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A Matter of Trust: Federal Environmental Responsibilities to Native Americans Under Customary International Law

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COMMENT

A MATTER OF TRUST: FEDERAL ENVIRONMENTAL RESPONSIBILITIES TO NATIVE AMERICANS UNDER CUSTOMARY INTERNATIONAL LAW

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> *If the water is depleted the Hopis will be cut off from this holy land where they have a covenant with their creator.*
>
> — Vernon Masayesva, Hopi tribal chairman, on the effect of coal mining on Hopi land[1]

> *All our lands on the hill*
> *No longer can be used*
> *Will become home of craters and rocks.*
>
> — Nauruan song, lamenting the fate of Topside, the phosphate-bearing central plateau of Nauru[2]

The Black Mesa-Kayenta coal mine complex on Native American land in Arizona is the world's largest strip mine. Nauru, a tiny island in the Pacific, has been made almost uninhabitable by phosphate mining. Nauruans and Native Americans share a history with many other countries whose lands offer valuable natural resources, but whose people do not have the technology to develop those resources. This is a history in which nonnatives developed the resources and received nearly all economic benefit from those resources, while leaving behind environmental destruction.[3] The governments which arranged for and approved of the mining did not fulfill their obligations to these aboriginal peoples. Nauru has found a partial solution with a multimillion-dollar settlement from Australia. The Navajo and Hopi of Black Mesa can

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1. Tom Kenworthy, *Hopis Feel Their Life Blood Draining Away: Arizona Tribe Blames Water Problem on Coal Being Transported to Nevada Power Plant*, WASH. POST, Nov. 17, 1993, at A14 [hereinafter *Hopis Feel Their Life Blood Draining Away*].

2. CHRISTOPHER WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP 29 (1992). This volume is the report of a commission established by the Government of Nauru to discover which government should accept responsibility for rehabilitating the mined areas of phosphate land and the cost and feasibility of any proposed rehabilitation. Christopher Weeramantry is a Professor of Law at Monash University.

3. James Cook, *New Hope on the Reservations*, FORBES, Nov. 9, 1981, at 108 [hereinafter *New Hope on the Reservations*].

look to that settlement to find their own solution in the courts of the United States.

The history of Native Americans on reservation lands begins with the fact that the 51.9 million acres the United States reserved for the Indians, unbeknownst to the politicians distributing the land, contained tremendous stores of the nation's natural resources.[4] Given the federal government's neglect and their isolation from technological developments, Native Americans were not technically capable, even if inclined, to develop their natural resources for profit.[5] Today, Native Americans have become America's most disadvantaged minority, with "a disproportionate share of their population ill-housed, ill-educated, unhealthy, ill-paid and underemployed."[6] Their burdens increase while Indians can only watch as the land and water which is vital to their survival is destroyed with the approval of the federal government.

This comment argues that there is a customary international law of trusteeship, and that Native Americans have a claim under that law that the destruction of Black Mesa is a breach of the trusteeship duties of the United States. Part I presents a description of the damage done to the Hopi and Navajo tribes by coal mining at Black Mesa and demonstrates the current problems with seeking redress for the damage from federal agencies or the courts. This section also describes the damage done to Nauru by phosphate mining and analyzes the implications of the settlement of Nauru's case against Australia. Part II establishes the history of the concept of trusteeship in international customary law and the obligations imposed — including, this comment argues, an obligation to prevent environmental destruction. The section then establishes the acceptance of those norms by the United States. Part III demonstrates that the use of customary international law of trusteeship in U.S. courts will establish a new cause of action for Native Americans seeking to hold the federal government responsible for the unequal environmental burdens they bear.

I. Two Histories of Environmental Destruction and Economic Exploitation

Nauru and Black Mesa have shared remarkably similar histories since their natural resource wealth was discovered. Each area bore the burden of mining without gaining a proportionate share of the benefits. The predominantly white governments which had promised to protect them failed the native peoples of each area. Recently, however, their paths diverged. While the Native Americans of Black Mesa may be unable to find relief in United States courts, Nauru has received enough money from Australia to enable the Nauruans to reclaim their land as part of the settlement of a case Nauru

4. *Id.* at 388.
5. *Id.* at 389.
6. *Id.* at 390.

brought before the International Court of Justice. Although Nauru is a trust territory of Australia supervised by the United Nations Trusteeship Council,[7] and Native Americans have a trust relationship with the United States independent of those in the U.N. Charter, the Nauruan settlement has significance within the United States. The claim of the Nauruans was based not only on the provisions of the Charter, but on customary international law. Since part II of this comment argues that the United States is subject to that customary international law, the similarities between the destruction of Nauru and the destruction of Black Mesa serve as evidence that the United States has failed to meet its obligations to Native Americans in the same way that Australia failed the Nauruans. Only members of the United Nations may bring a case before the International Court of Justice.[8] However, since the United States Supreme Court has held that international law is part of U.S. law,[9] the environmental obligations established by the Nauru case offer hope to Native Americans suffering from the destruction of Black Mesa for judicial relief in U.S. courts.

A. Destruction of Native American Land with the Consent of the Federal Government

1. Coal Mining on Black Mesa

"Six days a week, 24 hours a day, draglines rip back the earth to expose the rich, 14-feet-thick veins of coal that crisscross Black Mesa."[10] The Peabody Coal Company mines approximately 12 million tons of coal each year from the two strip mines it has leased from the Navajo and Hopi tribes.[11] Peabody Coal is the biggest coal producer in the United States and has been mining Black Mesa for more than three decades.[12] While mining provides employment for some members of the tribes and mining royalties account for a very high portion of tribal revenues, mining is also creating environmental devastation, and an equitable share of the profits of coal is not being reaped by the Native American owners.[13]

Coal mining began on Black Mesa in the 1930s, when the federal government began operating a mine.[14] In 1964, Peabody signed its first contract with the Navajo and was allowed to mine on more than 24,000 acres

7. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 296 (3d ed. 1993).

8. *Id.* at 807.

9. *Id.* at 60 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

10. Bruce Cory, *A New Generation of Navajos*, N.Y. TIMES, Nov. 18, 1984, at 156 [hereinafter *A New Generation of Navajos*].

11. *Id.*

12. Elliot Diringer, *Drying Springs Threaten Hopis: Arizona Indians Say Big Coal Mine is Diverting Scarce Water*, S.F. CHRON., Dec. 17, 1993, at A1.

13. *See infra* text accompanying notes 19-54.

14. Mary Joan Martin, *Navajo Find Their Rainbow's Pot of Gold . . . in Coal*, COAL, Nov. 1992, at 32.

of Black Mesa.[15] In 1966, the Navajo and Hopi leased an additional 40,000 acres of land to the company.[16] The agreements were modified in 1987, and Peabody received the right to mine an additional 270 million tons of coal from the existing lease area, while the tribes received greater coal and water royalties.[17]

When Peabody first began mining at Black Mesa, the techniques used to reclaim land after mining were basic and largely unsuccessful.[18] The indications are that Peabody is not meeting with much greater success today, despite the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[19] Robert Curry, a hydrologist and professor of Environmental Studies at University of California-San Jose, has studied the efforts at Black Mesa and found that reclamation is happening too slowly.[20] Topsoil, trees, and plants are stripped two years before mining, resulting in lost nutrients, erosion, and food shortages for wildlife. Compounding the problem, Peabody has failed to establish new drainage systems which would prevent some of the extensive, and unnecessary, erosion.[21] In addition, Professor Curry believes that reclamation standards for the Peabody mine are not adequate to support future uses of the land after mining operations end.[22]

Members of the Navajo and Hopi tribes also believe that the reclamation goals are wrong. Oak and pine are needed for shelter, tools, ceremonial uses, and food.[23] While Peabody has promised to replant oak and other needed plants in 2020, the tribes and the animals they depend on need the vegetation now. Many medicinal plants needed for healing are now extinct, and the few plant species which Peabody has managed to grow are no longer sturdy.[24]

There are other indications that Peabody has failed to take its reclamation obligations seriously. The Office of Surface Mining (OSM) was organized under SMCRA as an agency of the Department of Interior (DOI).[25] Its mission is to administer a nationwide program to protect citizens and the

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.).

20. WATER INFORMATION NETWORK (WIN), THE ENVIRONMENTAL EFFECTS OF COAL DEVELOPMENT ON INDIAN LANDS — BLACK MESA MEETING, OCTOBER 9-10, 1993, at 2 (1993) [hereinafter WIN].

21. *Id.*

22. *Id.* at 2. One reason is that current reclamation standards are based on conditions in Wyoming and Montana, where there is much more rainfall than in northern Arizona.

23. *Id.* at 6.

24. *Id.* at 8.

