No. _____

In The

Supreme Court of the United States

GROS VENTRE TRIBE, ASSINIBOINE TRIBE, AND FORT BELKNAP COMMUNITY COUNCIL,

Petitioners,

v.

UNITED STATES, BUREAU OF LAND MANAGEMENT, BUREAU OF INDIAN AFFAIRS, AND INDIAN HEALTH SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the proper interpretation of § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, as well as the proper construction of treaties and agreements between the United States and the Gros Ventre and Assiniboine Indian Tribes ("Tribes") of the Fort Belknap Indian Reservation in north-central Montana.

The questions presented are:

(1) Should certiorari be granted to resolve a conflict among the circuits as to whether the waiver of sovereign immunity in § 702 of the APA is limited by the final agency action requirement of § 704 or the judicial review provisions of § 706 of the APA?

(2) Should certiorari be granted to resolve a conflict among the circuits as to whether this Court's opinions addressing Tribal claims for money damages under the Tucker Act limit this Court's opinions addressing Tribal claims for equitable relief under Treaties and the common law Indian Trust doctrine?

LIST OF PARTIES AND PARTIES TO THE PROCEEDINGS BELOW

Petitioners Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community reside on the Fort Belknap Indian Reservation, a 652,000 acre tract of land in north-central Montana. Petitioner Fort Belknap Indian Community Council is the governing body of the Tribes. Petitioners were appellants in the court of appeals and plaintiffs in the district court.

Respondents are: the United States; the Bureau of Land Management, an agency of the United States Department of Interior: the Bureau of Indian Affairs, an agency of the United States Department of Interior; and the Indian Health Service, an agency of the United States Department of Health and Human Services. Respondents were appellees in the court of appeals and defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Gros Ventre Tribe, Assiniboine Tribe, and the Fort Belknap Indian Community state the following:

> No party to this petition or to the proceedings below is a corporation, or a parent of publicly held company of a corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-27) is published at 469 F.3d 801 (9th Cir. 2006). The opinion of the district court (App., *infra*, 40-58) is published at 344 F.Supp.2d 1221 (D. Mont. 2004). The June 28, 2004 opinion of the district court (App., *infra*, 28-39) is unreported. The May 29, 1998 decision of the Interior Board of Land Appeals is reported at 144 IBLA 168, 1998 WL 344223 (I.B.L.A.) (May 29, 1998).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 13, 2006. The court of appeals denied a petition for rehearing on March 16, 2007 (App., *infra*, 59). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTORY PROVISIONS INVOLVED

Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (App., *infra*, 61-68).

Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 (App., *infra*, 69-78).

An Act to Ratify and Confirm an Agreement with the Gros Ventre, May 1, 1888, 25 Stat. 113 (App., *infra*, 79-89).

Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, 29 Stat. 350 (1896) (App., *infra*, 90-98).

5 U.S.C. § 702 provides, in relevant part, as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704 provides, in relevant part, as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise

requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 provides, in relevant part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. . . .

25 U.S.C. § 71 provides as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. . . .

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1505 provides as follows:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive

> orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

42 U.S.C. § 4332(2)(C) provides, in relevant part, as follows:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action, . . . any adverse environmental effects which cannot be avoided should the proposal be implemented, . . . alternatives to the proposed action, . . . the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and . . . any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

STATEMENT OF THE CASE

I. Treaties and Statutory Background

This case raises issues of profound importance involving the proper construction of treaties and agreements entered into by the United States government with Native American Tribes, including the petitioning Tribes – the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation in Montana. This case also raises the

important question of whether the waiver of sovereign immunity for nonmonetary claims against the United States in § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, is limited by other provisions of the APA.

A. Treaties

In 1851, the Treaty of Fort Laramie was executed among several Indian nations, including the "Assinaboines" and "Gros-Ventre Mandans," and the United States government. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (App., *infra*, 61-68). In exchange for the Tribes' promise to "abstain in future from all hostilities whatever against each other," *id*. at art. 1 (App., *infra*, 61), "make an effective and lasting peace," *id*., and make "restitution or satisfaction" for "wrongs" committed by them against United States citizens who may be "lawfully residing in or passing through their respective territories," *id*. at art. 4 (App., *infra*, 62), the signatory Indian nations were promised that the United States would "protect" them against "all depredations" committed by the people of the United States. *Id*. at art. 3 (App., *infra*, 62).

The Treaty of Fort Laramie also recognized and acknowledged territories for the various signatory Indian nations. *See id*. at art. 5 (App., *infra*, 62-63). It was nevertheless made clear that, in making this recognition and acknowledgment, the Indian nations did not "abandon or prejudice any rights or claims they may have to other lands" or "surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." *Id*. (App., *infra*, 64).

