

April 23, 1998

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Attachment 3

Mr. Robert A. Winfree
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SWFSC 215, NAU
2500 S. Pine Knoll Drive
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Dear Mr. Winfree:

Thank you for your letter of April 3. I enjoyed meeting you and appreciated the opportunity to give a presentation to members of the Technical Work Group on the federal trust responsibility to Native Americans. I am enclosing a copy of the working paper which I prepared for the session and recently finalized. I also sent a copy of the paper to Mr. Moore pursuant to his request.

The Technical Work Group is engaged in an important and complex endeavor, and I am pleased that I could serve as a resource for the members of the Group. Please let me know if I may be of further assistance in the future.

Sincerely,



Rebecca Tsosie
Associate Professor and
Executive Director,
Indian Legal Program

Presentation for Glen Canyon Dam Technical Work Group:

Federal Agencies and the Trust Responsibility

by Rebecca Tsosie¹

I. Introduction:

The United States and Indian nations have shared a complex and often turbulent relationship for the past 200 years. This political relationship is unique, beset with conflict, and often hard to characterize. However, the essential feature of this political relationship is the trust responsibility of the federal government toward the Indian nations. The Trust Doctrine imposes several duties and obligations on the government with respect to its dealings with the Indian nations. Moreover, the Trust Doctrine has aspects that touch on international law and domestic policy, as well as the private common law applicable to fiduciaries. Today, I would like to discuss the historical basis of the Trust Doctrine and its contemporary relevance to the dealings of federal agencies with Indian nations.

II. The Historical Basis of the Trust Doctrine:

A. The Roots of the Trust Doctrine:

The federal trust responsibility has been recognized by the

¹ Associate Professor of Law and Executive Director, Indian Legal Program, Arizona State University. These comments have been prepared for oral presentation to the Glen Canyon Dam Technical Work Group. Those wishing to further examine the issues raised by this working paper are directed to two excellent articles by Professor Mary Christina Wood that fully discuss the Trust Doctrine and its contemporary application. See Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471; Protecting the Attributes of Native Sovereignty: A New Trust paradigm for Federal Actions Affecting Tribal Lands and Resources," 1995 Utah L. Rev. 109.

courts, Congress and the executive branch throughout the history of federal Indian law. The roots of the trust responsibility extend back to the earliest treaties between European governments and Indian nations. According to Professor Robert Williams, who has conducted a detailed historical examination of the treaties in the colonial era, two core principles emerge from the Classical Era treaty diplomacy: first, that the treaty creates a relationship of "sacred trust," and second, that the most important promise contained in the treaty is the promise of protection given a treaty partner in times of need or crisis. Williams claims that these themes of trust and protection were incorporated into the treaties between the Indian nations and the United States. For example, the Treaty of **Hopewell** with the Cherokee Nation, which was signed in 1785, offers "peace to all the Cherokees," and pledges to "**receive** them into the favor and protection of the United States of America."

The principles of trust and protection that emerged from the treaty relationship formed the basis for Chief Justice John Marshall's articulation of the United States' trust responsibility toward Indian nations in two foundational Indian law cases. Marshall's opinions in Cherokee Nation v. Georgia and Worcester v. Georgia defined the political relationship between the Indian nations and the United States, and began to articulate the dimensions of the federal government's unique responsibilities with respect to Indian nations. In Cherokee Nation v. Georgia, Marshall wrote that "**the** relation of the Indians to the United States is

marked by peculiar and cardinal distinctions which exist nowhere else."² According to Marshall, the guiding principles of Federal Indian law derived from the fact that the Indians recognize a relationship of trust arising out of their treaties with the United States: "**They** [the Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great **father**." Marshall described the political status of the Indian nations as that of "domestic, dependent nations."

Marshall's subsequent opinion in Worcester v. Georgia further articulated the federal government's **unique** trust responsibilities which emerged from the treaties. Marshall analyzed the treaties between the United States and the Cherokee Nation and found that the status of the Indians under these agreements "**was** that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master."³ Under Marshall's analysis, the federal government had a duty to protect Cherokee rights from incursions by the states and private citizens. According to Marshall, this duty stemmed from the treaties with the Cherokee Nation, as well as the Indian Commerce Clause of the United States Constitution, which provides that Congress shall have the sole and exclusive power to deal with Indian nations.

