No. 19-17088

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION,

Plaintiff and Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants and Appellees,

STATE OF ARIZONA, ET AL.,

Intervenors, Defendants and Appellees.

On Appeal from the United States District Court
for the District of Arizona

No. CV-03-00507
Hon. G. Murray Snow

AMICUS CURIAE BRIEF OF THE NCAI FUND IN SUPPORT OF PLAINTIFF-APPELLANT NAVAJO NATION AND REVERSAL

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Date: March 4, 2020

NATIVE AMERICAN RIGHTS FUND

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INTEREST OF AMICUS CURIAE[1]

Amicus National Congress of American Indians Fund (Amicus or NCAI Fund) is the non-profit public-education arm of the National Congress of American Indians, the oldest and largest organization of Alaska Native and American Indian Tribal governments and their citizens. NCAI Fund's mission is to educate the general public, and Tribal, Federal, and State government officials about Tribal self-government, treaty rights, and policy issues affecting tribes, including interpretations of common law trust obligations of the federal government.

SUMMARY

Amicus submits this brief in support of the Navajo Nation's (Nation) breach of common law trust claims. Amicus herein 1) provides a history of the common law trust doctrine; 2) explains the Supreme Court's foundation for common law trust claims for equitable relief in that common law breach of trust claims are subject to two types of analysis, and the development of the common law Indian trust doctrine as it applies to claims for A) cases that seek money damages, and B) those, as here, that seek equitable relief; and 3) describes the common law trust duty at issue in this case.

[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than the NCAI Fund, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

I. HISTORY OF THE COMMON LAW INDIAN TRUST DOCTRINE

The Indian trust doctrine is a common law doctrine developed by courts to protect Indian interests from actions taken by the other two branches of government. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1495. The trust duty arises from federal recognition and control of tribal land and related promises that native peoples could continue their way of life on their homelands. *Id.* This federal duty to protect tribal independence, by protecting tribal lands, resources, and native way of life, was recognized early in this nation's history, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-61 (1832), and remains a viable source of law today as it relates to breach of trust claims for equitable relief. *See, e.g. Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (general trust relationship imposed duty on Corps to ensure treaty rights not violated).

As the Supreme Court recognized in *Worcester*, the federal duty to protect the independence of tribes was expressed in international law (law of nations) and treaties negotiated between the federal government and tribes. *Worcester*, 31 U.S. at 551-61. Indeed, "[p]rotection does not imply the destruction of the protected." *Id.*

The treaties expressly recognized the sovereignty of the tribes;[2] assured that the federal government would protect the tribes;[3] including from hostile non-Indian "bad men"[4] and promised a permanent homeland with continued rights to hunt, fish, and gather, and rights to continue traditional and cultural practices.[5] And settled international law recognized that "a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its protection." *Worcester*, 31 U.S. at 560-61.

In line with international law, the federal duty to protect the independence of tribes also was expressed in early acts of Congress. In the 1787 Northwest Ordinance, for example, Congress formalized the government's duty of protection when it said,

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[2] *See e.g.*, *Worcester*, 31 U.S. at 555 (The relation between the United States and the Cherokee Nation "was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character.").

[3] *See e.g.*, *Id.* at 551-56 (The Treaty of Holston provided that "the Cherokee Nation is under the protection of the United States of America, and of no other sovereign whosoever").

[4] *See e.g.*, *Treaty with the Northern Cheyenne and Northern Arapahoe*, art. I, May 10, 1868, 15 Stat. 655 (1868) ("If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . cause the offender to be arrested and punished according to the laws of the United States.").

[5] *See e.g.*, *Treaty with the Walla Walla*, Cayuse, and Umatilla, art. I, June 9, 1855, 12 Stat. 945, 946 (1855) (guaranteeing right to fish, hunt, gather roots and berries, and pasture stock off reservation).

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

An Ordinance for the government of the territory of the United States North West of the river Ohio, art. III, July 13, 1787, 32 Journals of the Continental Congress 334, 340-41.

Against this backdrop of international, executive, and congressional recognition of the duty to protect tribal independence, the judiciary responded by adopting a doctrine of federal common law known as the Indian trust doctrine. In *Worcester*, the Supreme Court recognized the relation between the Tribe and United States

> . . . was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of the master.
>
> . . . .
>
> [The Treaty of Holston], thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.

