

Comment

Trust Betrayed: The Reluctance to Recognize Judicially Enforceable Trust Obligations Under the Indian Health Care Improvement Act (IHCIA)

*Lauren E. Schneider**

The federal trust doctrine developed out of the legal relationship between European sovereigns—and later, the United States government—and American Indian tribes. By signing treaties with Indian tribes, the settler governments entered into an ongoing relationship with sovereign tribal governments. The United States government has a duty to fulfill the promises inherent in these treaties, including the provision of such services as health care to Indian tribes. The trust doctrine embodies these obligations.

When Congress legislates with respect to American Indians and Indian tribes for the provision of services, such as the Indian Health Care Improvement Act of 1976 (IHCIA), Congress acts in fulfillment of its historic trust obligations. But the Indian Health Service (IHS) is drastically underfunded. Patients go without critical care. Hospitals cannot keep their doors open. Tribes have sought to enjoin the U.S. government to provide necessary health care under the trust doctrine and the IHCIA. This Comment

* J.D. Candidate, Loyola University Chicago School of Law, 2022. I want to acknowledge my personal complicity in the ongoing denial of justice to American Indian tribes and indigenous peoples and my family's historical connection to Indian land dispossession. My ancestor William Wilson Larimer, the great-grandfather of my mother's mother, purchased a tract of land from the United States government on March 16, 1882, in what settlers called Washington Territory. He homesteaded on this land, located in Snohomish County, Washington. It was later named Larimer's Corner, a name it carries to this day. His direct descendants, my mother's family, lived in Snohomish County continuously from 1882 until my grandmother's death in 2018. Only about thirteen miles from Larimer's Corner and twenty-seven years earlier, on January 22, 1855, the Native peoples and tribes of the greater Puget Sound region were coerced into signing the Treaty of Point Elliott, dispossessing them of their ancestral lands and forcing their removal to reservations designated by the federal government. In exchange for their lands, the treaty promised that the United States would pay the represented tribes \$150,000 over ten years. It also promised "to employ a physician . . . , who shall furnish medicine and advice to their sick . . ." Many promises made in the treaty to tribal leaders were not fulfilled. The lands that now comprise Snohomish County, Washington, are the ancestral homelands of the contemporary Tulalip Tribes, including the Duwamish, Snohomish, Snoqualmie, Skagit, Suiattle, Samish, and Stillaguamish people. My family settled on the stolen lands of the ancestors of the people of the Tulalip Tribes, and I benefit directly and indirectly from this historic dispossession.

analyzes divergent approaches in the Eighth and Ninth Circuit Courts of Appeals regarding the judicial enforceability of federal trust obligations under the IHCIA. This Comment argues that, in recent years, the Supreme Court has interpreted the trust doctrine and its enforceability under statutes too narrowly to be compatible with the trust doctrine's federal common law principles. Finally, this Comment proposes that a broader interpretation of judicially enforceable trust obligations inherent in statutes like the IHCIA would be more faithful to original common law principles, align with human rights and indigenous peoples' rights principles under international law, and initiate long overdue restorative justice for American Indians.

I. INTRODUCTION	1101
II. HISTORICAL BACKGROUND: THE TRUST DOCTRINE	
AND HEALTH CARE	1107
A. <i>The Federal Trust Doctrine</i>	1107
1. The Trust Doctrine's Development: The Treaty Era and the Marshall Trilogy	1109
2. Congressional Plenary Control: Late Nineteenth- and Early Twentieth-Century Evolution of the Trust Doctrine	1113
3. Narrow Statutory Enforcement: The Court's Interpretation of the Federal Trust Doctrine Since 1980	1116
B. <i>Federal Provision of Health Care Services to American Indians</i>	1121
1. Early History and Policy	1121
2. The Snyder Act of 1921	1123
3. The Indian Health Care Improvement Act of 1976 (IHCIA).....	1124
III. THE IHCIA IN THE EIGHTH AND NINTH CIRCUITS	1129
A. <i>White v. Califano</i>	1131
B. <i>Quechan Tribe of the Fort Yuma Indian Reservation v. United States</i>	1137
C. <i>Recent Application in Rosebud Sioux Tribe v. United States</i>	1140
1. Considering When the Federal Government Owes a Trust Duty to Tribes	1142
2. Considering the Statutory Basis for the Breach of Trust Claim.....	1144
3. Applying <i>White</i> and Supreme Court Precedent to <i>Rosebud Sioux Tribe</i>	1147

IV. THE TRUST DOCTRINE'S NARROWING ENFORCEABILITY	1149
A. <i>Divergent Approaches to the Trust Doctrine in the Eighth and Ninth Circuit Courts of Appeals</i>	1150
B. <i>Narrowing the Federal Trust Doctrine in the Rosebud Sioux Tribe Appeal</i>	1158
1. <i>Narrowing the Sources of the Trust Doctrine</i>	1159
2. <i>Narrowing the Scope of the Trust Doctrine</i>	1160
3. <i>Reducing the Enforceability of the Federal Trust Doctrine</i>	1161
C. <i>Predictions for the Supreme Court's Resolution of the Circuit Split</i>	1164
V. REHABILITATING THE TRUST DOCTRINE.....	1167
A. <i>Ground the Trust Doctrine in Its Common Law Origins</i> .1167	
B. <i>Update the Trust Doctrine with Contemporary Principles of International Law</i>	1170
C. <i>Apply the Common Law and White District Court's Approach to Find Judicially Enforceable Trust Obligations under the IHCA</i>	1173
VI. CONCLUSION.....	1177

I. INTRODUCTION

Rosebud Hospital, a thirty-five-bed medical facility, is the primary health care provider for members of the Rosebud Sioux Tribe.¹ It serves approximately 35,000 Rosebud Sioux living on or around the Rosebud Indian Reservation in South Dakota.² It is also the only provider of emergency medical services within a roughly forty-five-mile radius.³ The

1. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-06-17-00270, ROSEBUD HOSPITAL: INDIAN HEALTH SERVICE MANAGEMENT OF EMERGENCY DEPARTMENT CLOSURE AND REOPENING 1 (2019) [hereinafter ROSEBUD HOSPITAL CASE STUDY]; see also *Rosebud Service Unit*, INDIAN HEALTH SERV., <https://www.ihs.gov/Rosebud/> [<https://perma.cc/U32Y-XMTM>] (last visited Apr. 9, 2021) (describing Rosebud Hospital and its role in the community). Rosebud Hospital, along with many other IHS hospitals on rural Indian reservations, has suffered for years from inadequate funding, insufficient staffing, high turnover in leadership, and citations from federal regulators for unsafe conditions at facilities. See generally Dan Frosch & Christopher Weaver, 'People Are Dying Here': Federal Hospitals Fail Tribes, WALL ST. J. (July 7, 2017, 10:16 AM), <https://www.wsj.com/articles/people-are-dying-here-federal-hospitals-fail-native-americans-1499436974> [<https://perma.cc/SQK4-SBEC>].

2. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 2; *Rosebud Service Unit*, *supra* note 1. Rosebud Hospital provides a range of health care services, including obstetric, dental, pediatric, and emergency services. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 2.

