T.W. Arman, owner, & John F. Hutchens, Joint Venturers,
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P.O. Box 992867, Redding, CA 96099 530-275-4550, fax 530-275-4559
Lighthorse Ventures, LLC, Stephen B, Lopez; Essential Solutions, Inc. **JOINDER**

UNITED STATES DISTRICT COURT EASTERN DISTRICT of CALIFORNIA

ADMINISTRATIVE INTERVENTION DECLARATORY & INJUNCTIVE RELIEF
ARREST OF JUDICIAL TAKING BEFORE JUDGMENT INTERLOCUTORY APPEAL
EMERGENCY CITIZEN SUIT INTERVENTION - EX REL. HUTCHENS

IRON MOUNTAIN MINES, INC. &	**)Civil No. 2:10-cv-0232 FCD KLM -- JOINDER**
T.W. ARMAN, DEFENDANTS	**)Related case: Civil No. 2:91-cv-0768 DFL JFM**
v.	**)Other cases: USCFC No. 09-207 L**
UNITED STATES OF AMERICA	**)CIRCUIT No. 09-17411, 09-70047, 09-71150**
PLAINTIFFS	**) HONORABLE JUDGE: JOHN A. MENDEZ**
IRON MOUNTAIN MINES, INC. &	) *Writ of error, coram vobis damnum absque injuria;*
T.W. ARMAN, DEFENDANTS	) *stare decisis & intervention; de Quibis Commote*
v.	)*Alodium & Alodarii, Quia tria sequunturdefama-*
CALIFORNIA	)*torem; Quando Dominus Conscientiae detrimen-*
PLAINTIFFS	)*tum; Quae clamat tenere de te per liberum seruit-*
WRONGFUL TAKINGS; DEFAMATION;	)*ium & difficillimum est invenire authorem infama-*
VIOLATIONS: §§ 1983, 1985, 1986.	)*toriae scripturae;* ***Breve Capitalis Justiciarius***
§ 241, § 242, § 245, § 3729. §§15 §1110b	)***noster and ad placita coram nobis tenenda;***
CONSTITUTIONAL CIVIL RIGHTS §905	) ***Breve Soke;*** pattern of deception of the Court
CERTIORARIFIED MANDAMUS §1257	)**TRUST, FRAUD, ACCIDENT, MISTAKE, &**
NEGLIGENCE §803 FALSE CLAIMS §706	) **HARDSHIP; COMPULSORY JOINDER OR**
PETITION FOR CIVILIZATION	)**DISMISSAL; ORDER TO SHOW CAUSE**

writ of error, coram vobis damnum absque injuria; **petition for order to show cause and review.**

§ 807. The law of natural flow

In conducting mining operations, water, as was said by Lord Tenterden, is a sort of common enemy, against which each man must defend himself. Yet while this property right of defense is a natural one, it must be so exercised as not to endanger the lives or property of others.

Each mine owner has all the rights of property in his mine, and, among them, the right to extract all minerals therefrom, provided he works with skill and in the usual manner; and if, while the occupier of a higher level exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.

Land on a lower level owes a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down upon it.

From the necessity of the case, every owner of a mine must submit to the inconvenience of having water of an adjoining mine upon a higher level descend upon his land so long as it descends in the natural course of drainage.

If the owner of the servient heritage wishes to guard against this operation, he must leave barriers "to bay back the water of his higher neighbor."

Otherwise the resulting damage, if any, is *damnum absque injuria.*

In July of 1983, before Iron Mountain Mine was placed on the NPL, the U.S. Dept. of the Interior Bureau of Reclamation completed its SPRING CREEK HEAVY METAL POLLUTION STUDY. See: http://www.ironmountainmine.com/iron mountain/doi study.pdf

"Optimum protection of Chinook salmon would be achieved by alternative 4b, increasing the size of the Spring Creek Debris Dam to 25,000 acre-feet (an increase of 19,200 acre-feet)".

STATUTORY REMEDY REQUIRED & RELIEF DEMANDED

As this remedy is still needed for Iron Mountain Mine to meet provisions of the CWA (Clean Water Act), we respectfully request this Court to direct to the U.S. Bureau of Reclamation an Order to Show Cause why they should not be compelled to complete this dam improvement.

TITLE 18 > PART II > CHAPTER 211 > § 3240. Creation of new district. Division.

The seasonal streams at Iron Mountain are contained by the Spring Creek debris dam, then pass Keswick Lake and Anderson and Redbluff diversion dams before its navigable waterway.

PETITION FOR REVIEW OF CERCLA & CWA JURISDICTION AFTER *RAPANOS:*

OF A DETERMINATION BASED ONLY ON PRICE OF DILUTION WATER AND PRUDENT ACTION FOR JUVENILE FISH DURING DROUGHT**.** (i.e. NO HUMAN HEALTH THREAT).

WITH: Sec. 9604. Response authorities

(3) Limitations on Response.--The President shall not provide for a removal or remedial action under this section in response to a release or threat of release--

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

COMPULSORY JOINDER OF INDISPENSIBLE & JOINT INTEREST PARTIES

1. RULE 19. (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest.

CHAPTER 601 – IMMUNITY OF WITNESS § 6001-6005 IMMUNITY GENERALLY

CHAPTERS 13, 19, 31, 41, 42, 43, 45, 47, 50, 50A, 53, 63, 65, 73, 88, 89, 90, 91, 93, 95, 96, 109.

PABTDBS 23 7. GRAY V. BARRYMORE 4 Sawyer U. 8. 638

The Chief Justice: The doctrine of equity, when some of the parties are out of the jurisdiction of the court, is well stated by Mr. Justice Story in his Equity Pleadings, sees. 81, 82 and 83. After commenting upon the general rule that all persons legally or beneficially interested in the subject-matter of a suit in equity should be made parties, and stating an exception with reference to persons without the jurisdiction, who cannot consequently be reached by the process of the court, the learned justice says: "It is an important qualification engrafted on this particular exception that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. The doctrine ordinarily laid down on this point is that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the de-

cree, or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties. And under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests ; but the suit, so far at least as their rights and interests are concerned, should be stayed ; for to this 24 GRAY V. BARRYMORE extent it is unavoidably defective. In many instances the objection will be fatal to the whole suit."

