

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,)
)
 Plaintiff,)
)
 and)
)
 CHEYENNE RIVER SIOUX TRIBE,)
)
 Intervenor-Plaintiff)
)
 v.)
)
 U.S. ARMY CORPS OF ENGINEERS,)
)
 Defendant-Cross-Defendant)
)
 and)
)
 DAKOTA ACCESS, LLP,)
)
 Intervenor-Defendant-)
 Cross-Claimant.)
 _____)

Case No. 1:16-cv-1534-JEB

**BRIEF OF *AMICI CURIAE* ASSOCIATION ON AMERICAN INDIAN AFFAIRS,
PUEBLO OF POJOAQUE, AND UNIVERSITY OF NEW MEXICO SCHOOL OF LAW
NATURAL RESOURCES AND ENVIRONMENTAL LAW CLINIC IN SUPPORT OF
PLAINTIFF STANDING ROCK SIOUX TRIBE'S MOTION FOR SUMMARY
JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to LCvR 7(o) and FRAP 29 (c)(1), Amici Association on American Indian Affairs, the Pueblo of Pojoaque, and the University of New Mexico School of Law Natural Resources and Environmental Law Clinic make the following disclosures:

1. For non-governmental corporate parties please list all parent corporations: None.
2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None
3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interest: Counsel for the Association on American Indian Affairs, the Pueblo of Pojoaque, and the University of New Mexico School of Law Natural Resources and Environmental Law Clinic is aware of no such corporation.

Dated: February 21, 2017

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INTEREST OF *AMICI CURIAE*

The Pueblo of Pojoaque is a sovereign Indian tribal government, and one of the nineteen Pueblos of New Mexico. The Pueblo has land and cultural resources which are located both on and off its current reservation lands, which are subject to the trust relationship. There are still ancestral village sites which are located off of the current reservation. The Pueblo of Pojoaque was historically known as "Po-suwae-geh Owingeh" or Water Gathering Place. The Pueblo knows how important water was to its history and development as a civilization and how important water still is to its people. The Pueblo is proud to honor its role as a guardian of the water in the Pojoaque Valley by supporting the Standing Rock Sioux Tribe in its efforts to protect the integrity of its cultural and natural resources. Additionally, the Pueblo of Pojoaque has a profound interest in ensuring the United States government, especially members of the Executive Branch, honor their fiduciary responsibilities when it reviews and issues permits impacting Indian lands and resources.

The Association on American Indian Affairs ("AAIA") was established in 1922 as a nonprofit American Indian advocacy organization and has an all-Native American Board of Directors. One of its primary goals is to advocate for the protection of sacred lands and Native American cultural resources in partnership with American Indian tribes and traditional leaders. Over the course of its 95 year history, the AAIA has helped to draft the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act, and has actively participated by providing comments and legal assistance for tribes in the federal environmental and cultural review process required by the National Environmental Protection Act, National Historic Preservation Act, and section 4f of the Transportation Act, among others.

The University of New Mexico School of Law Natural Resources and Environmental Law Clinic (NREL), enables students to provide community lawyering to underrepresented

individuals, community-based groups, nonprofit organizations and Indian tribes. NREL seeks to protect and preserve lands and natural resources, and to improve public health and the environment of rural communities. NREL Clinic students embody the highest ideals of excellence, subject-matter competence, and client collaborative process in the areas of environmental law and Federal Indian law.

This case matters not only to the Standing Rock Sioux Tribe but to all federally recognized tribes and tribal peoples throughout the United States. *Amici* are deeply concerned that the actions taken by the United States in approving the Dakota Access Pipeline easement substantially undermine tribal treaty rights and tribal sovereignty. Moreover, these actions undermine the trust duties and obligations of the United States to the Standing Rock Sioux Tribe, and all other tribes, to protect and preserve Indian lands, waters, and cultural resources. *Amici* urge this Court to grant the Standing Rock Sioux Tribe's Motion for Summary Judgment.

