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I. STATEMENT OF JURISDICTION

Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1346, 1361, and 1362. Appellants Gros Ventre Tribe, Assiniboine Tribe, and the Fort Belknap Indian Community ("Tribes") brought this action against Appellees, the United States of America and three federal agencies, including the Bureau of Land Management ("BLM"), Bureau of Indian Affairs, and the Indian Health Service ("Defendants"). The action arises under the laws of the United States, including the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1966) ("APA"); federal common law governing the trust relationship between the Tribes and the federal government; the Treaty of Fort Laramie, Sept. 17, 1851, U.S.-Sioux, *et al.*, 11 Stat. 749 ("Treaty of Ft. Laramie") (Tribes' Excerpts of Record ("E.R.") 22-26); the Treaty with the Blackfeet, Oct. 17, 1855, U.S.-Blackfeet, *et al.*, 11 Stat. 657 ("Treaty with the Blackfeet") (E.R. 27-30); An Act to Ratify and Confirm an Agreement with the Gros Ventre, *et al.*, May 1, 1888, U.S.-Gros Ventre, *et al.*, 25 Stat. 113) ("1888 Agreement") (E.R. 31-35); Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, Oct. 9, 1985, U.S.-Fort Belknap Indians, 29 Stat. 350 ("Grinnell Agreement") (E.R. 36-39); and the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq* (1976) ("FLPMA").

The Ninth Circuit of the Federal Court of Appeals has jurisdiction over this appeal from a final decision of the Montana District Court. 28 U.S.C. § 1291. A

judgment denying Tribes' motion for summary judgment, and granting Defendants' motion for summary judgment was entered on June 28, 2004. Slip Op. (June 28, 2004) (E.R. 168-81). This final judgment was elaborated upon by the district court, in an order dated October 22, 2004, denying the Tribes' motion to amend or alter the judgment. Slip Op. (Oct. 22, 2004) (E.R. 196-217). The October 22, 2004, order was reissued verbatim, *nunc pro tunc*, on November 12, 2004. Order (Nov. 12, 2004) ("*Nunc Pro Tunc* Order") (E.R. 218-22). The Appellants' Notice of Appeal was timely filed on December 21, 2004, within 60 days of entry of the final judgment. *See* Notice of Appeal (E.R. 240-43). This appeal is timely filed pursuant to Rule 4 (a)(4)(A)(iv) of the Federal Rules of Appellate Procedure.

II. ISSUES PRESENTED

(1) Whether, after having bifurcated trial proceedings into liability and remedy phases, a district court may grant summary judgment at the conclusion of the liability phase based on a finding that the Tribes have no remedies.

(2) Whether an equitable cause of action brought under federal common law regarding the trust obligations of the federal government to Indian tribes is subject to the "final agency action" requirement for judicial review under the APA.

(3) Whether the specific and general trust obligations of the United States

government to the Assiniboine and Gros Ventre Tribes mandate action beyond facial compliance with federal environmental and other statutes, where such action is necessary to comply with Treaty obligations and to protect tribal trust resources.

III. STATEMENT OF THE CASE

This equitable action by the Assiniboine and Gros Ventre Tribes against the federal government alleges breach of the federal government's specific and general trust obligations to the Tribes in the permitting of two cyanide heap-leach mines to initiate and expand mining operations over the course of two decades, destroying tribal trust resources. The Tribes also allege violations of FLPMA. In their prayer for relief, the Tribes request that the 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 the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*. ("NEPA"), and other statutes, as well as its failure to fully reclaim the area, constitutes unnecessary and undue degradation in violation of FLPMA; (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. *See* Complaint (Apr. 12, 2000) at 10-13 (E.R. 1-5).

The action was filed on April 12, 2000, in federal district court in Montana. *Id.* On January 29, 2001, the District Court denied the federal government's motion to dismiss the complaint. Order (Jan. 29, 2001) at 12 (E.R. 17). In November of 2001, the District Court bifurcated the proceedings into liability and remedy phases. Order (Nov. 30, 2001) at 3 (E.R. 19). 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 the Supreme Court's opinions in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), and *United States v. Navajo Nation*, 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). Renewed summary judgment motions and briefs were exchanged in October and November 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. Order (June 28, 2004) (E.R. 168-81). The court ruled against the Tribes on the issue of liability, even though "damages have been bifurcated from liability," because the court 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 (E.R. 178). Thus, the district court ruled against the Tribes on the basis that there was no adequate

remedy, even though the Tribes, having adhered to the District Court's Nov. 30, 2001 Order (E.R. 19) 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. *See* Pl. Motion To Amend Judgment (July 12, 2004) (E.R. 182-88). On October 22, 2004, the court denied the Tribes' motion to alter or amend the judgment and reaffirmed its previous order. Order (Oct. 22, 2004) (E.R. 196-217). The October 22, 2004 order was reissued, *nunc pro tunc*, on November 12, 2004. *Nunc Pro Tunc* Order (Nov. 12, 2004) (E.R. 218-39).

