No. 04-36167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GROS VENTRE TRIBE, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana

ANSWERING BRIEF OF THE APPELLEES

STATEMENT OF JURISDICTION

1. District Court jurisdiction. Plaintiffs-Appellants Gros Ventre Tribe, Assiniboine Tribe, and the Fort Belknap Indian Community Council (collectively, "the Tribes" unless otherwise noted) brought this action against the United States, the Bureau of Land Management (BLM) and other federal agencies alleging violations of the federal government's trust obligations and the Federal Land Policy and

Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq. C.R. #1, E.R. 2-4.[1] The Tribes invoked the district court's jurisdiction under, inter alia, 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1362 (suits by Indian tribes). C.R. #1, S.E.R. 3 (Complaint, ¶ 5).[2] The district court entered a final judgment as to all parties and claims on June 29, 2004 (E.R. 181, C.R. #124), and denied the Tribes' motion to amend judgment on October 22, 2004. E.R. 196-217, C.R. #129.

2. Appellate jurisdiction. The Tribes filed a timely notice of appeal on December 21, 2004. E.R. 240-243, C.R. #131; see Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A)(iv). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court acted within its discretion in granting summary judgment in favor of the United States at the close of the liability phase of this bifurcated proceeding.

II. Whether the district court correctly ruled that the Tribes' breach of trust claim is subject to the "final agency action" requirement of the Administrative

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[1] "E.R." refers to the appellants' excerpts of record. "C.R." refers to the clerk's record in the district court. It is reproduced at E.R. 244-255.

[2] "S.E.R." refers to the appellees' supplemental excerpts of record, filed along with this brief.

Procedure Act (APA), 5 U.S.C. § 704.

III. Whether this Court need address the validity of the district court's statement that, "[i]n 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" (E.R. 206), when that portion of the district court's decision is dictum, as the Tribes acknowledge.

STATEMENT OF THE CASE

A. Nature of the Action

In their complaint, the Tribes alleged that BLM breached its trust responsibility to the Tribes and violated FLPMA in approving permits for, and failing to fully reclaim, two gold mines situated on a mix of public and private land near the Tribes' reservation. The district court did not reach the merits but instead granted summary judgment in favor of the United States, concluding that it lacked subject matter jurisdiction over the Tribes' claims. This appeal followed.

B. Legal Framework

1. The Administrative Procedure Act (APA). The APA authorizes suit for judicial review by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where no other statute provides a private right of action for

judicial review, and where there is "no other adequate remedy in a court," the "agency action" complained of must be "final agency action." 5 U.S.C. § 704. "Agency action" is defined to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent thereof, or failure to act." 5 U.S.C. § 551(13). The APA provides relief for a failure to act in 5 U.S.C. § 706(1): "The reviewing court shall * * * compel agency action unlawfully withheld or unreasonably delayed." The APA in 5 U.S.C. § 706(2)(A) provides that a reviewing court shall hold unlawful agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

2. The Mining Law of 1872 and FLPMA. The mining at issue in this case was conducted by Pegasus Gold Corporation (Pegasus) and its wholly owned subsidiary Zortman Mining, Inc. (ZMI), under the Mining Law of 1872, as amended, 30 U.S.C. § 21 et seq. See id. § 22 (providing that "all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase"). Section 302(b) of FLPMA, 43 U.S.C. § 1732(b), provides that, in managing public lands, including those subject to the Mining Law, the Secretary of the Interior "shall * * * take any action necessary to prevent unnecessary or undue degradation of the lands."

3. BLM's Surface Management Regulations. In 1979, when the Montana Department of State Lands (DSL) first issued operating permits to ZMI for the Zortman and Landusky mines, BLM had not yet promulgated approval requirements for mining on public lands. S.E.R. 61 (A.R. Z00025 (2002 Record of Decision (ROD), p. 1)).[3] In 1981, BLM promulgated regulations for operators mining on public lands under the Mining Law of 1872. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)); see 43 C. F. R. Subpart 3809 (1981). In 1981, BLM accepted the DSL operating permits for the Zortman and Landusky mines as pre-existing authorizations for a plan of operations under BLM's regulations. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)); see 43 C.F.R. § 3809.1-8 (1981). Under the BLM regulations in effect when the mines ceased operating in 1998, the failure of an operator "to comply with applicable environmental protection laws and regulations thereunder will constitute unnecessary or undue degradation" for purposes of FLPMA. 43 C.F.R. § 3809.0-5(k) (1998).[4]

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[3] "A.R." refers to the administrative record before BLM.

[4] The BLM regulations also provided that "[f]ailure to initiate and complete reasonable mitigation, including reclamation of disturbed areas * * * will constitute unnecessary or undue degradation." 43 C.F.R. § 3809.0-5(k) (1998). The regulations encouraged BLM to "[c]oordinate, to the greatest extent possible, with appropriate State agencies, procedures for prevention of unnecessary or undue degradation with

(continued...)

4. National Environmental Policy Act (NEPA). Section 102(C) of NEPA, 42 U.S.C. § 4332(C), requires that, where an agency proposes a "major Federal action[ ] significantly affecting the quality of the human environment," it must prepare a detailed environmental impact statement (EIS) for the proposed action. NEPA "does not mandate particular results," but rather, "simply prescribes the necessary process" to ensure that federal officials take the necessary "hard look" at the environmental consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

5. Treaty of Fort Laramie and the Grinnell Agreement. In the Treaty of Fort Laramie, 11 Stat. 749 (Sept. 17, 1851), several Indian tribes, including appellants Gros Ventre Tribe and Assiniboine Tribe, agreed to recognize the right of the United States to establish roads and military posts within their respective territories. Id. at Art. 2 (reproduced at E.R. 22).[5] The United States agreed to protect the Tribes "against the commission of all depredations by the people of the * * *

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[4](...continued)
respect to mineral operations" (id. § 3809.0-2(c)), and authorized the negotiation of "agreements to provide for a joint Federal-State program for administration and enforcement" (id. § 3809.3-1(c)).

[5] The treaty is noted in Statutes at Large but not printed there. The text of the treaty appears in Sen. Doc. No. 53, 70th Cong., 1st Sess., at 1065-1067 (1927).

United States." Id. at Art. 3 (reproduced at E.R. 22). In the Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, 29 Stat. 350 (Oct. 9, 1895), referred to as the Grinnell Agreement, the Gros Ventre and Assiniboine Tribes ceded to the United States, for a specified sum of money, a portion of their reservation situated in the northern portion of the Little Rocky Mountains. Arts. I and II, 29 Stat. 350-351 (reproduced at E.R. 36-37). The federal commissioners who negotiated the Grinnell Agreement assured the tribes that "they would have ample water for all their needs." Sen. Doc. No. 117, 54th Cong., 1st Sess., at 4 (1896) (reproduced at E.R. 73).

