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Federal Treaty and Trust Obligations, and Ocean Acidification

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COMMENTARY:

**FEDERAL TREATY AND TRUST OBLIGATIONS,
AND OCEAN ACIDIFICATION**

Robert T. Anderson*

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I. INTRODUCTION

Ocean acidification will have profound effects on the entire human population and natural resources that depend in any way upon Earth’s oceans and lakes. In turn, those effects will be even greater, and potentially catastrophic, for indigenous populations who rely on the seas for physical, cultural, and spiritual sustenance. While most research on carbon dioxide absorption from the atmosphere has focused on oceans and the resulting acidification, many believe that acidification levels also will also increase in the Great Lakes.¹ Indian tribes in the Pacific Northwest and the Great Lakes regions share reliance

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1. Brian Bienkowski, *Acidification is not just for oceans—the Great Lakes could acidify, too, as our carbon emissions increase. Here’s why you should take note.* THE DAILY CLIMATE (December 8, 2015), <http://www.dailyclimate.org/tdc-newsroom/2015/12/forgetting-freshwater-could-the-great-lakes-be>. NOAA OCEAN ACIDIFICATION STEERING COMM., NOAA OCEAN AND GREAT LAKES ACIDIFICATION RESEARCH PLAN: SPECIAL REPORT 107 (2010), http://www.nodc.noaa.gov/media/pdf/oceanacidification/NOAA_OA_Steering2010.pdf (last visited April 24, 2016).

on marine and freshwater resources, and many treaties contain provisions reserving off-reservation access to these resources.² These treaties have consistently been interpreted as the Indians would have understood them, with any ambiguities interpreted in favor of the tribes.³ While many tribes have fought off incursions on their territories and treaty rights in particular cases, the threats from greenhouse gases and ocean acidification call for even greater efforts due to extensive tribal rights in affected waters and resources.⁴ This battle also requires a major effort on the part of the United States government.

Each article in this book details the problem of ocean acidification, which as Professor Hull describes, is also known as climate change's "evil twin."⁵ Professor Mary Wood describe the Atmospheric Trust Litigation effort to force "urgent emission reductions around the world,"⁶ while Jaqueline M. Bertelsen draws specific attention to the federal government's obligation to protect the Tulalip Tribes' access to shellfish beds, and makes specific recommendations for federal and state actions to accomplish that end.⁷ Others offer a creative array of legal and policy arguments to deal with this escalating problem threatening the most important natural resource on the

2. See Treaty with the Yakamas art. 3, 1855, 12 Stat. 951 ("The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."); Treaty with the Lake Superior Chippewa, art. 11, 10 Stat. 1109 ("And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.").

3. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Wash. State Commercial Fishing Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

4. See Fawn Sharp, *Tribes have up close perspective on climate change*, THE SEATTLE TIMES (April 23, 2016), <http://www.seattletimes.com/opinion/tribes-have-up-close-perspective-on-climate-change/>.

5. Robin Kundis Craig, *Dealing with Ocean Acidification: The Problem, The Clean Water Act, and State and Regional Approaches*, 90 WASH. L. REV. 1583, 1585 (2015).

6. Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 633 (2016).

7. Jaqueline M. Bertelsen, *"Fed" Up with Acidification: "Trusting" the Federal Government to Protect the Tulalip Tribes' Access to Shellfish Beds*, 6 WASH. J. ENVTL. L. & POL'Y 495 (2016).

planet.⁸ All of these approaches, if followed, may help a bad situation from getting worse. The United States must consider the effects of any action, or inaction, upon Indian treaty rights and resources. Federal law does not permit abrogation of Indian treaty rights absent express congressional authorization,⁹ and third-party interference with treaty rights is not permitted.¹⁰ Federal permitting processes that may adversely affect treaty resources must take place in consultation with the affected tribes, and be consistent with the federal government's trust responsibility.

This essay describes the nature of Indian treaty rights and the federal-tribal relationship, shows how the United States has sometimes acted to protect Indian treaty rights, and argues that the United States must do more to protect and enhance environmental conditions that are causing ocean acidification. Tribal property rights secured by treaty, and the federal government's trust responsibility require serious protective action by the United States to stop the increase in ocean and freshwater acidification. Part II describes the federal-tribal relationship and the parameters of the federal trust responsibility. Part III reviews legal authority supporting federal litigation and administrative actions to protect Indian treaty rights to hunt, fish, and gather and to the habitat upon which those rights depend. Part IV concludes the piece with a normative discussion of why the federal trust responsibility requires the robust use of protective, proactive, and ameliorative efforts outlined by others in this book. In sum, it will take a broader view of the trust responsibility and more aggressive action by policy makers to force limitations on greenhouse gas emissions and stem the harm from increasing ocean acidification.

II. THE FEDERAL TRUST RESPONSIBILITY

A. *Background*

The United States' trust responsibility has its roots in international law and treaties and agreements made between

8. See Ryan P. Kelly & Margaret R. Caldwell, *Ten Ways States Can Combat Ocean Acidification (And Why They Should)*, 37 HARV. ENVTL. L. REV. 57 (2013).