3. See ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 1 (noting that when Rosebud's emergency room closed, patients were forced to travel to the next-nearest emergency rooms, forty-five and fifty-five miles away); see also Dana Ferguson, *Feds Again Probe Problems at Government-*

Indian Health Service (IHS), a division of the Department of Health and Human Services (HHS), operates Rosebud Hospital.⁴

In November of 2015, federal inspectors for the Centers for Medicare and Medicaid Services (CMS) evaluated Rosebud Hospital for compliance with safety regulations.⁵ CMS inspectors cited several violations⁶ and deemed the hospital in “immediate jeopardy,” the most serious deficiency categorization based on the scope of potential harm to patients.⁷ On November 23, 2015, CMS sent Rosebud Hospital a notice setting December 12, 2015, as the deadline by which the hospital had to correct the alleged violations, or CMS would terminate its provider agreement with the hospital.⁸ But on December 5, 2015, IHS unilaterally placed Rosebud Hospital’s Emergency Department (ED) on “divert status”—effectively closing down the reservation’s only emergency medical services provider—and cited “staffing changes and limited resources” in its news release of the decision.⁹

IHS’s decision had immediate consequences. Patients who needed urgent medical care were diverted to hospitals in Winner, South Dakota,

Run South Dakota Hospital, ARGUS LEADER (Aug. 4, 2018, 2:05 PM), <https://www.argusleader.com/story/news/politics/2018/08/04/rosebud-sioux-tribe-feds-probe-south-dakota-ihs-hospital-medicare-medicare/874640002/> [<https://perma.cc/9ZWM-P3AS>] (noting that sick and injured patients were transported nearly an hour away when the Rosebud ED was closed).

4. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 1; *see also Agency Overview*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/overview/> [<https://perma.cc/BS43-RLLY>] (last visited Apr. 9, 2021) (describing the IHS as an agency within the Department of Health and Human Services).

5. Complaint at 10, *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986 (D.S.D. 2020) (No. 16-CV-03038). CMS regularly monitors IHS hospitals’ compliance with minimum quality and safety standards for participation in CMS reimbursement. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 3; *see also id.* at 6 (“During an onsite survey in November 2015, CMS found both quality-of-care and operational problems across Rosebud Hospital departments and cited the hospital for noncompliance with nearly one-third (7 of 23) of the Medicare CoPs [Conditions of Participation].”).

6. Complaint, *supra* note 5, at 10. Specifically, the federal surveyors “identified condition-level deficiencies related to the Governing Board, Patient Rights, QAPI program, Medical Staff, Medical Record Service, Physical Environment, and Emergency Services” categories of the Medicare Conditions of Participation. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 6.

7. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 6. Within the Emergency Services category of the Medicare Conditions of Participation, the surveyors noted the hospital’s “failure to provide adequate and timely treatment for four patients,” including two patients with chest pain, a pediatric patient with possible head injury, and “a patient who delivered a pre-term baby unattended on the ED bathroom floor.” *Id.*

8. Complaint, *supra* note 5, at 10. IHS hospitals must either be certified by CMS or accredited by a health care accrediting organization that meets CMS’s reimbursement requirements. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 3.

9. Complaint, *supra* note 5, at 11; *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 988–89 (D.S.D. 2020) (“On December 5, 2015, Indian Health Service (IHS) placed the Rosebud IHS Hospital Emergency Department in Rosebud, South Dakota, on ‘divert status.’”); *see also Ferguson*, *supra* note 3 (noting that the IHS closed the Rosebud ED while trying to improve the facilities and avoid federal funding cuts, resulting in patients being transported nearly an hour away).

and Valentine, Nebraska, about forty-five and fifty-five miles away, respectively.¹⁰ IHS did not tell Rosebud's staff in advance about its decision to divert patients.¹¹ Nor did IHS notify the receiving hospitals of the Rosebud ED closure, so they had no time to prepare for the additional patients.¹² Several patients died in transit trying to get to hospitals nearly an hour's drive away.¹³ Rosebud Hospital's ED remained closed for over seven months, through July 15, 2016.¹⁴

On April 28, 2016, Rosebud Sioux Tribe sued the United States government, HHS, and its constituent agency IHS, seeking declaratory and injunctive relief.¹⁵ The tribe alleged that the United States government had, through federal legislation, "undertaken the specific trust obligation of providing health care to Indians."¹⁶ In closing the Rosebud Hospital ED, the tribe argued that the government had violated

10. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 992 (noting both Winner and Valentine were about fifty miles from Rosebud); ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 1; *see also* Ferguson, *supra* note 3 (noting that sick and injured patients were transported nearly an hour away when the Rosebud ED was closed in December 2015).

11. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 8.

12. *Id.*

13. Ferguson, *supra* note 3; *see also* Lisa Kaczke, *Rosebud's ER Improved After Forced 2015 Closure. It Didn't Last, Report Shows.*, ARGUS LEADER (July 23, 2019, 3:36 PM), <http://www.argusleader.com/story/news/2019/07/23/indian-health-service-rosebud-hospital-didnt-sustain-improvements-after-forced-closure/1803042001/> [<https://perma.cc/9TSU-W7KF>] (noting that the additional patients taxed the receiving hospitals' resources). Reports suggested that the extra distance to the hospital and the lack of preparation by the already underresourced receiving hospitals contributed to negative health outcomes. *Id.*; *see also* ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 8–12 (describing the effects of the short notice closure on other underresourced area health facilities and the consequences for patients seeking emergency services).

14. ROSEBUD HOSPITAL CASE STUDY, *supra* note 1, at 1; *see also* Kaczke, *supra* note 13 (noting that Rosebud's ED remained closed for seven months after the 2015 inspection).

15. Complaint, *supra* note 5, at 1. The Rosebud Sioux Tribe asked the court for a declaratory judgment requiring IHS to acknowledge that it violated federal statutes and its trust duties arising under treaty and statutes by closing the Rosebud Hospital ED. *Id.* at 21–22. The tribe also asked the court for an injunction that "(a) preliminarily and permanently forces IHS to re-open and properly staff the emergency room at the Rosebud Hospital and enjoins IHS from further action in closing the Rosebud Hospital's facilities . . . ; (b) requires IHS to comply with its trust duties to the Tribe, protect the Tribe's entitlement to health care services, take sufficient measures to ensure health services are provided to members of the Tribe that permit the health status of the Tribe and its individual members to be raised to the highest possible level . . ." *Id.* at 22–23.

16. Complaint, *supra* note 5, at 5. The tribe cited federal obligations to provide health care to American Indians arising under the Snyder Act of 1921, 25 U.S.C. § 13; the Indian Health Care Improvement Act of 1976 (IHCIA), 25 U.S.C. § 1601 *et seq.*; and the Patient Protection and Affordable Care Act of 2010 (ACA), 25 U.S.C. § 103, that permanently reauthorized the IHCIA. *Id.* at 5–6. "In enacting the Snyder Act, the IHCIA, and the Affordable Care Act, Congress imposed statutory trust duties on the United States to confer upon tribes the right to receive health care services and a duty to protect these rights. . . . Having undertaken responsibility for Indian health care, the United States has a statutory and fiduciary trust obligation to provide such care in a competent manner." *Id.* at 6–7.

its trust duty to provide health care services.¹⁷ The tribe claimed that it was, therefore, entitled to a declaratory judgment acknowledging this breach, as well as an injunction mandating IHS “to comply with its trust duties to the Tribe, protect the Tribe’s entitlement to health care services, and take sufficient measures to ensure that health services are provided to members of the Tribe.”¹⁸

The tribe asserted a judicially enforceable trust obligation, originating in the common law trust relationship between the United States government and American Indian tribes,¹⁹ and articulated in federal legislation, including the Indian Health Care Improvement Act of 1976 (IHCA).²⁰ But the IHCA’s scope and enforceability under the federal trust doctrine is uncertain.²¹ Only two federal appellate courts have directly addressed the issue, and they reached different conclusions.²² The U.S. Court of Appeals for the Eighth Circuit held in *White v. Califano* that the IHCA *did* create specific trust obligations for the federal government to provide health care services for American Indians and that

17. Complaint, *supra* note 5, at 17; *see also* *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 989 (D.S.D. 2020) (stating the allegations in the breach of trust action).

