CONFLICTED JUSTICE: THE DEPARTMENT OF JUSTICE'S CONFLICT OF INTEREST IN REPRESENTING NATIVE AMERICAN TRIBES

Ann C. Juliano*

"Father, I feel the conflict within you"—Luke Skywalker
"There is no conflict"—Darth Vader.

RETURN OF THE JEDI (Lucas Film Ltd. 1983).

The Department of Justice takes a very Darth Vader-like position in its representation of Native American tribes. The Department of Justice refuses to recognize the existence of a conflict between its obligations to Native American tribes and to federal agencies. This conflict does not arise from any malfeasance on the part of Department of Justice attorneys, who generally are hard-working civil servants seeking to do right. Rather, the conflict stems from the internal structure of the Department of Justice and its multiple obligations.¹

¹ Professor, Villanova University School of Law. The author is a former member of the Indian Resources Section, Environment and Natural Resources Division, United States Department of Justice. As will be apparent, the views expressed herein are entirely my own and do not represent the Department of Justice. No confidential communications or client confidences have been released in this Article. Earlier versions of this Article have been presented at the Federal Bar Association's Indian Law Conference and the University of Washington's Indian Law Symposium. Research grants from Villanova Law School made possible the research and writing of this piece. I would like to thank the following people for their helpful comments: Michelle Anderson, Greg Magarian, Matt Borger, Curtis Berkey, Larry Roberts, Michael Carroll, Frank Rudy Cooper, and Jennifer O'Hare. My research assistants provided invaluable help: Monica Lawrence, Christopher Mavros, Kristen Johnson, Susan Fiorentino, and Christopher Mudd. Finally, I must thank Emily Ann for sleeping through the night at four weeks of age.

¹ One commentator observed, "[T]hese conflicts arose in part from the administrative structure within the Interior and Justice Departments that required . . . the same Department of Justice Division to prosecute Indian claims against states and third parties while opposing Indian claims against the United States." Reid Peyton Chambers, A Study of Administrative Conflict of Interest in the Protection of Indian Natural Resources (Jan. 1971), reprinted in Federal Protection of Indian Resources: Hearings Before the Senate Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 92d Cong. 233 (1971).
Conflicts of interest are inevitable in our governmental system, as executive branch agencies often disagree with one another. For example, the Army and the Environmental Protection Agency may disagree over whether the Clean Air Act allows for the imposition of fines on the Army. The Executive Branch must resolve these conflicts in order for the government to function. The area of Indian law, however, is unique. When the Department of Justice seeks to resolve a conflict between a tribe and an agency, the conflict is not between two Executive agencies; rather, it is between trustee and beneficiary. The federal government assumed a special trust relationship with the Indian tribes early in United States' history that has developed over time through treaties, statutes, and case law. The relationship originated from the status of the United States as a sovereign and the Indians as independent nations within the borders of the United States. The tribes retained their powers of self-government, while at the same time, the United States protected them. The trust relationship represents an affirmative duty on the part of the United States to protect the tribes, serve their best interests and uphold the other trust duties under a standard of good faith. It is this trust relationship which sets apart

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1 The Clean Air Act authorizes the Environmental Protection Agency (EPA) to issue civil penalties for violations of the Act. 42 U.S.C. § 7413(d)(3) (2000). In 1994, the EPA proposed a rule allowing it to fine other federal agencies for violations of the Act. Lieutenant Colonel Jaynes, Update on Administrative Penalties Under the Clean Air Act, ARMY LAW., Aug. 1998, at 53. In the summer of 1997, the Department of Justice determined that the EPA had the authority to impose such fines. Id. The Department of Defense objected, arguing that they should be exempt from such fines:
   
   There has been no change in the Army's policy concerning payment of punitive fines that are imposed by state regulators under the [Clean Air Act]. It continues to be the Army policy that the doctrine of sovereign immunity precludes payment of state-imposed punitive fines under the CAA.

2 Id.

3 See Note, The Role of Solicitor General and Intragovernmental Conflict, 76 MICH. L. REV. 324, 325 (1977) (“In order to formulate the position of the United States, the Solicitor General may have to give priority to the views of one among several competing governmental agencies, and he may have to decide whether his obligation to the public overrides his responsibility to the government.”).

4 See infra notes 51-110 and accompanying text.

5 See infra notes 51-110 and accompanying text.

6 See infra notes 51-110 and accompanying text.
the conflicts involving tribal interests from inter- and intra-agency conflicts.

As trustee, the United States, usually acting through the Department of the Interior, manages a significant portion of tribal land and a great deal of tribal resources. The Department of the Interior, of course, retains responsibility for many other federal programs and federal lands. The Department of Justice represents the Department of Interior and most other federal agencies in court. Thus, as aptly stated by President Nixon:

The United States Government acts as a legal trustee for the land and water rights of American Indians. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

Despite that unassailable description of the current state of affairs within the executive branch, a situation which President Nixon referred to as “an inherent conflict of interest,” the Department of Justice maintains that there is no conflict of interest “where the United States has a dual role of protecting tribal interests while at the same time defending against tribal claims or representing non-Indian interests.”

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7 The Department of the Interior, through the Bureau of Indian Affairs, manages 43,450,267 acres of tribally owned land, 11,000,000 acres of individually owned land, and 443,000 acres of federally owned land held in trust. UNITED STATES DEP'T OF THE INTERIOR, STRATEGIC PLAN 2000-2005: BUREAU OF INDIAN AFFAIRS 3 (2000).

8 RICHARD NIXON, SPECIAL MESSAGE TO CONGRESS REGARDING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 9-10 (1970).

9 Id. at 9.

10 Letter from Lois J. Schiffer, Acting Assistant Attorney General, United States Department of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School, and Charles W. Wolfram, Professor, Cornell Law School (June 16, 1994) (on file with author) [hereinafter Schiffer Letter]; see also Deputy Assistant Attorney General James Simon, Environment and Natural Resources Division, Remarks at Federal Bar Association Indian Law Conference 1 (Apr. 12, 1996) (on file with author) (“In brief, there is no conflict of interest when Department of Justice represents the United States in its capacity as a trustee for Indians and tribes.”).
untenable. A careful examination of the grounds on which it rests demonstrates that the Department of Justice is misreading the relevant law and failing to live up to its responsibilities as trustee for Native American tribes.

In Part I, I briefly set out the nature of a private trust relationship and the origins of the federal Indian trust relationship. Then, Part II.A describes the structure of the Department of Justice and its primary client in Indian issues, the Department of the Interior. With that background, Part II.B sets forth the following three categories of conflicts faced by the Department of Justice: conflicts over the same property, conflicts within the same case, and conflicts due to a fear of preclusion. Part II.C concludes that the duty of loyalty to the beneficiary would prevent a private trustee from acting as the Department of Justice does.

Part III focuses on the impact on a conflicts analysis when the trustee is the Department of Justice rather than a private trustee. First, Part III.A explains the Department of Justice's theory that there is no conflict in its representation of Native American tribes. Next, Part III.B examines the underpinnings of the Department of Justice's position, beginning with a letter by former Attorney General Griffin Bell and then turning to the Supreme Court's decision in Nevada v. United States. Finally, Part III.C finishes with an analysis of the Department of Justice's use of the Nevada decision. I conclude from this analysis that Nevada simply holds that when the Department of Justice proceeds in the face of congressionally imposed conflicting interests, the doctrine of res judicata still applies to bind the United States and the tribal parties to that litigation.

11 See infra notes 25-110 and accompanying text.
12 See infra notes 111-33 and accompanying text.
13 See infra notes 134-87 and accompanying text.
14 See infra notes 188-93 and accompanying text.
15 See infra notes 194-310 and accompanying text.
16 See infra notes 202-14 and accompanying text.
17 463 U.S. 110 (1983); see also infra notes 215-79 and accompanying text.
18 See infra notes 280-310 and accompanying text.
19 See infra note 589 and accompanying text.
In Part IV, I consider one remedy for this conflict, a damages action. Part IV traces the limitations placed by the Supreme Court on breach of trust actions in two decisions known as the *Mitchell* decisions. I then examine the post-*Mitchell* system and review two recent Supreme Court decisions as well as several lower court cases. Those two decisions, which the Court heard in the October 2002 term, are evidence that the lower courts are beginning to recognize the conflict of interest. However, I conclude that under current case law, a breach of trust action against the Department of Justice for considering a conflict of interest is not promising. Therefore, a preemptive solution is necessary. In Part V, I describe why any successful solution must address the problems created by the Eleventh Amendment and the rules of preclusion. I therefore recommend the creation of a separate litigating agency outside of the Departments of Justice and Interior, and the adoption of special preclusion rules to govern litigation by the Department of Justice as trustee.

I. THE NATURE OF THE TRUST RELATIONSHIP

Claims of conflict arise from the principles that govern a private trust relationship. The trust relationship between the federal government and Indian tribes derives from the private law of trusts. Therefore, a brief explanation of private trust doctrine will help contextualize this Part’s later discussion on the origins and fundamental characteristics of the federal Indian trust relationship.

A. PRIVATE TRUST DOCTRINE

A trust is a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use

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20 See infra notes 311-463 and accompanying text.
23 See infra notes 464-588 and accompanying text.
24 See infra notes 515-88 and accompanying text.
that interest for another's benefit.25 In its most common form, a trust is "an arrangement of property in which the legal title is vested in one person who is to hold, administer, or otherwise deal with the property, as may be directed, for the benefit of another person who is the equitable owner."26 In general, the person who creates the trust is the settlor, the property that is held in trust is the trust res, the person who holds title for the benefit of another is the trustee, and the person for whose benefit the property is held is the beneficiary.27 A trust is normally created by a trust document, such as a will, deed, or agreement.28 The trust instrument defines the specific duties of the trustee29 and courts generally will look to the four corners of the creating instrument to determine the obligations of the trustee.30

The courts of equity place an obligation on the trustee to act only with honesty and good faith in the execution of the trust.31 Due to the fiduciary nature of the relationship, the law demands an exceptionally high standard of moral conduct from the trustee toward the beneficiary.32 Courts generally consider the "level of conduct for fiduciaries [to be] at a level higher than that trodden by the crowd."33 Thus, "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."34 Generally, this means that the trustee must act with honesty and good faith in the sole interest of the beneficiary when making any decision concerning the trust.35 The duty of loyalty is strictly

27 RESTATEMENT (SECOND) OF TRUSTS § 3 (1959).
28 GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 1, at 10 (2d ed. 1984). In some cases trusts are created without a writing and therefore there is no actual trust instrument. Thus, the terms of the trust are determined by the settlor's intent. Id.
29 See In re Estate of Bentley, 127 N.E.2d 749, 752 (Ohio 1955). For example, a trustee may be required to diversify the trust's investments in order to minimize the risk of significant losses. Baker Boyer Nat'l Bank v. Garver, 719 P.2d 583, 588 (Wash. Ct. App. 1986) (citing RESTATEMENT (SECOND) OF TRUSTS § 228 cmt. a (1959)).
31 BOGERT ET AL., supra note 28, § 1.
32 Id.
35 See 76 AM. JUR. 2D Trusts § 379 (2002) ("A trustee must act in good faith in the administration of the trust, and this requirement means that he or she must act honestly and
enforced and places numerous restrictions on the conduct of the trustee in her dealings with the beneficiary. In most instances, this means that a trustee may not act out of self-interest. For example, a trustee may not sell trust property to herself or deal with the trust property for her own benefit, even if such transactions are made in good faith and a fair price is paid. Further, a trustee may not enter into situations in which her own interests are brought into conflict with those of the trust, irrespective of good or bad faith.

The duty of loyalty also means that a trustee may not act in the interest of a third person:

The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell property to a third person for the purpose of benefitting the third person rather than the trust estate.

Additionally, there is a duty not to disclose to third persons information that the trustee has acquired as trustee, where she should know that the effect of such disclosure would be detrimental to the interest of the beneficiary. Nor may a trustee use any information gained in the administration of the trust to the prejudice of the trust.

Finally, a trustee may not do anything tending to interfere with the exercise of a wholly disinterested and independent judgment.

with undivided loyalty to the trust, and to the interests of the beneficiary.

36 RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. b (1959); see also Presbyterian Church v. Plainfield Trust Co., 52 A.2d 400, 407 (N.J. Ch. 1947) (holding one with fiduciary character may not directly or indirectly purchase trust property, even when acting in good faith and with absence of concealment of facts). In addition, a trustee may not take part in any transaction concerning the trust, where the trustee has a private interest contrary to that of the beneficiary. Dean v. Shingle, 246 P. 1049, 1051 (Cal. 1926).


38 RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. q (1959).

39 Id. § 170 cmt. s.

40 See 76 AM. JUR. 2D Trusts § 380 (2002); see also Trice v. Comstock, 121 F. 620, 624 (8th Cir. 1903) (holding that defendant could not lawfully buy land about which he had learned while acting as agent for plaintiffs who wanted to buy land).

41 In re Trusteeship of Stone, 34 N.E.2d 755, 760 (Ohio 1941).
It therefore follows from the nature of the trust relationship that "a fiduciary cannot contend that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of a secondary one and it has been stated that the rule of undivided loyalty must be enforced with uncompromising rigidity."42 Thus, a trustee who acts for some interest other than that of the beneficiary may breach her duty of loyalty.43

Breach of trust and fiduciary liability questions depend on the honesty of the trustee's conduct, not the eventual performance of the investments made in the name of the trust.44 A trustee can breach her fiduciary duty by failing to protect and preserve the trust property.45 Breach of duty or bad faith may be grounds for removal of the trustee.46 Other reasons for removal include failure to act, unreasonable failure to cooperate with cotrustees, and commitment of a crime.47 Short of removal, a court is permitted to substitute its judgment for that of the trustee in situations where there is a conflict of interest.48

42 76 Am. Jur. 2d Trusts § 380 (2002); see also, e.g., NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Under Principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties."); Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 269 (1941) ("A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of this secondary one.").

43 Ethan G. Stone, Note, Must We Teach Abstinence? Pensions' Relationship Investments and the Lessons of Fiduciary Duty, 94 Colum. L. Rev. 2222, 2233 (1994). Other duties of a trustee include the duty to keep trust property separate from her own and to collect and distribute income derived from the trust assets. For example, the settlor may expressly or impliedly impose a duty on the trustee to bring in financial returns, such as rent, interest, or dividends, from the trust property. See Linder v. Officer, 135 S.W.2d 445, 447 (Tenn. 1940) ("It is fully established in this jurisdiction that if any trust or duty is imposed on the trustee, either expressly or by implication, the trust is an active one."). If permitted by the trust document, a trustee also may sell the property to generate income, but she must carefully follow the instructions of the settlor as well as any applicable statutory rules governing the transaction. Bogert et al., supra note 28, § 482.


45 Bogert et al., supra note 28, § 582.


47 Bogert et al., supra note 28, § 582.

B. THE ORIGIN OF THE FEDERAL-INDIAN TRUST RELATIONSHIP

Generally, the federal government occupies a trustee position in three areas. First, the state and federal governments hold lands and waterways in public trust for the benefit of the American people. Second, the federal government occupies a trustee position with regard to its foreign territories. Finally, the federal government stands as trustee to Native American tribes and

49 The premise of the public trust doctrine is that the government should hold public lands in trust for the people of the United States. Nathan Scheg, *Preservationists v. Recreationists in Our National Parks*, 5 HASTINGS W.-NW. J. ENVTL. L. & POLY 47, 59 (1998). Public lands, such as rivers, the seashore, and the air, are common properties not owned by an individual. Peter Egan, *Applying Public Trust Tests to Congressional Attempts to Close National Park Areas*, 25 B.C. ENVTL. AFF. L. REV. 717, 718 (1998). The rationale for the concept of a public trusteeship is that certain resources are important to the public as a whole and that private ownership of the resources would be inappropriate. Id. Furthermore, the government is obliged to look after the general public interest rather than allow public resources to be redistributed for private gain. Id. Thus, shores, bays, rivers, and the land beneath are held open for the benefit of the whole community. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 413 (1842). The duties of the government's trust responsibility in this area include governing the use and disposition of the public lands by both private and public agents. See Susan Baer, Comment, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 385 (1988) (mentioning federal agencies responsible for administering public land and its diverse resources). The American people, as beneficiaries, have the power to compel the trustee to honor its obligation to protect the trust property. Id. at 387.

50 For example, there are five island groups that occupy a special relationship with the United States, but are not states: (1) the Territory of American Samoa, (2) the Territory of Guam, (3) the Commonwealth of the Northern Mariana Islands, (4) the Commonwealth of Puerto Rico, and (5) the Territory of the United States Virgin Islands. The United States holds a trustee position with respect to these political entities. This position is derived from the Constitution, which states, "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3. For a discussion of the evolving status of the relationship between the United States and its territories, see generally Jennifer C. Davis, *Beneath the American Flag: United States Law and International Principles Governing the Covenant Between the United States and Commonwealth of the Northern Mariana Islands*, 13 TRANSNAT'L LAW. 135 (2000) (discussing United State's trust relationship with Mariana Islands); Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under its Covenant with the United States*, 71 OR. L. REV. 127 (1992) (discussing Northern Mariana Islands immigration power under covenant with United States); Paul Lansing & Peter Hipolito, *Guam's Quest for Commonwealth Status*, 5 ASIAN PAC. AM. L.J. 1 (1998) (discussing ways Guam could improve its commonwealth status); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990) (discussing formalistic aspects of territorial government); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992) (discussing legal issues regarding government of territories).
individuals. Many scholars have discussed, analyzed, and critiqued the origins and development of the federal-Indian trust relationship. Here I offer only the basics of the origins of this relationship. The trust relationship is a necessary corollary to the exercise of federal power over the tribes. The judiciary has determined that this federal power is based in the Constitution as well as treaties and statutes. The Constitution, treaties, and statutes created what the courts have recognized as "the undisputed existence of a general trust relationship between the United States and the Indian people."

In colonial and precolonial times, the British government interacted with Indian tribes as sovereign nations. As such, tribes and the British and colonial governments entered into treaties. The fledgling American government continued the same practice. Usually, in these treaties, the tribes relinquished claims to tribal lands, in exchange for protection of the remaining lands, rations, and other necessities. Treaties with Indian tribes are given the

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51 The individual state governments also act as trustees. For example, the Maine state constitution and statutes recognize the creation and existence of lands and monies held by the state in trust for the tribes residing there. See, e.g., Me. Const. art IX, § 14 (recognizing issuance of bonds with regard to money held in trust for Indian tribes); Me. Rev. Stat. Ann. tit. 30, § 6205-A (West 1996) (authorizing acquisition of Houlton Band Trust Land); Me. Rev. Stat. Ann. tit. 30, § 6208-A (West 1996) (establishing trust fund for Houlton Band).


55 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 10 (2d ed. 1988).

56 See Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1496 (discussing origins of trust doctrine). Treaties were oriented toward protecting the tribes and guaranteeing the perpetual existence
same effect as treaties with foreign nations.\textsuperscript{57} Some treaties have explicitly created a trust relationship in which the government promises, as a term of the treaty, to protect the tribe.\textsuperscript{58} Other treaties have implicitly created a trust relationship in which they have provided for the United States to obtain Indian lands in exchange for giving the tribes special rights to the lands which were held in trust by the government.\textsuperscript{59} Although the practice of making treaties with the Indians was discontinued in 1871, many treaties are still in force and are a source of the trust relationship.\textsuperscript{60}

Acts of Congress are also a source of the trustee relationship. For example, some of the earliest statutes dealing with Indian issues are the Trade and Intercourse Acts.\textsuperscript{61} These Acts implemented various

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\textsuperscript{57} See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (recognizing Cherokee Nation as "distinct political society").

\textsuperscript{58} See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 66 (Rennard Strickland et al. eds., 1982) (discussing legal effect of Indian treaties). Cohen noted, "Many treaties explicitly provided for protection by the United States . . . . Indian treaties sometimes expressly provided for the exercise of congressional power, and often provided for the exercise of considerable power by the President." Id. at 65.

\textsuperscript{59} See Wood, supra note 56, at 1496 ("[T]he modern form of the trust obligation is the federal government's duty to protect . . . tribal lands, resources, and the native way of life."); see also Sandi B. Zellmer, Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First, 43 S.D. L. REV. 381, 386 (1998) ("Thus, the trust responsibility arises . . . from the massive transfer of lands from Indian natives to the federal government and the retention and protection of a critical—though diminished—land base, as reflected in treaties.").

\textsuperscript{60} See COHEN, supra note 58, at 208.

\textsuperscript{61} See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 87-91 (4th ed. 1998) (describing passage of Trade and Intercourse Acts). The Trade and Intercourse Acts represented an early attempt by the federal government to formalize a policy towards Indian tribes through a series of federal laws passed between 1790 and 1834. Id. at 88. The goals of these laws were as follows:

1. Protection of Indian rights to their land by setting definite boundaries for the Indian Country, restricting the whites from entering the area except under certain controls, and removing illegal intruders.
2. Control of the disposition of Indian lands by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means.
3. Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.
4. Control of the liquor traffic by regulating the flow of intoxicating liquor into the Indian Country and then prohibiting it altogether.
5. Provision for the punishment of crimes committed by members of one
promises made in treaties and further defined the responsibilities of the government toward Indians. In the Acts, Congress prohibited the purchase of land from Indians without Congressional approval. In this way, Congress ostensibly sought to protect the tribes, but also protect the federal, as opposed to state, power over Indian commerce. Other statutes provide further definition to the trust relationship.