IV. STATEMENT OF RELEVANT FACTS

In 1851, the United States entered into a treaty with several Indian Tribes, including the Assiniboine and Gros Ventre, and promised to protect the Tribes against "all depredations by the people of the . . . United States." Treaty of Ft. Laramie at Art. 3 (E.R. 22). In 1856, the United States entered into another treaty with the Assiniboine and Gros Ventre, again binding itself to protect the Tribes against "depredations and other unlawful acts which white men residing in or passing through their country may commit." Treaty with the Blackfeet at Art. 7 (E.R. 28). In 1888, a tract of land was reserved and set apart for the use of the

Assiniboine and Gros Ventre Tribes. 1888 Agreement at Preamble (E.R. 31), Art. II-III, IX (E.R. 32, 34-35); *see also* Grinnell Agreement at Art. I, II (E.R. 36-37). The 1888 Agreement reserved to the Tribes the full use of all waters flowing to and entering Reservation lands, including all water, undiminished in quality, "necessary to fulfill the purposes of the Reservation." *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *see also U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1511 n.10 (9th Cir. 1991) ("In *Winters* and the subsequent case of *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), the Supreme Court held that a reservation of land to an Indian tribe may include by implication rights of usage of adjacent waters to the extent necessary to fulfill the purposes of the reservation."). The 1888 Agreement did not replace or diminish the promises made by the United States in previous treaties.

The original reservation created by the 1888 Agreement included the Little Rocky Mountains. 1888 Agreement at Art. IX (E.R. 34). These mountains are the headwaters for much of the Reservation's water resources and are considered sacred by Tribal members. *See, e.g.*, BLM, Final Environmental Impact Statement, Zortman and Landusky Mines, Reclamation Plan (Mar. 1996) ("1996 EIS") at 3-251 (E.R. 57); Letter from Charles D. Plumage, Chairman, Fort Belknap Indian Community to Leo Berry, Commissioner, Montana Dep't of State

Lands (Apr. 3, 1979) (E.R. 61-64); Affidavit of Virgil F. McConnell (Aug. 9, 1990) ("McConnell Aff.") at ¶¶ 3-9 (E.R. 65-70). The mountains have long been used by the Tribes and other Native Americans for hunting, fishing, cultural, and spiritual purposes. 1996 EIS at 3-251; McConnell Aff. at ¶¶ 3-9.

In the early 1880s, prospectors trespassing on the Reservation discovered gold in the Little Rocky Mountains. *Id*. at 3-262 (E.R. 58). On October 9, 1895, subsequent to the trespass, the United States removed the mountains from the Reservation following a one-sided "negotiation" with the Tribes that resulted in the Grinnell Agreement. S. Doc. No. 117, at 25, 54th Cong. (1st Sess. 1986) ("Senate Report") (E.R. 83). The United States assured the Tribes that the Reservation's water resources would not be affected by the Agreement, and that the federal government would protect the Tribes' water supply. *See id.* (delegating "control of the waters of the streams having their sources in the mountains for much-needed irrigation" to the federal government "for domestic uses by the Indians" and stating that "these matters should receive . . . careful consideration in order that no irreparable damage might be done the Indians by depriving of these important benefits, which might be vital to their very existence"). Discussions between the Tribes and the United States culminated with the signing of the Grinnell Agreement on October 9, 1895. *Id.*; Grinnell Agreement (E.R. 36-39). Within 10 years, the Little Rocky Mountains mining district became the state's

largest gold producer. 1996 EIS at 3-262 (E.R. 58).

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. *Id.* at 1-1, 1-2 (E.R. 41-42); *id*. at Tables 1-1, 1-2 (E.R. 43-44). MDSL prepared a draft Environmental Impact Statement for the two mines, and the BLM approved of ZMI's plan of operations. *See* MDSL, Draft Environmental Impact Statement for the Proposed Plan of Mining and Reclamation (1979) ("1979 DEIS") at 1, 4, 59, 60, 72 (E.R. 89-93); *Island Mountain Protectors, et al.*, 144 IBLA 168, 171 (May 29, 1998) (E.R. 97). The BLM's comments on MDSL's 1979 DEIS and ZMI's proposed heap-leach cyanide mine did not mention the importance of the Little Rocky Mountains to the Tribes or the obligation of the federal government to protect the Tribes' water resources. *See* Letter from Charles S. Dahlen, BLM to Ralph Driear, MDSL (Mar. 19, 1979) ("BLM Comments") (E.R. 130-40).

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. *Island Mountain Protectors* at 171-72 (E.R. 97-98); *see also* 1996 EIS at Tables 1-1, 1-2 (E.R. 43, 44). No additional

environmental impact statements were undertaken to evaluate these expansions. In 1996, the BLM prepared an EIS to evaluate another proposed expansion of mining operations, and eventually approved additional mining at the Zortman mine. 1996 EIS at 1-1 – 1-2 (E.R. 41-42); *id*. at Tables 1-1, 1-2 (E.R. 43, 44); *see also* 1979 DEIS at 1, 4, 59, 60, 72 (E.R. 89-93). The BLM authorized this expansion despite admitting in the 1996 EIS that the mines had a substantial negative impact on the Tribes' water and cultural resources. *Id*. at 4-316 (E.R. 60). During the 15 years between 1979 and 1994, as the BLM was authorizing repeated expansions of mining operations, the BLM never mentioned in any public document its trust obligations to the Assiniboine and Gros Ventre Tribes. *See, e.g.*, Review of Proposed (Conceptual) Pegasus (Zortman-Landusky) Sulphide Heap Leach Mining (1990) at 8 (E.R. 140) (BLM employee observing that the "Ft. Belknap Community has been almost totally ignored over the past twenty years re: mining in the Little Rocky Mountains").

