Superfund in Indian Country:
The Role of the Federal-Indian Trust Relationship in Prioritizing Cleanup

by

Mervyn L. Tano
International Institute for Indigenous Resource Management
444 South Emerson Street
Denver, CO 80209-2216
(303) 733-0481

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1. Introduction

As authorized by the Superfund Amendments and Reauthorization Act ("SARA"), the U.S. Environmental Protection Agency ("EPA") has been developing policies and procedures to increase tribal participation in the Superfund program and to ensure that hazardous waste sites in Indian country are remedied. SARA amended Section 126 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") requires the governing body of an Indian tribe to be accorded the same treatment as a state with respect to certain provisions of CERCLA. Accordingly, the definition of "State" in the National Contingency Plan was revised to also encompass Indian tribes. SARA also applied Subpart F of the National Contingency Plan ("NCP") to Indian tribes and authorized EPA to interact directly with Indian tribes. EPA can now negotiate cooperative agreements with Indian tribes to undertake pre-remedial or remedial response actions at hazardous waste sites within the tribes' jurisdictional boundaries.

As the tribal experience in administering Superfund has grown, so too has the tribal environmental staff's commitment to ridding Indian country of hazardous waste sites along with their frustration at the apparent inability of the Hazard Ranking System ("HRS"), the relative-risk based approach to prioritization required by CERCLA, to accomplish that objective. Tribal frustration with the HRS is summed up in a recent report of the All Indian Pueblo Council's Office of Environmental Protection which states that ". . . the Superfund HRS model does not account for Indian religious and ceremonial impacts from sites. Due to their importance in Pueblo life, culturally significant plants, animals, ceremonial surface water use, and sacred areas should be considered as critical impacts when evaluating the various pathways of exposure of the HRS." *The Pueblo Superfund Program—A Native American Perspective on Cultural Impacts and Environmental Equity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),* p. 1. In response to this and similar criticism from tribes and other tribal organizations, EPA is currently exploring how the HRS can be modified to incorporate tribal cultural concerns and interests.

Although a more culturally-relevant HRS may more accurately assess risks to Indian tribes, I am of the opinion that the trust relationship between the federal government and the obligations derived therefrom are powerful yet underused tools to clean up hazardous waste sites in Indian country. The objectives of this paper are: first, to set out the legal and policy foundations of the federal-Indian trust relationship; second, to describe the part the federal-Indian trust relationship can play in instructing the U.S. Environmental Protection Agency ("EPA") as to its responsibilities to clean up hazardous waste sites in Indian country; and third, to suggest a strategy that Indian tribes and EPA can use to begin the cleanup of hazardous waste sites in Indian country.

2. Legal and Policy Foundations of the Federal-Indian Trust Relationship

That the United States stands in a fiduciary relationship to American Indian tribes is established beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy. These standards may be summarized as follows:

- There is a legally enforceable trust obligation owed by the United States government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indian tribes.
- While the Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be tied rationally to the government's trust obligations. Congress must, in its exercise of its powers, act in the best interest of Indian tribes, however, Congressional judgment of exactly what constitutes the best interests of Indian tribes may eventually prove faulty, as occurred in the case of the Allotment Acts and its termination policy.
- The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive branch, including the U.S. Environmental Protection Agency. The government has fiduciary duties of care and loyalty, to make trust property productive, to enforce reasonable claims on behalf of Indian tribes, and to take affirmative action to preserve trust property.
- Executive branch officials have discretion to determine the best means to carry out their responsibilities to Indian tribes, but only Congress has to power to set policy objectives contrary to the best interest of Indian tribes.
- These standards operate to limit the discretion not only of the Secretary of the Interior, but also of other executive branch officials.

2.1. Origins of the Trust Doctrine

The origin of the trust relationship between the federal government and Indian tribes lies in the course of dealings between the "discovering" European nations (later the original states and the United States) and the native Americans who occupied the continent. The interactions between

these peoples resulted in the conclusion by this country of treaties and agreements recognizing the quasi-sovereign status of Indian tribes.

The U.S. Supreme Court has stated that:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. *Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943).