Courts have also relied on the Constitution as a source of the trust relationship. However, the Constitution does not specify any general source of power over Indian matters. When the Constitution was drafted, tribes were regarded as sovereign nations. However, due to the continuing conflicts between the states and the tribes, the drafters of the Constitution wished to make clear that the federal government was the appropriate body to deal with the tribes. The narrow constitutional basis for the federal government's power over tribal interests derives primarily from the Indian Commerce Clause, which states that the federal government has the authority "[t]o regulate commerce . . . with the

race against the other and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which led to frontier hostilities.

(6) Promotion of civilization and education among the Indians, in the hope that they might be absorbed into the general stream of American society.

Id.

62 Alex Talchchief Skibine, Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida, 29 ARIZ. ST. L.J. 121, 126 (1997). The Department of the Interior has recommended the repeal of this section. Letter from Ross O. Swimmer, Director, Office of Indian Trust Transition, to Tribal Leaders (June 5, 2002) (on file with author).


64 A nonexhaustive list of statutes follows. The Bartlett Act was enacted to provide a method to distribute funds to the State of Alaska to assist in providing housing to Native Alaskans. 42 U.S.C. § 3371 (2000). This Act has been interpreted to mean that the government may fulfill its trust duty toward the Native Alaskans by following the requirements of the Act. See Eric v. United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 47 (D. Alaska 1978) (holding that Bartlett Act gives government fiduciary duty toward Native Alaskans). The Tucker Act permits individuals to sue in the Court of Federal Claims, and thus the Court of Federal Claims and the Federal Circuit can hear Indian claims against the United States. 28 U.S.C. § 1491 (2000).

65 Newton, supra note 53, at 199. For a discussion of the pre-Constitution legal impact on Indians, see COHEN, supra note 58, at 50-61.

66 Newton, supra note 53, at 200.

67 Id.
Indian tribes." Thus, the trust doctrine has evolved judicially in the absence of any specific Constitutional basis.

The judiciary set the foundations for the trust relationship in three cases in the nineteenth century. Chief Justice Marshall authored each of the opinions. In Johnson v. M'Intosh, the Court had the opportunity to consider the power of Indians to convey full title. In a dispute over title, one party claimed land by way of a title conveyed from a tribe, and the other party from a deed granted by the federal government. Invoking the "doctrine of discovery," Marshall stated that "discovery" of the land "gave exclusive title to those who made it." Thus, the European governments held title prior to the Revolutionary War. This title included the sole right to purchase land from the native peoples. The Indians were not completely dispossessed, but rather, "were admitted to be the rightful occupants of the soil." However, their complete sovereignty was diminished and "their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle [of discovery]." At the end of the Revolutionary War, the American government acquired, by way of

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68 U.S. CONST. art. I, § 8, cl. 3. There are only three explicit references to Indians in the Constitution, as follows: once in the Commerce Clause, id., and twice in the exclusion of "Indians not taxed" from population counts taken for the purpose of apportioning taxes, U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2. The Treaty Clause, U.S. CONST. art. II, § 2, cl. 2, which grants exclusive treaty-forming power to the federal government, is also applicable to Indian law, as is the Supremacy Clause, U.S. CONST. art. VI, cl. 2, which enables federal laws concerning Indian affairs to supersede conflicting state laws. See Janice Aitken, The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope, 18 N. ILL. U. L. REV. 115, 115 n.2 (1997) (listing sources of federal authority over Indian affairs).

69 See Judith V. Royster, Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources, 71 N.D. L. REV. 327, 331 n.15 (1995) (noting that because trust doctrine is not based on Constitution, it cannot be asserted against legislative branch); cf. Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (rebutting notion that Congress' plenary power was extraconstitutional, stating that such power is "drawn both explicitly and implicitly from the Constitution itself").


71 Id. at 543-63.

72 Id. at 574.

73 Id.

74 Id.

75 Id.
treaty, the full title from the British government.\textsuperscript{76} Thus, this opinion has been read to establish a subjugation of the Indian right to the land to the federal government; tribes retained the right of occupancy subject to the federal government's title.\textsuperscript{77}

The second case in the trilogy built upon this subjugation, and first articulated the trust relationship. In \textit{Cherokee Nation v. Georgia},\textsuperscript{78} Chief Justice Marshall recognized the unique relationship between the government and the tribes as that of a guardian to a ward.\textsuperscript{79} The tribe filed the action under the original jurisdiction of the Supreme Court in order to enjoin the state from enforcing its laws on land guaranteed to the tribe by treaty.\textsuperscript{80} The Court held that it lacked jurisdiction over the matter because the tribe was neither a state of the Union nor a foreign state and thus could not bring suit before the Court under Article III of the Constitution.\textsuperscript{81} As Indian tribes were "domestic dependent nations . . . in a state of pupillage," they could not be defined as a foreign and distinct political entity.\textsuperscript{82} Marshall based his conclusion on the fact that the Indians' "relation to the United States resembles that of a ward to his guardian."\textsuperscript{83} Because of this characterization, the Court held that the action was outside its original jurisdiction.\textsuperscript{84} \textit{Cherokee Nation} therefore further diminished tribal sovereignty and created an obligation on the government to the tribes.

In the final case, Marshall refined the trust doctrine. In \textit{Worcester v. Georgia},\textsuperscript{85} the Court protected tribal sovereignty by holding that state laws did not apply in Indian country.\textsuperscript{86} Marshall

\begin{itemize}
\item \textsuperscript{76} \textit{Id.} at 584.
\item \textsuperscript{77} \textit{Id.} at 587.
\item \textsuperscript{78} 30 U.S. (5 Pet.) 1 (1831).
\item \textsuperscript{79} \textit{Id.} at 17.
\item \textsuperscript{80} \textit{Id.} at 15.
\item \textsuperscript{81} \textit{Id.} at 19-20.
\item \textsuperscript{82} \textit{Id.} at 17.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 20.
\item \textsuperscript{85} 31 U.S. (6 Pet.) 515 (1832).
\item \textsuperscript{86} \textit{Id.} at 561. The facts of this case arose from Georgia's attempt to assert jurisdiction and ownership over the mineral rich lands belonging to the Cherokee Nation in order to enforce a statute prohibiting whites from living on reservation land. \textit{Id.} at 515-16. The Court invalidated the state law and held that the federal government had exclusive power to deal with the tribes. \textit{Id.} at 561. Thus, federal laws, as well as treaties, preempted state laws regarding the tribes. This case also laid the foundation for the canon of construction that
\end{itemize}
found that the sovereign status of tribes denied the ability of states to exercise power over tribes. In so doing, however, Marshall upheld the supremacy of federal power over Indian tribes. Marshall derived his decision from the constitutional authority conferred upon Congress to regulate commerce with the Indian tribes. Marshall stated that "[t]he Indian nations had always been considered as distinct, independent political communities ... and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection." Marshall concluded that the Indians possessed sovereign rights that freed them from state control.

After issuing these cases, the Court did not decide a case involving the trust responsibility for more than fifty years. When the Court did finally speak, it issued a lasting and damaging opinion. In United States v. Kagama, the Court defined the trust doctrine as an additional, independent source of government authority over the tribes derived from the dependent status of the tribes. In Kagama, the Court considered the validity of the Major Crimes Act, making certain offenses between Indians subject to federal jurisdiction. The Court upheld the power of Congress to subject Indians to federal, as opposed to state or tribal, jurisdiction. The Court found that the Indians "are wards of the nation ... [and] communities dependent on the United States. Dependent largely for their daily food ... [and] their political rights." Therefore, the power of the federal government over

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87 Id. at 552-53.
88 Id. at 561.
89 See Newton, supra note 53, at 201.
90 See id. at 202.
92 Id. at 561.
93 The Court did issue a decision strongly supportive of tribal sovereignty in Ex parte Crow Dog, 109 U.S. 556, 572 (1883) (construing provisions at issue narrowly to avoid abridgement of tribal sovereignty).
94 Id. at 383-84.
95 Id. at 376.
96 Id. at 385.
97 Id. at 383-84.
"these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection." This definition of the trust doctrine was a reflection of the general policy of federal power over tribes resulting from years of subjugation. The Court's emphasis on the tribe's weakness and helplessness gave the government both the duty of protection and the power to control Indians. During the forty years after Kagama, "the trust relationship was used to expand the ability of the Federal Government to intrude into internal tribal affairs."

The plenary power doctrine that originated in Kagama was reinforced in Lone Wolf v. Hitchcock. Lone Wolf, the plaintiff, sought an injunction against enforcement of an agreement providing for cession of tribal land. The plaintiff claimed that the cession was obtained fraudulently and without the required signatures of three-quarters of all tribal adult males. The plaintiff claimed that Congress could not divest the tribe of its land unless prior treaty agreements, such as the one requiring the signatures, were followed. The Court disagreed and held that "plenary power over the tribal relations of the Indians has been exercised by Congress from the beginning [and is] not subject to be controlled by the judicial department of the government." More specifically, the judiciary could not hold Congress to the terms of a treaty if Congress determined that a different course of action was necessary. Thus, Congress' authority in respect to the care and protection of the Indians gave it the power to abrogate the provisions of the treaty and to divest the plaintiff of his land. The Court assumed that Congress had acted in good faith in its dealings with the Indians and therefore recognized the government's trust relationship, but at

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96 Id. at 384.
99 Wood, supra note 56, at 1503. The period of the late nineteenth century is referred to as the period of assimilation because the United States attempted to end the Indians' separate culture. Id. at 1501-02 n.135.
100 Aitken, supra note 68, at 124.
101 Id. at 116.
102 187 U.S. 553 (1903).
103 Id. at 561-62.
104 Id. at 561.
105 Id. at 564.
106 Id. at 565.
107 Id. at 564.
the same time refused to enforce the obligations that accompanied that relationship. The Court thus vested Congress with the power to protect Indian interests as the government perceived them, not as the wards knew them to be.

By the early 1900s, the trust relationship was firmly established. Tribal sovereignty, although protected from incursions by the states, was subject to the plenary power of the federal government. The federal government, in turn, had some obligations to the tribes to act as a guardian. Kagama laid the jurisprudential foundation for the increasing federal governmental control of all aspects of tribal life. Thus, the trust doctrine acted as a sword and a shield. In order to carry out this power and obligation, a federal bureaucracy developed.

II. THE FEDERAL GOVERNMENT AS CONFLICTED TRUSTEE

A. EXECUTIVE BRANCH ORGANIZATION

The Department of Justice is the largest law office in the world and the self-proclaimed "world's largest legal employer." The basic function of the Department of Justice is to represent the

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109 Aitken, supra note 68, at 127. Another example of the power of the government to protect an Indian's interest regardless of whether the Indian agreed with the exercise of that power is exemplified in Heckman v. United States, 224 U.S. 413, 444-45 (1912) (stating that case was not dependant on Indians being part of suit, nor their acquiescence).
110 The trust responsibility extends to the entire federal government, not just the Bureau of Indian Affairs. See Pyramid Lake Paiute Tribe v. United States Dept of the Navy, 898 F.2d 1410, 1420-21 (9th Cir. 1990) (holding that Navy has fiduciary duty to tribes which was not violated in this case); see also Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) (holding that trustee duties create responsibilities not just for Justice Department, but for federal government as whole); Northwest Sea Farms, Inc. v. United States Army Corps of Eng'rs, 931 F. Supp. 1515, 1521-22 (W.D. Wash. 1996) (holding that trust responsibility requires government to take action to ensure Indian treaty rights are given full effect, and not impinged upon, even though such action is not specifically authorized by government regulation); Joseph R. Membrino, Indian Reserved Water Rights, Federalism and The Trust Responsibility, 27 LAND & WATER L. REV. 1, 17 n.64 (1992) ("The government's fiduciary duty to Indians is not just the responsibility of officials managing Indian Affairs.").

interests of the United States in the courts. The Department of Justice's mission is "[t]o enforce the law and defend the interests of the United States . . . to ensure fair and impartial administration of justice for all Americans." The affairs and activities of the Department of Justice are directed by the Attorney General.

The Department of Justice has several divisions, each supervised by an Assistant Attorney General. The Environment and Natural Resources Division (ENRD), formerly known as the Land and Natural Resources Division, litigates most of the cases involving Indian law issues. The ENRD, through litigation in the federal and state courts, safeguards and enhances the American environment; acquires and manages public lands and natural resources; and protects and manages Indian rights and property.

112 See 28 U.S.C. § 516 (2000) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); see also Luther A. Huston, History of the Office of the Attorney General, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1 (1968) (stating that basic function of Department of Justice, headed by Attorney General, is to represent interests of United States in courts).


In addition, the Civil Rights Division, the Civil Division, and the Criminal Division may litigate cases involving tribes. The ENRD both litigates on behalf of tribes and defends actions brought by tribes. In the past, the same attorney could be assigned to defend the United States in actions brought by a tribe against the United States, and represent the same tribe in affirmative actions brought for their benefit. Although denying the existence of any conflict, “the Department has instituted a procedure to ensure that suits filed for the benefit of tribes are not impaired by the Department’s role in defending claims against the government.”

This “procedure” entailed the creation within the ENRD of the Indian Resources Section in 1975 to “conduct litigation for the United States as trustee for the private rights of Indian people.” The Indian Resources Section “conducts and supervises civil litigation on behalf of the United States both in defense of suits against individual Indians or tribes and prosecution of suits on behalf of Indian tribes or individuals.” The General Litigation Section is responsible for lawsuits brought by Indian tribes or individual Indians. For a broad outline of the structure of the Department of Justice, see United States Department of Justice, Department of Justice Organization Chart, at http://www.usdoj.gov/dojorg.htm (last updated Feb. 25, 2003). For a broad outline of the structure of the Environment and Natural Resources Division, see United States Department of Justice, Environment and Natural Resources Division Organization Chart, at http://www.usdoj.gov/enrd/enrdorg.htm (last updated Jan. 18, 2002).

Id., supra note 10, at 2.


Id. United States Dept of Justice, United States Attorneys’ Manual tit. 5, § 5-14.001 (4th ed. 1997); see also Simon, supra note 10, at 2:

I understand that in the 1970's the Department responded to a concern voiced by some of the tribes about the fact that, as the Environment Division... was then organized, attorneys who defended suits brought by tribes against the United States also represented the government in suits on behalf of tribes. The Department created a unit within the Division—the Indian Resources Section—specifically to represent the United States in furtherance of the trust responsibility.

Id.
individual Indians against the United States or federal officials. In other words, the General Litigation Section litigates against tribes and the Indian Resources Section litigates on behalf of tribes. As described by the Justice Department itself, "[t]his separation of functions helps to ensure that both the trustee and defense interests of the United States are pursued with the utmost vigor." Although the creation of the Indian Resources Section prevented the dual assignment of the same attorney, it did not prevent the deeper conflict. The Indian Resources Section and the General Litigation Section both report to the same Assistant Attorney General who must determine the position of the Division in litigation. Further, although language from the Department of Justice may suggest that Native American tribes themselves are the clients, the Department of Justice is adamant that the client is the United States as trustee for tribes.

121 See United States Department of Justice, Environment and Natural Resources Division Sections: General Litigation Section, at http://www.usdoj.gov/enrd/components.htm (last updated Dec. 26, 2002) (describing various subject matters litigated by General Litigation Section); see also Schiffer Oversight Testimony, supra note 115, at 18 ("The General Litigation Section . . . litigates claims filed by Indian tribes against the government and defends against claims in the Court of Federal Claims.").


123 The Environment and Natural Resources Division also includes the Wildlife and Marine Resources Section, the Environmental Enforcement Section, the Environmental Crimes Section, and the Environmental Defense Section. United States Department of Justice, Environment and Natural Resources Division Sections, at http://www.usdoj.gov/enrd/components.htm (last updated Dec. 26, 2002). Each of these sections may handle litigation involving Indian reservations. Id.

124 See Schiffer Letter, supra note 10, at 2 ("The Department, however, represents the United States and not particular tribes. . . . [T]he Attorney General is attorney for the United States as "trustee," not the "beneficiary." "") (quoting 1979 letter from Attorney General Griffin Bell). Often, a conflict of interest analysis involves conflicts between different clients. In fact, the Justice Department often defends against accusations of conflicts in Indian litigation by referring to the constraints against representing clients with conflicts. See Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 6 n.1 (2001) ("The Government is 'not technically acting as [the Tribes'] attorney. That is, the Tribes have their own attorneys, but the United States acts as trustee.'") (quoting transcript of oral argument); Simon, supra note 10, at 2 ("[T]here is no conflict of interest because the Department of Justice does not represent two or more clients having different or conflicting interests. It has only one client: the United States."); see also NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789-1990 at 30 (1992) ("The Attorney General, together with the available machinery of the Department of Justice, is at the disposal of the government of the United States in performing the functions of attorney and counsellor at law. The client is the United States of America.") (quoting LARRY SPEAKS & ROBERT PACK, SPEAKING OUT: THE REAGAN PRESIDENCY FROM INSIDE THE WHITE HOUSE 70
Litigation, either defensive or affirmative, by the Indian Resources Section occurs as a result of a request from a federal agency. Such litigation "includes protection of tribal assets or jurisdiction, assertion of Indian rights to property including hunting, fishing and water rights and the protection of tribal sovereignty in such areas as taxation . . . and reservation boundaries." Primarily these requests come from the Department of the Interior, and within the Department from the Bureau of Indian Affairs. After a tribe sends a request for litigation to the Department of the Interior, it is then referred to the nearest Regional Solicitor's office. The Interior Department determines whether to forward the request to the Department of Justice. If the Interior Department approves the request it is then referred to the Indian Resources Section, which makes the final determination about litigation. The potential for conflicts within the Department of the Interior is even greater than at the Department of Justice. Professors Wolfram and Hazard have eloquently described the situation:

(1988) (quoting Homer Cummings). Therefore, identifying the client of government attorneys is of paramount importance. See Developments in the Law: Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1414 (1981) ("A government lawyer serves the interests of many different entities: his supervisor in the department or agency, . . . the entire government of which that agency is a part, and the public interest."). This Article accepts the Justice Department's proposition that there is only one client and that client is the United States. The conflict problem on which this Article focuses is a conflict within the trustee itself, rather than a conflict between clients.

See Schiffer Oversight Testimony, supra note 115, at 16 ("Our civil cases . . . are referred to us by other federal agencies, either when they request that the Division file an action or when they have sued.").

126 United States Dept of Justice, supra note 119, at tit. 5, § 5-14.100.
127 The Bureau of Indian Affairs (BIA), located within the Department of the Interior, was created by Congress as the primary institution for carrying out the trust relationship between the federal government and Indian groups. See STRATEGIC PLAN, supra note 7. Comprehensive authority is conferred on the Commissioner of Indian Affairs to manage all matters arising out of Indian relations. 25 U.S.C. § 1a. Today, BIA activities include providing Native Americans with education scholarships, business loans, employment assistance, social services, and housing improvements, and managing trust resources like land, water, and minerals. WILLIAM C. CANBY, AMERICAN INDIAN LAW 44-45 (1988).
129 See Schiffer Oversight Testimony, supra note 115, at 16.
The heart of the problem results from Federal law allocating responsibility among the Executive Branch departments and the system of organization within these departments. The Solicitor's Office of DOI bears overall responsibility for all the legal work of DOI, including the fulfillment of the agency's legal obligations as trustee to the tribes. Thus, the Solicitor represents the tribes as *cestui que* trust of the Secretary of the Interior in his general capacity as trustee for the lands and natural resources of Indian tribes, but also represents the Secretary when his agency's actions are the subject of a suit brought against DOI by or on behalf of a tribe.130

Specifically, the attorneys representing the Solicitor's office in the above-described matters are located in the Division of Indian Affairs. The Division of Indian Affairs is legal counsel to the Secretary of the Interior and provides advice to the Bureau of Indian Affairs concerning the administration of Indian service programs.131 Due to this structure, the same attorney at the Interior Department could work with Justice Department attorneys in the General Litigation Section and the Indian Resources Section. Thus, Interior Department attorneys working on behalf of a tribe in one matter "engage in the same kind of confidential (and highly trusted) communications with the tribe that anyone would engage in with a trusted attorney."132 As Professors Wolfram and Hazard point out, "[i]n collaborating with DOJ in defending suits by the tribe, these DOI attorneys unfortunately cannot ignore or forget that which they have learned as fiduciaries of the tribe."133

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130 Letter from Geoffrey C. Hazard, Jr., Professor of Law, Harvard Law School, and Charles W. Wolfram, Professor of Law, Cornell Law School, to Janet Reno, Attorney General, and Bruce Babbitt, Secretary of the Interior 2 (June 7, 1993) (on file with author) [hereinafter Hazard & Wolfram Letter].
132 Hazard & Wolfram Letter, supra note 130, at 2.
133 Id.
B. HOW CONFLICTS ARISE

Within the executive branch, numerous conflicts may arise without the involvement of the Department of Justice. Specific to Indian issues, conflicts often arise within the Interior Department, for example, "[T]he conflict of interest centers in the Department of the Interior, which is responsible both for management of Indian affairs and for management and utilization of public land and water resources in the western United States."\textsuperscript{134} Bureaus within the Interior Department may use resources or land belonging to tribes without compensation,\textsuperscript{135} or agencies may disagree on a course of action.\textsuperscript{136} The Secretary of the Interior may solve these conflicts when it renders a decision. However, the Justice Department is often used as the arbiter of inter- or intra-agency disputes. In fact, President Carter encouraged agencies to submit disputes to the Attorney General for resolution.\textsuperscript{137} At a much less exalted level, attorneys within the Justice Department must resolve disputes within and between agencies on a regular basis. Unresolved disputes may arrive at the Justice Department or may develop as litigation progresses. These potential conflicts may be grouped into the following three broad categories: conflicts over the same piece of property, conflicts within the same case, and conflicts due to a fear of preclusion.\textsuperscript{138}

\begin{footnotesize}
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\item \textsuperscript{134} \textit{Indian Trust Counsel: Hearing on S. 2035 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 92d Cong. 202 (1972) (statement of Reid Peyton Chambers). The Department of the Interior's General Counsel acts as the attorney for the trustee and as attorney for the agencies whose interests conflict with the Indian claims. Id. at 215.}
\item \textsuperscript{135} \textit{Id. at 215.}
\item \textsuperscript{136} Although the Justice Department may not be involved in the process, it serves as "counsel to these conflicting public bureaus; in addition to its public duties to advise and represent the trustee, Justice also appears obligated to provide legal representation to the Indian beneficiaries." \textit{Id. at 203; see also Membrino, supra note 110, at 19 (discussing disagreement between Interior and Justice Departments over appropriate litigation position for Pyramid Lake Paiute Tribe's water rights).}
\item \textsuperscript{137} \textit{Exec. Order No. 12,146, 3 C.F.R. 411 (1980), reprinted as amended in 28 U.S.C. § 509 (2000). This Executive Order is still in effect.}
\item \textsuperscript{138} For a different categorization of conflicts, see Colloquium, \textit{Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development?}, 71 N.D. L. REV. 365, 377 (1995) [hereinafter Colloquium, \textit{Federal Trust Responsibility}] (comments of P.S. Deloria) (stating following three kinds of "situations where the federal government has a conflict[:]" when federal government claims same land as claimed by Indians; application of taxes to Indian situation; and conflicting statutory obligation which}
\end{itemize}
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1. Same Property. The Department of Justice may face a conflict over a piece of property. A prime example is the Arkansas River Bed litigation. This action seeks to quiet title to thousands of acres in the Five Tribes in Oklahoma. The request for the initiation of litigation has been around for years; in fact, the federal appellate court quoted the United States as stating it was prepared to file since 1970. In 1989, when the United States still had not filed the complaint, the Cherokee Nation of Oklahoma filed its own suit alleging a breach of trust on the part of the United States for failure to quiet title as part of its obligation to manage tribal lands.

