup>269</sup> but the distinction has not seemed to matter to courts. Instead “courts collapse protective trust requirements into statutory standards.”<sup>270</sup> They have wrongly rejected the argument that in actions affecting Indian tribes (where the tribe participates in the agency proceeding, or the agency otherwise is aware of a potential effect on tribal interests) the agencies should be held to a higher standard. That higher standard could be satisfied by analogy to NEPA’s “hard look” requirement<sup>271</sup> and mandate explicit consideration of tribal interests and a reasoned determination that those interests are protected in the proposed action. In other words, the agency should explain why tribal concerns are already respected under its decision, and why a tribally proposed alternative is not feasible.<sup>272</sup>

For the most part, courts have not analyzed or criticized the distinction between the damages claims and claims for injunctive relief. Instead, courts fold the analysis into their consideration of whether the federal trust responsibility provides a heightened standard for review of agency action and conclude that it does not.<sup>273</sup> The Standing Rock Sioux court rejected the tribe’s argument in the following terms: “The problem for Standing Rock, however, is that “[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law.”<sup>274</sup>

The Supreme Court has never addressed that precise question in a case brought outside of the Indian Tucker Act. Congress has not been silent on these issues, although most of its attention has focused on failures to properly manage tribal and individual Indian trust funds. Trust reform legislation passed in 2016, and its findings noted that “through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a

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<sup>268</sup> See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, § 5.05[3][c], at 431 (courts have held that “the absence of specific statutory duties, federal agencies discharge their trust responsibility if they comply with the statutes and general regulations.”).

<sup>269</sup> Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003).

<sup>270</sup> *Id.* at 356.

<sup>271</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 334 (1989).

<sup>272</sup> Congress has provided states with special treatment due to their sovereign status that would be appropriate for tribes as well. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 200–07 (2005) (discussing examples from several statutes).

<sup>273</sup> *Standing Rock IV*, 255 F. Supp. 3d 101, 143–45 (D.D.C. 2017).

<sup>274</sup> *Id.* at 143 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)).

unique trust responsibility to protect and support Indian tribes and Indians.”<sup>275</sup> The operative sections of the legislation authorized a demonstration project for the management and approval of residential, business, agricultural, or wind or solar resource leases of land without Secretarial approval.<sup>276</sup> This is a positive step, consistent with prior efforts in the Indian Self-Determination and Self-Governance Acts<sup>277</sup> that advanced tribal self-government by relaxing the supervisory authority of the Bureau of Indian Affairs. An intriguing portion of the 2016 trust reform statute gives the Secretary of the Interior authority to establish a new administrative office with increased power to coordinate the Department of the Interior’s various programs related to Indian affairs.<sup>278</sup> This Under-Secretary for Indian Affairs would be authorized to “the maximum extent practicable, [to] supervise and coordinate activities and policies of the BIA with activities and policies of” other Interior Department agencies.<sup>279</sup> While it represents a starting point for advancing Indian interests within the Interior Department, any advance may be illusory, because the Under-Secretary could be overruled by the Secretary.

It is apparent that Indian tribes in the United States need more than rights to consultation when federal projects or federal-permitted projects take place in off-reservation areas that may nonetheless affect indigenous rights to land and water. At least, any consultation power must have teeth. One approach would be to adopt a model similar to the process established in section 7 of the Endangered Species Act.<sup>280</sup> If a federal action may affect any species listed as threatened or endangered, the federal agency taking action must consult with a federal wildlife management agency (U.S. Fish and Wildlife Service or the Department of Commerce) to determine if the proposed action may jeopardize the continued existence of the species.<sup>281</sup> The wildlife management agency may then impose conditions on the federal activity to prevent harm to the species or its habitat.<sup>282</sup> It is beyond the scope of this article to set out the details of such an approach, but it could provide substantive protection for tribal citizens and their territory.

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<sup>275</sup> 25 U.S.C. § 5601 (2018).

<sup>276</sup> 25 U.S.C. § 5614 (2018).

<sup>277</sup> Indian Self-Determination and Educational Assistance Act (ISDEA) of 1975, 25 U.S.C. § 5301 (2018) (amended by the Tribal Self-Governance Acts of 1988, 1994, and 2000 (codified at 25 U.S.C. §§ 5361-5399)).

<sup>278</sup> 25 U.S.C. § 5633(a) (2018).

<sup>279</sup> 25 U.S.C. § 5633(c)(2) (2018).

<sup>280</sup> 16 U.S.C. § 1536(7) (2018). See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, NYU ENVTL. L.J. 179, 208-216 (2005) (discussing Endangered Species Act consultation and opportunities for greater cooperation with states).

<sup>281</sup> 16 U.S.C. § 1536(a)(3) (2018).

<sup>282</sup> 16 U.S.C. § 1536(b)(4) (2018).

## CONCLUSION

Tribal rights to water are firmly established, although for any tribe, claiming such rights is an arduous, lengthy, and expensive process. Still, the model — one that resulted in 32 settlements approved by Congress — has a large role for the tribes and others who rely on a common water resource. If settlement is not achievable in such cases, litigation is always an option, and the tribes (with substantial federal support) have generally done well in such litigation. In the case of environmental habitat protection like that at stake in the DAPL controversy, however, there is no settlement model. Tribal input into most projects affecting tribal lands and water is advisory only. Unlike the water rights situation, where tribes and the federal government are usually allied, tribes dissatisfied with a federal project or permitting decision are left to battle against the United States alone. The DAPL experience shows the shortcomings in this approach and should serve as a springboard for changes in federal law. Tribes should be afforded more influence in federal permitting decisions that will affect tribal land, water and people. It is not enough to be consulted if the permitting agency is free to reject tribal input subject to deferential judicial review. The Supreme Court could fix the problem by limiting its narrow interpretation of the tribal trust to the Tucker Act cases, and requiring that agency actions comply with a substantive trust obligation to recognize and protect tribal interests. And, of course, Congress has paramount authority that it should exercise due to its solemn obligations to Indian nations.

