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RISING TIDES, RISING OBLIGATIONS:
ENFORCING TRIBAL TRUST RESPONSIBILITY FOR CLIMATE CHANGE MITIGATION

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The trust responsibility, in the context of Federal Indian Law, is the unique political and legal relationship between the federal government and Native nations. The theory is based on the exchange of federal authority over Native peoples for their protection and well-being under the treaties signed between them. History has shown that the Government seldom acts in compliance with this relationship. Despite the trust's colonialist doctrinal roots, Native nations continue to cite this relationship as a tool to protect their remaining resources. In the years since Cherokee Nation*, which first discussed the trust relationship, the nature and extent of the relationship has been inconsistently applied by all government branches, to the point where many remain skeptical to the trust's utility in the 21st century.*

The Trump administration continues to divest from previous efforts to reduce, or even study, the impacts of climate change in the face of rising average global temperatures and attendant environmental consequences. Native nations bear the brunt of the consequences as water becomes scarcer, forests burn and die off, and access to traditional resources becomes more difficult. While the trust responsibility is not often seen as a method to compel equitable relief, such as specific performance of treaty provisions, this Note will show that the canon of Federal Indian Law supports an affirmative, actionable trust responsibility that would bind federal agencies to climate change reduction efforts. The federal government must carry out its obligation to protect Tribal trust resources under

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their management, including mitigating climate change to minimize losses to such resources. The legal remnants of the original trust doctrine still retain enough power to control federal action in this regard, under the Administrative Procedure Act and the Indian Claims Commission Act. This new application of the trust to climate change mitigation could be a useful tool to turn a traditionally hollow, paternalistic doctrine into a means of crafting a sustainable future for Indigenous communities in line with its original intent.

I. Introduction

In looking to accountability of the Supreme Court to Indigenous rights, such iconic quotes as "[s]poliation is not management,"[1] or "[g]reat nations, like great men, should keep their word"[2] quickly come to mind. Yet, when the Supreme Court, and lower courts in turn, apply those concepts to Federal Indian Law, they are frequently the exception rather than the rule. In a recent Congressional hearing, the Associate Deputy Secretary of the Department of Interior described the responsibilities of the Department of Interior to Native nations as merely a "historical responsibility," but explicitly denied any kind of a moral or legal responsibility.[3]

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[1] *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 498 (1937).
[2] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (J. Black, dissenting).
[3] *Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Oversight Hearing Before the H. Subcomm. on Indian, Insular and Alaska Native Affairs*, 115th Cong. (2017) (statement of James Cason, Deputy Assistant Secretary, Bureau of Indian Affairs).

What's most interesting is not that Deputy Secretary Cason disavowed the idea that—in the face of centuries of United States colonization—the federal government owes any responsibility to the people from whom it has stolen lives, land, children, and traditions, forcibly displaced, and continues to politically marginalize. However, what's most interesting is that today the question remains must: exactly what responsibility *does* the United States government have in upholding treaties and managing Tribal assets? The question has been presented in a myriad of ways, from the Removal Era to Self-Determination, as demanded by constant political change in domestic Indian policy. The answer almost always finds a way to deprive Native peoples in the same ways since the first treaties were signed.

Indian Affairs is housed in the Department of Interior, which began halting progress in climate change research and mitigation under the Trump administration.[4] Former Secretary of the Interior Ryan Zinke joked to the House Committee on Appropriations that the glaciers in Glacier National Park have been melting since the end of the Ice Age.[5] While there is no denying that the planet is overall warmer than it was when ice covered the Earth, there is also no denying the fact that human-based warming is taking place, and creating serious consequences. The last two years have been the warmest on record.[6] Consequently, wildfires and hurricanes in the United States have intensified.[7] In light of this, the upper ranks of the United States government remain unwilling, if not antagonistic, to implement methods to curb global warming.

Climate change is also taking a toll on Indigenous land. As sea levels rise, the Native Village of Kivalina, Alaska, inches closer to the sea with each passing season.[8] Climate change threatens not just coastal Native villages, but also Native forests, hunting animal populations, and access to water. When political methods fail, what tools will craft a future where future generations can survive? The law, hopefully, is one we can explore here. Our political system is one that has never

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[4] *See* Lisa Friedman, *Trump Takes a First Step Toward Scrapping Obama's Global Warming Policy*, N.Y. TIMES, (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/climate/trump-climate-change.html; Rene Marsh and Gregory Wallace, *EPA makes 'climate change' vanish from four-year plan*, CNN (Oct. 11, 2017), http://www.cnn.com/2017/10/11/politics/epa-climate-report/index.html.

[5] *Department of the Interior Budget Hearing Before the H. Subcomm. on Interior, Environment, and Related Agencies*, 115th Cong. (2017) (statement of Ryan Zinke, Secretary, Department of the Interior).

[6] Scott Neuman, *2016 Hit Records for Global Temperature and Climate Extremes*, NPR (Aug. 10, 2017), http://www.npr.org/sections/thetwo-way/2017/08/10/542720189/2016-hit-records-for-global-temperature-and-climate-extremes.

[7] Sabrina Shankman, *Costs of Climate Change: Early Estimate for Hurricanes, Fires Reaches $300 Billion*, INSIDE CLIMATE NEWS (Sept. 28, 2017), https://insideclimatenews.org/news/28092017/hurricane-maria-irma-harvey-wildfires-damage-cost-estimate-record-climate-change.

[8] Maria L. La Ganga, *This is climate change: Alaskan villagers struggle as island is chewed up by the sea*, L.A. TIMES (Aug. 30, 2015), http://www.latimes.com/nation/la-na-arctic-obama-20150830-story.html.

truly contemplated Indigenous participation,[9] but Native leaders may have a trump card born from that very system used to justify the occupation: federal trust responsibility. Regardless of whatever responsibilities the Executive thinks it has or does not have towards Native nations, courts have long recognized basic duties to protect Tribal natural resources. These duties can and should be used as tools to demand climate change mitigation at a federal level.

This Note will first explore the origins of the trust responsibility, from the doctrines of the *Marshall Trilogy* through the modern-day application of trust principles. These principles will form the foundation, through the Indian Claims Commission Act and Administrative Procedure Act, for the legal actions Native nations may take against the government for its breach of fiduciary duties. Second, this Note will identify the trust corpora, Tribal natural resources under the management of the Government, the statutory framework that gives rise to their protection, and the impacts of climate change impacting the trust corpora. Finally, this Note will synthesize the application of the trust principles to the effects of climate change on Tribal resources, and suggest the means by which legal action can enforce protection against climate change impacts.

II. The Origins and Meaning of the Trust Responsibility

A. Trust Responsibility, Plenary Power, and Throwing Out the Constitution

History shows us that, as Justice Thomas so eloquently put it, "Federal Indian policy is, to say the least, schizophrenic."[10] What suited the whims of one generation of jurists on the proper approach to Indian Law was later discarded to suit the policy of the week, a tradition that endures to this day. This section will address the line of cases touching directly on the trust responsibility post-*Marshall*, from the 19th century to today. These cases contain specific language that builds the context for the exact meaning of the trust that cannot yet be escaped in modern law. Each era represents not only a change in the legal regime, but also in the political. Setting up the best framework of the modern trust responsibility involves looking to the history and asking: Do these cases create or enforce a fiduciary duty? If so, what is the nature of that duty?