C. Statement of Facts

1. Introduction. From 1979 until declaring bankruptcy and ceasing operations in 1998, Pegasus and ZMI operated the Zortman and Landusky mines in the Little Rocky Mountains of north-central Montana. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)). The mines are located in the southwest corner of Phillips County on a combination of public lands managed by BLM and private lands. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)). The mines are not located within the Fort Belknap Indian Reservation or on any Tribal lands. S.E.R. 66 (A.R. Z00050 (2002 ROD, p. 26)). However, the mines are situated near the southern boundary of the Reservation and have the potential to cause impacts to trust resources. S.E.R. 61, 66 (A.R. Z00025,

Z00050 (2002 ROD, pp. 1, 26)).

There are no trust resources or assets in the mining area over which the Tribes have ownership or property rights, with the possible exception of downstream water rights to some of the runoff from the mining areas. S.E.R. 66 (A.R. Z00050 (2002 ROD, p. 26)). The Tribes attach religious and cultural significance to the Little Rocky Mountains, a portion of which was ceded to the United States in 1895 in the Grinnell Agreement. S.E.R. 66 (A.R. Z00050 (2002 ROD, p. 26)); see supra, p. 7. Historically, underground mining has occurred in the area since the mid-1880s. However, the advent of cyanide heap leaching technology, coupled with a sharp rise in gold prices, spurred the development of open pit mining operations beginning in the late 1970s. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)).

2. Permitting History of the Zortman and Landusky Mines. In May 1979, after preparing a final EIS, the Montana DSL issued permits authorizing the operation of the Zortman and Landusky mines as open pit, heap leaching operations. S.E.R. 61 (A.R. Z00025 (2002 ROD, p.1)). In 1981, after promulgating regulations for operators mining on public lands under the Mining Law of 1872, BLM accepted the DSL operating permits for the Zortman and Landusky mines as pre-existing authorizations for a plan of operations under BLM's regulations. S.E.R. 61 (A.R. Z00025 (2002 ROD, p. 1)); see supra, p. 5.

Numerous amendments to the operating plans of the respective mines were approved over the years, either by DSL itself (for activities on private land or prior to the promulgation of BLM's regulations), or jointly by DSL and BLM pursuant to memoranda of understanding executed by the agencies after BLM's regulations became effective. S.E.R. 50-52 (A.R. L8990-L8992 (1981 memorandum of understanding)); S.E.R. 53-57 (A.R. L8980-L8984 (1984 memorandum of understanding)); see supra, note 4. Between 1979 and 1988, eleven amendments to the Zortman mine's operating plan were approved, increasing the disturbance area from 273 acres to 406 acres. S.E.R.61-62 (A.R. Z00025-00026 (2002 ROD, pp. 1-2)); E.R. 43 (A.R. L2428 (Appendix J-4, 1996 FEIS, vol. 1, Table 1-1)). Between 1980 and 1991, ten amendments to the Landusky mine's operating plan were approved, increasing the disturbance area from 256 acres to 783 acres. S.E.R. 62 (A.R. Z00026 (2002 ROD, p. 2)); E.R. 44 (A.R. L2428 (Appendix J-4, 1996 final EIS, vol. 1, Table 1-2)).

3. Development of Reclamation Plans for the Mines.

a. Acid Rock Drainage. In 1992, ZMI submitted proposed plans for a major expansion of the Zortman mine. S.E.R. 62 (A.R. Z00026 (2002 ROD, p. 2)). In the course of reviewing that expansion proposal, BLM and DSL determined that acid rock drainage (ARD) had become a widespread occurrence at both the Zortman and

Landusky mines.[9] S.E.R. 62 (A.R. Z00026 (2002 ROD, p. 2)); e.g., S.E.R. 39-49 (A.R. L6377-L6387 (1/15/93 letter and situation report from BLM and DSL to ZMI regarding Landusky mine)); S.E.R. 107-114 (A.R. Z10369-Z10376 (2/1/93 letter and situation report from BLM and DSL to ZMI regarding Zortman mine)); S.E.R. 105-106 (A.R. Z09362-09363 (8/13/93 letter from BLM to DSL)); S.E.R. 103-104 (A.R. Z08862-Z08863 (12/21/93 letter from BLM to ZMI)).

In light of the ARD problem, ZMI submitted proposed modifications to its existing reclamation plans, which were analyzed by the agencies in an environmental assessment (EA) and presented to the public in November 1993. S.E.R. 62 (A.R. Z00026 (2002 ROD, p. 2)); A.R. L5609-5704 (1993 EA). In response to public comment on the EA, and due to the technical complexity of the ARD issue when considered in combination with the mine expansion proposal, BLM and DSL decided in March 1994 to analyze the reclamation plan modifications for both mines in a single environmental impact statement (EIS). At the same time, the agencies decided

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[9] "Simply stated, ARD is produced when rock containing sulfides (such as iron sulfide, or the 'fools gold' familiar to many of us) is exposed to air and water during mining operations. Water traveling through the rock becomes acidic, and sometimes contains metals such as lead, arsenic, zinc, copper, and silver. Bacteria present in mine water can accelerate the rate of acid generation, because of their ability to oxidize sulfide-bearing materials." E.R. 45 (A.R. L2428 (Appendix J-4, 1996 final EIS, vol. 1, p. 1-9)).

to require ZMI to immediately implement specified interim corrective measures to address ARD at the Landusky mine. S.E.R. 62 (A.R. Z00026 (2002 ROD, p. 2)); S.E.R. 33-38 (A.R. L4799-4804).

b. Rejection of BLM's 1996 and 1998 RODs by the Interior Board of Land Appeals (IBLA); Closure of the Mines by ZMI and Pegasus. In October 1996, after completing a final EIS, BLM and the Montana Department of Environmental Quality (DEQ), a successor agency to DSL, issued a ROD. S.E.R. 61 n.1, 63 (A.R. Z00025 n.1, Z00027 (2002 ROD, pp. 1 n.1, 3)); see A.R. Z04812-Z04873 (1996 ROD). The 1996 ROD approved additional mining operations at both mines, and required the implementation of reclamation plans, including specific measures to control the development of ARD. S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)); S.E.R. 82-99, 100, 101-102 (A.R. Z04817-Z4834, Z4842, Z4847-Z4848 (excerpts from 1996 ROD)). In late 1996, the Tribes (and other groups) appealed BLM's decision to the Interior Board of Land Appeals (IBLA). S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)); see Island Mountain Protectors, 144 I.B.L.A. 168 (1998). IBLA stayed the mine expansion approvals pending disposition of the administrative appeal. S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)).