25. U.S. GENERAL ACCOUNTING OFFICE, INVESTIGATIVE REPORT ON THE INSPECTION PRACTICES OF THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, TO SUBCOMMITTEE ON INTERIOR AND RELATED AGENCIES, HOUSE COMMITTEE ON APPROPRIATIONS 3 (1993) [hereinafter APPROPRIATIONS REPORT].

environment from the adverse effects of past and current coal mining operations.[26] Title IV of SMCRA created the Abandoned Mine Reclamation Fund, to be administered by the Secretary of Interior and funded by a fee imposed on all operators of coal mining operations.[27] The Fund is to be used for "reclamation and restoration of land and water resources adversely affected by past coal mining."[28] An OSM audit discovered that Peabody did not properly report the tonnage of coal it mined or pay the reclamation fees owed on the coal.[29] In response, OSM and Peabody Western Coal have signed an agreement which requires the company to pay $900,000 in overdue abandoned mine land reclamation fees, interest, and penalties.[30]

The Navajo have reported other signs of environmental destruction. Blasting at the mine causes the ground to shake and damages homes. Water is polluted from mining operations, and livestock get sick from drinking polluted water. Wells are going dry. There is air pollution from coal dust and the smoke of burning coal.[31] Some on the reservation report that "[o]ur water is disappearing and the water quality is getting very bad. The mine is not minimizing damage to our water."[32] Deep wells are drilled which contaminate the Navajo aquifer in the mine site, but monitoring is not close enough to the mine site to show the vertical contamination of the vital deep water supply.[33] Other observers declare that, "[s]urface streams, springs and washes are drying up. The salts in the springs, lakes and wells may be toxic based on dying trees. Livestock won't drink or get sick if they do. No radiochemical, heavy metal, or toxic metal monitoring is being conducted."[34]

To transport the coal it mines, Peabody utilizes an unusual slurry line which mixes coal with water and pumps it 273 miles to a power plant serving Southern California.[35] The lower levels of water noticed by the Native Americans may be explained by the fact that the slurry line uses more than a billion gallons of water a year.[36] Despite earlier federal studies supporting Peabody's claims that the mine's pumping poses no threat to Hopi springs and wells, the United States Geological Study now states that not only is its data insufficient, but its computer model is incapable of accurately assessing the

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26. *Id.*

27. 30 U.S.C. § 1232 (1994). The reclamation fee is "35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10% of the value of the coal at the mine, as determined by the Secretary, whichever is less." *Id.*

28. 30 U.S.C. § 1231(c)(1) (1994).

29. *OSM and Peabody Western Coal Have Signed an Agreement*, INSIDE ENERGY, Dec. 6, 1993, at 15.

30. *Id.*

31. WIN, *supra* note 20, at 6.

32. *Id.* at 8.

33. *Id.*

34. *Id.* at 9.

35. Diringer, *supra* note 12.

36. *Id.*

problem.[37] The Environmental Protection Agency reviewed an environmental impact study of the mine and found that groundwater pumping might harm the aquifer. It stated that "the wisdom of continuing use of this water for slurry pipeline" was uncertain.[38]

The chair of the Hopi, Vernon Masayesva, says the mine is beginning to dry up their sacred springs. "We have no other source of drinking water, and any significant depletion of our groundwater could spell doom for our tribe."[39] The Hopi village of Old Oraibi in Black Mesa has been inhabited for more than eight centuries, and archeologists believe it to be North America's oldest continually occupied settlement.[40] Both the Hopi and Navajo tribes state that sources of water which have supported their people for centuries are drying up.[41] Most of the Hopi rely on the Navajo aquifer for water, and all Hopi farmers use water from nearby streams.[42] Furthermore, springs have always been considered sacred places for ceremonies.[43] The United States Geological Survey has confirmed that in 1990 the stream which drains Black Mesa was dry downstream of the mine during the area's traditional high water season.[44]

The Hopi have suggested that the Colorado River be used as an alternative water supply for the mine. They believe this solution will be inexpensive for individual electricity consumers, and will spare a uniquely pure water source.[45] In 1987, the company refused to consider using a different type of transportation system, but raised its royalty rates to $300 an acre/foot from the $2 an acre/foot they had been paying.[46] The Hopi have asked Interior Secretary Bruce Babbitt to deny the renewal of Peabody's operating permit in the absence of an alternative method for transporting the coal.[47] Three years ago the tribe was initially successful in its efforts when then-Interior Secretary Manuel Lujan, Jr., overruled his department's OSM and delayed the permit in order to allow further studies of the mine's impact on the aquifer and of alternatives for transporting the coal.[48]

Peabody has caused these environmental problems while, for most of the history of its mining, sharing very little of its profits from the Indians' coal

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37. *Id.*

38. *Hopis Feel Their Life Blood Draining Away, supra* note 1.

39. Diringer, *supra* note 12.

40. *Id.*

41. Lawrence Lack, *Indians Criticize Mine's Water Use*, CHRISTIAN SCI. MONITOR, June 27, 1990, at 8 [hereinafter *Indians Criticize Mine's Water Use*].

42. *Id.*

43. Diringer, *supra* note 12.

44. *Indians Criticize Mine's Water Use, supra* note 41.

45. Diringer, *supra* note 12.

46. *Peabody Permit in Arizona Delayed Over Tribes' Water Concerns*, INSIDE ENERGY, July 16, 1990, at 13.

47. *Hopis Feel Their Life Blood Draining Away, supra* note 1.

48. *Id.*

resources. Peabody mines Black Mesa with the consent of both the Hopi and the neighboring Navajo. In exchange, the company pays the two tribes royalties of more than $33 million a year. The $11 million in royalties the Hopi collected last year make up more than 80% of the tribal government's annual budget.[49]

However, those royalty rates are very recent — until the end of the 1980s, royalties were paid according to the terms of the coal leases signed in the 1950s and 1960s.[50] The rates, ranging from fifteen cents to thirty-seven cents a ton were fixed, rather than based on the market price of the coal.[51] When the price of coal rose to $10 and $20 per ton, the coal companies were able to pay the same low price they had paid when coal was $2 per ton.[52] One scholar who analyzed the terms of both the Navajo coal leases and similar agreements made with lesser developed countries found that the Navajos' agreements are "among the worst ever made."[53]

The DOI is the trustee of Indian lands and, through the Bureau of Indian Affairs, "is responsible for all phases of minerals management through the leasing process."[54] Most Indian coal leases had fixed royalty rates because the Bureau of Indian Affairs had not established a coal-lease rate policy based on the selling price of coal.[55] It is clear that the Bureau of Indian Affairs, despite its position as trustee for American Indians, signed contracts with developers that gave tribes just a small portion of what their resources were worth while the developers made fortunes.[56] Since the 1970s, the federal government has maintained differing policies for the terms for coal mining on federal land and Indian land — on federal land, royalties are based on the market price of the coal, not on a fixed price.[57] The federal government was aware of the inadequacy of fixed royalty rates, yet the agency responsible for Indian lands did nothing to solve the problem.

Federal agencies also are failing to fulfill their responsibilities after the coal mining contracts are signed. OSM field inspectors are the key to enforcement of environmental protection laws for lands being strip-mined; yet in 1981, the Secretary of Interior reorganized OSM and reduced the number of field

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49. Diringer, *supra* note 12.

50. *A New Generation of Navajos*, *supra* note 10.

51. *Id.*

52. *New Hope on the Reservations*, *supra* note 3.

53. *A New Generation of Navajos*, *supra* note 10.

54. U.S. GENERAL ACCOUNTING OFFICE, RED-76-84, REPORT TO THE SENATE COMMITTEE ON INSULAR AFFAIRS 2 (1976) [hereinafter INSULAR AFFAIRS].

55. *Id.* at 22.

56. Liz Forrestal, *Indians Scouting for Better Land Deals*, CHEMICAL WK., June 28, 1978, at 25.

57. INSULAR AFFAIRS, *supra* note 54, at 23. For example, in April 1971, the Northern Cheyenne Tribe conducted a sale of exclusive coal prospecting permits on 367,000 acres of land. The royalty rate was set at 17.5 cents per ton, but the Bureau of Indian Affairs did not recommend percentage royalty rates and agreed to the terms of the sale.

inspectors from 200 to seventy.[58] OSM directors since 1981 have been perceived by most OSM field employees, citizen groups, and environmental organizations as opposed to environmental laws and in favor of coal developers.[59] According to DOI officials, in 1991, the Secretary of Interior told his agency directors to decrease their efforts to enforce regulations against the coal industry.[60] The then-Director of OSM eliminated federal inspection and review of state-issued coal mining permits, despite the fact that review of such permits traditionally enabled OSM to identify potential mining operation problems before mining began.[61] From 1990 through 1993, the Office of Inspector General at DOI conducted nine audits of OSM programs and operations, conducted ten criminal investigations of OSM employees, and processed thirty-three complaints involving administrative inquiries.[62] This history of the agency demonstrates its lack of respect for both the environment and the law.

With the arrival of the Clinton administration, it was hoped that OSM would be more concerned with the purposes and requirements of SMCRA. However, there are some indications that Native Americans and their lands will continue to bear the burden of coal mining. Under the new Secretary of Interior, Bruce Babbitt, OSM is examining its organizational structure, but has not hired additional field inspectors.[63] The administration is also studying ways to "reduce the perception that political considerations are weighed too heavily in OSM,"[64] studying ways to ensure effective oversight of the Abandoned Mine Land Program,[65] reviewing ways to ensure that OSM's regulatory oversight is more uniform,[66] and working to improve the implementation of citizen participation provisions in SMCRA.[67] The new administration has not, however, proved to be any more receptive to Native Americans' concerns than previous administrations.