Worcester, 31 U.S. at 555-56. This history necessitates that the trust obligation be viewed as a property law concept. It is a principle that arises from the native "relinquishment" of land in reliance on federal assurances that retained lands and

resources be permanently protected for future generations. Harm to that resource by federal action or inaction must be remedied with the right to seek judicial redress against the government. *See e.g., United States v. Mitchell,* 463 U.S. 206, 226 (1983) (*Mitchell II*) ("[T]he 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."). As discussed in Section III, in this case, the Nation's injury stems from federal inaction resulting in a breach of the government's common law duty found in its treaty to protect the Nation's homeland.

The duty of protection that was central during the treaty years and in years thereafter when Congress enacted laws to protect tribal rights remains today. That duty of protection remains enforceable through common law breach of trust claims seeking equitable relief. Reviewing courts must resist collapsing trust standards into statutory standards, as discussed below, or risk effectively eliminating the role of the trust responsibility in protecting unique tribal interests, a role recognized in *Worcester*.

II. THE DEVELOPMENT OF COMMON LAW INDIAN TRUST DOCTRINE INTO TWO TYPES OF ANALYSIS AND ITS APPLICATION TO MONETARY DAMAGES AND EQUITABLE RELIEF

Courts generally assumed a prevailing trust relationship between the executive branch and the tribes, and hold that branch to fiduciary duties even

absent an explicit expression of a trust duty. Wood, *supra* p. 2, at 1516. In the 1980s, however, the Supreme Court narrowed the application of the Indian trust doctrine for claims seeking monetary compensation for breach of fiduciary duty. *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *Mitchell II*, 463 U.S. 206 (referred to herein as the *Mitchell* analysis). As described in more detail below, the *Mitchell* cases did not narrow (and could not have narrowed) breach of trust claims seeking equitable relief. Because the rationale for narrowing the application of the Indian trust doctrine to claims seeking monetary damages is not applicable to claims seeking equitable relief, courts err when they apply the *Mitchell* analysis to injunctive or declaratory relief claims instead of applying the general common law breach of trust analysis.

A. Courts Have Recognized Two Types of Analysis for Common Law Breach of Trust Claims

There are two prongs to the common law breach of trust analysis: First, general common law breach of trust for equitable relief that protects tribal interests, as explained below in Section II.C.; and second, common law breach of trust for damages that equates tribal interests with the public's interests at large as enumerated in statutory standards, as explained below in Section II.B. The latter is sometimes referred to as an exception to the general rule of common law trust, as

specific trust law, as Tucker Act[6] analysis or as *Mitchell* analysis. The District Court here failed to engage in a full consideration of the Nation's equitable common law breach of trust claim. The court should have considered both prongs of this doctrine and considered the question left open in *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 n.10. (9th Cir. 2006), involving the duty to identify, protect, and conserve tribal resources, tribal trust assets, and tribal health and safety. However, the Discover Court followed, without much discussion, case law that collapsed common law trust requirements into statutory standards. In doing so, it disregarded the viability of the general common law trust analysis.

B. The Narrowing of the Indian Trust Doctrine for Claims Seeking Monetary Damages

In *Mitchell I*, 445 U.S. 535, individual allottees of tribal land sued the government in the Court of Federal Claims (CFC) to recover damages for alleged mismanagement of timber resources under the Tucker Act and the Indian Tucker Act, 28 U.S.C. § 1505. Since both acts are jurisdictional grants of authority and confer no substantive rights against the government, the Supreme Court required the allottees to identify an independent source of law that creates a federal substantive right. *Mitchell I*, 445 U.S. at 546. The allottees argued that the

[6] Tucker Act, 28 U.S.C. § 1491.

General Allotment Act (GAA)[7] provided the source of their federal substantive right. 445 U.S. at 536-37.

The GAA required the United States to "hold the land . . . in trust for the sole use and benefit of the" allottee. GAA § 5, 24 Stat. at 389. The Court determined that the GAA created only a limited trust and did not impose any duty upon the government to manage timber resources. *Mitchell I*, at 542. The Supreme Court further found that, under the GAA, the Indian allottee was responsible for using the land for agricultural or grazing purposes and that the allottee, not the United States, was to manage the land. *Id*. at 542-543. Accordingly, the Court concluded that the GAA's "trust" language could not have been intended to permit the government to control use of the land or be subject to money damages for breaches of fiduciary duty. *Id.* at 544. The Court concluded that any right of the respondents to recover money damages for government mismanagement of timber resources must be found in some source other than the GAA. *Id.* at 546.