ARGUMENT

I. THE TRUST DOCTRINE REQUIRES THE UNITED STATES TO EXERCISE ITS FIDUCIARY RESPONSIBILITIES TO PROTECT AND PRESERVE THE TREATY RIGHTS, RESOURCES AND BEST INTERESTS OF INDIAN TRIBES

This pivotal moment in the history of the Standing Rock Sioux Tribe and many other tribes may determine whether the continued protection of the Lakota, Dakota, and Nakota Peoples' traditional lifeways dependent on natural resources will survive for future generations. The Standing Rock Sioux Tribe is at the brink of losing their cultural and natural resources due to the impending advancement of the Dakota Access Pipeline across Lake Oahe and other tribal lands. These lands are intertwined with their Ancestors, belief systems, sacred places, water supply, and treaty rights. Without the required federal environmental and cultural reviews, and the tribal consultations mandated under federal law, the United States disregards the various impacts of the pipeline to these lands. At risk in this case is the destruction of sacred sites and the contamination of tribal waters. Both are deeply interwoven with tribal health, safety, and welfare, and are integral to tribal life since time immemorial. This neglect by the United States to carry out its trust and fiduciary duties is tantamount to an environmental assault and will have dire consequences across Indian Country. Furthermore, it is an abrogation of the trust doctrine and violates what is owed to tribes under the solemn federal-tribal relationship.

A. Introduction

The United States and its executive agency, the U.S. Army Corps of Engineers, have an established trust relationship with the Standing Rock Sioux Tribe,¹ as recognized by the Solicitor

¹ This trust relationship was established in the Fort Laramie Treaty of 1851, 11 Stat. 749 and the Fort Laramie Treaty of 1868, April 29, 1868, 15 Stat. 635, wherein the Standing Rock Sioux Tribe reserved an extensive area of land for the “absolute and undisturbed use and occupation” of the Sioux Nation. *Id.* Art. 2. The Fort Laramie Treaty, entered into pursuant to the United States Constitution, memorializes the trust obligation, and the Constitution expressly proclaims such treaties as the “supreme law of the Land.” U.S. CONST., Art. VI, cl. 2. This constitutional emphasis on the rank of treaties in the federal system of laws

of the Department of the Interior.² The federal trust relationship with Indian tribes carries with it independent trust duties owed to individual Indians and Indian tribes. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (2006). This unique duty arises from the vast cession of millions of acres of land by tribes in reliance on promises by the United States that the reserved tribal lands and resources, and traditional tribal uses of off-reservation lands, would be permanently protected for future generations.³ The trust responsibility is a duty owed to the tribes by all federal departments and agencies exercising federal authority, which relates to an Indian tribe. *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 (W.D. Wash. 1996).

In the early years of the federal government, federal protection was provided to secure reserved native lands against encroaching white settlers. The modern form of the trust obligation is based on the federal government's duty to protect tribal survival by protecting tribal lands, resources, and the native way of life, as well as shielding Indian lands from environmental threats. See e.g., *United States v. Creek Nation*, 295 U.S. 103 (1935); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987) (finding trust responsibility to protect tribe's wildlife resources);

supports a high prioritization of native interests when treaty rights are impacted. For many tribes, the vast cessions of land by tribes through the treaty process were premised on federal promises that native people could continue their way of life on homelands of smaller size, free from intrusions of the majority society, and hunt, fish and gather off-reservation. The dominant tenet which emerges from these origins is that a tribe's best interests is in preserving the tribe's sovereign nation status, reserving their lands, and ensuring the wellbeing of future generations. And, the trust doctrine is the tool to implement the tenet.

² Opinion of Solicitor of the Department of the Interior, M-37038, Dec. 14, 2016. The legal opinion, requested by the U.S. Army Corps of Engineers, confirms the Standing Rock Sioux's Treaty rights in Lake Oahe, and finds the agency failed to consider the Tribe's Treaty rights during the permitting process.

³ See, Charles Wilkinson, AMERICAN INDIANS, TIME AND THE LAW, 14-19 (1987), Professor Wilkinson describes the "old laws" embodied in the early treaties, case law, and statutes, were designed to create a "measured separatism" for tribes within a growing majority society embracing very different economic and cultural ways. *Id.* at 18. See also, Mary C. Wood offered a critique of several federal agencies in her article, Mary Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 *Env't'l Law* 733 (1995).