Implicitly, the Court recognized the course of history in which the Indian tribes concluded treaties of alliance or—after military conquest—peace and reconciliation with the United States. In virtually all these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility to Indian tribes has its roots for the most part in solemn contracts and agreements with the tribes. The tribes ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weakened position. No comparable duty is owed to other United States citizens.

While the later executive agreements and presidential orders implementing them with tribes are shorter and less explicit than the treaties, a similar guarantee of protection can be implied from them. As the Supreme Court stated in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), "the unique legal status of Indian tribes under federal law (is) . . . based on a history of treaties and the assumption of a guardian-ward status."

The treaties and agreements represented a kind of land transaction, contract or bargain. The ensuing special trust relationship was a significant part of the consideration of that bargain offered by the United States. By the treaties and agreements, the Indian commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. By administrative practice and later by statute, the title of this land was held in trust by the United States for the benefit of the Indians.

From the beginning, the Congress was a full partner in the establishment of the federal trust responsibility to Indians. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new Constitution in 1789, 1 Stat. 50, 52, declared:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never 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.

In 1790, Congress enacted the Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. §177, which itself established a fiduciary obligation on the part of the United States to protect Indian property rights.

Articulation of the concept of the federal trust responsibility as including more protection than simple federal control over Indian lands evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *Cherokee Nation* was an original action filed by the tribe in the Supreme Court seeking to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, though a "distinct political community" and thus a "state," was neither a State of the United States nor a foreign state and was thus not entitled to bring the suit initially in the Court. Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupilage" and that "their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall's subsequent decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship.

Later in the nineteenth century, the Court used the guardianship concept as a basis for congressional power, separate and distinct from the commerce clause. In *United States v. Kagama*, 118 U.S. 375 (1886), a case concerning the constitutionality of the Major Crimes Act, the Court concluded that the statute was outside the commerce power of the Congress, but upheld the validity of the statute by reference to the government's fiduciary responsibility. The Court state that "[t]hese Indian tribes are the wards of the Nation. They are communities dependent upon the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power.

A number of cases in the decades on either side of 1900 make express reference to such a power based on the federal guardianship, *i.e.*, *LaMotte v. United States*, 254 U.S. 570, 575 (1921) (power of Congress to modify statutory restrictions on Indian land is "an incident of guardianship"); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (the power existing in Congress to administer upon and guard the tribal property"), and the Supreme Court has continued to sustain the constitutionality of Indian statutes as derived from an implicit power to implement the "unique obligation" and "special relationship" of the United States with tribal Indians. See *Morton v. Mancari*, 417 U.S. 345, 552, 555 (1973),

2.2. The Federal-Tribal Trust Doctrine as a Limitation on Administrative Discretion

In Indian, as in other matters, federal executive officials are limited by the authority conferred upon them by statute. In addition, the federal responsibility imposes fiduciary standards on the conduct of the executive—unless Congress has **expressly** authorized a deviation from those standards. Since the trust obligation is binding on the United States, fiduciary standards of conduct pertain to all executive departments that may deal with Indians, not just those such as the Departments of Interior and Justice which have special statutory responsibilities for Indian affairs. This principle is implicit in *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976), where the court employed the canon of statutory construction that ambiguous federal statutes

should be read to favor Indians and thwarted the efforts of the Army Corps of Engineers to take tribal land.

A number of court decisions hold that the federal trust responsibility constitutes a limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is *United States v. Creek Nation*, 295 U.S. 103 (1935), where the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court based its decision on the federal trust doctrine, stating:

> The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. *United States v. Creek Nation*, 295 U.S. 103 (1935), at 109-110.

Creek Nation stands for the proposition that—unless Congress has expressly directed otherwise—the federal executive is held to a strict standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot, as a result of a negligent survey, "give the tribal lands to others, or . . appropriate them to its own purposes." Other decision of the Supreme Court reviewing the lawfulness of administrative conduct managing Indian property and Indian affairs have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness."
Seminole Nation v. United States, 316 U.S. 286, 296-297, (1942); *United States v. Payne*, 264 U.S. 446, 448 (1924).