Four years after the signing of the Treaty of Fort Laramie, the United States government entered into the Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 (App., *infra*, 69-78), by which the parties promised peaceful relations among the Tribes, between the signatory Tribes and other Tribes, and between the Tribes and the United States. *Id*. at art. 1, 2 (App., *infra*, 69-70). The territories established by the Treaty of Fort Laramie were modified by the new treaty. *Id*. at art. 4 (App., *infra*, 71-72).

The Treaty with the Blackfeet required the signatory Indian Tribes to "acknowledge their dependence on the Government of the United States," promise not to commit any "depredations or other violence" against U.S. citizens and allow them to "live in and pass unmolested" through Indian territories, and "deliver such individual[ ]" Tribal members to United States authorities for "trial and punishment" for any depredations committed by them against United States citizens. *Id*. at art. 11 (App., *infra*, 74). In return for these promises, the United States promised to "protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit." *Id*. at art. 7 (App., *infra*, 72).

B. Congressionally-Ratified Agreements

In 1871, treaty-making formally ended, Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (2000)), although obligations in any treaties "made and ratified with any such Indian nation or tribe prior to March 3, 1871" were deemed not to be "invalidated or impaired." *Id*. As a result, formal treaty

making with Indian nations ceased, but more than 70 agreements between tribes and the United States were entered into and approved by Congress, usually by way of legislation. *See* Robert Laurence, *A Paradigmatic, Comparative, Private-Law Perspective on the Federal Trusteeship*, 46 NAT. RESOURCES J. 463, 471 (2006) (citing Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994)).

Two such agreements pertain to the Gros Ventre and Assiniboine Tribes. In 1888, Congress ratified an act to reduce the territory of the Gros Ventre and other Indian Tribes. An Act to Ratify and Confirm an Agreement with the Gros Ventre, ch. 213, May 1, 1888, 25 Stat. 113 (App., *infra*, 79-89). Through this "1888 Agreement," Congress created the original Fort Belknap Indian Reservation, an area of land specifically set aside for the use and enjoyment of the Indian tribes. The original Fort Belknap Reservation included the Little Rocky Mountains, which to this day are the headwaters for much of the Reservation's water resources, are considered sacred by Tribal members, and were traditionally used by the Tribes for hunting, fishing, cultural, and spiritual purposes.

The 1888 Agreement reserved to the Tribes the full use of all waters flowing to and entering Reservation lands, including all water, "undiminished in quantity and undeteriorated in quality," necessary to fulfill the purposes of the Reservation. *Winters v. U.S.*, 207 U.S. 564, 567 (1908). The 1888 Act was the subject of the seminal Indian law decision *Winters v. U.S.*, in which this Court held that the 1888 Agreement granted the Tribes full use of all waters flowing to and entering Reservation lands. *Id*. at 576. The 1888 Agreement did not replace or diminish any

of the promises made by the United States in previous treaties.

In the early 1880s, prospectors trespassing on the Reservation discovered gold in the Little Rocky Mountains. In 1896, Congress ratified another agreement, which later became known as the "Grinnell Agreement," by which the Tribes agreed to relinquish all mineral interests in the Little Rocky Mountains in return for certain monetary considerations. Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, ch. 398, 29 Stat. 350 (1896) (App., *infra*, 90-98).

The report to the Senate accompanying the Grinnell Agreement stated that the Tribes "would not be giving up any of their timber or grass lands" and "would have ample water for all their needs." S. Doc. No. 54-117, at 3-4 (1896) (App., *infra*, 105). Indeed, the Senate Report reflects multiple reassurances that were made to the Tribes with regard to their water rights. *See*, *e.g.*, *id*. ("you will have all the water that you need"). For example, the Report states that the Tribes were reassured that they would retain "control of the waters of the streams having their sources in the mountains for much-needed irrigation and for domestic uses by the Indians," and that there would be "no irreparable damage . . . done the Indians by depriving them of these important benefits, which might be vital to their very existence." *Id*. at 3 (App., *infra*, 104); *see also id*. at 4 (App., *infra*, 105) (agency officials reporting that "the water rights of the Indians will not be in any way impaired by the cession" and that "they have retained enough wood and water for their uses for all time").

C. Section 702 of the Administrative Procedure Act

Section 702 of the APA waives sovereign immunity for any person who has suffered "legal wrong" due to the acts or failure to act of an agency or officer or employee thereof, acting in an official capacity or under color of legal authority when the relief sought does not include money damages. 5 U.S.C. § 702. "Legal wrong" means such wrong as particular statutes or the courts have recognized as constituting grounds for judicial relief. *See Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (1955), 932, *cert. denied*, 350 U.S. 884 (1955) ("'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review").