The duty of protection was also encompassed within federal

² 30 U.S. (5 Pet.) 1, 16 (1831).

³ 31 U.S. **515**, 555 (1832).

statutes such as the Trade and Intercourse Acts, which further defined the federal government's exclusive jurisdiction to regulate trade between non-Indians and the Indian nations. The Northwest Ordinance, passed by Congress in 1787, also formalized the federal government's broad duty of protection, stating:

"The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed . . . but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

As Professor Vine Deloria has noted, these words are not mere "poetic sentiment." Rather, they define clear principles which Congress intended as standards of behavior for the United States. In that sense, the Northwest Ordinance is a precursor of the modern day Trust Doctrine.

B. **The Substance of the Trust Doctrine:**

The Trust Doctrine that emerges from the treaties and Supreme Court's jurisprudence represents a formal acknowledgement of the United States' duty to protect tribal rights. This duty has several aspects: first, it has significance as a "moral obligation" that requires the utmost good faith and fair dealing from the United States government in its dealing with Indian nations; second, it is crucial to protect tribal rights, such as rights to natural and cultural resources, which are necessary to the

continued survival of Indian nations; and finally, it should act to constrain government actions that undermine tribal **self-government** and self-determination.

These aspects of the Trust Doctrine can be found in various opinions and federal statutes. However, it should not be forgotten that the United States government has, at various points throughout its history, refused to give full effect to the Trust Doctrine. For example, during the rapid westward expansion of the 19th Century, the federal government divested the Indian nations of thousands of acres of their traditional and treaty lands for the benefit of white settlers. During this period, the federal-tribal relationship was reconceptualized by some lawmakers as a "guardian-ward relationship," characterized by the extreme dependency of the tribes and the overwhelming power of the federal government to dictate Indian policy. In the words of the court in United States v. Kagama, the dependency of the tribes justified the exercise of nearly absolute federal authority over Indian tribes.

However, as Professor Mary Christina Wood notes, "despite Kagama's language, which associated plenary power with a **trust-like** responsibility inhering in a 'guardian-ward relationship,' it is critical to **delink** the trust doctrine and the plenary power doctrine."⁴ In particular, the association between the trust doctrine and plenary power has no place in the context of challenges to agency action because it is well settled that

⁴ Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471, 1504 (1994).

agencies do not have plenary power over tribes. Moreover, even though Congress is considered to have "plenary power" over the tribes, application of the Trust Doctrine became a way to critique the appropriateness of Congressional actions. For example, in Seminole Nation v. United States,⁵ the Supreme Court held that "in carrying out its treaty obligations with the Indian tribes," the government has "charged itself with moral obligations of the highest responsibility and trust." The government's conduct in such a case was analogous to the actions of a private trustee and should "be judged by the most exacting fiduciary standards."

This historical survey of Indian law demonstrates that during the 19th Century, the federal government used the Trust Doctrine as a rationale for federal power over Indian affairs. After World War II, with the increased attention to human rights principles, the United States began to address previous harms to Indian tribes, in part through the Indian Claims Commission. During this period, as Professor Robert Clinton notes, the legal doctrine of the federal trusteeship evolved into a source of **right**.⁶ The Trust Doctrine therefore became a legal theory under which the Indian nations could sue the United States for past wrongs.

III. The *Contemporary* Relevance of the Trust Doctrine:

The Trust Doctrine remains important in adjudicating tribal rights and federal responsibilities. Modern case law has further

⁵ 316 U.S. 286 (1942).

⁶ Comments by Professor Robert Clinton, 71 N. Dak. L. Rev. 369, 371 (1995).

defined the contours of the federal trust responsibility, and has highlighted its application to both Congressional and Executive action. Importantly, the executive branch has reaffirmed the Trust responsibility in several significant actions during recent years. For example, in 1994, President Clinton held a meeting with over 300 tribal leaders in which he pledged to fulfill the federal government's trust responsibility. Several agencies within the executive branch have developed or begun to develop trust policies to guide their actions with respect to Indian nations.