The case of a bill brought by one partner against several other copartners, one of whom was out of the jurisdiction, praying for an account and dissolution of the copartnership, is given by Story in illustration of this last position, that the objection will sometimes be fatal to the whole suit, for "the absent partner," says the justice, "would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and indeed, would pervade the entire operations of the partnership." The case of Browne v. Blount, 2 Euss. & Mylne 83, is also referred to as illustrating the same position. In that case a judgment creditor of one Blount had sued out a writ of elegit upon his judgment, and had filed his bill to reach certain real estate which was vested in trustees upon certain trusts, under which Blount was entitled to the rents and profits during his life. The trustees and certain parties interested under the trusts, and others having a charge upon the trust estates, were made parties, but Blount was abroad, and had been for years previous to the institution of the suit, and was not, therefore, made a party. The court held that "Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence." See in further illustration of the doctrine stated : Midford's Chan. PL 31, 32; Inchiquin v. French, 1 Ambler 33; Fell v. Brown, 2 Brown's Chan. Cas. 276; Beaumont V. Meredith, 3 Ves. & Beams 180; Evans v. Stokes, 1 Keen 32; Eussell v. Clark's Executors, 7 Cranch 98; Mallow V. Hinde, 12 Wheat. 194; Fuller v. Benjamin, 23 Me. 255; Sparr v. Scoville, 3 Cush. 578. In Evans v. Stokes the bill was filed to have the affairs of a joint-stock company, which was a co-partnership, wound up and settled under the decree of the court, and accounts of the partnership taken, and a sale of some PARTIES 25 portion of the property made by the directors set aside, and it was held that

all the members of the company, however numerous, must be made parties. "It is perfectly obvious," said the master of the rolls, "that a suit, where all the accounts of the partnership are to be taken, and the rights of all the parties are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those parties." The case of Fuller v. Benjamin is equally pointed.

In that case four persons had been co-partners, two of whom had become insolvent, and were out of the state; the suit was brought by one of the partners against the solvent member. On demurrer for want of parties the court said: "In cases of partnership it must be difficult, if not impracticable, to proceed in equity without the presence of all the co-partners or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment of which it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights." And again: "The plaintiff in this case would seem to be without remedy, either at law or in equity. In Story on Equity Pleadings, sections 82, 83, 152 and 218, it is clearly shown that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners not present are insolvent, yet are they indispensable parties whose rights might be affected by a decree, and who must be present to be able to afford information as to their own claims in connection with 26 VOSE V. BRONSON those of the others, and if bankrupts, their assignees should be made parties. ' ' The condition of the alleged co-partners. Gray and Eaton, might have been similar to that of the plaintiff in this last case— without relief either at law or in equity — had there not been a provision in the legislation of the state for securing service by publication upon the nonresident infant. As they did not pursue the course pointed out by the statute, their present position with reference to the subsequent proceedings, and the decree rendered, is precisely what it would have been if no such statute had existed. The principle upon which the several cases cited proceed is fundamental, and underlies the administration of justice in all courts of equity. (Note: Other parts of above opinion are omitted.)

PETITION FOR CEQA REVIEW WITH ATTORNEY & EXPERT FEE AWARDS

"We caution that rules regulating the protection of the environment must not be subverted into an instrument for oppression and delay of social, economic, or recreational developments and advancement. Citizens of Goleta Valley v. Board of Supervisors.

PRIOR RIGHTS AND IMMUNITIES ASIDE, THE LAW REQUIRES THAT FOR NEPA A CONSIDERATION OF ALTERNATIVES ANALYSIS IS A "LINCHPIN" OF THE EIR. Monroe County v. Volpe 2nd Cl. 1972, 472 F 2d 693, 697-698.

"even if an alternative requires "legislative action", this fact does not automatically justify excluding it from the EIS". Mathew Valley Citizen v. Regional Forest.

1021.5 CP

Upon Motion, a court may award attorneys fees to a successful party…in any action which has resulted in an important right affecting the public interest of (a) a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and burden of private enforcement…. are such as to make the award appropriate.

EQUITABLE ENFORCEMENT OF CONSTITUTIONAL RIGHTS

Press v. Lucky Stores, 1983 34 Cal. 3d 311, 318 (193 Cal. Rpt. 900).

Any important right affecting the public interest. Planned Parenthood v. Aakhus 2 district 1993

SUBTANTIVE DUE PROCESS VIOLATION WITH DE FACTO AND CONSTRUCTIVE PER SE WRONGFUL TAKING UNDER FALSE PRETENSE OF OFFICIAL RIGHT ON ILLEGITIMATE ANIMUS WITH MALICIOUS MOTIVES AND BOTH PHYSICAL AND REGULATORY TAKING DESTROYING ALL USE OR VALUE & STIGMATIC INJURY.

Nuisance does not apply to regulation that outlaw "a productive use that was previously permissible under relevant property and nuisance law." Lucas v. South Carolina.

PURSUANT TO THE RESERVED POWERS DOCTRINE AND SUBSTANTIVE DUE PROCESS CLAUSE STRIKE CERCLA. See: Fuentes v. Shevin U.S. 67, 81 (1972).

"the right to due process is conferred, not by legislative grace, but by constitutional guarantee". Cleveland, Bd. Of E. v. Loudermill, 470 U.S. at 542.

PRIMA FACIE CASE OF DISCRIMINATION

BECAUSE OF THE DISPROPORTIONATE IMPACT AND DISCRIMINATORY PURPOSE, UPON APPLICATION OF OUR MONROE DOCTRINE PROTECTIONS AND OUR PROTECTIONS UNDER §1983 AS SUPPLEMENTAL REMEDY TO STATE LAW REMEDIES TO UNCONSTITUTIONAL LAWS AND WRONGFUL ACTION UNDER COLOR OF LAW, AND WHEN RIGHTS DENIED INCLUDE LIFE, LIBERTY, AND PROPERTY, AND WHEN LIBEL AND SLANDER INJURE THEIR GOOD NAMES, AND WITH COMMERCE CLAUSE VIOLATIONS AND DELIBERATE INDIFFERENCE TO PRIVATE PROPERTY. Rochin v. California, 1952

§1983 was implicitly passed, not just pursuant to congressional power under preconstruction amendments, but pursuant to all article I powers.

Acts enforceable by individuals are no substitute for §1983.

When the action is for private right and private remedy, there is immediate appealability.

Behrens v. Pelletier.

When there is clear absence of all jurisdiction, that is judicial §1983.

"the judges act not taken in a judicial…taken in complete absence of capacity.