In amending the APA in 1976 to include § 702, the Judiciary Committee of both Houses identified, in their reports, the measure's clear purpose as the "eliminat[ion of] the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6129 (1976); *see also Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981) (the "legislative history of this provision could not be more lucid").

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Federal common law claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. *See*, *e.g.*, *Illinois v. City of*

Milwaukee, Wis., 406 U.S. 91, 100 (1972) ("section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."); *Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980) (federal common law claims "arise under" 28 U.S.C. § 1331); *see also Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F.Supp. 1515, 1519-20 (W.D. Wash. 1996) (Indian trust obligation constitutes "law to apply").

II. Factual Background

A. Cyanide Heap-Leach Gold Mining in the Little Rocky Mountains

Within a decade of the discovery of gold in the Little Rocky Mountains in the 1880s, and the subsequent "Grinnell Agreement" carving the territory out of the original Fort Belknap Reservation, the Little Rocky Mountains mining district became the state's largest gold producer. Mining largely ended in the early 1900s, but in 1979, the Montana Department of State Lands ("MDSL") granted Zortman Mining, Inc. ("ZMI"), a wholly owned subsidiary of Pegasus Gold, Inc., two permits to begin cyanide heap-leach gold mining in the Little Rocky Mountains within the "Grinnell" lands adjacent to and surrounded on three sides by the Reservation. MDSL prepared a draft "Environmental Impact Statement" for the two mines, and the Bureau of Land Management ("BLM"), a federal agency, approved of ZMI's plan of operations. *See Island Mountain Protectors, et al.*, 144 IBLA 168, 171 (May 29, 1998) (discussion of history of Zortman and Landusky mines).

Between 1979 and 1994, working jointly, the BLM and MDSL approved 15 expansions of the mining operations in the Little Rocky Mountains, more than doubling the size of

the original disturbance. *Id*. at 171-72. BLM undertook no additional environmental impact statements to evaluate these expansions. In 1996, the BLM prepared an "Environmental Impact Statement" pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), to evaluate yet another proposed expansion of mining operations, and eventually approved additional mining at the Zortman mine even though it concurrently recognized that the mines were having a substantial negative impact on the Tribes' treaty-based water resources.

The Little Rocky Mountains form the headwaters of streams running onto the southern end of the Reservation. King Creek, Lodgepole Creek, and Bighorn Creek originate in the Little Rockies and flow onto the Reservation. Mining operations have diverted flows from the Little Rocky Mountains away from the Reservation, generated wastewater, waste rock, leach pads, and process wastes, and polluted a number of watersheds in the mountains, including those running onto the Reservation. The mines have leached, and continue to leach, acid rock drainage – an acidic brew of heavy metals – into surface and groundwaters hydrologically connected to the mines. There is an unquantified amount of recharge of waters impacted by mining activities in the limestone formations located in the mountains. These facts are undisputed.[1]

[1] Furthermore, as a result of the mine operations, the Tribes' cultural and spiritual use of the mountains has been severely eroded; the BLM observed in one planning document that mining will have 100 plus years of significant disruption to Native American traditional cultural practices in the Little Rocky Mountains. Spirit Mountain, once the core of tribal religious practices in the mountains, is now entirely gone – replaced by enormous open pits.

Indeed, as the district court acknowledged:

> It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated.

Gros Ventre, et al. v. United States, et al., CV 00-69-M-DWM, Slip Op. (D. Mont. June 28, 2004) at 12 (App., *infra*, 38).[2]

In January of 1998, ZMI declared bankruptcy and announced its intention to cease operations at the mines. In response, the BLM developed and selected new closure and reclamation plans for the mine sites.

B. The District Court's Decisions

On April 12, 2000, in U.S. District Court for the District of Montana, the Tribes filed an equitable action against the federal government, including the BLM, alleging breach of the federal government's specific and general trust obligations to the Tribes in the permitting of

[2] As a result of these impacts, in 1996, the Interior Board of Land Appeals ("IBLA") observed that the BLM had failed to obtain the information necessary about groundwater contamination from the mines to develop an adequate reclamation plan. *Island Mountain Protectors*, 144 IBLA at 201. In 1998, the IBLA held, *inter alia*, that in approving the mine reclamation plan, the BLM did not fully observe its trust responsibility to the Tribes and failed to protect public lands from unnecessary or undue degradation. *See id.* at 202-03. In light of these violations of the trust obligation and federal law, the IBLA halted the proposed expansion of the mines. *Id*. at 203.

the Zortman and Landusky cyanide heap-leach mines over the course of two decades, and the resulting destruction of Tribal trust resources.