At Black Mesa, the Peabody Coal mine uses two facilities without permits, a slurry pipeline and an eighty-three-mile-long rail line used solely by the mine. The Citizens Coal Council, the Water Information Network, and the Dineh-Hopi Alliance have filed formal complaints to require the pipeline and rail line to get permits mandated under SMCRA.[68] More than 270 Navajo,

58. APPROPRIATIONS REPORT, *supra* note 25, at 3.
59. *Id.* at i.
60. *Id.*
61. *Id.* at iii.
62. *Id.*
63. OFFICE OF SURFACE MINING, U.S. DEP'T OF INTERIOR, RESPONSE TO THE REPORT TO THE COMMITTEE ON APPROPRIATIONS 3 (1993).
64. *Id.* at 5.
65. *Id.* at 7.
66. *Id.* at 8.
67. *Id.* at 9.
68. Telephone Interview with Will Collette, Citizens Coal Council (Mar. 24, 1994).

mostly tribal elders, signed the complaints.[69] A federal inspector determined that the facilities did require permits.[70] OSM regulations require that, upon such a determination, an order to cease mining operations must be issued. Under orders from his superior, however, the inspector did not follow regulations.[71] The Alliance has now filed suit in the DOI Office of Hearings and Appeals.[72]

Coal mining is destroying the land and water of Black Mesa, and the Native Americans who bear the burdens of environmental destruction cannot count on the federal agencies charged with protecting them to ensure that destruction is mitigated, much less prevented, to ensure that mining contracts provide for the highest possible income to the tribes, or to ensure that royalties from mining are collected in a timely and efficient manner. Hopi tribal chief Vernon Masayesva states that the Hopi are unsure whether they want to permanently shut down the mine. "But if it's a choice between money and water, we'll take the water. We'll still survive. We've survived here for thousands of years. But we can't survive without the water."[73] This situation is untenable under notions of fairness and equity, but current interpretations of the law may not offer Native Americans much relief.

2. Difficulties Addressing Environmental Inequities for Native Americans in U.S. Courts

Although the Constitution only specifically grants Congress authority with regard to commerce with tribes, Congress has extended its power over almost

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69. *Id.*

70. Memo from Mitchell Rollings, Reclamation Specialist, to Robert H. Hagen, Director, OSM Albuquerque Field Office 2 (Nov. 10, 1993) (citing 30 C.F.R. 816.180 (1993)).

71. *Id.*

72. Telephone Interview with Will Collette, *supra* note 68. The pipeline was constructed by Black Mesa Pipeline, Inc. (BMP) from 1968 to 1970. Memo from Mitchell Rollings to Robert Hagen, *supra* note 70, at 2. The parts of the pipeline observed by the inspection had been revegetated although it is not known whether the corridors were reseeded or volunteer vegetation was established in the past 23 years. Rock mound strips are visible along each side of the corridor where rock was excavated to bury the pipeline. BMP was unsure how many spills had occurred over the years, but there have been at least four in the last two years. *Id.* Rollings also determined that the railroad was intimately and wholly dependent on the Peabody mining complex and, therefore, needed a permit under SMCRA. Memo from Mitchell Rollings to Robert Hagen, *supra* note 70, at 3. However, Rollings wrote to Hagen, "While 30 CFR 843.11(a)(1) and (a)(2) require issuance of a cessation order when a surface coal mining operation does not have nor has timely applied for a permit, I did not issue a cessation order per your direction." *Id.* at 4.

In response to this action, the Citizens Coal Council (CCC) wrote to the Acting Director of OSM and requested an informal review of the decision not to issue a cessation order. Letter from Carolyn Johnson, CCC, to Anne Shields, Acting Director, OSM (Nov. 29, 1993). The appeal was denied. Letter from Anne Shields, Acting Director, OSM, to Carolyn Johnson, CCC (Nov. 29, 1993).

73. Diringer, *supra* note 12.

all aspects of tribal life and interactions.[74] The United States Supreme Court, under the leadership of Chief Justice John Marshall, formulated a trust responsibility doctrine to describe the relationship between Native Americans and the federal government.[75] Later courts have applied the trust doctrine inconsistently, and have allowed congressional action which seems to violate the trust responsibility articulated by Marshall.[76] The current Supreme Court does not appear to recognize any trust duties but those Congress imposes upon itself or federal agencies, and the Court is very reluctant to find that Congress has imposed such duties upon itself. While the Court is more likely to find that an agency has trust responsibilities, it has held that those responsibilities are shaped by the statute and the regulations the agency itself issues. Though the Court recognizes the long history of the trust relationship between Native Americans and the federal government, it clearly does not believe that the trust relationship establishes any substantive rights for Native Americans.[77] This move away from Marshall's trust doctrine, combined with the Court's reluctance to find any right beyond a right to proper agency process, make it unlikely that the Hopi and Navajo will be able to receive substantial relief from the courts for the environmental inequities caused by the strip mining on Black Mesa.

The federal government's promise in its early treaties with Indian tribes "to 'protect' the tribes or to 'receive them into the protection of the United States,'" is the basis for the concept of the trust relationship.[78] In *Cherokee Nation v. Georgia*[79] and *Worcester v. Georgia*,[80] the first Supreme Court decisions to formulate the trust responsibility doctrine, the Court analyzed whether Georgia statutes applied to individuals living on Cherokee lands in Georgia.[81] In *Cherokee Nation*, Chief Justice Marshall observed that Indian tribes were not foreign states, but "'denominated' domestic dependent nations . . . in a state of pupilage."[82] In *Worcester*, Marshall held that the state could not regulate Indians residing on Cherokee Indian lands within Georgia.[83] Marshall analyzed the Indian Trade and Intercourse Act,[84] and found that Congress

74. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1138 (1990) (citing U.S. CONST. art. I, cl. 3).

75. *See infra* text accompanying notes 79-85.

76. *See infra* text accompanying notes 86-94.

77. *See infra* text accompanying notes 95-114.

78. Reid Peyton Chambers, *Judicial Enforcement of Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1213 n.1 (1975) (references omitted).

79. 30 U.S. (5 Pet.) 1 (1831). The case was filed by the tribe under the original jurisdiction of the Supreme Court. The Court held that it did not have original jurisdiction because the tribe was not a foreign state within the meaning of Article III of the Constitution. *Id.* at 19.

80. 31 U.S. (6 Pet.) 515 (1832).

81. Chambers, *supra* note 78, at 1215-18.

82. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

83. *Worcester*, 31 U.S. (6 Pet.) at 561.

84. 1 Stat. 137 (1790) (current version at 25 U.S.C. § 177 (1994)). The statute prohibited

consistently intended, in law and in treaties, to ensure tribal self- government as well as land ownership, without finding any statutory language that stated such a purpose.[85]

The Marshall concept of trust was reshaped by later courts into a "moral obligation," under which Congress had no legal obligation to adhere to its treaties with Indians and could exercise almost total power over Indians.[86] By 1903, the Court had rejected the idea that the trust relationship imposed obligations on the federal government, holding instead that "the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[87] Federal courts have held that Congress possesses the power to regulate all aspects of Indian life on Indian land[88] and to abrogate or modify treaties unilaterally.[89]

Courts judge the trust responsibilities of federal agencies by the duties imposed on those agencies by Congress. Courts have, at times, held agencies to an independent standard of care based on the trust relationship, but these cases are rare and inconsistent with the majority of decisions. In *Pyramid Lake Paiute Tribe v. Morton*,[90] the court issued an injunction preventing a federal dam and reclamation project which reduced the level of Pyramid Lake on a downstream Indian reservation. The court did not find evidence that such a reduction of water was contrary to specific language in a treaty or statute, but instead based its decision on the belief that the water diversion violated the government's trust responsibility to the tribe.[91] In contrast, in *Nevada v. United States*,[92] the Court addressed the question of how the United States may fulfill its obligation to Indian tribes in a situation in which Congress has imposed a conflicting duty by statute. The Court held that

> the United States undoubtedly owes a strong fiduciary duty to its Indian wards . . . . 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

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purchase of or intrusions upon Indian lands by states or private persons. Chambers, *supra* note 78, at 1217 n.25.

85. Chambers, *supra* note 78, at 1218.

86. *Id.* at 1225-26.

87. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (rejecting suit to enjoin enforcement of a statute which authorized sale of unallotted tribal lands despite the fact that it conflicted with an 1867 treaty expressly prohibiting any sale of reservation lands without the consent of the Indians on the reservation).

88. *See* United States v. Kagama, 118 U.S. 375 (1886) (upholding constitutionality of the Major Crimes Act and its application to Indians committing crimes against other Indians in Indian country, although previously federal criminal law had not applied in such cases).

89. *Lone Wolf*, 187 U.S. 553.

90. 354 F. Supp. 252 (D.D.C. 1972).

91. Chambers, *supra* note 78, at 1233-34.

92. 463 U.S. 110 (1983).

> authorized the inclusion of reservation lands within a project, the analogy of faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.[93]

The Court further stated that the government "cannot follow the fastidious standards of a private fiduciary."[94]

The current Court's position on the trust relationship is that it will not recognize any trust duties that Congress does not impose on itself or its agencies. The Court's position is best understood through analysis of the *Mitchell I* and *Mitchell II* decisions — cases brought by the same plaintiffs, the Quinault Tribe and 1465 individual allottees of land contained in the Quinault Reservation, and containing the same allegations, but with different causes of action. In *Mitchell I*, the question was whether the Indian General Allotment Act of 1887 authorized the award of money damages against the United States for mismanagement of forests on lands allotted to Indians under the Act.[95] Under the General Allotment Act, the Government allotted all of the Reservation's land in trust to individual Indians.[96] Other enactments of Congress require the Secretary of Interior to manage these forests, sell the timber, and pay the proceeds of such sales, less administrative expenses, to the allottees.[97]

Section 5 of the General Allotment Act provided that the United States would retain title to the allotted lands "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made."[98] The Supreme Court rejected the lower court's holding that this language created an express trust, and its conclusion that money damages were available when a trustee violated a fiduciary duty.[99] The Supreme Court instead concluded that "the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."[100] The Court believed that Congress used the words "hold the land . . . in trust" not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent the land from passing out of Indian ownership and to ensure that allottees would not have to pay state

93. *Id.* at 142.