18. Complaint, *supra* note 5, at 18; *see also* *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 989 (stating the relief claimed).

19. “American Indian tribe” (or “Indian tribe” or “tribe” when shortened for convenience) is the term used throughout this Comment to refer to the sovereign, self-governing legal entities that are composed of individual members who trace their ancestry back to the original inhabitants of land that is now governed by the United States. This Comment uses “American Indian” or “Indian” to refer to the people who claim this ancestry. This is consistent with the terminology and usage in the *Restatement (Third) of the Law of American Indians* and in Cohen’s *Handbook of Federal Indian Law*, the two primary legal treatises in this field. Per the *Restatement*’s definition, “An ‘Indian tribe’ is any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that either: (1) the Secretary of the Interior; or (2) Congress pursuant to its plenary authority has acknowledged to exist as an Indian tribe.” RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS § 2(a) (AM. L. INST., Tentative Draft No. 1 2015).

20. Complaint, *supra* note 5, at 16–17 (“The federal government has a specific, special trust duty, pursuant to the Snyder Act, the IHCA, the Treaty of Fort Laramie, and federal common law, to provide health care services to the Tribe and its members and to ensure that health care services provided to the Tribe and its members do not fall below the highest possible standards of professional care.”); *see also* *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 996 (identifying the substantive sources of law for the Tribe’s complaint).

21. *See* *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998 (discussing the U.S. Supreme Court’s decision in *Lincoln v. Vigil*, brought under the Snyder Act, the IHCA, and the APA, where the Court ruled on the reviewability under the Administrative Procedure Act of congressional allocations made under these health care-related statutes, but where the Court declined to issue a holding based on the general trust relationship between the federal government and American Indians); *see also* *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (“Whatever the contours of [the trust] relationship, though, it could not limit the [IHS’s] discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.”).

22. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998–99 (comparing the cases brought in the Eighth and Ninth Circuits); *see also* cases cited *infra* note 138.

courts could enforce these obligations through equitable relief.²³ But the U.S. Court of Appeals for the Ninth Circuit held in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States* that there was no judicially enforceable trust obligation under the IHCA to provide specific health care services to Indian tribes.²⁴

Despite the Ninth Circuit's interpretation, the U.S. District Court for the District of South Dakota ruled in *Rosebud Sioux Tribe v. United States* that Supreme Court precedent had not foreclosed the finding of an affirmative trust obligation to provide health care services.²⁵ Following Eighth Circuit precedent, the district court ruled in favor of the tribe and issued a declaratory judgment that the government owed the tribe "a duty to provide competent physician-led health care to the Tribe and its members."²⁶ The government has appealed the ruling to the Eighth Circuit,²⁷ where it is currently pending.²⁸

The extent to which statutes providing health care services for American Indians and Indian tribes embody specific trust obligations is debated,²⁹ but the statutes themselves broadly declare Congress's

23. See *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (holding that "Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians" and thus the federal government had to pay for emergency inpatient mental health care for indigent tribe member); see also *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998 (citing the Eighth Circuit affirming the district court's reasoning in *White v. Califano*).

24. *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015); see also *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999 ("The Ninth Circuit and a district court therein, however, have considered claims brought by tribes alleging a governmental duty to provide health care and found that no such trust duty existed.").

25. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999 ("This Court does not accept the Government's conclusion that it owes no duty for health care to the Tribe or its members. Although some courts have found that the Snyder Act and the IHCA speak of Indian health care in terms too general to create an enforceable duty, the Eighth Circuit has explicitly recognized that these acts create a 'legal responsibility to provide health care to Indians.' Furthermore, despite these 'general terms,' the Supreme Court made note of IHS's 'statutory mandate to provide health care to Indian people.'" (citations omitted)).

26. Judgment at 1–2, *Rosebud Sioux Tribe*, 450 F. Supp. 3d 986 (No. 16-CV-03038); see also *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1005 ("It is further ordered that the Tribe's motion for summary judgment, Doc. 88, is denied in part, but granted to the limited extent that this Court issues a declaratory judgment that the Defendants' duty to the Tribe under the 1868 Treaty of Fort Laramie expressed in treaty language as furnishing 'to the Indians the physician' requires Defendants to provide competent physician-led health care to the Tribe's members.").

27. Notice of Appeal at 1, *Rosebud Sioux Tribe*, 450 F. Supp. 3d 986 (No. 16-CV-03038) (appealing the opinion and declaratory judgment from the U.S. District Court of the District of South Dakota to the Eighth Circuit).

28. See *Rosebud Sioux Tribe v. United States*, No. 20-2062 (8th Cir. argued Mar. 18, 2021).

29. Compare *McNabb v. Bowen*, 829 F.2d 787, 794–95 (9th Cir. 1987) (holding that the IHCA embodied congressional intent and the trust doctrine required that the federal government meet health care needs of American Indians when those needs were unmet by state and local programs), and *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (holding the IHCA created an obligation to provide health care services to an indigent Indian woman), with *Gila River Indian*

legislative policy to uphold the government's trust obligations.³⁰ The executive branch and its constituent agencies likewise affirm this responsibility.³¹ But the Supreme Court in recent years has significantly narrowed the scope of the federal government's judicially enforceable trust obligations to American Indians.³² This raises the question relevant to the Rosebud Sioux Tribe in IHS's forced closure of the tribe's sole provider of emergency health services: if courts cannot enforce IHS's statutory mandate to adequately maintain an IHS-operated hospital because the IHCA does not embody federal trust responsibilities, then what purpose does the trust relationship serve? How can the federal trust relationship be meaningful at all, if the beneficiary of the trust relationship (American Indians and Indian tribes) cannot hold their trustee (the United States) accountable for the provision of services which they are entitled to by statute and common law?

This Comment will analyze the circuit split between the Eighth and Ninth Circuits on the issue of whether the IHCA embodies a judicially enforceable trust obligation of the federal government to provide health care services to American Indians. This Comment will, in its second part,

Cnty. v. Burwell, No. 14-CV-00943, 2015 WL 997857, at *4–5 (D. Ariz. Mar. 6, 2015) (finding that the Indian Self-Determination and Education Assistance Act and other related health care legislation did not indicate government responsibility for providing services).

30. See Act of Nov. 2, 1921 (Snyder Act), Pub. L. No. 67-85, ch. 115, 42 Stat. 208, 208–09 (codified as amended at 25 U.S.C. § 13) (“[T]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: General support and civilization, including education. For relief of distress and conservation of health. . . . For the employment of . . . physicians . . .”); see also Indian Health Care Improvement Act, 25 U.S.C. § 1602 (“[I]t is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians—(1) to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy . . .”).

31. See, e.g., *Statement on the Reauthorization of the Indian Health Care Improvement Act*, 1 PUB. PAPERS 406 (Mar. 23, 2010) (“Our responsibility to provide health services to American Indians and Alaska Natives derives from the nation-to-nation relationship between the federal and tribal governments.”); see also *Basis for Health Services*, INDIAN HEALTH SERV. (Jan. 2015), <https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/> [<https://perma.cc/GCR6-NGEH>] (“The trust relationship establishes a responsibility for a variety of services and benefits to Indian people based on their status as Indians, including health care.”).

32. See, e.g., Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “*We Need Protection from Our Protectors*”: *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T. & ADMIN. L. 397, 441 (2017) (“Regardless of what the Executive Branch may assert, it could not avoid the federal trust responsibility without a Supreme Court inclined to rule against Indians and skeptical of the federal trust responsibility.”); *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (“Whatever the contours of [the trust] relationship, . . . it could not limit the Service’s discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.”); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (“The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”).

trace the development of the trust doctrine and the Court's interpretation of the relationship between the federal government and American Indian tribes and their members. It will also discuss Congress's affirmation of the federal trust doctrine's principles through legislation providing health care services to tribes.