In their prayer for relief, the Tribes requested that the district court: (1) declare the federal government in violation of its fiduciary duty to protect Tribal trust resources; (2) declare that the federal government's failure to comply with NEPA and other statutes, as well as its failure to fully reclaim the area, constitutes unnecessary and undue degradation in violation of the Federal Land and Policy Management Act, 43 U.S.C. § 1701, *et seq.*; (3) issue a writ of mandamus compelling the federal government to fully reclaim the area in fulfillment of its trust obligations; and (4) enjoin the further destruction of Tribal trust resources.

On January 29, 2001, the District Court denied the federal government's motion to dismiss the complaint. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Jan. 29, 2001). In November of 2001, the District Court bifurcated the proceedings into liability and remedy phases. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Nov. 30, 2001). In December of 2002, the parties exchanged summary judgment briefs. The District Court did not rule on the initial set of summary judgment briefs, and instead ordered the parties to renew their motions for summary judgment in light of this Court's opinions in *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *U.S. v. Navajo Nation*, 537 U.S. 488 (2003). Renewed summary judgment motions and briefs were exchanged in October through December of 2003.

On June 28, 2004, the District Court ruled against the Tribes and in favor of the federal government on the parties' renewed motions for summary judgment. *Gros*

Ventre, et al. v. United States, et al., CV 00-69-M-DWM, Slip Op. (D. Mont. June 28, 2004) (App., *infra*, 28-39). The District Court ruled against the Tribes on the issue of liability, even though damages had been bifurcated from liability, because it determined *sua sponte* that there was a "lack of an effective remedy for any wrongs committed on the Tribes" which "render[ed] the exercise of judicial power superfluous, and the case moot", *id*. at 11 (App., *infra*, 36), even though the Tribes – having adhered to the District Court's Nov. 30, 2001 Order bifurcating the proceedings – never had an opportunity to address the remedy issues for the court.

On July 12, 2004, the Tribes filed a Rule 59(e) motion under the Federal Rules of Civil Procedure for the court to alter or amend its judgment, based upon the procedural unfairness of deciding the action solely on remedy issues. On October 22, 2004, the court denied the Tribes' motion to alter or amend the judgment and reaffirmed its previous order. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Oct. 22, 2004) (App., *infra*, 40-58). The October 22, 2004 order was reissued, *nunc pro tunc*, on November 12, 2004.

C. The Ninth Circuit's Decision

Following issuance of final judgment by the District Court, the Tribes appealed to the U.S. Court of Appeals for the Ninth Circuit.

On November 13, 2006, a panel of the Ninth Circuit issued a decision and affirmed the District Court. *See Gros Ventre Tribe, et al. v. United States, et al.*, 469 F.3d 801 (9th Cir. 2006) (App., *infra*, 1-27). The panel's decision recognized a direct conflict in Ninth Circuit case law

concerning whether § 702's waiver of sovereign immunity for nonmonetary actions against the government is limited by the "final agency action" provision of § 704. *Id*. at 809 (App., *infra*, 12-15) (citing *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 523-26 (9th Cir. 1989); *Gallo Cattle Co. v. U.S. Dep't of Agric*., 159 F.3d 1194, 1198 (9th Cir. 1998)). The panel declined to resolve the matter, however, indicating that the conflict could only be resolved by the entire Ninth Circuit through the *en banc* process. *Id*. (App., *infra*, 14). The Ninth Circuit panel then held that the Tribes have no common law cause of action for breach of trust under the facts of the case. *Id*.

The Tribes timely filed a petition for rehearing and rehearing *en banc* on December 28, 2006. On January 11, 2007, Judge Tallman, a member of the Ninth Circuit panel, ordered the defendants to respond, which they did on February 9, 2007. On March 16, 2007, the Ninth Circuit panel denied the petition for rehearing. (App., *infra*, 59)

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT AS TO WHETHER THE APA'S WAIVER OF SOVEREIGN IMMUNITY IS LIMITED BY OTHER PROVISIONS OF THE APA, INCLUDING SECTIONS 704 AND 706, AND THE QUESTIONS SHOULD BE DECIDED BY THIS COURT.

Section 702 of the APA waives sovereign immunity for any person who has suffered "legal wrong" due to the acts or failure to act of an agency or officer or employee thereof, acting in an official capacity or under color of legal

authority when the relief sought does not include money damages. 5 U.S.C. § 702. "Legal wrong" means such wrong as particular statutes or the courts have recognized as constituting grounds for judicial relief. *Kansas City Power*, 225 F.2d at 932 ("'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review").