A. **The Contours of the Modern Trust Doctrine:**

As illustrated by the Supreme Court's decision in the Mitchell cases,⁷ the federal government's trust relationship with Indian tribes carries at least three different **aspects**.⁸ First of all, the federal government maintains a "general" trust relationship with the Indian tribes, which represents the government's historical obligation to protect tribal lands and tribal **self-government**, and to observe the "utmost good **faith**" towards the Indian people, as would a private fiduciary. Secondly, the federal government often enacts statutes, such as the General Allotment Act, which create specific duties in order to serve the purpose of the statute. Under this "limited" trust responsibility, the government affirmatively assumes certain duties in order to carry

⁷ See United States v. Mitchell, 445 U.S. 535 (1980) ("Mitchell I"); 463 U.S. 206 (1983) ("Mitchell II").

⁸ See Judith V. Royster, "Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources" 71 N. Dak. L. Rev. 327, 332-33 (1995).

out the specific goals of the statute. The third category of trust relationship is the full fiduciary relationship which arises from comprehensive federal management of tribal assets, whether that management is established by comprehensive federal statutes and regulations or by actual pervasive federal control. Not surprisingly, the full fiduciary relationship gives rise to enforceable fiduciary duties remediable by actions for damages or other relief for breach of trust.'

B. Application of the Trust Doctrine to Congressional Action:

Many Supreme Court cases have recognized Congress's fiduciary duties toward Indian tribes, and have affirmed its duty to act in good faith toward the Indian nations in the exercise of its duty to protect them. Despite these pronouncements, the Trust Doctrine has never been used to invalidate a federal statute. The Trust Doctrine has been used, however, to suggest a certain standard in dealing with Native American trust assets. For example, in United States v. Sioux Nation, the Court determined that Congress enjoys a fiduciary's power to manage the affairs of the Indian nations, including their lands and resources.' Congress can transfer treaty-guaranteed lands out of tribal ownership so long as it makes a "good faith **effort**" to provide the tribes with cash or property of equivalent value. To the extent, however, that Congress fails to do this, it will be held liable under the Fifth Amendment for

⁹ See United States v. Mitchell, 463 U.S. 206, 226 (1983).

¹⁰ United States v. Sioux Nation, 448 U.S. 371 (1980).

a taking of vested property rights without just compensation.

The Court has also recognized that because of its trust duties, Congress's actions toward Indian nations deserve judicial scrutiny under a rational basis test. Thus, Congress's actions must be "tied rationally to the fulfillment of [its] unique obligations toward the Indians." The Supreme Court has both acknowledged federal power over Indian affairs and suggested certain limitations that inhere in the fiduciary duties that attach to the exercise of federal power.

The Supreme Court has also affirmed Congressional power to terminate its trust relationship with particular Indian nations. The Termination legislation of the 1950s, for example, operated to terminate the federal trust relationship with certain Indian nations. Under most of these acts, the Tribe's lands and other assets were liquidated to cash, and individual tribal members were paid a lump sum in final "settlement" of the government's obligation to them. Thereafter, these individual tribal members were in the same position as non-Indian citizens within the state. Needless to say, the Termination era stands as a grim example to most Indian nations of yet another forcible assimilation policy, and suggests that cultural survival is jeopardized by the removal of lands and resources from tribal ownership.

c. **Application of the Trust Doctrine to Executive Action:**

A significant body of **caselaw** exists which enforces fiduciary

¹¹ Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974).

duties against the executive branch in its management of Indian affairs. Unlike Congress, agencies lack plenary power over Indian tribes, and thus in the context of executive action, the trust doctrine has been used as a tool to restrain, rather than authorize, federal actions. For example, the trust doctrine has been used to force the federal government to properly manage tribal trust funds; to consider tribal interests in adjudicating water rights; to clean up pollution on reservations; to protect Indian lands against trespassers and infringing development; to distribute income and proceeds to appropriate individuals; to prevent the improper conveyance of Indian lands; and to compensate tribes for resource mismanagement.

Federal Indian policy has increasingly moved from being the product of Congressional action to one of administrative action. Thus, Indian nations may enforce the federal fiduciary duty through equitable, declaratory, or mandamus relief in federal district court pursuant to the Administrative Procedure Act. Tribal claims to enforce the trust responsibility carry significant flexibility in this context because the federal district courts have broad authority to hear federal common law claims and to grant equitable and declaratory relief for such claims. In many cases, injunctive relief based on the trust responsibility is the preferred remedy to stop federal actions that would impair tribal rights.