Creek Nation and the other cases cited above were for money damages under special jurisdictional statutes in the Court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is *Land v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of the guardianship, but an act of confiscation." *Land v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), at 113.

If, as the decisions in *Creek Nation* and *Pueblo of Santa Rosa* are sound, it follows that federal agency officials are obliged to adhere to fiduciary principles. These cases, in other words, lead to the conclusion that the government is in fact, a trustee for the Indians and executive branch officials must act in accordance with trust principles in its relationships with Indian tribes.

2.3. The Independent Nature of the Trust Obligation

The trust obligation of the United States is derived not only from specific statutes, treaties or agreements. This view is reinforced by reference to the origins of the trust responsibility doctrine. Originally, Great Britain claimed for itself sovereignty over all Indian lands in the English colonies. In 1763, the King issued a Royal Proclamation, the precursor of the federal Non-Intercourse Act that decreed that the Crown owned Indian lands and that no person or government could acquire such lands without the consent of the Crown. This policy reflected the practical need of the Crown to assert its control over the land and wealth of the colonies and to preserve peace among the colonists and the Indians. Notably, the 1763 Proclamation applied to all Indians without regard to the presence or absence of specific treaties or agreements.

When the United States acquired sovereignty from Great Britain, it succeeded to all the incidents of the prior sovereign's powers. The United States no only did not renounce the peculiar power and duty assumed by Great Britain over Indians, but endorsed it by specific reference in Article I of the Constitution.

In *Delaware Tribal Council v. Weeks*, 430 U.S. 73 (1977), the Court held that the trust responsibility is subject to due process limitations. The case stands for the proposition that the Congress is not free to legislate with respect to Indians in any manner it chooses; rather, Congressional action with respect to Indians is subject to judicial review and will be sustained only so long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Other opinions shed further light on what is meant by the "unique obligation toward the Indian." In *Morton v. Ruiz*, 415 U.S. 73 (1977), the Court, in holding that the Bureau of Indian Affairs erred in excluding a certain category of Indians from the benefits of its welfare program spoke of the "overriding duty of our Federal Government to deal fairly with Indians." 415 U.S. at 236.

This statement appears as part of the procedural rights of Indians, and in this connection, the Court cited *Seminole Nation v. United State*, 316 U.S. 286, 296 (1942), which says governmental action must be judged by the "strictest fiduciary standards."

The "unique obligation" mentioned in *Weeks* and the "overriding duty" of fairness discussed in *Ruiz* exist apart from any specific statute, treaty or agreement, and they impose substantive constraints on the Congress and the executive branch. These decisions lead to the conclusion that the government's trust responsibility to Indian tribes has an independent legal basis and is not limited to the specific language of statutes, treaties and agreements. At the same time, the content of the trust obligation—apart from specific statutes, treaties and agreements—is limited to dealing fairly with Indian tribes. The standard of fairness is necessarily vague and allows considerable room for discretion, but these independently based duties do not stand alone. They must be read together with a host of statutory and treaty provisions designed to protect tribal interests.

The more general notions of the "unique obligations" and "overriding duty" of fairness form a backdrop for the construction and interpretation of the statutes, treaties and agreements respecting Indian tribes. This means that provisions for the benefit of Indians must be read to give full effect to their protective purposes and also they must be given a broad construction consistent with the

trust relationship between the government and the Indians. General notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of EPA's administration of the Superfund program in Indian country and instruct EPA officials in their discharge of their hazardous waste cleanup responsibilities toward Indian lands and are properly utilized to fill any gaps in the statutory framework.

2.4. Specific Environmental Protection and Restoration Obligations

Although most statutes governing non-tribal agency action are not likely to contain express fiduciary language, Congress, nevertheless, made its intent to impose fiduciary obligations clear in at least one important environmental statute. CERCLA provides for recovery of natural resource damages associated with the release of hazardous waste substances on both public and Indian lands. CERCLA also provides an exemption from liability for releases that are authorized under federal permits or licenses; however, in the case of damage to Indian lands, CERCLA provides an exemption only "if the issuance of that permit or license is not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe." This language reflects an explicit Congressional recognition of a fiduciary duty that implicates the full range of federal permit decisions affecting Indian lands.

