

June 1986

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### Recommended Citation

7 Pub. Land L. Rev. 117 (1986)

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# OFF-RESERVATION ENFORCEMENT OF THE FEDERAL-INDIAN TRUST RESPONSIBILITY

Adele Fine

## I. INTRODUCTION

The federal government's trust responsibility to Indians is often used to enforce Indian rights against the federal government.<sup>1</sup> Courts have been especially willing to invoke the trust responsibility against federal executive officials entrusted with the management of Indian property held in trust for tribes by the federal government.<sup>2</sup> Ruling on standards of conduct applicable to private fiduciaries, courts have awarded money damages and equitable relief to Indians for executive agency breach of the trust responsibility through mismanagement of Indian trust property.<sup>3</sup>

The trust responsibility is not limited to federal action on Indian reservations however. In recent years, courts have also invoked the trust responsibility to protect Indian tribes and reservations from the harmful effects of federal actions undertaken off but near Indian reservations.<sup>4</sup> Federal executive agencies are often responsible for the management of nearby off-reservation federal projects, and the general question in such situations is whether executive agency adherence to the trust responsibility remains unchanged in its transfer from the on-reservation to the off-reservation context.

Specifically, one issue is whether executive agencies should be held to strict fiduciary standards off the Indian reservation, given their legitimate obligations to others whose interests often conflict with Indian interests.<sup>5</sup> Another issue is whether the trust responsibility should be invoked to protect only tangible Indian property, as it is when applied to on-reservation federal action, or whether it should be broadened to encompass protection of intangible Indian interests, damage to which is sometimes the

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1. On rare occasions, the trust responsibility has also been used as a source of federal power over Indians. See *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

2. The Bureau of Indian Affairs (BIA) is obviously the federal agency most closely associated with the federal-Indian trust responsibility, but the trust responsibility applies to all federal agencies. See, e.g., *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981).

3. See *infra* text accompanying notes 6-30.

4. This comment does not discuss invocation of the trust responsibility to compel the federal government to provide services to Indians, which in a sense is also "off-reservation" enforcement of the trust responsibility. See *Morton v. Ruiz*, 415, U.S. 199 (1974); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983). See also R. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1243-46 (1975).

5. See *infra* text accompanying notes 32-68.

only damage Indians can point to in the off-reservation context.<sup>6</sup> This comment examines the various approaches courts have taken to off-reservation enforcement of the federal-Indian trust responsibility, with a view to assessing their consequences for the preservation of Indian culture.

## II. HISTORICAL BACKGROUND

The trust doctrine was first articulated by Chief Justice Marshall in his now famous opinions in the *Cherokee* cases: *Cherokee Nation v. Georgia*<sup>7</sup> and *Worcester v. Georgia*.<sup>8</sup> In *Cherokee Nation*, Marshall noted that the Indians' relationship to the United States was "marked by peculiar and cardinal distinctions which exist[ed] nowhere else."<sup>9</sup> Indian tribes like the Cherokees were independent in the sense of being autonomous, self-governing entities with an "unquestioned" right to occupy the lands preserved for them in treaties with the United States.<sup>10</sup> Nevertheless, Marshall stated, when the tribes ceded their lands to the United States, they relinquished their power to control their external relations and instead looked to the United States for protection.<sup>11</sup> Indian tribes were thus "domestic dependent nations" whose relationship to the United States resembled "that of a ward to his guardian."<sup>12</sup>

The *Worcester* opinion added no new principles to those Marshall set out in *Cherokee Nation*. In *Worcester*, however, Marshall emphasized the Indians' status as "distinct, independent political communities" with the right to govern themselves within their territorial boundaries.<sup>13</sup> This emphasis suggests that the federal duty of protection extends not only to protection of Indian land, but to protection of Indian internal governmental and cultural autonomy as well.<sup>14</sup>

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6. See *infra* text accompanying notes 69-107.

7. 30 U.S. (5 Pet.) 1 (1831). In *Cherokee Nation*, the Tribe petitioned the Supreme Court to enjoin the state of Georgia from enforcing its laws against the Tribe. *Id.* at 15. The narrow issue before the Court was whether the *Cherokee Nation* was a "foreign state" in a constitutional sense and thus able to maintain an original action in the Supreme Court. *Id.* at 16. The Court held that although the Cherokee Nation constituted a "distinct political society," *Id.*, it was not a foreign nation, and therefore could not press its claim in the Supreme Court. *Id.* at 20.

8. 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the petitioner was a missionary who had been convicted in Georgia of violating a state statute that prohibited whites from residing in Cherokee Nation territory without a license. *Id.* at 528-29. Worcester claimed the state statute encroached upon the federal government's exclusive power to regulate relations with Indian tribes. *Id.* at 534. The Supreme Court agreed, claiming the federal constitution, treaties, and federal statutes clearly established the United States' exclusive power in Indian affairs. *Id.* at 549-62.

9. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

10. *Id.* at 16-17.

11. *Id.* at 17.

12. *Id.*

13. *Worcester*, 31 U.S. (6 Pet.) at 559.