94. *Id.* at 128.

95. United States v. Mitchell, 445 U.S. 535 (1980) (*Mitchell I*).

96. Section 1 of the General Allotment Act authorized the President to allot to each Indian resident on a reservation up to 80 acres of agricultural land or 160 acres of grazing land found within the reservation. *Id.* at 540.

97. *Id.* at 537.

98. *Id.* at 541 (citing 25 U.S.C. § 348).

99. *Id.*

100. *Id.*

taxes.[101] As Justice White wrote in dissent, "[t]he Act could hardly be more explicit as to the status of allotted lands. They are to be held by the United States 'in trust for the sole use and benefit of the Indian.' The United States has here unmistakably assumed the obligation to act as trustee of the lands with the Indian allottees as beneficiaries."[102] The majority opinion demonstrates how very reluctant the Court is to find general obligations of trusteeship in the relations between Native Americans and the federal government.

In *Mitchell II*, the plaintiffs based their claim of mismanagement on the broad range of statutes and regulations governing timber management.[103] The Supreme Court found that the DOI exercised "comprehensive" control over the harvesting of Indian timber.[104] The Secretary of Interior has broad statutory authority over the sale of timber on reservations: sales must be "based upon consideration of the needs and best interests of the Indian owner and his heirs."[105] The proceeds from such sales are to be used for the benefit of the Indians or transferred to the Indian owner.[106] In 1911, the DOI's Office of Indian Affairs promulgated detailed regulations covering its responsibilities in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."[107]

The Court, therefore, distinguished the first Mitchell case, and wrote that

> [i]n contrast to the bare trust created by the General Allotment Act, 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. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.[108]

The Court further held that when the federal government establishes such extensive controls it establishes a fiduciary relationship.[109] Indeed, the Court found that all of the necessary elements of a common-law trust were present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian land, timber, and funds).

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101. *Id.* at 544.
102. *Id.* at 547 (citation omitted).
103. United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).
104. *Id.* at 209.
105. *Id.* (citing 25 U.S.C. § 406(a)).
106. *Id.* (citing 25 U.S.C. §§ 406(a), 407).
107. *Id.* at 220 (citing OFFICE OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, REGULATIONS AND INSTRUCTIONS FOR OFFICERS IN CHARGE OF FORESTS ON INDIAN RESERVATIONS 4 (1911)).
108. *Id.* at 224.
109. *Id.*

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust, or fiduciary connection.[110]

The Court did mention Marshall's concept of a trust relationship when it declared that "[o]ur construction of these statutes and regulations is reinforced by the undisputed evidence of a general trust relationship between the United States and the Indian people."[111] The Court went on to cite the previously recognized "'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'"[112] Given the existence of a trust relationship, the Court found that "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."[113] The Court then declared that

> [t]his Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.[114]

While it is difficult to predict results from this line of cases, the Court's reluctance to find trust obligations for the federal government in the absence of explicit regulatory language encompassing the trust relationship makes it unlikely that Native Americans will find relief in the courts for the destruction of Black Mesa. The Court seems to reject the possibility of substantive rights under the trust relationship and to find procedural rights only when Congress' regulation of the field is comprehensive. The effect of that distinction is that while SMCRA would seem to offer the Hopi and Navajo a statutory basis for claims to protect their land and water, it is likely that the Court will recognize only those claims based on procedural errors under SMCRA regulations. In addition, the Court's long history of deference to agency expertise makes it unlikely that the Court would find the regulations themselves to be improper.[115] In essence, the Court has created a substance/procedure distinction similar to its interpretation of the National Environmental Policy Act.

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110. *Id.* (quoting Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1966)).
111. *Id.* at 225.
112. *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).
113. *Id.* at 226.
114. *Id.* (citing Seminole Nation v. United States, 316 U.S. at 286).
115. *See infra* text accompanying notes 132-36.

In 1970, President Richard Nixon signed into law the National Environmental Policy Act (NEPA),[116] which established general environmental goals for the nation.[117] NEPA required the federal government "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."[118] To meet these goals, NEPA required all federal agencies "to consider the likely environmental effects of their activities."[119]

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[120] the Court declared that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural . . . . Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached."[121] In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[122] the Court reiterated that NEPA was designed to ensure a fully-informed and well-considered decision. The "only role for the court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"[123] Lynton Caldwell criticizes this as a "'crabbed interpretation of NEPA' because it views the substantive mandate of section 101(b) as 'largely rhetorical, imposing no mandate upon the agencies cognizable by the courts.'"[124]

The lesson of the Court's NEPA interpretation is that SMCRA may be vulnerable to a similar "crabbed interpretation" which would limit its usefulness for solving the problems of Black Mesa. In SMCRA, Congress recognized exactly those costs which Native Americans are now bearing:

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116. 42 U.S.C. §§ 4321-4370(a) (1994).

117. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1023 (1992).

118. 42 U.S.C. § 4331(a) (1994), *quoted in* PERCIVAL ET AL., *supra* note 117, at 1023.

119. 42 U.S.C. § 4332(C) (1994), *quoted in* PERCIVAL ET AL., *supra* note 117, at 1024.

120. 435 U.S. 519 (1978).

121. *Id.* at 558, *quoted in* PERCIVAL ET AL., *supra* note 117, at 1065 (holding that NEPA did not require the Atomic Energy Commission to reopen licensing procedures to consider energy conservation measures as an alternative to construction of a nuclear power plant)).

122. 444 U.S. 223 (1980), *cited in* PERCIVAL ET AL., *supra* note 117, at 1030 (holding that the Department of Housing and Urban Development's consideration of alternative sites for a low-income housing project was sufficient under NEPA).

123. *Id.* at 228 (quoting Kleppe v. Sierra Club, 437 U.S. 390, 410 n.21 (1976)), *quoted in* PERCIVAL ET AL., *supra* note 117, at 1031-32.

124. PERCIVAL ET AL., *supra* note 117, at 1066-67 (quoting Lynton Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, ENVTL. F., Nov.-Dec. 1989, at 18, 18. A full discussion of the Court's NEPA rulings is beyond the scope of this comment. *See* Caldwell, *supra*.

impacts from unreclaimed lands disturbed by surface and underground coal mining "impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality."[125] Thus, a number of the purposes of SMCRA are relevant to the continuing destruction of Black Mesa. Congress wanted to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations";[126] "assure that surface mining operations [were] not conducted where reclamation, as required by [the Act was] not feasible";[127] "assure that surface mining operations [were] conducted so as to protect the environment";[128] and "assure that adequate procedures [were] undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations."[129] The reclamation requirements in the Act include a requirement to ensure the protection of the quality and quantity of surface and groundwater both on- and off-site from adverse effects of the mining and reclamation process.[130] The provisions of SMCRA are applicable to surface coal mining on Indian lands.[131]

However, under the current Supreme Court's reasoning, the environmental destruction of Black Mesa would not be a justiciable issue; the only issue would be whether the agency followed the procedures it issued under SMCRA. Section 102(d) would not be held to create an independent right to halt mining operations which were not conducted so as to protect the environment, just as in *Mitchell I* the General Allotment Act was not held to create a right to a trust relationship[132] and NEPA was not held to create a right to a clean environment.[133] Instead, the Court would determine whether the regulations were reasonable under the statute and whether the agency followed the regulations.

Native Americans would have a very difficult time convincing the Court that the regulations issued by OSM were unreasonable, even if they result in mining which is unsafe for the environment. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[134] established that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of

125. 30 U.S.C. § 1201(h) (1994).
126. *Id.* § 1202(a).
127. *Id.* § 1202(c).
128. *Id.* § 1202(d).
129. *Id.* § 1202(e).
130. *Id.* § 1258(a)(13).
131. *Id.* § 1300.
132. *Mitchell I*, 445 U.S. at 546.
133. *See supra* text accompanying notes 120-24.
134. 467 U.S. 837 (1984). The Court held in *Chevron* that the EPA's decision to allow states to treat all of the pollution- emitting devices within the same industrial grouping as though they were encased within a single "bubble" was based on a reasonable construction of the statutory term "stationary source." *Id.* at 865-66, *cited in* PERCIVAL ET AL., *supra* note 117, at 746.

authority to the agency to elucidate a specific provision of the statute by regulation."[135] Once the agency has issued a regulation, the Court states that, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court.'"[136]

The result of the current Supreme Court's analysis seems to offer little relief to the Native Americans of Black Mesa. Since the Court would concentrate on the regulatory obligations of OSM, relief might come in the form of a delay in mining while the slurry pipeline and road await permits and the provision of water from an alternative source.[137] The underlying issue of inequitable distribution of environmental harms would not be addressed.