Additionally, the U.S. Environmental Protection Agency has for several years expressly recognized a fiduciary duty toward Indian tribes. The EPA Statement on Indian Policy states:

> EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

Further, in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), the Eighth Circuit found a trust obligation for the Bureau of Indian Affairs and Indian Health Service to clean up illegal solid waste dumps arising from the Resource Conservation and Recovery Act even though RCRA contained no specific trust language. The court reasoned that Congress intended the specific obligations to apply to the agency through RCRA. In discussing the fiduciary role of the agencies, the court stated, "BIA and IHS have not merely violated RCRA, but, in so doing, they have violated their fiduciary obligation toward the plaintiffs and the tribe.

3. The Role of the Federal-Indian Trust Relationship in Addressing Hazardous Waste Sites in Indian Country

In summary, federal law, policy and court decisions demonstrate that a trust relationship exists between the federal government and Indian tribes; that the obligations thereunder attach to all executive agencies of the federal government; and that the performance of these obligations should be judged by the most exacting fiduciary standards. The cases sited above provide some guidance as to what these principles might mean in the prioritization of hazardous waste sites in

Indian country, but they are less instructive as to the exact dimensions of the U.S. Environmental Protection Agency's hazardous waste site cleanup responsibilities in Indian country.

3.1. The Hazard Ranking System

The Hazard Ranking System ("HRS") is a mathematical scoring system used by EPA to assess relative risk posed by sites to determine whether a site is eligible for placement on the National Priorities List ("NPL"). The HRS is addresses the requirement of Section 105(8)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), that EPA develop criteria for determining priorities among the various "releases or threatened releases" throughout the nation. These criteria shall be based upon relative risk or danger to public health or welfare, or the environment, taking into account a variety of factors including the population at risk, . . . [and] the potential for destruction of sensitive ecosystems . . . ."

An HRS score for a site is determined by evaluating four pathways: groundwater migration, surface water migration, soil exposure, and air migration. The scoring system for each pathway is based on a number of individual factors grouped into three factor categories: likelihood of release, waste characteristics, and targets. Combining the four pathways of exposure wit the three factor categories develops a site score, which can range from 0 to 100. Any site scoring 28.5 or greater is eligible for placement on the NPL. It is important to recognize that although only sites listed on the NPL qualify for long-term remedial action financed by the Superfund, a site not listed on the NPL may still be the subject of a more short-term removal action.

3.2. Tribal Views of the Shortcomings of the Hazard Ranking System

Tribal criticism of the Superfund program has centered almost solely on the exclusion of tribal risks and interests in the HRS, the mathematical model used to prioritize federal cleanup of contaminated sites. The example cited by the Pueblo Office of Environmental Protection, in a paper entitled, *The Pueblo Superfund Program—A Native American Perspective on Cultural Impacts and Environmental Equity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),* is that "cultural impacts, be it (*sic)* water, plants, or culturally historic sites, have direct links to Pueblo traditions and ceremonies. This is a substantial area of environmental protection in Pueblo country because it is the protection of Pueblo culture."

EPA has responded to these criticisms by examining "how it uses to HRS—to better assess the effects of a site's contamination on the tribal community's culture and religious integrity." *Options for Including Tribal Cultural Concerns in EPA's Hazard Ranking System,* n.d., p. 3. EPA has proposed three options to incorporate tribal cultural issues into the scoring process at sites in Indian country. These options are: first, create new, tribal-specific HRS guidance; second, modify existing HRS guidance; and third, modify the HRS rulemaking to incorporate tribal concerns.

CERCLA, EPA policy, the federal-Indian trust responsibility and federal Indian law provide sufficient authority for EPA to exercise any of these options to modify the HRS guidance or the HRS itself. *Northern Cheyenne Tribe v. Hodel,* 12 Indian L. Rep. 3065 (D. Mont. May 28, 1985) is instructive in this regard. In that case the court stated that:

> [T]he special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully the potential impacts to the tribe [from coal leasing near the reservation]. ***Ignoring the special needs of the tribe and treating the Northern Cheyenne like merely citizens of the affected area and reservation land like any other real estate in the decisional process . . . violated this trust responsibility***. (*Emphasis added.)*

A fair reading of *Northern Cheyenne v. Hodel* is that the application of the HRS in Indian country without considering the special needs of the affected tribe and treating the tribal populations like any other citizen and reservation land like any other real estate is a violation of EPA's trust responsibility. CERCLA requires EPA to take "into account a variety of factors including [*inter* alia], the **population at risk**, . . . [and] the potential for destruction of **sensitive ecosystems** . . . ." (Emphasis added).