Justice Souter has previously stated that "5 U.S.C. § 702 . . . waives the immunity of the United States in actions for relief other than money damages" and "is not restricted by the requirement of final agency action that applies to suits under the [APA]." *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 510 n.4 (1999) (Souter, J., dissenting). There is confusion among the Circuits, however, as to whether § 702's waiver is restricted by the APA's other provisions – including the "final agency action" requirement of § 704 of the APA, and the standards of judicial review found in § 706 of the APA.[3]

The Third Circuit, for example, agrees with Justice Souter that § 702 is not limited by a "final agency action." *See*, *e.g.*, *Johnsrud*, 620 at 31 (§ 702 waived sovereign immunity for nonstatutory review of claims seeking

[3] The requirement of "final agency action" is part of § 704 of the APA, and applies to judicial review cases. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). There is no common law "final agency action" requirement. Federal common law claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. *See Illinois v. City of Milwaukee*, 406 U.S. at 100 ("section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."); *Northwest Sea Farms*, 931 F.Supp. at 1519-20 (the trust obligation constitutes "law to apply" consistent with *Heckler v. Chaney*, 470 U.S. 821 (1985).

equitable relief for ongoing agency inaction allegedly required by U.S. Constitution); *Jaffee v. U.S.,* 592 F.2d 712, 718-19 (3d Cir. 1979) (§ 702 waived sovereign immunity for nonstatutory review of agency action in suit alleging, inter alia, ongoing agency failure to give medical warning and provide or subsidize medical care as required by U.S. Constitution).

At least two different Ninth Circuit panels, however, have issued decisions that are in conflict on this question, as the panel below recognized. *Compare Presbyterian Church,* 870 F.2d at 525 ("On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable."); *with Gallo Cattle*, 159 F.3d at 1198 (holding that the waiver "'contains several limitations,' including § 704's 'final agency action' requirement"). In another, Indian law case, however, a Ninth Circuit panel held that § 702's waiver "is not limited to suits" under the APA – *i.e.*, "the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . . '" and "[n]o words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA." *Assiniboine & Sioux Tribes of the Ft. Peck Reservation v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (quoting C. Davis, *Administrative Law Treatise* §23:19, at 195 (2d ed. 1984)).[4]

[4] As stated in the legislative history of the 1976 amendments:

> The application of sovereign immunity is illogical and one cannot predict in what case the injustice is likely to occur. . . . [T]he time [has] now come to eliminate the sovereign immunity defense *in all equitable actions* for specific

(Continued on following page)

There is also confusion within the D.C. Circuit on this question. For example, in several opinions, the D.C. Circuit has held that § 702's waiver of sovereign immunity applies to *any* suit challenging a legal wrong as a result of agency action, whether under the APA or not, and is limited only by its own terms – *i.e.*, when another statute expressly or implicitly forecloses equitable relief. *See*, *e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.") (citing *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984); *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (§ 702's waiver limited only by its own terms, *i.e.*, does not affect courts' power to dismiss any action or deny relief on "any other appropriate legal or equitable ground"); *Schnapper*, 667 F.2d at 107-08 (§ 702 "retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief"); *accord*, *Dronenburg v. Zech*, 741 F.2d 1388, 1389-91 & n.3 (D.C. Cir. 1984).

In *Cobell v. Norton*, however, the D.C. Circuit applied the "final agency action" requirement of § 704 in determining whether the district court had subject matter jurisdiction over claims alleging breach of trust obligations grounded in federal law. *Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001). In *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 946-47 (D.C. Cir. 2004),

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relief against a Federal agency or officer acting in an official capacity.

H.R. Rep. No. 94-1656, at 8-9, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6128-29 (emphasis added).

cert. denied, 545 U.S. 1104 (2005), the D.C. Circuit observed that for non-statutory causes of action, the APA's waiver of sovereign immunity is limited by the "adequate remedy" bar of § 704. In a 2006 decision, however, the D.C. Circuit reiterated its holding in *Chamber of Commerce v. Reich*, *Sea-Land Service*, and *Dronenburg*, and held that § 702's waiver is "not limited to APA cases – and hence that it applies regardless of whether the elements of an APA cause of action are satisfied." *See Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 186-87 (D.C. Cir. 2006).