14. *Id.* at 556-57. Although this comment emphasizes the trust responsibility's purpose of

Early in the twentieth century, tribes began to use the trust responsibility to assert their rights against federal executive agency officials.<sup>15</sup> The typical issue before the courts concerned the conduct of federal executive officials in the management of tribal lands held in trust for the tribes by the United States.<sup>16</sup> For example, in *United States v. Creek Nation*,<sup>17</sup> the Creek Tribe sued the United States for money damages when it discovered that a federal executive agency had erroneously surveyed reservation boundaries and sold a portion of Creek land to non-Indians.<sup>18</sup> On certiorari, the Supreme Court held the Tribe was entitled to compensation for the erroneous taking of its reservation land.<sup>19</sup> The Court noted that, even though as the Tribe's guardian the federal government exercised complete control over tribal trust property, the federal government's power was nevertheless constrained by the limitations "inhering" in the trust responsibility.<sup>20</sup>

The Supreme Court did not address the exact nature of the limitations inherent in the trust responsibility in the *Creek Nation* case, but in more recent money damage suits where federal executive agency management of tribal trust property has been at issue, courts have construed the trust responsibility as imposing strict fiduciary duties on federal executive officials.<sup>21</sup> In *Navajo Tribe of Indians v. United States*,<sup>22</sup> for example, the Navajo Tribe claimed the federal government breached its trust obligations to the Tribe when the Bureau of Mines, which was responsible for the supervision of oil and gas leases on the Navajo Reservation, failed to inform the Tribe that it had assumed an oil and gas lease from a private company

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protecting tribal autonomy, courts have also relied on *Cherokee Nation* and *Worcester* to emphasize other purposes of the trust responsibility as well, such as maintaining federal power in Indian affairs as against state power. See *supra* note 1; see also Chambers *supra* note 4 at 1220-23.

15. One of the earliest cases is *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of lands owned by the Pueblo Indians under the federal public land laws based on the federal-Indian trust relationship.

16. Trust lands are lands owned collectively by tribes but which the tribes cannot alienate without Congressional approval. See F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 509-10 (1982).

17. 295 U.S. 103 (1935).

18. *Id.* at 106-7.

19. *Id.* at 108.

20. *Id.* at 109-10.

21. A leading case is *Seminole Nation v. United States*, 316 U.S. 286 (1942), where the United States Supreme Court stated: "[U]nder a humane and self-imposed policy . . . [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 dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Id.* at 296-97. See also *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (*Mitchell II*); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18-19 (1944); *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

22. 364 F.2d 320 (Ct. Cl. 1966).

that no longer wished to conduct drilling operations on tribal lands.<sup>23</sup> The Tribe sought money damages on grounds that the lease should have been assigned for the benefit of the Tribe, not the federal government.<sup>24</sup> The Court of Claims held in the Tribe's favor, stating that "[t]he case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself."<sup>25</sup> The Court thus cast the federal executive official's duty to the Tribe in terms of a private fiduciary's duty of loyalty to a beneficiary.

Courts have applied the strict fiduciary standard in suits brought by tribes seeking declaratory and injunctive relief against the federal government as well.<sup>26</sup> A leading case in this regard is *Manchester Band of Pomo Indians v. United States*.<sup>27</sup> In *Manchester Band*, the Tribe sought a declaration stating the Secretary of the Interior's statutory and fiduciary obligations in the management of tribal funds.<sup>28</sup> The district court found that, like a reasonably prudent trustee, the Secretary was obligated to make tribal trust funds under his control productive of income.<sup>29</sup> Thus, the Secretary violated his trust responsibility to the Tribe by not investing tribal funds in accounts bearing higher interest rates than the accounts in which the funds were invested, even though investments in the latter accounts did not violate the Secretary's statutory obligations to the Tribe.<sup>30</sup>

### III. THE TRUST DOCTRINE APPLIED TO OFF-RESERVATION FEDERAL ACTION

#### A. *The Issues*

The cases discussed above illustrate how the trust doctrine is applied in situations where executive agency management of tribal lands, natural resources, and funds is at issue. When the dispute is strictly between the executive agency responsible for managing trust property and an Indian tribe or tribal members, courts will invariably reach for principles of private trust law to determine the nature and scope of the federal government's duty to the Indians. The ultimate benefit of this approach is that it furthers the purpose of the trust responsibility as conceived by Chief Justice Marshall. By holding the federal government to the standard of a

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23. *Id.* at 322-23.

24. *Id.* at 323.

25. *Id.* at 324.

26. The jurisdictional base for such suits is usually the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1982).

27. 363 F. Supp. 1238 (N.D. Cal. 1973).

28. *Id.*

29. *Id.* at 1247.

30. *Id.* at 1247-48.

private fiduciary, courts encourage the preservation of Indian property, and thus Indian political and cultural integrity as well.<sup>31</sup>

The federal-Indian trust responsibility in the off-reservation context is another matter. Several factors come into play which ordinarily do not arise when the trust responsibility is invoked in disputes concerning on-reservation federal activities. First, the federal government is responsible to others whose interest may conflict with the interests of Indian tribes. Second, management of tribal trust property is not directly at issue. Third, other statutes, particularly other environmental statutes, may also be at issue; federal obligations under these statutes may influence the determination of the scope of the trust responsibility in the off-reservation context. The influence these factors have on the trust responsibility is the focus of the remainder of this comment.