The trust responsibility as a principle of United States jurisprudence has understandably drawn the ire of Federal Indian Law students and practitioners alike. After all, reading Chief Justice John Marshall's language in the foremost case establishing the trust relationship, *Cherokee Nation v. State of Georgia*, does not inspire confidence in the legal system: "[T]hey [Native peoples] are in a state

[9] *See Talton v. Mayes*, 163 U.S. 376 (1896) (holding that Native nations' non-participation in the Constitution precluded its application to Tribal courts); *see also* Indian Citizenship Act of 1924, 68 P.L. 174, 43 Stat. 253, 68 Cong. Ch. 232.
[10] *United States v. Lara*, 541 U.S. 193, 219 (2004) (J. Thomas, dissenting).

of pupilage. Their relation to the United States resembles that of a ward to his guardian."[11] The enduring legacy of the trust relationship, however, is a bit of silver lining from a string of decisions based on legal justification for forced removal and genocide. The "solemn commitment of the Government toward the Indians"[12] is as fundamental to the development of Federal Indian Law as the repugnant justifications for its existence as a field. The paternalistic and outright racist language that birthed the trust was a product of the white man's courts–but it must not be forgotten that a paternalistic trust was an obligation voluntarily undertaken by federal courts as a means of treaty interpretation. It has been persistent since its inception, and, as the very essence of the entire legal relationship between Native nations and the federal government, can be thrown out no more easily than federal superintendence over Native affairs.

Yet the Supreme Court today can be just as paternalistic towards Native nations than it was in 1886.[13] With the courts refusing to repudiate centuries of faulty legal decisions on Native issues, perhaps one last-resort means for environmental justice in Indian Country is to use the rusted tools left behind in those decisions to create something better and stop the continuing degradation of Indian Country.

The specific language in *Cherokee Nation* is one of these tools. Breaking *Cherokee Nation* down to its basic elements reveals this principle: Native peoples and their governments are not entirely sovereign nations, but rather they have yielded their exclusive sovereignty to the United States in exchange for the "protection" of the United States.[14] Marshall saw the process as:

> [A] people once numerous, powerful, and independent. . .yield[ing] their lands by successive treaties, *each of which contains a solemn guarantee of the residue*, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. . .to preserve this remnant, the present application is made.[15]

The Court continued that the Cherokee looked to the U.S. government for protection and relied upon its kindness and power, appealed to it for relief to their wants.[16] In Marshall's last major decision for Indian Country, *Worcester v. Georgia*, the essence of the trust relationship is even more specifically delineated:

> The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They [United States] receive the Cherokee nation into their favour and protection. The Cherokees

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[11] *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831).

[12] *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

[13] *See generally, City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

[14] *Cherokee Nation*, 30 U.S. at 17 (1831).

[15] *Id.* at 15.

[16] *Id.* at 17 (1831).

> acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.[17]

The Court looked to provisions within the Treaty of Hopewell giving the federal government power to regulate their affairs for their benefit, without sacrificing their internal sovereignty.[18]

The trust responsibility, while clearly paternalistic in nature, was the consideration given in exchange for colonization. The trust responsibility thus calls to mind a basis in contracts principles.[19] As Daniel Rey-Bear and Matthew Fletcher described:

> The federal-tribal trust relationship is based in part on [common law contracts] principles, because the treaties which historically provided the basis of federal-tribal relations were fundamentally and necessarily contracts. In particular, federal-Indian treaties and agreements are essentially contracts between sovereign nations, which typically secured peace with Indian tribes in exchange for land cessions, which provided legal consideration for the ongoing performance of federal trust duties.[20]

Under common notions of contract theory, both parties should be legally responsible for upholding their ends of the bargain. The land cessions have already taken place, yet the ongoing performance of trust duties is not taking place.

1. Because I Said So: *Crow Dog*, *Kagama*, *Sandoval*, and *Lone Wolf*

Some fifty or so years after the *Marshall Trilogy*, the Court reassessed the nature of the trust. The backdrop for this period of law was westward expansion, the Allotment Era–where, under the General Allotment Act,[21] land was divested from communal Tribal ownership, parceled out to individual Indians under the

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[17] *Worcester v. State of Georgia*, 31 U.S. 515, 518 (1832).
[18] *Id.*
[19] Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Envtl. & Admin. L. 397, 402 (2017).
[20] *See also* Indian Trust Asset Reform Act, Pub. L. 114-178, § 101(4)–(5), 130 Stat. 432, 433 (2016) (to be codified at 25 U.S.C. §§ 5601(4)–(5)) ("[T]he fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and. . . the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed.").
[21] General Allotment Act, 24 Stat. 288, 25 U.S.C. § 331 *et seq.* (1887).

trust of the United States, with the "surplus" land sold off to white settlers. If jurisprudence reflects dominant societal values at all, the late 1800's cases demonstrate the Court's lack of concern finding extraconstitutional justification for executive and congressional anti-Indian policies.

Ex Parte Crow Dog was a brief glimpse of hope for Tribal sovereignty during an era of genocide and mass displacement. Kan-gi-shun-ca (Crow Dog), a member of the Sičháŋğu Oyáte (Brulé Sioux), was convicted of murder of another member of his Tribe under U.S. law.[22] The Court considered his habeas petition, facing the decision of whether he could be prosecuted under U.S. law.[23] Under their treaty, the Sioux were "subject to the law of the United States."[24] The Court applied the principle from *Worcester* that the guardian-ward relationship did not deprive the Sičháŋğu Oyáte of self-governance, nor did it subject them to the laws of the United States without "a clear expression of the intention of Congress."[25] The Sičháŋğu Oyáte were not citizens, but rather "a dependent community who were in a state of pupilage. . . ."[26] Being subject to the laws of the United States acknowledged their allegiance therein, and,

> [t]he corresponding *obligation of protection on the part of the government* is immediately connected with it, in the declaration that each individual shall be protected in his rights of property, person, and life, and that *obligation* was to be fulfilled by the enforcement of the laws then existing appropriate to those objects, and by that future appropriate legislation which was promised to secure to them an orderly government.[27]

The Court was explicit that treaties created mutual obligations: the government was obligated to exercise control over the Tribe such that their self-governance and well-being were protected, and the Tribe was obligated to peace under this relationship.[28]

In response, Congress passed the Major Crimes Act,[29] fulfilling that express intent of Congress needed to subject all Native people to certain criminal liabilities. When the law was challenged in *United States v. Kagama*, the Court interestingly noted: citing the Indian Commerce Clause as a basis for Congress' power to enact Indian Country criminal statutes was a "very strained construction of this clause. . .."[30] Instead, the power to enact these statutes came "[f]rom [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised,

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[22] *Ex parte Kan-gi-shun-ca*, 109 U.S. 556 (1883).
[23] *Id.*
[24] *Id.*
[25] *Id.* at 556, 568, 572.
[26] *Id.* at 569 (1883).
[27] *Id.*
[28] 15 Stat. 635 (1868).
[29] 23 Stat. 385 (1885); 18 U.S.C. § 1152 (2018).
[30] *United States v. Kagama*, 118 U.S. 375, 378 (1886).

there arises the duty of protection, and with it the [lawmaking] power."[31] The Court saw this exercise as a necessary duty to protect Native peoples, much like that of *Crow Dog*. The Court later affirmed this idea of power derived outside of the Commerce Clause in *United States v. Sandoval*, noting:

> [n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.[32]

Most importantly though, if *Kagama* and *Sandoval* can exist extraconstitutionally, then the trust responsibility is rooted in, and can be exercised as, a unique principle of law that is not constrained by constitutional or statutory authority. This is a frightening proposition to vest near-unlimited power in Congress with no discernible parameters. However, those parameters are the trust—a duty of protection for the well-being of Native peoples.