Department of Justice attorneys in the Indian Resources Section are working on the request to file quiet title actions and other Department of Justice attorneys in the General Litigation Section are working to defend the breach of trust case. Although the attorneys are assigned to different sections and report to different section chiefs, those section chiefs report to the same Assistant Attorney General. Meanwhile, at the Interior Department, the attorneys working on the quiet title action are the same attorneys working to defend the breach of trust action.

After the Cherokee Nation filed suit, the District Court determined that it could not decide the breach of trust suit without a ruling on the extent of the tribe's ownership of the lands in question. Based on this determination, the District Court issued a stay. Under the stay, until the question of the Nation's ownership of the river bed was adjudicated, the breach of trust action would not be decided. The Court of Appeals, quite

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139 Cherokee Nation v. United States, 124 F.3d 1413, 1418 (Fed. Cir. 1997).
140 Id.
141 Id. at 1418.
142 Id.
143 See supra notes 111-33.
144 See supra notes 111-33.
145 See supra notes 111-33.
146 Cherokee Nation, 124 F.3d at 1415.
147 Id. (describing district court).
148 Id.
correctly, overturned the stay, stating "[t]he potential conflict of interest is manifest." Thus, the appellate court held:

The stay also has the cruel effect of placing the Tribes at the mercy of the party against whom they seek redress. Under the trial court's stay, the Tribes cannot pursue their claims against the Government until the Government files and prosecutes the quiet title actions. The potential conflict of interest is manifest. As litigation adversaries go, the United States may be a relatively trustworthy sentry, but this court is confident the Tribes would prefer to have a neutral party guard the "hen house." Had the stay remained in place, the success of the quiet title action could have directly impacted the breach of trust action. If the quiet title action failed, there would be no breach by the United States for failing to file the action. Or, apart from these extremes, the less acreage quieted in the Nation, the lower the potential award for damages for failure to manage the lands properly.

2. Same Case. A second situation in which the Department of Justice faces potential conflicts of interest occurs within the same case. The classic example is a water rights case. In a type of litigation known as a "general stream adjudication," anyone claiming rights to water within a particular watershed must file a claim. The federal government, as owner of property through

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149 Id. at 1418.
150 Id.
151 A breach of trust action may fail for any number of reasons, including a finding by the court that Justice or Interior Department does not have a specifically delineated trust responsibility, or a determination that the government did in fact fulfill its trust obligations. See infra notes 314-64 and accompanying text (discussing Mitchell cases).
152 The purpose of general stream adjudication is to establish both consumptive and nonconsumptive rights of water users on the stream. Courts maintain that this special type of litigation does not create any new rights, it merely confirms preexisting ones. See A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 7:2 (1988):
Water rights adjudication is an action to determine all respective water rights on a stream system. It is analogous to a quiet title action, but an adjudication determines the rights of water right holders among themselves not between a class of claimants and a single tract of land. The analogy between water rights adjudications and quiet title actions
many different agencies, has many different claims to water within any watershed. An Army base within the watershed will have a claim, the Forest Service will have a claim for the national forests, the Park Service will have a claim for the national parks, the Bureau of Reclamation will have a claim for its lands, and the Bureau of Indian Affairs will have a claim for any reservations within the watershed. Department of Justice attorneys represent each of these different federal claimants. Indian Resource Section attorneys represent the Bureau of Indian Affairs on behalf of the tribes, and General Litigation Section attorneys represent the remaining federal claimants. Obviously, there is only so much water to go around.

For example, in *Arizona v. California*, the litigation concerned the Colorado River water rights of five Indian tribes, five states, and various other federal agencies. The Supreme Court, with original jurisdiction, apportioned the water rights in 1979. In the litigation, the tribes were represented by the United States, which was also representing the other various federal interests. The tribes later intervened and wished to relitigate their interests because they were not present in the original litigation. They claimed that there was a conflict of interest in the United States representing their rights along with those of other federal establishments in the same case. The Supreme Court held that

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Id. (footnotes omitted).

153 An additional conflict arises when the same Indian Resources attorney represents several tribes in a general stream adjudication.

154 The conflict between the tribe and federal agencies may in practice be reduced by the fact that the tribal water rights generally are more senior rights to those of the federal agencies, and thus the tribe is entitled to water first.

156 Id. at 608-09.
157 Id. at 611-12.
158 Id. at 608-09.
159 Id. at 612.
160 Id. at 627.
there was no conflict of interest. The Court declared, "[T]here was no basis for the Government to believe that Indian water rights and water needs for other federal property were in direct competition."

Justices Brennan, Blackmun, and Stevens dissented and recognized that there was in fact an inherent conflict of interest. They noted that the Secretary of the Interior and the Attorney General must, at the same time, act in the national interest and the private interest of the Indians regarding land use and water rights. They believed "[t]here is considerable evidence that the Indians are the losers." Although the dissenting Justices found that in this case the United States's representation of both interests did not diminish the Indians' water rights, they noted that the federal government is often slow to bring Indian claims that conflict with other federal interests.

Yet another example is the Pyramid Lake litigation. In 1913, the United States successfully sued on behalf of several Indian tribes to obtain water rights to the Truckee River. Later, in 1973, the United States again sued to obtain additional water rights to the river for the tribes. In addition, the government filed suit on the behalf of the Newlands Reclamation Project and represented both the Project's interest and the tribes' interest. The Court held that it was not a conflict of interest for the United States to represent both entities even though they had competing interests.

3. Preclusion. Finally, conflicts may arise from a fear of preclusion. With notable exceptions, the Department of Justice conducts all litigation for the United States. This control of

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161 Id.
162 Id. at 628.
163 Id. at 650 (Brennan, J., concurring in part, dissenting in part).
164 Id. at 650-51 (quoting H.R. Doc. No. 91-363, at 9-10 (1970)).
165 Id. at 651.
166 Id.
170 Nevada, 463 U.S. at 110.
171 Pyramid Lake, 354 F. Supp. at 261.
172 28 U.S.C. § 516 provides that "except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."
federal litigation allows the Justice Department to control and regulate other administrative agencies and departments. However, the control exercised by the Justice Department over litigation places it in the position of resolving numerous interagency disputes. Indeed, "because inter-agency disputes arise from conflicting government interests, the question of who will resolve such conflicts has implications beyond questions of efficiency." Thus, the Justice Department must determine the litigating position of the United States when faced with contradictory or conflicting positions brought to it by agencies.

In the case of Indian litigation, the Bureau of Indian Affairs (represented by the Indian Resources Section) may seek to assert one position and a separate agency within the Interior Department or a different department (represented by the General Litigation Section) may seek to assert another. Additionally, one agency

U.S.C. § 516 (2000). In principle, this statute places the Attorney General at the helm of the executive branch's litigation proceedings. Neal Devins, Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation, 82 CAL. L. REV. 255, 263 (1994). However, Congress has allowed for exceptions. Id. at 263-64. Unfortunately, these exceptions represent an extraordinary patchwork which defy easy categorization. Id. at 264. For example, the Federal Election Commission has independent litigating authority on all matters before all courts; the Department of Agriculture and the Federal Trade Commission can litigate independently before all courts, but only on some matters; the Securities and Exchange Commission, the Internal Revenue Service, and the Equal Employment Opportunity Commission have litigating authority that extends to some courts on all matters; and the Environmental Protection Agency and the Departments of Health and Human Services, Agriculture, Defense, Labor, and Treasury have litigating authority in some courts on some matters. Id. at 264, 269. For other agencies, like the National Transportation Safety Board, no independent litigating authority exists. Id. at 278. For a thorough discussion of the patchwork nature of the litigating authority of independent agencies, see generally id. at 285-327. See also Note, Judicial Resolution of Administrative Disputes Between Federal Agencies, 62 HARV. L. REV. 1050, 1056 (1949) (discussing "the supervisory power which the Attorney General exercises over all litigation to which the United States or its agencies are party").

Clayton, supra note 114, at 72 ("The [Office of the Attorney General]'s ability to control federal litigation makes it an attractive instrument for regulating other administrative agencies and departments.").

Id. at 79.

Id. at 78-79 (suggesting that Department of Justice performs important service to courts by filtering government litigation and forcing agencies to compromise).

Id. at 79.

Senate Subcomm. on Admin. Practice & Procedure of the Comm. on the Judiciary, 91st Cong., A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources 14 (Comm. Print 1971) ("The Department of Justice's statutory duty to defend proceedings commenced by Indian tribes or bands in the
may seek to block another's litigating position for fear that the adoption of such a position may impact future litigation.\textsuperscript{178} Even if the litigating position is considered to be that of the "client" agency rather than the United States as a whole, one agency's position in court may bind another in later litigation.\textsuperscript{179}

For example, consider the eastern land claims. In the 1960s, New York tribes sued the United States under a federal statute waiving sovereign immunity and providing tribes access to federal court.\textsuperscript{180} In these cases, the tribes alleged that the United States failed to protect their rights when the State of New York purchased tribal land in the 1800s.\textsuperscript{181} The United States defended those claims and included the argument that the purchase was ratified by Congress, a defense which would cut off the tribes' claim against the United States and any potential claim against the State of New

\textsuperscript{178} See Note, supra note 172, at 1057 (claiming that supervision by Attorney General over litigation is "ordinarily desirable in order to maintain the Government in a consistent position in its dealings with private parties").

\textsuperscript{179} Id. at 1050.

\textsuperscript{180} Because the United States cannot be sued without its consent, Congress passed the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v (1976), which permitted a commission to hear suits in law and equity brought by tribes against the United States. The Act permitted the following types of suits: (1) claims by Indian tribes, bands, or other identifiable Indian groups against the federal government, arising under the Constitution, laws, or treaties of the United States, or executive orders of the President; (2) claims on which the claimant would be entitled to sue if the federal government was subject to suit; (3) claims that would result from the revision of treaties, contracts, or agreements between the claimant and the United States on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake 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 by treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity. 25 U.S.C. § 70a (1976). Congress passed the Act with the intent of settling all claims of past wrongs against Indian claimants once and for all, with the Act set to expire in 1978. 41 AM. JUR. 2D Indians § 105 (1995). The jurisdiction of the Indian Claims Commission was limited to claims arising prior to 1946, or to damages arising after 1946 where the claim accrued prior to 1946. See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 264-68 (1988) (discussing Indian Claims Commission Act). Any claims arising after the establishment of the Commission were to be presented to the Court of Claims, a court with a much narrower permissible scope of review. Id. Many claims against the federal government for land taken or unfairly purchased from Indian claimants were handled by the Commission prior to its end, in 1978. Id.

York. In one case, the court accepted the defense and found that the sale to the State of New York had been implicitly ratified by Congress in 1927. In the 1980s and 1990s, the same tribes sued the State of New York alleging a violation of the Trade and Intercourse Act that requires congressional approval for purchases of Indian land. In the late 1990s, the United States intervened in the actions on behalf of the tribes. For the United States to assert a claim on behalf of the tribes, the United States must assert that the 1960s litigation does not preclude the current suit. Although the United States successfully asserted that it was not precluded by the earlier litigation, the positions that the United States (and specifically, the General Litigation Section) took in the 1960s presented an obstacle to the Indian Resources Section when it sought to litigate on behalf of the tribal interest in the 1990s. In addition, the Justice Department certainly must consider the impact of arguing that the Indian Claims Commission litigation does not preclude current litigation on the potential future litigation as tribes could seek to reopen cases long thought closed.

C. THE BEHAVIOR OF THE DEPARTMENT OF JUSTICE VIOLATES PRIVATE TRUST PRINCIPLES

Considering the three areas of potential conflict, this Article concludes that a private trustee could not proceed in the face of such conflicts. First, in conflicts over the same property, the trustee must act with utmost loyalty to the beneficiaries and therefore seek to establish title to the property for the trust. The trustee could not

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182 Id.
183 Id.
187 Seneca Nation II, 26 F. Supp. 2d at 566-68.
188 Senate Subcomm. on Admin. Practice & Procedure of the Comm. on the
refrain from taking such action simply because the trustee may be found liable later. In fact, the trustee may be found in breach of her duties for failing to take action to protect trust property.\footnote{See Simon, supra note 10, at 2.}

The second potential area of conflicts arises within the same case. A trustee simply could not consider any interest beyond the interest of the beneficiary.\footnote{See Gila River Pima-Maricopa Indian Cmty. v. United States, 684 F.2d 852, 863 (9th Cir. 1982) (holding that United States should have taken legal action to end diversion or restore alternate supply of water in order to comply with fiduciary duty of fair and honorable dealings). The tribe claimed that the United States was required to enjoin the upstream diversion of reservation water. \textit{Id.}} The Department of Justice argues that there is no conflict because this is only one client, and that a trustee may both represent the trust and defend the trust in actions brought against it.\footnote{SENATE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE COMM. ON THE JUDICIARY, supra note 177, at 3 ("[P]rivate rights, which the United States is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes.").} However, this misrepresents the situation. Considering the Army's claim to water is considering an interest beyond that of the beneficiaries of the trust. If federal agencies are considered beneficiaries along with the tribes, then the trustee could not choose sides in a dispute between beneficiaries. The Supreme Court has recognized as much, stating, "[T]he 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."\footnote{See infra notes 245-79 and accompanying text.}

Finally, the fear of preclusion creates the potential for conflicts. Again, considering an interest other than the beneficiary's violates the trustee's duty of loyalty. A private trustee could not refrain from action on behalf of the trust on the grounds that the action could negatively affect a separate trust (or client) in the future.

Thus, under the common law of trusts, a private trustee could not engage in the same actions as does the United States in its representation of Indian tribes. Such considerations would violate
the trustee's duty of loyalty and allow, at a minimum, the appearance of conflicts of interest.  

III. DOES THE PRESENCE OF THE UNITED STATES CHANGE THE CONFLICTS ANALYSIS?

As established above, the Department of Justice's continued representation of conflicting interests violates the duties that a private trustee must uphold. The question remains whether the Justice Department should be held to the same standards as a private trustee. There are differences between the Justice Department and a private trustee. Unlike a private trust, there is no single document creating the federal-Indian trust relationship. Thus, the entirety of the duties of the United States as trustee are not spelled out in a clear manner. In supporting its argument that there is no conflict, the Justice Department wholly rejects the application of private trust standards.  

The Department of Justice recognizes the possibility of a conflict of interest, noting "In cases involving Indian representation by the United States, conflicts may arise between Indian interests and those of particular entities of the federal government." Despite this recognition of potential conflicts, the Justice Department has long maintained that there is no disabling conflict. The Justice Department rests this position on the following two grounds: a 1979 letter from then—Attorney General Griffin Bell to then—Secretary

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193 See Colloquium, Federal Trust Responsibility, supra note 138, at 373 (comments of Robert Clinton) ("You're not going to get undivided loyalty however much you try to enforce an obligation."); id. at 374 (comments of P.S. Deloria) ("[T]he conflict of interest cannot be resolved as a private trustee").

194 See infra notes 315-64 and accompanying text (outlining and discussing Mitchell decisions).

195 See infra notes 202-14 and accompanying text.

196 UNITED STATES DEP'T OF JUSTICE, supra note 119, at tit. 5, § 5-14.400. The solution that the Justice Department instituted for these potential conflicts is notification to the Chief of the Indian Resources Section. Id. The Department ordered, "When it is determined that such conflicts exist and cannot be resolved, the Chief, Indian Resources Section should be notified." Id. The Justice Department does not provide any advice as to what the Chief of the Indian Resources Section is supposed to do other than refer to the 1979 letter from Griffin Bell to Cecil Andrus.

197 See infra notes 202-14 and accompanying text.
of the Interior Cecil Andrus ("the Andrus Letter"), and the Supreme Court's decision in *Nevada v. United States*. After explaining the grounds for the Justice Department's position, I describe the opinion in *Nevada* and suggest that the Department is misusing *Nevada*.

**A. THE POSITION OF THE DEPARTMENT OF JUSTICE**

In 1979, Attorney General Griffin Bell wrote to Secretary of the Interior Cecil Andrus to set forth his understanding of the legal principles governing the conduct of "the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties." Bell began the letter by discussing the respective roles of the Interior and Justice Departments. He recognized the multiple obligations on Congress and the Interior and Justice Departments in fulfillment of the special relationship between the federal government and the Indian tribes. He also noted that the Secretary of the Interior is responsible for implementing such laws and treaties, and that the Attorney General is responsible for litigation on behalf of the United States arising under the statutes and treaties. In addition, Bell observed that Congress gave the Attorney General responsibility for litigation in which the United States is a party or is interested.

In regard to these multiple obligations, Bell stated "there is no disabling conflict between the performance of [the duties to Indian tribes] and the obligations of the Federal Government to all people of the Nation." He surmised that the separation of powers—the "functional thesis upon which our form of government is
premised”—presupposes that the people as a whole benefit when the executive branch enforces the laws enacted. The fact that an identifiable class realizes tangible benefits from litigation “does not distinguish Indian cases from many civil rights or labor cases.”

Thus, “where there are other statutory obligations imposed on the Executive in a particular case aside from this affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or overlapping interests to arrive at a single position of the United States.”

The Department of Justice Manual explicitly refers to the Andrus Letter, noting, “Guidance concerning the role of the Department of Justice in the conduct of Indian litigation is set forth in a 1979 letter from the Attorney General to the Secretary of the Interior.”

Four years later, the Supreme Court issued *Nevada v. United States*, a res judicata decision in a water rights case. The Department of Justice relies on *Nevada* for its position that there is no conflict of interest:

> These overlapping obligations do not give rise to a conflict of interest. In this area of the law, as recognized by the Supreme Court in *Nevada v. United States*... “[t]he Government does not ‘compromise’ its obligation to one interest that Congress obliges it to represent when it simultaneously performs another task for another interest that Congress has obligated it by statute to do.”

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209 *Id.* at 3.
210 *Id.*
211 *Id.* at 3-4. Bell suggested that the canons of construction requiring congressional actions to be interpreted in light of the trust relationship will be considered in reaching this unitary position. *Id.*
B. THE NEVADA DECISION

Because Justice relies heavily on Nevada, a detailed examination of the opinion is useful. The Nevada action involved an attempt to reopen a prior decree that adjudicated water rights to the Paiute Indian Reservation. In 1859, the Department of the Interior set aside half a million acres in what is currently Nevada as a reservation for the Paiute Indians. In 1874, President Grant confirmed this withdrawal of public lands through an executive order that created the Pyramid Lake Indian Reservation. This reservation encompassed Pyramid Lake, the land surrounding it, and the lower end of the Truckee River.

Almost thirty years later, Congress, through the Reclamation Act of 1902, required the Secretary of the Interior to withdraw from public entry specified arid lands, reclaim the lands through irrigation projects, and then restore the lands pursuant to applicable homestead law. At that time, the Secretary withdrew from the public domain 200,000 acres in Western Nevada. This created the Newlands Reclamation Project, which was designed to irrigate a substantial area in Nevada using the waters of both the Truckee and Carson Rivers. Before the Project was fully operational, however, private landowners also established water rights to the Truckee. In 1913, the United States brought an action for the benefit of the Paiute Tribe and the Project, claiming rights to water in the Truckee and seeking a final decree quieting title to the rights

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215 Nevada, 463 U.S. at 110.
216 Id. at 115.
217 Id.
218 Id.
220 Nevada, 463 U.S. at 115.
221 Id.
222 Id.
223 Id. at 116.
of all parties. This action became known as the Orr Ditch litigation.