Jurisdiction, Mireles v. Waco 1981, U.S. v. Lanier 1997

For case law on Judicial Atty. Fee award. Pulliam v. Allen

INJUNCTIVE RELIEF, NO IMMUNITY. Imbler v. Pactman, 1976

Immunity does not accompany administrative or investigative functions. Ex parte Young, 1908 Steffel v. Thompson, Dennis v. Sparks,

Public and Private §1983 conspirators, 28 USCA 2201, declaration of rights of parties, Relief from judgment (60b). Frew v. Hawkins.

§1988 ATTORNEY FEES, EXPERT FEES, REVIEW CONSENT DECREE. Maher v. Gagne

EQUAL PROTECTION, SUBSTANTIVE AND PROCEDURAL DUE PROCESS, TRUST

1. WHAT IS TRUST RESPONSIBILITY?

The doctrine of the trust responsibility had its beginning in the opinion of Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. 1 (1831). In that case the Chief Justice called Indian tribes "domestic dependent nations" and suggested that "their relation to the United States resembles that

of a ward to his guardian." 30 U.S. at 16-17. It is from this metaphor and general principle that the doctrine of federal trust responsibility to Indian tribes developed.

The Supreme Court, in defining the trust responsibility, has held that:

[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941).

The same trust principles that govern private fiduciaries also define the scope of the federal government's obligations to the Tribe. Covelo Indian Community v. F.E.R.C., 895 F.2d 581, 586 (9th cir. 1990). These include: 1) preserving and protecting the trust property; 2) informing the beneficiary about the condition of the trust resource; and 3) acting fairly, justly and honestly in the utmost good faith and with sound judgment and prudence. See Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986); Trust, 89 C.J.S. §§ 246-62. Additionally, a long line of cases imposes a trust duty of protection on agencies when their off-reservation actions threaten the use and enjoyment of Indian land. See, e.g., Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988) (Department of the Interior violated the tribe's interests in coal leases on eight tracts of public lands surrounding the reservation).

The American Indian Policy Review Commission has suggested that, although the initial enunciation of the doctrine described the relationship as one of guardian and ward, that terminology should be replaced by language from the law of trusts. American Indian Policy Review Commission at 127. The whole basis of a guardian and ward relationship is the presumption that the ward is incompetent to manage his or her own affairs and, in fact, can have no say in those affairs. A trusteeship does not similarly assume incompetence on the part of the beneficiary. Further, the beneficiary of the trust does not necessarily have no say in the decisions made by the trustee. Perhaps during the apogee of the "plenary power" theory of Indian relations, see, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the relationship between many tribes and the United States government approached one of ward to guardian. But such a condescending characterization should not be perpetrated.

That a general trust relationship exists between the United States and Indians does not mean, however, that such a duty is regularly and generally enforced by courts. True, courts commonly reiterate that the trust imposes on the United States an "overriding duty . . . to deal fairly with Indians wherever located." Morton v. Ruiz, 415 U.S. 199, 236 (1973). But the history of this country teaches that fairness has rarely characterized the United States-Indian relationship nor has some general concept of fairness been enforced by the courts. Nevertheless, both the courts and Congress generally accept the notion that there exists a special relationship between American Indians and the federal government, a relationship often likened to a trust. See, e.g., United States v. Mitchell, 436 U.S. 206, 225 (1983); 25 U.S.C. § 1601(a) (Indian Health Care Improvement Act).

As the Supreme Court has stated:

"Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the `disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. Seminole Nation v. United States, 316 U.S. 286, 297 fn. 12 (1942).] [Quoting from Chief Judge (later Mr. Justice) Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1.

In a simplified fashion, some central tenets (and limits) of the trust doctrine are as follows:

1.1 Courts generally hold that the nature of the trust responsibility and its specifics (except, perhaps, when dealing with Indian property and money) are defined by Congress. See, United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I). Congress could presumably subtract, limit, expand or even terminate the trust altogether. Unless a Congressional action violates some other provision of the constitution, such as the Fifth Amendment prohibition against taking of property without just compensation, Congressional action in defining the trust is not reviewable by a court of law. See,

Menominee Tribe v. United States, 607 F.2d 1335 (Ct. Cl. 1980), cert. denied (4454 U.S. 950 (1980).

1.2 Because of Congressional control of the nature of the trust, courts have generally said that an enforceable trust relationship "must be . . . based upon specific statute, treaty or agreement which helps define and, in some cases, limit the relevant [trust] duties. . . ." Joint Tribal Council of Passo-moquaddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975). Thus, courts have generally not found trust obligations to provide general financial support, social services, education and that sort of thing to Indians, except when it is explicitly required by Congress. See, Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194 (Ct. Cl. 1970) cert denied 400 U.S. 819 (1970).

1.3 The trust with respect to tribal property and money is somewhat different, however. The courts do generally impose a trust obligation on the federal government when it manages tribal property or money. See, e.g., United States v. Mitchell, 463 U.S. 207 (1983). In addition, courts have found under the Non-Intercourse Act a federal a duty to protect Indian land from improper alienation. See, Joint Tribal Council of Passomoquaddy Tribe v. Morton, supra.

1.4 Although courts are hesitant to enforce a generalized trust obligation outside of the property context, and require instead that enforceable duties be defined by Congress, they have nevertheless used the generalized existence of a trust obligation to accomplish two other important objectives. First, the existence of the trust is used to support the general rule of statutory construction whereby laws passed for the benefit of Indian peoples are broadly construed to protect their interests. See, Cohen's Handbook of Federal Indian Law, (Second Edition 1982) at 221-224. Second courts use the existence of some generalized trust responsibility to impose obligations of procedural fairness on the United States when it is making decisions affecting Indians. See, Morton v. Ruiz, 415 U.S. 199 (1974).

1.5 Courts will enforce both federal statutes and the Constitution against the federal government. In doing so, they often mention the trust and read the statutes to create "trust-like" duties. But as a legal matter, the existence of the trust is not required to protect tribal rights set out in statutes, treaties or the Constitution.

1.6 Cases on trust duty have often discussed issues of "remedy." In some cases, a court might find that a trust exists, but that it only has power to enjoin continued violations of the trust rather than to grant money damages for past violations. Only the Claims Court can award money damages against the United States. Cf. Duncan v. United States, 517 F. Supp. 1 (N.D. Cal. 1977). While the battle over the nature of relief can get fairly complex, it is probably sufficient to note here that except in a few isolated instances, money damages are available for Indian tribes for United States' violations of its trust obligations with respect to management of trust property and money. See, United States v. Mitchell, (Mitchell II) supra.