When the Tribes appealed the 1996 EIS, the Interior Board of Land Appeals ("IBLA") held that, in approving the 1996 EIS and reclamation plan, the BLM "did not fully observe its trust responsibility to the Tribes, had incomplete information about groundwater flows which was essential to a reasoned choice among alternatives[,] and did not comply with 40 C.F.R. § 1502.22, and failed to protect public lands from unnecessary or undue degradation." *See Island*

Mountain Protectors at 202-03 (E.R. 128-29). 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 Little Rocky Mountains form the headwaters of the streams running onto the southern end of the Reservation. 1996 EIS at 3-251 (E.R. 57). King Creek, Lodgepole Creek, and Bighorn Creek originate in the Little Rockies and flow onto the Reservation. *Id*.; *see also* Montana Department of Environmental Quality and BLM, Record of Decision for Reclamation of the Zortman and Landusky Mines (May 2002) ("2002 ROD") at 26-27 (E.R. 147-48). Mining operations have diverted flows from the Little Rocky Mountains away from the Reservation. 1996 EIS at 4-45 (E.R. 59). Mining has generated wastewater, waste rock, leach pads, and process wastes, and has polluted a number of watersheds in the mountains, including those running onto the Reservation. *See, e.g.*, *id*. at 1-9 – 1-10 (E.R. 45-46), 3-58 – 3-86 (E.R. 52-53); BLM and Montana Department of Environmental Quality, Final Supplemental Environmental Impact Statement for Reclamation of the Zortman and Landusky Mines (Dec. 2001) ("2001 SEIS") at 3-90, 3-93 (E.R. 151-52). 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. 1996 EIS at 1-9 – 1-10 (E.R. 45-46), 3-58 – 3-106 (E.R. 52-55); *see also* Zortman Mine Situation Report (Feb. 2, 1993) at 1,

3-4 (E.R. 153, 155-56) (noting that "the acid generating potential of waste rock form the Zortman pits is *not* minimal") (emphasis in original); Letter from MDSL and BLM to James Geyer, ZMI (Feb. 1, 1993) at 1 (E.R. 158) (informing mine operator that "oxidation of sulfide minerals present in the ore and/or waste rock is resulting in acid rock drainage").

There is an unquantified amount of recharge of waters impacted by mining activities in the limestone formations located in the mountains. 1996 EIS at 3-53, 3-108 (E.R. 51, 58); *see also id*. at 3-49 – 3-53 (E.R. 47-51), 3-87 – 3-106 (E.R. 54-55) (discussing groundwater contamination from the mines). The IBLA observed that the BLM failed to obtain the information necessary about groundwater contamination from the mines to develop an adequate reclamation plan in 1996. *Island Mountain Protectors* at 201 (E.R. 127). Further, the Tribes' cultural and spiritual use of the mountains has been severely eroded. *See, e.g., id.* at 4-316 (E.R. 60) (mining will have "100 plus years of significant disruption to Native American traditional cultural practices" in the Island Mountains); McConnell Aff. at ¶¶ 3-10 (E.R. 66-70). Spirit Mountain, once the core of tribal religious practices in the mountains, is now entirely gone – replaced by enormous open pits. *See, e.g.*, 2002 ROD at 15-16 (E.R. 145-46) (referring to methods to develop reclamation plan that will bring mountains "closer" to "pre-mining topography"). 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.

Order (June 28, 2004) at 12 (E.R. 179).

In January of 1998, ZMI declared bankruptcy and announced its intention to cease operations at the mines. *See* 2001 SEIS at 1-5 (E.R. 150). In response to the cessation of activities at the sites, the BLM developed and selected new closure and reclamation plans for the sites. *Id.*; *see also* 2002 ROD at Cover Letter (E.R. 142). The reclamation plans do not address the contamination of the watersheds flowing onto the southern end of the Reservation; deliberately route water away from the Reservation; inadequately address the contamination of surface waters and groundwater in other areas of the Little Rocky Mountains; and do nothing to mitigate the loss of religious sites in the mountains. *See generally* 2002 ROD at i-ii (E.R. 143-44) (Executive Summary). When reviewing the revised ROD, the IBLA again found that "BLM had a trust responsibility to independently consider and protect Tribal resources" that was not discharged by the agency's compliance with NEPA, and set aside the revised ROD. *See In Re Island Mountain Protectors, et al.*, Slip Op. (Nov. 20, 1998) at 6-7 (E.R. 166-67).

V. SUMMARY OF THE ARGUMENT

The district court's final judgment was both procedurally and substantively

erroneous. The district court bifurcated the proceedings into liability and remedy phases (*see* Order (Nov. 30, 2001) at 3 (E.R. 19)) but then resolved the liability issues by finding, *sua sponte*, that there was a "lack of an effective remedy for any wrongs committed on the Tribes." *See* Order (June 28, 2004) at 11 (E.R. 178). The court reached its conclusion without the benefit of any briefing by the parties, provided no findings of fact to support its holding that the Tribes lacked an effective remedy for their claims, and contradicted its own bifurcation order by addressing remedy issues during the liability phase. This constitutes a clear abuse of discretion.

Second, the District Court's legal conclusion that the Tribes must challenge a specific "final agency action" in order to establish federal court jurisdiction is erroneous. The APA is not a "jurisdictional" statute. *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Jurisdiction in this case is provided by 28 U.S.C. § 1331 (federal question jurisdiction). The relevance of the APA lies in its waiver of sovereign immunity of the United States in all non-monetary claims, including claims that are not classic judicial review claims. 5 U.S.C. § 702. Here, the Tribes have brought an equitable claim for breach of trust. As correctly stated by the district court in its January 2001 Order denying the Defendants' motion to dismiss, "Actions taken by or on behalf of the United States can form the basis of a cause of action, regardless of whether there is an ongoing

administrative process." Order (Jan. 29, 2001) at 7 (E.R. 12). Thus, the court also correctly observed:

> This case is different. This case is more analogous to one brought by a homeowner for relief from unauthorized encroachments on her property as a result of an agency's actions than it is to one brought by a third party with standing to challenge an administrative decisions.