9. *United States v. Dion*, 476 U.S. 734 (1986).

10. *United States v. Winans*, 198 U.S. 371 (1905).

the United States and indigenous Nations.¹¹ European nations that explored and came to what is now the United States, asserted exclusive rights to deal with the Indigenous Nations in matters related to land and intergovernmental relations. This assertion of authority was largely designed to resolve competition between the European Nations and could not affect the status of Indian nations as pre-existing sovereigns. When the United States Constitution was adopted, the federal government assumed exclusive authority in all matters related to Indian affairs, and got to work on the colonization process. Nearly fifty years later, Supreme Court Chief Justice John Marshall stated that the “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”¹² The Supreme Court in 2004 noted that “at least during the first century of America’s national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.”¹³ A look back in time reveals that Indian nations and the United States government have a sovereign-to-sovereign relationship evidenced by the Constitution,¹⁴ treaties,¹⁵ agreements,¹⁶ acts of Congress,¹⁷ and court decisions.¹⁸ The federal trust responsibility is derived from all these sources, as well as their international law antecedents.

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, as a practical matter the tribes were made subject to various federal laws without regard to tribal desires.¹⁹ This colonial treatment of indigenous

11. See generally NELL J. NEWTON & ROBERT T. ANDERSON ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 5.04, 5.05 (Newton et al., 2012 ed. 2012).

12. *Worcester v. Georgia*, 31 U.S. 515, 558 (1832).

13. *United States v. Lara*, 541 U.S. 193, 201 (2004).

14. U.S. CONST. art. I, § 8, cl. 3.

15. See, e.g., Treaty with the Yakamas, and Treaty with the Lake Superior Chippewa, *supra* note 2.

16. See *Winters v. United States*, 207 U.S. 564 (1906) (discussing agreement ratified by Congress). CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1986) (discussing treaty substitutes utilized after 1871).

17. Act June 30, 1834, c. 161, § 12, 4 Stat. 730 (codified in part at 25 U.S.C. § 177) (restricting sale of Indian land without federal approval); American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001–4061.

18. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

19. See Robert T. Anderson, *Treaty Substitutes in the Modern Era*, ch. 11, in THE

peoples was geared toward the United States' acquisition of land for westward expansion.²⁰ In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands, access to natural resources, and recognition of the right to continue to exist as distinct sovereign peoples. The Supreme Court noted that although the federal government and others had colonized the United States, the law of nations mandated that the Indian tribes were owed a duty of protection from incursions on tribal governmental authority and independence within the newly formed nation.²¹ These rights were to be safeguarded, and supported, by the United States, especially from interference by the states. The government-to-government relationship and these promises of political allegiance remain at the foundation of the federal trust responsibility despite vacillating federal policies. The initial respect for tribal territories was eroded with the President Andrew Jackson's removal policy, which was effected by a number of actions—the most infamous of which is the Trail of Tears.²² allotment of tribal lands, and the associated loss of approximately ninety million acres of tribal land by 1934.²³ Congress returned to the public domain lands that were considered “surplus” to Indian needs.²⁴ While previous reservations were generally under exclusive tribal ownership, the new allotment policies allowed an influx of non-Indians within reservation boundaries. This resulted in a checkerboard pattern of land ownership within reservations and introduced many of today's vexing jurisdictional problems.²⁵

POWER OF PROMISES, RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST, (Alexandra Harmon ed., 2008); see also CHARLES F. WILKINSON, MESSAGES FROM FRANKS' LANDING: A STORY OF SALMON TREATIES, AND THE INDIAN WAY 11, 14 (2000).

20. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 197–98 (1999) (describing treaty negotiations in Minnesota, and quoting “statement of Hole-in-the-Day, the principal negotiator for the Chippewa: ‘Your words strike us in this way. They are very short. ‘I want to buy your land.’ These words are very expressive—very curt.’”).

21. *Worcester v. Georgia*, 31 U.S. 515 (1832).

22. See ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 50–55, 74–77 (3d ed. 2015).

23. See Judith K. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–12 (1995).

24. See, e.g., *Solem v. Bartlett*, 465 U.S. 463 (1984).

25. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492

Congress reversed course with the adoption of the Indian Reorganization Act (IRA) in 1934—sometimes known as the Indian “New Deal.”²⁶ The IRA “halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted Indian lands.”²⁷ This return to support of tribal self-government and a secure Indian land base was short-lived, however, as less than twenty years later, Congress adopted a resolution calling for the “termination” of the federal-tribal relationship with certain Indian tribes.²⁸ Although the termination period quickly fell into disfavor, its short tenure resulted in the end of the government-to-government relationship between the United States and over seventy federally recognized Indian tribes, and transferred jurisdiction over those tribes to the states.²⁹ This state control turned the historic federal-tribal relationship on its head. States began aggressively to assert jurisdiction over Indian country through laws such as Public Law. 280, which gave selected states full criminal and some civil jurisdiction over Indian country—without regard to tribal desires.³⁰

Although federal policies changed over time from the reservation system, to removal, to allotment and assimilation era, and then to outright termination of the federal-tribal

U.S. 408 (1989); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962); Royster, *supra* note 23, at 1.