1.7 Finally, depending on Congressional statutory direction, the trust relationship between the United States and Indians can run both to tribes see, e.g., Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980) and to individual Indians see, e.g., Cramer v. United States, 261 U.S. 219 (1923); Morton v. Ruiz, 415 U.S. 199 (1973); Cf. Chippewa Indians of Minnesota, 307 U.S. 1 (1939) (individuals may not enforce rights belonging to tribe where the Congress dealt with tribal Indians).

2. WHO HAS A TRUST RESPONSIBILITY?

Generally, the federal government and all federal agencies must exercise their respective responsibilities in the context of a trust responsibility to Indian Tribes. They may not adopt policies, promulgate regulations, or take actions that would compromise their ability to fulfill their fiduciary responsibilities to those Tribes.

The federal trust responsibility to Indian tribes applies to all federal entities. See Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) ("any federal government action is subject to the United States' fiduciary responsibility toward the Indian tribes"). In Covelo Indian Community v. FERC, 895 F.2d 581 (9th Cir. 1990), the court clearly ruled that all government agencies have "fiduciary" responsibilities to tribes. As agencies of the federal government, they are subject to the United States' fiduciary responsibilities towards Indian tribes. The same trust principles that govern private fiduciaries determine the scope of Federal agency obligations. The trustee must always act in the interests of the beneficiaries. Covelo, supra, at 586 (citations omitted)(specifically dealing with the Federal Energy

Regulatory Commission). (FERC did not abuse discretion in refusing later intervention to the Covelo Community.)

The Ninth Circuit has underscored the importance of trust responsibility for all agencies:

We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights. See, e.g., Joint Bd. of Control v. United States, 862 F.2d 195, 198 (9th Cir. 1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.

Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) (Part of the Department of Commerce's federal trust responsibility is to protect the exercise of reserved tribal fishing rights.)

3. TRUST RESPONSIBILITY TO MANAGE TRIBAL FUNDS AND TRIBAL PROPERTY.

3.1 What Tribal Property Is Covered By The Trust Responsibility?

Tribal trust law is most well developed in the arena of trust property and money. The courts have made it fairly clear that certain kinds of Indian property and monies are held by the United States in trust. In such cases, the government must assume the obligations of a fiduciary or trustee.

First, the courts have imposed trust duties with respect to tribal funds. E.g., Seminole Nation v. United States, 316 U.S. 286 (1942); Angle v. United States, 709 F.2d 570 (9th Cir. 1983); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390 (Ct. Cl. 1975). Additionally, as the Indian Claims Commission noted, "the fiduciary obligations of the United States toward restricted Indian reservation land, including minerals and timber, are established by law and require no proof." Blackfeet and Gros Ventre Tribes of Indians, 32 Ind. Cl. Comm. 65, 77 (1973). As a general matter, the United States must properly manage and, protect such resources as: tribal land, United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); tribal minerals, Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227 (1985); oil and gas, Navajo Tribe of Indians v. United States, 610 F.2d 766 (Ct. Cl. 1979); grazing lands, White Mountain Apache Tribe v. United States, 8 Cl. Ct. 677 (1985); water, Id., and timber, United States v. Mitchell, (Mitchell II), supra.

3.2 How Does a Trust Over Indian Property Arise?

There are two ways in which the trust relationship with respect to Indian property is seen to arise. First, Congress can explicitly announce an intent to create a trust, as when certain funds are placed "in trust" for a tribe or tribes. Second, when dealing with tribal property or money, there need not be a specific statute or treaty creating the trust relationship. Rather, "a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over [resources] . . . and property belonging to Indians. All of the necessary elements of the common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, or funds)." United States v. Mitchell, supra, 463 U.S. at 225, citing Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980). One court has suggested with respect to money, that "where the United States holds funds for Indian tribes, a trust relationship exists unless there is explicit language to the contrary." Angle v. United States, supra, citing Moose v. United States, 674 F.2d 1277, 1281 (9th Cir. 1982).

3.3 What Rules Govern A Property Or Money Trust?

Once a court determines that a trust relationship exists between the United States and tribes with respect to tribal property and tribal funds what rules constrain the actions of the United States? First, of course, an agency of the United States must comply with federal statutory law. Thus, for instance, if the law requires that the BIA manage federal timber on a sustained yield basis, its failure to do so would violate the statutory terms of the trust relationship. See, Mitchell II, supra.

In addition, however, the courts have held that once a property or money trust relationship is found to exist between the United States and an Indian or an Indian tribe, many of the general common law rules established to govern the fiduciary obligations of a trustee towards his beneficiary will apply to any government action. See, Mitchell II supra. On the other hand, it cannot be said that all the rules applicable to private fiduciaries are necessarily and automatically applicable to the trust relationship between the United States government and tribes. See, United States v. Nevada, 463 U.S. 110, 127 (1983) ("while these [principles of private trust law] undoubtedly provide useful analogies in cases such as these, they cannot be regarded as finally dispositive of the issues.") The Claims Court, which regularly applies the general principles of trust law says this:

[Although we can apply the general principles of trust law] this does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States . . . . In each situation the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the government and the particular tribe.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980). We now turn to some of the obligations courts have imposed on the federal government in Indian cases.

3.3.1. Most generally, a trustee must act in a reasonably prudent manner in managing the trust assets. With respect to tribal funds, for instance, the United States has the fundamental obligation both to protect the Indian beneficiaries' principal, that is, the so-called trust corpus, as well as to maximize the trust income from the corpus. See, Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390, 1392 (Ct. Cl. 1975). Thus the United States can be held liable in trust fund cases for its failure wisely to invest the monies. See, Id. Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393 (8th Cir. 1987).

3.3.2. The United States is obligated to protect Indian trust lands from alienation. Joint Tribal Council of Passomoquaddy Tribe v. Morton, supra. This is true even when the trust is a limited one. Typically the primary purpose of federal trust land is to maintain it in federal and tribal hands. See, United States v. Mitchell, (Mitchell I), supra, (1980); United States v. Chippewa Nations, 229 U.S. 498 (1912).

3.3.3. The United States as property trustee is generally prohibited from acting in a manner that benefits it and harms its beneficiary. Thus, the United States cannot take economic advantages for itself which should be flowing to its beneficiary, e.g., by leasing its own land but refusing to lease adjacent tribal land. Navajo Tribe of Indians v. United States, supra, 610 F.2d 766, 768 (Ct. Cl. 1979). This general rule of trust law, however, is somewhat softened in its restrictions on governmental actions because Congress can assign to the executive branch obligations which might conflict. The Supreme Court has said:

It may be that where only a relationship between the government and a tribe is involved the law respecting the obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States. But 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 as even authorizing 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.