After eleven years of hearings, a Special Master issued a report and proposed a decree that awarded the tribe significantly less water than the Project. In 1926, the District Court entered a temporary restraining order, which remained in place until a prolonged drought occurred. In 1934, settlement negotiations commenced between the organizational defendants and the United States as representative of the tribe and the Project. These negotiations resulted in an agreement giving the United States, on behalf of the tribe, an increase in water rights to allow for irrigation of an additional 2,745 acres of reservation land. In 1944, a final decree embodying this negotiated settlement was entered by the District Court. No appeal was taken.

Due to heavy use of the Truckee by off-reservation interests, the waters of Pyramid Lake gradually receded and the indigenous fish
of the lake neared extinction. In 1973, the United States filed suit on behalf of the tribe in order to seek additional water from the Truckee "for the maintenance and preservation of Pyramid Lake, and for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish." The Paiute Tribe intervened in the action. The United States's complaint named as defendants all persons who claimed water rights to the river, including those who had been defendants in the Orr Ditch case, the Truckee-Carson Irrigation District (successor to the Project), and individual farmers who claimed water under the Project. The United States argued that the Orr Ditch decree settled only claims as to rights to water for irrigation, not claims as to sufficient water necessary to maintain and preserve the lake and the fishery.

The defendants asserted res judicata as an affirmative defense, arguing that the Orr Ditch decree precluded relitigation of water rights to the Truckee. The District Court upheld the defense, finding that all of the parties in the Nevada litigation were parties, or in privity with parties, in the Orr Ditch case. The court further found that the Orr Ditch litigation had adjudicated all water rights to the Truckee, that the parties were required at the time of the Orr Ditch litigation to set up their full claims to the water, and that the Nevada cause of action was the same quiet-title cause of action asserted by the United States in the Orr Ditch litigation.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The court agreed that the cause of action was the same as that in Orr Ditch, but held that the Orr Ditch decree did not settle the water rights claim between the tribe and the owners of the Project. The court reasoned that litigants are not

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233 Id. at 119 n.7.
234 Id. at 119.
235 Id. at 118.
236 Id. at 119. In addition, the United States claimed that, based on the Winters doctrine, the 1874 order creating the reservation must have reserved the right to all water needed to sustain the reservation, including the fishery. Id. at 116 n.1.
237 Id. at 119.
238 Id. at 119-20.
239 Id.
240 Id.
241 Id.
bound by a prior judgment unless, inter alia, they were adversaries in the earlier pleadings.242 Neither the tribe nor the project owners were parties in the Orr Ditch litigation.243 Rather, each was represented by the United States and “since their interests may have conflicted in that proceeding,” the Ninth Circuit found that the United States had not intended to bind these nonparties “absent a specific statement of adversity in the pleadings.”244 Therefore, the tribe was not bound by the Orr Ditch litigation.

The Supreme Court reversed in part and affirmed in part, holding that res judicata prevented the United States and the Paiute Tribe from litigating the water rights previously decided by the Orr Ditch litigation.245 The Court recognized the “fiduciary obligation” of the government to Indian tribes and stated, “[T]he 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.”246 Moreover, the “potentially conflicting interests” in the Nevada case occurred as a result of congressionally imposed obligations:

Today, particularly from our vantage point nearly half a century after the enactment of the Indian Reorganization Act of 1934, it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands.247

Despite this apparent conflict, the Court stated “it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has

242 Id. at 120-21.
243 Id. at 121.
244 Id.
245 Id. at 145.
246 Id. at 128.
247 Id. (citation omitted).
 obliged it to represent other interests as well.\textsuperscript{248} The Court further held that 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."\textsuperscript{249} The Department of Justice uses this language to justify its position.\textsuperscript{250} However, as explored further below, this language is mere dicta set forth as context to the discussion of the principles of res judicata.\textsuperscript{251}

As the Court stated, "With these observations in mind, we turn to the principles of res judicata that we think are involved in this case."\textsuperscript{252} The Court first considered whether the Orr Ditch litigation and the Nevada litigation concerned the same cause of action, the first requirement of res judicata.\textsuperscript{253} The Court answered this question in the affirmative.\textsuperscript{254}

Having found the first requirement of res judicata to be present, the Court turned to the second, namely whether the parties in the second action were parties to the first action or in privity with

\begin{itemize}
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Schiffer Letter, supra note 10, at 2.
\item \textsuperscript{251} See infra notes 301-10 and accompanying text.
\item \textsuperscript{252} Nevada, 463 U.S. at 128. There are three elements to res judicata:
  \begin{itemize}
  \item The essential elements of res judicata that must be established before the doctrine can be invoked are, in general, that [1] the parties in the present litigation be the same or in privity with the parties to the earlier dispute, that [2] the claim presented in the current action be identical to the one determined in the prior adjudication, and that [3] there be a valid final judgment on the merits.
  \end{itemize}
\item \textsuperscript{253} See Nevada, 463 U.S. at 129-36. There are three elements to res judicata:
  \begin{itemize}
  \item There are three elements to res judicata:
  \end{itemize}
\item \textsuperscript{254} See Nevada, 463 U.S. at 130-34 (discussing whether same cause of action sought in Orr Ditch litigation was currently being sought).
\end{itemize}
parties to the first action. The Court held that the United States was a party and the tribe, whose interests were represented by the United States and could be bound by the decree. The Court's decision to bind the tribe rested on the guardian-ward relationship, explaining that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question.' We reaffirm that principle now.

The Paiute Tribe sought to break free from the preclusive effect of the government's presence as "guardian" in the Orr Ditch litigation. The Tribe cited the Court's prior decision in Hansberry v. Lee in which the Court held that "persons vicariously represented in a class action could not be bound by a judgment in the case where the representative parties had interests that impermissibly conflicted with those of persons represented." The Tribe argued that the government's primary interest in the Orr Ditch litigation was the Newlands Reclamation Project, and that "by definition, any water rights given to the Tribe would conflict with that interest." The Court rejected that argument.

The Court referred back to its argument that the government stands in a different position from that of a private fiduciary when Congress obligates it to perform more than one duty. It noted, "When the Government performs such duties it does not by that reason alone compromise its obligation to any of the interests involved." The Court then set forth the history of the government's involvement in the Orr Ditch litigation. After the initiation of that litigation, a Special Assistant United States

255 Id. at 134-35.
256 Id. at 135.
257 Id. (quoting Heckman v. United States, 224 U.S. 413, 446 (1912)) (additional citations omitted).
258 311 U.S. 32 (1940).
259 Nevada, 463 U.S. at 135 n.15.
260 Id.
261 Id.
262 Id.
263 Id.
264 Id.
Attorney recognized that the government should seek to establish water rights for the Reservation. The Bureau of Indian Affairs (BIA) was kept aware of the litigation and participated in settlement negotiations. The involvement of the BIA appeared to be of great import to the Court: when it said, "[T]here is nothing in the record of this case to indicate that any official outside of the BIA attempted to influence the BIA's decision in a manner inconsistent with these obligations." Further, the Court surmised that it may have been entirely the decision of the BIA not to press for a fishery water right. The Court made use of those findings to bolster its conclusion that there was no improper influence on the government in choosing to carry out its obligations. The Court quoted with approval the decision of the District Court:

This conflict of purposes was apparent prior to and during the Orr Ditch proceedings and was resolved within the executive department of the government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials charged with that responsibility. . . . The government lawyers in Orr Ditch . . . as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the executive department of government.

After determining that the potential conflict did not deprive the United States of the authority to litigate, the Court turned to the question of the adversity of interests between the Paiute Tribe and
the Project.\textsuperscript{271} The Court rejected the Ninth Circuit's holding that the requisite adversity was not present because the United States had breached its duty of loyalty to the tribe.\textsuperscript{272} The Ninth Circuit had relied on principles of private trust law.\textsuperscript{273} According to the Supreme Court:

[T]he Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. . . . It may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.\textsuperscript{274}

Further, the Court, relying on \textit{Heckman v. United States},\textsuperscript{275} noted that the representation of the United States is "complete."\textsuperscript{276} The Court quoted \textit{Heckman} in saying, "'There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents . . . . [It] is [not] circumscribed by rules which govern private relations.'"\textsuperscript{277}

The Court cast aside the tribe's claim of conflict, declaring, "The District Court's finding reflects the nature of a democratic
government that is charged with more than one responsibility; it does not describe conduct that would deprive the United States of the authority to conduct litigation on behalf of diverse interests." Therefore, the United States's representation of the tribe in the Orr Ditch litigation, despite any potential conflict, was sufficient to bind the tribe to the prior decree, and render the tribe and the Project sufficiently adverse to apply res judicata.

C. ANALYSIS OF NEVADA AND THE JUSTICE DEPARTMENT'S MISREADING OF NEVADA

Within the Indian community, the concern over Nevada is not only that Indian rights "compete" with other federal interests, but that they always yield to the federal interests. The Department of Justice refuses to recognize this concern over a conflict of interest. The Justice Department's position is simplistic because it believes that Nevada supports its position that, as long as it considers the tribal trust interest along with another governmental interest, there is no conflict. Reading Nevada in this manner, the Justice Department expands the decision beyond its holding and seeks to use the decision as both a sword and a shield. Nevada does not support this reading, and the Department of Justice can find little support from the lower courts.

278 Id. at 138 n.15.
279 The Court addressed the possibility of the government's violation of its fiduciary responsibilities in a footnote, stating "If in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." Id. at 144 n.16. Justice Brennan concurred on the same grounds. Id. at 145 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted.").
280 See Russel Lawrence Barsh, Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term, 59 WASH. L. REV. 863, 889 (1984) ("When Congress directs the Interior Department to promote some private interest, . . . conflicting Indian rights and claims are implicitly subordinated and may be lost.").
281 The lower courts do not provide much in the way of explication of the Nevada decision. Despite the importance of the Nevada decision, the portion of the decision concerning the government's fiduciary duty is not often analyzed. The decision has been cited in over 200 federal cases, however, and in the majority of these cases, Nevada was cited only as an example of the doctrine of res judicata in situations factually dissimilar to that of Nevada. A number of these cases that do involve Indian tribes do not address the government's fiduciary duty. See, e.g., United States v. Alpine Land & Reservoir Co., 279 F.3d 1189 (9th
The Department of Justice seeks to use Nevada as a shield to protect the government from claims for breach of trust based on the consideration of an interest that competes with the tribal interest. But Nevada itself did not reach this result. The thin reed upon which the Justice Department bases its breach of trust defense is that “[t]he 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.” In this dictum, the Court stated that representation of competing interests did not necessarily constitute a conflict of interest. The Court did not hold that representation of conflicting interests necessarily precludes a breach of trust finding, but that is how the Justice Department reads it.

The cited passage from Nevada is dicta because the Court did not rule out the possibility that the government could compromise its obligations by performing competing tasks. The Court in fact recognized the possibility—if not the probability—of a claim for

Cir. 2002), amended by 291 F.3d 1062 (9th Cir. 2002); Klamath Water Users Protection Ass'n v. United States Dept of Interior, 189 F.3d 1034 (9th Cir. 1999); United States v. Orr Water Ditch Co., 914 F.2d 1302 (9th Cir. 1990); United States v. Alpine Land & Reservoir Co., 887 F.2d 207 (9th Cir. 1989); Pyramid Lake Paiute Tribe v. Hodel, 882 F.2d 364 (9th Cir. 1989); Bear v. United States, 810 F.2d 158 (8th Cir. 1987); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985); Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983); Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983).

Nevada, 463 U.S. at 128; see also 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, 230 (describing Nevada as applying to “clear and precise, congressionally created conflict of interest situations—a rare circumstance”).

See Nevada, 463 U.S. at 128. For a well-reasoned critique of the Nevada decision, see generally Roger Florio, Water Rights: Enforcing the Federal-Indian Trust After Nevada v. United States, 13 AM. INDIAN L. REV. 79 (1987). Florio argues that the Court unnecessarily restricted the federal government’s trust responsibility by “severing water adjudication” from the government’s obligations. Id. at 79-108. Florio also argues that the Court could have protected the finality of the water decrees without removing the ability of tribes to sue for breach of trust based on earlier inadequate representation, contending, “Although innocent third parties should be able to rely on the finality of water rights decrees, adversely affected tribes should be able to obtain relief where government representation has been inadequate.” Id. at 97.

The Ninth Circuit supports this interpretation of Nevada. White Mountain Apache Tribe v. Hodel, 784 F.2d 921, 925 (9th Cir. 1986) (“Of course, the government remains under a firm obligation to represent the Tribe’s interests forcefully despite its other representative obligations. The government’s failure to do so might well give rise to some claim for breach of duty.”).
breach, stating, "If in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." The Court merely found that the existence of competing interests does not by itself require a finding of breach of fiduciary duty.

The lower courts' interpretation of *Nevada* is mixed. For example, in *Miccosukee Tribe v. United States*, the tribe brought suit alleging violation of the trust responsibility when the Department of the Interior, through the National Park Service, refused to alleviate flooding on the reservation. The court held that there was no breach of trust because "Congress authorized the Park Service to weigh competing interests" before taking action. The Park Service had made the determination that alleviating flooding by removing vegetation to divert water flow around the reservation would adversely affect water quality and wildlife. The court, quoting *Nevada* as a case with "very similar circumstances," held:

In this instance, Congress mandated that the Park Service weigh tribal and park interests. Given Park officials' mandate to protect park resources, their broad discretion to carry out the mandate, and their concern that cutting the vegetation would harm [the Park], the decision not to cut the vegetation breached no duty towards the Tribe.

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285 *Nevada*, 463 U.S. at 144 n.16.
286 *Id.* at 140-44.
287 Some lower courts cite *Nevada* as supporting the existence of the trust responsibility. See Idaho v. Andrus, 720 F.2d 1461, 1466 (9th Cir. 1983) (citing *Nevada* for proposition that "the United States undoubtedly owes a strong fiduciary duty to its Indian wards"); N. Cheyenne Tribe v. Lujan, 804 F. Supp. 1281, 1286 n.3 (D. Mont. 1991) (*Nevada* and other Supreme Court precedent cited in the text indicate that the government's obligation to the tribes remains important.).
289 *Id.* at 460-63.
290 *Id.* at 460-62.
291 *Id.* at 456, 462.
292 *Id.* at 463.
293 *Id.* at 463.
The United States District Court for the District of Arizona reached a similar result in *White Mountain Apache Tribe v. Clark*. The Tribe claimed the government was unable to adequately represent the Tribe in its water adjudication in state court due to a conflict of interest between the tribal interest and the interests of federal reclamation projects. Without much analysis, the court quoted *Nevada*, declared the issue "well-settled," and dismissed the Tribe's claim.

Another court gave a different reading of *Nevada*. In *Northern Cheyenne v. Lujan*, the court held that "[a]lthough the Secretary also has duties to all United States citizens, "the Secretary's conflicting responsibilities and federal actions taken in the "national interest"... do not relieve him of his trust obligations." Further, the court cited *Nevada* as a case in which the government "must act both as a fiduciary to an Indian tribe and as an administrator of natural resources pursuant to an act of Congress." In such a case, where the government is forced into two fiduciary obligations and might have to choose sides, if the government "acts against a tribal interest... , the government does not necessarily violate its fiduciary duties." Nonetheless, the court held that the government must make "some showing" that it seriously considered the tribal interest when acting against the tribe.

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295 Id. at 189.
296 Id. at 190; see also Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 647-48 (D. Mont. 1986) (rejecting tribal claim of conflict of interest due to simultaneous representation of tribal and federal water claims). Courts' recognition of the government's ability to weigh competing interests and choose one does, on rare occasion, redound to the tribes' benefit. See *Mille Lacs Band v. Minnesota*, 152 F.R.D. 583, 587 (D. Minn. 1993) (rejecting argument that United States should be considered defendant in case due to its obligation to defend Indian Claims Commission proceedings). The *Mille Lacs* court said, "Although the United States may have interests to protect in this case in addition to its trustee interest in Indian tribes, it may choose to enforce its trustee interest instead of other interests." Id. (citing *Nevada v. United States*, 463 U.S. 110, 128 (1983)).
298 Id. at 1285 (quoting *Navajo Tribe v. United States*, 364 F.2d 320, 323-24 (Cl. Ct. 1966)).
299 Id. at 1286 n.3.
300 Id.
301 Id. In *Joint Board v. United States*, 646 F. Supp. 410 (D. Mont. 1986), rev'd, 832 F.2d 1127 (9th Cir. 1987), Joint Board of water users brought suit against the Bureau of Indian Affairs (BIA) for considering only tribal interests in establishing a water management plan. *Id.* at 412-13. The BIA excluded the Joint Board representatives from a meeting at which the
These examples from the lower courts provide some support for the use of *Nevada* as a shield from breach of trust suits. However, the issue in *Nevada* was not a breach of trust claim. The Court faced the sole question of whether to set aside res judicata due to the government's competing interests. The Court considered the trust responsibility only to show how the parties in the first action were sufficiently adverse so that mutuality binds them in other litigation on the same cause of action. Both the Department of Justice and some lower courts are therefore inappropriately applying the decision in nonpreclusion contexts.

The Justice Department also employs *Nevada* as a shield to argue that the principles of a private trust relationship do not apply to the United States. However, the *Nevada* Court did not reject wholesale the common law trust principles, observing, "[W]here only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States." For example, in *Cobell v. Babbitt*, an ongoing breach of trust suit over the mismanagement of Indian trust funds, the United States District Court for the District of Columbia read *Nevada* as supporting the proposition that "the common law of trusts must generally inform plaintiffs' breach of trust claims in this case." The court further found that the underlying substantive rights and applicable remedies must be

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tribe presented its argument for water claims. *Id.* at 423. The court found that the BIA based its decision on data presented at this meeting. *Id.* Relying on *Nevada*, the court held, "Thus, the exclusion of the [Board] from one meeting may not be critical if it is a meeting between fiduciary and ward. Where, however, that meeting is between one party to a controversy and the judge of that controversy, the exclusion of the other party is a different matter." *Id.* at 425. By failing to consider all of the competing interests, the government erred. *Id.* at 427.

302 *Nevada v. United States*, 463 U.S. 110, 142 (1983); see also *Begay v. United States*, 16 Cl. Ct. 107, 128 n.17 (1987) ("[I]t is simply unrealistic to sadd[le] the Commission with 'fastidious standards of a private fiduciary' in matters relating to the cultural, social and psychological Indian psyche relative to their relocation.").


construed in light of common law trust principles. What Nevada does is remove the application of the principle of "undivided loyalty" and prevent the suggested remedy of destroying the federal-Indian trust relationship.

In contrast, the Department of Justice seeks to use Nevada as a sword to avoid responsibility for present and future conflicts. Nothing in the decision suggests it should apply to such situations. In fact, much of the discussion in Nevada suggests that the decision should be limited to preclusion situations. In reaching its conclusion, the Court placed great weight on the importance of finality of decrees. This emphasis only reinforces the argument that Nevada is simply a res judicata decision and nothing more. As support for the need for finality, the Court notes that the Orr Ditch proceedings were in rem, "[E]ven though quiet title actions are in personam actions, water adjudications are more in the nature of in rem proceedings. Nonparties . . . have relied just as much on the Orr Ditch decree in participating in the development of western Nevada as have the parties of that case." The Court stressed the particular importance of finality in a water rights adjudication. The remedy sought in Nevada would have required modification of prior water adjudication and would have affected thousands of non-Indian water users. Consequently, the Justice Department seeks to use a decision in which the Court created an exception to the mutuality requirement of res judicata as justification for refusing to address an ongoing problem in Indian law.

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305 Cobell, 52 F. Supp. 2d at 20.
306 See id. at 28 n.17 ("Just as the application of the common law 'undivided loyalty' principle was unrealistic and inapplicable in Nevada, a request for the removal of the government as trustee would also be inapplicable.").
307 See Florio, supra note 283, at 97 ("Nevada should apply only where a tribe seeks to reopen a prior decree."); Nell Jessup Newton, Indian Claims in the Courts of the Conqueror, 41 AM. U. L. REV. 753, 808 (1992) ("Nevada was a not a claims case and can be limited to cases in which Congress has given the Department of the Interior conflicting mandates and in which a tribe essentially argues the Government breached its duty of loyalty as a trustee."); Royster, supra note 69, at 352 ("[Nevada] should carry no weight when a tribe raises the federal conflict of interest in an on-going or anticipated water rights suit.").
308 Nevada, 463 U.S. at 143-44.
309 Newton, supra note 307, at 608.
310 See United States v. Mendoza, 464 U.S. 154, 163 n.8 (1984) ("In Nevada, we applied principles of res judicata against the United States as to one class of claimants who had not been parties to an earlier adjudication, but we recognized that this result obtained in the
Nothing in the Nevada decision exempts the Department of Justice from recognizing the conflicts and working to fix them. The invocation of Nevada as some sort of protective mantra merely avoids the issue. Nevada does not compel the Justice Department to continue in the face of conflicts. At best for the Justice Department, the decision holds that the government’s consideration of competing interests when it is forced to represent multiple parties is not, in and of itself, a violation of the trust responsibility. The effect of the trust responsibility on these competing interests is addressed in the next part.