Following their defeat in *Mitchell I*, the *Mitchell I* plaintiffs amended their complaint to assert that the United States breached its fiduciary duty under a number of federal statutes and regulations. *Mitchell II*, 463 U.S. at 210. The Court

[7] General Allotment Act, 49 Cong. Ch. 119, 24 Stat. 388 (Feb. 8, 1887) (repealed 2000).

examined this amended claim to determine whether those statutes and regulations could fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they imposed. *Id*. at 219. The Court found that the timber management statutes (25 U.S.C. §§ 406, 407; 25 U.S.C. § 466 (transferred to 25 U.S.C. § 5109)) and the implementing regulations (25 C.F.R. pt. 163 (1982)) established "comprehensive" responsibilities of the government in managing Indian timber harvest. *Mitchell II*, 463 U.S. at 222, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-46 (1980). In contrast to the bare trust created by the GAA in *Mitchell I*, the federal timber statutes and regulations required the government to comprehensively manage Indian resources and land for the benefit of the Indians. *Mitchell II*, 463 U.S. at 224. According to the Court, a fiduciary relationship arose from this comprehensive scheme and defined the contours of the United States' fiduciary responsibilities. *Mitchell II*, 463 U.S. at 224. The Court concluded that

> [where] 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 . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection.

463 U.S. *Id*. at 225. Accordingly, a key lesson from *Mitchell II* is that the Court recognized (much as it did in *Worcester*) that the trust obligation arises out of circumstances rather than expressed intentions. *Id.* Even in the context of money

damages claims or suits under the Tucker Acts, the Court's language in *Mitchell II* suggests that the presence of federal control forms a source of a trust duty independent of express statutory trust language. *Id.* at 226.

1. The Narrowing of the Indian Trust Doctrine Should Be Limited to Claims Seeking Monetary Relief (Tucker Act Claims)

Before *Mitchell I* and *Mitchell II*, courts applied the general common law trust analysis without resort to any statutory standard giving rise to a breach of fiduciary duty. *See below*, Section II.C. The Court in *Mitchell I* and *II* deviated from the general common law trust analysis for jurisdictional purposes only. *Mitchell II*, 463 U.S. at 211 ("Respondents have invoked the jurisdiction of the Court of Claims under the Tucker Act."); *Mitchell I*, 445 U.S. at 538 ("The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act."). Because equitable common law claims are not actionable in the CFC under the Tucker Act, *e.g. Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 242, 245 (D.D.C. 2008), *vacated and remanded sub nom. on other grounds*, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (portion of claim resembled claim for interest lost or an accounting for profits, which are money damages claims that must be brought in CFC), the Court in the *Mitchell* cases was required to derive the remedial damages portion of the trust obligation from specific statutory or regulatory language. This requirement should be confined to the *Mitchell* line of

cases – cases seeking monetary relief or Tucker Act claims – because the jurisdictional requirement to find a trust obligation in a specific statute or regulation has never been required by the Supreme Court in equitable or declaratory breach of trust cases under the Administrative Procedures Act (APA) or other statutes. The Tucker Act and APA have very different requirements for establishing jurisdiction.

2. Lower Courts Have Unnecessarily Narrowed the Indian Trust Doctrine to Tribal Claims Seeking Equitable Relief

Following *Mitchell I* and *II*, some lower courts extended the Tucker Act restrictions to claims brought under the APA, even where monetary damages were not at issue. This unnecessarily requires that trust beneficiaries show a statute or other source of express law supports their trust claim. This is despite the fact that the APA does not include such restrictions and that the Government's trust responsibility, particularly with respect to rights that attach to permanent homelands – is sufficient to support relief independently. *Nw. Sea Farms*, 931 F. Supp. at 1520 (the fiduciary duty to take treaty rights into consideration controls, not regulatory provisions).