United States v. Nevada, supra, 463 U.S. at 142. The Court, unfortunately, did not go on to explain how the executive branch should handle the situation when Congress has assigned it potentially conflicting obligations.

3.3.4. With respect to natural resources, the courts do not require that the United States always seek to lease or sell the resources for profit. Thus, for instance, the Claims Court has held that the government is not obligated actively to seek out persons to drill reservation oil and pay royalties. Navajo Indian Tribe v. United States, supra, 610 F.2d 766. Nor must it establish a grazing permit system whereby non-Indians would graze on reservation land and pay the tribe for the privilege. See, White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987). The Indian Claims Commission described this rule as it generally follows:

Rules for the management of commercial real estate [for instance] by private trustees have little application [in the Indian context]. The primary purpose of establishing Indian reservations is to provide a home for the Indians, where, it was hoped, they might eventually make their living by their own efforts. Consequently the trust status of reservation land never wholly ousted the Indians from its management, for which, in more recent years, they have been encouraged to assume increasing responsibility. Indian reservations are not like apartment houses which a trustee is expected to keep filled with paying tenants at all times. No general law requires the Government to administer Indian land for profit at all.

Blackfeet and Gros Ventre Tribes v. United States, 32 Ind. Claims Com. 65, 77 (1973). Thus the Claims Commission concluded that "the government has never been under an obligation to lease out [reservation] . . . land."

The fiduciary obligations to account for trust activities "arises only where the Government has undertaken to permit a third party to use reservation land, to extract reservation minerals, or to cut or haul away reservation timber, or when the government has done one or more of these things itself." Id., 32 Ind. Cl. Com. at 78. See, also Three Affiliate Tribes of the Fort Berthold Reservation v. United States, 36 Ind. Cl. Com. 116, 130 (1975). Thus, in White Mountain Apache Tribe v. United States, supra, the court said that the United States was not required to establish a grazing permit system in order to make Apache land economically productive. But once it decided to institute a system, it had to run it prudently and for the Indians' financial benefit.

3.3.5. Management of tribal land or resources for tribal income creates, really, a dual obligation on the government. It must both make money from the resources and protect the value of the trust property. For instance, when managing timber, the government must "obtain revenue from the forest and . . . protect the forest. To neglect or minimize that latter in performance of the former would amount to a breach of fiduciary duty." White Mountain Apache Tribe of Arizona v. United States, 11 Cl. Ct. 614, 672 (1987). Similarly, if the government permits grazing on federal land it must insure that the grazing does not lead to erosion and diminution of the value of the land itself. Id.; see, also Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660 (1986) (obligation to protect ground water to permit continued agricultural uses). In the famous Mitchell case, the allottees contended that the federal government failed to replant harvested areas, thus reducing the long-term value of the reservations resources. See, Mitchell v. United States, 10 Cl. Ct. 63, modified 10 Cl. Ct. 787 (1986). At the same time, the government has to make choices that are advantageous for the tribes financially and must protect their interests when negotiating or regulating non-Indian lessees of tribal resources. Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (en banc); 793 F.2d 117 (1986).

3.3.6. In seeking a profit for tribes, the government must act as a prudent manager using good business judgment, seeking to obtain full value for the resources sold or leased. Nevertheless, the mere existence of a difference between what the government obtains for the Indians and what a later independent analysis identifies as the fair market value, does not automatically show a breach of fiduciary obligation. Not all deals turn out well. The government is a trustee, not a guarantor. As long as

the government makes reasonable and prudent efforts the failure of some investments does not give rise to a cause of action. See, United States v. Mason, 412 U.S. 391 (1973) (failure of the United States to challenge the legality of inheritance tax on certain Indian property held not to be unreasonable); Montana Bank of Circle, N.A. v. United States, 7 Cl. Ct. 601 (1985) (approval by Secretary of the Interior, under 25 U.S.C. § 81, of certain contracts between an Indian-chartered corporation and a bank did not make the United States liable to make up any losses which the Indians suffered as a result of the contract approved). Cf. Hydaberg Coop Association v. United States, 667 F.2d 64 (Ct. Cl. 1981) (government not guarantor of profits of tribal enterprise). On the other hand, if a discrepancy of value and price is extreme, a court might find the difference sufficient proof of gross neglect and actionable on its face. See, Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) (right of way, worth at least $50,000 sold for $2500).

3.3.7. The government must, at a minimum, take such steps to protect the level of water necessary to continue existing Indian agricultural practices. See, Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660 (1986). However, it would appear that there is no obligation on the part of the government either to develop the full potential of Indian water supplies or even to protect the full extent of Indian water rights. Id. It seems also clear that the United States may not act in a manner that suppresses or limits Indian use of water to which they have rights, see, White Mountain Apache Tribe v. United States, supra, 8 Cl. Ct. 677 (1985), 11 Cl. Ct. 614 (1987).

3.4. Beneficiary Consent Does Not Defeat Trust Responsibility.

In standard trust law, the beneficiary may not complain about an action of the trustee to which the beneficiary consents. See, e.g., Restatement of Trusts Second, § 216. Of course, in many instances, tribes must by statute give their consent to natural resource actions of the BIA. See, e.g., 25 U.S.C. § 324 (right-of-way approvals); 25 U.S.C. § 398 (oil and gas leases); 25 U.S.C. § 402a (lease of agricultural land). No cases are known in which tribal council general consent to BIA action has been used successfully to defend a breach of trust case. The Indian Claims Commission knew well that Indians were involved in the management of their resources, but it never suggested that constituted a valid defense in a tribal property breach of trust case. See, Blackfeet and Gros Ventre Tribes, supra, 32 Ind. Cl. Comm. at 77. Additionally, in some cases there appears to have been explicit con-

sent to actions that were held, nevertheless, to be a breach of trust. See, e.g., United States v. Mitchell (Mitchell II), supra, (Supreme Court notes that Indian allottees must consent to certain forest management decisions); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977); Duncan v. United States, 597 F.2d 1337 (1979) (tribe agreed to what turned out to be inadequate water supplies, yet the government was found to have breached a trust in not providing water supplies).