### B. *The Problem of Conflicting Obligations*

One of the first cases in which the trust responsibility was extended to federal activities off Indian reservations was *Pyramid Lake Paiute Tribe of Indians v. Morton*.<sup>32</sup> In *Pyramid Lake*, the Department of the Interior had promulgated a regulation which governed the diversion of water from a river flowing into Pyramid Lake, located on the Tribe's reservation, to a federal irrigation project located upstream from the reservation.<sup>33</sup> The diversion of water caused by the off-reservation federal project lowered the level of the lake, thereby endangering the fish habitat that had always been the Tribe's principle source of livelihood.<sup>34</sup> Invoking the Administrative Procedure Act, the Tribe sued to set aside the regulation as arbitrary and capricious, claiming the Secretary's decision to divert water from Pyramid Lake violated the federal-Indian trust responsibility.<sup>35</sup>

The District Court for the District of Columbia granted the Tribe's request. Quoting from *Seminole Nation v. United States*,<sup>36</sup> the court

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31. Analogizing the federal government's trust responsibility to that of a private fiduciary is easy to do in situations where federal management of tangible Indian property is at issue; the traditional trust law elements of fiduciary, beneficiary, and trust corpus fit well in such situations. See, e.g., *Mitchell II*, 463 U.S. at 225. The analogy is more strained, however, when intangible Indian interests are at stake, such as tribal culture or sovereignty. Courts have been reluctant to invoke the trust responsibility in such instances. See *Chambers supra* note 4 at 1242-43. Reluctance could change as a result of the application of the trust responsibility in the off-reservation context, for in those instances damage to tangible trust property is not necessarily present. See *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. (AM. INDIAN LAW. TRAINING PROGRAM) 3065 (D. Mont. May 28, 1985), discussed *infra* at text accompanying notes 41-49 and 90-107.

32. 354 F. Supp. 252 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974).

33. *Id.* at 254.

34. *Id.* at 254-55.

35. *Id.* at 254.

36. See *supra* note 21 and accompanying text.

reiterated the principle that, in all of its dealings with Indians, the federal government was to be judged by exacting fiduciary standards.<sup>37</sup> Therefore, the Secretary of the Interior was not free to devise a regulation based on an attempted accommodation of competing interests. The trust responsibility demanded a precisely formulated regulation, the aim of which was to preserve the maximum amount of water possible for the Tribe.<sup>38</sup>

The district court's use of the private fiduciary standard in the off-reservation context in *Pyramid Lake* suggests, in one commentator's words, "an affirmative duty, especially by the Department of the Interior to protect Indian trust property from injury by other federal projects."<sup>39</sup> At a minimum, the district court's analysis makes clear the proposition that, even where federal conduct vis-a-vis Indian trust property is not directly at issue, Indian interests cannot be summarily overridden by other, seemingly more pressing federal concerns.<sup>40</sup> To the contrary, the government's strict fiduciary obligation required federal executive officials to give special consideration to the effects of other federal projects on Indian trust lands.

A more recent case in which trust principles identical to those applied in *Pyramid Lake* were used is *Northern Cheyenne Tribe v. Hodel*,<sup>41</sup> a 1985 decision of the federal district court for the District of Montana. In the *Northern Cheyenne* case, the Tribe claimed the Secretary of the Interior violated his trust obligations because he failed to consider adequately the socioeconomic and cultural effects of coal development on the Tribe before holding coal lease sales of tracts of federally-owned coal located just beyond the Tribe's reservation boundaries.<sup>42</sup> In his defense, the Secretary claimed his obligation to develop federal coal resources taken in the "national interest," warranted relaxation of his trust responsibilities to the Northern Cheyenne Tribe.<sup>43</sup>

The district court refused to allow the Secretary any relief from his trust responsibilities to the Northern Cheyenne.<sup>44</sup> The court noted at the outset of its discussion on the trust issue that the "special relationship imposes strict fiduciary standards of conduct on federal executive agencies in their dealings with Indian tribes."<sup>45</sup> The court analyzed the federal

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37. *Pyramid Lake*, 354 F. Supp. at 256.

38. *Id.* at 256-57.

39. Chambers, *supra* note 4 at 1234.

40. The water flowing into Pyramid Lake was diverted to an irrigation district and used primarily for non-Indian agricultural purposes. *Pyramid Lake*, 354 F. Supp. at 254.

41. 12 Indian L. Rep. (AM. INDIAN LAW TRAINING PROGRAM) 3065 (D. Mont. May 28, 1985). As in the *Pyramid Lake* case, the Tribe in *Northern Cheyenne* sought declaratory and injunctive relief using the APA, 5 U.S.C. §§ 551-706 (1982), as the jurisdictional base.

42. *Id.* at 3066.

43. *Id.* at 3071.