This misapplication of *Mitchell I* and *Mitchell II* first appeared in a 1980 case brought by the Inupiat Eskimos, alleging breach of trust claim and violation of the APA and seeking injunctive relief. *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980). Applying *Mitchell I* (a Tucker Act case) – notwithstanding

that *Mitchell I* concerned jurisdiction under the Tucker Act, and *North Slope Borough* concerned jurisdiction under the APA – the D.C. Circuit held a "trust responsibility can only arise from a statute, treaty, or executive order." *North Slope Borough*, at 611. Partly because of the holding in *Mitchell I* and partly because the Inupiat Eskimos did not have a treaty, the court looked for, but did not find any "specific provision for a federal trust responsibility in any of the statutes argued to [the court]." *Id.* at 612. Invoking *Mitchell I, North Slope Borough* concluded that "the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute," *id.* at 611, and, in doing so dangerously generalized that "where the Secretary has acted responsibly in respect of the environment, he has implemented responsibly, and protected, the parallel concerns of the Native Alaskans." *Id.* at 612. In other words, the Secretary's compliance with the National Environmental Policy Act is deemed to check the box with respect to his trust responsibility owed to an Indian tribe generally.

Since then, this misapplication of *Mitchell I* and *Mitchell II* to the Indian trust doctrine has found its way into Ninth Circuit law, narrowing the legal rights attached to the federal trust responsibility owed Indian tribes, particularly with

respect to property rights.[8] As described in the Nation's Opening Brief, *Gros Ventre* announced the latest rendition of Ninth Circuit case law when it concluded that "Tribes cannot allege an independent common law cause of action for breach of trust." *Gros Ventre*, 469 F.3d at 814. The Ninth Circuit then applied the *Mitchell* analysis to the Tribes' breach of trust claim for equitable relief.

Gros Ventre construed the Tribes' theory of liability as conflating general trust law principles with an attack on agency inaction under the APA. *Id.* at 803. The Ninth Circuit concluded that "[b]ecause the government's general trust obligations *must* be analyzed within the confines of generally applicable statutes and regulations, we reject the suggestion to create by judicial fiat a right of action Congress has not recognized by treaty or statute." *Id.* (emphasis added). But the Indian trust doctrine emerged out of federal common law over a century ago, and the Supreme Court narrowed the application of the general common law trust analysis by requiring a specific statute mandating money damages *only* in actions seeking money damages.

North Slope Borough and *Gros Ventre* equate the United States' "distinctive obligation of trust," *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942),

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[8] *See e.g.*, Appellant's Opening Br., ECF 12 at 33-37, describing the following Ninth Circuit cases: *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 572 (9th Cir. 1998), *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000), and *Gros Ventre*, 469 F.3d 801. To avoid unnecessary duplication, Amicus adopts and incorporates by reference those arguments and authorities.

with generally applicable statutory standards when analyzing claims seeking equitable and declaratory relief. These opinions conclude that if the agency abides by generally applicable statutes that apply to all, it is protecting the unique Indian interest as well. The courts, therefore, have essentially collapsed the distinctive common law trust standards into generally applicable statutory standards. When judges equate trust standards with statutory standards, they eliminate the role of the trustee to protect uniquely tribal interests, a role recognized in *Worcester*, 31 U.S. at 515, 551-61.

C. Pre-*Mitchell* and Post-*Mitchell* Cases Seeking Equitable Relief Apply the Common Law Breach of Trust Analysis Without Any Prerequisite Finding of a Specific Statutory Trust Duty

When courts define common law duties according to statutory standards, they diminish that common law duty recognized to protect native rights and resources. This subsection examines equitable relief cases where the trust responsibility is enforced under the APA. Amicus acknowledges that the Nation's suit is based on trust claims pursuant to federal question jurisdiction and invokes the APA only for its waiver of the government's sovereign immunity. But, just as the trust enforcement under the APA does not require a tribe to premise a claim on a statute,[9] similarly, the trust enforcement under the federal question jurisdiction is

[9] 5 U.S.C. § 706(2)(a) (granting general authority to courts to set aside agency action "not in accordance with law").

not limited to statutory violations.[10] Because the APA and federal question jurisdiction do not require premising a claim on a statute, the following APA cases provide analogous instances to help analyze common law breach of trust claims under federal question jurisdiction.

In *Klamath Tribes v. United States*, No. 96–381, 1996 WL 924509, *7-10 (D. Or. Oct. 2, 1996), the Tribes filed an action challenging the decision of U.S. Forest Service (USFS) to proceed with eight timber sales located in the Winema and Fremont National Forests in south-central Oregon. The Tribes argued that by facilitating the timber sales within the former Reservation without engaging in meaningful consultation, the USFS breached its trust responsibility to ensure that the former Reservation lands are managed to protect the Tribes' treaty rights. *Id.* at *1.