A tribe may bring a breach of trust action if the government lets a tribal council, which it knows to be corrupt, mismanage tribal funds. In such a context, the corrupt council could not properly provide the tribe's consent for any action, and the government was held liable for participating in the loss of tribal resources because it dealt with the incompetent or corrupt council. See, Seminole Nation v. United States, 316 U.S. 286 (1942).

Although beneficiary consent does not seem to prevent tribal trust lawsuits in the natural resources context, there are a number of cases involving tribal funds which are worth pondering. In that setting, it appears that actual tribal control of the funds is seen as a valid defense against a claim that the federal government breached its trust in using the funds. For instance, in Navajo Tribe v. United States, 34 Ind. Cl. Com. 432, 434 (1974) the Commission dealt with a contention "that the Commission erred in ordering defendant to account for [the use of] those tribal funds which are controlled and managed by plaintiff [tribe]. Plaintiff's Reply concedes this issue . . . ." Given that concession, the Claims Commission ordered that the federal government was not required to account for any tribal funds which had been transferred directly to the plaintiff for its use.(1)

A similar issue came up in another funds accounting case, American Indians Residing on Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981). The court required a government accounting of the use of funds. But in doing so, it cited the Navajo case and said:

If complete control of tribal organization funds has been transferred to the tribe, the government is not required to account. If the government contends that control has been transferred it has a burden of showing that fact, and, where tribal leadership did not control use of the money, the government must account.

667 F.2d at 1003.

There is a difference of course between control and consultation. In Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390 (Ct. Cl. 1975) the government tried to defend its failure to use productively tribal funds in part by pointing to its policy of consulting with the Indians. The government said the tribes failed to respond usefully or on time. The court responded to that claim as follows:

[W]hile such consultation may have been a useful part of the defendants overall policy to make the Indians ready for dissolution of trust status, the government was duty bound to make the maximum productive investment unless and until specifically told not to do so by a tribe and until the defendant also made an independent judgment that the tribes request was in its own best interest.

512 F.2d at 1396. If this rule were adopted generally, it would appear that as long as the federal government approves tribal actions, it may still be held liable as a trustee if the actions are imprudent.

In Loudner v. United States, the court held that certain descendants could recover judgment funds. In Loudner, certain lineage descendants of the Sisseton-Wahpeton Sioux Tribe did not learn of a judgment fund until more than twenty years after distribution of the fund. The government alleged that the action was too late and it was barred by the statute of limitations. In disallowing this defense the court noted that the beneficiaries duty to discover claims against the trustee was lessened by the beneficiaries' right to rely upon the trustee's good faith and expertise and that the government's efforts to call attention to the original distribution through Federal Register postings, news releases and other matters was insufficient to put reasonably diligent beneficiaries on notice. Loudner v. United States, 108 F.3d 896 (8th Cir. 1997).

4. WHAT IS THE NATURE OF THE TRUST RESPONSIBILITY OUTSIDE OF THE INDIAN PROPERTY AND INDIAN FUNDS CONTEXT?

Courts have hesitated to find enforceable substance of the trust responsibility outside the context of tribal property or funds. Thus, for instance, the courts have refused to find the existence of some general trust responsibility of the United States to care for the general health and welfare of Indians absent an explicit statute, treaty or executive order. The general rule was stated in Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980):

[W]here the federal government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) . . . . On the other hand, if no tribal money or property is involved and the question is, for instance, whether the United States has a general fiduciary obligation to educate Indians, the existence of the special relationship for that purpose depends upon the proper interpretation of the terms of some authorizing document (e.g., statute, treaty, executive order).

The court in Navajo relied on its own case, Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1198 (Ct. Cl. 1980); cert. denied 400 U.S. 819 (1970), to support this view. The Indian community there had charged that the United States had failed to provide adequate educational opportunities and health care to the tribe, in violation of the trust responsibility. It said that having undertaken to help the Indians, the government must do so reasonably well. The court rejected such arguments. 427 F.2d at 1199. In other words, the court would not imply an enforceable trust relationship simply because the United States has taken over management and control of tribal education, even though it would imply a trust if the government had taken over management and control of tribal property. See, also Vigil v. Andrus, 667 F.2d 931, 934 (10th Cir. 1982); Fort Sill Apache Tribe v. United States, 477 F.2d 1360 (Ct. Cl. 1973).

Thus, the courts have held that the Federal Energy Regulatory Commission need not afford a tribe greater rights than they otherwise would have had under the Federal Power Act in assigning preliminary power licenses. Skokomish v. F.E.R.C., 121 F.3d 1303 (9th Cir. 1997). Neither must the FAA make special arrangements for an Indian tribe if it otherwise complies with applicable law in determining flight paths. Morongo Band v. FAA, 161 F.3d 569 (9th Cir. 1998).

Nevertheless the courts have found some trust duties outside of the money and property context. First, and most clearly, courts have found that the trust duty imposes certain procedural obligations on the federal government. Second, the courts have imposed some substantive trust or trust-like obligations on the federal government related to social services for Indians.

4.1 Trust Responsibility And Procedural Rights.

Trust responsibility means that Federal agencies must consult with tribes before taking action which affects their property and rights. Thus the United States must observe procedural fairness when it is making decisions affecting Indians. See, Morton v. Ruiz, 415 U.S. 199 (1974).

As a general matter, courts emphasize that special attention to procedural fairness is required because of the "overriding duty of our federal government to deal fairly with Indians wherever located" and the "distinctive obligation of trust incumbent upon the government in its dealings with these dependent and sometimes exploited people." Morton v. Ruiz, 415 U.S. at 236. Citing Seminole Nation v. United States, 316 U.S. 236 (1942).

In Morton v. Ruiz, the Supreme Court reviewed a decision of the BIA to deny certain general assistance (welfare) benefits to tribal members who lived off reservations. The BIA had determined to limit such benefits only to those persons who lived on the reservation. The off-reservation Indians argued that violated the trust responsibility.

The Bureau of Indian Affairs (BIA) argued first that Congress knew of and approved the limitations. The Court rejected that argument upon review of the legislative record.

The Court went on to note, however, that given a limit on available funds, the BIA obviously had to make benefit choices as long as they did not violate specific statutory directives. Given the breadth of the authorizing legislation (the Snyder Act, 25 U.S.C.§ 13), these choices necessarily lay, in large part, within the BIA's discretion.(2)

But the Court found that in this instance the BIA had erred by choosing its policy without promulgating the decision as an administrative rule available for public review and comment. The Court relied for its decision on the Administrative Procedure Act. But it also emphasized that special attention to procedural fairness was required because of the "overriding duty of our federal government to deal fairly with Indians wherever located" and the "distinctive obligation of trust incumbent upon the government in its dealings with these dependent and sometimes exploited people." 415 U.S. at 236. Citing Seminole Nation v. United States, 316 U.S. 236 (1942).