In January 1998, while the Tribes' administrative appeal was pending before IBLA, ZMI and Pegasus declared bankruptcy. S.E.R. 63 (A.R. Z00027 (2002 ROD,

p. 3)). In March 1998, the companies announced that they would not proceed with the approved mine expansion plans and instead would close and reclaim the mines. S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)); Island Mountain Protectors, 144 I.B.L.A. at 170. In light of these developments, BLM issued a second ROD in June 1998, which rescinded the previously approved mine expansion and selected a reclamation alternative from the 1996 final EIS for implementation. S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)); S.E.R. 80 (A.R. Z02283 (cover letter to 1998 ROD)). That alternative required reclamation of the existing disturbances using agency-developed mitigation to address the acid generating character of the waste rock and pit areas. S.E.R. 63 (A.R. Z00027 (2002 ROD, p. 3)); S.E.R. 80 (A.R. Z02283 (cover letter to 1998 ROD)).

Simultaneous with BLM's issuance of the 1998 ROD, IBLA issued a decision on the Tribes' challenge to the 1996 ROD. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). IBLA concluded that, "[b]ased upon the record before us, we agree with Appellants that 'incomplete or unavailable information' about groundwater flows precluded BLM from adequately evaluating reasonably foreseeable significant adverse effects on the human environment." Island Mountain Protectors, 144 I.B.L.A. at 187. IBLA also concluded that "BLM did not fully observe its trust responsibility to the Tribes." Id. at 203. The case was remanded to BLM. Ibid.

BLM requested reconsideration on the ground that, absent a mine expansion proposal, the hydrologic data collected on the existing mines was sufficient for reclamation purposes. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)); S.E.R. 72, 74 (A.R. Z01967, Z01969 (IBLA order on reconsideration, pp. 1, 3)). However, in November 1998, IBLA issued an order setting aside the 1998 ROD. IBLA directed that, before selecting a final reclamation alternative, "BLM must separately analyze, and consult with the Tribes about, potential effects on Tribal water resources and report its actions in its decision." S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)); S.E.R. 76-77 (A.R. Z01971-Z01972 (IBLA order on reconsideration, pp. 5-6)).

c. 2001 Supplemental Final EIS and 2002 Reclamation ROD for the Mines. As directed by IBLA, beginning in early 1999, BLM and DEQ embarked on a course of extensive consultation with the Fort Belknap tribal government, i.e., appellant Fort Belknap Indian Community Council (FBICC), concerning mine reclamation. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). This consultation process utilized a technical working group of specialists from BLM, DEQ, FBICC, and the U.S. Environmental Protection Agency to discuss and analyze the issues associated with mine reclamation, including additional groundwater studies and reports. S.E.R. 65-70 (A.R. Z00049-Z00054 (2002 ROD, pp. 25-30)).

The technical working group developed several reclamation alternatives for each of the two mines. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). In March 2000, BLM and DEQ determined that selection of a reclamation alternative developed during the consultation process may constitute a substantial change to the reclamation plan proposed in the (previously vacated) 1998 ROD. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). Accordingly, BLM and DEQ prepared a supplemental EIS (SEIS) pursuant to NEPA's implementing regulations (see 40 C.F.R. § 1502.9(c)(1)(i)), focusing on the technical working group's reclamation alternatives. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)).

The final SEIS on reclamation of the mines was completed in December 2001. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). Based on the final SEIS, BLM and DEQ issued a reclamation ROD in May 2002 after consulting with the Tribes. The reclamation alternative selected for each mine, referred to as Z6 (for the Zortman mine) and L4 (for the Landusky mine), was chosen in part because it "place[s] only the relatively non acid-generating waste rock as backfill in the mine pits, and leave the most strongly acid-generating waste rock on the lined leach pads where any leachate will be easier to control and treat." S.E.R. 60 (A.R. Z00022 (2002 ROD, p. ii)). The agencies concluded that "[t]hese alternatives will best meet the purpose and need to reclaim the mines with a reasonable assurance of long-term success in

meeting State and Federal requirements for mine reclamation, while protecting human health, the environment, and trust resources." S.E.R. 71 (A.R. Z00055 (2002 ROD, p. 31)). The Tribes agreed that alternatives Z6 and L4 should be implemented, though the Tribes believed that the reclamation plan should include additional measures (e.g., a Fort Belknap job training and placement service program). S.E.R. 31-32 (Consultation Record 00005-00006).

The Tribes appealed the 2001 final reclamation SEIS and 2002 reclamation ROD to the IBLA. That appeal is currently pending.

D. Proceedings in the District Court

1. The Tribes' Complaint. On April 12, 2000, prior to BLM's issuance of the 2001 final reclamation SEIS and 2002 reclamation ROD, the Tribes filed a complaint in the United States District Court for the District of Montana seeking declaratory, injunctive, and mandamus relief against the United States, BLM, and other federal agencies. C.R. #1, S.E.R. 1-13.[7] The Tribes did not amend their complaint to challenge the 2001 final reclamation SEIS or the 2002

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[7] The complaint also named as additional defendants the Bureau of Indian Affairs and the Indian Health Service. S.E.R. 4 (Complaint ¶14). Because the distinction among the federal agencies is not material to the instant appeal, we refer in this brief to the defendants-appellees collectively as the United States, unless otherwise noted.

reclamation ROD.

The Tribes' complaint asserted two "claims for relief." The first claim, styled "Indian Trust Violations," alleged, inter alia, that BLM's approval of operations at the Zortman and Landusky mines and failure to fully reclaim them has negatively impacted the quantity and quality of water available to the Tribes in violation of the United States' trust obligation to the Tribes and the APA, 5 U.S.C. § 706(2). C.R. #1, S.E.R. 10 (Complaint ¶¶ 57-59). The Tribes' second claim for relief was styled "FLPMA violations." This claim alleged that BLM approved operations at the mines without complying with NEPA and failed to fully reclaim them thereby causing "unnecessary and undue degradation" to public lands, in violation of FLPMA and the APA. C.R. #1, S.E.R. 12 (Complaint ¶¶ 70-72).

The Tribes sought a declaration that the United States had violated its trust obligations and FLPMA. C.R. #1, S.E.R. 12-13 (Prayer for Relief, ¶¶ A-B). The Tribes also sought a writ of mandamus compelling the United States "to reclaim the mining sites" in conformity with applicable law and an injunction "prohibiting further unnecessary and undue degradation of lands that were the subject of the Grinnell agreement." C.R. #1, S.E.R. 13 (Prayer for Relief, ¶¶ C-D).