44. *Id.*

45. *Id.* at 3070.

government's conduct in terms of private fiduciary's duty of loyalty to a beneficiary. Citing *Navajo Tribe of Indians v. United States*,<sup>46</sup> the court asserted that, like a private fiduciary, the Secretary had a duty to remain loyal to the Tribe's interests even, indeed especially, in the face of conflicting obligations to other federal projects.<sup>47</sup> The court stated that the trust responsibility was all the more important "in situations 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."<sup>48</sup> The court ultimately held that the federal government was under a strict fiduciary obligation to consider the socioeconomic and cultural impacts of coal development on the Tribe.<sup>49</sup>

As applied in *Pyramid Lake* and *Northern Cheyenne*, the trust responsibility is a fairly effective means of protecting Indian tribes from threatening off-reservation federal activities. However, the argument that federal obligations to other off-reservation projects should preclude executive agency adherence to the strict fiduciary standard has been recognized by the United States Supreme Court in the context of water rights adjudication.<sup>50</sup> The case, *Nevada v. United States*,<sup>51</sup> is factually distinct from cases where equitable relief against the federal government is sought, but the reasoning of the case stands ready to be transferred to situations like those presented in *Pyramid Lake* and *Northern Cheyenne*.

The *Nevada* case was filed by the United States on behalf of the Pyramid Lake Paiute Tribe shortly after the *Pyramid Lake* case was decided.<sup>52</sup> The United States sought additional water rights for the Pyramid Lake Paiute Tribe to the same river at issue in *Pyramid Lake*.<sup>53</sup> The defendants asserted *res judicata*, claiming the United States was attempting to relitigate water rights already settled in a prior decree.<sup>54</sup> The District Court for the District of Nevada agreed and dismissed the

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46. See *supra* notes 21-25 and accompanying text.

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

48. *Id.*

49. *Id.*

50. The problem of the federal government's divided loyalty has long been present in water resource cases like *Pyramid Lake*, see *supra* notes 31-39 and accompanying text, where federal agencies charged with developing water resources sometimes divert water flowing into Indian reservations to other federal projects, thus causing a conflict with Indian water rights protected under the *Winters* doctrine. See Chambers, *supra* note 4 at 1236 n.105. On the *Winters* doctrine, see Cohen, *supra* note 16 at 578-604.

51. 463 U.S. 110 (1983).

52. *Id.* at 118. In *Nevada*, the United States and the Tribe sought a general stream adjudication of the water rights of approximately 17,000 water users. *United States v. Truckee-Carson Irrigation Dist.*, NO. R-2987 TBA (D. Nev. filed Dec. 21, 1973).

53. *Nevada*, 463 U.S. at 118.

54. *Id.* at 119.



complaint.<sup>55</sup>

On appeal, the Ninth Circuit Court of Appeals reversed in part, holding that, because the Tribe and certain owners of land adjacent to the reservation were not parties in the prior adjudication, but were both represented by the United States, and because their interests may have conflicted, neither could be bound by the prior decree.<sup>56</sup> Citing the Restatement (Second) of Trusts,<sup>57</sup> the Ninth Circuit also stated that the United States breached its duty of "undivided loyalty to the Tribe" by representing both the Tribe and the landowners in the previous litigation.<sup>58</sup>

The United States Supreme Court held on certiorari that *res judicata* prevented the United States and the Tribe from litigating their claim for additional water rights against anyone.<sup>59</sup> The Supreme Court faulted the Ninth Circuit for casting the relationship between the United States and the Tribe in terms of a private trustee-beneficiary relationship. The Court acknowledged the United States' "strong" fiduciary duty to Indian tribes, but concluded: "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 . . . the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests."<sup>60</sup> The Supreme Court thus found that under the circumstances presented in the case, the interests of the Tribe and the landowners were "sufficiently adverse" to bind both to the prior decree.<sup>61</sup>

The *Nevada* case is distinguishable from *Pyramid Lake* and *Northern*

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55. *Id.*

56. *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1309-11 (9th Cir. 1981), *amended*, 666 F.2d 351 (1982).

57. RESTATEMENT (SECOND) OF TRUSTS § 170 & comments p,q,r (1959).

58. *Truckee-Carson*, 649 F.2d at 1310.

59. *Nevada*, 463 U.S. at 111.

60. *Id.* at 142. Justice Rehnquist, who wrote the majority opinion, stated earlier in the decision:

[I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obligated it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

61. *Id.* at 143. The Court found the necessary adversity in settlement negotiations which resulted in an agreement between the representative for the landowners and the federal government prior to issuance of the original water rights decree. *Id.* at 140.