In short, according to Morton v. Ruiz, the Snyder Act and subsequent Congressional appropriations did not impose a particular substantive obligation on the government to provide a particular level of assistance. (Indeed, the Court noted that if appropriated funds are not sufficient to provide fully for

the needs of Indians, the resulting hard choices do not necessarily violate the trust. 415 U.S. at 230-231.) But the Court used the trust responsibility to impose the procedural obligation that the BIA make its decisions in an open and above-board manner. Several courts following Morton have imposed similar obligations in like circumstances. See, e.g., Oglalla Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979) (the assignment of superintendent of Pine Ridge Agency without full consultation with the Tribe violated the Administrative Procedure Act, BIA guidelines, and the "trust responsibility"); Rogers v. United States, 697 F.2d 886 (9th Cir. 1983) (failure to give adequate notice to distributees of judgment fund violated the trust); Fox v. Morton, 505 F.2d 254 (9th Cir. 1974) (Indians entitled to due process prior to termination of Indian Health Service benefits because of "overriding duty of fairness due to Indians"); Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986) (failure to follow own internal decision guidelines violates trust).

This requirement of procedural fairness is now surely a basic component of the trust obligation, whether the issue involves Indian property or some other federal programs that affect Indians or Indian tribes.

4.2 Court Imposition of Other Substantive Obligations Under Trust Law.

There are other cases that impose some substantive obligations on the federal government based on the trust, or a "trust-influenced" reading of federal statutes and regulations in social service contexts.

One case arose in Alaska and may be the most unusual. In Eric v. Secretary of the United States HUD, 464 F. Supp. 44 (D. Alaska 1978), the court had before it an objection brought by certain Indians to the adequacy of housing provided under the so-called Bartlett Act. That law generally provided that housing should be constructed for Alaska natives. The court decided that the Act was passed, in part, to implement the trust responsibility and did, in fact, establish a trust relationship between the government and the Alaska natives with respect to housing. Having found that such a "housing" trust existed, the court nevertheless recognized that the Bartlett Act itself established no standards for the quality or nature of the housing to be provided. But, using the kind of theory typically used in the Indian property contexts, the court imposed on the federal government a general fiduciary obligation to provide decent, healthful housing. But Cf., Begay v. United States, 865 F.2d

230 (Fed. Cir. 1989) (Navajo-Hopi Settlement Act did not require United States to pay incidental damages allegedly caused by relocation).

In the case of White v. Califano, 437 F. Supp. 543 (D. S. Dakota 1977) aff'd. 581 F.2d 697 (8th Cir. 1978) the court considered the obligation of the United States to pay for emergency in-patient mental health care for an indigent member of the Oglalla Sioux Tribe. Citing statements in the Indian Health Care Act, 25 U.S.C. § 1601, referencing the unique relationship between the federal government and Indians and calling for adequate health services for Indians, the court decided:

Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the "unique relationship" between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U.S. Code pertained only to Indians.

437 F. Supp. at 555. On this basis, the court held that those cases limiting the enforceable trust responsibility to tribal property and money. It concluded, however, that the Indian Health Service had to provide in-patient mental health care for a seriously mentally ill person, when the state would not or could not do so. The court said that in health care, Congress had done much more than generally announce the trust responsibility.

Therefore when we say [the court said] that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract, but rather to a Congressionally recognized duty to provide services for a particular category of human needs. The trust responsibility, as recognized and defined by statute, is a ground upon which federal defendants' duties rest in this case.

437 F. Supp. at 557.

Finally, the Califano court acknowledged that Congress only appropriated a certain limited amount of money. Obviously, the Indian Health Service had to use its discretion in determining what persons to serve with limited funds. The court determined, however, that that discretion was constrained by IHS regulations and it went on to read those regulations to require an allocation of funds for those with the most pressing health needs--such as severe mental illness.

In McNabb v. Bowen, 829 F.2d 787 (9th Cir. 1987), an individual indigent Indian claimed that she and her child were not being properly served by the Indian Health Service. She and her child could not obtain health care from the local or state government and demanded that the federal government take care of their health needs. In agreeing with her assertions, the Ninth Circuit did not rely quite as explicitly on the trust doctrine as had the Eighth Circuit in White v. Califano. Rather, the court concluded that the language of the Indian Health Care Act, "brought into sharper focus by the trust doctrine," required that the Indian Health Service either assist an individual Indian in obtaining other medical care (such as from a state) or provide the medical care itself. The court decided Congress intended that result. Thus, in a way, the McNabb case can be seen as a imposition by the court of a "trust like" obligation based primarily on a specific statutory announcement of the trust by Congress. Significantly, the court was unwilling to impose any particular kind of health care obligation based on the broadly worded Snyder Act and turned, instead, to the more specifically Indian Health Care Act.

The Ninth Circuit has also held that the federal government may not delegate its trust responsibilities to other governmental entities. See Assiniboine and Sioux Tribes v. Bd. Of Oil and Gas, 792 F.2d 782 (9th Cir. 1986).

4.3 Trust Responsibility and Treaty Rights.

Treaty rights are legally enforceable without reference to trust theory. See e.g. Washington v. Passenger Fishing Vessel, 443 U.S. 658 (1979). However, the courts have also reminded the United States that it has a trust duty to protect those rights.

Thus, the United States has been held subject to monetary damages if reserved Indian fisheries are harmed by federal mismanagement or environmental degradation. See e.g., Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), cert. denied, 369 U.S. 818; Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Northern Paiute Tribe v. United States, 30 Ind. Cl. Comm. 210 (1973). See also United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976).

The treaty right to take fish is a property right protected by the Fifth Amendment. As the district court in Muckleshoot Indian Tribe v. Hall stated:

The United States has a fiduciary duty and "moral obligations of the highest responsibility and trust" to protect the Indians' treaty rights. Seminole Nation v. United States, . . .

698 F. Supp. at 1510 (Corps of Engineers enjoined from permitting marina which would eliminate judicially recognized fishing areas). The Court observed that "no court has permitted the actual taking of fishing grounds without an act of Congress." Id. at 1512.

In upholding federal action providing for fisheries for Indians of the Hoopa Reservation in California, the Ninth Circuit noted:

. . . We must conclude, as we did in Washington Charterboat, that the Tribes' federally recognized fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.