2. The District Court's Decisions. Initially, in November 2001, the court entered an order that bifurcated the proceedings into a liability phase, to be followed

by a damages phase if necessary. C.R. #53, E.R. 19 (Nov. 30, 2001 order, ¶3) ("Proceedings in this matter will be bifurcated with liability and damages tried separately."). In October 2003, the parties filed cross-motions for summary judgment. C.R. ## 97 & 102. On June 28, 2004, the court denied the Tribes' motion for summary judgment and granted that of the United States. C.R. #123, E.R. 168-180. The Tribes filed a motion to amend judgment pursuant to Fed. R. Civ. P. 59(e). C.R. #125. In an order dated October 22, 2004, the court denied that motion and clarified its reasons for granting judgment in favor of the United States. C.R. #129, E.R. 196-217.

a. The Court's June 28, 2004 decision. At the outset, the court explained: "The Tribes are not challenging the 2002 SEIS and ROD. In fact, they are not challenging any particular decision; rather, they seek a broad ruling that the BLM violated its trust responsibilities and its FLPMA obligations by approving operations at Zortman-Landusky over the past 25 years."[8/] E.R. 173. The court concluded that "the lack of an effective remedy" for any wrongs complained of "renders the exercise of judicial power superfluous, and the case moot." Id. at 178. The court reasoned

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8/ Although the court referred to the "2002" SEIS, that environmental impact statement was actually finalized in 2001. S.E.R. 64 (A.R. Z00028 (2002 ROD, p. 4)). This apparently inadvertent oversight by the court is not material here.

that "[o]ther than final reclamation of the mines" – an issue not before the court – "the actions of which the Tribes complain either cannot be undone or have already been undone." Ibid. Elaborating on that rationale, the court explained:

> While the Tribes have challenged the BLM's 1996 EIS and ROD, those decisions were vacated by the IBLA, and have been supplemented by the 2002 SEIS and ROD. Reviewing the earlier decisions without reviewing the decision supplementing those decisions would be a futile exercise. More importantly, the only remedy for a defective EIS has already been undertaken by the BLM in the form of the 2002 SEIS.

Id. at 180.

b. The Court's October 22, 2004 decision. Acting on the Tribes' motion to amend judgment, the district court clarified that summary judgment in favor of the United States was warranted because it lacked subject matter jurisdiction over the Tribes' claims. Accordingly, the court denied the Tribes' motion to amend judgment. E.R. 202-217.

The court explained that jurisdiction over suits against the United States "requires a clear waiver of sovereign immunity," including in cases where Indian tribes sue the government for an alleged breach of its trust responsibilities. E.R. 202. Where a party sues the United States for equitable relief, the court explained, the APA constitutes a waiver of sovereign immunity. Id. at 202-203 (citing 5 U.S.C. § 702). The court noted that under the APA, 5 U.S.C. § 704, the sovereign

immunity of the United States is waived with respect to either "[a]gency action made reviewable by statute" or "final agency action for which there is no adequate remedy in a court." Id. at 203. "Because the actions complained of by the Tribes are not reviewable under a particular statute," the court concluded that its jurisdiction "must rest upon the challenged action being a 'final agency action.'" Ibid. And, the court noted, "[t]his is true whether the claim challenges an action taken by an agency or a failure to take a specific act." Id. at 203-204 (citing Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004) (SUWA)).

The court then considered the applicability of FLPMA, i. e., "[t]he only statute under which the Tribes challenge the BLM here." E.R. 208. That claim, the court explained, "is brought under APA § 706(1) for failure to prevent undue degradation of tribal lands by failing to adhere to NEPA." Id. at 209. Applying SUWA to the Tribes' claim, the court concluded:

> [C]ourts may not issue broad declaratory judgments that an agency has failed to comply with its statutory mandate. Yet this is exactly what the Tribes are asking the Court to do – to exercise its broad equitable relief, declare the BLM in violation of its broad trust obligations, and fashion particular remedies such as instructing the BLM to construct a passive water treatment system at the headwaters of King Creek.

Id. at 209-210. The court explained that the relief sought by the Tribes "is directed at either (a) preventing further disturbance of the land, or (b) reclaiming the disturbed

lands." Id. at 210. The court noted that BLM "has already exercised its discretion and expertise by adopting the 2002 Reclamation ROD and SEIS, thereby superseding previous decisions and fashioning a remedy for the Tribes' injuries." Ibid. The court declined to "insert[ ] itself into an ongoing administrative process by exercising its equitable powers to fashion suitable remedies for the tribes." Id. at 210-211.

The court also concluded that the Tribes' claims foundered on the grounds of standing, mootness, and the statute of limitations. E.R. 211-216. First, with respect to standing, the court noted that "[t]he last permitting decision was made in 1996, when the BLM authorized a significant expansion of the mine[s]," a decision that was "vacated by the IBLA, and never implemented due to the bankruptcy of [Pegasus]." Id. at 212. The court found it "difficult to see how a decision that was made but never implemented – and subsequently superseded by another final agency action, i. e., the reclamation plan – can have caused an injury in fact." Id. at 213. Lacking an injury flowing from BLM's 1996 final EIS and ROD, the court found that "the Tribes do not have standing to challenge the 1996 decision." Ibid.

Second, the court concluded that "any decisions made to expand the mines are moot." E.R. 213. The court explained that the controversy before it "has to do with approval of mine operations that led to the acid rock drainage," yet "[t]hat * * * is not a live controversy," because "[t]he mines have closed" and "there is no indication

they will reopen." Id. at 214. The court stressed that the mines "have been closed for six years, and substantial reclamation work has taken place"; moreover, "[t]he likelihood of the mines reopening appears minuscule." Id. at 216. The court added that any controversy concerning the adequacy of the reclamation plan selected by BLM in the 2002 reclamation ROD "is not before this Court," but rather, is before the IBLA. Id. at 214.

Third, the court found that it was precluded from considering the Tribes' claims by 28 U.S.C. § 2401(a), which provides, in relevant part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." E.R. 214. Because the Tribes' complaint was filed on April 12, 2000, the court noted, "[t]he Tribes' challenge is * * * limited to final agency actions taken after April 12, 1994." Id. at 212. The court explained that, although the 1996 final EIS and ROD fell within the six-year time frame, they were superseded by the 2001 final SEIS and 2002 reclamation ROD; thus, the 1996 final agency actions are "no longer BLM's operative decisions * * *, and an earlier final agency action must be identified." Id. at 213. The next earlier final agency action, the court found, was BLM's approval of modifications to ZMI's operating permits in March 1994, "which is outside the statutory time frame" prescribed by § 2401(a). Id. at 214.

SUMMARY OF ARGUMENT

In this Court, the Tribes do not contest the bulk of the district court's rulings set forth above. None of the issues raised by the Tribes in this appeal warrants disturbing the judgment below.

I. The district court acted within its discretion by granting summary judgment to the federal defendants at the conclusion of the liability phase of this bifurcated proceeding. The Tribes' contention that, in doing so, the district court contravened Fed. R. Civ. P. 42(b) and its own bifurcation order is based on a misunderstanding of the court's reasons for granting summary judgment to the United States at the conclusion of the liability phase, and entirely overlooks the court's analysis set out in its October 22, 2004 decision. In making their "bifurcation" argument, the Tribes do not (and cannot) explain how the rulings made by the court in that decision raise "remedial" issues that necessitated factual development and briefing in a remedy phase of this proceeding. The court's disposition of this case at the close of the liability phase is consistent with the purpose of Rule 42(b) and the cases cited by the Tribes in support of their "bifurcation" argument are inapposite.