*Cheyenne* in several respects. First, *Pyramid Lake* and *Northern Cheyenne* were suits for equitable relief in which the issue was whether certain executive agency decisions were made arbitrarily.<sup>62</sup> The issue in *Nevada* was whether *res judicata* prevented the United States from asserting its claim for additional water rights.<sup>63</sup> Second, in the *Pyramid Lake* case at least, there was only one regulation at issue and one defendant, the Secretary of the Interior. The defendants in *Nevada*, on the other hand, included thousands of landowners, each of whom owned water rights to the river flowing into the Pyramid Lake. The costly and time-consuming project of adjusting all of their water rights had the United States succeeded on the merits may have been a factor in the Supreme Court's decision to prohibit the United States from proceeding further with its claim.<sup>64</sup> Finally, the Supreme Court's discussion of the fiduciary-beneficiary relationship in *Nevada* referred to the federal government's role as representative in water rights adjudication.<sup>65</sup> Pronouncing the private fiduciary standard inappropriate in that situation does not necessarily mean the identical rationale should govern in suits in which tribes seek declaratory and injunctive relief against the federal government.

Still, the underlying dilemma of the federal government's divided loyalty is common to all three cases. Arguably, the Supreme Court's rationale in *Nevada* could be applied in situations similar to those presented in *Pyramid Lake* and *Northern Cheyenne*. Executive agency officials administering off-reservation projects have both a trust responsibility to Indians and obligations to other federal projects. If in administering an off-reservation project an executive official's dual obligations come into conflict, perhaps it is not unreasonable to permit the executive official some flexibility in accomodating those competing obligations. The argument for flexibility becomes stronger when one adds the fact that Congress itself instructed the Secretary to carry both obligations simultaneously,<sup>66</sup> and stronger still if the off-reservation project enjoys popular public support.

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62. See *supra* notes 32-49 and accompanying text.

63. *Supra* note 53 and accompanying text.

64. See *supra* note 52. In his concurring opinion in *Nevada*, Justice Brennan stated: "In the final analysis, our decision today is that thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago . . . despite strong claims on the part of the Pyramid Lake Paiutes." *Id.* at 145.

65. The *Nevada* case has probably laid in its final resting place the proposal to create an independent Indian Trust Counsel Authority, first proffered by President Nixon in 1970. H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970); see also R. Chambers, *A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources*, Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Senate Comm. Reprint, 91st Cong., 2d Sess. 11-12 (1971).

66. See *supra* note 60.

If federal executive officials were released from the strict fiduciary standard, however, Indian efforts to preserve tribal cultural autonomy could be detrimentally affected. Executive agency officials habitually make decisions through a process of compromise and accommodation. In a world where Indians have little political clout to begin with, it is difficult to imagine Indian interests gaining pre-eminence over non-Indian interests if federal executive officials are permitted to resolve conflicts between Indians and non-Indians over off-reservation federal projects through a political process. Federal adherence to the private fiduciary standard preserves the trust duty of undivided loyalty and compels executive agency officials to subordinate off-reservation interests to Indian rights protected by the trust responsibility.<sup>67</sup> Thus, the trust obligation to preserve Indian cultural and political autonomy as articulated by Chief Justice Marshall is more likely to be fulfilled.

The judicial approach chosen to resolve the problem of the federal government's conflicting obligations is ultimately a reflection of the strength of the federal commitment to protecting Indian tribes as distinct cultural entities. If courts compel executive agency officials to abide by private fiduciary standards even in their off-reservation activities as illustrated in the *Pyramid Lake* and *Northern Cheyenne* cases, then the preservation of Indian cultural autonomy is likely to be enhanced. If executive officials are permitted to relax their trust duties in the off-reservation context and thus balance Indian rights along with many other interests, danger to the continued survival of Indian autonomy increases.<sup>68</sup>

### C. *Protection of Nonproprietary Indian Interests*

The problem of the federal government's conflicting obligations is just one of the issues that invariably arises in the context of off-reservation enforcement of the federal-Indian trust responsibility. Another issue that arises concerns the scope of the trust responsibility. The traditional focus of the trust responsibility has always been on protection of tribal trust property, including lands,<sup>69</sup> funds,<sup>70</sup> and natural resources.<sup>71</sup> Courts have been reluctant to broaden the trust responsibility's scope to include explicit protection of nonproprietary Indian interests, like tribal sovereignty or

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67. See Chambers *supra* note 4 at 1235-38 for a discussion of the importance of equitable relief generally to preserving tribal autonomy.

68. The district court in *Northern Cheyenne* voiced the same concern, stating: "identifying and fulfilling the trust responsibility is even more important in situations 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." *Id.*, 12 Indian L. Rep. at 3071.

69. *Creek Nation*, 295 U.S. 103 (1935).

70. *Manchester Band*, 363 F. Supp. 1238 (N.D. Cal. 1973).

71. *Mitchel II*, 463 U.S. 206 (1983).

cultural integrity.<sup>72</sup>

This focus may be changing, however, as a direct result of the application of the trust responsibility in the off-reservation context. Recently, a few tribes have sought equitable relief against federal executive officials based on alleged violations of both the trust responsibility and the requirements of certain environmental statutes. The response of the courts in these cases has been to intertwine the requirements of the environmental statutes with the federal government's duties under the trust responsibility so that the scope of the former determines the scope of the latter. Depending on what is protected in the environmental statutes, a favorable decision for Indians may mean that the scope of the trust responsibility is broadened to include protection of intangible Indian interests as well as Indian trust property.