The Court's next move in *Lone Wolf v. Hitchcock* is the foremost example of the boundless application of plenary power. As mentioned before, the political influences surrounding Indian Law in the courts distort the legal approach with which cases are decided. Here, the context was defending Congress' decision to abrogate the Kiowa treaty rights and allot out their lands in a process that was wrought with deceit, fraud, and a stunning lack of fair negotiation.[33] The Court observed that:

> Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. . . the power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest

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[31] *Id.* at 384. One person's trash is another's treasure. Philip Frickey, and also the Sixth Circuit in *U.S. v. Doherty*, found the lack of basis for the trust and plenary power to be "an embarrassment of constitutional theory...of logic...[and] of humanity." *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 35 (1996); *United States v. Doherty*, 126 F.3d 769, n.2 (6th Cir. 1997). While the plenary power of *Kagama* and *Lone Wolf* are jurisprudential blemishes, they are still good law, and evidence of the United States' voluntary and everlasting duty of trust to Tribes.

[32] *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913).

[33] Ann Laquer Estin, *Lone Wolf v. Hitchcock: The Long Shadow, in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880'S, 215, 216-34 (Sandra Cadwalader & Vine Deloria, Jr., eds. 1984).

of the country and the Indians themselves, that it should do so.[34]

This appears to conflict with the trust as outlined until this point, excepting the assumption of consistency with "perfect good faith" that is allegedly left as a political question.[35]

Lone Wolf left the trust in an awkward position. On one hand, the trust duty is not expressly abrogated itself—Congress has a moral obligation to act in good faith with its treaties as it would a foreign nation; but on the other hand, Congress has free legal discretion to violate treaties as it feels necessary to benefit tribes, regardless of the ultimate effect on their well-being or protection. As Rey-Bear and Fletcher elaborate, the good faith principle is a basic tenet of common law trusts, where the trustee must not profit at the expense of the beneficiary and has a fiduciary duty to protect the trustee's interests from other as well as misconduct by the trustee themselves.[36] Could this be the nature of the intent behind *Lone Wolf*? Likely not, because the government clearly sought to benefit at the expense of the beneficiary, the Kiowa Tribe. Chambers proposes that in lieu of seeing plenary power as an unquestionable bright-line rule, the express terms of a treaty or agreement, alone or together with ordinary fiduciary principles, could provide in appropriate cases a measuring standard useful in determining whether or not the United States has met its obligations as trustee.[37] Chambers argues that, as far as courts are concerned, the entire trust is nothing more than *Lone Wolf*'s strict moral obligation, with no justiciable enforcement mechanism.[38] However, the line of cases following *Lone Wolf*, as Chambers notes, indicates that the trust has enforceable limits, at least on executive action, up to and including equitable remedies.[39]

2. Light in the Dark: *Santa Rosa Pueblo*, *Cramer/Creek*, *Shoshone*, *Seminole*, and *Pyramid Lake*

The early 20th century, post-*Lone Wolf,* brought evolving approaches to trust cases before the Court. Several of these cases, such as *Lane v. Pueblo of Santa Rosa*,[40] *Cramer v. United States*,[41] *United States v. Creek Nation*,[42] and *Shoshone Tribe v. United States*,[43] move the approach closer to traditional notions of a fiduciary-trust relationship. During this time, the U.S. government was

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[34] *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903).
[35] *Id.* at 566.
[36] Rey-Bear & Fletcher, *supra* note 18, at 406 (2017).
[37] Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1227 (1975).
[38] *Id.*
[39] *Id.* at 1230.

[40] *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).
[41] *Cramer v. United States*, 261 U.S. 219 (1923).
[42] *United States v. Creek Nation*, 295 U.S. 103 (1935).
[43] *Shoshone Tribe v. United States*, 299 U.S. 476 (1937).

transitioning from the Allotment Era to the Reorganization Era, named for the Indian Reorganization Act of 1934 (IRA)[44]. The IRA sought to end allotment practices, and help restore Native nations to a place of self-sufficiency in the eyes of the Department of Interior officials.[45] Following the establishment of the Indian Claims Commission and Indian Court of Claims (ICC) in 1946,[46] Native nations had a forum in which they could monetarily settle claims for various transgressions at the hands of the United States. This was part of a larger scheme of the Termination Era, where the United States government began terminating its trust relationship with Native nations as a means of political and cultural assimilation.[47] However, in situations where a trust relationship was not terminated, that acknowledged relationship remained. As the federal government shifted towards proclaiming self-determination and honoring obligations, so too did the Court for a brief time. The following cases establish that the Court has both acknowledged the fiduciary-trust relationship explicitly, but also implemented it in such a way that has compelled executive action.

In *Pueblo of Santa Rosa*, the Department of Interior offered to sell property within a Tohono O'Odham pueblo as public lands.[48] The Pueblo sued the department, on the grounds that their fee title to the land in issue endured the acquisition of southern Arizona from Mexico, and thus the land was not the department's to sell.[49] Over the arguments that *Lone Wolf* had granted the department the plenary power to dispose of Indian land at will, the Court held that the department could not sell the land because:

> [Their ward status] has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. *That would not be an exercise of guardianship, but an act of confiscation*.[50]

Following that line of logic, in *Cramer*, the Court cancelled part of a land patent granted to a railway company that had been occupied by a local group of Native peoples.[51] The Court found that title of occupancy of the Natives pre-empted the sale of the land, and that the United States could cancel the grant when it was in line with United States policy.[52] This policy was based on a line of cases

[44] 48 Stat. 984 (1934).
[45] *Id.*
[46] 60 Stat. 1049 (1946).
[47] David Getches, et al. *Cases and Materials on Federal Indian Law.* Ch. 4 § C (West Academic, 7th ed., 2017).
[48] *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).
[49] *Id.* at 111.
[50] *Id.* at 113.
[51] *Cramer v. United States*, 261 U.S. 219 (1923).
[52] *Id.* at 232-33.

establishing the United States' desire to respect aboriginal title, and protect the rights of Native property from the "greed, rapacity, cunning, and perfidy"[53] of white man.[54] The Court in *Creek Nation* similarly took a focus on protecting property rights. In *Creek Nation* an inaccurate survey led to Creek land being allotted to the Sac and Fox Nation, and eventually sold off to white settlers, with the money being credited to the U.S. treasury.[55] Citing *Santa Rosa Pueblo*, the Court found that:

> While extending to all appropriate measures for protecting and advancing the tribe, [the power to manage and sell Indian land] *was subject to limitations inhering in such a guardianship* and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'[56]

Confiscation and mismanagement continued to be a theme in *Shoshone*. In *Shoshone*, the Eastern Shoshone were promised by treaty that they would have "exclusive occupation" of the land reserved to them on the Wind River Reservation; yet less than a decade later, the U.S. Army forcibly marched many members of the Northern Arapaho Tribe to the Shoshone reservation, and, to put it simply, left them there to wait indefinitely for their own reservation.[57] The U.S. Government eventually began treating the reservation as though it was both Tribes' lands, and the Shoshone sued for the lost one-half interest implicitly granted to the Northern Arapaho.[58] The Court agreed that the Treaty imposed a duty to remove non-Shoshone, and that not doing so was a dereliction of the Government's duty.[59] Moreover, they noted that the "Commissioner of Indian Affairs was not empowered to fix the future policy of the government, still less to exercise in its behalf the power of eminent domain."[60] The government may manage or dispose of land for the "benefit" of Tribes, but, looking to *Pueblo of Santa Rosa*, that does not negate the responsibility to give just compensation for, as the Court admonished, "spoliation is not management."[61]

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[53] *United States v. Gray*, 201 F. 291, 293 (8th Cir. 1912). *See also United States v. Fitzgerald*, 201 F. 295, 297 (8th Cir. 1912). Both cases contain an interesting discussion on the interest the United States has to protect Indian property, in these situations from outside entities, as a matter of public policy. *Cramer* extends that policy to actions where the Department of Interior sells Indian lands and does not retain their right of occupation.