26. Wheeler-Howard Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79).

27. 25 U.S.C. § 461 (On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.). See *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

28. H.R. Con. Res. 108, 83d Cong. (1953) (directing the Secretary of the Interior to recommend tribes for termination). See NEWTON & ANDERSON ET AL., *supra* note 11, § 1.06, at 95. In general, “[termination] would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled.” Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970), H.R. Doc. 91-363, at 1. *But see* *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination of Menominee Indian Tribe did not abrogate tribal rights to hunt and fish free of state regulation).

29. See NEWTON & ANDERSON ET AL., *supra* note 11, § 1.06, at 95.

30. See generally Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915 (2012).

relationship, since 1970 the federal policy is one of Indian self-determination without termination. This modern policy implements the federal government's trust responsibility to protect and advance Indian Nations' status as governments with inherent sovereignty. Indian reservations have come to be regarded permanent tribal homelands with President Nixon's 1970 address rejecting the forced termination policy described the nature of the federal-tribal relationship.

The policy of forced termination is wrong in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship for Indian communities as an act of generosity toward a disadvantaged people and that can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the federal government is the result of solemn obligations, which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services that would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.³¹

The Supreme Court has concluded that the United States "has charged itself with moral obligations of the highest responsibility and trust."³² Since then, the American Indian Policy Review Commission (AIPRC) was established by a resolution of Congress in 1973 to review all aspects of Indian law and policy, including the federal trust responsibility.³³ The Final Report of the AIPRC carefully evaluated the trust

31. Richard M. Nixon, President of the United States, Special Message on Indian Affairs (July 8, 1970).

32. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

33. S.J. Res. 133, 93rd Cong. (1973).

responsibility and described it as “a rather confusing legal concept with murky origins and inexact application.”³⁴ The Final Report noted that the National Tribal Chairman’s Association categorized the trust responsibility as including: 1) protection and proper management of Indian resources, properties and assets; 2) protections and support of tribal sovereignty; and 3) provision of community and social services to tribal members.³⁵ This characterization is consistent with the AIPRC Final Report’s evaluation of the federal trust, and was relied upon by the Commission for a variety of recommendations for federal implementation of the trust responsibility in the modern era. These recommendations sparked a remarkable congressional response—one unheard of in any era of federal Indian policy. Over a dozen federal statutes were developed in consultation with Indian tribes intended to promote economic self-sufficiency, and to protect tribal natural resources and the distinct sovereign status of Indian nations and their people.³⁶

More recently, in 2009, Secretary of the Interior Ken Salazar appointed a five member Commission on Indian Trust Administration and Reform to carry out a comprehensive review of the Interior Department’s performance in carrying

34. AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT SUBMITTED TO CONGRESS MAY 17, 1977, at 125 (1977).

35. AM. INDIAN POLICY REVIEW COMM’N, REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP 47 (1976).

36. See, e.g., Indian Self-Determination and Educational Assistance Act (ISDEA) of 1975, 25 U.S.C. § 450 *et seq.* (amended by the Tribal Self-Governance Acts of 1988, 1994, and 2000, 25 U.S.C. §§ 458aa to 458aaa-18); Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501 *et seq.*; Tribally Controlled Colleges and Universities Act of 1978, 25 U.S.C. § 1801 *et seq.*; Native American Housing Assistance Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq.*; Indian Financing Act of 1974, 25 U.S.C. § 1415 *et seq.*; Indian Forest Resources Management Act, 25 U.S.C. §§ 3101–3120; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721; Tribal Treatment as State under the Clean Air and Clean Water Acts, 42 U.S.C. § 7474(c) (Clean Air Act), 33 U.S.C. § 1377(e) (Clean Water Act); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1931; American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996; Native American Languages Act of 1990, 25 U.S.C. §§ 2901–2906; Native American Grave Protection and Repatriation Act of 1990 (NAGPRA), 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–3013; Tribal Law and Order Act of 2010, Pub. Law 111-211, 111th Cong. 2d Sess., 124 Stat. 2258, 2261–2301; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, *amending* 25 U.S.C. § 415; Violence Against Women Reauthorization Act, Pub. L. 113-4, Title IX, § 904, 127 Stat. 120 (codified at 25 U.S.C. § 1304).

out federal trust responsibilities.³⁷ The Commission's Report noted that, "in the past, the trust responsibility was viewed as a demeaning and paternalistic guardian-ward relationship. That model is unsuited for the modern self-determination era, but . . . the outmoded trust model still influences the performance of the federal government's obligations to Indian nations and people in some cases."³⁸ The Commission concluded:

It is critical that the United States continue to acknowledge its historic legal and moral obligations to Indian nations to further the sovereign-to-sovereign relationship at the foundation of the many complex dealings that occur on a regular basis. It must be remembered that the United States would not exist but for the acquisition of tribal territories that were given in exchange for the continued support and respect of the federal government. The promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples impose solemn obligations on all branches of the federal government.³⁹