Joint Passamaquoddy Tribal Council v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (noting the federal government’s fiduciary duty to protect tribal lands is “beyond question”). In light of the preservation goals of the trust responsibility, it is a logical and necessary conclusion to extend it to natural resource protection.

Federal agencies have tremendous impacts on Indian country through their land management systems, regulatory structure, and implementation of federal environmental laws. Through these processes, the agencies regulate a variety of private activities, including oil and gas pipelines, which have the potential to threaten or degrade the environment. The scheme of environmental laws – Clean Water Act,⁴ the Clean Air Act,⁵ the Safe Drinking Water Act,⁶ the Endangered Species Act,⁷ and the National Environmental Policy Act⁸ – were enacted to protect the interests of the majority of society, not the specific interests of tribes, tribal resources, cultural resources, or sacred sites. However, the federal agencies are obligated through the trust doctrine and the government-to-government relationship with Indian tribes to protect specific interests of tribes when implementing federal laws. The trust doctrine creates a heightened level of duty: the United States has charged itself with moral obligations to the tribes of the highest responsibility and trust, *Seminole Nation v. United States*, 316 U.S. 286 (1942), to be judged by “the most exacting fiduciary standards.” *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004) (quoting *Morton v. Ruiz*, 419 U.S. 199, 236 (1974), and *Seminole Nation*, 316 U.S. at 297). When undertaking federal action, it is incumbent upon agencies to exercise discretion based on the trust

⁴ Pub. L. No. 95-217, 91 Stat. 1566 (1977).

⁵ Pub. L. No. 88-206, 77 Stat.392 (1963).

⁶ Pub. L. No. 93-523, 88 Stat. 1660 (1974).

⁷ Pub. L. No. 93-205, 87 Stat. 884 (1973).

⁸ Pub. L. No. 91-190, 83 Stat. 852 (1970).

doctrine and the accompanying fiduciary duties owed to tribes within the environmental statutory scheme in order to protect these vital tribal interests and resources.

B. The Federal Government Fulfills Its Responsibilities to Tribes Through the Exercise of its Trust Responsibility

1. Origins of the Federal Trust Responsibility

The trust doctrine is a cornerstone of federal Indian law. The origins of the trust responsibility are found in Supreme Court’s decisions in two landmark Cherokee Nation cases. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Cherokee Nation*, the Court held that the Cherokee Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution. 30 U.S. (5 Pet.) at 10. In analyzing the treaties with the Cherokee, the Court held that both the treaties with tribe and the Indian Trade and Intercourse Acts protected the tribe. Accordingly, the Court declared that the Cherokee Nation was a “state” in the sense of being “a distinct political society . . . capable of managing its own affairs and governing itself.” *Id.* However, the Court also held that all tribes were subject to the protection of the United States, and therefore “might more correctly be denominated domestic dependent nations.” *Id.* at 13. The Court concluded that “[t]heir relation to the United States resemble that of a ward to his guardian.” *Id.* The Court in *Worcester* built upon *Cherokee Nation* by not only construing the treaties as “explicitly . . . recognizing the national character of the Cherokee as their right of self-government,” but also holding that state law has no force and effect on Indian lands. 31 U.S. Pet. at 557, 561.

Today, it is well accepted that the United States owes fiduciary duties to American Indians.⁹ Indeed, nearly four hundred treaties between Indian tribes and the United States and an

⁹ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Tulee v. State*, 315 U.S. 681 (1942); *United States v. Santa Fe Pac. Ry.*, 314 U.S. 339 (1941); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. Candelaria*, 271 U.S. 432

entire title (25 U.S.C.) of the United States Code are premised on this responsibility. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

2. Common Law United States- Tribal Trust Principles

The Supreme Court has consistently recognized that the United States “is something more than a mere contracting party” with Indian tribes, and “has charged itself with the moral obligations of the highest responsibility and trust” to those tribes. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1941). The standards of conduct imposed by the trust doctrine apply to all federal agencies when dealing with protected Indian interests. *Id.*; *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) (“It is fairly clear that any federal action is subject to the United States’ fiduciary responsibilities toward the Indian tribes”); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976). The “trust responsibility extends not just to the Interior Department, but attached to the federal government as a whole.” *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995).