IV. IS THERE A BREACH OF TRUST CLAIM FOR A CONFLICT OF INTEREST?

To sue the government for breach of trust, “a tribe must satisfy three major threshold[s],” as follows: establish subject matter jurisdiction, demonstrate that the United States has waived its sovereign immunity, and “assert a claim, a federally recognized right entitling it to the relief requested.” Before 1983, courts generally assumed the existence of a trust relationship between the United States and tribes that created a right to relief. Common law concepts measured the duties imposed by the relationship. To fully understand the impact of Nevada on these basic requirements, and specifically the tribes’ ability to sue for conflict of interest, one

unique context of [a water rights adjudication].”) (citation omitted). The Eighth Circuit reached the same conclusion. Mille Lacs Band v. Minnesota, 124 F.3d 904, 932-33 (8th Cir. 1997). In a case addressing tribal treaty hunting and fishing rights, one group of defendants argued that the Tribes’ claims were barred by res judicata because the Tribes had previously sued a different group of state officials for violation of the same treaty at issue in the present case. Id. at 932. The defendants argued that Nevada compelled this result. Id. The Eighth Circuit disagreed and characterized the Nevada decision as one in which “the Supreme Court carved out a narrow exception to the mutuality rule.” Id. The court noted, “The proceedings in Nevada were unique; they involved comprehensive water rights adjudication, in which many non-party water appropriators had relied on a prior decree as much as the parties to the action, making res judicata appropriate because of the special need to finally quantify reserved water rights.” Id. at 932-33.


Id. at 689.

Id.
must consider a pair of Supreme Court cases from the early 1980s.\textsuperscript{314}

In the \textit{Mitchell} cases, (\textit{Mitchell I} and \textit{Mitchell II})\textsuperscript{315} the Court restricted the ability of tribes to seek money damages for breach of trust to those situations in which the government had assumed supervision or control over tribal resources.\textsuperscript{316} The \textit{Mitchell} decisions seem to limit the government's obligation to abide by fiduciary responsibilities. However, in the last few years, the courts have begun to recognize the problems of the conflict of interest in the government and to provide some relief. In this Part, I outline the \textit{Mitchell} decisions.\textsuperscript{317} I then examine the post-\textit{Mitchell} system, which has been described as a tripartite system of trust obligations.\textsuperscript{318} Finally, I review two recent Supreme Court decisions and several recent lower court cases—as evidence that the lower courts are beginning to recognize the conflict of interest.\textsuperscript{319}

A. THE \textit{MITCHELL} DECISIONS

In \textit{Mitchell I}, over 1,400 Quinault Indians brought suit against the United States in the Court of Claims seeking to recover money damages for the mismanagement of timber on reservation lands held in trust.\textsuperscript{320} The plaintiffs based their claims on alleged


\textsuperscript{316} Id.

\textsuperscript{317} See infra notes 320-64 and accompanying text.

\textsuperscript{318} See infra notes 365-93 and accompanying text.

\textsuperscript{319} See infra notes 394-463 and accompanying text.

\textsuperscript{320} \textit{Mitchell I}, 445 U.S. at 537. Specifically, the plaintiffs claimed that the government had
violations of the General Allotment Act\textsuperscript{321} and argued that the Act provided for the recovery of money damages.\textsuperscript{322} The United States argued that it had not waived its sovereign immunity from suit.\textsuperscript{323} The lower court ruled that the government had breached its fiduciary duty under the General Allotment Act.\textsuperscript{324} That court based its holding on the Act's language which provided that the United States "hold the land . . . in trust for the sole use and benefit of the" allottee.\textsuperscript{325} The court concluded that this language created an express trust.\textsuperscript{326} Further, the Court of Claims found that money damages are available for violation of this trust because such "remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty."\textsuperscript{327} The Court of Claims therefore held that the Act constitutes a waiver of sovereign immunity.\textsuperscript{328}

The Supreme Court reversed and remanded.\textsuperscript{329} The Court rejected the plaintiffs' argument that the Tucker Act\textsuperscript{330} and section 24 of the Indian Claims Commission Act\textsuperscript{331} provided such waiver.\textsuperscript{332} Instead, the Court held that these statutes merely confer jurisdiction.\textsuperscript{333} However, the Court did not answer the question of whether the General Allotment Act provided a waiver of sovereign immunity.\textsuperscript{334} The Court reasoned that the General Allotment Act


\textsuperscript{323} Id. at 537-38. The Department of the Interior disagreed with the Solicitor General and believed that the Act did create a cause of action for money damages. \textit{Id.} at 550 (White, J., dissenting).

\textsuperscript{324} \textit{Id.} at 538.
\textsuperscript{325} \textit{Id.} at 541.
\textsuperscript{326} \textit{Id.}
\textsuperscript{327} \textit{Id.} at 541-42.
\textsuperscript{328} \textit{Id.} at 535.
\textsuperscript{329} \textit{Id.} at 538.
\textsuperscript{331} \textit{Id.} § 1505.
\textsuperscript{332} \textit{Mitchell I}, 445 U.S. at 538-40.
\textsuperscript{333} \textit{Id.} at 540.
\textsuperscript{334} \textit{Id.} at 542.
does not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."335 The Court found that Congress intended to limit the scope of the Act by providing that the United States hold the land in trust only for purposes of preventing alienation and taxes, without conferring a general control or responsibility for the land.336 Therefore, the Act created only a "limited trust relationship" between the government and the allottees.337 With the limited trust relationship came a limited fiduciary duty, and the Court therefore found that no money damages were available for a violation of the Act.338 Because the General Allotment Act could not be read as giving the United States a fiduciary duty to manage the allotted lands, the rights of the plaintiffs to recover money damages would have to be found from some other source.339 The Court remanded the case to the Court of Claims to consider the timber statutes cited by the plaintiffs as a source of a fiduciary duty.340

Mitchell I caused a great deal of uproar and concern over the ability of tribes to enforce the trust responsibility.341 Advocates rested great hope on the outcome of the remand. That hope was somewhat justified.342 On remand, the Court of Claims found that timber statutes and regulations imposed a full fiduciary duty on the United States and again awarded money damages.343

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335 Id.
336 Id. at 543-44.
337 Id. at 542.
338 Id. at 546.
339 Id.
340 Id. Justice White, relying on common law trust principles and a common sense reading of the Act, dissented. Id. at 546 (White, J., dissenting). Joined by Justices Brennan and Stevens, White read the Act to explicitly create a fiduciary relationship. Id. at 547-48. Justice White found government consent to suit in the existence of the trust, "It is hornbook law that the trustee is accountable in damages for breaches of trust." Id. at 550. Finally, Justice White noted the importance of money damages as a preventive measure, "Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust." Id.
341 See, e.g., Richard W. Hughes, Can the Trustee Be Sued for Its Breach? The Sad Saga of United States v. Mitchell, 26 S.D. L. Rev. 447, 493 (1981) ("All in all, Mitchell represents a discouraging episode in Indian law."); Newton, supra note 311, at 683 ("In conclusion, Mitchell was wrong.").
342 See Newton, supra note 307, at 789 ("Mitchell II is a rare victory for Indian tribes.").
In *Mitchell II*, the Court examined numerous Indian timber management statutes and regulations to determine whether they could "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." The Court first held that the Tucker Act did constitute a waiver of sovereign immunity for claims that fall within the terms of the Act. Specifically, the Court found the waiver to cover "claims founded upon statutes or regulations that create substantive rights to money damages." The Court therefore turned to an analysis of the statutes and regulations at issue to determine if they created substantive rights.

Justice Marshall set forth the history of timber management on the Quinault Reservation. As early as 1910, Congress "empowered the Secretary of the Interior to sell timber on unallotted lands." One year later, Interior issued detailed regulations that "addressed virtually every aspect of forest management." In 1934, Congress imposed stricter duties on the Interior Department to respond to deficiencies in the Department's performance. Finally, in 1964,

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545 Id. at 216; see also 28 U.S.C. § 1491(a)(1) (2000):
The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. The Tucker Act did not create a substantive right, but merely authorized the Court of Claims to hear the case. Barsh, supra note 280, at 885.
547 Id. at 219.
548 Id. at 219-20.
549 Id. at 220; see also 25 U.S.C. §§ 406, 407 (2000) (regulating sale of timber on lands held in trust and unallotted lands).
550 *Mitchell II*, 463 U.S. at 220. These aspects included the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source.

Id.
551 Id. Specifically, Congress directed the Interior Department to manage Indian forests "on the principle of sustained-yield management." Id. at 221. Among other things, this principle "forbade the clear-cutting of large contiguous areas." Id. at 221.
Congress amended the statutes to include a “best interests” standard; that is, the Secretary must consider “the needs and best interests of the Indian owner and his heirs.”

These statutes and regulations “establish the ‘comprehensive’ responsibilities of the Federal Government in managing the harvesting of Indian timber. . . . Virtually every stage of the process is under federal control.” Justice Marshall contrasted this system of control with “the bare trust created by the General Allotment Act” and found that “the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” In a statement of paramount importance to later cases, Justice Marshall held that these statutes and regulations not only establish a fiduciary relationship but also define “the contours of the United States fiduciary responsibilities.”

The Court buttressed its conclusion with the direct language of the statute, common-law trust principles, and the general trust relationship between the United States and the Indian people. Justice Marshall found that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. 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 concluded that when the government takes control over tribal interests a fiduciary relationship exists, unless Congress has provided otherwise, even if nothing is explicitly stated in the authorizing statute regarding a trust or fiduciary obligation.

Having found a distinct substantive obligation on the part of the United States to manage and operate the lands and resources of the plaintiffs, the Court turned to the question of whether money

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352 Id. at 222 (quoting 25 U.S.C. § 406(a) (2000)).
353 Id. (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).
354 Id. at 224.
355 Id.
356 Id. at 224-25.
357 Id. at 225.
358 Id.
damages should be available for a breach of this obligation.\textsuperscript{359} Turning again to common-law trust principles, the Court reasoned that liability in damages for breach of fiduciary duties "naturally follows" from the existence of the trust relationship.\textsuperscript{360} Money damages were held to be the appropriate remedy since equitable remedies would be "totally inadequate" because the allottees were not able to monitor effectively the government's management of their lands.\textsuperscript{361} Furthermore, the recognition of damages would advance the purpose of the statutes and regulations which clearly defined the government's full fiduciary duty to manage the land to generate proceeds for the Indians.\textsuperscript{362} The Court went on to say that "it would be anomalous to conclude that these enactments create a right to the value of certain resources when the [government] lives up to [its] duties, but no right to the value of the resources if the . . . duties are not performed."\textsuperscript{363} The majority held that the timber management system can be interpreted to mandate compensation by the government for violations of its fiduciary responsibilities in the management of Indian property.\textsuperscript{364}

B. THE EFFECT OF MICHHELL I AND MICHHELL II ON CONFLICT OF INTEREST CLAIMS

After Mitchell II, to recover damages, a plaintiff must establish a substantive right that can be interpreted as requiring damages for breach of trust. This substantive right may arise in one of the following two ways: (1) a comprehensive statutory scheme or (2) the

\textsuperscript{359} Id. at 226.

\textsuperscript{360} Id. (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205-212 (1959); GEORGE G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 862 (2d ed. 1962); 3 AUSTIN WAKEMAN SCOTT, LAW OF TRUSTS § 205 (3d ed. 1967)).

\textsuperscript{361} See Mitchell II, 463 U.S. at 227:

\begin{quote}
Many [of the Indians] are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments . . . . A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.
\end{quote}

\textsuperscript{362} Id.

\textsuperscript{363} Id.

\textsuperscript{364} Id. at 228.
assumption of control on the part of the government over the property of the Indians. The Mitchell Court did not make clear the exact requirements for either.

As Professor Newton aptly summarized, the Mitchell Court created “three kinds of trust relationships: a general trust, a limited or bare trust, and a fiduciary relationship.” For every federally recognized tribe, there is a general trust between the federal government and the tribe. Newton continued, “A general trust is merely the statement of the historic relationship between Indian tribes and the Government... At the most, it provides the rationale for reading statutes liberally.” A bare or limited trust “refers to a trust established for a narrow and limited purpose” and does not encompass all interactions with the government. A monetary remedy is available only if it is clearly indicated in the formation of the limited trust. Finally, a fiduciary relationship is the type at issue in Mitchell II, and is created by a comprehensive statutory scheme and pervasive federal management.

Therefore, if a tribe seeks monetary damages and bases that claim on a statute, the statute must be so comprehensive as to create the full fiduciary relationship. The existence of a statute

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365 See id. at 225. Professor Mary C. Wood provides an insightful analysis of the misuses of the Mitchell requirements in cases seeking injunctive relief. See Mary Christina Wood, Origins and Development of the Trust Responsibility: Paternalism or Protection?, Federal Bar Association, 28th Annual Indian Law Conference (April 2003) at 13-15. She describes how courts have applied the restrictions required by the Mitchell cases to claims under the Administrative Procedures Act seeking injunctive relief.

366 Newton, supra note 307, at 801.

367 Id.

368 Id.

369 Id.

370 Id. at 802.


372 There are other reasons a tribe may fail in its breach of trust claim. Even if the court finds a fiduciary duty, a tribe still must meet its burden of proof. In Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 419-20 (1991), the Tribe sued the United States for water rights losses sustained as a result of the Arizona v. California litigation. Although the court interpreted the federal trust responsibility broadly, the Tribe's claim failed because “[m]any of the men and women who participated in the litigation that led to [Arizona v. California were] deceased” and “many of the records that describe[d] the government’s actions at the relevant time [were] destroyed.” Fort Mojave Indian Tribe v. United States, 32 Fed. Cl. 29, 34 (1994). The court stated that “[r]econstructing a complete picture of what happened over three decades ago, including why certain decisions were made and why certain positions were taken, [was] impossible.” Id.
merely touching upon Indian property or Indian rights is not enough. For example, in Salt River Pima-Maricopa Indian Community v. United States, the Tribe's claim was that the 1988 Settlement Act created substantive rights to relief within the meaning of Mitchell II. The Tribe relied on the legislative history of the Act to claim that there was a substantive right to relief. The court concluded, however, that "[t]he language of the Settlement Act provides [only] that the Tribe may file suit against the United States in the Claims Court. It has done so, and failed on the merits." The court held that the Act operates only as a waiver of sovereign immunity and did not create a substantive right to relief for breach of a specific fiduciary duty as required by Mitchell II. In contrast, a statute requiring the Secretary to prepare a roll of lineal descendants and distribute their share of a judgment fund imposed fiduciary obligations on the United States "because the

373 More recently, the Western District of Wisconsin rejected a claim for breach of trust based on a provision of the Indian Reorganization Act, 25 U.S.C. § 476(d)(2) (2000). Thomas v. United States, 141 F. Supp. 2d 1185, 1205 (W.D. Wis. 2001). The plaintiffs claimed that the United States breached its trust responsibilities by revoking approval of a tribal election and failing to hold a replacement election. Id. at 1204. Section 476(d)(2) provides for automatic Secretarial approval in the event of inaction, and "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court." 25 U.S.C. § 476(d)(2) (2000). The court concluded that the Act "does not specify that the United States is subject to suit for monetary damages." Thomas, 141 F. Supp. 2d at 1204. Therefore, § 476 did not impose fiduciary duties on the United States as trustee and does not impose a damages remedy against the United States. Id. at 1205.


376 Salt River, 26 Cl. Ct. at 202.

377 Id. To show a substantive claim, the Tribe pointed to the negotiations leading up to passage of the bill. Id. at 203. The Tribe claimed that it had "struck a bargain" with the Senator in charge of the hearings in order to be able to litigate claims in the Claims Court. Id. Originally, the Act would have allowed for a $10 million settlement "in full and complete satisfaction of all claims of the Tribe against the United States." Id. This provision made a veto of the entire Act likely. Id. The provision was opposed by the Department of Justice, and thus was deleted, allegedly in exchange for the "bargain." Id. However, the language of the Act only provides for the extension of the statute of limitations from six to eight years. Id.

378 Id. at 204.

379 Id.
United States retains control over tribal monies while the Secretary is preparing the roll.\textsuperscript{380}

In \textit{Cheyenne-Arapaho Tribes v. United States},\textsuperscript{381} the court found the statute at issue provided the necessary detailed relationship so as to hold the government to its fiduciary responsibilities.\textsuperscript{382} Tribal members sued the United States for breach of trust when the Bureau of Indian Affairs approved communitization agreements\textsuperscript{383} that extended the primary terms of certain mineral leases on the tribe’s land.\textsuperscript{384} The Bureau was acting pursuant to the statutory authority of 25 U.S.C. § 396d (2000), which relegates control of mineral leases on Indian lands to the Secretary of the Interior.\textsuperscript{385} The court held that the United States’ trustee function necessarily limits the Secretary of the Interior’s discretion to approve communitization agreements.\textsuperscript{386} Relying on \textit{Mitchell II}, the court determined that the Secretary acted inconsistently with the fiduciary responsibility to the Indians by failing to consider the impact of the agreements on the tribe.\textsuperscript{387}

Absent a statute, actual control over tribal resources by the federal government gives rise to a breach of trust claim.\textsuperscript{388} However,

\textsuperscript{381} 966 F.2d 583 (10th Cir. 1992).
\textsuperscript{382} Id. at 588-91.
\textsuperscript{383} Communitization agreements assure that drilling operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit. Communitization agreements . . . thus extend the terms of all the leases if drilling is commenced on any lease within the units covered by the agreements.
\textsuperscript{384} Id. at 585.
\textsuperscript{385} Id.
\textsuperscript{386} Id. at 588.
\textsuperscript{387} Id.
\textsuperscript{388} See White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1375 (Fed. Cir. 2001) ("The language of \textit{Mitchell II} makes quite clear that control alone is sufficient to create a fiduciary relationship"); see also Newton, \textit{supra} note 307, at 804:

[A]ctual control may be a sufficient factor on which to base a claim for breach of fiduciary duty by mismanagement of the trust. . . . As long as the Government, and not the Indian or the tribe, has actual control over the management of a resource, the exercise of this control can create a trust claim.

\textit{Id.}
the Mitchell II Court did not make clear how pervasive the control must be in order to establish a trust relationship. In Shoshone Indian Tribe v. United States, the Court of Federal Claims heard a claim for breach of trust based on governmental control over a tribal resource. The Shoshone Tribe alleged a breach of the trust responsibility in the government's mismanagement of tribal sand and granite. The court read Mitchell II to contemplate "an inquiry into the level of control that the United States exercises over the Indian resources in question." The court found the government to have taken "actual control" over the tribal resource and therefore denied the government's motion to dismiss.

Thus, both the "control" and "comprehensive statutory scheme" methods are valid avenues for finding a fiduciary duty on the part of the federal government. The analysis necessarily turns on whether either avenue provides a method for holding the Department of Justice accountable in a conflict of interest situation.

C. BREACH OF TRUST CLAIMS FOR CONFLICT OF INTEREST

How, then, does Mitchell II operate in the area of conflicts of interest? Professor Judith Royster provided a comprehensive examination of this question in the area of mineral development.

Professor Royster began by considering three different types of resource development: proposed development of federal resources outside of Indian country, management of water resources shared by tribes and federal projects, and tribal mineral development. She states that, in the first two areas, the courts "generally permitted the federal government to subordinate tribal interests to public interests, based on the lack of a full fiduciary relationship obligating the government to act in the interests of the affected

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389 See Barsh, supra note 280, at 886 (noting uncertainty in breach of application of Mitchell II).
391 Id. at 615.
392 Id. at 620.
393 Id. at 624.
394 See Royster, supra note 69, at 327.
395 Id. at 328.
Courts allow such governmental action because none of the statutes at issue in off-reservation development create a full fiduciary duty. At most, the statutes create a limited trust that requires the government "to specifically consider the impacts of the proposed federal action on the tribe as a separate entity. Once the agency expressly evaluated and considered the tribe's concerns, however, it had met its trust obligations." However, Royster concluded that, in the area of mineral development, there are "extensive statutes and regulations" governing mineral development which provide the trusteeship obligations of the federal government and the environmental compliance requirements for approval of mineral development projects. These extensive statutes create a full fiduciary duty on the part of the United States. Therefore, Royster argued, "[b]alancing the tribal interest against public considerations, and in particular subordinating the tribal interest to public interests represented by [federal] agencies... violates the Secretary's trust obligations to the Indian tribes."

In the area of water rights litigation, "courts have refused to find any harm to tribal interests from the fact of dual representation, noting that Congress has authorized the government to act simultaneously on behalf of both tribes and federal concerns." She continued, "Where the tribe can show actual or likely harm, courts will hold the government to its fiduciary obligations." However, where "the harm is not clear, or as in dual representation, not present, the courts are dismissive of tribal claims of conflict of interest[,]" suggesting that courts employ a "crabbed view of what constitutes injury." Given this state of affairs, it is difficult to

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396 Id.
397 Id. at 348.
398 Id.
399 Id. at 334.
400 Id. at 333.
401 Id. at 329.
402 Id. at 348-49.
403 Id. at 349.
404 Id.
405 Id. at 358. Courts have found claims of injury to be conjectural or unproven. One example that Royster cites is White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987), aff'd mem., 5 F.3d 1506 (Fed. Cir. 1993). The tribe claimed that the government mismanaged the flow of the Salt River to benefit a downstream reclamation project to the
fashion an argument holding the Department of Justice liable for damages for breach of fiduciary duty due to a conflict of interest. To find a full fiduciary duty on the part of the Justice Department, there must be either a comprehensive statutory scheme or actual control by the government.

There is no comprehensive statutory scheme covering Justice Department representation of tribal interests. There is the general statute, 28 U.S.C. § 516, which simply provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence thereof, is reserved to officers of the Department of Justice, under the direction of the Attorney General." This provision authorizes the Justice Department to litigate as trustee for tribes. Further, 25 U.S.C. § 175 provides that the United States Attorney "shall represent [reservations or allotted Indians] in all suits at law or in equity." However, it does not explicitly mention the tribal trust responsibility and therefore falls very short of meeting the requirements of Mitchell II.