Unfortunately, the federal government does not always live up to the Commission's proposed standard. This is because the United States vigorously defends itself when Indian tribes bring suit against seeking monetary compensation for harm allegedly caused by federal agencies to tribal financial or natural resources. In so doing, the United States sometimes avoids monetary liability in tribal breach of trust actions. The Supreme Court has opined that the federal trust responsibility is sometimes different than a private trust, and that common law trust duties do not apply to the United States under all circumstances. This has created a mistaken impression that the federal government is relieved of obligations to protect treaty resources from third party harm. As set out in the next section, the line of cases limiting federal liability has no

37. Order 3292 (Dep't of the Interior, December 8, 2009). The author of this chapter was a member of the Commission and co-author of the Report.

38. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM, FINAL REPORT, APPROVED BY THE COMMISSION (2013), https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf.

39. *Id.* at 33.

application to consideration of prospective actions to protect treaty resources—a topic considered in Part III.

B. Federal Trust Liability Standards

Private trusts are different from the complex federal-tribal relationship in a number of ways. A leading legal treatise describes a trust “as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.”⁴⁰ The basic elements of a private trust include: 1) trust property held for the benefit of another; 2) a settlor who creates the trust; 3) a trustee who holds the property for another; 4) a beneficiary for whom the property is managed; and 5) a trust instrument which defines the purpose of the trust and duties of the trustee and rights of the beneficiary.⁴¹ The trustee is a fiduciary from which the law demands an unusually high standard of ethical or moral conduct with reference to the beneficiary. Trustees owe a duty to act solely in the interest of the beneficiary, and must not consider their own personal advantage.⁴²

While the property holding aspects of a private trustee are analogous in some ways to the federal-tribal trusteeship, the elements of a private trust cannot support the full realm of responsibilities embodied in federal trusteeship to Indian peoples. Private trust principles, however, provide appropriate guidance when the federal government is exercising management responsibilities for real property, and natural resources that it holds in trust for Indian tribes.⁴³ Unfortunately, the Supreme Court has narrowly interpreted the federal trust responsibility when it evaluates federal monetary liability for the breach of trust obligations.⁴⁴ In the case of *United States v. Navajo Nation*,⁴⁵ the Court considered claims that the Secretary of the Interior and the Bureau of

40. George G. Bogert & Amy M. Hess, *Trusts and Trustees*, ch. 1, § 1 (3d ed. 2007).

41. *Id.*

42. *Id.*

43. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (fundamental common law duty of trustee is to preserve and maintain trust assets).

44. The Indian Tucker Act, 28 U.S.C. § 1505 (waives federal sovereign immunity for money damages claims against the United States).

45. *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Indian Affairs (BIA) failed to act in the Navajo's best interest in the renewal of an expired coal lease between the Navajo and the Peabody Coal Company. The newly negotiated lease called for a twenty percent royalty, but could become effective only with the approval of the BIA. The Secretary privately met with a Peabody Coal Company representative and agreed to direct the BIA to delay lease approval.⁴⁶ Laboring under the erroneous belief that the BIA (as opposed to the Secretary) was not inclined to approve the lease with a twenty percent royalty, the tribe agreed to a twelve percent royalty. The Court refused to award damages to the Navajo Nation to despite the unfaithful actions that resulted in a financial disadvantage to the Navajo Nation, in the form of an 8% reduction in the negotiated royalty.⁴⁷ The Court reasoned that "there is 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."⁴⁸ In a second decision after the tribe prevailed on remand, the Court again rejected the Navajo Nation's claims, and explained the test for determining when the United States is liable for damages in breach of trust cases.

[T]here are thus two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act. First, the tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. If that threshold is passed, the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]. At the second stage, principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach.⁴⁹

46. *Navajo Nation*, 537 U.S. at 497.

47. *Id.*

48. *Id.* at 511.

49. *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009). *See also* *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) ("So when Congress says the government may be called to account, we have some reason to think it means to allow the relevant Native American beneficiaries to sue for an accounting, just as traditional

The federal government has sometimes rested on this narrow standard to refuse to protect tribal resources from prospective harm, and to resist tribal efforts to compel agency action.⁵⁰ As one respected commentator noted, “The trust responsibility should play a role in protecting tribal lands and resources, but the trust doctrine stands in potential jeopardy today as courts collapse protective trust requirements into statutory standards.”⁵¹ Professor Wood’s observation regarding the protective trust standards relates only to the question of federal court actions seeking to force the federal government to take protective actions. Whether or not courts are willing to force the United States to bring such protective actions is an important question, but the larger point is that the federal government’s good faith obligations should lead it to take protective actions involving tribal resources even if not compelled by the courts. As stated in the Northwest Ordinance of 1787: “the utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.”⁵² The federal government has in fact brought many actions to protect Indian treaty rights—both to harvest resources and to preserve habitat. Federal agencies have also stepped up in recent times to protect Indian treaty rights and associated habitat. As discussed in the concluding section III, these sorts of actions will be especially important in combatting climate change and associated acidification of the Ocean and freshwater lakes.