II. The district court correctly ruled that the Tribes' breach of trust claim is subject to the "final agency action" requirement of the APA, 5 U.S.C. § 704. This Court has made clear that the waiver of sovereign immunity for equitable claims set

forth in the APA, 5 U.S.C. § 702, is limited by the conditions on that waiver prescribed in the APA, 5 U.S.C. § 704, including the requirement of final agency action. Here, the Tribes seek to invoke the waiver of sovereign immunity while at the same time ignoring the express statutory limitations on that waiver. The cases cited by the Tribes do not support such a result. The judgment below may be affirmed on the basis of the district court's conclusion, which the Tribes do not contest, that they failed to challenge, with respect to the Zortman and Landusky mines, a final agency action of BLM that falls within the applicable statute of limitations period or is not moot.

III. This Court need not address whether the district court was correct in ruling that "[i]n 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." Although the Tribes disagree with the court's statement, they concede, and properly so, that this statement is not necessary to the court's decision, i. e., is dictum. In any event, the court accurately stated the law of this circuit. While the Tribes invite the Court to use this case to "clarify" the law regarding the federal government's trust obligations toward Indian tribes, in fact the Tribes seek alteration of extant circuit law on the subject, which can be done only by the en banc Court.

The Tribes also argue that, even under the (allegedly erroneous) dictum of the district court, the court should have found that, with respect to the Zortman and Landusky mines, the United States breached specific trust obligations to the Tribes found in the Treaty of Fort Laramie and in "discussions surrounding" the Grinnell Agreement. That contention is entirely academic in this case. As noted above, the district court correctly ruled that the Tribes must challenge final agency action that falls within the applicable statute of limitations period and is not moot. As the district court correctly found (and the Tribes do not contest), the Tribes failed to meet those conditions here.

STANDARDS OF REVIEW

This Court reviews the existence of subject matter jurisdiction de novo. Crawford v. C.I.R., 266 F.3d 1120, 1123 (9th Cir. 2001). Similarly, cases arising on summary judgment are reviewed de novo. See Shotgun Delivery, Inc. v. United States, 269 F.3d 969, 971 (9th Cir. 2001). A district court's decision regarding the management of litigation is reviewed for an abuse of discretion. Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1358 (9th Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION BY GRANTING SUMMARY JUDGMENT TO THE FEDERAL DEFENDANTS AT THE CONCLUSION OF THE LIABILITY PHASE OF THE CASE.

The Tribes first contend (Br. 15) that, having initially bifurcated this case into liability and remedy phases (see E.R. 19), the district court abused its discretion by subsequently granting summary judgment to the United States at the conclusion of the liability phase "based on a finding that remedies were not available." The Tribes maintain (Br. 19) that the court thereby "nullified the procedural choices reserved to the Tribes" under Fed. R. Civ. P. 42(b) and "the court's own bifurcation order." That "procedural choice," the Tribes argue (Br. 19), was the option "to reserve the briefing of remedy issues for the second phase of the trial." There is no merit to the Tribes' contentions, which are based on a misunderstanding of the court's reasons for granting summary judgment to the United States at the conclusion of the liability phase.

A. Contrary to the Tribes' suggestion, the court did not grant summary judgment to the United States simply "based on a finding that remedies were not available." The fundamental premise of the Tribes' "bifurcation" argument rests on a flawed understanding of the court's reasons for granting summary judgment to the United States. Although the court's initial June 28, 2004 decision adverted to "the

lack of an effective remedy for any wrongs committed on the Tribes" (E.R. 178), the court expressly "clarif[ied] its reasoning" in its subsequent October 22, 2004 decision denying the Tribes' motion to amend judgment. E.R. 199. In making their "bifurcation" argument, the Tribes entirely overlook the court's analysis in its October 22 decision.

As discussed more fully above, see pp. 18-21, the court in its October 22 decision rested its grant of summary judgment to the United States on the grounds that: (1) the legal sufficiency of the 2001 final reclamation EIS and 2002 ROD for the Zortman and Landusky mines was not before the court; (2) the court's jurisdiction over the Tribes' claims as asserted in their complaint depended on their identifying and challenging one or more "final agency action[s]" within the meaning of the APA, 5 U.S.C. § 704, undertaken by BLM in connection with permitting at the mines; (3) the Tribes had not challenged a final agency action falling within the six-year statute of limitations period prescribed by 28 U.S.C. § 2401(a); (4) the Tribes lacked standing to challenge the vacated 1996 final EIS and ROD; and (5) any challenge to BLM's approval of expansion of the mines was moot in light of ZMI's bankruptcy and closure of the mines. In making their "bifurcation" argument, the Tribes do not (and cannot) explain how these rulings raise "remedial" issues that necessitated factual development and briefing in a remedy phase of this proceeding.

Moreover, the district court's decision to address these issues on cross-motions for summary judgment at the close of the liability phase was fully consistent with Fed. R. Civ. P. 42(b), which authorizes a court to order "a separate trial of * * * any separate issue" when separate trials will be "conducive to expedition and economy." Rule 42(b) "confers broad discretion upon the district court to bifurcate a trial, thereby deferring costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002).

Here, precisely as contemplated by this principle, the district court resolved the Tribes' claims on dispositive threshold issues of justiciability and jurisdiction at the conclusion of the liability phase. Indeed, the district court was required to resolve these threshold issues before proceeding to the merits. See Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 94-95 (1998) (rejecting the doctrine of "hypothetical jurisdiction" and explaining that "[t]he requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'") (quoting Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884)). Although the Tribes assert (Br. 17) that the district court "never directly addressed" their request for declaratory relief, that assertion again wholly overlooks the court's analysis in its

October 22 decision.[9]

B. The case-management decisions on which the Tribes rely in support of their "bifurcation" argument are inapposite. To support their "bifurcation" argument, the Tribes primarily rely (Br. 18) on In Re Hanford Nuclear Reservation Litigation, 292 F.3d 1124 (9th Cir. 2002), but that case is inapposite. Hanford held that where a district court has bifurcated discovery on issues of "generic causation" (i. e., the capacity of a toxic agent, such as radiation, to cause the illnesses alleged by the plaintiffs) from discovery on issues of "individual causation" (i. e., whether that toxic agent actually caused a particular plaintiff's illness), the court errs in ruling that,