Detriment of the Tribe. Id. at 637. Royster notes that, despite the court's determination that the Interior Department's management was "marked by incompetence and maladministration," the court held that the tribe "had failed to prove that the government either diverted the tribe's water to downstream users or otherwise interfered with the tribe's reserved rights to water." Royster, supra note 69, at 355-56 (citing White Mountain Apache Tribe, 11 Cl. Ct. at 629).

See Steven Paul McSloy, Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States, 44 AM. U. L. REV. 537, 590 (1994) ("The Mitchell II standard requires that in order to vindicate their rights as beneficiaries Indian people must locate specific statutes or regulations applicable to the facts of their claims by which the United States has voluntarily limited the powers it has imposed.").

28 U.S.C. § 516 (2000). 25 U.S.C. § 175 (2000). Although this provision is written as mandatory through the use of the word "shall," the courts have interpreted the provision as discretionary. See Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1484 (D.C. Cir. 1995) (holding § 175 does not limit Attorney General's discretion to refuse to assert tribes' claims to off-reservation water rights); Siniscal v. United States, 208 F.2d 406, 410 (9th Cir. 1953) (holding that United States Attorney could not represent defendants as he was also prosecuting case). Although other provisions in Title 25 of the United States Code refer to the Justice Department representing tribes or individual Indians, none provide the level of detail necessary to create the type of statutory scheme required in Mitchell II. See, e.g., 25 U.S.C. § 305(e) (2000) (authorizing Attorney General to initiate civil action against persons falsely claiming to have produced Indian goods); 25 U.S.C. § 450(i) (2000) (authorizing federal employees assigned to Indian tribe to act as attorneys for such tribes); 25 U.S.C. § 1300d-10 (2000) (authorizing Attorney General to represent certain Sioux tribes).

It is possible that the numerous codes of professional responsibility barring attorneys...
The second method available under *Mitchell II* requires the government to have control over the Tribal resource or right at issue. This argument has more promise. In several recent cases, lower courts have found a fiduciary relationship based on this theory. For example, in *Brown v. United States*, members of the Salt River Pima-Maricopa Indian Community brought suit for breach of trust against the United States, claiming that the United States failed to enforce lease provisions of a golf course lessee on behalf of the tribal lessors. Relying on *Mitchell II*, the tribe argued that the Bureau of Indian Affairs had full control over the commercial lease. The court agreed, stating that "commercial leasing does . . . impose an enforceable fiduciary duty on the government under the 'control' portion of *Mitchell II*'s 'control or supervision' test."

The Supreme Court recently reiterated its support of the "control" theory. In *White Mountain Apache Tribe v. United States*, the Court found that the federal government had a fiduciary duty to maintain certain buildings located on the Fort Apache Reservation. In so doing, the Court relied on the government's occupation of the trust land to find that the United States "has obtained control at least as plenary as its authority over timber in *Mitchell II*."
I argue that the “control” exercised by the federal government over tribal litigation should create a fiduciary duty on the federal government. When the federal government litigates as trustee on behalf of tribes, the tribes are bound by such action.\footnote{Nevada v. United States, 463 U.S. 110, 135 (1983); see also Barsh, supra note 280, at 882 (citing Heckman v. United States, 224 U.S. 413, 445-46 (1912)) ("The Supreme Court long ago ruled that the executive branch, acting as the Indians' trustee, can conclusively litigate Indians' rights without their participation or consent.").} For the most part, tribes are not legally required to have the United States sue on their behalf. However, as will be discussed below, in practice tribes often must rely on the federal government to litigate on their behalf.\footnote{The reasons for this arise from the immunity provided to states through the Eleventh Amendment. See infra notes 483-514 and accompanying text.} In addition, the United States is not required to bring a claim requested by a tribe.\footnote{See Shoshone-Bannock v. Reno, 56 F.3d 1476, 1484 (D.C. Cir. 1995) (holding that § 175 does not require Attorney General to assert tribes' claims).} As a practical matter, given the deference accorded the United States by the courts, it is rare a settlement is approved without the participation and consent of the United States.\footnote{See Hoyster, supra note 69, at 349 ("The federal government is responsible for litigating tribal rights to water. . . . [T]he litigation of tribal rights to water in both federal and state courts is almost exclusively in the hands of federal litigators.").} Thus, although the government does not control the resource, it controls the litigation to establish the rights to that resource.

Once courts find a fiduciary duty, the question becomes whether the existence of a conflict of interest violates that duty. While the conflict violates common law trust duties, the courts are not willing to find breaches in the area of tribal resources without a showing of actual harm, and courts read Nevada to say there is no harm from dual representation. Again, recent cases offer some promise to tribal advocates. The Supreme Court recently made passing reference to the common law of trusts in relation to the duties of the Bureau of Indian Affairs,\footnote{See Dept of the Interior v. Klamath Water Users Ass'n, 532 U.S. 1, 14 (2001) (citing Restatement (Second) of Trusts for proposition that "Bureau of Indian Affairs in its fiduciary capacity would be obliged to adopt the stance it believed to be in the beneficiary's best interest, not necessarily the position espoused by the beneficiary itself").} and the lower courts have turned to the common law of trusts to interpret the duties of the federal government.\footnote{See Confederated Tribes v. United States, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (looking
This trend is so evident that Secretary of the Interior Gale Norton has stated as much during Congressional testimony:

The Department’s long-standing approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model. The Department agrees that our trust duty requires a better way of managing than has been done in the past. The current structure of the Department is not suitable for carrying out the expectations of the tribes, the Congress, or the courts.\textsuperscript{433}

Most notably, the Supreme Court has recognized the importance of common law trust principles in one recent case and ignored such principles in another case. In \textit{United States v. Navajo Nation},\textsuperscript{424} the Court found that money damages were not available to the Tribe.\textsuperscript{425} The Navajo Nation and Peabody Coal Company sought to renegotiate the royalty rate for a lease for coal on Navajo land.\textsuperscript{426} Due to a stalemate in talks, the Nation asked the Bureau of Indian Affairs to resolve the issue, as contemplated by statute.\textsuperscript{427} The Bureau initially set the royalty rate at twenty percent (up from two percent).\textsuperscript{428} This rate was approved up the chain of command at the Interior Department, but was withdrawn at the instruction of the Secretary.\textsuperscript{429} The favorable proposed rate was not communicated to the Nation.\textsuperscript{430} Instead, the Interior Department encouraged the Navajo Nation and Peabody to continue negotiations.\textsuperscript{431} During this

\textsuperscript{424} 123 S. Ct. 1079 (2003).
\textsuperscript{425} Id. at 1084.
\textsuperscript{426} Id. at 1085-86.
\textsuperscript{427} Id. at 1086.
\textsuperscript{428} Id.
\textsuperscript{429} Id.
\textsuperscript{430} Navajo Nation v. United States, 263 F.3d 1325, 1328 (Fed. Cir. 2001).
\textsuperscript{431} \textit{Navajo Nation,} 123 S. Ct. at 1086.
time, Peabody had “numerous contacts” with Department officials including the Secretary. As a result of economic pressures, the Nation agreed to a 12.5 percent royalty rate. After learning of the ex parte communications, the Nation sued.

The Federal Circuit reversed the lower court’s holding that there was no fiduciary duty on the part of the government. The appellate court found such a duty in the Indian Mineral Leasing Act. Relying on the “control” theory, the court held that the measure of control the Secretary exercised over the leasing of Indian mineral rights warranted an award of money damages. After finding a fiduciary duty, the court turned to common law principles to conclude that the Secretary had breached his duties. The Federal Circuit cited with approval the lower court’s finding that the Secretary violated “the most basic common law fiduciary duties owed to the Navajo Nation.” The appellate court continued, “There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties’ desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events.”

The Supreme Court reversed relying on Mitchell I and II. After describing the decisions in Mitchell I and Mitchell II, the Court turned to the question of whether the Indian Mineral Leasing Act (IMLA) and its regulations “can fairly be interpreted as mandating compensation for the Government’s alleged breach of trust.” Justice Ginsburg held the IMLA to more closely resemble the statute and regulations at issue in Mitchell I than those in Mitchell II. “The IMLA simply requires Secretarial approval before coal

\[432\] Id.
\[433\] Id. at 1087.
\[434\] Id. at 1088.
\[435\] Navajo Nation, 263 F.3d at 1332.
\[437\] Navajo Nation, 263 F.3d at 1332.
\[438\] Id. (citing Navajo Nation v. United States, 46 Fed. Cl. 217, 219 (2000)).
\[439\] Id.
\[441\] Id. at 1091.
\[442\] Id.
mining leases between Tribes and third parties become effective." Further, the majority relied on one purpose of the IMLA, tribal autonomy, as grounds for concluding that the Secretary's approval discretion was limited. The Court found no "textual basis" for concluding that 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." In concentrating so keenly on a textual basis, the Court did not discuss the findings of the lower courts that common law trust duties had been breached. The Supreme Court's holding in Navajo Nation does not bode well for a claim for money damages based on a conflict of interest, because there is no statutory or regulatory requirement that the United States avoid a conflict of interest.

In White Mountain Apache, the Federal Circuit turned to the common law to hold the federal government liable for failing to maintain buildings it controlled exclusively. The court first determined that a statute giving the United States the obligation to hold the reservation in trust subject to the Secretary's right to use any part of the land for administrative or school purposes created a fiduciary obligation on the part of the United States. It stated, "Once we have determined that a fiduciary obligation exists by virtue of the governing statute or regulations, it is well established that we then look to the common law of trusts, particularly as reflected in the Restatement (Second) of Trusts, for assistance in defining the nature of that obligation." The court explicitly considered the conflict of interest that arises when the government acts both as trustee and beneficiary:

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443 Id.
444 Id.
445 Id. at 1094. Justice Souter, joined by Justices Stevens and O'Connor, dissented. Justice Souter reviewed the legislative history of the Act and the regulations to find a responsibility on the Secretary to apply a "best interests" standard when approving tribal leases. Id. at 1097 (Souter, J., dissenting). Justice Souter relied on the United States' general trust responsibility to support his conclusion of an enforceable fiduciary duty on the part of the United States.
446 See supra notes 406-09 and accompanying text.
447 White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1377 (Fed. Cir. 2001).
448 Id.
449 Id. at 1377-78.
Indeed, this type of conflict is hardly unique. It is axiomatic that where the sole trustee is one of the beneficiaries, there is a "danger that the trustee will unduly favor himself." Actions of the trustee in such a situation "might well be subject to careful scrutiny to determine whether in view of [its] antagonistic interest [it] was abusing the discretion conferred upon" it to fulfill its obligations to the Tribe. Application of these principles mandates that "[w]here the trustee is one of the beneficiaries, he will not be permitted in the administration of the trust to favor his own interest at the expense of that of other beneficiaries."\(^{450}\)

The court concluded that the United States is required to act with "due regard" for the interests of the beneficiary.\(^{451}\)

The Supreme Court affirmed.\(^{452}\) Justice Souter found the 1960 Act to permit a "fair inference" that the Government is subject to duties as a trustee and liable in damages.\(^{453}\) First, the statute invests the United States with discretion to use portions of the trust land.\(^{454}\) Second, the United States enjoyed both daily supervision and daily occupation of the land. Thus, "the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee."\(^{455}\) Thus, the "control" theory of *Mitchell II* supports a claim to relief here. To reach this conclusion, Justice Souter relies heavily on common law trust principles, including "elementary trust law."

*Navajo Nation* and *White Mountain Apache*, read together, provide money damages if a tribe can locate the claim to relief in some text—statutory or regulatory. Once such a right exists, the common law of trust will aid in fleshing out the obligations of the government.

\(^{450}\) Id. at 1379-80.

\(^{451}\) Id. at 1379.

\(^{452}\) Id.


\(^{454}\) Id. at 1133.

\(^{455}\) Id.
A third recent Federal Circuit case provides support, and perhaps the death knell, for this theory of breach of trust based on a conflict of interest within the Department of Justice. In *Cobell v. Babbitt*, the United States District Court for the District of Columbia addressed the federal government's mismanagement of Indian trust funds. Beneficiaries of Individual Indian Money trust accounts sued Interior Department and Treasury Department officials for breach of fiduciary duties in the management of these accounts. The

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457 *Id.* at 18-19. *Cobell v. Babbitt* was a class action suit brought by 300,000 beneficiaries of the Individual Indian Money (IIM) trust fund against the Secretary of the Interior and other trustees. *Id.* The IIM accounts held in trust money income generated through mineral, timber, and agricultural leases from Native American land allotments. *Id.* at 15. The money was deposited with the Department of the Treasury, and invested by the Department of the Interior at its discretion. *Id.* In 1887, Congress authorized that the federal government hold the allotments in trust through passage of the General Allotment Act, ch. 199, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.). The federal government maintained legal title of the individual allotments, in trust, for the benefit of the plaintiffs in the action. *Cobell*, 52 F. Supp. 2d at 15. In 1992, after concern about mismanagement of the trust funds, Congress passed the Indian Trust Fund Management Reform Act, 25 U.S.C. § 162a(d) (2000), which specifically provided for the Secretary of the Interior's responsibility in managing the funds, including periodic statements of performance. *Cobell*, 52 F. Supp. 2d at 17. Despite enactment of this Act, the government was not able to provide an accounting of the money to plaintiffs. *Id.* at 18. Eloise Cobell thus brought suit seeking an accounting of the money. *Id.*

In the first action, Judge Lamberth of the District Court for the District of Columbia denied the government's motion for summary judgment on the plaintiffs' claim that the federal government breached its trust responsibility by denying an accounting of the funds. *Id.* at 19. Relying on *Mitchell II*, the court held, "[T]he fiduciary relationship that serves as a basis of plaintiffs' breach of trust claims is grounded in and defined by statute and has arisen from the pervasive, complete federal governmental control of plaintiffs' IIM funds." *Id.* at 24. The court continued, "As with any trust, the beneficiaries are entitled to an accounting." *Id.* Further, the plaintiffs were "entitled to seek standard common law remedies for breach of their IIM trust rights." *Id.* Subsequently, in a six-week bench trial in *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), the judge found the following: (1) the court had jurisdiction; (2) sovereign immunity was waived pursuant to the Administrative Procedures Act; (3) absent a specific statutory scheme, beneficiaries could not assert common-law claims for breach of trust against federal officials for financial mismanagement of IIM trust, yet the Secretary of the Interior had a duty to render accurate accounting of IIM funds under the specific provisions of the Indian Trust Fund Management Reform Act; and (4) the Secretary's lengthy delay in accounting was a breach of his fiduciary responsibility. *Id.* at 24-57. The judge concluded by stating that the decision was a "stunning victory...on behalf of the 300,000-plus Indian beneficiaries of the IIM trust." *Id.* at 57.

On appeal, District of Columbia Circuit Judge Sentelle affirmed the lower court's ruling, finding that the Department of the Interior had breached its fiduciary responsibility to the plaintiffs when it utterly failed to produce an accounting of the IIM funds. "There is no dispute that the federal government owes IIM beneficiaries—the plaintiffs/appellees—these
District Court found that the government had a fiduciary duty grounded in various statutes. The court examined these statutorily-created duties in light of the common law of trusts and discussed the import of Nevada. Nevada "strongly supports the proposition that although the government stands in a different position as a private fiduciary in some necessary respects, the common law of trusts must generally inform plaintiffs' breach of trust claims in this case." In the midst of its strong defense for application of common law principles, the court stated, "[I]n short, one standard duty of a trustee under the common law of trusts did not logically apply to the government as trustee on that point." That standard duty is the principle of "undivided loyalty" which the court termed "unrealistic and inapplicable in Nevada."

Even as it applied common law principles, the court attempted to incorporate the holding in Nevada. Unless and until courts either limit Nevada's holding, as described above in Part III.C, or until Nevada is overruled, tribes are left without a strong damages remedy. Advocates must then look early in the process and seek a solution that prevents the conflicts before damages are inflicted. I suggest a solution in the next Part.

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duties." Cobell v. Norton, 240 F.3d 1081, 1091 (D.C. Cir. 2001). While ultimately agreeing with the lower court's ruling, the appellate court disagreed that there was no common-law claim for breach of trust against the federal government:

The fundamental problem with appellants' claims is the premise that their duties are solely defined by the 1994 [Indian Trust Fund Management Reform] Act. [This Act] reaffirmed and clarified preexisting duties; it did not create them. . . . The trust nature of the federal government's IIM responsibilities was recognized long before passage of the 1994 Act.

Id. at 1100.

463 Cobell, 52 F. Supp. 2d at 17.
465 Id. at 26-27.
466 Id. at 26.
461 Id. at 27.
462 Id. at 28 n.17. Although a damages suit for breach of trust based on a conflict within the trustee seems limited, there remains the possibility of equitable relief. See generally Rodina Cave, Comment, Simplifying the Indian Trust Responsibility, 32 Ariz. St. L.J. 1399 (2000) (advocating use of common law breach of trust to resolve problem of mismanagement of Indian trusts).

463 See supra notes 302-10 and accompanying text.
A realistic solution to this ongoing conflict must allow the federal government to continue in its myriad of responsibilities while at the same time providing effective representation for Native Americans. Common law remedies, such as resignation of the trustee, simply are not practicable. Several scholars have proposed a type of resignation by the trustee, as follows: a complete revamping of the federal trust responsibility, including a termination of the trust responsibility and a return to the full sovereignty exercised by tribes in the past. Although these arguments are compelling, the trust relationship and all of its baggage seems here to stay. Thus, I propose a solution adapted to the current state of affairs.

Specifically, I support the oft-discussed creation of a separate litigating agency within the federal government to focus on Native

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464 See Reid Peyton Chambers, Conflicts of Interest in the Administration of the Federal Trust Responsibility: A Report to the Committee on Claims Adjudications of the Administrative Conference of the United States, reprinted in Indian Trust Counsel: Hearing on S. 2035 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 92d Cong. 215 (1971) ("[A] private trustee faced with a conflict between a fiduciary duty and a critical personal interest could resign, whereas the federal trust obligations cannot be ended without an Act of Congress."); see also Cobell, 52 F. Supp. 2d at 28 n.17 ("[A] request for the removal of the government as trustee would also be inapplicable.").

465 See Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 ARK. L. REV. 77, 134 (1993) (arguing for jettisoning of certain elements of the federal trusteeship which continue the legacy of conquest, and for retention of those elements which protect legal autonomy of tribes); Robert Laurence, A Memorandum to the Class, 46 ARK. L. REV. 1, 16 (1993) ("Should we remove the [trust responsibility] doctrine entirely, take the land out of trust, remove Bureau approval or tribal decisionmaking and Justice Department litigation of Indian issue? Yes, in my dream world."); Robert B. Porter, A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law, 31 U. MICH. J.L. REFORM 899, 999 (1998) ("[W]hile the federal trust responsibility should not be discarded entirely, it should be significantly modified to eliminate federal interference in internal tribal matters.").

466 As some scholars have pointed out, Indian communities do not themselves achieve consensus on the abolition of the trust relationship. "Despite the mixed feelings of Indian tribes about the federal government, any mention of the concept of termination of the trust relationship sends shock waves through Indian communities." Newton, supra note 311, at 683. Indeed, given the present state of affairs, tribes "need the federal government as an ally and an advocate." Membrino, supra note 110, at 21. Membrino continues, "A faithful trustee can prevent the Indian interest from being misunderstood or undermined, and thereby diminish the possibility that the non-Indian interest may prevail unfairly. Indian tribes increase their risk substantially by making their own way in negotiations or litigation." Id.
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American cases. Although such an entity is not without problems, it is the cleanest method by which to remove the consideration of non-Indian interests from the decisionmaking process. This suggestion is not a novel one. What I hope to add to the dialogue surrounding this issue is a method to address problems of preclusion. As an entity of the federal government, an Indian Trust Counsel Authority could be precluded by a position taken by another agency. Based on current common law understanding of the doctrines of preclusion, this need not be the case. Reconsidering elements of the preclusion doctrines will assist the Department of Justice in making decisions under the current structure and will add the litigation of a separate entity.

A. PREVIOUSLY SUGGESTED SOLUTIONS

Before turning to my proposed solution, it is necessary to discuss and set aside three other suggestions. First, in the past, federal agencies attempted to meet the numerous trust responsibilities by filing what are known as “split briefs.” With split briefs, two agencies each would file with a court a brief advocating a different position than the other agency. Attorney General Griffin Bell put an end to this practice, centralizing power over the litigating position of the federal government. A return to split briefs would not provide effective advocacy for tribes, as the tribes need and deserve the full weight of the federal government on their side in court.

467 See infra notes 515-40 and accompanying text.
469 Under Attorney General Janet Reno, the Department of Justice created the Office of Tribal Justice. The mission of this office is to provide a single point of contact within the Justice Department for meeting the broad and complex federal responsibilities owed to Indian tribes. The Office facilitates coordination between Departmental components working on Indian issues, and provides a permanent channel of communication for Indian tribal governments with the Department of Justice. OTJ represents the Department in its dealing with Indian tribes, federal agencies, Congress, state and local governments, professional associations, and public interest groups. Because Indian issues cut across so many entities within the Executive Branch, OTJ, in cooperation with the Bureau of Indian Affairs, serves to unify the federal response.