One case illustrating this interplay of the trust doctrine and environmental law is *North Slope Borough v. Andrus*.<sup>73</sup> In *North Slope Borough*, representatives of the Inupiat Eskimos of Alaska sued to enjoin the Secretary of the Interior from proceeding with lease sales to develop federal oil and gas properties of the north coast of Alaska.<sup>74</sup> The Inupiat feared that oil and gas development would endanger the Bowhead whales that migrated through the area, and upon which the Inupiat depended for their subsistence culture.<sup>75</sup> The representatives claimed in part that the Secretary violated both the Endangered Species Act<sup>76</sup> (ESA) (the Bowhead whale was on the ESA list of endangered species)<sup>77</sup> and the trust responsibility in that the Secretary failed to consider adequately the impact of the potential disappearance of the whales on the traditional Inupiat culture.<sup>78</sup>

The district court for the District of Columbia held the Secretary had not met the requirements of the ESA, and to that extent he had breached his duties under the trust responsibility as well.<sup>79</sup> The circuit court reversed on both issues. It first examined the ESA issue and concluded that the Secretary had taken the necessary steps to preserve the Bowhead whales as prescribed by the ESA.<sup>80</sup> The court then moved to the issue of the scope of

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72. See Chambers *supra* note 4 at 1242-43.

73. 642 F.2d 589 (D.C. Cir. 1980).

74. *Id.* at 592.

75. *Id.* at 593.

76. 16 U.S.C. §§ 1531-1543 (Supp. II 1984).

77. *Id.* at 607-11.

78. *Id.* at 611-13.

79. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 344 (D.D.C. 1980).

80. *North Slope Borough*, 642 F.2d at 609. Under the ESA, an executive agency undertaking a federal project which is likely to affect an endangered species must obtain a "biological opinion" from the agency responsible for the animal to ensure that the project will not jeopardize the animal's continued existence. 16 U.S.C. § 1536(a) (Supp. II 1984). In this case, the court found that a letter

the trust responsibility. It acknowledged the importance of the Bowhead whales to Inupiat tribal culture, but concluded that, "where the Secretary has acted responsibly in respect of the environment [by complying with the ESA], he has implemented responsibly, and protected, the parallel concerns of the native Alaskans."<sup>81</sup> The circuit court thus found that any duty the federal government had to protect the subsistence culture of the Inupiat Eskimos was satisfied by its compliance with the ESA.<sup>82</sup>

The assumption underlying the circuit court's analysis in *North Slope Borough* was that the federal government's duties under the trust responsibility were coextensive with its duties under the environmental statute. Another case, *Nance v. Environmental Protection Agency*,<sup>83</sup> followed the same pattern of analysis. In *Nance*, the Crow Tribe sought equitable relief against the Environmental Protection Agency (EPA), claiming that EPA's alleged failure to consider the impact of reclassification of the adjoining Northern Cheyenne Tribe's air quality on coal development within the Crow Reservation constituted a violation of both the Clean Air Act<sup>84</sup> and the federal trust responsibility to the Crow Tribe.<sup>85</sup> The Ninth Circuit Court of Appeals held first that EPA's conclusions that the air quality reclassification would not harm coal development in surrounding areas was proper under the Clean Air Act.<sup>86</sup> The circuit court then held that, insofar as the EPA complied with the provisions of the Clean Air Act, it discharged adequately its trust duty to protect the Crow Tribe's interest in developing coal on its reservation.<sup>87</sup> Like the court in *North Slope*

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from the National Marine Fisheries Service to the Bureau of Land Management, in which possible danger to the Bowhead whale was discussed, constituted a "biological opinion" within the meaning of the ESA. *North Slope Borough*, 642 F.2d at 610.

81. *Id.* at 612.

82. The court's emphasis on the ESA was influenced largely by the United States Supreme Court's decision in *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535 (1980). In *Mitchell I*, the Supreme Court held the General Allotment Act created no enforceable fiduciary duties to Indian allottees and thus could not be used as the substantive basis upon which to bring a money damages claim against the federal government under the Tucker Act, 28 U.S.C. § 1491 (1982). *Id.* at 538-42. Even though the claim in *North Slope Borough* was for equitable rather than monetary relief, the court borrowed the *Mitchell I* rationale for its finding that a trust responsibility existed only if Congress's intent to create the trust responsibility was unambiguously stated in a statute, treaty or executive order. *North Slope Borough*, 642 F.2d at 611-12; See also Newton, *Enforcing the Federal Indian Trust Relationship after Mitchell*, 31 CATH. U. L. REV. 635, 673-79 (1982). The court found the ESA created only a limited trust responsibility to the Inupiat Eskimos insofar as the statute exempted the Alaskan Natives from prohibitions against hunting endangered species, which signified the federal government's recognition of its trust responsibility to protect the Alaskan Natives' subsistence hunting rights. *Id.* at 612. This right was protected, according to the court, by the Secretary of the Interior's compliance with the ESA. *Id.*

83. 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981).

84. 42 U.S.C. § 7401-7642 (1982).

85. *Nance*, 645 F.2d at 705.