In its third part, this Comment will discuss the respective Eighth and Ninth Circuit holdings and how the district court in *Rosebud Sioux Tribe v. United States* applied the Eighth Circuit's reasoning to reach its judgment in favor of the tribe. In the fourth part, this Comment will show that the Ninth Circuit based its reasoning on a flawed interpretation of previous Supreme Court holdings on top of an imprecise application of these holdings to the facts of the case it considered. Further, this part predicts that the Supreme Court would most likely agree with the government's similarly flawed reasoning in its *Rosebud Sioux Tribe* appeal. Finally, this Comment will propose that a radical judicial reinterpretation of the trust doctrine—one that would simultaneously return to federal common law principles while adopting current international law principles—could rehabilitate the trust doctrine as a right with a remedy. American Indians and Indian tribes could then enjoin the federal government to provide the health care services they are entitled to receive.

II. HISTORICAL BACKGROUND: THE TRUST DOCTRINE AND HEALTH CARE

Before discussing the Eighth and Ninth Circuits' divergent approaches to the federal trust doctrine and the subsequent application in *Rosebud Sioux Tribe v. United States*, it is necessary to trace the development of this unique legal doctrine, from its earliest articulation by Chief Justice John Marshall through the most recent Supreme Court holdings. These cases also implicate the government's provision of health care services to American Indians and Indian tribes. Thus, it is also important to understand Congress's health care legislation and policy for American Indians and the executive branch's role in implementing this legislation.

A. *The Federal Trust Doctrine*

The federal trust doctrine's earliest formulations took shape out of the treaty tradition derived from seventeenth- and eighteenth-century international law³³ and the Supreme Court's subsequent interpretation of the legal relationship between indigenous American peoples and

33. See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1] (Neil Jessup Newton, ed., 2019), LEXIS [hereinafter COHEN'S HANDBOOK] (describing European concepts of customary international law that influenced British, and later American, policy toward Indian tribes during the colonial era).

European colonizers.³⁴ The Court's first characterization of this relationship both recognized tribal sovereignty in theory while subjugating it in practice to the presumed Anglo-American supremacy of the era.³⁵ The treaty tradition, nonetheless, recognized inherent tribal sovereignty and required by law that the European (and later, American) governments provide goods, ongoing services, and protection from external interference to Indian tribes in exchange for their land—basic principles upon which the common law articulation of the federal trust doctrine was founded.³⁶

The trust doctrine evolved through periods where the Court asserted its presumed Eurocentric cultural superiority as justification for the federal government exercising complete control as the “guardian” over Indian tribes as a “ward,” to justify its exploitation of tribal land and resources.³⁷ Eventually, the Court came to describe the federal trust doctrine through principles of agency law, by virtue of both the de facto control the federal government had assumed over indigenous lands and resources over time and de jure control gained through federal

34. See RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS, *supra* note 19, § 4 cmt. a (“The trust relationship is based on the original understanding at the time of the Founding of the government-to-government relationship of preexisting sovereigns. The Supreme Court initially analogized the relationship of Indian tribes to the United States to a doctrine of the law of nations: that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government. The trust relationship was first exemplified during the treaty-making process, where the United States either explicitly or implicitly agreed to protect individual Indians and Indian tribes from outsiders in exchange to title to what would become the vast public domain.”).

35. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (articulating the “law of discovery,” by which European powers adhered to a doctrine of international law giving European powers exclusive claim to the title of land to the “discoverer” against all other European countries, whereas native peoples, though recognized as sovereigns, had only the “right of occupancy” to their newly “discovered” lands); see also *id.* at 588–92 (rationalizing the European conquest of the Americas and the United States’ rightful accession to this legacy based on the inherent right of stronger, “civilized” nations to conquer and then control native inhabitants viewed as “fierce savages” by Europeans); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 424–25 (1984) [hereinafter *Rethinking the Trust Doctrine*] (describing Chief Justice Marshall’s derivation of the trust doctrine from his own moral judgment that obliged the United States to act as guardian to Indian tribes, as a stronger nation to a weaker nation).

36. See *Rey-Bear & Fletcher*, *supra* note 32, at 402 (“[F]ederal-Indian treaties and agreements are essentially contracts between sovereign nations, which typically secured peace with Indian tribes in exchange for land cessions, which provided legal consideration for the ongoing performance of federal trust duties.”); COHEN’S HANDBOOK, *supra* note 33, § 1.03[1] (“Basic principles developed during this period [1789–1871] have nevertheless survived. Most notable are the general tenets that Indian tribes are governments, . . . [and] that the United States has a special trust obligation to Indians . . .”).

37. See *Rethinking the Trust Doctrine*, *supra* note 35, at 426–27 (describing the cultural theory of trust responsibilities from the late nineteenth through early twentieth centuries where the Court emphasized American Indians’ lack of civilization as justification for Congress to exert plenary power over them).

legislation.³⁸ The Court now understands the federal government's fiduciary obligations to American Indian tribes under the federal trust doctrine as limited only to situations where the government, pursuant to statute or regulations, exercises exclusive or near exclusive control over tribal property.³⁹

1. The Trust Doctrine's Development: The Treaty Era and the Marshall Trilogy

In the post-Contact, pre-Revolution era, English law required colonial land acquisitions from indigenous peoples to take place—at least nominally—through negotiated purchases memorialized in treaties with Indian tribes.⁴⁰ During the American Revolutionary War, the Continental Congress engaged as a sovereign government in treaty-making and diplomacy with Indian tribes, pledging mutual assistance, boundary recognition, and cessation of hostilities.⁴¹ The treaty tradition continued after the war ended, and early treaties guaranteed the United States

38. See *id.* at 427–28 (describing the control theory of the trust doctrine, whereby the United States' trust obligations as a fiduciary flow from the government's control over tribal land and resources).

39. See, e.g., *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542 (1980) (holding that the General Allotment Act did not obligate the federal government's exclusive management of tribal lands, so no fiduciary obligations attached under the Act); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–75 (2003) (holding that the federal government could be held liable for money damages for failing to preserve the historic property it exclusively occupied and held in trust on the White Mountain Apache reservation); *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 506–07 (2003) (holding that the government could not be held liable in money damages for breach of fiduciary obligations regarding the tribe's coal mine leasing royalties because the applicable governing statute and regulations did not provide the requisite substantive law to infer a trust relationship); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–74 (2011) (“The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a ‘trust,’ that trust is defined and governed by statutes rather than the common law. As we have recognized in prior cases, Congress may style its relations with the Indians a ‘trust’ without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is ‘limited’ or ‘bare’ compared to a trust relationship between private parties at common law.” (citations omitted)).

40. See COHEN'S HANDBOOK, *supra* note 33, § 1.02[1] (describing the competing seventeenth- and eighteenth-century European legal theories regarding European settlers' rights to Native-occupied lands in the Americas and dealings with Native peoples for acquisition of the land). “The English colonists, like the Dutch, Spanish, and French, also maintained the practice of dealing with tribal governments through treaties recognizing their sovereignty.” *Id.* Despite the legal requirement to acquire land through negotiations and treaty purchases with tribes, settlers did not consistently implement these laws, nor did they view or treat Native peoples as their equals. *Id.* Settlers broke treaties, disrespected negotiated boundary lines, and when Native peoples defended their land from intrusion, colonists responded with violence and conquest, resulting in further dispossession of Native land. *Id.*; see also JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 52–59 (2018) (discussing European justifications for the right to occupy Native land and make war on Native peoples when they “rebelled” against settlers and their governments).