B. Nauru: A Problem of Environmental Inequity and a Solution

1. History of Environmental Destruction on Nauru

Nauru is a coral island 3000 kilometers northeast of Australia.[138] In the late nineteenth century, Britain and Germany divided the territories of the Pacific between themselves.[139] Germany took control of Nauru and eventually annexed it to the German Empire.[140] At the conclusion of World War I, Nauru became a League of Nations' mandated territory under control of Australia, New Zealand and the United Kingdom. After World War II, Nauru again was assigned to the three countries as a trust territory.[141] The concept of a mandate or trust, which was given legal force under the Covenant of the League of Nations and subsequently under the Charter of the United Nations, confers rights on dependent peoples and imposes duties on the nations entrusted with their care.[142] Furthermore, the duties of care were

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135. *Id.* at 747.

136. *Id.* (citing National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Labor Board v. Hearst Publications, Inc., 322 U.S. 111 (1944); Republic Aviation Corp. v. Labor Board, 324 U.S. 793 (1945); Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947); Labor Board v. Seven-Up Bottling Co., 344 U.S. 344 (1953)).

137. 30 U.S.C. § 1258(a)(13)(C) (1994) (requiring the provision of alternative sources of water where protection of the quantity of water cannot be assured).

138. WEERAMANTRY, *supra* note 2, at 1.

139. *Id.* at 6.

140. *Id.*

141. *Id.* at 2.

142. *Id.* at 6. The mandate system was established under Article 22 of the Covenant of the League of Nations. The mandate was applied to those colonies which, as a consequence of World War I, had ceased to be under the sovereignty of the state which formerly governed them and which were inhabited by peoples "not yet able to stand by themselves under the strenuous conditions of the modern world." Covenant of the League of Nations art. 22(1) (Jan. 28, 1919). The trusteeship system established by the United Nations applied to the mandate territories and to new territories which were detached from enemy territories as a result of the war. *Id.* at art.

to be exercised under the supervision of the international community.[143]

Nauru is the site of a large quantity of phosphates which are used as fertilizer throughout the world. Phosphate mining occurred in Nauru under the controlling governments from 1906 until Nauru's independence in 1968.[144] In December 1986, the Government of Nauru appointed an Independent Commission of Inquiry to determine which government was responsible for the rehabilitation of the island which had been destroyed by mining.[145]

The phosphate deposits lie on the central plateau of the island, sixty to ninety meters above sea level.[146] Before phosphate mining began, the central plain was used for food production. The trees harvested from the central plateau also were necessary for building houses and boats.[147] A 1984 paper titled "Phosphate Mining-Induced Vegetation Changes on Nauru Island" estimated that it will take centuries for the forest to reestablish itself, and that a number of indigenous plants are endangered.[148] Nauruans have the second highest incidence of diabetes in the world, due mainly to the fact that phosphate mining left the islanders without enough land to grow adequate food.[149] A study has found that Nauruans have diabetes at a rate more than eight times the rate in Europe and Australia, and diabetes causes a quarter of the island's deaths.[150]

The destruction of the land has also caused a cultural crisis. Nauru's nearest neighbor is 250 kilometers away.[151] Nauruans thus developed a unique culture and language.[152] Nauruans were deeply attached to their land,[153] and traditional Nauruan skills and recreation have disappeared along with their land.[154]

No matter which country or countries took control of the phosphate mining, the Nauruans never received the full benefits of the phosphate. From 1908 to 1913, the Nauruans received £1320 from the Germans for phosphate worth £945,000.[155] In 1919, the three mandatory powers. Australia, New Zealand, and the United Kingdom, signed the Nauru Island Agreement which established that they would be entitled to the phosphates of Nauru and that the

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143. WEERAMANTRY, *supra* note 2, at 7.

144. *Id.* at 2.

145. *Id.* at xiii.

146. *Id.* at 2.

147. *Id.*

148. *Id.* at 30-31.

149. *Diabetes: Biggest Killer in Nauru*, XINHUA GENERAL OVERSEAS NEWS SERV. (Oct. 29, 1993), *available in* LEXIS, News Library, Arcnws File (item no. 1029119).

150. *Id.*

151. WEERAMANTRY, *supra* note 2, at 1.

152. *Id.* at 3.

153. *Id.*

154. *Id.* at 30.

155. *Id.* at 23.

phosphates would be supplied to them at cost and not at market price.[156] When the mandate began, the phosphate deposits were valued at hundreds of millions of pounds sterling.[157] Approximately 34 million tons of phosphate were mined by the controlling governments — mining which destroyed one-third of the plateau.[158]

The Commission found that the governments made substantial profits, estimated at $1 billion Australian, from Nauruan phosphate during the period of control.[159] The Nauruans received only a small portion of the profits. The percentage of the profits paid to Nauruan landowners and payments to Nauruan royalty trust funds were, at various points during the mandate and trust years: .5% in 1922; .9% in 1927; 4.2% in 1940; 2% in 1948; 2.9% in 1958; 6% in 1965; and 22.4% in 1966.[160] Furthermore, these percentages were calculated on a special price the three governments paid for the phosphate. Because the market price for phosphate was higher than the special price, the Nauruan share of the actual value of the phosphate was even lower than those percentages indicate.[161]

The Commission found that all three partner governments "derived considerable benefits from the Nauruan mandate and trust."[162] The Commission also found that a conservative estimate of the current costs for rehabilitation would be $72 million Australian.[163] The Commission then concluded that the three governments were responsible for repairing the damage they had caused.[164]

2. A Solution to the Problem of Environmental Inequity

On May 19, 1989, the Government of the Republic of Nauru instituted proceedings against the Commonwealth of Australia in the International Court of Justice regarding "a dispute . . . over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence."[165] In its application, Nauru requested that the Court declare that Australia bear the responsibility for breaches of the following legal obligations:

> First: the obligations set forth in Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru of November 1, 1947.

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156. *Id.* at 10.
157. *Id.* at 3.
158. *Id.* at 11.
159. *Id.* at 13.
160. *Id.* at 234-38.
161. *Id.* at 239.
162. *Id.* at 373.
163. *Id.* at 13.
164. *Id.* at 374.
165. Nauru v. Australia, 32 I.L.M. 46, 50 (1993).

> Second: the international standards generally recognized as applicable in the implementation of the principle of self-determination;
>
> Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources;
>
> Fourth: the obligation of general international law not to exercise powers of administration in such a way as to produce a denial of justice lato sensu;
>
> Fifth: the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights; and
>
> Sixth: the principle of general international law that a state which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another state in respect of that territory.[166]

Australia, in its Preliminary Objections, requested that the Court declare the Application by Nauru inadmissible and declare that the Court lacked jurisdiction to hear the claims.[167] The Court held that it did have jurisdiction and that Nauru had not waived its claim, submitted the claim in an unreasonable time period, or sued the wrong party. The only objection accepted by the Court concerned Nauru's claim on the overseas assets of the British Phosphate Company, which had formerly held title to the phosphate deposits — the claim was inadmissible because Nauru had not raised it in its initial Application to the Court.[168] The case was then scheduled to proceed.

However, on September 9, 1993, Nauru and Australia filed a joint notification in the Registry of the International Court of Justice, informing the ICJ that a settlement had been reached and that they had agreed to discontinue the proceedings. Under the Agreement, Australia agreed to pay Nauru a total of $107 million Australian, $50 million of which is to be paid over twenty years.[169] Article I of the Agreement states that "the above payments are made without prejudice to Australia's long-standing position that it bears no responsibility for rehabilitation of the phosphate lands."[170] There is also a commitment in Article I(2) for Australia to provide development assistance after the twenty-year period ends.[171]

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166. *Id.* at 51.
167. *Id.*
168. *Id.* at 62-63.
169. Settlement Document, Nauru v. Australia, 32 I.L.M. 1471, 1474 (1993).
170. *Id.* at 1475.
171. *Id.*

In Article 3 of the settlement, Nauru waives any right to make a claim against Australia, New Zealand, or the United Kingdom in relation to the administration of Nauru during the Mandate or Trusteeship period or in relation to issues arising from phosphate mining. Australia has sought through diplomatic channels contributions to the settlement from both States.[172]

The settlement included a joint declaration of principles guiding relations between Australia and the Republic of Nauru. The Governments and peoples of Australia and Nauru reaffirmed their commitment to a relationship between the two countries based on respect and cooperation.[173] In addition, the governments agreed to work together to rehabilitate Nauru and to protect the environment of Nauru.[174] Finally, Australia agreed to provide assistance to contribute to development and self-reliance in Nauru.[175]

Although the settlement was entered into without prejudice to Australia's contention that it was not responsible for the damage to the island, when placed within the context of recent developments in Australia, this case can stand for the proposition that there is a new awareness of the environmental equity responsibilities of a trust relationship. Until the late 1970s, Australian courts refused to recognize an Aboriginal right to territory.[176] However, the courts have become increasingly open to an argument that Aboriginal peoples have rights to their traditional lands.[177] One court based its decision on international law, stating that international law indicated that Australian rejection of Aboriginal title was wrong.[178] The Australian High Court is considering the question of whether the Commonwealth government breached its fiduciary obligations to Aboriginal owners when it forced them to sign a uranium mining agreement without fully disclosing the terms.[179] In addition, the courts have found that Australia has international responsibilities to both Aboriginals and Torres Strait Islanders.[180]

Recognition of equity issues has also come in the legislative branch. Most Australian states have passed legislation to establish Aboriginal land rights and to protect Aboriginal sacred sites.[181] Placed within the context of Australia's changing perception of the rights of Aboriginal peoples and the government's responsibility for preserving those rights, Australia's decision to settle the Nauruans' case can be seen as an implicit recognition that a trustee