The Court explained that the federal government owes a unique obligation to Tribes and that this responsibility extends to the protection of treaty rights. *Id.* at *7-8, citing *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977); *Seminole Nation*, 316 U.S. at 296-97. The Court found that a procedural trust

[10] 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. § 1362 ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.").

obligation mandates that the federal government consult with an Indian tribe in the decision-making process to avoid adverse effects on treaty resources. *Klamath Tribes*, 1996 WL 924509 at *8, citing *Lac Courte Oreilles Band of Indians v. Washington* 668 F. Supp. 1233, 1240 (W.D. Wis. 1987). A substantive duty also arises to protect "'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend." *Klamath Tribes*, 1996 WL 924509 at *8, quoting *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973), *rev'd in part on other grounds,* 499 F.2d 1095 (D.C. Cir. 1974). In contrast to the line of cases discussed above, the court acknowledged "that compliance with all applicable environmental laws does not necessarily mean that treaty rights have not been violated, and that a determination that a project is consistent with [a federal agency] plan does not ensure that treaty obligations have been fulfilled." *Klamath Tribes*, 1996 WL 924509 at *4.

The *Klamath Tribes* case provides one example, following *Mitchell I* and *Mitchell II*, where a general common law trust analysis was applied to protect tribal interests. Although an unreported decision, the *Klamath Tribes* holding is supported by *Pyramid Lake Paiute Tribe*, 354 F. Supp. 252, where the Paiute Tribe sued under the APA seeking equitable relief arguing, *inter alia*, that the Secretary ignored his own guidelines and failed to fulfill his trust responsibilities to the Tribe by illegally and unnecessarily diverting water from Pyramid Lake. *Pyramid Lake*,

354 F. Supp. at 255. The Tribe argued that the challenged regulation, based on the Secretary's "judgment call," delivered more water to the District than required by applicable court decrees and statutes, and improperly diverted water that otherwise would flow into nearby Pyramid Lake located on the Tribe's reservation. *Id.* at 254-56.

The court found that the regulation, based on a "judgment call," was not legally permissible and explained that the Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that "hopefully" everyone could live with; rather, the burden rested on the Secretary to justify any diversion of water from the Tribe. *Id.* at 256. The court further explained that it was not the Secretary's function to attempt an accommodation, but he instead must fulfill his fiduciary duty by honoring the court decree. The United States "[is] charged . . . with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Id.*, quoting *Seminole Nation*, 316 US at 297; *see also Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966).

The court admonished the Government that it is not enough to assert the water and fishing rights of the Tribe by filing a suit in the U.S. Supreme Court. The Secretary was obliged to formulate a closely developed regulation that would

preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. *Pyramid Lake*, 354 F. Supp. at 256-57. Similar to *Pyramid Lake*, and as described in Section III below, the Federal Defendants in this case are obligated to formulate a water needs assessment, and an implementation plan that would preserve and protect the water for the Nation.

In *Nw. Sea Farms*, 931 F. Supp. 1515, a post-*Mitchell* case, the Court applied general common law trust standards to protect tribal fishing rights against overfishing. *Nw. Sea Farms* involved a salmon fish farm operator (Northwest Sea Farms) in the waters of Puget Sound. In 1992, the Army Corps of Engineers (Corps) denied Northwest Sea Farms' application for a required permit under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986).[11] The denial was based upon a finding that the project would be against the public interest because it would conflict with the Lummi Nation's fishing rights at one of its usual and accustomed fishing places under the Treaty of Point Elliott. *Nw. Sea Farms,* 931 F. Supp. at 1518.

The court recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *Nw. Sea Farms*,

[11] The court in *Nw. Sea Farms* simply refers to the § 10 permitting process. Section 10 is part of an 1890 appropriations act, 30 Stat. 1151, that later evolved into 33 U.S.C.A. § 403 (1986).