Id. at 6-7 (E.R. 11-12). The court accordingly rejected the government's "assumption that all the requirements of the Administrative Procedure Act apply." *Id*. at 9 (E.R. 14).

Finally, the district court's dictum that the trust obligations of the federal government to the Tribes are content-less unless coupled with federal environmental or other statutes erroneously conflates three distinct branches of Indian trust law jurisprudence: (1) those involving the federal government's specific trust obligations, elaborated in a treaty or statute, the breach of which can be remedied through declaratory and injunctive relief; (2) those involving a claim for monetary damages in which the federal government has managerial or other specific control over tribal property or trust resources; and (3) those involving the general trust obligation of the federal government to Indian tribes.

Although the Tribes provided the court with treaties and agreements giving rise to the specific trust obligation of the federal government to protect the Tribes' resources, the court treated the Tribes' claims as arising solely under the government's general trust obligation. The court's failure to address the federal

government's specific trust obligations established in treaties and the Grinnell Agreement is an error of law.

Although the district court's language regarding Indian trust law is dictum, this Court should take the opportunity presented by this case to clarify Indian trust law jurisprudence, and provide guidance to district courts regarding the three distinct branches of Indian trust law, and the appropriate remedies under each branch.

VI. ARGUMENT

A. Bifurcating proceedings into a liability phase and a remedy phase, then granting summary judgment at the conclusion of the liability phase based on a finding that remedies were not available, was an abuse of discretion.

A trial court's decision regarding management of litigation is reviewed for abuse of discretion. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998). A judgment of a district court made without a factual finding, or that is plainly against the logic of factual findings such that it appears to be a plain error, is reviewed for abuse of discretion. *Wing v. ASARCO, Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). District courts have inherent authority to control the cases before them, but may not exercise that discretion to nullify the procedural choices reserved to parties under the federal rules. *See Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998).

On November 30, 2001, the district court bifurcated the proceedings, ordering that:

> Proceedings in this matter will be bifurcated with liability and damages tried separately. The schedule in this Order applies to the issue of *liability only*. A separate schedule will be set for the issue of damages if and when liability is established.

Order (Nov. 30, 2001) at 3 (E.R. 19) (emphasis added). Subsequent to this Order, the Tribes engaged in discovery and summary judgment proceedings with the intent of proving violations of the government's trust obligations to the Tribes. The Tribes did not engage in any discovery or briefing on remedy issues, in compliance with the court's Order. For example, in reply to Defendants' arguments in their summary judgment motion, the Tribes stated:

> Rather than address actions in the [Little Rocky] Mountains which resulted in significant impacts to Tribal cultural and water resources, Defendants argue that the 2002 Record of Decision for Reclamation (2002 ROD) at the mine sites fulfills the requirements of NEPA and FLPMA. Defendants' focus on the 2002 ROD and 2001 SEIS, however, confuses the liability phase of this case with the remedies phase, and ignores this Court's Order bifurcating the two phases.

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dec. 31, 2002) at 9 (E.R. 21).

On June 28, 2004, the district court issued its Order on the summary judgment motions. In denying the Tribes' motion, the court stated:

> [A]lthough damages have been bifurcated from liability, the lack of an effective remedy for any wrongs committed on the Tribes renders the exercise of judicial power superfluous, and the case moot. Other

> than final reclamation of the mines, the actions of which the Tribes complain either cannot be undone or have already been undone. . . . It appears that the only remedy which will redress the Tribes' injuries is reclamation of the mine sites, which is taking place pursuant to the 2002 SEIS and ROD. While water treatment may be required in perpetuity, equitable relief cannot alter that fact.

Order (June 28, 2004) at 11-12 (E.R. 178-79). These sweeping factual conclusions are not supported by the record or any findings of fact.

Indeed, determining the propriety of equitable remedies for the Defendants' trust violations requires fact-intensive evidence and briefs which the Tribes expected to occur during the second phase of the trial. Reclamation under the 2002 ROD is not the only remedy which would redress the Tribes' injuries, and equitable relief could, in fact, alter the need for water treatment in perpetuity. The district court, however, came to its conclusions with no input from the Tribes on these critical factual issues. In addition, the Tribes requested declaratory relief, *see* Complaint at 12-13 (E.R. 4-5), but their request for such relief was never directly addressed by the district court. *See*, *e.g.*, *Gator Com. Corp. v. L.L. Bean, Inc*., 398 F.3d 1125, 1129 (9th Cir. 2005) ("The 'test for mootness . . . [where] a plaintiff seeks declaratory relief ... is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."'") (quoting *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir.2002) (additional citation omitted); Order (June 28,

2004) at 11-12 (E.R. 178-79) (resolving Tribes'' request for injunctive, but not declaratory, relief, stating that "the only remedy which will redress the Tribes' injuries is reclamation of the mine sites, which is taking place").