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172. *Id.*
173. *Id.* at 1476.
174. *Id.*
175. *Id.*
176. Julie Cassidy, *The Enforcement of Aboriginal Rights in Customary International Law*, 4 IND. INT'L & COMP. L. REV. 59, 72 (1993).
177. *Id.*
178. *Id.* at 73.
179. *Id.* at 83 (citing R. v. Guerin, 2 C.S.R. 335 (1984) (Austl.)).
180. *Id.* at 84.
181. *Id.*

has a responsibility to prevent the environmental destruction of a beneficiary's property. Moreover, Australia's decisions with respect to the Aborigines and the Nauruans were made in the face of an international spotlight on their treatment,[182] and it is just that type of international pressure which forms the basis for enforcement of international law.[183]

II. Trust Law and a Responsibility for Environmental Equity

While the United States Supreme Court has held that the federal government has a trust responsibility toward Indian nations, the Court has not held Congress to a standard of responsibility independent of those duties Congress itself chooses to impose. International law may be a source of more stringent requirements for trustees. Since the relationship between Native Americans and the federal government is not part of the United Nations trusteeship system, any more stringent requirements must come from international customary law. This section explores the concept of trust doctrine in international customary law and in the law of the United States. The section also explores the possibility that the recent International Court of Justice case between Nauru and Australia has identified an environmental obligation in the customary international law of trust.

A. Trust Doctrine in Customary International Law

One of the sources of international law is custom. The *Restatement (Third) of International Law* declares that customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[184] Furthermore, international agreements may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.[185] This section will argue that a customary international law of trust satisfies the requirements for establishing customary law: (1) there are consistent standards of state practice, including widely accepted international agreements, and (2) states follow these standards from a sense of legal obligation. This section then establishes that one of the obligations imposed by the customary international law of trust is to prevent the destruction of the trustee's environment.

The history of trusteeship qualifies it as a widespread and consistent practice by states. In the sixteenth century, as the European nations extensively colonized the world, the idea that there was a trust relationship

182. *Id.* at 83.

183. *See infra* note 202-10 and accompanying text.

184. RESTATEMENT (THIRD) OF INTERNATIONAL LAW § 102 (1987), *cited in* HENKIN ET AL., *supra* note 7, at 51.

185. *Id.*

with the people under their power began to emerge.[186] More extensive discussion of the rights of indigenous peoples and the responsibilities of colonial powers began with the discovery of the West Indies and South America by Spanish explorers.[187]

Jean Lopez de Palacios Rubios (1447-1522), professor of law at the University of Salamanca, wrote a treatise, *Tractus Insalarum Maris Oceani*, which argued that, as human beings, conquered peoples had a right to liberty.[188] Bartolomé de Las Casas (1474-1566) was the first legal writer to compare the role of the colonizer with that of a guardian when he declared that a moral duty compelled colonizers to look after and restore the property of indigenous peoples, just as a guardian must look after and restore the property of a ward.[189] Franciscus de Vitoria (1480-1547), a Jesuit theologian, argued that Indians had a right to control both their property and their country.[190] He too was guided by the concept of guardianship and a guardian's responsibility to ensure that the ward's interests are protected.[191] In England in 1783, Edmund Burke promoted the concept of trusteeship for dependent peoples, declaring that "all political power which is set over men . . . ought to be in some way or other exercised ultimately for their benefit."[192]

The trust concept existed not merely in the common law, but was widely shared by the major legal systems of the world. A trust principle can be found in civil law, Hindu law, and Islamic law.[193] The principles that the trustee must not benefit from the trust and that the trustee must look after the property of the beneficiary with the same care he would give to his own are also universal.

In Nigerian customary law, "the chief [is] the trustee of the land in his control."[194] Hindu law explicitly contemplates trust obligations: "He who steals communal wealth or violates the rules of a trust should be exiled from the country after being deprived of all wealth."[195] Islamic law also creates strict duties of care for trustees: "God doth command you/To tender back your Trusts/To those whom they are due."[196]

The *Restatement (Third)* declares that international agreements may contribute to the formation of customary international law,[197] and the

186. WEERAMANTRY, *supra* note 2, at 77.
187. *Id.*
188. *Id.* at 78.
189. *Id.*
190. *Id.*
191. *Id.* at 79.
192. *Id.*
193. *Id.* at 151.
194. *Id.*
195. *Id.* at 152.
196. *Id.*
197. RESTATEMENT (THIRD) OF INTERNATIONAL LAW § 102, *cited in* HENKIN ET AL., *supra*

concepts of trust and mandate are evident in international agreements. Great Britain was given control over the Ionian Islands under the 1815 Treaty of Paris by Russia, Prussia, and Austria.[198] In 1885, the colonial powers met at the Berlin Congress to divide up the right to profit from the resources of Africa. As those countries agreed on an orderly means of exploiting Africa, they also agreed to "bind themselves to watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral well-being and to help in suppressing slavery."[199] In 1919, the Covenant of the League of Nations established the mandate system, and after World War II, the United Nations established the trusteeship system.[200]

The consistent standards of state practice, and of the mandate and trustee systems established by international documents, confirm the universal acceptance of nations of the concept that colonial powers formed a trust relationship with universal powers. Such consistency is considered evidence of a customary international norm.[201]

The second factor in determining the existence of customary international law is that a practice must be followed from a sense of legal obligation.[202] International mandates and trusteeship are not merely a product of humanitarianism, they also are an important part of "the working of the state system of the world."[203] The Berlin Agreement was not an act of humanitarianism, but a legal structure to facilitate the colonialism of European nations. Thus, states have followed the practice out of a sense of legal obligation to the international community.

Historically, mandates and international trusteeship have been rooted in "the decline and fall of empires, in the expansion of states into weak and backward areas, in the rivalry of states, in spheres of interest, and in the balance of power."[204] The European powers did recognize that colonialism and the marketing of natural resources had seriously harmed "uncivilized nations."[205] The international law of trusteeship, however, was concerned not only with lessening the destruction of indigenous peoples and their lands, but with maintaining international peace as both countries and individuals continued to search for new territory and expanded opportunities for trade.[206]

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note 7, at 51.

198. WEERAMANTRY, *supra* note 2, at 80.

199. *Id.* at 81 (citing article 6 of the General Act of the Conference of Berlin).

200. H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 29 (1948).

201. Christopher Cline, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng*, 42 HASTINGS L.J. 591, 598 (1991).

202. RESTATEMENT (THIRD) OF INTERNATIONAL LAW § 102, *cited in* HENKIN ET AL., *supra* note 7, at 51.

203. HALL, *supra* note 200, at 8.

204. *Id.* at 15.

205. *Id.* at 101.

206. *Id.* at 102.

The history of international governance of Africa demonstrates that the colonial powers did develop some strict guiding principles for trust relationships:

> The principle of the dual mandate — that trusteeship for dependent peoples involved not only duties by the colonizing power towards the peoples under trust, but also obligations towards the family of nations which themselves also had a collective responsibility in the matter — was well recognized . . . . Starting from the clear precedent of the prohibition by international law of the slave trade, the powers recognized that duties to backward peoples form a suitable subject-matter for international law.[207]

Although there was not actual international enforcement of the rules,[208] a commentator pronounced that by 1918 it was "'established as a fundamental principle of the law of nations that aboriginal tribes are the wards of civilized States.'"[209] The lack of enforcement power is inherent in international law, but there is "horizontal enforcement" through the reactions of other nations, making the question "not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior, [and] whether international behavior reflects stability and order."[210] The history of nations shows that an international customary law of trusteeship was observed and did, in fact, affect the way nations behaved.

The customary international law of trust establishes broad obligations. The essence of a trust is a fiduciary relationship, and the general principles governing the trust concept throughout the history of nations are that "the trustee must not benefit from the trust," and that the trustee "must look after the property of the beneficiary with the same care [he or she] would give [his or her] own" (the prudent person requirement).[211] An additional principle of the customary international law of trusteeship is a duty to enable the beneficiary to become independent.

The principle of the League of Nations' mandate system was that the "well-being and development of such peoples form a sacred trust of civilisation."[212] The League believed that this principle could most effectively be accomplished through the guidance of "advanced nations,"[213] thereby leading

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207. *Id.* at 105.

208. *Id.*

209. *Id.* at 106 (citing A.H. SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS 50-51 (1919) (State Department brief for the 1919 Paris Peace Conference)).

210. LOUIS HENKIN, HOW NATIONS BEHAVE 25-26 (2d ed. 1979), *quoted in* HENKIN ET AL., *supra* note 7, at 23-24.

211. WEERAMANTRY, *supra* note 2, at 151.

212. *Id.*

213. *Id.* at 86.

them on the path to self-government.[214] The objectives of the trusteeship system established by the United Nations were "to promote the political, economic, social, and educational development of the trust territories, and their progressive development toward self-government or independence."[215]

Nauru's complaint before the International Court of Justice raises the possibility that nations in a trustee relationship have an obligation under customary international law to ensure that environmental destruction does not result from their treatment of the natural resources of aboriginal peoples. While the Court did not have an opportunity to rule on the merits of the case, we can learn from its rejection of Australia's call for summary dismissal of the complaint. Environmental destruction violates the obligations imposed by the customary international law of trusts. A prudent person would not destroy the land which provided the only source of food or pollute the only source of water. In addition, self-sufficiency is rationally related to self-government and independence — allowing all of a trustee's natural resources to be mined or allowing grazing land and water to be made unusable is a violation of the obligation to guide a trustee toward self-government.