So too, the fiduciary “duty extends to the Corps of Engineers in the exercise of its permit decisions.” *Northwest Sea Farms*, 931 F.Supp. at 1519, *citing Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1523 (W.D. Wash. 1988). Accordingly, “in carrying out its fiduciary duty, it is . . . the Corps’ responsibility to ensure that Indian treaty rights are given full effect.” *Northwest Sea Farms*, 931 F. Supp. at 1519.

(1926); *United States v. Payne*, 264 U.S. 446, 448 (1924); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Heckman v. United States*, 224 U.S. 413, 437-38 (1912); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564(1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641 (1890); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *United States v. Kagama*, 118 U.S. 375 (1886); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

The United States' obligation to tribes is greater than that of any ordinary trustee. The federal executive is to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness," *United States v. Payne*, 264 U.S. 446, 448 (1924), and must exercise the highest degree of care and all the skill at his disposal to protect trust property from loss or damage. *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981). Moreover, trust responsibilities require far more than a "judgment call" that subordinates the tribes' trust resources to competing federal interests. *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973).¹⁰ A tribe is not required to prove to the trustee that particular measures are necessary; indeed, "[a] tribe is 'entitled' to rely on the United States, its guardian, for need protection of its interests." *United States v. Creek Nation*, 295 U.S. at 110. Although relevant statutes and treaties will define the contours of the trust obligations, "[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities." *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001), quoting *Mitchell II*, 463 U.S. at 225.¹¹

The source of the federal government's trust responsibility is established by the provisions in treaties, statutes, and agreements, and is "reinforced by the undisputed existence of a general trust relationship between the United States and Indian people." *United States v. Mitchell*, 463 U.S. 206, 226 (1983). See, Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indian*. 27 Stan. L. Rev. 1213 (1975). It operates as both a promise by the Federal

¹⁰ *Modified on other grounds*, 360 F.Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

¹¹ The various decisions of the Court of Appeals for the District of Columbia Circuit in *Cobell v. Norton*, apply the trust principles. *Cobell* was a class action brought by individuals for who the United States maintains trust accounts. On several occasions in the litigation, the D.C. Circuit rejected the Secretary of the Interior's claim that because she had not violated a specific statute in managing Individual Indian Money accounts she was not liable to the plaintiffs tribal landowners. See *Cobell*, 391 F.3d at 257.

government regarding its conduct toward tribes and their land and resources, and as a measure by which to assess that conduct. Therefore, the trust responsibility underpins all actions of the United States relating to Indian lands and resources.

II. THE TRUST DOCTRINE APPLIES TO THIS CASE IN SEEKING INJUNCTIVE RELIEF TO PROTECT SACRED TREATY RIGHTS AND RESOURCES

A. The Courts Have Distinguished Between Damages and Injunctive Relief Trust Cases

Because the trust doctrine is a common law doctrine, the courts have defined the contours and responsibilities of the United States' trust duties regarding potential harm to tribal resources and communities. Today, the doctrine of the federal trusteeship is pertinent in two ways: (1) to obtain injunctive relief to stop the federal government from allowing harm to Indian lands and resources; and (2) to hold the United States liable for money damages for mismanagement of tribal lands or resources. This case is an injunctive relief trust case - not one seeking damages. Therefore, the line of cases addressing agency trust responsibilities in the context of injunctive relief is applicable here.

Some courts have failed to acknowledge the distinction between stating a cause of action for damages against the United States under the Tucker Act or the Indian Tucker Act¹² and stating a cause of action for declaratory and injunctive relief against the United States under the Administrative Procedures Act.¹³ Claims filed under the Tucker Acts require a statute expressly

¹² The Tucker Act, 28 U.S.C. §1491(a)(1) (2000), and its counterpart for claims brought by tribes, the Indian Tucker Act, 28 U.S.C. § 1505 (2000), waive the sovereign immunity of the United States with respect to the claims specified in those statutes. *United States v. Mitchell*, 463 U.S. at 212-16.