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[9] In its October 22 decision, the court addressed the declaratory relief sought by the Tribes in the context of their claim against BLM under FLPMA. See supra, p. 19. Applying SUWA, 124 S.Ct. 2373, the court concluded: "[C]ourts may not issue broad declaratory judgments that an agency has failed to comply with its statutory mandate. Yet this is exactly what the Tribes are asking the Court to do – to * * * declare the BLM in violation of its broad trust obligations, and fashion particular remedies such as instructing the BLM to construct a passive water treatment system at the headwaters of King Creek." E.R. 209-210. The court's application of SUWA was correct and the Tribes do not contend otherwise here. See SUWA, 124 S.Ct. at 2381 (admonishing that "[i]f courts were empowered to enter general orders, compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved," and concluding that "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA"); Center for Biological Diversity v. Veneman, 394 F.3d 1108, 1113 (9th Cir. 2005) (applying SUWA to conclude that the district court lacked subject matter jurisdiction under the APA, 5 U.S.C. § 706(1), where plaintiff did not allege "a discrete agency action that the [agency] failed to take").

to survive summary judgment on the generic causation issue, each individual plaintiff must prove that he had been exposed to a threshold dose of radiation that statistically doubled the risk of harm over the risk that exists for the general population. Id. at 1129-1134. Rather than dismissing plaintiffs' claims on that ground before discovery reached the individual causation stage, the Hanford court concluded that the district court "should, consistent with its own discovery orders, have limited its ruling to whether the evidence showed the defendants' alleged emissions were capable of causing the illnesses from which plaintiffs suffered." Id. at 1134.

No such circumstances are involved in the instant case. Here, consistent with its bifurcation order, the district court granted summary judgment to the United States on threshold justiciability and jurisdictional grounds at the conclusion of the liability phase of the case. Hanford does not bar that result.

The Tribes also cite (Br. 19) Atchison, Topeka & Santa Fe Railway Co. v. Hercules, Inc., 146 F.3d 1071 (9th Cir. 1998), in support of their "bifurcation" argument, but that case is likewise inapposite. There, this Court concluded that the district court may not issue a scheduling order that effectively requires the plaintiff to bring cross-claims against a third-party defendant as compulsory claims, where Fed. R. Civ. P. 14(a) makes such claims permissive and assertable in a separate suit. 146 F.3d at 1072-1074. Plainly, the district court's bifurcation order in this case had

no such improper effect on the Tribes' ability to pursue its claims against the United States. The Tribes' reliance (Br. 19) on Wing v. Asarco, Inc., 114 F.3d 986 (9th Cir. 1997), is also misplaced. There, this Court concluded that the district court acted within its discretion in determining the amount of an attorney's fee award. No such issue was before the district court here.

II. THE DISTRICT COURT CORRECTLY RULED THAT THE TRIBES' BREACH OF TRUST CLAIM IS SUBJECT TO THE "FINAL AGENCY ACTION" REQUIREMENT OF THE APA, 5 U.S.C. § 704

The Tribes next contend (Br. 20) that their equitable federal common law claim for breach of trust is not subject to the "final agency action" requirement of the APA, 5 U.S.C. § 704. The district court properly dismissed the federal common law breach of trust claim. As the court held, the Tribes failed to set forth a challenge to a final agency action, and therefore the APA's waiver of sovereign immunity does not apply.

A. The waiver of sovereign immunity found in APA section 702 cannot be read in isolation from the limitations on that waiver found in APA section 704. The Tribes' contention (Br. 21-26) that they may invoke the waiver of sovereign immunity provided by APA section 702 without also satisfying the final agency action requirement of APA section 704 cannot be squared with the principle, articulated by this Court in Gallo Cattle Co. v. United States Dep't of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998), that the APA provides the framework for

judicial review in suits seeking review of agency action under 28 U.S.C. § 1331, on which the Tribes rely here, see Br. 21 ("Jurisdiction in this case is provided by 28 U.S.C. § 1331."). Section 702 of the APA waives federal sovereign immunity in certain instances, providing that "[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." As this Court explained in Gallo Cattle Co., however, "the APA's waiver of sovereign immunity contains several limitations." 159 F.3d at 1198. Judicial review under the APA is limited, absent a specific statute providing otherwise, to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added); Gallo Cattle Co., 159 F.3d at 1198. The APA provides that only "[a]gency 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." 5 U.S.C. § 704; see also Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990).

The Tribes' position, which is contrary to Gallo Cattle Co., reads the APA's waiver of sovereign immunity more broadly than Congress provided. Section 702 does not waive the United States' immunity to any suit seeking relief other than money damages. To the contrary, the waiver is limited to the traditional forms of suit that seek "judicial review" of "agency action."

The structure of section 702 itself dictates this conclusion. When Congress enacted section 702's waiver in 1976, it did not do so by enacting an entirely new provision of the United States Code.[10/] Instead, it inserted a waiver of immunity into the APA, and into section 702 in particular. By so doing, Congress indicated that the waiver should be confined to the causes of action that section 702 itself recognizes and codifies -- suits through which a "person suffering legal wrong" or "adversely affected or aggrieved" because of "agency action" has traditionally obtained "judicial review thereof," 5 U.S.C. § 702. See Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97 (1992) (noting that statutory construction must account for the "structure" of the statute); Adams Fruit Co. v. Barrett, 494 U.S. 638, 645 (1990) (noting that courts must "giv[e] effect to the meaning and placement of the words chosen by Congress."). To the extent that there is any doubt about whether section 702 should be construed in this manner or instead read expansively, as the Tribes propose, the doubt is settled by the established maxim that courts are to construe waivers of sovereign immunity narrowly. See Lane v. Pena, 518 U.S.

10/ The waiver originally was proposed by the Administrative Conference of the United States and the Administrative Law Section of the American Bar Association in 1970. See Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong. 3 (1970) (hereinafter 1970 Hearing). Congress enacted the proposal into law six years later. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721.

187, 192 (1996).

The legislative history of section 702's waiver further evidences Congress' intent to limit the waiver. The House Report declared that, by placing the waiver of immunity in section 702, Congress intended to limit the waiver's scope. H. Rep. No. 94-1656, at 11 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6131 ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701."). The Department of Justice, speaking through then Assistant Attorney General Scalia, conditioned its support for the 1976 amendment on the understanding that the waiver would be limited to actions subject to the APA's standards of review. Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong. 105 (1976) ("[I]t is also an important factor in our support for the bill that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act . . . .").

Moreover, the authors of the amendment expressed the same intent. "Because the amendment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative

Law Section explained, "it will be applicable only when that provision is applicable." 1970 Hearing, at 59 (statement of Dan M. Byrd, Jr.). Professor Kenneth Culp Davis expressed the same view: "Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable." Id. at 222; see also id. at 238 (opining that the amendment's waiver "is applicable only to administrative conduct and conduct of the individual that is contemplated for judicial review by the APA") (Prof. Cramton).