[54] *Cramer,* 261 U.S. at 233.

[55] *United States v. Creek Nation*, 295 U.S. 103 (1935).

[56] *Id.* at 110 (*citing Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919)).

[57] *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476, 487 (1937).

[58] *Id.* at 490.

[59] *Id.* at 494.

[60] *Id.*

[61] *Id.* at 498.

The message sent by the Court in these cases was not, as one may infer from *Lone Wolf*, that the paternalistic relationship of the U.S. in managing Tribal affairs and resources was one of unlimited and unguided power. Rather, the guardianship provided a floor that the Government's non-legislative actions could not fall below. *Lone Wolf* allows Congress to adjust that floor, but once a trust relationship is established, Secretarial action must fall within the boundaries of what then became a trusteeship.

Chambers was quick to point out that the "limitations inhering in such a guardianship" mentioned in *Creek Nation* were not very well defined.[62] The modern Court has vaguely eschewed notions that the trust responsibility operates pursuant to the standards of trust law.[63] In *Seminole v. United States*, the Court pointed to a well-known and oft-cited corporate fiduciary case, *Meinhard v. Salmon*, to supplement its analysis, and the language quoted bears repeating:

> Many forms of conduct permissible in a workaday world for those acting at an arm's length, are forbidden by those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[64]

The question in *Seminole* was whether the United States was liable under the Indian Claims Commission Act for paying trust fund payments to a Tribal council that it knew misappropriated the funds.[65] The Court looked to the "well-established principle of equity that a third party who pays money to a fiduciary [the council] for the benefit of the beneficiary [the Seminole at large], with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and therefor liable to the beneficiary."[66] They continued:

> In carrying out its treaty obligations with the Indian tribes, the government is something more than a mere contracting party. . .[u]nder a. . .self-imposed policy which has found expression in many acts of Congress and numerous decisions of the Court, it has charged itself with *moral obligations of the highest responsibility and trust*. . .[which] should be judged by the most exacting fiduciary standards.[67]

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[62] Chambers, *supra* note 37, at 1232.
[63] *See United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).
[64] *Seminole Nation v. United States*, 316 U.S. 286, 297 fn. 12 (1942) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928)).
[65] *Seminole Nation v. United States*, 316 U.S. 286 (1942).
[66] *Id.* at 296.
[67] *Id.*

Seminole certainly would seem to fill the holes in interpreting what fiduciary standards the Court alluded to in *Creek Nation.*[68]

Compelling executive action is not a new concept: *Pyramid Lake Paiute v. Morton* is a persuasive example of a court directing the Secretary of the Interior to conform to trust principles when making agency decisions.[69] Secretary Morton had, in this instance, made a "judgment call" about how much water to divert from Pyramid Lake Paiute Tribe to a Bureau of Reclamation project serving non-Tribal members—the "judgment call" reduced the Paiute's water supply and fish spawn, which are crucial to the Paiute's existence.[70] In analyzing the decision under the Administrative Procedures Act, the D.C. District Court referred to three factors "which must necessarily control the Secretary's action: namely, the Secretary's contract with the [irrigation] District, certain applicable court decrees, *and his trust responsibilities to the Tribe*."[71] The court found that his action was "doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe."[72] Disregarding the department's trust responsibility in decisions that affect Tribes is an abuse of discretion and not in accordance of law.[73]

Chambers' discussion on the issue was fresh off of the decision in *Pyramid Lake.*[74] Nonetheless, the cases Chambers examined stand out significantly from earlier cases due to the fact that the Administrative Procedures Act opened the courts to suits in equity, whereas previous claims only qualified for monetary damages and relief.[75] As Chambers put it:

> [t]he different approaches to the purposes of the trust responsibility can be reconciled to permit judicial enforcement as long as a distinction is observed between executive and congressional action. Reading all the cases together, the principle that emerges is that Congress intends specific adherence to the trust responsibility by executive officials unless it has

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[68] *See United States v. Jicarilla Apache*, 564 U.S. 162 (2011) (J. Sotomayor, dissenting); similarly, in *Menominee Tribe v. United States*, 101 Ct. Cl. 22, 40 (1944), the Court of Claims held that even though the statute opening claims for the Menominee specifically mentioned the government's role as a trustee, "the Government owes to the Indians the duties of a trustee, in the care and protection of their property, and that the special provision of section 3 of the jurisdictional act, which same act was the basis of our jurisdiction in that case, seemed to add little to what would have been the Government's obligations in the absence of section 3." In other words, the government acts as a trustee regardless of the statutory language describing the relationship.

[69] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255 (D.D.C. 1972), *supplemented,* 360 F. Supp. 669 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974).

[70] *Id.* at 256.

[71] *Id.* at 255.

[72] *Id.* at 257.

[73] *Id.*

[74] Published in May 1975, Chambers' work also refers to a case similar to *Pyramid Lake*, *Manchester Band of Pomo Indians, Inc. v. U.S.*, 363 F.Supp. 1238 (1973). Chambers, *supra* note 37, at 1248 fn. 95.

[75] Chambers, *supra* note 37, at 1236.

expressly provided otherwise.[76]

This sentiment, however, must be read in light of *Nevada v. U.S.*, which visited the issues presented in *Pyramid Lake*. While acknowledging the backdrop of the trust duty of *Seminole* and *Pyramid Lake*, the Court spared the department from answering to multiple duties (notably, interchanging the term "duty" generally as actions the department statutorily oversees versus duty in a formal, fiduciary sense) by denouncing any hierarchy in obligations when presented with conflicting positions—traditional notions of a trust are essentially incompatible with the complex, multifaceted responsibilities of the government.[77] *Pyramid Lake*'s modern application is unclear in light of *Nevada*, but the basic principles of Administrative Procedure Act (APA) relief when there is no statutory conflict remain an important avenue to trust-based injunctive relief.

3. Trust, Interrupted: *Mitchell*, *Navajo*, and *Jicarilla Apache*

The trend away from formalistic notions of trustee relationships espoused in *Nevada* casts doubt on the efficacy of the trust doctrine. Nonetheless, a formal trust outline elaborated in the *Mitchell* line of cases continues to be the standard by which government actions are measured. The Indian Claims Commission Act opened the United States government to suit by Tribes.[78] The Act provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands

[76] *Id.* at 1248.
[77] *Nevada v. United States*, 463 U.S. 110, 128 (1983) ("Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.").
[78] Indian Claims Commission Act, 60 Stat. 1049 (1946).

> owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.[79]

The modern set of cases should be read under the backdrop that the Indian Claims Commission merely confers jurisdiction upon the Court of Claims whenever the substantive right of suit exists, and that individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.[80] The court in *United States v. Mitchell* (*Mitchell I*), regarded a dispute over mismanagement of timber resources on the Quinault reservation, raised under the Indian Claims Commission Act.[81] The Quinault argued that the General Allotment Act, under which the government placed land into trust for the Tribe for agricultural development, created the requisite fiduciary duty for proper management of resources.[82] The Court rejected this view of the trust, concluding that the General Allotment Act created only a limited trust relationship that does not impose any duty upon the Government to manage timber resources.[83] The General Allotment Act did not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands, and thus any mismanagement could not be an actionable breach.[84]

The Quinault went back to the Supreme Court (*Mitchell II*), this time with more specific statutory provisions that outlined the government's forest management responsibilities.[85] In Congress' creation and assumption of this statutory system of elaborate control over forests and property belonging to Tribes, the Court found that "a fiduciary relationship necessarily arises. . . 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)."[86] The government's self-imposed statutory web of responsibilities can be sufficient to create an actionable trust relationship.[87] With claims of breaches in the vein of *Mitchell*, the Court construes duty from a strictly statutory basis; mere common law notions of a trust responsibility, even where

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[79] *Id.*
[80] *United States v. Mitchell*, 445 U.S. 535, 538 (1980).
[81] *Id.* at 537.
[82] *Id.* at 540-41.
[83] *Id.* at 542.
[84] *Id.*
[85] *United States v. Mitchell*, 463 U.S. 206 (1983).
[86] *Id.* at 225.
[87] *See also U.S. v. Navajo Nation*, 556 U.S. 287 (2009) (where side dealings in coal leasing negotiations by the Secretary of the Interior, in which the Navajo Nation was unable to participate, were found to not be a breach of the trust. As the Court noted, "there is no textual basis for concluding the Secretary's approval function includes a duty, enforceable in an action for money damages, to ensure a higher rate of return for the Tribe concerned."); *White Mountain Apache v. United States* (where the statutory management scheme for the Interior's on-reservation property provided the necessary guidance and trust corpus to compel damages).

traditionally one would exist, are not sufficient to open the government to a claim.[88]

Such was the case in *Jicarilla Apache v. United States*, where the Government was not obligated to turn over documents in litigation with the Jicarilla Apache under the theory of a "fiduciary exception."[89] While the Court acknowledged that in certain limited cases, such as *Mitchell*, an analogy to private trustee relationship is appropriate, "this cannot be taken too far."[90] Unless the statutory web of responsibility is clearly outlined, "the trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee, but pursuant to its sovereign interest in the execution of federal law."[91]

If this is the current conception of the trust responsibility, it begs the question: is there a trust responsibility at all? Or does the government see its "duty" being merely to execute its own statutes? Justice Sotomayor wisely pointed this out in her dissent to *Jicarilla*, noting that "if the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose."[92] The dissent lays out a very useful alternative, in order to maintain continuity with the established jurisprudence: a statutory framework of responsibility can create the trust relationship (a trustee, a beneficiary, and a trust corpus), and the general trust principles of *Seminole* define the Government's fiduciary duties.[93] This is the most consistent reading of the trust line of cases, because it meets the government's general policy of protecting Tribal property and assets, while also maintaining the Court's policy of grounding their relationship with a specific statute.

The *Jicarilla* dissent, unfortunately, does not control the approach for all trust cases. The limitations of applying common law notions of trust doctrine are discouraging, but nonetheless, a useful framework emerges from what is leftover. The basic principles of *Pyramid Lake* still control potential Administrative Procedure Act litigation, with the exception that the trust does not compel the government to prioritize one statutory responsibility over another. The limits of *Mitchell II*, in piercing the sovereign immunity veil of the ICCA, may bar many suits that are mere unfair and unethical moves by government agencies with

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[88] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011).
[89] *Id.*
[90] *Id.*
[91] *Id.*; *c.f. City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 fn. 8 (2005) ("We resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II,* is inextricably linked to, and is thus "fairly included" within, the questions presented.").
[92] *Jicarilla Apache Nation*, 564 U.S. at 203-04 (J. Sotomayor, dissenting) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996)).
[93] *Id.*

Tribes. Yet, when there is an identifiable government management system administered on behalf of the Tribe for their benefit, dereliction of the government's duty to properly manage that system can be actionable. In addition, actions arising from the Department of Interior that are adverse to Tribal interests may still fall under *Pyramid Lake* and the APA "arbitrary and capricious" standard if the department acts without sufficient, definable consideration for its role as a fiduciary.

This is the roadmap for fighting climate change divestment, at least within the Department of Interior. The evidence shows that climate change significantly and adversely impacts Tribal natural resources, member health, and the overall well-being of Native communities. Tribal natural resource management systems are and will continue to be affected, to the point where some resources may disappear entirely at the hands of a hostile environment. There is a trust corpus in those resources, a trustee, and a beneficiary. Climate-adverse action by the department, without clear authorization by Congress, could not only be inimical to the trust duty to maintain statutory natural resource schemes, but also an unlawful abuse of the discretion to manage those programs.

III. Climate Impacts on Indigenous Communities & Identifying the Trust Corpus

When you say, 'my mother is in pain,' it's very different from saying 'the earth is experiencing climate change.'[94]

Mitchell II and *Navajo Nation* provide a disappointingly narrow framework for litigating native breach-of-trust claims. Claims must state the statutory framework and resource, or the trust corpus, giving rise to a trust duty. The *Pyramid Lake* requirements on the Department of Interior as trustee offer more optimism to protect Native lands, but federal courts will likely restrict their application to decisions of the Secretary. Nonetheless, the combination of these two doctrines could be enough to require general mitigation of climate change to protect two easily identifiable corpora – forests and water. Significant research exists detailing the effects of climate change in Indian Country, such as impacts on traditional foods and traditions.[95] And while these resources are no less important than government-managed resources, the federal "courts of the conqueror"[96] will likely remain unsympathetic in light of the *Mitchell II* framework. This section will identify briefly the impacts climate change has on

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[94] Bennett, T. M. B., et al., *Indigenous Peoples, Lands, and Resources* in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, U.S. GLOBAL CHANGE RESEARCH PROGRAM at 301, (J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, Eds. 2014), https://nca2014.globalchange.gov/report/sectors/indigenous-peoples (quoting Hat, Sr., A. White, and Papalii Failautusi Avegalio, 2012: personal communication).

[95] *See, e.g.,* Kathy Lynn, et al. *The Impacts of Climate Change on Tribal Traditional Foods*, 120 Climatic Change 545 (2013).

[96] WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010).

trust forests and water resources, as well as the statutory framework of government management that gives rise to their sufficient trust protection.

A. The Harsh Reality of Climate Change

Ironically, some of the best research confirming the extent of human-caused climate change comes from the U.S. government. NASA and the U.S. Global Change Research Program (USGCRP) provide data every four years, pursuant to the Global Change Research Act of 1990.[97] NASA has characterized the current warming trend to be "of particular significance" and "unprecedented."[98] Their data shows that the trend is likely to be the result of human activity since the mid-20th century and proceeding at a rate never seen before.[99] The planet's average surface temperature has risen about 2 degrees Fahrenheit since the late 19th century.[100] Most of the warming occurred in the past 35 years, with 16 of the 17 warmest years on record occurring since 2001.[101] Not only was 2016 the warmest year on record, but eight of the 12 months that make up the year—from January through September, with the exception of June—were the warmest on record for those respective months.[102] With regards to Native nations in the Southwest, there is a general upward trend in average temperature for Colorado River Indian Tribes (CRIT) Reservation, Duck Valley Indian Reservation, Duckwater Reservation, Gila River Indian Community, Hopi Reservation, Navajo Nation, Pyramid Lake Reservation, Uintah and Ouray Indian Reservation, Walker River Indian Reservation, and Zuni Indian Reservation.[103] The USGCRP is not convinced that any alternative explanation, aside from human-caused emissions of greenhouse gases, explain this trend.[104]