This section has found that a customary international law of trusteeship exists and has identified certain obligations which it imposes on trustees. It is not yet clear, however, how that law can be used by Native Americans in U.S. courts.

B. Customary International Law and Trust Doctrine in U.S. Domestic Law

An analysis of the application of the customary international law of trusteeship must begin with a discussion of the validity of international law in U.S. courts. This section first details the general use of customary international law in U.S. courts, including its use by non-State plaintiffs.[216] Then, because customary international law is binding only on those nations which have not protested its norms, this section examines the sources and obligations of the trust relationship between the federal government and Native Americans.

In *The Paquete Habana*, the Supreme Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."[217] The *Restatement (Third)* states that "[i]nternational law is, and is given effect as, law in the United States."[218] A country which enters the international community as an

214. HALL, *supra* note 200, at 94.

215. U.N. CHARTER art. 76, ¶ b.

216. Traditionally, international law is seen as primarily governing relations between States. HENKIN ET AL., *supra* note 7, at xvii.

217. *Id.* at 60 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

218. *Id.* at 163 (citing RESTATEMENT (THIRD) OF INTERNATIONAL LAW pt. I, ch. 2

independent state becomes subject to international law.[219] When the United States became an independent member of the international community after the Revolutionary War, it became subject to international law. In the United States "[f]rom the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect."[220]

The Paquete Habana is the basis for the analysis not only of international law obligations in the United States but also for customary international law obligations. In *The Paquete Habana* the Court held that a standard that began as one of comity only could develop over the succeeding century into "a settled rule of international law," by "the general assent of civilized nations."[221] The case involved capture by the United States of two Cuban fishing vessels as prizes of war. The Court found that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."[222] The Court found evidence of custom in national law, executive decrees, acts of military commanders, judgments of national tribunals, and the works of legal scholars.[223] The widespread practice of states and the works of scholars provide similar support for the customary international law of trusteeship.

A more recent discussion of the use of customary international law in U.S. courts occurs in *Filartiga v. Pena-Irala*.[224] In *Filartiga*, citizens of the Republic of Paraguay who had applied for permanent political asylum in the United States brought an action against another citizen of Paraguay, who was in the United States on a visitor's visa, for wrongfully causing the death of their son, allegedly by the use of torture. One of the causes of action cited by the plaintiffs was "practices constituting the customary international law of human rights and the law of nations."[225] A federal court has jurisdiction over cases which "arise under the . . . laws of the United States."[226] The laws of the United States include both laws passed by Congress and the common

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introductory note).

219. *Id.* at 161.
220. *Id.* at 163.
221. *Id.* at 58.
222. *Id.*
223. *Id.* at 58-61.
224. 630 F.2d 876 (2d Cir. 1980).
225. *Id.* at 879.
226. *Id.* at 886.

law.[227] The court then looked at the history of the Constitution and found that the common law of the United States includes international law.[228]

Next, the court searched for an international law regarding torture. The court found that because many international agreements and the official policy of almost all countries condemn torture, an act of torture committed by a state official violates "established norms of the international law of human rights, and hence the law of nations."[229] The court declared that international law may be determined by legal scholars, the practice of countries, or by court decisions.[230]

Courts have held that the requirement that a rule command the general assent of civilized nations is a stringent one; else the courts of one nation might feel free to impose their own standards. In *Banco Nationale de Cuba v. Sabbatino*,[231] the Supreme Court declined to decide the validity of the Cuban government's expropriation of a foreign-owned corporation's assets because of the sharply conflicting views on expropriation between two groups of nations (socialist and capitalist). Section IIA of this comment demonstrated that there is no such conflict with regard to the universal acceptance of trust obligations. The concept of trust obligations should, therefore, meet the courts' stringent requirements.

Given a customary international law of trusteeship, *Filartiga* also demonstrates that Native Americans, despite not being states in the international arena, may allege violations of international law against the United States. The *Filartiga* court declared that its previous dictum that "violations of international law do not occur when the aggrieved parties are nationals of the acting state"[232] has not kept pace with the development of international law.[233] The court reached this conclusion because customary international law opposing torture necessarily protects rights of citizens against their government. Under this reasoning, the customary international law of trust must create a right for conquered peoples. The *Filartiga* court held that, in fact, "international law confers fundamental rights upon all people vis-à-vis their own governments."[234] Commentators agree that individuals have rights under international law.[235]

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227. *Id.*

228. *Id.*

229. *Id.* at 880.

230. *Id.* (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

231. 376 U.S. 398 (1964), *cited in* HENKIN ET AL., *supra* note 7, at 181 (holding that the act of state doctrine barred any claim against the Cuban government's nationalization of many companies in which Americans held interests).

232. *Filartiga*, 630 F.2d at 884 (citing Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d. Cir. 1976)).

233. *Id.* at 884.

234. *Id.* at 885.

235. Cassidy, *supra* note 176, at 87 (citing HANS KELSEN, PRINCIPLES OF INTERNATIONAL

While international law is a part of U.S. law, "a violation of customary international law may be alleged only against a nation that has not protested that norm."[236] The United States Supreme Court has embraced the concept of a trust relationship between the federal government and Native Americans throughout its history, and has based that relationship on the philosophy and practice of European nations. This analysis concludes that both the executive and legislative branches also have accepted the responsibilities of a trust relationship as an obligation of international law. Since the United States has not issued a protest, Native Americans may claim that the United States has violated the customary international law of trusteeship.

The Supreme Court has always held that the federal government has a duty as guardian or trustee of aboriginal inhabitants of the territory over which it has jurisdiction.[237] As a consequence of the relationship between the federal government and Native Americans, the Court believed that the United States had obligations and duties to the Native Americans because "[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."[238]

The origin of those duties is the European jurisprudence of first colonizers. In *Johnson v. M'Intosh*,[239] the Supreme Court declared that America's history proved the universal recognition of the European principle that discovery gave title to a government against all other governments, but that the rights of the original inhabitants could not be disregarded.[240] The fact that the Supreme Court acknowledged and accepted the customary international law of sovereign title by discovery and the corresponding principle of respect for the rights of those already in possession demonstrates that the United States has never protested those norms.

Analysis of the executive branch, which negotiated the treaties providing for protection for Native Americans, shows that international law was very much a factor in the treaties. Therefore, the trust relationship was established in the treaties because the United States recognized its international obligations.[241] This interpretation is bolstered by reference to the writings of President Washington's Secretary of War, Henry Knox, in which he discussed the reasons for the government's strategy of treaty negotiation with the Indians. He believed the treaties should be observed with "'the most rigid justice,'"[242] and declared that a general Indian war would be against the

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LAW 194 (2d ed. 1966)).

236. Cline, *supra* note 201, at 599.

237. Chambers, *supra* note 78.

238. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

239. 21 U.S. (8 Wheat.) 543 (1823) (holding that the law of nations gave Indians the right of occupancy, but not title to transfer their property).

240. *Id.* at 574.

241. Chambers, *supra* note 78, at 1221.

242. *Id.* at 1222 n.45 (citing Report from Secretary of War Knox to President Washington

"'principles of justice and the laws of nature.'"[243] He also suggested that forcibly ejecting the Indians from their land would violate international law:

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.[244]

The fact that the principles of the trust relationship between the federal government and Native Americans are the same as those established by customary international law is evidence of the international law basis of the responsibility. In 1975, Congress established the United States American Indian Policy Review Commission to analyze the legal history of the relationship between the United States and Native Americans.[245] The Commission found that the federal trust responsibility emanates from "the unique relationship between the United States and Indians in which the federal government undertook the obligation to ensure the survival of Indian tribes."[246] The Commission also found that the trust responsibility has a number of sources, including international law, treaties, laws of Congress, and judicial rulings.[247] The broad purpose of the trust is "to protect and enhance the people, the property, and the self-government of Indian tribes."[248]

The Commission compared the Indian trust relationship to a common law trust.[249] Therefore, the federal government must act with "good faith and utter loyalty to the best interests of the beneficiary."[250] At common law, prior consent by the beneficiary was not sufficient to fulfill the trustee's obligations if "the trustee can be shown to have failed to disclose essential facts which he knew or should have known, or if he fraudulently induced consent, or if the bargain was not fair and reasonable.[251] In addition to good faith and loyalty, the fiduciary relationship also requires that the trustee exercise the care, diligence, and skill of a prudent person in managing the trust assets of the beneficiary."[252] These common law principles have long

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(June 15, 1789)).

243. *Id.*

244. *Id.*

245. U.S. AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT, at III (Comm. Print 1977) (citing Pub. L. No. 93-580) [hereinafter COMMISSION FINAL REPORT].

246. *Id.* at 126.

247. *Id.*

248. *Id.*

249. *Id.* at 127.

250. *Id.* at 128.

251. *Id.*

252. *Id.*

been accepted as directly applicable to the federal trust responsibility to Indians.[253]

The Commission concluded that the purpose behind the trust

> is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.[254]

These purposes and obligations are part of the federal trust responsibility and may not be ignored simply because they are abstract concepts or are difficult to achieve.[255]

The fact that the United States' trust responsibilities for Native Americans have been acknowledged by all three branches of government and that those responsibilities have been based on customary international law means that Native Americans may allege that the United States has violated its responsibilities under customary international law.