B. The cases cited by the Tribes do not support their position that, having invoked the waiver of sovereign immunity in APA section 702, their breach of trust claim is not subject to the "final agency action" requirement of APA section 704. Although the Tribes maintain that the challenged agency action need not be final, only one of the cases on which the Tribes rely (Br. 22-25) is a decision of this Court, Assiniboine and Sioux Tribes v. Bd. of Oil and Gas Conservation, 792 F.2d 782 (9th Cir. 1986), cited at Br. 22. In that case, the challenged agency action, an allegedly unlawful delegation of authority under the Indian mineral leasing statutes, was final action, and this Court held that APA § 702 waives sovereign immunity for a claim brought pursuant to 28 U.S.C.§ 1362, as it does for a claim brought pursuant to 28 U.S.C. § 1331. Not only did Assiniboine involve final agency action, but also, the Court in Assiniboine did not address the separate issue of the

scope of section 702's waiver. That distinct question was addressed by this Court in Gallo Cattle Co., supra, 159 F.3d at 1198, where the Court expressly concluded that "the APA's waiver of sovereign immunity contains several limitations," including the requirement of final agency action found in § 704. Ibid. Application of that principle is particularly warranted in this case because, as the district court pointed out (E.R. 205), BLM took numerous final actions over the years with respect to the Zortman and Landusky mines which the Tribes could have challenged in a timely fashion, but elected not to do so.[11/]

11/ As this Court has explained in a situation similar to that presented here:

> [P]laintiffs challenge the [agency's] actions on numerous grounds. Among these are two claims – challenges to arbitrary and capricious agency action – that plaintiffs describe as being asserted under the [APA]. * * * However, it is equally the case that plaintiffs' other arguments against the challenged actions – that they were undertaken without statutory authority, or that they violate statutory standards – should also be regarded and treated as claims under the APA. This is because the APA is a framework statute that provides the generally applicable means for obtaining judicial review of actions taken by federal agencies. Generally, except where a party challenges an agency action as violating a federal law * * * that has been interpreted as conferring a private right of action, or where a particular regulatory scheme contains a specialized provision for obtaining judicial review of agency actions under the scheme, review under a framework statute such as the APA is the sole means for testing the legality of the federal agency action.

(continued...)

To the extent that cases of other circuits cited by the Tribes suggest that section 702's waiver of sovereign immunity is not subject to section 704's requirement of final agency action, those cases are not consistent with the view of this Court. Moreover, while the Tribes rely primarily on decisions of the D.C. Circuit, it is not clear that those cases support the Tribes' broad view of section 702's waiver. For example, in Chamber of Commerce v. Reich, 74 F.3d 1322, 1324-1329 (D.C. Cir. 1996), cited at Br. 23, the challenged action included final regulations implementing an executive order, and the court concluded that, by virtue of APA section 702, sovereign immunity did not bar the plaintiff's suit. Likewise, in Clark v. Library of Congress, 750 F.2d 89, 99-102 (D.C. Cir. 1984), cited at Br. 22 n.1, 23, the challenged agency action included the failure to promote an applicant to any of forty positions, which is plainly a series of final agency actions; the court held that the waiver of sovereign immunity in section 702 encompassed the plaintiff's claim for reinstatement. In Sea-Land Service, Inc. v. Alaska Railroad, 659 F.2d 243, 244-245 (D.C. Cir. 1981), cited at Br. 22-23 n.1, 24, the court did not address section 704, but rather, held that while sovereign immunity did not bar the plaintiff's antitrust claim,

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[11/](...continued)
Clouser v. Espy, 42 F.3d 1522, 1527-1528 n. 5 (9th Cir. 1994) (emphasis added) (citing Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), and Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988)), cert. denied sub nom. Clouser v. Glickman, 515 U.S. 1141 (1995).

the Sherman Act does not expose an instrumentality of the United States to liability for conduct alleged to violate antitrust constraints.

None of these decisions of the D.C. Circuit holds that a plaintiff may invoke the waiver of sovereign immunity in APA section 702 to bring a common law claim against a federal agency while at the same time ignore the limitations on that waiver delineated in section 704. And in fact, more recent cases of the D.C. Circuit indicate that such is not that court's position. For instance, in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), cited at Br. 29, the court applied the final agency action requirement in determining whether the district court had subject matter jurisdiction over claims alleging breach of trust obligations grounded in federal law. See 240 F.3d at 1094-1095. An even more recent decision of the D.C. Circuit adopted a similar approach in a related context. See National Wrestling Coaches Ass'n v. Department of Education, 366 F.3d 930, 947 (D.C. Cir. 2004) (explaining that as to alleged non-statutory causes of action, the waiver of sovereign immunity under section 702 is limited by the "adequate remedy" bar of section 704), cert. denied, 73 U.S.L.W. 3415 (June 6, 2005).

Although the Tribes also rely on decisions of the Third Circuit, those cases do not support their broad view of section 702.[12/] Other cases relied on by the Tribes in support of their argument involved challenges to final agency action.[13/]

In sum, the district court properly held that the limitations on the waiver of sovereign immunity found in APA section 704 apply to the Tribes' common law breach of trust claim. The judgment of the district court should be affirmed on the

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Johnsrud v. Carter, 620 F.2d 29 (3d Cir. 1980),cited at Br. 24, 25, and Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979), cited at Br. 24, are inapposite. Neither case dealt with APA section 704. Rather, in Jaffee, the court concluded that section 702's limitation on the waiver of sovereign immunity to non-monetary relief did not bar the plaintiff's claim that the government was obligated to warn individuals about the medical risks associated with the test of a nuclear device to which they were allegedly exposed. 592 F.2d at 714-715, 718-719. In Johnsrud, the court found "no relevant distinction between this case and Jaffee," and thus concluded that a similar warning claim arising out of the Three Mile Island accident was not barred by sovereign immunity. 620 F.2d at 32.

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See Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 254-256 (D.D.C.), cited at Br. 29 (final Interior Department regulation allocating water between an Indian tribe and an irrigation district found arbitrary where the record was "completely devoid of any explanation or indication of the factors or computations which [the Secretary of the Interior] took into account in arriving at the diversion figure"), modified on other grounds, 360 F.Supp. 669 (D.D.C. 1973), rev'd in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975); Muckleshoot Indian Tribe v. Hall, 698 F.Supp. 1504, 1507, 1509-1516 (W.D. Wash. 1988), cited at Br. 29-30 (granting preliminary injunction against the Army Corps of Engineers' issuance of a permit allowing a developer to build a marina where the tribes demonstrated probability of success on the merits of their claim that the marina would infringe on fishing rights established by a treaty).

basis of the court's finding – which the Tribes do not contest – that the Tribes failed to challenge a final agency action of BLM that falls within the applicable statute of limitations period or is not moot with respect to the Zortman and Landusky mines.