41. See COHEN'S HANDBOOK, *supra* note 33, § 1.02[2].

receiving Indian tribes “into their protection.”⁴² Treaties also expressed the United States’ obligation to provide services to tribes as part of the bargained exchanges.⁴³ Therefore, treaties both recognized tribal sovereignty and ongoing obligations, which came to be viewed as trust responsibilities owed by one sovereign to another under its protection.⁴⁴

The common law articulation of the relationship between the federal government and American Indian tribes developed in the early days of the Supreme Court with the “Marshall Trilogy” cases.⁴⁵ *Johnson v. M’Intosh* was the first Supreme Court case to consider the nature of American Indian tribes’ title to their land in relation to the United States’ claim of sovereignty, which was grounded in the European understanding of international law of the day.⁴⁶ Chief Justice Marshall articulated the “law of discovery” as essential to the law of nations, which entailed that the European power that “discovered” a land reserved the rights (1) to

42. *Id.* (quoting Treaty with the Six Nations, 1784, 7 Stat. 15 (Treaty at Fort Stanwix)); see also RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS, *supra* note 19, § 4 Reporters’ Notes, cmt. a (listing twelve examples of treaties completed from 1784 through 1861 between the federal government and various Indian tribes, which incorporated language relating to the government’s obligation to “protect” tribes). In its original context, this legal term of art from international law referred to the federal government’s ongoing duty to preserve tribal property and self-government from external interference, not to control tribes’ internal affairs. *Id.*

43. See RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS, *supra* note 19, § 4 cmt. a; see also COHEN’S HANDBOOK, *supra* note 33, § 1.03[1] (“Treaties frequently called for the United States to deliver goods and services to the tribes as part of an exchange for vast amounts of Indian land. . . . Provisions were also commonly made for health and education services.”); Rey-Bear & Fletcher, *supra* note 32, at 402 (“In particular, federal-Indian treaties and agreements are essentially contracts between sovereign nations, which typically secured peace with Indian tribes in exchange for land cessions, which provided legal consideration for the ongoing performance of federal trust duties. In terms of consideration, it is beyond question that the United States has long reaped the benefit of vast cessions of Indian lands in exchange for its voluntarily and unilaterally imposed trust relationship.” (footnotes omitted)).

44. See COHEN’S HANDBOOK, *supra* note 33, § 1.03[1] (“The treaty tradition placed the word of the federal government behind the recognition of tribal sovereignty and federal trust obligations; these pledges, in turn, have fundamentally shaped Indian law and policy.”); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–99 (describing the origins and early development of the trust doctrine wherein treaties recognized tribal sovereignty, pledged to protect tribes from external interference, and promised the provision of goods and services).

45. See Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, HUM. RTS., May 2015, at 3, 3 (summarizing the “Marshall Trilogy” cases of *Johnson v. M’Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), and their respective holdings); see generally, AMERICAN INDIAN LAW DESKBOOK §§ 1:1–1:2, Westlaw (database updated June 2020).

46. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 LAW & HIST. REV. 67, 70 (2001); see also COHEN’S HANDBOOK, *supra* note 33, § 5.07[1] & n.3 (citing *Johnson v. M’Intosh* as establishing the existence and scope of Indian title to property). The case considered whether private buyers could purchase land from Indian tribes or whether the government maintained the exclusive purchasing rights. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 544–72 (1823) (reciting the factual background of the land purchase claims in question and summarizing the arguments of the plaintiffs and defendants).

exclude other European nations and (2) to determine by their own laws their relationship with the indigenous occupants, including the right to acquire land.⁴⁷ This articulation both recognized Native peoples' sovereignty—which presumed they must be dealt with on a nation-to-nation basis—while designating their status as inferior to the nations of Europe.⁴⁸ This holding both established a relationship between superior and inferior sovereigns and provided a legal basis for more efficiently appropriating American Indian lands.⁴⁹

The next two Marshall Trilogy cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, further clarified the Court's view of Indian tribes as sovereign nations, albeit nations of an inferior status, and first directly

47. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

Johnson, 21 U.S. at 573 (emphasis added); see also Kades, *supra* note 46, at 71 (describing a two-step rule outlined in *Johnson*: first to determine the right to exclude other nations from acquiring land via the “discovery rule,” and second for each nation to determine by its own laws how to acquire land from native peoples).

48. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Johnson, 21 U.S. at 574. According to Chief Justice Marshall, this status denied American Indian tribes full fee title to their land and the right of alienation to anyone but the federal government. *Id.* at 591–92 (“[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.”).

49. See Kades, *supra* note 46, at 110–13 (arguing that the Court was motivated in part to justify the federal government's exclusive sovereign right to deal with another sovereign, thus allow it to efficiently obtain more land).

alluded to the federal trust doctrine.⁵⁰ In *Cherokee Nation*, Chief Justice Marshall termed Indian tribes “domestic dependent nations,” with a relationship to the United States resembling “that of a ward to his guardian.”⁵¹ Again, this concept derived from Eurocentric international law of the time, when a stronger sovereign nation took a weaker nation into its protection.⁵² But in the American context, Chief Justice Marshall created “a new legal entity.”⁵³ Tribes were sovereigns with a government-to-government relationship with the United States, somewhat like that of the states to the federal government.⁵⁴ But by analogizing to the guardian-ward relationship, the Court also alluded to the federal government’s ongoing fiduciary responsibilities toward Indian tribes inherent in this type of trust relationship.⁵⁵

The following year, Chief Justice Marshall further elaborated on this new type of relationship in *Worcester v. Georgia*.⁵⁶ The Court reaffirmed the Cherokee Nation’s sovereignty in its own territory, subject to no state

50. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1215–20 (1975) (discussing the relationship between tribal nations and the federal government in the trust doctrine as expressed by the Marshall Court’s decisions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*); see also Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1464 (1991) (“The first legal interpretations of tribal status and federal-tribal relations appeared in the seminal *Cherokee Nation v. Georgia* and *Worcester v. Georgia* decisions by Chief Justice John Marshall.”).

51. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (“Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a *ward to his guardian*.” (emphasis added)).

52. See Rey-Bear & Fletcher, *supra* note 32, at 413 (explaining the dynamics of the United States recognizing Indian tribes as “under its protection”); see also COHEN’S HANDBOOK, *supra* note 33, § 5.07[1] (describing the international law origins of the trust doctrine). For discussion on this legal term of art in international law, see sources cited *supra* note 42.

53. LEPORE, *supra* note 40, at 215; see also Wood, *supra* note 44, at 1498 (“It has often been said that the relationship of Indian tribes to the federal government is unlike any other, or *sui generis*.”).

54. Rey-Bear & Fletcher, *supra* note 32, at 413.

55. *Id.* at 408. The “guardian-ward” characterization does not completely fit the nature of the relationship between the federal government and Indian tribes, though, because tribes do not lack legal capacity to act for themselves, as wards do. *Id.* Thus, the Marshallian conception of the trust relationship can rightly be criticized as paternalistic and racist, as it assumed Native peoples were not capable of acting in their own best interest, but instead relied on the “superior” judgment of Europeans. See *id.* at 408–09. But this characterization nonetheless also recognized inherent tribal sovereignty and legally cognizable fiduciary obligations, both of which are key foundational principles to understanding the common law articulation of the federal trust doctrine. *Id.*

56. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). The Court declared that Georgia had unlawfully exercised state jurisdiction on Cherokee land. *Id.*

government's jurisdiction over internal affairs.⁵⁷ Despite this declaration that Georgia had no authority to act within Cherokee land, the executive branch, led by President Andrew Jackson, infamously refused to enforce the Court's judgment recognizing tribal sovereignty.⁵⁸

Taken together, the Marshallian articulation of the trust relationship between the United States and Indian tribes simultaneously emphasized tribes' sovereign status while also deeming them dependent upon the United States.⁵⁹ The United States was, in turn, bound by its responsibilities as a sovereign "trustee" for American Indian nations and by its treaty promises.⁶⁰ These concepts tracked with Euro-American international law at the time.⁶¹ This trust relationship continued to develop throughout the nineteenth and twentieth centuries, when the United States' policies toward Indian tribes transitioned from expression in treaties to statutory law.