United States Department of Justice, Office of Tribal Justice Homepage, at http://www.usdoj.
Second, the current administration, spurred on by the trust funds class action and the continued contempt proceedings against government officials, has proposed reforms for the Bureau of Indian Affairs. Under a plan unveiled in late 2001, a new office within the Department of the Interior would be created, the Bureau of Indian Trust Assets Management (BITAM). BITAM “will concentrate on four main areas of enhanced capability: trust reform, performance and program management, beneficiary services, and trust asset and investment strategy development. . . . In addition, all Indian trust assets management functions currently within the Bureau of Indian Affairs will be transferred to the new Bureau.”

Almost uniformly, Indian Country opposes the creation of BITAM. The greatest criticism from tribal leaders focuses on the failure of the federal government to consult with tribes prior to creating and unveiling the plan for BITAM. In addition, tribal advocates fear the disorganization inherent in splitting the Bureau of Indian Affairs into two offices and the reduction in funding proposed. Currently, the Interior Department has created a task force to study options for trust fund reform.

Third, funding of private attorneys is often touted as the “best” solution for the conflict of interest problem:

The best approach, which itself is not totally free from the taint of conflict, would be to have the United States make available to Indian beneficiaries under the trust, sufficient funds to be utilized for private legal counsel in those cases where the United States, under trust theories, should represent the beneficiary but cannot or will not because of the conflict problem. . . . The conflict

gov/otj/index.html (last updated July 8, 2002). Although the creation of the Office of Tribal Justice has provided some procedural protection for tribes by creating an office where they can be heard, it does not solve the substantive problems of the conflict.


Id.

Id.
is not totally avoided because funds to provide counsel to the beneficiary would be provided by the trustee, who is opposing the trustee’s interest. However, it provides the best possible solution.\footnote{Staff of Am. Indian Policy Review Comm’n, 94th Cong., Task Force One Report on Trust Responsibilities and the Federal-Indian Relationship, Including Treaty Review 186-87 (Comm. Print 1976).}

A similar proposal has been made to establish a Federal-Native American Litigation Trust Fund.\footnote{David I. Gold, I Know You’re the Government’s Lawyer, But Are You My Lawyer Too? An Exploration of the Federal Native-American Trust Relationship and Conflicts of Interest, 19 Buff. Pub. Int. L.J. 1, 18-20 (2001).} This fund would be analogous to a block grant, where “[t]he federal government would be responsible for appropriations under the fund based on its Federal-Native American trust responsibility, and Native Americans, perhaps through a common entity such as the Native American Rights Fund . . . would be empowered to litigate claims on their own behalf using trust fund assets.”\footnote{Id. at 20.} According to the author, this solution would serve to give Native Americans greater autonomy by allowing them to litigate issues themselves, while at the same time avoiding Nevada-like conflict of interest problems.\footnote{United States v. Kagama, 118 U.S. 375, 384 (1886).}

Although such proposals would allow Native Americans to litigate against private individuals, they solve only part of the problem. Much litigation to protect tribal land and sovereignty involves states. Indeed, the Court in Kagama referred to the states as the “deadliest enemies” of tribes.\footnote{Land disputes in particular can lead to protracted and costly litigation. As an example, consider the dispute between the State of New York and the Seneca Nation, a federally recognized tribe that owns the Oil Spring Reservation located in Cattaraugus and Allegany Counties, New York. See generally Seneca Nation v. New York, 26 F. Supp. 2d 555 (W.D.N.Y. 1998). Under a 1794 treaty between the Seneca Nation and the United States Government, the Senecas reserved a 640-acre area to themselves. Id. at 560. In 1858, the state took possession of a portion of the lands as part of a project to construct a dam. Id. The Senecas initiated legal action in 1924, submitting a formal petition to the Commissioners of the New York Land Board. Id. at 560-61. Their petition was denied. Id. at 561. In 1960, the Senecas filed a second petition, this time before the Indian Claims Commission. Id. at 562. This petition also was denied. Id. After an appeal to the United States Court of Claims, the
conservation regulations,\textsuperscript{460} gambling,\textsuperscript{481} and hunting.\textsuperscript{482} If tribal interests are to be adequately protected, the ability to litigate against states must be part of the solution. Unfortunately, due to recent Supreme Court jurisprudence on the Eleventh Amendment, tribes' ability to sue states has been drastically curtailed.

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."\textsuperscript{483} Although the Eleventh Amendment is silent on the subject of whether a state may be sued by one of its own citizens,

Senecas filed the action in federal district court in New York. \textit{Id.} at 559. To date, this land dispute has not been resolved. In March 2002, the United States District Court for the Northern District of New York decided post-trial motions. Cayuga Indian Nation \textit{v.} Pataki, 188 F. Supp. 2d 223, 224 (N.D.N.Y. 2002). The case is now on appeal.\textsuperscript{480} See, \textit{e.g.}, United States \textit{v.} Washington, 694 F.2d 1374, 1375 (9th Cir. 1983) (holding that states and tribes each have obligation to take reasonable steps commensurate with resources and abilities of each to preserve fisheries); United States \textit{v.} Michigan, 471 F. Supp. 192, 216 (W.D. Mich. 1979) (holding that state was without power to regulate manner of Indian fishing in Great Lakes region).

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See, \textit{e.g.}, California \textit{v.} Cabazon Band, 480 U.S. 202, 212-13 (1987) (holding that state and local gambling laws did not apply to prohibit bingo or card parlor games on Indian reservations).

See, \textit{e.g.}, Washington \textit{v.} Buchanan, 978 P.2d 1070, 1080-81 (Wash. 1999) (holding that defendant Indian tribe member was entitled to present evidence that alleged hunting violation took place on aboriginal hunting grounds, pursuant to treaty that secured to Nooksack Indian Tribe right to hunt on aboriginal hunting grounds).

U.S. CONST. amend. XI. It is generally thought that the Eleventh Amendment was a response to an early Supreme Court decision. Article III of the Constitution provides that the federal "judicial power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2. Just a few short years after the Constitution was adopted, the Supreme Court was called upon to interpret the meaning of state sovereign immunity under Article III. \textit{See generally} Chisholm \textit{v.} Georgia, 2 U.S. (2 Dall.) 419 (1793). In that case, a South Carolina citizen sought to recover a Revolutionary War debt from the State of Georgia based on a provision of the Judiciary Act of 1789 that created original jurisdiction for suits against a state by citizens of another state. \textit{Id.} at 420. Georgia claimed that under the doctrine of sovereign immunity, such a suit could not be brought by a private individual of another state. \textit{Id.} at 469. The Supreme Court, in a four-to-one decision, ruled that Article III did in fact authorize such a suit, and that sovereign immunity never intended to prevent such suits. \textit{Id.} at 471-78. After Chisholm, states feared more lawsuits arising from Revolutionary War debts. Timothy S. McFadden, \textit{The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of Kimel v. Florida Board of Regents}, 27 J.C. \& U.L. 519, 524 (2000). Scholars argue that this fear was the impetus behind swift passage of the Eleventh Amendment, just one year after Chisholm, which essentially overturned the Court's interpretation of Article III. \textit{Id.}
the Supreme Court has ruled that the Eleventh Amendment does provide such protection.\(^4\)

There are some exceptions to its application. For example, a state can be sued in federal court either by the United States Government or by another state government.\(^5\) However, this exception does not include the ability of a tribe to sue a state.\(^6\) Rather, a tribe must rely on the following three additional mechanisms for litigating against states without violating the Eleventh Amendment: waiver, suits against state officers, and abrogation.\(^7\)

A state may choose to waive immunity under the Eleventh Amendment.\(^8\) However, this choice has been limited in recent years by the Supreme Court's decision in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board.\(^9\) The Supreme Court held that a state may waive its immunity in federal court only if it does so expressly and unmistakably.\(^10\) Thus, absent an explicit waiver, tribes may not sue states.

A second way that a lawsuit may be brought against a state is to bring the suit directly against an individual state officer.\(^11\) In Ex parte Young,\(^12\) the Supreme Court allowed a suit for injunctive

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\(^{4}\) Hans v. Louisiana, 134 U.S. 1, 10 (1890). Hans, a citizen of Louisiana, believed that Louisiana owed him $87,500 in the form of state-issued bonds. *Id.* at 3. Hans brought suit in federal court against the State of Louisiana, but the Supreme Court held that such a suit was barred by the Eleventh Amendment. *Id.* at 10. Thus, this decision broadly interpreted the Eleventh Amendment to encompass a prohibition of suits brought by individual citizens against their own states. *Id.*


\(^{7}\) McFadden, *supra* note 483, at 537-52.

\(^{8}\) See Atascadero v. Scanlon, 473 U.S. 234, 247 (1985) (reversing judgment because state did not specifically waive its immunity to suit in federal court).

\(^{9}\) 527 U.S. 666 (1999).

\(^{10}\) McFadden, *supra* note 483, at 539.

\(^{11}\) *Id.*

\(^{12}\) 209 U.S. 123 (1908).
relief against a state official when the official acted in violation of federal law. This device is generally viewed as the most common way around the Eleventh Amendment prohibition. However, even this exception to the Eleventh Amendment has been given a narrow application by the Supreme Court. In Idaho v. Coeur d'Alene Tribe, the tribe brought suit against Idaho state officials in a land dispute. The Supreme Court held that the Eleventh Amendment barred the suit, and that the Young exception did not apply:

To interpret Young to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction.

Given this ruling, tribes cannot rely on the Young exception to avoid application of the Eleventh Amendment.

Finally, a third way that states may be sued without violating the Eleventh Amendment is through congressional statutes that abrogate Eleventh Amendment immunity. Until recently,

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493 Id. at 148.
494 Juliano, supra note 485, at 1119. Justice Peckman explained the rationale for the doctrine, "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution." Ex parte Young, 209 U.S. at 159-60.
496 Id. at 264-65.
497 Id. at 270.
498 McFadden, supra note 483, at 545. The Supreme Court upheld this concept in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In that case, petitioners brought suit against the Connecticut Chairman of the State Employees' Retirement Commission, alleging violation of Title VII of the Civil Rights Act of 1964. Id. at 448. The Court held that such a suit was permissible, because Title VII was enacted pursuant to the Fourteenth Amendment, id. at 456-57, which states that Congress has the "power to enforce, by appropriate legislation, the provisions of this article" U.S. CONST. amend. XIV, § 5. The Court reasoned that the language of § 5 of the Fourteenth Amendment was intended to enlarge congressional power: When Congress acts pursuant to § 5, not only is it exercising legislative authority . . . it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms
Congress was thought to have the power to abrogate states' immunity under the Commerce Clause, and by analogy, the Indian Commerce Clause. However, in *Seminole Tribe v. Florida*, the Court reversed its earlier jurisprudence. There, the Seminole Tribe sued the State of Florida for failure to comply with the Indian Gaming Regulatory Act (IGRA). Florida argued that the suit was barred by the Eleventh Amendment, and the Supreme Court agreed. In determining whether there had been a valid abrogation of sovereign immunity, the Court stated that first, Congress' intent must be clearly expressed, and second, Congress must be acting pursuant to a valid exercise of power. The Court concluded that, although the first criterion was met, Congress' power under the Indian Commerce Clause was not a valid exercise of congressional power. The Court held that Congress may abrogate a state's sovereign immunity only when the legislation is pursuant to section five of the Fourteenth Amendment.

embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States . . . which are constitutionally impermissible in other contexts.

*Fitzpatrick*, 427 U.S. at 456.

See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1988) ("Our prior cases . . . indicate that Congress has the authority to override states' immunity when legislating pursuant to the Commerce Clause.").

501 *Id.* at 44 (1996).

502 *Id.* at 50-53; *see also* 25 U.S.C. § 2710 (2000) (providing for Indian gaming in conformity with state law).

503 *Seminole Tribe*, 517 U.S. at 76.

504 *Id.* at 55-63.

505 *Id.* at 57-76.

506 *Id.* at 63-64. At the same time, the Court has been restricting the scope of congressional powers under § 5 of the Fourteenth Amendment. *See City of Bourne v. Flores*, 521 U.S. 507, 532-36 (1997) (holding that Religious Freedom Restoration Act exceeds Congress' power under § 5 of Fourteenth Amendment). That case involved a suit that the Archbishop of San Antonio brought against the City of Bourne, alleging violation of the Religious Freedom Restoration Act (RFRA). *Id.* at 511-12; *see also* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). The issue was whether the RFRA was a proper exercise of congressional power under § 5 of the Fourteenth Amendment. *City of Bourne*, 521 U.S. at 512. The Court reasoned that Congress' power under § 5 is remedial only; because the language of the RFRA was too broad to be considered remedial, the Court ruled that the city could not be sued. *Id.*
To the extent that tribes could rely on Congress to help protect their litigating positions, *Seminole Tribe* and its progeny have closed that avenue of assistance. Over the last decade, the Supreme Court has strengthened states' sovereign immunity protection under the Eleventh Amendment. In short, the Court has held that Congress may authorize private lawsuits against states for money damages only when it is acting pursuant to its powers under section five of the Fourteenth Amendment.507

States have already begun to raise Eleventh Amendment immunity.508 In addition to the leading case of *Seminole Tribe*, states have claimed immunity from hunting and fishing claims509 and land claims.510 In these cases, courts have allowed the tribal claims to go forward only as a result of the presence of the United States.511 As the court stated in *Oneida Indian Nation v. New York*,512 "When litigation is brought by or could have been brought by the United States on behalf of an Indian Nation and the claims made by the United States are identical to those made by the Indian tribe, the Eleventh Amendment has been found not to apply."513 Yet the court was quick to caution that "it is also a well established rule

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507 See *Seminole Tribe*, 517 U.S. at 65. See generally McFadden, supra note 483.

508 One commentator noted, "Indian tribes are being used as a kind of pawn in this battle of power between the federal government and the states, and this state's rights Court is effectively ... assisting the states in their long-standing campaign to exterminate Indian tribes." Colloquium, *Panel Discussions From "Indian Nations on the Eve of the Twenty-First Century"*, 43 S.D. L. REV. 438, 483 (1998).

509 See *Mille Lacs Band v. Minnesota*, 124 F.3d 904, 912-14 (8th Cir. 1997) (claiming sovereign immunity when Indian tribe sought declaratory judgment as to continued usufructuary rights in land).


511 See *Mille Lacs Band*, 124 F.3d at 912-13 ("[B]ecause the United States has the right to bring these claims in federal court, the states sovereign immunity is not compromised."). In 1997, the Mille Lacs Band of Chippewa Indians brought suit against the State of Minnesota in federal court, seeking to enforce treaty rights guaranteeing the tribe the right to hunt and fish on tribal lands. *Id.* at 910. The State of Minnesota argued that the suit was barred by the Eleventh Amendment, but the Eighth Circuit disagreed. *Id.* at 912-14. The court held that the lower court's rejection of the Eleventh Amendment argument was sound because the tribe was seeking the same relief that the United States was seeking in the action. *Id.* at 913. In addition, the tribe's claim for relief against the state official was valid under the *Ex parte Young* exception to the Eleventh Amendment. *Id.* at 913-14.

512 194 F. Supp. 2d 104 (N.D.N.Y. 2002). Here, the Tribe filed suit against the State of New York for alleged illegal purchase of the Tribe's ancestral lands. *Id.* at 111-13.

513 *Id.* at 129.
of law that the State should retain its immunity to the extent that the Plaintiffs raise any claims that conflict with those of the United States.\textsuperscript{514}

Therefore, an entity outside of the federal government simply does not provide enough protection for Native Americans.

B. THE PROPOSAL: THE ITCA MEETS PRECLUSION

This Article suggests the resurrection of a solution raised in the past—the creation of an independent litigating authority within the federal government—and a reconsideration of preclusion rules. The independent litigating authority would not report to either the Justice or Interior Department and therefore would be free to choose litigating positions in the best interests of the beneficiaries. By making this litigating unit part of the United States Government, the unit retains the ability to sue states, unlike an entity outside of the federal government. This part of the proposal is not new or unique. Rather, I suggest a government unit as the most effective manner to remove the conflict from the decisionmaking process.

1. The Indian Trust Counsel Authority. The most well-known suggestion to create an independent litigating body is that made by President Richard Nixon. On July 8, 1970, President Nixon addressed the United States Senate and proposed measures to protect the interests of American Indians.\textsuperscript{515} In so doing, he explicitly recognized the conflict of interest inherent in the system.\textsuperscript{516} In the course of suggesting various administrative changes to provide Native Americans with more autonomy, Nixon proposed the creation of an Indian Trust Counsel Authority (ITCA), which would nullify the conflicts of interest the Department of Justice faced in its mandated dual representation.\textsuperscript{517}

\textsuperscript{514} Id.


\textsuperscript{517} Id. at 10.
In 1971, based upon President Nixon's broad outline, Senator Robert Byrd introduced Senate Bill 2035. The bill, divided into twelve sections, provided for the creation of ITCA, outlined its structure and the methods for building and maintaining the structure, specified its mission, and enumerated its powers. Most importantly, ITCA would litigate on behalf of Native Americans in federal and state courts free from the control from any executive agency. Under the bill, the United States would waive its sovereign immunity and retain the obligation to uphold the trust.

518 S. 2035, 92d Cong. (1971).
519 Id. Section one outlined the purpose for the proposal. Id. § 1. Section two established a three-member Board of Directors to govern the ITCA, made up of at least two Indians, appointed by the President and limited to a certain term. Id. § 2. Section three required the Board to meet at least once per quarter, to set policy, to review activities and to report to Congress and the President. Id. § 3. Section four required the Board to "appoint and prescribe the duties of a chief legal officer for the [ITCA]," and to set his or her salary. Id. § 4. Section five gave the ITCA the authority to appoint as many attorneys, special counsel and experts as it deemed necessary, and gave these individuals the authority to appear in court as official ITCA representatives. Id. § 5. In the event of an internal conflict between parties requesting ITCA assistance, section five further allowed the ITCA to hire special counsel or experts (outside of the ITCA) to represent either or both parties. Id. Section six authorized the ITCA to hire any other employees that it deemed necessary to facilitate the operation of the organization. Id. § 6. Section seven liberated the ITCA from any control by any executive department. Id. § 7. Section eight assigned the representation of Indians in natural resource litigation to the ITCA exclusively and simultaneously relieved the Departments of Interior and Justice from such responsibility, while still expressly requiring the latter Departments to uphold their remaining duties under the trust relationship. Id. § 8. Section nine gave the ITCA the authority to initiate and prosecute claims, in state and federal courts, on behalf of American Indians against the United States and individual "states, their subdivisions, departments and agencies, or against persons and corporations," to "prosecute appeals in all courts" and to "intervene in any federal, state or local administrative proceeding in order to protect the rights of the Indians." Id. § 9. That section further conceded that the United States "waives its sovereign immunity from suit in connection with litigation initiated by the [ITCA]" and provided that all of the Indian claims were not to be heard by a jury. Id. § 9. Section ten prevented the ITCA from "filing or prosecution of or intervention in any action, claim or other proceeding against the United States relating to any matter as to which a claim has been filed or could have been filed under the Indian Claims Commission Act of 1946 . . . but shall not include suits that could be brought under the provisions of section 1346(a)(2) and 1491 of title 28, United States Code." Id. § 10. Section eleven gave the ITCA authority to "make such rules and regulations as it deem[ed] necessary to carry out its functions," to "receive and use funds or services donated by others," to "make such expenditures or grants . . . as may be necessary to carry out its responsibilities" and to request information or services from other government agencies, which such agencies can choose to provide at their own discretion. Id. at § 11. Section twelve broadly stated that the ITCA shall receive whatever funds necessary to carry out its duties. Id. at § 12.

520 Id. § 7.
responsibility. The Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs reviewed the proposed legislation and heard testimony from various advocates and critics. As is usually the case, the bill quietly died somewhere in the legislative process. Six members of Congress sponsored three similar bills in 1974, which unfortunately suffered the same fate.

The reasons for the failure to create ITCA are varied. In 1989, the Senate's Special Committee on Investigations of the Select Committee on Indian Affairs held hearings during which Senator John McCain posed an obvious question about the previous failed legislation that seemed to have no definite answer, "What happened?" According to the testimony, every possible constituency failed to support the bill, from the White House, to Congress, to executive agencies and the Native-American community.

A review of the 1971 hearings indicates that one major flaw of the bill was its ambiguity. Congressmen demanded numerous clarifications from those testifying. Additionally, a few senators

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521 Id. § 9.
522 Comparing the number of bills introduced in Congress to the number of public laws passed for both the 105th and 106th Congresses yielded five percent and six percent bill passage rates, respectively. See Thomas, Bill Summary & Status, at http://thomas.loc.gov/bss (last visited Mar. 31, 2003) (enabling user to calculate bill passage rates).
523 H.R. 6106, 93d Cong. (1973); H.R. 6374, 93d Cong. (1973); H.R. 6494, 93d Cong. (1973). These three bills were proposed at the same time, and the hearings at which they were introduced were held in Alaska and involved testimony from Native Alaskans. Creation of the Indian Trust Counsel Authority: Hearings on H.R. 6106, H.R. 6374, and H.R. 6494 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 93d Cong., III (1973). While the three bills obviously sought the establishment of ITCA, much of the testimony given merely expressed general and unproven support for ITCA. See generally id.
525 Id.
526 See, e.g., Indian Trust Counsel: Hearing on S. 2035 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong. 104-07 (1971) [hereinafter 1971 Hearings] (reflecting Senator Lee Metcalf's and Mr. Franklin Ducheneaux's agreement that § 8 of bill is ambiguous as to when Interior and Justice Departments were to relinquish their duties over natural resource litigation to ITCA, and as to what other duties those departments may or may not be required to uphold); id. at 107-08 (revealing Senator Metcalf's and Mr. Ducheneaux's disagreement over how § 5(b) and § 5(d) differ as to hiring
were concerned with the “limited” effect that ITCA would have in remedying the overall problem of the federal-Indian trust relationship. According to other testimony, after the initial legislative failure, ITCA never materialized because of a lack of “central coordination at the White House” over the numerous federal Indian affairs offices and departments. Another witness testified that Congress was probably reluctant to oversee another independent institution and disliked the proposal to grant the Indian Trust Counsel the power to file split briefs because these briefs cause confusion within the courts. The Bureau of Indian Affairs, of course, feared the type of decentralization that the bill created. Finally, some in the Native American community refused to support the bill because the Indian Trust Counsel “might be too small” and “might be overwhelmed by the other, more powerful bureaucratic organizations.”