This warming has resulted in rising surface, atmospheric, and oceanic temperatures; melting glaciers; diminishing snow cover; shrinking sea ice; rising sea levels; ocean acidification; and increasing atmospheric water vapor.[105] The climatic changes contribute as well to increase in forest fires and tree loss, as well as the growing incidence of water scarcity.[106] The incidence of large forest fires in

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[97] National Global Change Research Act of 1990, 104 Stat. 3096 (1990).
[98] NASA, CLIMATE CHANGE: HOW DO WE KNOW? (January 26, 2018), https://climate.nasa.gov/evidence/.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] NATIVE WATERS ON ARID LANDS, *Climate Projections* (March 2017), http://nativewaters-aridlands.com/climate-projections/.
[104] Wuebbles, D.J., et al., *Executive Summary* in CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOL. I, U.S. GLOBAL CHANGE RESEARCH PROGRAM, at 14 (2017), https://science2017.globalchange.gov/chapter/executive-summary/.
[105] *Id.* at 21-22.
[106] *Id.* at 22.

the western United States and Alaska has increased since the early 1980s and is projected to further increase in those regions.[107] Earlier spring melt and reduced snowpack are already affecting water resources in the western United States and USGCRP expects these trends to continue.[108] Most alarmingly, if current water resources management remains constant, we face an increasingly possible future of chronic, long-duration hydrological drought before the end of this century.[109]

One solution is simple: cut down on greenhouse gas emissions. USGCP data shows that significant reductions in emissions could cap the increase in annual average global temperature relative to preindustrial times to 3.6°F or less (compared to 9ºF increase with no changes).[110] While changes in climate are determined by past and present greenhouse gas emissions, modified by natural variability, reducing net emissions of carbon dioxide is necessary to limit near-term climate change and long-term warming.[111]

B. Finding Statutory Trust Management Schemes

1. *Forest as a Trust Corpus*

What better example to fit the mold of *Mitchell II* than to look to the very thrust of the case: management of Tribal forests.[112] The plaintiffs in *Mitchell II* were Quinault Nation members and allottees who owned forest property on the reservation.[113] They sued the United States for pervasive waste and mismanagement of timber lands specifically for failure to manage timber on a sustained-yield basis and failing to collect payments on harvested timber. Pursuant to the waiver of sovereign immunity of the Tucker Acts,[114] the Court held that the "comprehensive" statutory scheme for forestry management on Indian lands created a sufficient trust duty to properly carry out that management.[115]

The *Mitchell* Court looked to three acts specifically, and those acts are still operative on Tribal lands: 25 U.S.C. §§ 406, 407, and 466.[116] Section 406 guarantees trust-land owners and allottees payments for timber sales on their lands through the Department of Interior.[117] Section 407 states that:

> [T]he timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 15.
[111] *Id.* at 31.
[112] *Mitchell*, 463 U.S. at 207.
[113] *Id.* at 210.
[114] 28 U.S.C §§ 1491, 1505 (2018) (directing claims against the United States to the Federal Court of Claims).
[115] *Mitchell*, 463 U.S. at 223.
[116] *Id.*
[117] 25 U.S.C. § 406 (2018).

> sustained-yield[118] management or to convert the land to a more desirable use.[119]

Section 5109 (renumbered from 466) says:

> The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management . . .and *to promulgate such other rules and regulations as may be necessary to protect the range from deterioration*, to prevent soil erosion, *to assure full utilization of the range, and like purposes*.[120]

The Code of Federal Regulations spells out, *inter alia*, the scope of the management for sustained-yield forests,[121] fire management,[122] and development.[123] All of these statutes and regulations provide the foundation for breach-of-trust claims if the Secretary does not protect the range from deterioration, or take action to make sure the forests are not harvested in accordance to a sustained-yield.

The inevitable impacts that anthropogenic climate change has on forests will prevent the Secretary from effectively managing Tribal forests for the benefit of the Tribes because there may not be much healthy forest left to manage. Increases in temperature and decreases in available water have had adverse effects on forest health across the United States. USGCRP reports recognized that Tribal access to valued resources is threatened by climate change impacts causing habitat degradation, forest conversion, and extreme changes in ecosystem processes.[124] The USGCRP expects warmer temperatures and more frequent drought to cause dieback and tree loss to species important to Native nations.[125] Trees die faster when drought is accompanied by higher temperatures, so short droughts, which occur more frequently than long-term droughts, can trigger mortality if temperatures are higher.[126] A direct effect of rising temperatures may

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[118] "Sustained-yield" is statutorily defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." Multiple Use - Sustained Yield Act, 74 Stat. 215 (1960).
[119] 25 U.S.C. § 407 (2018).
[120] 25 U.S.C. § 466 (2018) (emphasis added).
[121] 25 CFR § 163.3 (2018); *see also* 25 U.S.C. § 3104 (2018).
[122] 25 CFR § 163.28 (2018).
[123] 25 CFR § 163.32 (2018).
[124] Bennett, *supra* note 94, at 302.

[125] *Id.*
[126] L. A. Joyce, et al., *Forests* in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, U.S. GLOBAL CHANGE RESEARCH PROGRAM at 177, (J. M. Melillo, Terese Richmond, and G. W. Yohe, Eds. 2014), https://nca2014.globalchange.gov/report/sectors/forests.

be substantially greater tree mortality even with no change in drought frequency[127]

In addition, Native nations can expect to lose their forests to climate-change fueled fire. Due to current forest management techniques, most U.S. forests have higher fuel density than is natural.[128] Climate change and forest management are "subtly and inextricably intertwined;"[129] Modeled increases in temperatures and vapor pressure deficits due to anthropogenic climate change have increased forest fire activity in the western United States by increasing the aridity of forest fuels during the fire season.[130] The number of large fires has increased over the period 1984-2011, with high statistical significance in 7 out of 10 western U.S. regions across a large variety of vegetation, elevation, and climatic types.[131] These existing studies indicate with some confidence that human-caused climate change contributes to increased forest fire activity in the western United States and Alaska with likely further increases as the climate continues to warm.[132]

The real-time results are drastic. As of October 2017, fires in the U.S. had consumed more than 8.5 million acres.[133] Shortly thereafter in December, the Thomas fire, located in traditional California Chumash territory and close to their reservation, burned a record 281,900 acres before being contained.[134] Following the general climate trends, the fire was fueled by strong Santa Ana winds and plentiful dry fuel due to the overall lack of seasonal precipitation.[135] According to fire ecologist Jennifer Balch, today's fire season is three months longer than it was in the 1970s, in addition to far more large fires nationwide than ever before.[136] The Department of Interior has even taken notice of the wildfire problem, promising to take more "aggressive" action in response, though Interior has not directly addressed the direct impacts to trust resources.[137]

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[127] *Id.* at 178.

[128] M.F. Wehner, et al., *Droughts, Floods, and Wildfires* in CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOL. I, U.S. GLOBAL CHANGE RESEARCH PROGRAM, at 244 (2017), https://science2017.globalchange.gov/chapter/8/.

[129] *Id.*

[130] *Id.* at 243.

[131] *Id.*

[132] *Id.* at 244.

[133] Geoff Brumfiel, *California Blazes Are Part Of A Larger And Hotter Picture, Fire Researchers Say*, NPR (Oct. 13, 2017 1:11PM), https://www.npr.org/sections/thetwo-way/2017/10/13/557393274/california-blazes-are-part-of-a-larger-and-hotter-picture-fire-researchers-say.