2. Congressional Plenary Control: Late Nineteenth- and Early Twentieth-Century Evolution of the Trust Doctrine

The tradition of treaty-making (and breaking) continued through waves of mid-nineteenth-century westward expansion until 1871, when Congress ended the practice of making treaties with Indian tribes with the Appropriations Act of March 3, 1871.⁶² After the 1871 Act, statutes and

57. *Id.* at 560–61 (“The very fact of repeated treaties with [the Cherokee tribe] recognizes [their title to self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.”).

58. LEPORE, *supra* note 40, at 215–16. The Cherokee were forced, soon after, to cede their remaining lands to Georgia and leave under threat of U.S. military force in the infamous Trail of Tears. *Id.* at 216.

59. See Chambers, *supra* note 50, at 1219–20 (discussing the Marshallian guardianship status conferred upon tribes as both recognizing tribes' sovereignty while also conferring the United States' protection); see also *Rethinking the Trust Doctrine*, *supra* note 35, at 423–25 (describing the Marshall Court holdings affirming the Cherokee Nation's sovereignty but also asserting its dependency upon the United States).

60. See Wood, *supra* note 44, at 1496–1500 (describing the “sovereign trusteeship” and its trust obligations).

61. See COHEN'S HANDBOOK, *supra* note 33, § 1.02[1] (discussing the European legal precedents embedded in the trust doctrine); see also Kades, *supra* note 46, at 71 (describing the European “law of discovery” put forth in *Johnson v. M'Intosh*); Rey-Bear & Fletcher, *supra* note 32, at 412 (noting the role of customary international law at the time of the writing of the Constitution in shaping federal Indian law and policy).

62. See COHEN'S HANDBOOK, *supra* note 33, § 1.03[9] (describing the termination of the practice of treaty-making but the validation by law of obligations made under previously ratified treaties, despite the frequent breaking or nonenforcement of treaty terms in practice); see also Act of Mar. 3, 1871, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) (“*Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged

executive orders expressed federal policy toward tribes, and the military and executive agencies enforced policy.⁶³ Congress enacted the Snyder Act in 1921, one of the trust doctrine's earliest expressions in federal legislation.⁶⁴ The Snyder Act authorized the Bureau of Indian Affairs to spend congressional appropriations "for the benefit, care and assistance of the Indians throughout the United States."⁶⁵ During this period, the Court deepened its commitment to the "guardianship" relationship between Indian tribes and the government, the latter having by that point appropriated nearly all tribal lands, created the reservation system, and destroyed traditional ways of life.⁶⁶

After deciding *Worcester v. Georgia* in 1832, the Court next considered the nature of the relationship between the federal government and Indian tribes more than fifty years later in *United States v. Kagama*.⁶⁷ Citing the Marshall Court's guardian-ward analogy, the Court emphasized tribes' dependency on the federal government's provision of goods and services⁶⁸—a dependency into which they had been forced

or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.").

63. See COHEN'S HANDBOOK, *supra* note 33, § 1.04 (discussing the federal statutes developed in the period 1871–1928, including the General Allotment Act, the Citizenship Act of 1924, military campaigns against Western tribes, and policies carried out by the Bureau of Indian Affairs—all of which generally carried out the "twin cornerstones" of federal Indian policy at the time of acquisition of land and cultural assimilation of Indians).

64. *Id.*

65. *Id.* (quoting Act of Nov. 2, 1921 (Snyder Act), 42 Stat. 208 (codified as amended at 25 U.S.C. § 13)). For further detail on the Snyder Act, see discussion *infra* Section II.B.2.

66. See *Rethinking the Trust Doctrine*, *supra* note 35, at 426–27 (describing the Supreme Court's opinions in the late nineteenth and early twentieth centuries expounding the federal government's duty to "civilize" American Indians, which served as justification for seizing tribal lands); see also COHEN'S HANDBOOK, *supra* note 33, § 1.04 (describing the policy changes of the "Allotment and Assimilation" era from 1871–1928).

67. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); Chambers, *supra* note 50, at 1224; see also *United States v. Nice*, 241 U.S. 591, 597–98 (1916) (quoting *Kagama* and holding that Indians may be both citizens as well as subject to the guardianship of the United States). The plaintiff in *Kagama* challenged the constitutionality of Congress's extension of criminal jurisdiction over tribal citizens for crimes committed on Indian reservations. *Kagama*, 118 U.S. at 376. Considering the relationship between the United States and Indian tribes, the Court reasoned that, although Indians had once retained "a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided," Congress now retained exclusive jurisdiction to extend the laws of the United States over tribal citizens. *Id.* at 381–82, 384–85.

68. *Kagama*, 118 U.S. at 383–84 ("These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course

precisely because of the United States' history of unfair dealings and treaty breaking. In 1903, the Court in *United States v. Rickert* declared American Indians "in a condition of pupilage," wherein one of the federal government's responsibilities was to "maintain[]" them in preparation for "assuming the habits of civilized life" and the eventual "privileges of citizenship," which had not yet been recognized.⁶⁹ The same year, in *Lone Wolf v. Hitchcock*, the Court declared Congress's "plenary authority" over Indian affairs, either pursuant to treaty or statute, and declared that Congress could unilaterally abrogate the terms of a treaty or the trust relationship if it decided to do so.⁷⁰

The Court thus significantly undermined the foundational principles of tribal sovereignty and self-government in the federal trust doctrine's original common law articulation.⁷¹ But against the executive branch, the Court utilized the trust doctrine to place judicially enforceable restrictions on federal agencies' power over Indian land and property in several early twentieth century cases.⁷² These cases reinforced the federal trust doctrine with general fiduciary principles of the common law of trusts, at least with respect to managing tribal property, where the government

of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power [exerted over them by the federal government.].").

69. *United States v. Rickert*, 188 U.S. 432, 437 (1903). In *Rickert*, the United States sued the treasurer and tax assessor of Roberts County, South Dakota, who had tried to assess taxes on improvements to allotments of land that several members of the Sisseton Band of Sioux Indians possessed under the General Allotment Act. *Id.* at 433. The Court held that the State could not tax United States property held in trust and granted only for occupation and use to the Indians as "wards of the Nation." *Id.* at 437.

70. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903); see also Chambers, *supra* note 50, at 1225. In *Lone Wolf*, Congress had passed legislation changing the reservation lands of the Kiowa, Comanche, and Apache tribes without the consent of three-fourths of the adult males of the tribes, as required by the tribes' 1867 treaty with the government that had created the reservation. See *Lone Wolf*, 187 U.S. at 554–63 (detailing the tribes' allegations of the United States' fraud and misrepresentations during the negotiation of an agreement with the federal government to sell tribal land and open it for settlement to white people). The Court held that Congress retained full authority to abrogate treaties with Indian tribes. *Id.* at 565–66. Thus, it did not matter that Congress had passed legislation that violated the 1867 treaty's terms, as Congress held unilateral authority to do so. *Id.* at 567–68.

71. See *Rethinking the Trust Doctrine*, *supra* note 35, at 427 & nn.25–26 (citing *Lone Wolf* and *Kagama* holdings that emphasized Congress's plenary control over tribal affairs and property); see also Chambers, *supra* note 50, at 1226 ("The effect of depriving tribes of land title [in the *Kagama* and *Lone Wolf* cases] was, as a practical as well as conceptual matter, destructive of the tribal powers of self-government confirmed in *Worcester*. This power of Congress recognized under the *Lone Wolf* rendition of the trust responsibility is manifestly awesome, perhaps, unlimited.").