¹³ Examples of these cases include *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 471, 479 (9th Cir. 2000); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998).

supporting claims for damages against the United States.¹⁴ Tucker Act claims must be based on either the Constitution, statute, regulation, or contract.¹⁵ Likewise, the Indian Tucker Act requires that claims for damages against the United States be based on express law found in the Constitution, statutes, executive orders, or treaties.¹⁶

In contrast, this case is an equitable claim under the Administrative Procedures Act (“APA”), and requires a showing that the federal agency action is “not in accordance with law” or is “arbitrary [and] capricious.” 5 U.S.C. § 706(2)(a) (2005). Trust enforcement under the APA is much broader than under the Tucker Acts because there is no requirement under the APA to base a claim on a statute or some other source of express law. Indeed, a long line of federal cases reflects a firm judicial inclination to impose a trust duty of protection on federal agencies, such as the U.S. Army Corps of Engineers, when their actions threaten the use or enjoyment of Indian lands or resources. *See, e.g., Nance v. EPA*, 645 F.2d at 710 (imposing fiduciary duty on the EPA); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (fiduciary duty of the Bureau of Mines).

¹⁴ The damages cases began in *United States v. Mitchell*, 463 U.S. 206 (1983), wherein tribal members argued the lands. The Supreme Court agreed with the tribe and tribal members, finding the federal timber statutes “clearly give the Federal Government full responsibility to manage Indian resources and land for benefit of the Indians.” *Id.* at 224.

¹⁵ The Tucker Act provides in pertinent part:

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

28 U.S.C. § 1491(a)(1) (2000).

¹⁶ The Indian Tucker Act provides:

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

28 U.S.C. § 1505 (2000).

The APA does not have the restrictive language found in the Tucker Acts, and, therefore, this Court should treat this APA cause of action, separately from the Tucker Acts cases.

The courts have improperly applied the Tucker Act damages rule to APA cause of actions. This confusion has resulted in the erroneous view that the United States satisfies its trust obligations by merely complying with the applicable statute that has no specific duties to the tribe.¹⁷ It is inappropriate to require the showing of a specific statutory basis for damages claims to injunctive claims that are not seeking such relief.

B. The Court Should Apply Injunctive Relief Standards to This Case

The United States' duty of protection is critically important here because of the need to shield treaty rights and Indian lands from environmental contamination and deterioration. In natural resources and environmental matters, a federal agency must carry out its statutory mandates with due regard to the trust duties owed to Indian nations, particularly in decision-making on permits, leases, and review of energy projects. Indeed, many federal agencies retain jurisdiction over the regulations of pollutants that impact Indian lands and resources as a matter of federal law. *See Washington Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985). The trust responsibility imposes legal duties on federal executive agencies separate and apart for any express provisions of a treaty, statute, executive order or regulation. *Lane v. Pueblo of Santa Rosa*, 249 U.S.110 (1919).¹⁸ The resources at risk here are tied to the cultures and wellbeing of tribal

¹⁷ See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Land and Resources Through Claims for Injunctive Relief Against Federal Agencies*, 39 TULSA L.REV. 355 (2003).

¹⁸ In *Lane*, the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, “would not be an exercise of guardianship, but an act of confiscation.” *Id.* at 113. The lands in *Lane* were not protected by any treaty, and there was no claim that the Secretary’s proposed disposition of them violated any treaty or statute.

communities. Accordingly, the trust doctrine is a critical imperative that guides and assesses the federal government's actions to protect unique and irreplaceable tribal resources.

The trust obligation, as courts have acknowledged, has two critical components – procedural and substantive – which must be fulfilled by the trustee. *See Nance v. EPA*, 645 F.2d at 711. The procedural mandate requires an agency to consider the effects of its actions on tribal resources and other interests, and assess its trust obligations to the tribe. This includes a procedural duty “to consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources.” *Klamath Tribes v. U.S.*, 1996 WL 924509 (D. Or. 1996), quoting *Lac Courte Oreille Band of Indians v. Wisconsin*, 668 F. Supp. 1233, 1240 (W.D. Wis. 1987); see also President's Memorandum on Government-to-Government Relations with Native American Governments, 59 Fed. Reg. 22951 (Apr. 29, 1994).¹⁹ The substantive mandate requires the agency to affirmatively protect the tribes' interests when it undertakes any action.

