

## Thoughts about a Broader and More Aggressive Approach to Trust Reform in the Environmental Context

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- I. **Judicial definition** -- The federal Indian trust obligation is defined by courts. Over the past twenty years, the courts have greatly narrowed their interpretation of the trust obligation, to the point where it is now viewed as little more than an iteration of existing statutory obligations (such as those imposed by NEPA, the ESA, etc).<sup>1</sup> When judges equate trust standards with statutory standards, they eliminate the role of the trust responsibility in protecting uniquely tribal interests, and Indian law itself moves towards assimilation – because the one potentially powerful tool for protecting unique native interests becomes interpreted as merely a majority standard.
  
- II. **The Role of the U.S. Department of Justice** – When Indian trust cases against the government go to court, the U.S. Department of Justice litigates them. It determines the legal position the U.S. Government will take in defining the trust responsibility. Repeatedly in cases litigated over the past ten years, the Dept. of Justice has perpetuated the idea that the trust obligation requires little more than fulfilling the statutory duties. Not unexpectedly, courts give great solicitude to Dept. of Justice opinions on the law. Yet, in many cases, Justice positions are formulated out of a direct conflict of interest. On one hand, as an agency of the federal government, the Justice Department is bound by the same trust obligation towards tribes as other agencies are. But on the other hand, the Justice Department often finds itself defending U.S. agencies that are taking action directly adverse to tribes (in mining, water, and fisheries conflicts, for example). This kind of conflict of interest would never be tolerated in the private practice of law (it is a breach of ethical duty), but it has been institutionalized in the area of federal Indian law. Tribes might think about forming a task force, in partnership with BIA, to directly address the U.S. Department of Justices' position on the legal trust obligation.

### III. Climate as the Major Game Changer for the Trust Obligation

Climate change threatens irrevocable, catastrophic damage to Indian Country. Rising temperatures and erratic weather will harm or eradicate fisheries, wildlife, traditional foods, water supplies, forests, human health, and infrastructure. Rising sea levels are already forcing the relocation of

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<sup>1</sup> See Mary Christina Wood , *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief Against Fderal Agencies*, 39 Tulsa L. Rev. 355.

native communities. The federal government has estimated that 19 Alaska native villages must relocate inland, and one Washington coastal tribe has requested Congressional funds to relocate. Scientists warn that, if carbon emissions continue to rise (2-3 percent a year) even for a few more years, natural feedback processes could throw the planet beyond a tipping point into a state of runaway heating. The United Nations predicts that, under Business as Usual scenarios, the planet will heat as much as 11 degrees F (over pre-Industrial temperatures) by the end of the century. This could cause massive species extinctions, acidified and dead oceans, a planet without arctic ice, sea level rise, and a wipe-out of human populations. Climate analysts view global warming a threat to human civilization itself, yet the federal government still does not regulate greenhouse gas pollution.

In general, tribes are not meeting the climate challenge at the level they must in order to secure their homelands for future generations. While many states are at the forefront of climate policy, that is not true of tribes in general. The challenge is two-fold. First, it is imperative to reduce carbon dioxide emissions beginning within a year, and sustaining those emissions reductions until near zero levels are reached by mid-century. Scientists project that a **6% annual reduction** of carbon emissions on the global level is the minimal necessary to return the planet's atmosphere to equilibrium by the end of the century. This would have to be combined with a massive reforestation and soil practices effort to draw down the carbon already in the atmosphere on the order of 100 Gigatons. Second, it is critical to create adaptation strategies and appeal to the federal government for direct assistance and funding in carrying out those strategies. For both measures, time is of the essence. To carry out these steps, this conference could establish a national tribal climate task force or task an existing task force with engaging climate policy at all levels.

In sum, while many issues in Indian Country are high-priority, climate threats should take immediate priority simply because of the urgency in which carbon reduction must occur to thwart runaway heating -- to which there is no conceivable adaptation. I am happy to provide background materials, sources, and analysis for any tribal climate task force that carries this forward.