931 F. Supp. at 1519, citing *Mitchell II*, 463 U.S. at 225. The court further recognized that in conducting "any [f]ederal government action" which relates to tribes, the government must act according to its fiduciary duty. *Nw. Sea Farms*, 931 F. Supp. at 1519-20, citing, *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981). Without constraining itself to the *Mitchell* analysis, the Court explained that in carrying out its fiduciary duty, it is the government's responsibility to ensure that Indian treaty rights are given full effect. *Nw. Sea Farms*, 931 F. Supp. at 1520, citing *Seminole Nation*, 316 U.S. at 296-97 (finding that the United States owes the highest fiduciary duty to protect Indian contract rights as embodied by treaties). As such the court concluded that the Corps owed a fiduciary duty to ensure that the Lummi Nation's treaty rights are not impinged upon absent an act of Congress. *Nw. Sea Farms*, 931 F. Supp. at 1520. *See also Minnesota v Mille Lacs Band of Chippewa Indian*s, 526 U.S. 172, 202 (1999) (Congress must clearly express its intent to abrogate Indian treaty rights).

Northwest Sea Farms' argument—that the Army Corps did not consider Indian treaty rights, because the regulations did not include that protection in the definition of "public interest" – ignored the duties imposed by the trust relationship. The court explained that it is the "fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration." *Nw. Sea Farms*, 931 F. Supp. at 1520.

Similarly, in *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), the court expressed that "[it] long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise." *Id.* at 545. Commercial fishermen in *Parravano* alleged that the Commerce Secretary violated the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, (Magnuson Act) in issuing an emergency regulation that reduced the ocean harvest rate of Klamath River chinook for the 1993 fall season. *Parravano*, 70 F.3d at 541. The Magnuson Act authorized the Commerce Secretary to issue emergency regulations if necessitated by the Act or by "any other applicable law." *Id.* The Commerce Secretary may determine that protection of Indian fishing rights, under federal law, constitutes "applicable law." *Id.* at 544.

The Ninth Circuit has "noted, with great frequency, that the federal government is the trustee of the tribes' rights, including fishing rights." *Id.* at 546, citing *Joint Bd. Of Control v. United States*, 862 F.2d 195, 198 (9th Cir. 1988); *United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir. 1986); *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *Covelo Indian Cmty. v FERC*, 895 F.2d 581, 586 (9th Cir. 1990). *Parravano* determined that the Secretary fulfilled his federal trust obligation by issuing emergency regulations in response to ocean overharvesting of Klamath chinook, which

threatened the Tribe's ability to harvest their share of the salmon. *Parravano*, 70 F.3d at 546. Nowhere in *Paravvano* is there any indication that the court was constrained to apply the *Mitchell* line of cases that would require identification of a separate source of law or regulation expressing an enforceable duty.

In *Island Mountain Protectors, Nat'l Wildlife Fed'n, Assiniboine & Gros Ventre Tribes, & Fort Belknap Cmty. Council*, 144 IBLA 168, 1998 WL 344223 (1998) the Assiniboine and Gros Ventre Tribes, among others, brought an intra-agency appeal from an agency decision approving the expansion of the Zortman and Landusky Mines, and modification to the reclamation plans. *Id. at* 169. The Tribes argued that Bureau of Land Management (BLM) failed to adequately protect tribal interests and give priority and independent consideration to tribes affected by its decision.

The Interior Board of Land Appeals found that:

> In addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility . . . . BLM had a trust responsibility to consider and protect Tribal resources.
> . . . .
> . . . While the trust responsibility created by environmental laws may be "congruent" with other duties they impose, the enactment of those laws does not diminish the Department's original trust responsibility or cause it to disappear. BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its [decision approving expansion of a mine].

Id. at 184-85 (citing *Northern Cheyenne v. Hodel*, 851 F.2d 1152 (9th Cir. 1988). Importantly, *Island Mountain Protectors* rejected the application of *North Slope Borough*. Despite *North Slope Borough*, 642 F. 2d at 611, holding that "[a] trust responsibility can only arise from a statute, treaty, or executive order," as noted above, the Board found that the federal agency owed a trust responsibility to the Alaskan Inupiats irrespective of their lack of a treaty or any specific statutory provision with the Government. *Island Mountain Protectors*, 144 IBLA at 184-85.

The Ninth Circuit in *Gros Ventre* recognized *Island Mountain Protectors* and left open the question of whether the government "was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety" in its administration of environmental laws. *Gros Ventre*, 469 F.3d at 810 n.10. In the case at hand, the government's failure to develop a water needs assessment, devise an implementation plan, and otherwise preserve the water necessary to make the Reservation a livable homeland breaches its fiduciary duty to identify, protect, and conserve trust resources, trust assets, and tribal health and safety. The Government's use or administration of water, without a water needs assessment or implementation, further exacerbates the continuing problems the Nation faces due to lack of water and water infrastructure.