86. *Id.* at 705-8.

87. *Id.* at 711.

*Borough*, the Ninth Circuit in *Nance* construed the scope of the trust responsibility as being coextensive with the scope of the environmental statute.

Neither *North Slope Borough* nor *Nance* signify any radical expansion of the scope of the trust responsibility, for in both cases the major emphasis was on the environmental statutes rather than trust principles. In *North Slope Borough*, the court was unwilling to state that the federal government's trust obligations independently required it to protect traditional Inupiat culture from the threats posed by off-reservation federal oil and gas exploration.<sup>88</sup> The circuit court in *Nance* was more generous; although the court concluded that EPA compliance with the Clean Air Act resolved the trust responsibility issue, the court implied that the trust responsibility itself obligated the federal government to avoid off-reservation activities which would discourage tribal resource development on the Crow reservation.<sup>89</sup>

A stronger statement of the scope of the trust responsibility in the off-reservation context is found in the *Northern Cheyenne* case,<sup>90</sup> where the double violation of an environmental statute and the trust responsibility was also present. The district court in that case considered both *North Slope Borough* and *Nance* in its analysis of the issues before it,<sup>91</sup> but it did not explicitly collapse the scope of the trust responsibility with the scope of the environmental statute as the courts in the other two cases did. Instead, the court maintained the distinction between the federal government's duties under the trust responsibility and its duties under the environmental statute. Even as the court did so, however, it incorporated the requirements of the latter into the former. The result was a strong, independent federal obligation to investigate and mitigate the potentially harmful effects on an Indian tribe of federal action undertaken adjacent to the reservation.

The Northern Cheyenne reservation is located amidst vast tracts of federally-owned coal in southeastern Montana.<sup>92</sup> In 1982, as part of a nationwide coal development program begun in the late 1970's, the Department of the Interior<sup>93</sup> began leasing various tracts surrounding the

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88. *North Slope Borough*, 642 F.2d at 612. Interestingly, the court also noted in regard to the federal government's competing obligations that "no one can claim that the interests of the Eskimos . . . were an overriding veto staying the Secretary's hand with respect to other public concerns. Discretion, though, is given to the Secretary to make responsible decisions which balance the public and social interest involved." *Id.* at 612-13.

89. *Nance*, 645 F.2d at 711.

90. 12 Indian L. Rep. (AM. INDIAN LAW TRAINING PROGRAM) 3065 (D. Mont. May 28, 1985); see *supra* text accompanying notes 39-46.

91. *Northern Cheyenne*, 12 Indian L. Rep. at 3070-71.

92. *Id.* at 3065.

93. The Bureau of Land Management (BLM) was the agency within the Department of the Interior responsible for the federal coal development program.

reservation to coal developers.<sup>94</sup> The lease sales were governed by coal management regulations which in turn required the Department to complete a regional environmental impact statement (EIS) on the alternate lease sale schedules according to the provisions of the National Environmental Policy Act (NEPA).<sup>95</sup> The Northern Cheyenne Tribe, requesting equitable relief, claimed the regional EIS completed prior to the coal lease sales was deficient under NEPA because the Secretary failed to consider the sociological and economic effects of coal development on the Northern Cheyenne Tribe.<sup>96</sup> The Tribe also contended the Department's failure to consider such impacts constituted a breach of the federal-Indian trust responsibility.<sup>97</sup>

The district court considered the NEPA issue first. The Department argued that NEPA primarily required an assessment of the impacts of coal development on the natural, physical environment, not an assessment of social and economic impacts.<sup>98</sup> The court disagreed. It found that if an EIS was otherwise required to assess a proposed project's effects on the physical environment, then the agency drafting the EIS was also required to identify the social and economic effects flowing as a result of the disruption to the physical environment.<sup>99</sup> In the *Northern Cheyenne* case, the effects to be considered included population increases due to the influx of miners and their families into the area, increased demands on local governments, and increased needs for housing, schools, and other services.<sup>100</sup>

The court stressed that identifying and mitigating the harmful socioeconomic effects of coal development on the Northern Cheyenne Tribe was especially important because the Tribe was a "culturally discrete" entity in the area.<sup>101</sup> Because of the unique structure of political, economic and cultural life within the Northern Cheyenne reservation, coal development was likely to affect the Northern Cheyenne differently than it would people living in nearby white communities. The court faulted the EIS for its sparse references to the Northern Cheyenne Tribe,<sup>102</sup> which in the

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94. *Northern Cheyenne*, 12 Indian L. Rep. at 3065.

95. *Id.* at 3066. NEPA is codified at 42 U.S.C. § 4321-4361 (1982). The coal management regulations, 43 C.F.R. § 3400-3400.5 (1985), were promulgated in part under the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 201-209 (1982) and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201-1328 (1982).

96. *Northern Cheyenne*, 12 Indian L. Rep. at 3066.

97. *Id.* at 3070-71.

98. *Id.* at 3067.

99. *Id.* at 3067-68.

100. *Id.*

101. *Id.* at 3068.