III. PROTECTING INDIAN TREATY RIGHTS

Indian treaty rights to hunt, fish, and gather are property

trust beneficiaries are permitted to do.”); NEWTON & ANDERSON ET AL., *supra* note 11, at 428 (“Private trust law principles are most often invoked in controversies involving direct management of tribal resources and funds.”).

50. *See, e.g.*, Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006) (no judicially enforceable general duty to manage non-tribal resources so as not to harm tribal resources). *See also* NEWTON & ANDERSON ET AL., *supra* note 11, § 5.05[3][c], at 431 (“In the absence of specific statutory duties, federal agencies discharge their trust responsibility if they comply with the statutes and general regulations.”).

51. Mary C. Wood, *The Federal Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003).

52. 32 J. Cont’l Cong. 340–41 (1787).

rights protected under federal law.⁵³ Off-reservation hunting, fishing, and gathering rights are servitudes over the burdened lands. In a number of cases, the U.S. Supreme Court has interpreted treaties to contain the implied rights necessary to exercise a treaty's explicit or substantive provisions. For example, in *United States v. Winans*,⁵⁴ the Court confirmed that tribal members possess an easement of access over privately held land as necessary to the exercise of treaty hunting, fishing, and gathering rights. The Court specifically held that an access easement was necessarily implied from the treaties' specific reservation of fishing rights at a usual and accustomed station. This principle ensures that reserved treaty rights are not rendered a nullity by shifting patterns of property ownership and development.⁵⁵

Similarly, in *Winters v. United States*, the Supreme Court held that when the federal government set aside land for the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water from the Milk River to fulfill its purpose for creating the reservation, which was to provide a permanent tribal homeland with an agricultural economy.⁵⁶ Since *Winters*, courts addressing tribal reserved water rights for fisheries have recognized habitat protection as the basis for Indian reserved water rights.⁵⁷ In the *Adair* and *Walton I* decisions, the courts recognized the obvious fact that the reserved treaty rights to fish on rivers and gather aquatic plants require the presence of sufficient water to maintain the rivers, lakes, and marshes upon which the plants and fisheries

53. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Menominee Indian Tribe v. United States*, 391 U.S. 404 (1968). See also NEWTON & ANDERSON ET AL., *supra* note 11, § 18.02, p. 1156.

54. *United States v. Winans*, 198 U.S. 371, 381–382 (1905).

55. *Id.*

56. *Winters v. United States*, 207 U.S. 564, 577 (1908). For a comprehensive review of the Indian reserved rights doctrine, see NEWTON & ANDERSON ET AL., *supra* note 11, § 19.03.

57. *United States v. Adair*, 723 F.2d 1394, 1414–1415 (9th Cir. 1983) (“confirm[ing] to the Tribe the amount of water necessary to support its hunting and fishing rights”); *Colville Confederated Tribes v. Walton (Walton D)*, 647 F.2d 42, 48 (9th Cir. 1981) (awarding amount of water “necessary to maintain” on-reservation fishery). See Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 205–14 (2015) (summarizing the law of Indian reserved rights); NEWTON & ANDERSON ET AL., *supra* note 11.

depend.⁵⁸ These Indian reserved rights are property rights with a priority date of time immemorial,⁵⁹ and thus are superior in rank to any water rights created under other state or federal law. Federal and state agencies as well as private parties may not interfere with these *in situ* water rights. Moreover, the federal trust responsibility requires that the United States protect these rights.⁶⁰

Neither states, nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights.⁶¹ This principle also applies to federal agencies.⁶² The United States' trust responsibility extends not just to the Department of the Interior, but to the federal government as a whole. This responsibility includes duties to protect tribal assets and property from damage by third parties.⁶³ Thus, all federal agencies, including the Army Corps

58. *Id.* See also *In re Yakima River Drainage Basin*, 296 P.3d 835, 840 (Wash. 2013) (en banc) (“[The] nation also has a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek [which extends beyond reservation lands.]”); *State Dep’t of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (en banc) (“All of the parties to this litigation agree that the Yakima Indians are entitled to water for irrigation purposes and, at least at one time, were entitled to water for the preservation of fishing rights. The disagreement here is the extent of the treaty rights remaining.”). See, e.g., *Joint Bd. of Control of Flathead Irrigation Dist. v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (reversing trial court’s refusal to issue injunction to protect tribal water rights for fish); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (holding district court acted appropriately in ordering release of water to protect habitat for the fishery); *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff’d in part, rev’d in part*, 736 F.2d 1358 (9th Cir. 1984) (recognizing a reserved tribal water right for water needed to maintain favorable temperature conditions to support the fishery); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 764–66 (Mont. 1985) (recognizing that tribal reserved rights may include water for fisheries as well as agriculture and other purposes).