In *Northern Cheyenne v. Hodel*, , the Montana district court held that the Bureau of Land Management violated its fiduciary duty owed to the Tribe by failing to consider the tribe's interests in issuing coal leases on public lands surrounding the reservation. 12 Indian L. Rep. 3074 (D. Mont. 1985) *rev'd on other grounds*, 851 F.2d 1152 (9th Cir. 1988). The Northern Cheyenne Tribe claimed that the massive coal development close to the reservation would have deleterious

¹⁹ President Clinton directive provided,

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

Id. See also, William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).

effects on the Tribe's social, economic and cultural welfare. *Id.* at 3066. The court considered the United States's procedural and substantive duties:

[T]he special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully the potential impacts to the Tribe [from coal leasing near the reservation]. Ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in the decisional process . . . violated this trust responsibility. Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider impacts of his action upon a potentially affected tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary's obligations are any less than this would be to render the trust responsibility a pro forma concept absolutely lacking in substance.

Id. at 3074 (emphasis added). The court enjoined further leasing of tracts located near the reservation and ordered rescission of all prior leases. *Id.*

In *Northwest Sea Farms*, 931 F.Supp. 1515, the U.S. Army Corps of Engineers properly applied a heightened fiduciary standard to protect Indian interests in fulfillment of their trust responsibility, and the court sustained the higher standard under the trust doctrine. The federal district court upheld the Corps' denial of the permit for a fish farm because such activity could interfere with the treaty-protected fisheries of the Lummi Nation and Nooksack Tribes. *Id.* at 1521-22. The Corps, in keeping with its trust duties, exercised discretion in accordance with Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (2000), wherein the Corps could deny a permit that conflicted with the "public interest." The Corps construed "public interest" to include the protection of treaty rights. *Northwest Sea Farms* 931 F.Supp. at 1518. The district court upheld

the Corps' interpretation and conclusion, holding that the fiduciary trust duty formed a legal mandate within the federal statute. *Id.* at 1520.

More specifically, the U.S. Army Corps of Engineers in *Northwest Sea Farms* "asserted that the 'trust relationship' between it and the Lummi Tribe mandates consideration of treaty fishing rights." *Id.* at 1519. The Corps requested additional submissions from the tribe and the public after the issue concerning treaty rights was raised. *Id.* at 1524. The Corps recognized its duty to ensure that the tribe's treaty rights were "not abrogated or impinged upon absent an act of Congress." *Id.* at 1519. The Court agreed that the trust responsibility provided a "legitimate explanation for the Corps' request for information from the Lummi Nation." *Id.*

In *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C.) (mem.), the Nevada district court overturned a Department of the Interior regulation establishing the amount of water to be diverted to an irrigation district from the Truckee River. The river is the primary water source for Pyramid Lake; the lake is located on the Paiute Tribe's reservation and is central to the tribe's livelihood. Though the point of diversion was located off-reservation, the resulting decline in water flow seriously threatened the lake environment. *Id.* at 255. The district court found the Secretary of the Interior was obligated, pursuant to his fiduciary duty owed to the tribe, to assert his authority to the "fullest extent possible" to preserve water for the tribe. *Id.* at 256. The Secretary had simply made a "judgment call" in allocating the water between the tribe and irrigation district. *Id.* The court held an allocation, lacking an explicit rationale, violated the Secretary's trust obligation to the tribe. *Id.* at 256 – 57.²⁰

²⁰ Additionally, the Ninth Circuit, held that the Secretary of the Navy owed a fiduciary duty to the tribe to "preserve and protect" the Pyramid Lake fishery when leading appurtenant water rights that would result in decrease water levels in Pyramid Lake. *Pyramid Lake Paiute Tribe v. United States Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). The court explicitly acknowledged that the trust duty is not limited to the management of tribal property, but instead extends to "any federal government action." *Id.* at 1420.