[134] Eric Levenson, *Thomas Fire, Once Largest in California History, Is Now 100% Contained*, CNN (Jan. 12, 2018 2:40PM), https://www.cnn.com/2018/01/12/us/thomas-fire-california-contained/index.html.

[135] *Id.*

[136] Brumfiel, *supra* note 133.

[137] Press Release, U.S. DEPT. OF INTERIOR, *Secretary Zinke Directs Interior Bureaus to Take Aggressive Action to Prevent Wildfires* (Sept. 12, 2017).

Northern California Tribes have already seen the effects of increased fire threat to their homelands and forests—massive fires in 2016 forced evacuations for the Elem Indian Colony and similarly situated Nations.[138] A May 2016 report by the Indian Forest Management Assessment Team documented the impacts of fires on five northwest Native nations: Colville, Nez Perce, Spokane, Warm Springs, and Yakama.[139] The group has previously issued warnings about the dire current and future consequences of chronic failure to provide adequate resources to Indian forestry programs and fulfill fiduciary trust responsibilities.[140] The report indicated that since 1990, 4.8 million acres of Indian forest lands have been burned by wildfire, and that annual losses are only increasing.[141] In 2015, a then-record 539,000 acres of Indian forests were scorched nationwide, with 338,110 forest acres on the five subject reservations, damaging 1.2 billion board feet of their statutorily protected Tribal trust timber.[142] The five subject Tribes suffered $521 million in timber losses as a result of the 2015 wildfires.[143] The current and anticipated losses to Tribal forest resources as a result of increased wildfire and mismanagement, from direct services to systemic contribution to climate change, fall squarely within the trust protections under *Mitchell II*.

2. *Water as a Trust Corpus*

In 2016, the world heard the shouts of *mni wiconi*, the Sioux words for "water is life," as the U.S. Army Corps of Engineers continued construction of the Dakota Access Pipeline on sacred Sioux lands.[144] Under the *Winters* doctrine, the federal government reserves water rights to Native nations upon the establishment of reservation land.[145] To make reservations livable, their irrigation is contemplated as a matter of their very existence, with the amount of water allocated to them based on practically irrigable acreage.[146]

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[138] Debra Utacia Krol, *Northern California Tribes Face Down Massive Wildfires*, HIGH COUNTRY NEWS (Oct. 13, 2017), http://www.hcn.org/articles/tribal-affairs-northern-california-tribes-scramble-to-deal-with-massive-wildfires.

[139] Vincent Corrao, et al., *Wildfire on Indian Forests: A Trust Crisis*, INTERTRIBAL TIMBER COUNCIL at 1, (May 2016).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Pat Nabong and June Leffler, *NODAPL Supporters Shout 'Mni Wiconi' and It's Not Just About Water*, MEDILL REPORTS CHICAGO (Dec. 7, 2016), http://news.medill.northwestern.edu/chicago/nodapl-supporters-chant-mni-wiconi-and-its-not-just-about-water/.

[145] *Winters v. United States*, 207 U.S. 564, 576 (1908).

[146] *Arizona v. California*, 373 U.S. 546, 599-601 (1963).

To advance a breach of trust claim, the federal government must coordinate management of a resource than the mere secretarial approval of activity, as was seen in *Navajo Nation*.[147] Water rights have the small wrinkle that they are reserved treaty rights, which is not a factor addressed in the *Mitchell II* decision. Either way, water is still subject to a comprehensive federal management scheme as contemplated in *Mitchell II*. Title 25 of the U.S. Code has several provisions for the distribution of water to Tribal lands:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations;[148]

Other related provisions delegate power to the Department of Interior to manage Bureau of Reclamation project waters on Tribal lands,[149] or to deposit funds collected for Indian irrigation projects into a trust fund.[150] The regulations to administer section 381, 25 CFR Part 171, are more extensive and detailed as to construction, permitting, allocation, use, and finances.[151] Just as the law charges the Secretary with protecting the forest ranges from deterioration, so must the Secretary secure water to render Tribal lands irrigable for the Tribes' well-being.
The United States is staring down the barrel of increasing incidence of hydrologic drought. Drought is particularly severe in the southwest, where future changes in seasonal precipitation show that the southwestern United States may experience chronic future precipitation deficits.[152] At the current rate, Native nations in the southwest may run out of water.

USGCRP reports concluded with high confidence that the observed changes in temperature-controlled aspects of western U.S. hydrology are *likely* a consequence of human changes to the climate system.[153] Colorado River basin studies show that annual runoff reductions in a warmer western United States climate occur through a combination of evapotranspiration increases and precipitation decreases, with the overall reduction in river flow exacerbated by human water demands on the basin's supply.[154] Warmer temperatures reduce the amount of snowfall, as well as the size of the snowpack.[155] The USGCRP concluded that this shift is detectably different from natural variability and must

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[147] *United States v. Navajo Nation*, 556 U.S. 287 (2009).
[148] 25 U.S.C. § 381 (2018).
[149] 25 U.S.C. § 382 (2018).
[150] 25 U.S.C. § 385a (2018).
[151] 25 C.F.R. Part 171 - Irrigation Operation and Maintenance (2018).
[152] Wehner, *supra* note 128, at 237.
[153] *Id.*
[154] *Id.* at 236.
[155] *Id.*

be attributable to anthropogenic climate change.[156] Reduced snowfall accumulations in much warmer future climates are "virtually certain" as snow is replaced by rain, even if overall precipitation remains the same.[157] Observed declines in the snow water equivalent, river flow, and snowpack in the region have been formally attributed to anthropogenic climate change.[158] Hauntingly, they concluded that "[a]s a harbinger, the unusually low western U.S. snowpack of 2015 may become the norm" and that, under these projections, several important western U.S. snowpack reservoirs may effectively disappear by 2100, resulting in chronic, long-lasting hydrological drought.[159]

In one case study, the USGCRP looked to climatic changes on the Navajo Nation.[160] The Navajo Nation is member to the Ten Tribes Partnership, a coalition of Native nations in the Colorado River watershed formed to strengthen tribal influence over the management and utilization of Colorado River water resources.[161] According to their study:

> Navajo elders have observed long-term decreases in annual snowfall over the past century, a transition from wet to dry conditions in the 1940s, and a decline in surface water features. Changes in long-term average temperature and precipitation have produced changes in the physical and hydrologic environment, making the Navajo Nation more susceptible to drought impacts, and some springs and shallow water wells on the Navajo Nation have gone dry. Southwest tribes have observed damage to their agriculture and livestock, the loss of springs and medicinal and culturally important plants and animals, and impacts on drinking water supplies.[162]

Much like the prospects for forest health, the outlook for Tribal water resources should be a concern to the federal government as a trustee to that resource. The duties of securing water for Tribal agriculture and irrigation will be progressively more impeded by drought, depriving the Nations the benefits of a trust resource.