The population at risk is generally considered to be the number of people at risk. Although the HRS is not a full blown risk assessment, *Northern Cheyenne v. Hodel* indicates that EPA should, at the very least, survey the literature regarding the unique genetic, metabolic and dietary characteristics of the affected tribal populations, and assess the impact such characteristics might have on the tribal population's vulnerability to the contaminants present at the hazardous waste site. (See for example, Stuart G. Harris and Barbara L. Harper, *A Native American Exposure Scenario*, in Risk Analysis, Vol. 17, No. 6, p. 789). Similarly, using estimates of risk based on a hypothetical maximally exposed individual in Indian country is likewise, a violation of EPA's trust responsibility. Any assessment of exposure in Indian country should be tribal-specific and consider how the unique diets, cultural practices, and life-styles of tribal members affect their exposure levels.

The *Northern Cheyenne v. Hodel* reading of the trust obligation means that EPA cannot treat reservation land like any other real estate when it applies the HRS. Certainly, at a minimum, EPA should consider tribal cultural interests when it applies the HRS in Indian country. EPA does not define the term, "sensitive ecosystems," but defines a comparable term, "sensitive environments," as a terrestrial or aquatic resource, fragile natural setting, or other area with unique or highly valued environmental or **cultural** features. *Guidance for Performing Preliminary Assessments under CERCLA*, 1991. (Emphasis added).

Principles which follow from a reading of the Indian trust cases are that the trustee must take affirmative action to preserve trust property and to make trust property productive. These principles mirror and justify EPA's roles in both the protection and restoration of Indian lands.

Even a modified HRS that incorporates tribal cultural concerns and interests might be inadequate to address other tribal interests. In determining which DOD sites outside of Indian country to clean up first, the Department of Defense uses a "risk plus" approach that assesses relative risk information along with other factors, such as the status of legally enforceable cleanup agreements and the availability of cleanup technologies. DOD plans to use that same approach to prioritize sites in Indian country and has sought to identify other factors such as treaty rights and tribal- or Indian-specific statutes such as the American Indian Religious Freedom Act and the Native

American Graves Protection and Repatriation Act that should be considered "plus" factors. EPA should consider adapting and adopting the DOD model. Note that neither a modified HRS nor the DOD "risk plus" approach do much to identify or address what the court in *Northern Cheyenne v. Hodel* describes as "the special needs of the tribe."

3.3 Other Shortcomings of CERCLA in Indian Country

The 1985 Inventory of Hazardous Waste Generators and Sites on Selected Indian Reservations conducted by the Council of Energy Resource Tribes stated that hazardous waste site inventory and assessment work on Indian lands had simply not been done. The authors of the report went on to state that the potential for discovery of additional sites on reservations is great and that there is an urgent need for discovery of additional discovery and inventory work to be conducted on the 60 million acres of Indian lands in the United States. *Inventory of Hazardous Waste Generators and Sites on Selected Indian Reservations,* CERT/TR-85-1025, 1985, p. 3.

The CERT Inventory was admittedly only a sample. Section 126(c) of SARA required a more complete inventory.

> (c) Study. The President shall conduct a survey, in consultation with the Indian tribes, to determine the extent of hazardous waste sites on Indian lands. Such survey shall be included within a report which shall make recommendations on the program needs of tribes under this Act, with particular emphasis on how tribal participation in the administration of such programs can be maximized.

That survey was never conducted. A cursory rehashing of the CERT report with some input from the Bureau of Indian Affairs was submitted to the Congress. The admonition of the authors of the CERT report that the potential for discovery of additional sites on reservations is great and that there is an urgent need for discovery of additional discovery and inventory work to be conducted on the 60 million acres of Indian lands in the United States is as germane today as it was in 1985.