Parravano v. Masten, 70 F.3d 539, 546-547 (9th Cir. 1995).

4.4 Executive Action and Trust Responsibility.

In modern times, the federal executive has recognized the unique relationship and trust responsibility of the federal government to Indian tribes. In his special message on Indian Affairs, President Richard Nixon disavowed the concept of termination of Indian tribes as follows:

Termination implies that the federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and it can therefore discontinue this responsibility on the unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the federal government is a result instead of solemn obligations which have been entered into by the United States' government.

. . . .

. . . [T]he special relationship between the Indian tribes and the federal government which arises from these agreements continues to carry immense moral and legal force.

"Special Message on Indian Affairs," July 8, 1970, by Richard M. Nixon, quoted in "Documents of the United States Indian Policy," edited by Francis Paul Prucha, University of Nevada Press, p.256 (1975).

Federal agencies are subject to President Clinton's Executive Order regarding environmental justice, which requires all federal agencies to identify and address disproportionately high and adverse human health or environmental effects of programs and activities on minority and low-income populations. See Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629-7633 (Feb. 11, 1994). Although this Executive Order applies to all minority and low-income populations, it contains special mention of Native American programs due to the special relationship between the federal government and Indian tribes. Id. § 6-606.

Federal agencies are also subject to President Clinton's Memoranda on the subject of government-to-government relations with tribal governments. Memoranda, Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22951 (April 29, 1994). This memoranda requires federal agencies to implement activities affecting tribal rights or trust resources in a "knowledgeable, sensitive manner respectful of tribal sovereignty." See id. Further, federal agencies must "assess the impact" of their action on tribal trust resources and "assure that tribal government rights and concerns are considered." See id. at § (c). Requirements of this memorandum were further clarified in Executive Order 13084 entitled "Consultation and Coordination with Indian Tribal Governments," 63 Fed. Reg. 27655 (May 14, 1998). Although the memorandum of April 29, 1994, and Executive Order 13084 both are couched in terms of government-to-government relations and based on the recognition of tribal sovereignty, these documents also reference the "unique legal relationship" and the "responsibilities that arise from the unique and legal relationship" as a basis for their provisions. See e.g., Exec. Order 13084 § 2.

Numerous government agencies have attempted to comply with these directives. See Wood, Fulfilling The Executive's Trust Responsibility . . ., 25 Envtl. L. 733 (1995).

5. CONCLUSION - THE CASE OF THE RELUCTANT (INCOMPETENT?) GUARDIAN.

While the trust responsibility of the federal government is clear, implementation of that responsibility proves difficult. No case better illustrates this than the recent litigation over the government's management of the so-called IIM accounts (Individual Indian Money). Cobell v. Babbitt, Cause No. 96-1285, United States District Court for the District of Columbia. Through the IIM trust account

system the United States acts as trustee on accounts that hold money on behalf of individual Indian beneficiaries. When the complaint in Cobell was originally filed, it was estimated that those accounts held nearly $500,000,000. By February of 1999 the estimate was that the accounts allegedly held approximately $4,000,000,000.

The IIM accounts hold funds that originate from various sources related to Indian affairs. However, the majority of the funds are derived from income earned from individual land allotted to members of Indian tribes. This income includes income generated from grazing, farming, timber, mineral rights, and land leases. On February 4, 1997, the district court certified the class consisting of all present and former beneficiaries of these accounts. Cobell v. Babbitt, 30 F. Supp.2d 24 (D.D.C. 1998).

The case would seem to involve straight forward matters. Of course the United States must act as fiduciary in handling the money of Indians under its administration. Indeed, Congress reconfirmed the United States' duties with regard to these accounts in 1994 in the Indian Trust Fund Management Reform Act. 25 U.S.C. § 162a(d). This act codified several obligations of the Secretary of the Interior with regard to the discharge of his trust duties and IIM accounts.

Despite the fact that the Department of the Interior's duties are clear, the course of litigation has uncovered a bungling incompetence that boggles the mind. So incompetent is the government's maintenance of these records and so incompetent was the handling of the case, that on February 22, 1999, the court took the extraordinary steps of finding the Secretary of the Department of the Interior, the Secretary of the Treasury, and the Assistant Secretary for Indian Affairs in the Department of the Interior, in civil contempt for failure to comply with discovery orders. Cobell v. Babbitt, ___ F. Supp.3d ____, 1999 WL 101636 D.D.C. In testimony during the contempt trial, the former special trustee who had been unable to sort things out, testified that the IIM account record keeping system was "the worst that I have seen in my entire life." Id. at 5. This testimony was from a man who had served for five years supervising trust operations for the Comptroller of the Currency, as Chief Executive of a large trust department for a commercial bank and as Chief Executive Officer of Riggs Bank.

The record in the case shows that Interior Department officials essentially did nothing of any value to produce discovery documents, that Treasury officials destroyed records while under an order to produce them, etc. The court said:

The way in which the defendants have handled this litigation up to the commencement of the contempt trial is nothing short of a travesty.

Id. at 6. The court found that defendants' "misbehavior is especially egregious," id. at 8, that defendants' arguments "must be looked upon with suspicion . . .," id. at 10, that defendants' interpretation of the court's discovery order ". . . defies all logic." id., that the government displayed a ". . . reckless approach to managing document production . . ." id. at 12, that the "facts of this case belie any showing of good faith." id. at 16, and that several of the governments' attorneys ". . . have acted incompetently and with a shocking lack of candor to this Court." id. at 17.

The Justice Department also got its share of criticism. The court said:

Because of the Court's great respect for the Justice Department, the Court repeatedly accepted the government's false statements as true, and brushed aside the plaintiffs' complaints. This two-week contempt trial has certainly proved that the Court's trust in the Justice Department was misplaced. The federal government did not just stub its toe. It abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception of the Court. I have never seen more egregious misconduct by the federal government.

The Snyder Act is the basic authorization act for the Bureau of Indian Affairs. It provides that:

"The Bureau, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States,"

. . . .including such matters as general support and civilization, administration of Indian property, and general expenses in connection with the administration of Indian affairs. 25 U.S.C. § 13.

"on my own information or belief, I believe this to be true".: March 18, 2010

Signature:_____

s/ John F. Hutchens; Joint Venturer, Warden of the Gales, Forests, and Stannaries.

CITIZEN & AGENT OF RECORD, EXPERT for: T.W. Arman & Iron Mountain Mines, Inc.