In a case involving similar circumstances, where the district court bifurcated discovery but then dismissed plaintiffs' claims before discovery was completed, this Court held that the district court erred in dismissing plaintiffs' claims too soon, since "the parties were to grapple with [the issues] at a later stage." *See In Re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1134, 1135 (9th Cir. 2002). In *Hanford*, the district court issued an order bifurcating the issue of "causation" into two phases, with the "generic causation" to be decided first, followed by "individual causation." *See id.* at 1129. The court then proceeded to grant summary judgment to Defendants on "individual causation" grounds at the conclusion of the "generic causation" discovery phase, effectively depriving plaintiffs of the opportunity to present their "individual causation" case. This Court found that the district court had "in essence skipped the [relevant] inquiry and decided issues . . . without the benefit of full discovery or particularized . . . evidence." *Id*. at 1134-35. The Court remanded the case back to the district court so that the plaintiffs could proceed with the "individual causation" phase of the case. *Id*. at 1139; *see also id.* at 1134 (finding that the "court should, consistent with its own discovery orders, have limited its ruling" accordingly).

Here, in reaching its decision based upon an assumed "lack of an effective remedy for any wrongs committed on the Tribes," Order (June 28, 2004) at 11 (E.R. 178), the district court nullified the procedural choices reserved to the Tribes under the federal rules and the court's own bifurcation order. Under Rule 42(b) of the Federal Rules of Civil Procedure, the courts clearly have the power to bifurcate a complex trial, such that the proceedings will be more "conducive to expedition and economy." Under Rule 42(b) and the district court's November 2001 Order, the Tribes had the procedural choice to reserve the briefing of remedy issues for the second phase of the trial. While the courts have inherent authority to control their dockets, eliminating procedural choices available to the parties under the federal rules, as was done here, constitutes an abuse of discretion. *See Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d at 1074. Here, the court reached its conclusions regarding the ostensible lack of a remedy without any support in the record and pursuant to no findings of fact. A judgment made without basis in fact, as is the case here, constitutes an abuse of discretion. *See, e.g., Wing v. ASARCO, Inc.*, 114 F.3d at 988 (a judgment of the district court that is made without a factual finding, or that is plainly against the logic of factual findings such that it appears to be plain error, is reviewed for abuse of discretion).

B. An equitable cause of action brought under federal common law regarding the trust obligations of the federal government to Indian tribes is not subject to the "final agency action" requirement for federal court jurisdiction under the APA.

A district court's conclusions of law, and grant of summary judgment, are reviewed *de novo*. *See Fireman's Fund Ins. Cos. v. Big Blue Fisheries, Inc.*, 143 F.3d 1172, 1175 (9th Cir. 1998); *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *Clicks Billiards Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Under *de novo* review, the circuit court should not defer to the district court's ruling, but independently consider the matter anew as if no decision had been rendered on the matter below. *See U.S. v. Silverman*, 861 F.2d 571 (9th Cir. 1988). In reviewing a summary judgment decision, the circuit court must determine whether the District Court correctly applied the relevant substantive law. *Clicks Billiards*, 251 F.3d at 1257; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*).

Here, the district court granted summary judgment to Defendants, and denied the Tribes' motion for summary judgment, on the grounds that the Tribes' claims lacked a "final agency action" that did not violate the statute of limitations or was not moot. *See Nunc Pro Tunc* Order (Nov. 12, 2004) at 16-22 (E.R. 233-39). The district court's decision turned on whether § 702 of the APA waives sovereign immunity for non-monetary causes of action other than cases

challenging "final agency action" (*i.e.*, "judicial review" cases). As stated by the district court in its *Nunc Pro Tunc* Order:

> In November 2001, this Court denied the government's motion to dismiss on the grounds that the Tribes had stated a cognizable common-law breach of trust claim. It understood the Tribes' claim to be a common-law claim separate from the APA, thereby not requiring an identifiable final agency action subject to a statute of limitations defense. It has reconsidered that ruling *sua sponte*, and held implicitly in its June 29 Order and judgment that a common-law breach of trust claim must, as a jurisdictional matter, be analyzed within the framework of the APA. Within that framework, the Tribes' claims fail on a number of grounds.

Id. at 3-4 (E.R. 220-21). Once the district court re-cast the Tribes' breach of trust claim as being "a jurisdictional matter, to be analyzed within the framework of the APA," the Tribes' prior briefing, based on the district court's (correct) initial ruling, became irrelevant.

The APA is not a "jurisdictional" statute. *See Califano*, 430 U.S. at 105 ("the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions"). Jurisdiction in this case is provided by 28 U.S.C. § 1331. Rather, the APA provides a "cause of action" for judicial review of certain agency decisions. Section 702 of the APA performs an additional function: it waives the government's sovereign immunity for *all* non-monetary claims, whether based upon the APA or not. *See* Pub.L.No. 94-574, 90 Stat. 2721 (1976) (amending the APA to eliminate sovereign immunity defense in all actions for specific, non-monetary relief against a United States agency or officer acting in an

official capacity). After the Tribes pointed out these principles to the district court in their Motion To Amend Judgment at 2-6 (E.R. 183-87), and Reply in support of their motion, *see* Pl. Reply (Aug. 20, 2004) at 5-6 (E.R. 193-94), the district court again pronounced that, because the Tribes sought equitable relief, not money damages, and waiver of sovereign immunity under § 702, "the APA establishes the necessary prerequisites to the court's jurisdiction." Slip Op. (Oct. 22, 2004) at 9-10 (E.R. 226-27); *see also id*. at 10 (E.R. 227) ("the source of the waiver determines the necessary prerequisites to the Court's jurisdiction").