4. A Proposed Strategy to Clean Up Hazardous Waste Sites in Indian Country

First, EPA should work with the Department of Defense, Federal Aviation Administration, Department of Commerce, Department of Energy, Department of Agriculture, Administration for Native Americans and other Executive Agencies to inventory federal hazardous waste sites in Indian country. These federal facilities should be far more amenable to expedited cleanup under the federal facility environmental restoration programs than industry or other sites would be. The Department of Commerce and Department of Defense have undertaken efforts to identify hazardous waste sites in Indian country. The Administration for Native Americans also administers a grant program that supports tribal efforts to identify and assess hazardous waste sites within their borders.

Second, the U.S. Environmental Protection Agency should apply its trust obligations to prioritize and clean up hazardous waste sites in Indian country. Again, *Northern Cheyenne Tribe v. Hodel* is instructive as to how to proceed.

> Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider the impacts of his action upon a potentially affected Indian tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary's obligations are any less than this would be to render the trust responsibility a *pro forma* concept absolutely lacking in substance.

Northern Cheyenne v. Hodel stands for the proposition that the trust relationship between EPA and Indian tribes is the proper point of departure for prioritizing and cleaning up hazardous waste sites in Indian country. Specifically, the trust obligation, as set out in *Northern Cheyenne v. Hodel*, requires EPA to consult and collaborate with tribes to:

- identify the special needs of the tribe to oversee, regulate and otherwise participate in the identification, assessment and cleanup of hazardous waste sites in Indian country. These activities may require tribes to establish or strengthen systems to protect their treaty interests; to regulate the transport of hazardous materials through their lands; to ensure access to and protection of sacred sites; and to protect the people, lands and resources of the tribes from the effects of hazardous waste sites;
- identify and assess the cultural, environmental, social, economic, political and other impacts hazardous waste sites and the management and cleanup thereof may have on a potentially affected Indian tribe. This may require a renewed effort on the part of EPA to institute Brownfields projects in Indian country ;
- identify measures to mitigate deleterious impacts. This may mean education, training, technical assistance and general capacity and infrastructure building as well as the institution of response actions; and
- implement such measures to mitigate deleterious impacts.

A fair reading of the statutes, decisions and policies that define EPA's trust obligations indicate that these obligations do not require it to stop using the Hazard Ranking System to rank contaminated sites in Indian country. Nor do these obligations mean that EPA must grant contaminated sites in Indian country a "super priority" for immediate cleanup. The Supreme Court has held that Executive Branch officials are not required to advance or accede to every colorable claim, including demands for immediate and extra-stringent cleanup, which may be suggested by an Indian tribe. *United States v. Mason*, 412 U.S. 39 (1973). EPA may properly use the HRS to examine tribal cleanup prioritization claims critically and make a dispassionate analysis of their merit, but in doing so it must act and decide in the best interests of the Indian tribe. It follows that the HRS must be able to accurately assess the interests of the tribe.

The statutes, decisions and policies suggest a three step process for prioritizing contaminated sites in Indian country.

- First, they suggest that EPA should begin any prioritization of contaminated sites in Indian country by first identifying and addressing its trust obligations.

- After assessing its trust obligations the Department can then apply its modified Hazard Ranking System.
- Finally, EPA, in consultation with the affected tribe, should identify other factors, *e.g.*, treaty provisions, statutory requirements, availability of cleanup technology, consent decrees, etc. which should also be considered.

In short, what statutes, decisions and policies suggest is a "trust plus HRS plus" approach to prioritization in Indian country. Note, however, that the first leg has two parts—the identification of the EPA's trust obligation and the development and implementation of measures to address these obligations. This means that as part of its overall environmental restoration program, EPA should have an ongoing program to inventory hazardous waste sites in Indian country and to assess the cultural, environmental, social, economic, political and other impacts the past contamination and future environmental restoration activities may have on a potentially affected Indian tribe. Additionally, EPA should have an ongoing program of education, training, technical assistance and general capacity and infrastructure building for Indian tribes to support tribal participation in Superfund activities.