III. THIS COURT NEED NOT ADDRESS WHETHER THE DISTRICT COURT CORRECTLY RULED THAT "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": THAT STATEMENT WAS NOT NECESSARY TO ITS DECISION AND, IN ANY EVENT, THE DISTRICT COURT ACCURATELY STATED CIRCUIT LAW.

A. As the Tribes acknowledge, the language on which they focus was not necessary to the district court's decision. The Tribes ask this Court to determine whether the above-quoted statement of law by the district court "conflates three distinct branches of Indian trust law jurisprudence." Br. 14; see id. at 27. However, as the Tribes themselves twice acknowledge, and correctly so, that portion of the district court's analysis was not necessary to its decision. See Br. 14 (referring to "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"); Br. 15 (noting that "the district court's language regarding Indian trust law is dictum").

Although the district court addressed the application of the federal government's trust obligation to this case (see E.R. 205-208), that discussion was not

necessary to the court's decision. Rather, as we have discussed, the judgment of the district court rests on a finding (which the Tribes do not contest) that the Tribes failed to challenge a final agency action of BLM that falls within the applicable statute of limitations period or is not moot with respect to the Zortman and Landusky mines. As the Supreme Court noted long ago, appellate tribunals "review[ ] judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956). Indeed, having correctly concluded that it lacked jurisdiction over the Tribes' claims, the district court lacked authority to address the law that would apply, were the claims heard on the merits. See Steel Co., supra, 523 U.S. at 94-95. Review of the question whether the district court's dictum reflects an erroneous understanding of Indian trust law should await a case in which that issue is squarely presented.

B. In any event, the district court accurately stated circuit law. Although the Tribes disagree with the district court's statement (E.R. 206) that "[i]n 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" (see, e.g., Br. 14, 33, 36), the district court's statement accurately reflects circuit law. "Federal agencies owe a fiduciary responsibility to Native American tribes. * * * * In the absence of a specific duty, this responsibility is discharged by 'the agency's compliance with general regulations and statutes not specifically aimed at protecting

Indian tribes.'" Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 479 (9th Cir. 2000) (quoting Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 574 (9th Cir. 1998)). See Skokomish Indian Tribe v. FERC, 121 F.3d 1303, 1308-1309 (9th Cir. 1997) (rejecting claim that FERC "must afford Indian tribes greater rights than they would otherwise have under the [Federal Power Act] and its implementing regulations"); Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (concluding that absent a proper trust corpus, the federal government owed no duty to the tribes apart from its obligations under a particular federal statute, which did not provide for judicial review); Nance v. United States Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir.) (finding that adequate procedures were provided by the Clean Air Act and regulations to fulfill EPA's fiduciary responsibilities toward the Crow Tribe respecting the redesignation of air quality standards applicable to the Northern Cheyenne Tribe's reservation), cert. denied, 454 U.S. 1081 (1981).

Other courts of appeals agree with this accepted view of the law. For example, in Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (1995), the D.C. Circuit, interpreting United States v. Mitchell, 463 U.S. 206, 224-225 (1983) (Mitchell II) and United States v. Mitchell, 445 U.S. 535, 542 (1980) (Mitchell I), in the context of an APA action, stressed that "the government's fiduciary responsibilities

necessarily depend on the substantive laws creating those obligations." The Court went on to hold:

> We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only."

56 F.3d at 1482 (quoting National Wildlife Fed'n v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980)).

While the Tribes invite the Court to use this case to "clarify" the law regarding the federal government's trust obligations toward Indian tribes (see Br. 38), in fact the Tribes seek alteration, rather than clarification, of extant circuit law on the subject. It is well established, however, that only this Court sitting en banc may overrule a prior panel decision. See, e.g., State of Montana v. Johnson, 738 F.2d 1074, 1077 (9th Cir. 1984); First Charter Financial Corp. v. United States, 669 F.2d 1342, 1347 (9th Cir. 1982). Accordingly, the Tribes' evident disagreement with the line of precedent exemplified by Okanogan Highlands and Morongo Band must be addressed to the Court en banc and not to this panel.

Moreover, contrary to the Tribes' assertion (Br. 38), this Court's precedent has not "led to the illogical result that the general trust obligation has no content or

meaning, and the federal government's [sic] owes no greater obligations to tribes than to any citizen." As cases such as Morongo Band and Shoshone-Bannock Tribes illustrate, the general trust relationship creates no enforceable obligations outside those duties created by a positive source of law, such as a statute or regulation. In this case, the United States does not hold any tribal property in trust, but even where Indian property rights are implicated, the term "trust" is something of a misnomer. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" Pawnee v. United States, 830 F.2d 187, 192 (Fed. Cir. 1987) (quoting Mitchell II, 463 U.S. at 224), cert. denied, 486 U.S. 1032 (1988). Thus, where the federal government has complied with applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no claim for breach of "trust" can be stated. Pawnee, 830 F.2d at 192. See, e.g., Parravano v. Babbitt, 70 F.3d 539, 547-548 (9th Cir. 1995) (Secretary of Commerce, as trustee of tribal interests, properly considered Tribes' federally reserved fishing rights in issuing regulations reducing the ocean harvest limits of Klamath chinook salmon for non-Indians under the Magnuson Act), cert. denied, 518 U.S. 1016 (1996).

Be that as it may, in this case, the district court found, and the Tribes do not contest, that the Tribes failed to challenge any final agency action of BLM that falls

within the applicable statute of limitations period or is not moot with respect to the Zortman and Landusky mines. The district court therefore had no need to rule on the scope of BLM's legal obligations toward the Tribes, had a timely claim been asserted. In addition, cases like Parravano and Northwest Sea Farms v. U.S. Army Corps of Engineers, 931 F. Supp. 1515 (W.D. Wash. 1996), cited at Br. 29, are situations where courts upheld agency action which had sought to protect federal reserved fishing rights. 70 F.3d at 547-548 (rights arising from executive orders); 931 F. Supp. at 1520 (rights arising from treaty). These cases do not suggest that an Indian tribe can bring an untimely non-APA action against the United States to enforce general trust claims.

Finally, at one point in their brief, the Tribes argue that, even under the district court's (allegedly erroneous) statement of the applicable law, the court should have found that, with respect to the Zortman and Landusky mines, the United States breached specific trust obligations to the Tribes found in the Treaty of Fort Laramie and in "discussions surrounding" the Grinnell Agreement. Br. 28-31; see supra, pp. 6-7. Again, whether this treaty and agreement may give rise to specific trust obligations on the part of the United States that are enforceable in federal court is entirely academic in this case. As the district court correctly ruled, the salient point is that such an alleged specific obligation must be brought in the context of a final

agency action that falls within the applicable statute of limitations period and is not moot. As the district court correctly found (and the Tribes do not contest), the Tribes failed to meet those conditions here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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STATEMENT OF RELATED CASES

Counsel for the appellees is aware of no related cases pending in this Court, as that term is defined by 9th Cir. Rule 28-2.6.