Concerns over the ambiguities in the bill may be fixed by adjusting the language of any proposed legislation. Some of these
fixes, like expanding the size of the Indian Trust Counsel and its authority, could alleviate some of the Native American community's concerns. In addition to the ambiguities and the possibility of an underpowered Indian Trust Counsel, there are problems with concentrating—or appearing to concentrate—the trust responsibility in one office. Professor Deloria colorfully summarized the issue:

The Trust Counsel Authority essentially takes the Indian interest out of decision-making and moves them to an office building over in Virginia someplace, which means that when the Interior Department people sit down to decide what [they are] going to do, I can read you preemptively the transcript of the conversation. If anybody says at the meeting, "What about the Indians," and it's unlikely that they will, the answer will be "We don't need to worry about them. They have their lawyers over in Virginia and they can sue us." . . . Everybody in the government is freed from thinking about the impact on Indians.533

Under this view, an Indian Trust Counsel would provide a disincentive to creating substantive trust protections. Agencies would reach decisions without considering Indian interests. It is difficult to challenge agency decisions after the fact. Courts give deference to agency decisions and examine such decisions against the less than strenuous "arbitrary and capricious" standard and a

533 Colloquium, Federal Trust Responsibility, supra note 138, at 374-75.
reasonableness test. Under this view, then, an Indian Trust Counsel would leave Indians worse off than in the present state.

Although I agree with Professor Deloria that the federal agencies should not be given an excuse to ignore Indian interests in the decisionmaking process, I do not believe that an Indian Trust Counsel would result in less favorable decisions than currently are made. What is called for is both procedural and substantive protection for Indian interests. As Professor Clinton described the Indian Trust Counsel proposal, "The idea that formed the core of that proposal was that because the United States always has a conflict of interest, procedurally there has to be an entity or agency that will only have the Indian trust obligation at heart." The Indian Trust Counsel would provide the procedural mechanism to protect Indian interests.

Professor Deloria seeks to go beyond procedural protection of Indian interests and involve tribes in the substantive decisionmaking process. He advocates involving Indians as early in the process as possible. President Clinton sought to achieve this inclusion in the decisional process with his memorandum and executive order requiring government-to-government consultation. This may have had modest success in some agencies. At the Department of Justice, however, the decision process involves litigation strategy. Attorney-client privilege is at issue. Because Indian tribes are technically not the client of the Justice


535 Colloquium, Federal Trust Responsibility, supra note 138, at 373. Clinton suggests that the federal government will always be conflicted as a trustee. Id. Therefore, federal Indian law should "abandon efforts to enforce substantive limitations of undivided loyalty on the trustee." Id. Rather, federal Indian law should address the trust responsibility as a "doctrine that simply involves federal legal obligations of protection of Indian tribes against intrusions from third parties on their lands, resources, and sovereignty." Id.

536 See Wood, supra note 282, at 231 ("[W]hile the procedural duty is integral to fiduciary behavior, it alone is inadequate to fulfill the trust obligation owed to tribes because it does little more than formalize a political process in which non-Indian interests nearly always dominate.").

537 See Colloquium, Federal Trust Responsibility, supra note 138, at 374-78.

538 Id.

Department, conversations with tribes could waive the privilege. In fact, documents submitted by tribes to the Justice and Interior Departments in furtherance of litigation are not protected from disclosure under the Freedom of Information Act.\textsuperscript{540} Thus, what is necessary is an incentive to consider the Indian interests.

Perhaps the best incentive is the removal of one of the disincentives, namely the fear of preclusion. As described early in this Article, the Department of Justice may hesitate to take litigation positions for fear that such positions will negatively impact other litigation. Similarly, would the Indian Trust Counsel Authority, as part of the federal government, be bound by positions taken by other agencies? If so, then all that has been established is a race to the courthouse. Although the Indian Trust Counsel Authority could not be prevented from taking litigating positions, it still could be precluded. Therefore, the second part of my proposal suggests a new understanding of preclusion as applied to the federal government.

2. Rethinking Preclusion. My proposal is simple: formally recognize the dual responsibility placed on the Department of Justice, and treat the United States as one party when it acts in furtherance of the trust responsibility and another when it acts against tribal interests. Before considering how this proposal would aid in reducing the conflict, a very brief review of preclusion is necessary.

There are four main preclusion doctrines: claim preclusion (or res judicata), issue preclusion (or collateral estoppel), equitable estoppel, and judicial estoppel. Claim preclusion is a doctrine that provides:

an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.\textsuperscript{541}

\textsuperscript{540}Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15-16 (2001).
\textsuperscript{541}46 AM. JUR. 2D Judgments § 514 (1994).
Claim preclusion "prevents parties and those in privity with them from raising legal theories, claims for relief, or defenses which could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case."\textsuperscript{542} Most courts require parties to meet the following four requirements before they can successfully raise claim preclusion as a defense: "(1) there must have been a final judgment on the merits\textsuperscript{543} . . . (2) the prior action must have involved the same parties or their privies . . . (3) the prior action must have involved the same claim\textsuperscript{544} . . . [and (4)] the judgment in the prior action must have been rendered by a court of competent jurisdiction."\textsuperscript{546}

Issue preclusion, also called collateral estoppel, "precludes litigation of issues actually litigated and necessary to the outcome of the prior case, even if such issues are subsequently presented as part of a different 'claim.' "\textsuperscript{546} Thus, for issue preclusion, the following must be present: the same issue was litigated and decided in the prior action,\textsuperscript{547} the issue was essential to the judgment in the prior action, and the holding on the issue was embodied in a valid, final judgment.\textsuperscript{548}

To successfully invoke equitable estoppel, a party must establish that, in a prior proceeding, (1) the parties were adverse, (2) the

\hspace{1cm}\textsuperscript{542} 18 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.13[1] (3d ed. 1997) (emphasis added).
\textsuperscript{543} Under the first element, courts are "not necessarily confined to a final judgment in an action, but [may consider] any judicial decision upon a question of fact or law which is not provisional and subject to change in the future by the same tribunal." 46 AM. JUR. 2D Judgments § 583 (1994). Therefore, "for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Id.
\textsuperscript{544} To determine if the "same claim" is involved, courts use various "tests" to determine whether two "claims" or "causes of action" are the same, but ultimately must decide whether there is "factual nexus . . . between a pending case and a prior adjudication." 18 MOORE ET AL., supra note 542, ¶ 131.10.
\textsuperscript{545} Id. ¶ 131.01.
\textsuperscript{546} Id. ¶ 131.13[1] (emphasis added).
\textsuperscript{547} Courts have narrowly "defined an issue for purposes of issue preclusion as 'a single, certain and material point arising out of the allegations and contentions of the parties.' " 18 MOORE ET AL., supra note 542, ¶ 132.02[1] n.1 (quoting Paine & Williams Co. v. Baldwin Rubber Co., 47 F.3d 1415, 1423 (5th Cir. 1995)). Moore continues, "The doctrine of issue preclusion applies only when the issues presented in each matter are identical." Id. ¶ 132.02[2][a].
\textsuperscript{548} RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
party attempting to assert equitable estoppel detrimentally relied on their opponent's prior position, and (3) a party would be prejudiced if the court allowed its opponent to change the prior position.\(^5\)

Traditionally, these three doctrines require a finding of the same parties or "mutuality."\(^5\) Given the number of Indian issues litigated by the Department of Justice as trustee without the tribe as an actual party in the case, preclusion may not seem to be a concern. However, there are several variations on these basic elements that raise cause for concern. First, although generally courts require mutuality for claim preclusion, courts also are willing to find that a party was "represented" or in "privity" with a party in the first action. Consequently, in \textit{Nevada}, even though the tribe was not a party in the first case, the Court found that the United States had represented the tribe, and therefore the tribe would be bound by the judgment.\(^6\) Second, modern courts abandon the mutuality requirement for issue preclusion, allowing "strangers" to the first action to assert the defense against adversaries who were parties to, and had adequate opportunity to litigate the issue in, the prior action.\(^7\) However, this concern is lessened somewhat by the fact that the courts have consistently held that nonmutual issue preclusion is not available against the United States.\(^\) Nevertheless, the United States may be subject to nonmutual

\(^{549}\) Eric A. Schreiber, Comment, \textit{The Judiciary Says, You Can't Have it Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions}, 30 LOY. L.A. L. REV. 323, 331 (1996). In addition, courts will deny equitable estoppel against the government if the following elements are present: (1) the government must be acting in its sovereign capacity as opposed to its proprietary capacity, (2) the prior assertion made by the government must not be "affirmative misconduct," and (3) application of equitable estoppel against the government must not upset public policy. Jean F. Rydstrom, Annotation, \textit{Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies}, 27 A.L.R. FED. 702, 746 (Supp. 2002) (citing Furcron v. United States, 626 F. Supp. 320 (D. Md. 1986)).

\(^{550}\) The mutuality doctrine requires that "unless both parties (or their privies) in a second action were bound by a judgment in a previous case, neither party (nor his or her privy) may use the prior judgment as preclusive of an issue or claim in the second action." \textit{47 AM. JUR. 2D Judgments} § 644 (1995).


\(^{552}\) \textit{47 AM. JUR. 2D Judgments} § 645 (1995). Courts feel that allowing "strangers" to assert issue preclusion against parties in the latter position helps promote judicial economy, because it encourages parties to join all possible adversaries in the first action. \textit{Id.}

\(^{553}\) \textit{Mendoza v. United States}, 464 U.S. 154, 162 (1984). Thus, a party may not preclude the government based on an earlier action if such party was not involved in the first action.
defensive issue preclusion, and tribes still will be faced with preclusion arguments when litigating an issue previously litigated by the United States. Opponents will argue that tribes are the same party as the United States and therefore bound.

It is vital then to carefully define "same party" for purposes of preclusion. Based on a divergence in interests and recognizing the multiple responsibilities of the Department of Justice, the United States should not be considered one, unitary party. Rather, the Justice Department acting in furtherance of Indian interests is not the same party as the Justice Department acting in furtherance of the non-Indian "public interest." This proposal has support in the efficiency and fairness purposes of the preclusion doctrines the common law of preclusion, and a recent Supreme Court case.

The Restatement (Second) of Judgments says, "A person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action." When a party to a present action asserts res judicata as a defense, they must identify themselves and their adversary as a party to the prior action and should "aver and prove that the quality or capacity of the parties is the same in each action." However, in making these identifications, the parties must remember that "substance rather than form controls" because it is "the interests represented rather than the names appearing in the pleadings or on the judgment that control." The controlling substantive nature of party identification implies that a party who appears in one action in a representative capacity, such as a trustee, could sue or be sued in a separate, yet factually identical, action in their individual capacity.

55 See 46 AM. JUR. 2D Judgments § 515 (1994) ("The doctrine . . . is a judicially created doctrine, which may be said to exist as an obvious rule of reason, justice, fairness, expediency, practical necessity and public tranquility.").
56 See infra notes 566-75 and accompanying text.
59 18 MOORE ET AL., supra note 542, ¶ 131.40[2][a] (emphasis added).
60 Id. This exception includes government officials. If a government employee sues or is sued in his or her official capacity, he or she could additionally sue or be sued, on the same facts, in his or her individual capacity. Id.
On the other end of the representative spectrum, the party being represented (i.e., "a person . . . represented by a party who is . . . the trustee of an estate or interest of which the person is a beneficiary"), "is bound by and entitled to the benefits of a judgment as though he were a party.

However, the preclusive effect of these judgments can be defeated if the trustee does not effectively "limit his or her participation to the matters within his representative authority [nor] faithfully discharge [the representative] responsibility."

This is of course the argument that the plaintiffs tried to use unsuccessfully in Nevada, that the trustee had a conflict and therefore res judicata should not apply. My argument is different. Looking to the substance of the representation and the interests involved, the government is simply not the same party. The fact that there are divergent interests within the United States has been firmly established. In this way, Nevada actually provides some help. Nevada clearly discusses the conflicting obligations, and the necessity of the United States to meet all those obligations. These conflicting obligations demonstrate that if one looks to the actual interests involved in litigation, the United States should not be considered one party.

A recent Supreme Court case supports this proposal. In Department of the Interior v. Klamath Water Users Protective

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561 RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982); see also 18 MOORE ET AL., supra note 542, ¶ 131.40[3][e][v][A] ("Beneficiaries of a trust are generally bound by a judgment in a prior action in which the trustee asserted or defended claims related to the corpus of the trust."); id. ¶ 131.40[3][e][v][B].

562 18 MOORE ET AL., supra note 542, ¶ 131.40[3][e][i][D] (citing Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343, 345-46 (2d Cir. 1995)); see also RESTATEMENT (SECOND) OF JUDGMENTS § 42 (1982) ("A person is not bound by a judgment . . . if . . . [t]he subject matter of the action was not within the interests of the represented person that the party is responsible for protecting."). By no means do I wish to suggest agreement with the outcome in Nevada.


565 Traditionally, courts considered all agencies of the federal government to be in privity with one another. Joel deJesús, Comment, Interagency Privity and Claim Preclusion, 57 U. CHI. L. REV. 195, 205-07 (1990). However, more recent cases turn to an "interests" based approach and determine whether agencies' interests are congruent. Id. at 207-09. DeJesús recommends a "specific overlap" approach in which courts would examine the governing statutes for any overlapping jurisdiction. Id. at 210-15. If the statutes and regulations governing the agencies provide both agencies with authority over a specific factual situation, the judge should find privity. Id.
Ass'n, the Court considered whether certain documents submitted to the Department of the Interior by tribes were protected from disclosure under the Freedom of Information Act (FOIA). Specifically, the Interior Department argued that written memoranda submitted by the Klamath Tribe to the Bureau of Indian Affairs for purposes of determining the scope of water claims and memoranda submitted by other tribes to comment on a water allocation plan were protected from disclosure under the inter- or intra-agency exemption of FOIA. FOIA exemption number five protects from disclosure "inter-agency or intra-agency memorandums." Lower courts have expanded the exemption to include reports or other documents prepared by consultants for federal government agencies.

The Department of the Interior argued that its role as a fiduciary to Indian tribes brought these documents within the consultant corollary to exemption five. The Court held that the consultant corollary applied to those individuals who created documents and were not operating in their self-interest. Rather, the consultant's only obligations "are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." In holding that the documents were not protected because they were not generated by a federal agency, the Court stated that the tribal interest could be considered to have "merged" with the trustee.

Thus, the Court has
again emphasized that the tribal interests and the interests of the United States are not one and the same.

This functional approach to defining "same party" for purposes of preclusion provides a less complicated method for removing the bar of preclusion. Advocates need not attempt to find exceptions to the application of preclusion doctrines. Rather, by employing the functional approach to defining same party, the basic elements of claim and issue preclusion and equitable estoppel will not have been met and the Department of Justice may more freely advocate for tribal interests.

The same approach of "judicial estoppel" should be considered in the area of the final preclusion doctrine. As John Knight said, "The purpose of judicial estoppel is to prevent a litigant from taking inconsistent or contradictory positions in the same or succeeding cases." Thus, as in the eastern land claims, opponents may claim the United States is estopped from asserting a pro-tribal position because in the past it asserted a different position. Although it is the most rarely used preclusion doctrine, parties have begun to assert it against the United States in recent years. Judicial estoppel is a judge-made concept, and as such there is no standard application of the doctrine. There are essentially two views of judicial estoppel, the majority view and the minority view.

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577 Schreiber, supra note 549, at 323.


579 See Knight, supra note 576, at 32 (explaining judicial estoppel).

580 The majority view is held by the Second, Fourth, Fifth, Sixth, and Seventh Circuits. See, e.g., Exxon Corp. v. Oxford Clothes, Inc., 109 F.3d 1070, 1078 (5th Cir. 1997); Blanton v. Inco Alloys Int'l, Inc., 108 F.3d 104, 109 (6th Cir. 1997); Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996); Bates v. Long Island R.R. Co., 97 F.2d 1028, 1038 (2d Cir. 1939); Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1550 (7th Cir. 1990). Recently, the Supreme Court impliedly approved the majority view. In New Hampshire v. Maine, 532 U.S. 742 (2001), the Court described judicial estoppel as a doctrine "not reducible to any general formulation of principle." Id. at 750 (quoting Allen v. Zurich Ins. Co., 667
Under the majority view, in order for judicial estoppel to be applied, the first forum must have accepted the legal or factual assertion alleged to be at odds with the position in the current forum. Hence, litigants are free to advance an inconsistent position, as long as the position was not a winning one in the first forum. The minority view is split between those circuits that claim that judicial estoppel never applies and those circuits that claim that it can apply whether or not the litigant was successful in previously asserting an inconsistent position. Knight stated, "The doctrine applies even if the litigant was unsuccessful in asserting an inconsistent position if, by changing positions, the litigant is playing 'fast and loose' with the courts." However, even in courts that adopt this view, a prior inconsistent position that is the product of a good faith mistake will not trigger judicial estoppel. Thus, some courts apply judicial estoppel only if those who assert inconsistent positions do so in bad faith. This preserves the purpose behind judicial estoppel, namely protecting the integrity of the court.

Judicial estoppel should not prevent the Department of Justice from advancing pro-tribal positions for several reasons. First, as discussed above, the Justice Department or the Indian Trust Counsel Authority (ITCA) acting in furtherance of Indian interests should not be considered the same party as the Justice Department acting against Indian interests. Judicial estoppel would not therefore apply because it would not be the "same party" advancing an inconsistent position. Second, even if the Justice Department and the ITCA were considered the same party, the bad faith

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581 Knight, supra note 576, at 32.
582 This view is held by the District of Columbia Circuit and the Tenth Circuit. See, e.g., United Mine Workers v. Pittston Co., 984 F.2d 469, 477-78 (D.C. Cir. 1993); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1521 n.10 (10th Cir. 1991).
584 Knight, supra note 576, at 33.
585 Id.
586 Id.
587 See supra notes 563-65 and accompanying text.
requirement is not met. It would be the height of irony to conclude that the United States is acting in "bad faith" when it attempts to carry out the trust responsibility and balance the competing interests. Further, other parties could not claim unfair surprise by a difference in litigating position if the Justice Department makes clear the split between the ITCA and other litigating positions. All those who litigate against the government would be aware that the ITCA may take a different position than the Department of Justice and vice versa.

It is not necessary to enact legislation or to amend the Restatement of Judgments to carry out this approach to preclusion. This suggestion does not call for overruling past applications of preclusion. Rather, in the future, preclusion would not apply because the necessary elements would not be met, i.e., there would not be the same party involved. Current case law and treatises support such a definition of "same party." This approach should ease the concerns of the Justice Department and reduce the possibility of conflicts immediately.

VI. CONCLUSION

Whether it is blind stubbornness or a concern for the practicalities of litigating, the Department of Justice has refused to admit the conflict inherent in its litigation of Indian issues. The conflict results from the judicial and statutory interpretations of the federal-tribal trust relationship and the bureaucratic structure that developed to deal with the trust responsibilities. The current

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588 In United States v. Sioux Nation, 448 U.S. 371, 406-07 (1980), the Supreme Court upheld legislation that waived the defense of res judicata in an action against the United States. Specifically, Congress passed legislation to enable the Court of Claims to review, without regard to res judicata, the merits of a decision involving the taking of the Black Hills. Id. at 389. The Court found that such legislation did not violate the doctrine of separation of powers in that Congress may waive an otherwise valid defense to a legal claim against the United States. Id. at 407. This decision was called into question in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). In Plaut, Justice Scalia held that legislation reinstating numerous securities cases violated the separation of powers doctrine by instructing federal courts to reopen final judgments. Id. at 225-26. However, in so doing, Justice Scalia distinguished Sioux Nation. Id. at 230-32. Given the unclear state of the law, this Article does not propose to overturn the application of res judicata. Rather, under the theory in this Article, res judicata does not apply.
governmental structure provides no promise of conflict-free decisions to tribes, either substantive or procedural. Instead of referring to Nevada, the Justice Department should seek to do all that it can to support and uphold the trust responsibility. Rather than forcing tribes to bring ill-fated breach of trust actions, the Justice Department should support the creation of a separate litigating agency to aid in those cases in which there is a conflict. Although a separate agency would not solve all the conflict problems, it would bring a measure of procedural fairness. Further, treating a separate agency and “pro-tribal” positions taken by the Justice Department as a distinct party from the Justice Department acting against Indian interests, some degree of substantive protection for tribal rights will be provided. Without concern for the effect on other agencies and other cases, the Department of Justice and the Indian Trust Counsel Authority would be free to support the trust responsibility and to advocate zealously for tribal rights.

Finally, one must recall that Darth Vader ultimately recognized the conflict within himself and in so doing not only saved Luke, but saved himself. Likewise, the Department of Justice should seize the chance to save itself.

589 Thanks to David Wippman of Cornell Law School for pointing this out to me.