Likewise, in *Nance v. EPA*, 645 F.2d 701, the Crow Tribe challenged EPA's approval of the Northern Cheyenne Tribe's airshed redesignation under the Clean Air Act would impose more stringent restraints on development in the area surrounding the Crow Tribe's reservation. The Crow Tribe argued that the EPA violated its fiduciary duty by failing to consider the effect of the redesignation on the tribe's ability to mine coal on its reservation. *Id.* The Ninth Circuit unequivocally found that the EPA owed a procedural and substantive fiduciary duty to the Crow Tribe, but held that the agency fulfilled its trust obligation in its consideration of the tribe's interest. *Id.* at 710-12.

In *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir.), *cert. denied*, 113 S.Ct. 1642 (1992), the Tenth Circuit stated in an action affecting Indian lands,

When the Secretary is obligated, as in this case, to act as a fiduciary, then his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under stringent standards demanded of a fiduciary... The Area Director, . . . has broad administrative discretion to consider all factors affecting the Tribes' interests, but his fiduciary responsibilities do not allow such discretion when it comes to not considering certain factors.

966 F.2d at 591 (citation omitted). Thus, the United States was obligated under these "stringent standards" to consider all relevant factors affecting the Tribes' interests, not merely the minimal requirements of the law. *Id.*

In *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), the Ninth Circuit upheld an emergency regulation issued by the Department of Commerce to curtail non-Indian fishing under the Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976), in order to protect the salmon runs for the Yurok and Hoopa Valley Tribes. *Id.* at 547 -48. The court held that the United States' trust duty to protect the tribal fisheries amounted to "any other

applicable law” which the Secretary of Commerce must take into consideration when establishing fishery standards under the Act. *Id.*

Finally, for actions affecting tribal property interests, the United States must not subordinate its trust duty to other interests unless expressly directed by Congress. The government’s duty must be directed exclusively to the best interests of the tribes. The trust obligation requires protecting tribal property interests and treaty rights against competing interests of other constituencies to which agencies may feel beholden. *See Northwest Sea Farms* 931 F.Supp. 1515. The rule derives from the well-established line of authority that holds that federal agencies are not empowered to abrogate Indian treaty rights without congressional approval; such approval is not lightly implied. *See Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252. As stated in *Northern Cheyenne*:

The Secretary downplays his responsibilities to the tribe by arguing that the decision to hold the lease sale was taken in the “national interest.” He correctly points out that his duties and responsibilities extend to all United States citizens, and takes the position that federal coal development is vital to the nation’s energy future. The Secretary’s conflicting responsibilities . . . however, do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situation such as the present case where an agency’s conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.

12 Indian L. Rep. at 3071. Federal agencies, while not altering the actual reservation boundaries, may substantially diminish the usable Indian lands, and adversely affect treaty rights. Federal environmental laws fail to provide the degree of protection sufficient to safeguard the tribal environment, interests, and treaty rights. All of the aforementioned standards are applicable to the federal government in this case, and should be utilized to determine the United States’ heightened duties and obligations to the Standing Rock Sioux Tribe.

Taken together, these cases impose strong procedural and substantive construction of the trust doctrine to insure a federal agency exercises its duty to protect Indian lands and resources from adverse impacts. This interpretation of the trust doctrine is consistent with the underlying principles of guardianship, protection of tribal lands and people, the promise of separatism, which are all rooted in the federal-Indian relationship. Accordingly, the U.S. Corps of Engineers must fill the gap in the federal law through the exercise of its trust obligations to tribes.

CONCLUSION

The trust doctrine honors and protects the unique relationships of Indian tribes to their land and natural environment. Federal agencies are bound by their trust responsibilities to the tribes in all agency actions, including easement permitting, that affect Indian lands, resources, cultural resources, sacred sites, and waters. The federal agency's fiduciary duties are particularly exacting when tribes seek injunctive relief to prevent harm, as opposed to monetary damages to compensate for harm. Therefore, the Court must assess the sufficiency of the U.S. Corps of Engineers actions based upon the heightened fiduciary duties of the trust doctrine. The Standing Rock Sioux Tribe's Motion for Summary Judgment should be granted.

Respectfully submitted,

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