There is no question, however, that equitable actions for specific relief against federal agencies or officers encompass more than just judicial review cases under the APA, and federal courts have repeatedly held that § 702 waives sovereign immunity as to these claims, in addition to judicial review claims. This Court has specifically held that "section 702 does waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. §1331. . . . We see no reason to distinguish between this court's prior holdings governing suits brought under section 1331, and a suit brought under section 1362." *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 793 (9th Cir. 1986).[1]

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[1] The intent of the 1976 amendments to § 702 of the APA was to "eliminate[] the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity." *See*

In *Assinboine & Sioux Tribes*, the Court held:

> The abolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.

792 F.2d at 793 (quoting C. Davis, *Administrative Law Treatise* §23:19, at 195 (2d ed. 1984)). Other federal courts have reached the same conclusion. *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."); *Clark*, 750 F.2d at 102 ("sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the

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Clark v. Library of Congress, 750 F.2d 89, 103 (D.C. Cir. 1984); *accord, Dronenburg v. Zech*, 741 F.2d 1388, 1389-91 & n.3 (D.C. Cir. 1984); *Schnapper v. Foley*, 667 F.2d 12, 107-08 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982); *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981). 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 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). Section 702 retains the defense of sovereign immunity "only when another statute expressly or implicitly forecloses injunctive relief." *See Schnapper*, 667 F.2d at 108.

officials are alleged to be unconstitutional or beyond statutory authority"); *Sea-Land*, 659 F.2d at 244 ("Insofar as appellants seek equitable relief, we conclude that sovereign immunity does not bar the way."); *Johnsrud v. Carter*, 620 F.2d 29, 31 & n.3 (3d Cir. 1980) (holding that "in an equitable action under 28 U.S.C. § 1331 (1976) seeking 'non-statutory' review of agency action, the Administrative Procedure Act, specifically 5 U.S.C. § 702 (1976), serves as a waiver of the United States' sovereign immunity"); *Jaffee v. United States*, 592 F.2d 712, 718 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979) (holding that § 702, "when it applies, waives sovereign immunity in 'nonstatutory' review of agency action under [28 U.S.C.] section 1331").

In contrast, 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."); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1235 (9th Cir. 2001) ("[f]inal agency actions are reviewable by federal courts under section 704"). There is no common law "final agency action" requirement.

Section 702 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. *See Jaffee*, 592 F.2d at 712 (holding that where plaintiff brought "an action for money damages" it "does not come within the waiver of 5 U.S.C. § 702, which covers only suits 'seeking relief other than money damages'"). "Legal wrong" means such wrong as particular statutes *or the courts* have recognized as constituting grounds for judicial relief. *See Beller v. United* States, 277 F.Supp.2d 1164, 1168 (D.N.M. 2003) ("Even in cases where federal statutes do not provide the jurisdictional basis, federal court jurisdiction must exist separately and independently of the APA either by virtue of an alleged violation of a federal constitutional right or *other judicially enforceable right*.") (emphasis added); *see also Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932, *cert. denied*, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955) ("'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review").

Federal common law claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. *See, e.g., Johnsrud*, 620 F.2d at 31 ("The plaintiffs have brought a complaint alleging violations of their rights under federal constitutional, statutory, and *common law*. The complaint raises questions of federal law that we cannot term 'frivolous' or 'insubstantial' and thus plainly falls within the 'arising under' language of 28 U.S.C. § 1331.") (emphasis added); *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972)

("section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."); *Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F.Supp. 1515, 1519-20 (W.D. Wash. 1996) (stating that the trust obligation constitutes "law to apply" consistent with *Heckler v. Chaney*.).

Here, the Tribes have identified a series of actions taken in an official capacity or under color of law, violating the federal trustees' common law trust obligations to the Tribal beneficiaries, and have asked the court for a non-monetary remedy. The Tribes are plainly within the terms of § 702's waiver of sovereign immunity. With jurisdiction established under 28 U.S.C. § 1331 and the sovereign immunity of the federal government waived under § 702 of the APA, the "final agency action" requirement of § 704 simply does not apply to the Tribes' cause of action. The district court therefore was clearly erroneous in applying the "final agency action" requirement of § 704 and granting summary judgment to federal Defendants.

C. The general and specific trust obligations of the United States government to the Assiniboine and Gros Ventre Tribes mandate action beyond facial compliance with federal environmental and other statutes, when such action is necessary to protect tribal trust resources.

The district court concluded that even if the Tribes could maintain a common law trust claim under § 702, the common law delineating the federal government's trust obligations to the Tribes could not, standing alone, be a basis

for relief. As stated by the court:

> Judicial review under the APA requires finding law to apply. The Tribes claim the law to be applied is the government's trust obligation. However, the Court cannot find any cases in which that obligation has been applied outside the framework of another law. 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 applicable statutes.

Nunc Pro Tunc Order (Nov. 12, 2004) at 10-11 (E.R. 227-28) (citations omitted). The district court's conclusion, however, conflates three distinct branches of Indian trust law jurisprudence, and ignores the Tribes' claims with regard to the specific treaty "obligations" of the government to protect the Tribes' water supply. *See* Treaty of Ft. Laramie at Art. 3 (E.R. 22) (binding the federal government "to protect the . . . Indian nations against the commission of all depredations by the people of the . . . United States"); 1888 Agreement (E.R. 31-35); Treaty with the Blackfeet") (E.R. 27-30); Grinnell Agreement at Art. II (E.R. 37) (binding reservation funds to be spent, among other things, for the purpose of agricultural irrigation); Senate Report at 3 (E.R. 72) (providing that, pursuant to the Grinnell Agreement, the Indian Department should hold "control of the waters of the streams having their sources in the mountains for much-needed irrigation" for the benefit of the Indians' domestic uses, and that "no irreparable damage [may] be done the Indians by depriving them of these important benefits, which might be vital to their very existence"); *id*. (referring to the need to "protect the Indians in

the continued enjoyment of the natural resources of their reservation"); *id*. at 3-4 (E.R. 72-73) (stating that the Fort Belknap Indians were assured "that they would have ample water for all their needs"); *see also Winters v. United States*, 207 U.S. at 576.