72. See Chambers, *supra* note 50, at 1230–32 (arguing that in *Lane v. Pueblo of Santa Rosa*, *Cramer v. United States*, and *United States v. Creek Nation*, the Court held that federal executive agencies such as the Department of the Interior could not abrogate their fiduciary obligations to tribes with respect to the disposition or management of Indian lands).

could be judicially restrained from acting adversely to tribes' interests.⁷³

The Court also later conceded that although Congress had plenary power over Indian affairs per *Lone Wolf*, that power was not absolute.⁷⁴ Rather, Congress's power was limited by the responsibilities "inhering in . . . a guardianship,"⁷⁵ which included the duty of protection and the duty to act in the tribe's best interests.⁷⁶ Still, when interpreting the federal government's trust obligations under statutes enacted by Congress governing Indian affairs, the Court continued to rule narrowly as to the government's fiduciary duties as a trustee from this period onward.

3. Narrow Statutory Enforcement: The Court's Interpretation of the Federal Trust Doctrine Since 1980

Over the past forty years, the Court has addressed in several landmark cases the extent to which federal legislation embodies judicially enforceable fiduciary obligations, most often where tribes have sought monetary damages for alleged federal mismanagement of tribal lands and resources. Common to these cases are tribes' claims that the federal government has breached a specific fiduciary obligation created by statute and enforceable under the federal trust doctrine. Despite statutory language reaffirming federal trust obligations,⁷⁷ the Court has tended to

73. See *Chambers*, *supra* note 50, at 1246–47 (“[F]ederal officials can be judicially restrained from actions contrary to their fiduciary duties to Indians—actions which contravene the ordinary proprietary obligations of a fiduciary to a trust beneficiary—even if they are not contrary to any treaty, statute, or agreement.”).

74. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 52 (1946) (plurality opinion); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935).

75. *Creek Nation*, 295 U.S. at 109–10.

76. See *Rey-Bear & Fletcher*, *supra* note 32, at 423–24. *But see Chambers*, *supra* note 50, at 1226–27 n.66 (listing several examples of Congress's express termination by statute of the trust relationship with specific tribes).

77. See, e.g., 25 U.S.C. §§ 1902 (“[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . .”), 2401 (“(1) the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members, (2) included in this responsibility is the treaty, statutory, and historical obligation to assist the Indian tribes in meeting the health and social needs of their members . . .”), 2501(b) (“Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian self-determination policy for education . . .”), 3601 (“(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; . . .”), 3702 (“The purposes of this chapter are to—(1) carry out the trust responsibility of the United States and promote the self-determination of Indian tribes by providing for the management of Indian agricultural lands and related renewable resources . . .”), 4101(2) (“[T]here exists a unique relationship

rule narrowly on claims invoking statutorily affirmed federal fiduciary responsibilities enforceable by suits for legal or equitable relief.⁷⁸

In *Mitchell v. United States (Mitchell I)*, decided in 1980, the Court held that statutes disposing of tribal lands and resources—in this case, the General Allotment Act of 1887—did not necessarily establish judicially enforceable fiduciary obligations.⁷⁹ Congress must explicitly intend to create this obligation by statute.⁸⁰ Only then can a tribe sue for breach of trust seeking monetary damages.⁸¹ Some statutes, according to the *Mitchell I* Court, create only a “limited trust relationship,” to which fiduciary duties do not attach.⁸² The case returned in 1983 (*Mitchell II*) to test a different statute.⁸³ The *Mitchell II* Court held that, where statutes and implementing regulations plainly vest the federal government with exclusive or near exclusive responsibility to manage tribal resources, they “thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.”⁸⁴ To sue for monetary damages for breach of trust, the tribe’s claim must be grounded in a substantive source of law that clearly supports a trust relationship.⁸⁵ The Court in the

between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people . . .”).

78. See discussion, *infra* Section III.B (discussing this tendency as it arises in the case *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, 599 Fed. App’x 698 (9th Cir. 2015)).

79. *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542 (1980) (“The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands [under the Act].”). See generally General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388–91 (describing the allotment of tribal lands, held in trust by the United States, to individual members of tribes for their use).

80. See *Mitchell I*, 445 U.S. at 544 (“[W]hen Congress enacted the General Allotment Act, it intended that the United States ‘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 alienation of the land and to ensure that allottees would be immune from state taxation.”).

81. See *id.* at 546 (“The General Allotment Act, then, cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover monetary damages for Government mismanagement of timber resources must be found in some source other than that Act.”).

82. *Id.* at 542 (“We conclude that the [General Allotment] 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.”).

83. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983). In this case, the Court held that timber management statutes (codified at 25 U.S.C. §§ 406, 407, 466) and their implementing regulations established the federal government’s exclusive control over timber resources on the tribal lands at issue, and thus established a substantive source of law to infer a common law trust relationship. *Id.* at 219–23.

84. *Id.* at 224.

85. *Id.*; see also *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–75 (2003) (holding that the federal government could be held liable for money damages for failing to preserve the historic property it exclusively occupied and held in trust on the White Mountain Apache reservation); *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 506–07 (2003) (holding

Mitchell cases thus eschewed the traditional understanding that the trust relationship, with its origins in common law, could be enforced under common law alone.

In *Lincoln v. Vigil*, the Court further clarified that despite statutory language implying some quantum of trust responsibilities, an executive agency's spending discretion was not reviewable under the Administrative Procedure Act, and the trust doctrine did not preclude an agency from exercising its spending discretion.⁸⁶ Congress provides lump-sum appropriations pursuant to statutes—here, statutes providing health care services to American Indians—and agencies have discretion to adjust spending priorities.⁸⁷ According to *Lincoln*, Congress's lump-sum appropriations generally funding health care services under the Snyder Act and the Indian Health Care Improvement Act did not establish a judicially enforceable trust responsibility for the federal government to provide one *specific* health care program.⁸⁸ But the Court in *Lincoln* did not attempt to determine whether there were *any* judicially enforceable trust obligations for the provision of health care services under the respective statutes, or what the scope of such obligations might be.⁸⁹

that the government could not be held liable in money damages for breach of fiduciary obligations regarding the tribe's coal mine leasing royalties because the applicable governing statute and regulations did not provide the requisite substantive law to infer a trust relationship); *United States v. Navajo Nation (Navajo Nation II)*, 556 U.S. 287, 301–02 (2009) (foreclosing any fiduciary obligations arising from any other relevant statutes or regulations regarding the specific coal mine leasing royalties discussed in *Navajo Nation I*).

86. *Lincoln v. Vigil*, 508 U.S. 182, 193–95 (1993). In *Lincoln*, the Indian Health Service reallocated its annual lump-sum congressional appropriations provided under the Snyder Act and the Indian Health Care Improvement Act, discontinuing a residential mental health and therapeutic center for disabled Indian children of the Navajo and Hopi reservations, so that the funds could be used for a national mental health program for American Indians. *Id.* at 185–89. Tribal members sued the Director of the IHS, arguing that discontinuing the program violated the federal trust responsibilities to Indians and the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). *Id.* at 189.

87. *Id.* at 193 (“[A] lump-sum appropriation reflects a congressional recognition that an agency must be allowed ‘flexibility to shift . . . funds within a particular . . . appropriation account . . .’ [But] [o]f course, an agency is not free simply to disregard statutory responsibilities But as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) [of the Administrative Procedure Act] gives the courts no leave to intrude.” (quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318 (1975))).