IV. Compelling the Department of the Interior

While water and forest interests could fall within the *Mitchell II* framework, *Mitchell II* claims are only compensable in damages, not in equitable

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 236, 239.
[160] Bennett, *supra* note 94, at 303.
[161] COLORADO RIVER WATER USERS ASSOCIATION, *Ten Tribes Partnership* (2012), https://www.crwua.org/colorado-river/ten-tribes (member Nations include Ute Indian Tribe, Ute Mountain Ute Tribe, Southern Ute Indian Tribe, Jicarilla Apache Nation, Navajo Nation, Chemehuevi Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Quechan Indian Tribe and Cocopah Indian Tribe).
[162] Bennett, *supra* note 94, at 303.

relief. In the real world, compensation will only come after the resources are damaged or depleted to the point Tribes can prove cognizable injury and succeed in protracted litigation in hostile fora. Native nations will likely find little solace in receiving a check from the Department of Treasury once their forests and rivers are gone. If the *Cobell* litigation is any indication, the threat of monetary penalty years or decades down the road is, at best, quixotic way to motivate the federal government.[163]

Perhaps there is a way to move this type of trust litigation from *Mitchell II* into *Pyramid Lake,* despite subsequent limitations to balance other interests that Congress has charged to the Department of Interior. The U.S. Department of Interior manages one-fifth of the land in the United States, 35,000 miles of coastline, and 1.7 billion acres of the Outer Continental Shelf.[164] The Department of Interior's duties extend to overseeing the entirety of domestic Indian relations, fish and wildlife conservation, managing water supplies for more than 30 million people and protecting America's natural treasures—national parks and public lands.[165] More importantly, they have shifted focus to being the steward and manager of America's natural resources including oil, gas, clean coal, hydropower, and renewable energy sources. [166] Secretary Zinke has some ambitious goals:

> The Department of the Interior will increase access to public lands and balance conservation with the unleashing of America's energy opportunities. And removing burdensome regulations at the [d]epartment, the United States will benefit from a stronger economy.[167]

U.S. Secretary of the Interior Ryan Zinke today announced the next step for responsibly developing the National Outer Continental Shelf Oil and Gas Leasing Program (National OCS Program) for 2019-2024, which proposes to make over 90 percent of the total OCS acreage and more than 98 percent of undiscovered, technically recoverable oil and gas resources in federal offshore areas available to consider for future exploration and development. By comparison, the current program puts 94 percent of the OCS off limits. In addition, the program proposes the largest number of lease sales in U.S. history.[168]

With these goals in mind, climate change reversal is a dim hope. If, however, equitable remedies can be enforced for decisions made by the Department of Interior such as these the department essentially becomes a vehicle for climate change prevention by means of the trust.

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[163] *See generally Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009).
[164] U.S. DEPT. OF INTERIOR, *Climate Change* (2018), https://www.doi.gov/climate.
[165] *Id.*
[166] U.S. DEPT. OF INTERIOR, *American Energy* (2018), https://www.doi.gov/energy.
[167] *Id.*
[168] Press Release, U.S. DEPT. OF INTERIOR, *Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential* (Jan. 4, 2018), https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential.

Under the *Pyramid Lake* framework, the Secretary must balance conflicting responsibilities of what is required by statute and the trust duties to Native nations.[169] The APA allows courts to review and set aside agency decisions "found to be. . .arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[170] Agency rules and decisions are arbitrary and capricious if the agency, *inter alia,* entirely fails to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[171] This language is particularly important where the Department of Interior is left with free discretion on how to develop and manage public lands and energy development. The *Pyramid Lake* court equated the Secretary's decision as an abuse of discretion under the APA because it was wasteful and carelessly adverse to the needs of the Tribe, especially in light of their trust duties.[172] Courts should find administrative decisions that contribute to climate change equally unlawful.

Furthermore, some key language could help tie together *Mitchell II* and *Pyramid Lake*: "[t]he vast body of case law which recognizes this trustee obligation is amply complemented by *the detailed statutory scheme* for Indian affairs set forth in Title 25 of the United States Code."[173] *Pyramid Lake* might better be understood and accepted by modern courts through the lens of the *Mitchell II* progeny – where the Interior or similarly charged agencies carry out their statutory duties, they must take the utmost care to protect Tribal interests or risk injunction. This way, forest and water management as well as mineral and energy development are conducted under conditions that protect the trust corpora, which would include reducing climate-adverse projects. *Pyramid Lake* can be read as the equitable relief arm of *Mitchell II*-type claims. At the very least, this reading of *Pyramid Lake* creates a duty to prevent damage to statutorily managed trust assets.

As an illustration, the Obama administration promulgated new regulations to limit wasteful gas well flare releases of methane, a known greenhouse gas.[174] The Department of Interior under new administration immediately set off to suspend implementation of these rules.[175] The APA and *Pyramid Lake* give Tribes a cause of action to challenge this change in regulation as adverse to the trust assets. Because the change reverses course on climate change reduction harming

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[169] *Pyramid Lake,* 354 F. Supp. at 257.
[170] 5 U.S.C. § 706(1)(A) (2016).
[171] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[172] *Pyramid Lake,* 354 F. Supp. at 257.
[173] *Id.* at 256 (emphasis added).
[174] Waste Prevention, Production Subject to Royalties, and Resources Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016) (codified at 43 C.F.R. § 3179.6).
[175] Waste Prevention, Production Subject to Royalties, and Resource Conservation: Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050 (Dec. 8, 2017).

trust assets such as forest health and water availability, the agency decision entirely fails to consider an important aspect of the problem: the trust responsibility and statutorily defined duties. The new rule is therefore arbitrary, capricious, and invalid.[176]

This invokes the original question: does the trust doctrine create *affirmative* duties on behalf of the Department of Interior? Does the trust relationship compel the department to take action to prevent climate change? These questions expose the limitations on enforcing the trust responsibility.

Successful *Mitchell II* claims provide damages for mismanagement. Inaction towards climate change could be fairly read as mismanagement, because if the current trend continues, ignoring climate change's impact will compromise the value and viability of trust corpora. When taking preventative action does not conflict with other statutory duties under *Nevada*, action to alleviate the effects of climate change should be required as an extension of the management schemes. *Mitchell II* claims, again, only provide monetary damages, not equitable relief. This reading does not compel prospective action; rather, it forces the government to choose between money damages and climate reduction schemes.

APA review is also limited for compelling agency action. Courts are hesitant, if not completely barred, from reviewing agency *inaction*, as opposed to actions already taken.[177] In the *Massachusetts* case, however, agency action was essentially created once parties filed a rulemaking petition that was denied.[178] Tribes could similarly petition for rulemaking for better emissions standards on federal land oil/gas extractions, and force the Department of Interior into at least addressing the petition. The decision they make would then be subject to the APA.[179] Cases outside of Federal Indian Law, when read in light of the trust doctrine, could provide creative new avenues for administrative relief.

V. Conclusion

Any theory that seeks to compel the government to carry out beneficial duties to Native nations is optimistic, if not bordering on naïve, given the weight of history. Congress has the ability to remedy climate impacts on Native lands quite easily through direct legislation. In absence of legislation, workarounds such as *Pyramid Lake* and *Mitchell II*, insufficient as they may be, can at least prevent the Department of Interior from taking steps backwards. The established principles of these cases are a shield against radical actions like those of the Trump administration. They also give the trust useful meaning.

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[176] The Northern District of California similarly found this change in position to be invalid under the APA, without discussion of the trust responsibility to Tribes. *See State v. Bureau of Land Mgmt*., No. 17-CV-07186-WHO, 2018 WL 1014644 (N.D. Cal. Feb. 22, 2018).

[177] *See Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. . .That discretion is at its height when the agency decides not to bring an enforcement action.").

[178] *Id.*

[179] *Id.*

Pyramid Lake and *Mitchell II* provide avenues to compel the protection of forests and water for Native nations from the impacts of climate change. Defending trust corpora under these cases should prevent deregulation, administrative proliferation of carbon-intensive energy production, and resource management techniques that curb climate impacts. Otherwise, the federal government should expect to pay up for withering or burnt forests and parched reservations. In the nearly two centuries since *Cherokee Nation*, the trust can mean something for the benefit of Native peoples. Native nations and civil rights attorneys need to take advantage quickly—with everything on the line, every tool in the arsenal must be deployed before there is nothing left to defend.