The trust responsibility, however, may also form the basis for a tribe's suit for damages in the United States Claims Court, pursuant to the Indian Claims Commission Act, which is also known

as the Indian Tucker Act. In fact, the bulk of **caselaw** enforcing the trust responsibility resides in Court of Claims opinions awarding damages for breach of fiduciary duty. The Mitchell cases somewhat narrowed the application of the Trust Doctrine in the context of damages claims, suggesting that damages are only appropriate in cases where the Government assumes "elaborate control" of tribal property and assets, because in that case all of the necessary elements of a common-law trust are present: a trustee (the United States); a beneficiary (the Indian allottees); and a trust corpus (Indian timber, lands and funds).' The Court in Mitchell II reasoned that a damages remedy is essential to deter federal officials from mismanaging tribal resources.

IV. **The Importance of the Trust Doctrine for Tribal Natural and Cultural Resources.**

Tribal lands and resources, including natural and cultural resources, constitute the foundation for tribal cultural survival. Thus, the Trust Doctrine becomes an important means to protect Indian nations and ensure their continued cultural survival.

A. **Application of the Trust Doctrine to Natural Resources:**

The Trust Doctrine is an important legal tool to protect native rights to natural resources. The Trust Doctrine goes beyond specific treaty promises and embodies a clear duty to protect tribal lands and traditions tied to those lands. Indeed, the trust responsibility represents a focal point for Indian nations in their efforts to enforce federal protection of tribal lands and

¹² Mitchell II, 463 U.S. at 225.

resources. For example, the Columbia River Basin tribes, which possess treaty rights to harvest salmon, have urged federal agencies to fulfill their trust responsibility by restoring salmon runs, controlling water pollution, and conserving the natural flows of streams.

In the context of land and resources, it is important to acknowledge that the executive branch engages in two distinct roles that affect Indian land. First, the executive branch as trustee has an important role in managing tribal lands. Secondly, the government often takes action that incidentally affects Indian land. The trust analysis may vary depending upon which role is at issue.

1. **The Federal Government as Trustee:**

The BIA is the primary federal agency entrusted with responsibility for managing Indian affairs. In its role as trustee, the executive branch is often constrained by the language in statutes authorizing the management of Indian lands which mandates that the executive branch manage the land or resource in the "best interests" or "**for** the benefit" of the tribe. This type of language was present, for example, in the forest management statutes at stake in the Mitchell cases. Post-Mitchell decisions have found trust obligations arising from statutes conferring executive authority over tribal leases, mineral resources, timber resources, and water resources.

Moreover, the Eighth Circuit in Blue Legs v. United States Bureau of Indian Affairs found that the BIA and the Indian Health

Service (**IHS**) had a trust obligation arising from the Resource Conservation and Recovery Act (RCRA) to clean up hazardous open dumps on an Indian reservation.¹³ Although **RCRA** lacked specific language, the court recognized the existence of the general trust relationship between these agencies and the Tribe and found that "Congress intended the obligations of the BIA and the IHS under the **RCRA** to be exercised consistent with their trust obligation." Indeed, the government's general control over tribal trust lands can legitimate a court's finding of a trust obligation to protect such lands as the First Circuit held in Joint Tribal Council of the Passamaquoddy Tribe v. Morton.¹⁴

2. **Federal Action that Incidentally Affects Indian Land:**

The federal government through agencies such as the Forest Service, Fish and Wildlife Service and Bureau of Land Management exercises broad authority to manage public lands and natural resources such as water, forests, and wildlife. Moreover, the federal government, primarily through the Environmental Protection Agency, regulates pollution control on lands both within and outside of Indian Country. All of these actions can have substantial impacts upon tribal lands and resources, yet in none of these contexts is the particular federal agency statutorily vested with the same management responsibility of Indian lands as the BIA.

The question becomes, therefore, how the incidental effects

¹³ 867 **F.2d** 1094 (8th Cir. 1989).