1. Specific Trust Obligation Giving Rise to Non-Monetary Relief

The Tribes argued below that the federal government violated specific trust obligations contained in treaties and in statutes. In addition to the language of the Treaty of Fort Laramie, 11 Stat. 749, in which the federal government committed itself to protect the Tribes "against the commission of all depredations by the people of the said United States," very specific promises were made by the federal government to protect Tribal waters, "having their sources in the mountains,"during the discussion surrounding the taking of the Little Rocky Mountains in 1895. Senate Report at 3 (E.R. 72); Grinnell Agreement (E.R. 36-39). The United States assured the Tribes that the Reservation's water resources would not be affected by the Tribes' agreement to cede the Little Rocky Mountains from the Reservation, and that the federal government would protect the Tribes' water supply in perpetuity. *See id.* (delegating "control of the waters of the streams having their sources in the mountains for much-needed irrigation" to the federal government "for domestic uses by the Indians" and stating that "these matters should receive . . . careful consideration in order that no irreparable

damage might be done the Indians by depriving of these important benefits, which might be vital to their very existence"); *id*. (referring to the need to "protect the Indians in the continued enjoyment of the natural resources of their reservation"); *id*. at 3-4 (stating that the Fort Belknap Indians were assured "that they would have ample water for all their needs"); *id*. at 4 (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 federal government's failure to protect the Tribes' water and other resources gives rise to a claim for non-monetary relief. Under this branch of Indian trust law jurisprudence, 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., Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (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, 256 (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); *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."); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1523 (W.D.

Wash. 1988) (granting an injunction against the construction of a marina due to its effect on Indian treaty rights).

In the discussions resulting in the Grinnell Agreement, which removed the Little Rocky Mountains from the Fort Belknap Reservation, the federal government promised that the

> Indians could have the benefit of the timber and building stone abounding in the mountains, and which would be greatly needed by them in building houses and otherwise improving their homes; and also that the Indian Department should have the control of the waters of the streams having their sources in the mountains for much-needed irrigation and for domestic uses by the Indians. They were instructed that no irreparable damage might be done to the Indians by depriving them of these important benefits, which might be vital to their very existence.

Senate Report at 3 (E.R. 72); Grinnell Agreement at Art. II (E.R. 37). Further, the "Indians were assured by the commissioners that they would not be giving up any of their timber or grasslands by a cession of the tract described in the agreement, and that they would have ample water for all their needs." *Id*. The Indians of Fort Belknap thus had a very specific understanding of the "Grinnell Agreement," as reflected in their statements during the discussion.

> 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 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 (E.R. 75).

The Grinnell Agreement and previous treaties thus obligate the federal government to protect Tribal waters with their source in the Little Rocky Mountains from the depredations of non-Indians.

Although the court below recognized 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," the court did not mention in its final judgment the specific obligation of the federal government, under treaties and the Grinnell Agreement, to protect the waters originating in the Little Rockies. Instead, the court subsumed the Tribes' legal arguments regarding *specific* trust obligation in language that applies only to the Ninth Circuit's jurisprudence regarding the *general* trust obligation: "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 applicable statutes." *Nunc Pro Tunc* Order (Nov. 12, 2004) at 11 (E.R. 228). The Tribes made clear that the federal government has specific trust duties arising from treaties and the Grinnell Agreement. The court, however, made no reference to or findings regarding this specific duty, and instead decided to rule using law from an inapplicable branch of Indian trust law jurisprudence involving claims for *money*

damages. Relying on general trust law jurisprudence in a situation involving specific trust obligations constitutes an error in the application of relevant, substantive law.

2. Specific Trust Obligation Giving Rise to Monetary Relief

The second branch of Indian trust law jurisprudence involves specific trust obligations giving rise to claims for monetary relief. These cases arise under the Tucker Act, 28 U.S.C. § 1505, and 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 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 generally United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*"); *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*"). This

jurisprudence sets a high bar for recovery of money damages from the federal government.

In this case, the Tribes have made no claim for money damages. Tucker Act cases, including the *Mitchell* cases, *see infra* at 36-39 (discussing difference between causes of action brought pursuant to § 702 and cases brought pursuant to the Tucker Act, 28 U.S.C. § 1505), are thus entirely irrelevant to the Tribes' claims. Nonetheless, the court below cites to the *Mitchell* cases as support for the proposition that "unless a specific duty to act is imposed upon the government, its trust obligation to the tribes is fulfilled by complying with applicable statutes." *Nunc Pro Tunc* Order (Nov. 12, 2004) at 12 (E.R. 228). The district court's application of cases involving the Tucker Act's waiver of sovereign immunity for monetary claims to this case, which involves § 702 of the APA's waiver of sovereign immunity for *non*-monetary claims, was clear error.

3. The General Trust Obligation

The Tribes allege that the federal government, in allowing the mines to initiate operations and expand over the course of 17 years, resulting in the destruction of tribal water resources and cultural resource, violated not only the government's specific treaty and agreement obligations, but also the government's general trust obligation to the Tribes.