The question of whether § 702's waiver of sovereign immunity is limited by § 704 or § 706 of the APA affects all cases in which a party seeks equitable relief involving common law claims against the federal government. Unless that question is resolved by this Court, the confusion reflected in the Ninth Circuit's opinion in this case will recur in every case where a party seeks to enforce non-statutory rights in equity against the federal government, whether those rights arise under treaties, the Constitution, or the common law.[5]

[5] In this case, the Tribes challenged actions by the federal government that have harmed and are continuing to harm the Tribes, their members, and their protected water resources. The Tribes sought declaratory relief to clarify the legal obligations of federal agencies to the Tribes, and injunctive relief to stop pollution of Tribal waters and restore historic flows onto Tribal lands.

II. THE CIRCUITS ARE SPLIT AS TO WHETHER THE EQUITABLE POWERS OF FEDERAL COURTS ARE LIMITED IN INDIAN TRUST CASES BY THE COURT'S OPINIONS INVOLVING CLAIMS FOR MONEY DAMAGES BY INDIAN TRIBES UNDER THE INDIAN TUCKER ACT.

The lower courts' decisions erroneously conflated this Court's opinions involving Tribal claims for money damages under the Indian Tucker Act with this Court's opinions discussing the Indian trust doctrine as it applies to Tribal claims for equitable relief arising from Treaty violations. This conflation put the panel's opinion in conflict with opinions from other Circuits, and from this Court, and led the panel to two flawed conclusions: (1) in the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with generally applicable statutes, *see Gros Ventre*, 469 F.3d at 812 (App., *infra*, 20); and (2) the United States' fiduciary trust obligations to protect the Tribes from depredations applies only to acts that occur on the Reservation itself, and not to acts that occur off-Reservation, but which have impacts on the Reservation. *Id*. at 811-12 (App., *infra*, 20-23).

A. This Court's Indian Tucker Act Opinions Have Not Changed This Court's Indian Trust Law Opinions.

The Ninth Circuit panel held that the Tribes' treaties and agreements promising to "protect" the Tribes from "depredations and other unlawful acts," and subsequent agreements promising to reserve the full use of waters, undiminished in quantity and undeteriorated in quality,

flowing onto the Reservation, do not expressly promise to manage off-Reservation resources for the benefit of the Tribes. *See* 469 F.3d at 811-12 (App., *infra*, 18-23). This extremely narrow (and even illogical) reading of the phrase "protect . . . from depredations and other unlawful acts" directly conflicts with two long-standing canons of construction developed by this Court as part of its Indian trust law jurisprudence.

First, treaties are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians. *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Winters*, 207 U.S. at 576-77. Second, Indian treaties must be construed as the Tribes would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them") (other citations omitted).

The panel stated that "the Tribes seek to impose a duty, not found in any treaty or statute, to manage non-tribal property for the benefit of the tribes." 469 F.3d at 811 (App., *infra*, 18) (citing *U.S. v. Mitchell*, 445 U.S. 535, 538 (1980) ("*Mitchell I*")). *See id*. (App., *infra*, 18-19). The panel did not address the fact that the off-Reservation conduct was directly harming water quantity and quality on the Reservation, and most certainly did *not* interpret the Tribes' treaties and agreements (including the Blackfeet Treaty) "as the Indians themselves . . . understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196; *see also*, *e.g.*, S. Doc. No. 54-117, at 9 (App., *infra*, 118-19) (recounting "Medicine Bear" – *i.e.*, "I am not willing to sell the . . . water . . . but I am willing to

sell that mine"); *supra* at 7-8 (recounting promises made to Tribes regarding water rights); *Winters*, 207 at 576 (Tribes have property right to water originating in the Little Rocky Mountains).

Rather than citing any of these well-developed canons of construction for interpreting Treaties consistent with the Indian trust doctrine, the Ninth Circuit cited *Mitchell I*, 445 U.S. 535, a case involving claims for *monetary* relief under the Indian Tucker Act. 28 U.S.C. § 1505. Indian Tucker Act cases, however, are heard by the Federal Court of Claims, and, under this Court's decisions, require a substantive source of law that establishes a specific fiduciary duty that can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duty imposed. *See White Mountain Apache Tribe*, 537 U.S. at 479 (money damages can "mak[e] the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very availability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief"); *Navajo Nation*, 537 U.S. at 503 (having brought suit in the Court of Claims pursuant to the Indian Tucker Act, which waives sovereign immunity, "tribal plaintiff must [then] invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained'"); *see also U.S. v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). This jurisprudence sets a high bar for recovery of money damages from the federal government.