¹⁴ 528 **F.2d** 370 (1st Cir. 1975).

of federal land management on tribal resources can be addressed through the trust doctrine. The treaties, of course, generally provide that reservation lands should be held by Indian nations to support their way of life in perpetuity, and also express the federal government's duty to protect such lands and resources for the benefit of the Indians. The duty to protect Indian lands would be meaningless if courts were unable to restrain federal actions that harm tribal lands and resources. In fact, a long line of cases affirms the willingness of the federal courts to impose a trust duty to protect Indian lands and resources from harm caused by the incidental effects of federal agency action.

For example, in Northern Cheyenne Tribe v. Hodel, a federal district court held that the Department of Interior violated the fiduciary duty owed to the Cheyenne Tribe by failing to consider the tribe's interests in issuing coal leases on eight tracts of public lands surrounding the reservation. The tribe asserted that massive coal development so close to the reservation would negatively impact the tribe's social, economic, and cultural welfare. The court enjoined further leasing of tracts located near the reservation and ordered rescission of all prior leases, declaring that: "a federal agency's trust obligation to a tribe extends to actions it takes off a reservation that uniquely impact tribal members or property on the reservation."¹⁵

¹⁵ 12 Indian L. Rep. 3065 (D.Mont. May 28, 1985) (mem.). The court later modified the remedy portion of the opinion in an order suspending the leases pending preparation of a Supplemental Environmental Impact Statement assessing the impacts of the coal development on the tribe. The tribe appealed, and the Ninth

In Pyramid Lake Paiute Tribe v. Morton, a district court overturned a Department of Interior regulation establishing the amount of water to be diverted to an irrigation district from the **Truckee River**.¹⁶ The river **serves** as the primary water source for Pyramid Lake, a desert lake located on the Pyramid Lake Paiute Tribe's reservation which is essential to the tribe's livelihood. Though the point of diversion was located off the reservation, the consequential decline in water flow seriously jeopardized the lake environment. The court found that the Secretary of the Interior had a fiduciary duty to the tribe to assert his authority "to the fullest extent possible" to preserve water for the tribe. The Secretary had reached his decision by making a "judgment call" that allocated the water resource between the tribe and the irrigation district'. The Court held that the Secretary had violated his fiduciary duty to the tribe by reaching such an "accommodation" and by failing to "justify any diversion of water from the Tribe with precision."

In a subsequent related case, the Ninth Circuit held that the Secretary of the Navy owed a fiduciary duty to the tribe to "preserve and protect" the Pyramid Lake fishery when leasing appurtenant water rights that could diminish water levels in

Circuit reversed that portion of the opinion dealing with the remedy, remanding to the district court to hold a hearing in order to determine whether the public interest would be served by voiding the leases. 851 **F.2d** 1152, 1157-58 (9th Cir. 1988). On remand, the district court issued a judgment voiding the leases. Northern Cheyenne Tribe v. Lujan, 804 *F. Supp.* 1281, 1286-91 (D.Mont. 1991) (mem)

¹⁶ 354 *F. Supp.* 252 (D.D.C. 1972).

Pyramid **Lake**.¹⁷ The court explicitly stated that the trust duty is not limited to management of tribal property, but instead extends to "**any** federal government action."

In United States v. Washington--Phase II, the district court found that the tribe's treaty right to take fish imposes a corresponding duty on the federal government and the states to ensure environmental protection of those fish." The tribes had argued that the fish runs were declining dramatically due to state actions impairing the fish habitat, and the court held that because it was possible that in time the "**right** to take fish would eventually be reduced to the right to dip **one's** net into the water ... and bring it out **empty**," it was necessary to "recognize an implied environmental right in order to fulfill the purposes" of the treaty. Although the Ninth Circuit later modified that holding, it has in other cases recognized a similar duty to protect treaty hunting and fishing **rights**.¹⁹

The EPA has expressly acknowledged its fiduciary duty toward the tribes. The **EPA's** Statement on Indian Policy recognizes that a trust responsibility derives from the historical relationship between the Federal Government and the Indian tribes and pledges.

¹⁷ Pyramid Lake Paiute Tribe of Indians v. United States Dept. of the Navy, 898 **F.2d** 1410 (9th Cir. 1990).

¹⁸ 506 F. Supp. 187 (W.D. Wash. 1980), aff'd, vacated in part, 759 **F.2d** 1353 (9th Cir.).