For these reasons, Amicus respectfully requests that the Court fully address the Nation's breach of common law trust claim absent the restrictions imposed by

the *Mitchell* line of cases. It can do this by addressing the question it left open in *Gros Ventre*. Amicus also requests that the Court look beyond the analysis used in *North Slope Borough* and *Gros Ventre*, because the Supreme Court has never created or recognized an exception to the general common law trust doctrine for claims seeking equitable relief.

III. THE GOVERNMENT'S COMMON LAW TRUST DUTY REQUIRES ASSESSMENT OF THE NATION'S WATER NEEDS, DEVELOPMENT OF AN IMPLEMENTATION PLAN, AND TO OTHERWISE IMPROVE THE LIVING CONDITIONS ON THE NATION'S RESERVATION

The Nation's Opening Brief describes the poor living conditions on the Nation's Reservation, including the lack of water and water delivery infrastructure. ECF No. 12, at 5-13. Yet, despite these conditions, the United States has not undertaken a comprehensive water needs assessment to improve the living conditions on the Reservation and "to make [the] Reservation a permanent homeland for Navajo people . . . ." Mem. in Supp. of Mot. for 3d Am. Compl. at 1, *Navajo Nation v. United States*, No. 03-507 (D. Ariz. Jan. 10, 2019). Adding insult to injury, the United States has advanced non-Indian interests over those of the Nation's such that non-tribal interests now rely on limited water supplies to the detriment of the Nation. *Id.* at 1-2. This prioritization of non-Indian interests over Indian interests is well documented:

> The Nation is therefore confronted, in the decade of the 1970s—100 or more years after most Indian reservations were established—with

> this dilemma: in the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop water projects of their own in the future. In short, the Nation faces a conflict between the right of Indians to develop their long-neglected water resources and the impairment of enormous capital investments already made by non-Indian in the same water supply.

Nat'l Water Comm'n, WATER POLICIES FOR THE FUTURE, FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 476 (1973), *available at* https://perma.cc/W6XK-SDME. This Court's own Judge Canby offered a similar observation:

> Despite the clear ruling of [the 1908 *Winters v United States* Supreme Court ruling], Indian water rights were largely ignored for many decades thereafter. The United States was far more interested in encouraging non-Indian settlement and irrigation than it was in developing and protecting Indian water resources. Indeed, during those years the United States represented the tribes in several water rights adjudications that severely compromised the tribes' *Winters* rights.

William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 530 (7th ed. 2020); *see also* Democratic Staff of the Comm. on Nat. Res., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED WATER FOR NATIVE FAMILIES 9-10 (2016).

It should be required that the Government, as trustee, investigate and inventory all the potential sources of water that could be used to help improve the living conditions on tribal land and develop an implementation plan, including

water delivery systems and infrastructure. *See, e.g., Island Mountain Protectors,* 144 IBLA at 184 (federal agency has a trust duty to consider and protect tribal resources). *Cf. Gros Ventre,* 469 F.3d, at 810 n.10 ("leaving open the question of whether the [government] is required to take special consideration of tribal interests," including the requirement to consult and to "identify, protect, and conserve trust resources, trust assets, and tribal health and safety"). The United States' fiduciary duty to develop a needs assessment and an implementation plan arises from the Indian trust doctrine, informed by promises of treaties and executive orders setting aside the Nation's Reservation, and obligations created during the Nation's and the United States' course of dealing.

IV. CONCLUSION

The common law breach of trust claim protects tribal rights to assert their property interests and to seek equitable and injunctive relief. This judicial remedy was not affected by the Supreme Court's decision in either *Mitchell I* or *Mitchell II*, because those cases addressed money damages claims. This Court should remind itself of the issue it left open in *Gros Ventre* and take this opportunity to address the Nation's claims. Amicus does not ask the Ninth Circuit "to create by judicial fiat a right of action Congress has not recognized by treaty or statute," *Gros Ventre*, 469 F.3d at 803, but to honor a right which has been recognized by the Supreme Court as early as *Worcester*. Amicus asks that this Court fully

consider the Nation's common law breach of trust claim consistent with *Worcester,* and its progeny, including *Klamath Tribes*, *Pyramid Lake*, *Nw. Sea Farms*, *Parravano*, and *Island Mountain Protectors*.

Date: March 4, 2020

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FOR THE NINTH CIRCUIT

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