In this case, however, the Tribes made no claim for money damages.[6]

In addition to misapplying this Court's Indian Tucker Act jurisprudence to equitable claims seeking enforcement of treaty rights, the Ninth Circuit's opinion conflicts with decisions from other Circuits. The Eighth Circuit has determined, for example, that the federal government has a trust obligation that must be exercised concurrently with – but not necessarily dependent upon – the existence of other statutes. *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989). The First Circuit has concluded (as has this Court) that even absent a specific statute establishing a management duty, *Mitchell II* directs courts to find a trust obligation whenever the federal government has assumed control over Tribal land or resources. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[6] The Indian Tucker Act gives the United States Court of Claims jurisdiction over "any [damages] claim against the United States founded either upon the Constitution, or any Act of Congress." *Id*. Jurisdiction under the Indian Tucker Act is thus expressly limited to specific textual sources – acts of Congress or the Constitution. The *Mitchell I* court held that the General Allotment Act, relied upon by the Tribe as its source of textual, substantive law, did not in fact support a claim for money damages and did not therefore meet the requirements of the Indian Tucker Act for jurisdiction in the U.S. Court of Claims. *Mitchell I*, 445 U.S. at 546.

B. The Ninth Circuit Erroneously Interpreted The Treaties Between The Federal Government And The Tribes.

Promises made to the Tribes in treaties and Congressionally-ratified agreements to protect Tribal waters have unquestionably been broken by the federal government in this case. Two decades of virtually unrestricted cyanide heap-leach mining has destroyed the mountains adjacent to the Reservation that contain the headwaters for critical Reservation streams. Both the quantity and the quality of water on the Reservation has been damaged. The Senate Report for the Grinnell Agreement reflects multiple promises made to the Tribes concerning the water originating in the mountains in exchange for gold (which is now almost completely gone).[7] The Tribes have a classic

[7] *See* S. Doc. No. 54-117, at 3 (App., *infra*, 104) (stating that there should be "careful consideration in order that no irreparable damage might be done the Indians by depriving" them of water, "which might be vital to their very existence"); *id*. (federal agency to hold "control of the waters of the streams having their sources in the mountains" for the benefit of the Indians' domestic uses); *id*. (promising to "protect the Indians in the continued enjoyment of the natural resources of their reservation"); *id*. at 3-4 (App., *infra*, 105) (assuring Tribes "that they would have ample water for all their needs"); *id*. at 4 (App., *infra*, 105) (stating that the "water rights of the Indians will not in any way be impaired by the cession, and that they have retained . . . water for their uses for all time"). The Senate Report reflects, verbatim, the very specific understanding that the Indians of Fort Belknap had of the Grinnell Agreement:

> Medicine Bear: I am not willing to sell the forest, nor the water nor any of the things that you mention – that is the grass, wood and other things – but I am willing to sell that mine.
>
> Eyes in the Water: I am not willing to give you the wood, not the grass, nor the water, but only those rocks lying around the mines, and don't shut off the

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claim for treaty violations and non-monetary relief. These claims arise under the branch of Indian trust law jurisprudence by which trust obligations contained in specific treaties and statutes may be relied upon to bring an equitable claim in federal district court for breach of those obligations. *See, e.g., Mitchell II*, 463 U.S. at 227 (recognizing that "violations of duties imposed by the various statutes may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary" and that sovereign immunity is waived for such actions by § 702 of the APA); *see also*, *e.g.*, *Northwest Sea Farms*, 931 F. Supp. at 1520 ("It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration."); *Cobell*, 240 F.3d at 1101 (seeking an accounting of funds managed by the federal government as trustee on behalf of individual Indians); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (holding that the Secretary of the Interior must direct all water possible to the Pyramid Lake Paiute Tribe, in fulfillment of his trust obligation and the Tribe's water rights); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1512 (W.D. Wash. 1988) (holding that treaty-given fishing right was property right that could not be taken without Act of Congress); *cf. U.S. v. Winans*, 198 U.S. 371 (1905) (action to enjoin obstruction of fishing rights in the Columbia River secured to the Yakima

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water. If you don't touch those things, the people might live a little while yet.

Bad Dog: You ask for the mine and I am willing to give it, but I don't want you to touch any of the rocks or grass or water; that is what I will depend upon.

Id. at 9 (App., *infra*, 118-19).

Indians by the treaty of 1859); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (equitable action against state agencies to enforce hunting, fishing, and gathering rights under 1837 Treaty).