59. *Adair*, 723 F.2d at 1413–15. See NEWTON & ANDERSON ET AL., *supra*, note 11.

60. *Criteria and Procedures for Indian Water Rights Settlements*, 55 Fed. Reg. 9223 (1990) (“Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”).

61. *Winans*, 198 U.S. at 381, 384.

62. *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (Army Corps of Engineers may not construct dam that will destroy usual and accustomed fishing stations without express authorization by Congress).

63. See *Parravano v. Babbitt*, 70 F.3d 539, 546–47 (9th Cir. 1995) (“[Commerce] Secretary Brown issued emergency regulations to conserve salmon runs and to ensure consistency with ‘any other applicable law,’ which includes the Tribes’ federally

of Engineers, Department of Commerce, and Coast Guard, shoulder the same consultation and trust responsibilities as the Department of the Interior.⁶⁴ As one commentator notes, however, existence of the trust responsibility has not prevented massive damage to natural resources upon which tribes depend. “In recent decades, federal agencies have developed a myriad of “government to government” relationships with tribes and have created policies to carry out their trust obligation. Such policies, however, have generally failed to ensure protection of tribal interests.”⁶⁵ As discussed below, however, the United States has in fact brought many cases before the courts to protect Indian treaty rights and has an improving record in agency decision-making that protects or accommodates Indian treaty rights.

A number of federal courts have also ruled that protection of Indian treaty rights can preclude federal or state action that could adversely affect those rights by harming species’ habitat, or the places at which the tribes are entitled to exercise their rights.⁶⁶ Like the implied rights recognized in *United States v.*

reserved fishing rights.”).

64. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). *See also* President Barack Obama, Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,879 (Nov. 5, 2009) (reiterating Exec. Order No. 13,175 and ordering all agency heads to report to OMB with detailed plans for compliance with Exec. Order No. 13,175); Executive Order Establishing the White House Counsel on Native American Affairs, 78 Fed. Reg. 39,539 (June 26, 2013) (“This order establishes a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities.”).

65. Mary Christina Wood & Zachary Welcker, *Tribes As Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 387–88 (2008). Professor Wood provides a scathing review of the United States’ actions toward tribal interests. “The federal government has ignored its trust obligation time and time again and actively resists any judicial enforcement of the trust in pending court cases. Litigation to protect harvest resources has failed largely due to the deference courts give to agencies.” *Id.* at 393 (footnotes and citations omitted).

66. *See Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (duty to protect fish and fishing rights reserved by treaties applies to federal agencies as well as state and local governments; Army Corps of Engineers may not destroy fishing grounds absent authorization by Congress); *No Oilport! v. Carter*, 520 F. Supp. 334, 372–73 (W.D. Wash. 1981) (ordering hearing on whether sedimentation caused by proposed oil pipeline would adversely affect spawning habitat); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (holding the Tribe has a right of sufficient water quality and quantity to preserve fishing); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 (9th Cir. 1985) (upholding district court’s finding that

Winans and *Winters v. United States*,⁶⁷ in *Muckleshoot Indian Tribe v. Hall*, a federal district court enjoined construction of a marina in Elliott Bay that would eliminate a portion of the tribe's usual and accustomed fishing site.⁶⁸ The court rejected arguments by the Corps of Engineers, along with public and private developers, that there would be a *de minimis* effect on tribal treaty rights.

No case has been presented to this Court holding that it is permissible to take a small portion of a tribal usual and accustomed fishing ground, as opposed to a large portion, without an act of Congress, or to permit limitation of access to a tribal fishing place for a purpose other than conservation. In *Umatilla*, the court refused to permit an unauthorized taking of some, not all, of the fishing stations which would be flooded by the proposed dam's two and one-half mile reservoir on Catherine Creek. 440 F. Supp. at 555. In *Oregon*, the States' proposed restriction of treaty fishing would have eliminated two pools in the upper half of the Columbia River zone at issue, and left the tribes access to a 21.6-mile pool and one hatchery. 718 F.2d at 301–02. In *Winans*, one fishing station on the Columbia River was at issue. 198 U.S. at 371. In each of these cases, the court did not allow the tribes' right of access to their usual and accustomed fishing places to be impaired, limited or eliminated and did not indicate that the extent or amount of damage to the property right was a factor to weigh in reaching its decision.⁶⁹

The Army Corps took the court's admonitions seriously, and in *N.W. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*,⁷⁰ the district court upheld the denial of a federal permit to construct net pens for a fish farm at a Lummi Nation usual and

Bureau of Reclamation had authority to release water from project to protect treaty fish habitat from dewatering). See also *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1972 and 1973) (holding the Secretary of Interior is required to provide all water possible to Pyramid Lake to preserve fish depended upon by the Tribe, after fulfilling requirement of earlier decrees and contracts).

67. See *supra* notes 56 & 57 and accompanying text.

68. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1515–16 (W.D. Wash. 1988).

69. *Id.* at 1515.