The federal government and its agencies have an "undisputed" general trust

obligation to "the Indian people." *Mitchell II*, 463 U.S. at 225; *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").[2] This obligation imposes a fiduciary duty owed in conducting any federal government action which relates to Indian tribes. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981). As recently as 2003, the U.S. Supreme Court has affirmed the "undisputed existence of a general trust

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[2] *See also Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942) ("recogniz[ing] the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *United States v. Mason*, 412 U.S. 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (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. United States*, 305 U.S. 382, 386, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939) (observing that "the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees"); *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed.1023 (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 had deemed essential to the protection of such Indians" – *i.e.*, that of an "'extended a special guardianship'"); *accord*, *McKay v. Kalyton*, 204 U.S. 458, 469, 27 S.Ct. 346, 350, 51 L.Ed. 566 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396, 22 S.Ct. 650, 659, 46 L.Ed. 954 (1902); *United States v. Kagama*, 118 U.S. 375, 382-84, 6 S.Ct. 1109, 1113-14, 30 L.Ed. 228 (1886); *see also Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831) (the "relation" of Indians "to the United States resembles that of a ward to his guardian").

relationship between the United States and the Indian people. . . ." *Navajo Nation*, 537 U.S. 488 at 506.

The general trust obligation binds the federal government to, at a minimum, identify tribal interests, consult with the Tribes regarding the potential impact of a federal action on those interests, and mitigate or eliminate the negative impact of federal action on tribal interests when statutory and regulatory mandates so allow. *See, e.g., Island Mountain Protectors*, 144 IBLA at 185 (E.R. 111) ("While the trust responsibility created by environmental laws may be 'congruent' with other duties . . . the enactment of those laws does not diminish the [federal government's] original trust responsibility or cause it disappear. BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its . . . decisions."). 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*, 5 Pet. at 17 ("[Indians'] relation to the United States resembles that of a ward to his guardian."); *see also supra* at 22 & n.1. The general trust obligation imposes these duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute. *See, e.g., Cramer v United States*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923); *United States v. Creek Nation,* 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935);

United States v. Mason, 412 U.S. 391, 398, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973).[3]

Several Ninth Circuit opinions since 1980 have suggested that the general trust obligation may be satisfied simply by facial compliance with statutory and regulatory requirements. These opinions began with *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980). The *North Slope* court, however, mistakenly applied the requirements for waiver of sovereign immunity under the *Tucker Act*, 28 U.S.C. § 1505, which governs claims for money damages by Tribes against the federal government, to a case arising under *§ 702's* waiver of immunity. In *North Slope Borough*, 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 a Tucker Act case, *Mitchell I*, ruled against the Inupiat, and held that a trust

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[3] Indeed, in *Mitchell II*, the Supreme Court found 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. *Id*. 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.

responsibility can only arise from a statute, treaty or executive order. *Id*. at 611 (citing *Mitchell I*, 445 U.S. at 535). The *North Slope Borough* panel cited to the *Mitchell I* Court's holding that, for *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*.

The 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 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 Tucker Act for jurisdiction in the U.S. Court of Claims. *Mitchell I*, 445 U.S. at 546. Since 1980, the Ninth Circuit has followed the *North Slope Borough* opinion without distinguishing between 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. United States*, 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.*, 2004 WL 415224 (E.D. Cal. 2004).

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 general trust obligation has no content or meaning, and the federal government's owes no greater obligations to tribes than to any citizen. Yet, "[i]f 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 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).

This case presents an opportunity for this Court to clarify the law regarding the federal government's general trust obligation to Indian tribes. At a minimum, the general trust obligation requires the federal government to consult with tribes regarding any action that may affect tribal rights or interests, and to protect those interests so far as is possible. *See, e.g., Island Mountain Protectors*, 144 IBLA at 185 (E.R. 111) ("While the trust responsibility created by environmental laws may be 'congruent' with other duties . . . the enactment of those laws does not diminish the [federal government's] original trust responsibility or cause it disappear. BLM was required to consult with the Tribes and to identify, protect, and conserve trust

resources, trust assets, and Tribal health and safety in making its . . . decisions.”).

Here, as the IBLA observed, the federal government took actions over the course of two decades which destroyed tribal water and cultural resources without once referencing its trust obligation to the Assiniboine and Gros Ventre Tribes (prior to 1996) or consulting with the Tribes to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its . . . decisions. *Id.*; *see also id.* at 202-03 (E.R. 128-29) (BLM “did not fully observe its trust responsibility to the Tribes, had incomplete information about groundwater flows which was essential to a reasoned choice among alternatives[,] and did not comply with 40 C.F.R. § 1502.22, and failed to protect public lands from unnecessary or undue degradation”).

VII. CONCLUSION

The Tribes respectfully request that the judgment of the district court be reversed and the cause remanded with instructions to rehear the Tribes’’ motion for summary judgment as to liability in light of the arguments above, and if necessary, to proceed to the remedy stage of the proceedings.

Dated: April 22, 2005.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are unaware of any related case pending in this Court. Circuit Rule 28-2.6.

BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

I hereby certify that Plaintiffs-Appellants' Brief is proportionally spaced, has a typeface of 14 points, and contains 9,842 words.

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Amy Atwood Date

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2005, I served two true and correct copies of Plaintiffs-Appellants' Brief, and one true and correct copy of Plaintiffs-Appellants' Excerpts of Record, via first class mail, postage prepaid, to:

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