¹⁹ See, e.g., United States v. **Adair**, 723 **F.2d** 1394, 1410-11 (9th Cir. 1983) (holding that Klamath Tribe was entitled to a reservation of water sufficient to support its exercise of treaty hunting and fishing rights).

to protect the environmental interests of Indian Tribes when carrying out its responsibilities that **may** affect the reservations." The **EPA's** fiduciary duty is also recognized in CERCLA (the "Comprehensive Environmental Response, Compensation and Liability Act"), which provides for recovery of natural resources damages associated with the release of hazardous substances on public and Indian lands. Although CERCLA contains an exemption from liability for releases that are authorized by federal permits or **licences**, the statute specifically provides that with respect to Indian lands, the exemption is only applicable if the "issuance of that permit or license [is] not inconsistent with the fiduciary duty of the United States with respect to such Indian **tribe.**"

As this discussion demonstrates, Indian nations may continue to invoke the trust responsibility as a means of seeking equitable relief for federal action taken either in exercise of the government's role as trustee, or in the context of incidental effects of other federal land management responsibilities.

B. **Application of the Trust Doctrine to Cultural Resources:**

The continued survival of Indian nations is to a great extent dependent upon the tribes' ability to protect and preserve their cultural resources. Due to the integration of the natural world with tribal cultures and religions, there is a vivid connection in many cases between protection of tribal natural resources and cultural resources. It is therefore important to acknowledge that federal actions--whether undertaken in a land management capacity on the reservation or as incidental action off the reservation--

may have profound impacts on tribal cultures. Activities such as coal strip-mining or hydroelectric power plants can have severe impacts on sacred sites, natural springs and other water sources, and fish and wildlife resources that have religious connotations. For example, Hopi traditionalists have vehemently condemned the coal strip-mining taking place on Black Mesa, asserting that this activity desecrates a place that has deep spiritual significance to the Hopi people and threatens natural springs and other sites that are essential to the continuance of Hopi life.²⁰

Many federal statutes and executive orders recognize tribal interests in protecting cultural resources and serve to guide the developing discussion about the role of the federal trust responsibility in protecting such resources. These statutes and orders should be consulted by federal agencies concerned about the permissible scope of various land management activities. In particular, **NEPA** requires some assessment of the impacts of federal activities under various federal statutes, including the American Indian Religious Freedom Act and the various statutes that apply to protect cultural resources. The scope of this assessment, of course, varies somewhat depending upon whether the federal action will have a "significant impact on human health and the environment," thus meriting a detailed environmental impact

²⁰ See, e.g., *Lomayaktewa v. Hathaway*, 520 **F.2d** 1324 (9th Cir. 1975) In this case, Hopi traditionalists challenged the Tribal Council's decision to lease Black Mesa for coal strip-mining; they asserted that strip mining was a desecration and contrary "to everything that Hopi culture and religion **mean.**" The suit was eventually dismissed for failure to join an indispensable party--the Hopi Tribe.

statement. I would like to discuss some of the primary federal statutes that apply to protect what Indian nations would describe as "cultural resources."

Under the Archaeological Resources Protection **Act**,²¹ the federal government has a duty to protect archaeological resources on federal and Indian lands from exploitation by individual collectors and commercial interests, and to foster the professional gathering of information for future benefit. ARPA is hardly responsive to the full array of tribal interests in cultural resources protection, however it does provide a legal mechanism to take enforcement against individuals who excavate on tribal or federal lands without obtaining the appropriate permits, and it even applies to the sale in interstate commerce of objects obtained from private or state lands in violation of state law.²² ARPA also contains provisions requiring notice and consultation with an Indian tribe whenever issuance of a permit could result in harm to or destruction of any site with religious or cultural significance to a tribe.

The Native American Graves Protection and Repatriation **Act**²³ is intended to allow Native Americans to protect their cultural and spiritual heritage and repatriate their dead. The statute requires federal agencies and federally funded museums and institutions to

²¹ 16 U.S.C. 470aa et seq.

²² See, e.g., *United States v. Gerber*, 999 **F.2d** 1112 (7th Cir. 1993).