70. *N.W. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1521–22 (W.D. Wash. 1996).

accustomed fishing place. The court found that it is the Corps' fiduciary duty to the Lummi Nation, rather than any express regulatory provision, which mandates that the Corps consider and protect the Tribe's treaty-secured right to take fish at its usual and accustomed places. At the same time, if a permitted action will have only a *de minimis* effect on the exercise of treaty rights or habitat, courts may deny relief.⁷¹

In a recent decision, the Army Corps of Engineers discussed the *de minimis* standard when it denied a permit application for a port facility (Cherry Point) near Bellingham, Washington, which would receive and ship coal to Asian markets from the Powder River Basin in Wyoming and Montana.

At full build out, the over-water impacts of the project will include a trestle, wharf, three ship berths, and new vessel approach lane covering 122 acres and handling 487 total annual vessel calls, one vessel arrival or departure every 18 hours. This does not include the incidental vessel traffic needed to operate a deep water export facility of this magnitude. Therefore, at minimum, 122 acres of the Lummi's U&A fishing grounds will be impacted by the proposed project by eliminating the Lummi's access to their U&A fishing grounds.⁷²

The Corps considered avoidance and minimization measures as factors in whether the impacts are greater than *de minimis*, but concluded that "this proposed regulation on the time and manner of fishing at the U&A fishing ground is an impairment or limitation [of treaty rights] that is only appropriate by an act of Congress or for the conservation of the fishery resource."⁷³ Accordingly the Corps may not issue the permit

71. Lummi Indian Nation v. Cunningham, No. C92-1023 (W.D. Wash. 1992). See, e.g., United States v. Washington, 157 F.3d 630, 654 (9th Cir. 1998) (Upholding District Judge Rafeedie's ruling that tribal access across private land might be limited in some circumstances. The "district court did not err by requiring the Tribes to prove the unavailability of other forms of access before allowing them to cross private land." The "district court also [properly] invoked equitable principles to subject the Tribes' Treaty shellfishing right to reasonable time, place, and manner restrictions when the right is exercised on the Growers' or Owners' property.").

72. Memorandum for Record: Gateway Pacific Terminal Project and Lummi Nation's Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County, at 28, Pacific International Holdings, LLC, NWS-2008-260 (U.S. Army Corps of Eng'rs., May 9, 2016).

73. *Id.* at 31.

unless Congress were to authorize impairment of the Lummi Nation's treaty rights – an action not likely to occur and one that would raise Fifth Amendment takings issues.⁷⁴

The habitat question was taken one logical step further in litigation involving culverts that inhibited the ability of adult salmon to return to their natal streams to spawn as adults, and/or for smolts (juvenile salmon) to migrate to the ocean. In the latest chapter of *United States v. Washington*,⁷⁵ the Ninth Circuit court of appeals considered an action brought by treaty tribes of western Washington in 2001, and joined in by the United States as trustee. The court applied fundamental techniques of treaty interpretation to reject the State of Washington's claim that the treaties contained no implied protection for fisheries habitat.

In its brief, Washington characterizes the “treaties' principal purpose” as ‘opening up the region to settlement.’ Brief at 29. Opening up the Northwest for white settlement was indeed the principal purpose of the United States. But it was most certainly not the principal purpose of the Indians. Their principal purpose was to secure a means of supporting themselves once the Treaties took effect. Salmon were a central concern. An adequate supply of salmon was “not much less necessary to the existence of the Indians than the atmosphere they breathed.’ *Winans*, 198 U.S. at 381.”⁷⁶

The court concluded that “The Indians did not understand . . . that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make . . . such a cynical and disingenuous promise.”⁷⁷ The court accordingly upheld the district court's injunction mandating that the State of Washington repair salmon-bolcking culverts over a seventeen year period.⁷⁸

74. See *United States v. Sioux Nation*, 448 U.S. 371 (1980) (abrogation of treaty rights required payment of compensation for property taken).

75. *United States v. Washington*, No. 13-35474, 2016 WL 3517884 (9th Cir. June 27, 2016).

76. *Id.* at *10.

77. *Id.*

78. *Id.* at *23.

The “culvert litigation” is an excellent example of how the federal-tribal relationship can work to protect treaty rights and associated habitat from undue degradation by a third party—the State of Washington. In the case of climate change and ocean acidification, however, the problem is not readily targeted by discreet litigation because the primary cause is emission of carbon dioxide.⁷⁹ The problem is pervasive and world-wide in nature. Still the federal government should take action to minimize emissions and thus avoid even more harm to treaty resources and habitat.