III. An Environmental Equity Claim Based on International Customary Law in U.S. Courts

Having established earlier that there is a customary international law of trust and that the United States is bound by that law, this section of the comment explores the possibility of a lawsuit based on the failure of the federal government to fulfill its obligations and protect the environment of the Native Americans on Black Mesa. This section provides an overview of the elements which would form such a claim based on international law and U.S. statutes.

The effort to find a new cause of action for Native Americans might not be as difficult as it appears. As commentators have noted, "[t]he statutes involved in both [*Mitchell*] cases do not expressly establish general federal fiduciary responsibilities, do not expressly waive sovereign immunity, and do not provide an express cause of action for damages."[256] Yet, at least in *Mitchell II*, the Court was willing to find in favor of the Indian claimants.

The first hurdle which must be overcome is sovereign immunity. In *Mitchell I*, the Court declared, "[i]t is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the

253. *Id.*
254. *Id.* at 130.
255. *Id.* at 131.
256. Frickey, *supra* note 74, at 1153.

terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"[257] In *Mitchell II*, the Court provided the means for Native American plaintiffs to argue that sovereign immunity has been waived. Native Americans may make claims against the United States in the Court of Claims through the Indian Claims Commission Act.[258] The Indian Claims Commission Act parallels the Tucker Act which states that "[t]he Court of 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."[259] The *Mitchell II* court held that "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims."[260] The claim must be for money damages against the United States,[261] and the claimant must demonstrate that the source of substantive law relied upon "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"[262] The Court lowered that hurdle by stating that the law relied upon by the claimant may establish a right to recover damages "either expressly or by implication."[263]

A claim against the United States for the damage to Black Mesa would be based on a reading of SMCRA and the Indian Long-Term Leasing Act[264] informed by customary international law. The claim would be for both money damages and injunctive relief.[265] *Mitchell II* again provides the means for making a case that the substantive sources of law implicitly grant a right to recover damages. The Court wrote that

> [t]his Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.[266]

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257. *Mitchell I*, 445 U.S. at 537 (citing United States v. Sherwood, 312 U.S. 584, 586 (1941)).

258. 28 U.S.C. § 1505 (1994).

259. *Mitchell II*, 463 U.S. at 211 n.8.

260. *Id.* at 212.

261. *Id.* at 216 (citing United States v. King, 395 U.S. 1, 2-3, (1969)).

262. *Id.* at 217 (citing United States v. Testan, 424 U.S. 392, 400 (1976)).

263. *Id.* at 217 n.16 (citing Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607 (1967)).

264. 25 U.S.C. §396.

265. An analysis of the effect of a request for injunctive relief on a grant of sovereign immunity is beyond the scope of this comment.

266. *Mitchell II*, 463 U.S. at 226.

The Court found that there must be a right to damages because "'[a]bsent 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.'"[267] In addition, the Court recognized that "by the time government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy [such as declaratory or injunctive relief] may be next to worthless."[268]

The international customary law of trusteeship will be used to establish that SMCRA and the Indian Long-Term Leasing Act provide Native Americans with substantive rights. The idea of using international law to broaden the meaning and obligations of a statute is not new to U.S. courts. In *Filartiga*, the court declared that the narrow construction previously given to the statute at issue reflected the fact that "earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue."[269] The history and practice of international trusteeship norms are also well-established, and can broaden the Court's approach to interpreting the statutes.

As previously mentioned, in enacting SMCRA, Congress wanted "to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[270] In the Indian Long-Term Leasing Act, Congress established that "[o]n and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, . . . may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, by authority of the tribal council or other authorized spokesman for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities."[271] Through these statutes, Congress' regulation of mining on Indian territory is as comprehensive as its regulation of timber management was in *Mitchell II*.

A claim based on international customary law would allege that the strip mining on Black Mesa, the water loss and water pollution, the history of poor contracts, failed or lagging reclamation of land, and coal mining by non-Indian business entities are violations of the U.S. trust responsibilities. The actions of the United States must be judged by whether the United States has acted with good faith and utter loyalty to the best interest of the beneficiary.[272] Furthermore, as the history of the law of trusteeship showed in part II, and as the American Indian Policy Review Commission declared,

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267. *Id.* at 227 (citing *Mitchell I*, 445 U.S. at 550) (White, J., dissenting).
268. *Id.*
269. *Filartiga*, 630 F.2d at 888.
270. 30 U.S.C. § 1202(a) (1994).
271. 25 U.S.C. § 396a (1994) (emphasis added).
272. COMMISSION FINAL REPORT, *supra* note 245, at 128.

the most important principle of trusteeship is to ensure that the beneficiaries "have available to them the tools and resources to survive as distinct political and cultural groups."[273]

However, while coal mining contracts with fixed-rate below-market royalties are vulnerable to attack as not in the best interest of the beneficiary, the more recent contracts with market-based royalty rates might seem to a court to reflect a reasonable weighing of the burdens of coal-mining against the benefits of money and therefore to be in the best interest of the trustee. The court might then find that the federal agency had no obligation under SMCRA, the Indian Long-Term Leasing Act, or customary international law. However, that analysis ignores the existing unequal distribution of wealth, and critics have declared that "[w]hen a community suffers severe disadvantage from existing inequalities of wealth, the voluntariness of its agreement to host the LULU [locally undesirable land use] is questionable."[274] The principle of enabling the beneficiary to achieve self-government is vital to the trust concept, and within this context, points the courts in a new direction. The United States cannot be held to have fulfilled its trust obligation by depriving a community of resources and opportunities until its only options are the sale and destruction of its natural resources. Because a long-term base of resources is necessary for the establishment of distinct, self-sufficient Native American entities,[275] the purpose of the trusteeship as articulated by Chief Justice Marshall cannot be realized by simply approving the sale of those resources at a reasonable royalty rate. It may well be that the trust relationship requires "the preservation of the trust corpus in a particular form — land and natural resources instead of money."[276] Therefore, the Secretary of Interior could be said to have the obligation under the Indian Long-Term Leasing Act to approve only those leasing contracts which will further tribal self-government.

With these trust principles in mind, the obligations of the federal government under SMCRA also are greater. The duty to ensure that surface mining operations are conducted so as to protect the environment[277] becomes a substantive one. It cannot be enough under international law to fulfill regulatory procedures adequately while destroying the trust corpus. Given the trust responsibility, the scarred landscape and polluted water of Black Mesa are violations of that duty regardless of agency regulations. Under this cause of action, plaintiffs must prove that environmental destruction is the result of strip-mining on Black Mesa, but would no longer have to overcome *Chevron*

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273. *Id.* at 127.

274. Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 76 CORNELL L. REV. 1001, 1041 (1993).

275. Chambers, *supra* note 78, at 1235.

276. *Id.* at 1236.

277. 30 U.S.C. § 1202(d) (1994).

deference and prove that the agency's regulations are unreasonable. The trust principles also mean that providing an alternative source of water is not sufficient to meet U.S. obligations to Native Americans. Bottled water will not meet the religious and cultural needs which the trust is designed to protect.

As the trust relationship establishes more obligations, it creates more options for relief when those obligations are breached. In a number of cases, the Supreme Court has acknowledged the importance of tailoring the remedy to the breach of trust.[278] If the breach is of the obligation to promote a beneficiary's journey to self-government, then monetary damages, without guidance, training, and education may not lead to further progress toward independence. While this concern may seem paternalistic, paternalism is the essence of the trust relationship. Furthermore, it is the breach of the trust duty which has created the need for further paternalism. Native Americans are the poorest, least-educated members of the nation.[279] Therefore, relief must include education, compensation for past inequities, and opportunities for full employment on a sustainable basis (sustaining both the tribe and its natural resources).

For the Native Americans of Black Mesa, then, relief might include monetary damages for past below-market sales of coal, a restoration fund to reclaim the land and water damaged by strip mining, immediate cessation of coal mining, monies to fund a study to discover the industry most likely to provide employment and income for the tribe for the longest possible time with the least amount of environmental damage, and money and training to establish such an industry. This will entail a considerable amount of money; it is, however, the unavoidable consequence of decades of violations of the trust relationship by the United States government.

IV. Conclusion

The history of America's treatment of Native Americans is a shameful one, and the historic burdens they bear are exacerbated as the federal government allows, and even encourages, the destruction of their environment through the exploitation by others of their natural resources. American courts have continuously held that the United States owes a trust responsibility to Native Americans, yet have refused, for the most part, to bind the federal government to the obligations such a trust entails. This comment, and the parallel example of Nauru, have shown that the trust responsibility is not, however, merely a domestic one, but is in fact a duty imposed by customary international law. Moreover, the obligations imposed by international law, and acknowledged, while not followed, by our three branches of government, include an

278. *See supra* notes 266-68 and accompanying text.

279. *New Hope on the Reservations*, *supra* note 3, at 390.

obligation to protect the environment and the natural resources of land held for the beneficiaries. The federal government's violation of its trust responsibilities to Native Americans means that it is liable not just in the court of public opinion, but in the federal courts. America will finally have fulfilled its trust responsibilities when Native American tribes become, to extend Chief Justice Marshall's description, domestic *independent* nations. Perhaps the effort to find a mechanism for restitution under customary international law will result in significant progress towards that goal.