²³ 25 U.S.C. 3001 et seq.

inventory their collections to ascertain whether they have any Native American remains, funerary objects, sacred objects or objects of cultural patrimony. Any such items within the possession and control of such agencies and institutions must be repatriated to the appropriate Indian nations upon their request.

NAGPRA also applies to intentional or unintentional actions on federal or tribal lands which result in excavation of any of the listed objects. NAGPRA contains detailed provisions highlighting the need for notice to affected tribes and consultation with them prior to going forward with the excavation activity, with an intent toward the protection of such items and their eventual repatriation back to the Indian nations concerned.

The National Historic Preservation Act applies to assess the impacts of development activities on significant historic resources, including any structure, area or district listed or eligible for listing on the National Register of Historic **Places**.²⁴ Sites that have religious and cultural significance to Indian nations may be eligible for listing on the National Register even if they are essentially "natural" (e.g. as opposed to "manmade") properties. The **NHPA** covers "Traditional Cultural Properties," which are sites that are associated with the cultural practices and beliefs of a living community and are important in maintaining the continuing cultural identity of the community. Thus, the NHPA has relevance as a potential means to protect mountains and other natural features of the land that constitute "sacred **sites**" to an

²⁴ 16 U.S.C. 470 et seq.

Indian nation. Under the 1992 amendments to the NHPA, for example, if a proposed federal undertaking might affect a sacred site which is eligible for listing on the National Register as a Traditional Cultural Property, the agency must consult with the tribe as part of the section 106 process. This requirement applies regardless of the ownership status of the land.

The Executive Order on Indian Sacred Sites²⁵ is another tool to protect the interests of Indian nations in preserving sacred sites from harmful development activities. The Executive Order requires federal agencies with responsibility for management of federal lands to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and avoid adversely affecting the physical integrity of such sites. The Order specifies that it does not "create any right, benefit or trust responsibility, substantive or procedural," which would be enforceable "at law or equity" by any party against the United States or its officers or agencies. However, the Executive Order is clearly designed to protect tribal interests in important cultural resources, and in that sense, the Executive Order bolsters the general trust responsibility of the federal government to protect tribal cultural rights.

Professor Mary Christina Wood has suggested that the Trust Doctrine might prove more responsive to tribal cultural and religious needs than a claim based on the First Amendment because a trust claim encompasses the "complex interrelationship between

²⁵ 61 FR 26771 (May 24, 1996).

culture, religion, spirituality and tradition" that defines tribal ways of life and provides a standard of "affirmative protection" of native cultural and religious **vitality**.²⁶

Professor Wood suggests that one of the primary challenges to effective use of the Trust Doctrine to protect tribal cultural resources is to "instill a sensitivity in both the federal agencies and the judicial system" for tribal world views, which integrate concepts of religion with the natural environment. Tribal sovereignty should provide an important basis for such an ethic of respect. Tribal sovereignty, according to Professor Wood, contains at least four distinct elements that may serve as focal points for trust analysis: (1) a stable land base; (2) a functioning economy; (3) the ability to govern; and (4) cultural and religious vitality. Wood asserts that the trust doctrine should afford protection to all four attributes of sovereignty, just as all of these attributes of sovereignty have received validation in the law to some degree through treaties, statutes, and judicial opinions.

v. Conclusion: **The** Future of the Trust Doctrine within Federal Indian Law

The Trust Doctrine represents a **unique** opportunity for the United States to protect the important treaty promises it has made to Indian nations over the past two centuries. The policy shifts within the history of federal Indian law have been dramatic. Yet

²⁶ Mary Christina Wood, "Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources," 1995 Utah L. Rev. 109, 210-11.

today the federal government has pledged to respect tribal rights to self-determination, including the right to manage and preserve tribal natural and cultural resources. Tribal sovereignty is multidimensional and forms a critical foundation for tribal rights to cultural and political survival. Yet the federal courts have shown a marked lack of consistency in interpreting the nature and scope of tribal sovereignty and tribal rights. The federal trust responsibility becomes a way to critique Congressional and Executive actions in an era of self-determination to see whether these actions measure up to the moral and legal commands of the Trust Doctrine. The Trust Doctrine should not be viewed as a tool of the paternalistic history of federal Indian law, but a compact between nations that stems from the treaty era and is currently available to adjudicate the rights of Indian nations and the responsibilities of the federal government.