IV. LINKING THE TRUST RESPONSIBILITY, INDIAN TREATY RIGHTS, AND THE PROBLEM OF OCEAN ACIDIFICATION.

This section summarizes the rules set out above and argues that in light of the potential devastation caused by climate change and ocean acidification, the federal government must do more than just follow those rules and policies. To be sure the United States, as it acts through its various agencies, must consider the effects of administrative actions on Indian treaty rights, and the habitat that treaty resources rely upon. And federal law does not permit adverse impacts on treaty rights absent express congressional authorization. Moreover, every federal agency must consider any activity it might permit in light of the overall effect of any proposed project. Agency actions affecting tribal interests must take place in consultation with the affected tribes, and be consistent with the federal government’s trust responsibility.⁸⁰ The Army Corps of Engineers followed these rules well in its recent decision to reject the application for a coal terminal in Washington State.⁸¹ On the other hand, the important issue of whether the coal industry should continue to be encouraged as a matter of policy was not addressed in the decision because the narrow question before the Corps was the likelihood of

79. Robin Kundis Craig, *supra* note 5, at 1654.

80. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 § 3(a) (Nov. 6, 2000) (“Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”).

81. *See* discussion *supra* notes 70–72.

unlawful physical interference with Indian treaty rights.⁸² However, the effect of the decision is to deprive, or at least hinder the export of coal that would lead to increased greenhouse gas emissions.⁸³ One commentator noted that “more is at stake [than treaty rights], namely the rising costs of climate change and the need to keep as much carbon in the ground as possible. Coal is one of the worst contributors to greenhouse gases and the notion of ‘clean coal’ is, at least for now, another example of techno-narcissism.”⁸⁴

The Obama Administration did establish a pause in further federal coal leasing in January 2016 pending further review. Secretary Jewell’s Order highlighted climate impacts.

Concerns about Climate Change. The second broad category of concerns about the Federal coal program relates to its impacts on climate change. The United States has pledged to the United Nations Framework Convention on Climate Change (UNFCCC) to reduce its greenhouse gas (GHG) emissions by 26-28 percent below 2005 levels by 2025. The Obama Administration has made, and is continuing to make, unprecedented efforts to reduce GHG emissions in line with this target through numerous measures. Numerous scientific studies indicate that reducing GHG emissions from coal use worldwide is critical to addressing climate change.

At the same time, as noted above, the Federal coal program is a significant component of overall United States’ coal production. Federal coal represents approximately 41 percent of the coal produced in the United States, and when combusted, it contributes roughly 10 percent of the total U.S. GHG emissions.

Many stakeholders highlighted the tension between producing very large quantities of Federal coal while pursuing policies to reduce U.S. GHG emissions substantially, including from coal combustion.⁸⁵

82. *Id.*

83. See Lynda V. Mapes, *Tribes prevail, kill proposed coal terminal at Cherry Point*, THE SEATTLE TIMES, <http://www.seattletimes.com/seattle-news/environment/tribes-prevail-kill-proposed-coal-terminal-at-cherry-point> (last visited May 11, 2016).

84. John Talton, *Coal’s moment of truth at Cherry Point*, THE SEATTLE TIMES, <http://www.seattletimes.com/business/economy/coals-moment-of-truth-at-cherry-point/> (last visited May 11, 2016).

85. Order, 3338 at 4 (Dept. of the Interior, January 15, 2016) (Order by the Secretary

As all of the articles in this book note, there are very few effective technical or legal tools for controlling ocean acidification. There must be dramatic declines in greenhouse gas emissions simply to slow the process down. The Secretarial Order is a step in the right direction.

The burden of ocean acidification will fall heavily on Indian tribes with treaty rights to marine and freshwater resources. As Quinault Tribal Chairperson Fawn Sharp stated, “We’ve witnessed the desecration of our ocean being polluted by greenhouse gases through acidification, causing the food chain for salmon and other sacred natural resources to dwindle.⁸⁶ The federal government’s general trust responsibility to Indian tribes, coupled with its power and obligation to protect treaty resources, can result in incidental actions that may slow greenhouse gas emissions like the permit denial at Cherry Point. These same authorities support a larger “Indian trust” effort to reduce the causes of ocean acidification, just as Professor Wood argues in her article.⁸⁷ At bottom, however, I am skeptical that courts will play an effective role in enforcing the obligation that the federal government has to protect treaty resources by limiting emissions. This is a world-wide problem that can only be curbed by a shift from fossil fuels to alternatives. The broader trust environmental trust litigation advanced by Professor Wood can directly aid the tribal trust theories, but it is hard to see litigation leading directly to success in the effort—because it can be in a suit to prevent damage caused to fisheries by poorly constructed or maintained culverts. Instead, enlightened policy makers should rely on Indian trust principles and treaty rights to buttress arguments favoring policies such as the federal moratorium on coal leasing. As noted above, Presidential Executive Orders already require agencies to take protective actions regarding Indian treaty rights, and to consult with Indian tribes when tribal interests may be affected.⁸⁸ It would be a small step to include tribal rights to functioning marine and freshwater environments as factors that help guide the

of the Interior re. Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program).

86. Sharp, *supra* note 4.

87. *See supra* note 6.

88. *See supra* note 80.

United States to greatly reduce its greenhouse gas emissions and lead the world in that effort as well.

Efforts to curb ocean acidification will take a concerted effort using all the tools described in the various chapters of this book. The special obligations owed by the United States to Indigenous Nations that are now part of the national fabric should compel strong domestic federal action and international leadership to fight the environmental harm caused by carbon emissions and ocean acidification.