C. The Ninth Circuit's Opinion Robs This Court's Indian Trust Jurisprudence Of All Meaning.

In addition to violations of specific treaty obligations, the Tribes alleged that the federal government violated the government's *general* trust obligation to the Tribes. This Court has reaffirmed the "undisputed existence of a general trust relationship between the United States and the Indian people. . . . " *Navajo Nation*, 537 U.S. at 506. The general trust obligation imposes duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute. *See, e.g., Cramer v. U.S.*, 261 U.S. 219 (1923); *U.S. v. Creek Nation,* 295 U.S. 103 (1935).[8] The trust obligation imposes a fiduciary duty

[8] The law regarding the federal government's general trust obligation is established in a long line of cases going back to 1831. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Indians'] relation to the United States resembles that of a ward to his guardian."); *Mitchell I,* 445 U.S. 535; *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942) ("recogniz[ing] the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *U.S. v. Mason*, 412 U.S. 391, 398 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust."); *Minnesota v. U.S.*, 305 U.S. 382, 386 (1939) (observing that "the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees"); *U.S. v. Candelaria*, 271 U.S. 432, 442 (1926) (recognizing that "Congress, in imposing a restriction on the alienation of [Indian territory] lands, as we think it did, was but continuing a policy which prior governments

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on all federal government agencies whose actions adversely affect Indian tribes. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).[9]

Both the District Court and the Ninth Circuit panel in this case found that the general trust obligation may be satisfied simply by facial compliance with statutory and regulatory requirements. This rule, which empties the trust obligation of all meaning and treats Tribes no differently than other parties, originated with *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980). In *North Slope*, the Ninth Circuit mistakenly applied the requirements for waiver of sovereign immunity under the *Indian Tucker Act* to a case arising under *§ 702's* waiver of immunity. The *North Slope* panel cited to this Court's holding in

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had deemed essential to the protection of such Indians" – *i.e.*, that of an " 'extended a special guardianship' ") (internal citation omitted); *accord*, *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *U.S. v. Kagama*, 118 U.S. 375, 382-84 (1886); *see also Island Mountain Protectors*, 144 IBLA at 185 ("In addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility."); *id*. ("BLM had a trust responsibility to consider and protect Tribal resources").

[9] Although *Mitchell II* involved a claim for money damages, this Court reaffirmed that the federal government has a trust obligation to Tribes independent of any statutory expression of a trust. The Court found that a fiduciary relationship arises whenever the executive branch maintains extensive control over Indian property. *Mitchell II*, 463 U.S. at 222-25; *see also id.* at 225 ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians"). Thus, where 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 . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Id*. at 225.

Mitchell I that, for *Indian Tucker Act* money claims, unless there is "an unambiguous provision by Congress that clearly outlines a federal trust responsibility," the general trust obligation is met through compliance with general statutes and regulations. *Id*.[10]

Since 1980, the Ninth Circuit has followed the *North Slope* opinion without distinguishing between Indian Tucker Act claims for money damages and § 702 claims for non-monetary damages. *See, e.g., Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998); *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471, 1486-87 (D. Ariz. 1990), *aff'd sub nom*., *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992); *Inter-Tribal Council of Arizona v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995); *Pit River Tribe v. Bureau of Land Mgmt.*, 469 F.3d 768 (9th Cir. 2006).

The failure to distinguish between money damages and equitable relief in cases involving Indian trust claims has, unfortunately, led to the illogical result that the government's general trust obligation to Indian tribes has no content or meaning, and this Court's opinions recognizing and describing that trust are mere words on paper. "If the Court finds a prevailing fiduciary obligation only when statutory law already imposes duties on the executive branch, then the doctrine arguably amounts to little more

[10] In *North Slope*, the Inupiat Tribe of Alaska sued the Department of the Interior for endangering the survival of the bowhead whale, upon which the Inupiat depend, through oil leasing in the Beaufort Sea. The Inupiat sought injunctive relief – the cessation of oil leasing – to remedy the Department's violations of its general trust responsibility. *Id*. at 597. The *North Slope Borough* court, relying on *Mitchell I*, ruled against the Inupiat, and held that a trust responsibility can only arise from a statute, treaty or executive order. *Id*. at 611 (citing *Mitchell I*, 445 U.S. at 535).

than an emboldened principle of statutory interpretation." *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1521-22 (1994).

CONCLUSION

The Court should grant this petition in order to resolve conflicts among the Circuits on two issues: (1) whether the waiver of sovereign immunity in § 702 of the APA is limited by §§ 704 and 706 of the APA; and (2) whether this Court's Indian Tucker Act opinions involving Tribal claims for money damages have altered the Court's opinions involving interpretations of treaties and the general Indian trust doctrine. There is widespread, long-standing confusion within the Ninth Circuit, and between the Ninth and other Circuits, concerning the scope of § 702 of the APA, and whether federal courts' equitable powers are limited in all Indian trust cases by this Court's opinions involving claims for money damages by Indian Tribes – *i.e.*, the *Mitchell* line of cases. These questions should finally be resolved by this Court.

Respectfully submitted,

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