102. *Id.* The court stated:

The EIS, for example, does not acknowledge the existence of the tribal government and its powers and responsibilities, does not recognize that the reservation is culturally distinct

court's view indicated an erroneous assumption by the Department that it could treat the Tribe "merely as potentially affected citizens" rather than as a unique cultural entity.<sup>103</sup> The court agreed with the Northern Cheyenne Tribe that the Department's failure to consider the Tribe as a distinct entity for purposes of compliance with NEPA requirements was a fatal flaw of the EIS.<sup>104</sup>

This concern for protecting the Northern Cheyenne Tribe as a distinct entity was carried over into the court's discussion of the federal government's duties under the trust responsibility. As noted earlier, however, the court did not look explicitly to the provisions of NEPA to determine the scope of the trust responsibility in the off-reservation context. Instead, the court relied on traditional trust doctrine principles, especially the private fiduciary's duty of loyalty to the beneficiary,<sup>105</sup> to judge the Secretary's conduct in fulfilling his trust obligations. The reliance on strict fiduciary principles ensured that the federal government's trust responsibility, whatever it encompassed, would stand independently of the environmental statute.

For its ultimate holding on the trust responsibility issue, however, the district court referred back to the EIS' deficiencies noted earlier in its discussion of the federal government's duties under NEPA. Following its NEPA holding, the district court claimed the trust responsibility obligated the Secretary to identify and mitigate the unique social and economic impacts of coal development on the Tribe.<sup>106</sup> Thus, "treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate . . . violated this trust responsibility."<sup>107</sup> Though the district court made no direct connection between NEPA's requirements and those of the trust responsibility, in the end the two were identical.

What distinguishes the *Northern Cheyenne case* from *North Slope Borough* and *Nance* is that, even though the district court in *Northern Cheyenne* probably could not have defined the scope of the trust responsibility as it did except by reference to NEPA, its reliance on traditional trust law principles guaranteed that the trust responsibility would have independent force. Traditional trust doctrine principles did not play nearly the important role in *North Slope Borough* and *Nance* as they did in *Northern Cheyenne*. As a result, the trust responsibility in those cases was more a pro

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within the region, and does not consider that the different structure of public finance on the reservation may vary the tribe's ability to mitigate the impacts of increased coal development as compared to surrounding communities.

103. *Id.*

104. *Id.* at 3069.

105. *See supra* text accompanying notes 21-25.

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

107. *Id.*



forma concept that depended on the environmental statute for the limited vitality it did have. Based on *Northern Cheyenne*, however, tribal advocates in future cases may argue that, regardless of whether the federal government violated any environmental statute in its off-reservation activities, the federal-Indian trust responsibility obligates executive agencies to identify and mitigate any adverse impacts resulting from off-reservation federal projects which could harm the cultural integrity of a nearby Indian tribe. The ingredients going into *Northern Cheyenne* were much the same as those in *North Slope Borough* and *Nance*, but because of the district court's emphasis on the strict fiduciary standard as opposed to the environmental statute, even as the court incorporated the statute's requirements into those of the trust responsibility, the scope of the trust responsibility was broadened to include explicit protection of nonproprietary Indian interests.

#### IV. CONCLUSION

The *Cherokee* cases suggest that one of the primary purposes of the trust responsibility is to protect the land base of Indian tribes and the tribes' cultural and political autonomy. This purpose is more likely to be realized if the federal government, through its executive agencies, is held to the standard of a private fiduciary in its dealings with Indian tribes. The federal government knowing it may be sued for breach of trust according to private trust law principles, has an incentive to preserve tribal trust property and guard tribal interests in the best possible manner.

Federal adherence to the strict fiduciary standard is more difficult to maintain when executive agencies are charged with administering off-reservation projects that may adversely affect nearby Indian tribes. Some may think it entirely unrealistic and inefficient to hold the federal government to such a standard in these circumstances. As the courts in *Pyramid Lake* and *Northern Cheyenne* indicated, however, the strict fiduciary standard may be crucial in the off-reservation context if Indian rights are not to be ignored entirely. Strict adherence to the trust responsibility is especially important when the pressure to compromise that responsibility increases.

The trust responsibility may be strengthened if the opportunity to incorporate the requirements of other environmental statutes arises. Traditionally, the scope of the trust responsibility extended only to protection of tangible Indian trust property. The threats to Indian tribes posed by off-reservation federal projects, however, are often less concrete in nature, since immediate harm to Indian trust property is not always present. As the *Northern Cheyenne* case illustrates, environmental statutes which require the federal government to identify and protect important cultural values may be combined with the government's trust duties to

effectively broaden the scope of the trust responsibility to include protection of Indian cultural and political integrity. Once again, however, the ultimate situation depends on whether the trust responsibility is given independent force through the application of traditional trust law principles. Indian tribes must always struggle to remain culturally and politically distinct from the dominant white culture. To the extent the trust responsibility helps Indian tribes, federal government adherence to the standard of a private fiduciary in its off-reservation activities and explicit recognition that the trust responsibility includes protection of tribal sovereignty and culture will ensure that the struggle is not a hopeless one.