88. *See id.* at 193–94 (“The [Indian Health] Service’s decision to discontinue the Program is accordingly unreviewable under § 701(a)(2). . . . [T]he appropriations Acts for the relevant period do not so much as mention the Program, and both the Snyder Act and the Improvement Act likewise speak about Indian health only in general terms.”).

89. *See id.* at 194–95 (“The Court of Appeals saw a separate limitation on the Service’s discretion in the special trust relationship existing between Indian people and the Federal Government. . . . Whatever the contours of that relationship, though, it could not limit the Service’s discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.”). After disposing of the case as unreviewable under the APA, the Court did not address the breach of trust claim, considering it to have been dependent upon reviewability under the APA. *Id.* at 195.

Most recently, in 2011 in *United States v. Jicarilla Apache Nation*, the Court further hollowed out the federal government's fiduciary obligations owed to Indian tribes under the trust doctrine. Although the plaintiff tribe asserted a narrow application of the fiduciary relationship,⁹⁰ the Court disagreed that the Jicarilla Apache Nation's claim of a common-law trust relationship between the federal government and Indian tribes supported the fiduciary exception to the government's claim of attorney-client privilege.⁹¹ But the Court went further than it had in prior holdings, declaring:

The Government, of course, *is not a private trustee*. Though the relevant statutes denominate the relationship between the Government and the Indians as a "trust," that trust is defined and governed by statutes rather than the common law. As we have recognized in prior cases, Congress may style its relations with the Indians a "trust" without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is "limited" or "bare" compared to a trust relationship between private parties at common law.⁹²

The Court thus denied meaningful recognition of a common-law trust relationship between the federal government and Indian tribes, despite the fact that the government here was acting, in fact, as trustee, managing funds held in trust for the tribe.⁹³ Justice Sotomayor observed in her lone dissenting opinion that the Court's holding in *Jicarilla Apache Nation* portends sweeping negative consequences for the trust doctrine's future.⁹⁴

The Court's holdings in its recent cases interpreting the federal trust doctrine leaves Indian tribes with significant unanswered questions: if

90. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 166–67 (2011). The Jicarilla Apache Tribe had sued the federal government for alleged mismanagement of trust funds, and in the course of discovery for the suit, the tribe moved to compel relevant documents that the government had withheld. *Id.* The government cited attorney-client privilege and the attorney work-product doctrine, and thus refused to produce the requested documents related to the trust funds. *Id.* at 166. The Court of Federal Claims granted the tribe's motion to compel in part, because the communications related to the management of trust funds and thus fell within a common law "fiduciary exception" to the attorney-client privilege. *Id.* at 167. The Jicarilla Apaches argued that "by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed." *Id.* at 170. The lower court agreed that the relationship between the federal government and Indian tribes was "sufficiently analogous to a common-law trust relationship" that the fiduciary exception applied. *Id.* at 167–68.

91. *Id.* at 173–74.

92. *Id.* (emphasis added) (citations omitted).

93. See *id.* at 188 (Sotomayor, J., dissenting).

94. See *id.* at 189 ("I fear the upshot of the majority's opinion may well be a further dilution of the Government's fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes."); see also Rey-Bear & Fletcher, *supra* note 32, at 443–44 (describing the problematic reasoning in *Jicarilla Apache Nation* that failed to recognize the federal government's primary obligation to tribes as a fiduciary in managing tribal trust funds and praising Justice Sotomayor's reasoning in dissent).

Congress's use of the word "trust" in statutes to describe its obligations toward tribes, coupled with the executive branch's subsequent undertaking the role of a trustee of funds, do not actually confer common-law fiduciary responsibilities on the federal government, then what does the federal trust doctrine actually mean?⁹⁵ And if the federal government owes no common-law fiduciary duties to Indian tribes, how should obligations of government-to-government agreements under the federal common law, traceable back to the early treaties and the Marshall trilogy and subsequently expressed in federal legislation, be discerned, much less enforced?

In summary, the Court initially conceived the common law relationship between the United States and Indian tribes as one between sovereign governments, with the "greater" nation owing protection from external interference and ongoing obligations to the "lesser" nations in exchange for land. As the federal government appropriated more and more tribal lands and resources, the Court's understanding of the relationship shifted to one of a "guardian-ward," which also implied ongoing fiduciary obligations. But the Court also delegated to Congress full plenary authority in the federal government's relationship with American Indians and Indian tribes. It held that federal agencies could be restrained from acting adversely to tribes' interests as beneficiaries, but that trust obligations expressed in statutes enacted by Congress could only be enforced in narrow circumstances.

Judicial interpretation and enforcement of the federal trust doctrine has often involved restraint of federal authority over Indian tribes' proprietary interests, and the Court has resolved the federal government's duties toward tribes according to fiduciary trust principles in such cases.⁹⁶ But courts have rarely been asked to resolve whether the trust doctrine includes the *affirmative* obligation to provide government services under any statutory construction, and if so, whether the provision of such services is judicially enforceable.⁹⁷ The federal government's provision

95. See, e.g., Transcript of Oral Argument at 15, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (No. 10-382) (Justice Sotomayor: "Is there . . . any greater value to a fiduciary duty than to manage the account for the benefit of the beneficiary? That's the very essence of what a trust means So what you're [the Government], it seems to me, you're arguing is there is no duty. You're saying it's all defined by statute only, but you're rendering—there's no need to use the word 'trust' because it wouldn't be a trust.").

96. See *Chambers*, *supra* note 50, at 1246–47 ("[F]ederal officials can be judicially restrained from actions contrary to their fiduciary duties to Indians—actions which contravene the ordinary proprietary obligations of a fiduciary to a trust beneficiary—even if they are not contrary to any treaty, statute, or agreement.").

97. See *id.* at 1245–46 ("Although a persuasive argument can be made that the trust responsibility includes a federal duty to provide some governmental services to Indians, no court has enforced such an obligation. . . . There is a dearth of case law on this general question, and it seems

of health care services to American Indians under the trust doctrine as expressed through federal legislation is now directly at issue in a circuit split between the Eighth and Ninth Circuits.

B. Federal Provision of Health Care Services to American Indians

The relationship of American Indian tribes with European nations and later the United States implicated issues of health and health policy from the first contact forward. The provision of health care services to tribes began during the treaty era, expanded in the twentieth century, and continues today. This section traces the development of the federal government's Indian health policy from its earliest treaty provisions through the permanent reauthorization of the Indian Health Care Improvement Act under the Patient Protection and Affordable Care Act in 2010. This section also identifies the government's history and expressed policy of providing health care services to American Indians as demonstrative of its ongoing, affirmative trust obligation.

1. Early History and Policy

The fraught relationship between American Indians and European colonizers and their American successors is inextricably intertwined with issues of health. As has been well documented, European contact with Native peoples of the Americas had devastating health consequences for the latter.⁹⁸ Native populations in the decades following the first settlements were decimated by European diseases they had no immunity to.⁹⁹ Before Europeans arrived, Native peoples had their own advanced

unlikely that courts will enforce any federal trust obligation to furnish government services to Indians. As in the tribal self-government area, identifying which services should be offered and their proper extent may be outside the area of judicial competence.”). Since the 1970s, few courts have directly addressed this question, other than the cited Eighth and Ninth Circuit cases that are the subject of this Comment, until the present-day *Rosebud Sioux Tribe* case. See also COHEN'S HANDBOOK, *supra* note 33, § 22.01[3] (noting that the trust responsibility alone probably is not legally enforceable against Congress).

98. See LEPORE, *supra* note 40, at 19 (“[T]he people of the New World: They died by the hundreds. They died by the thousands, by the tens of thousands, by the hundreds of thousands, by the tens of millions. The isolation of the Americas from the rest of the world, for hundreds of millions of years, meant that diseases to which Europeans and Africans had built up immunities over millennia were entirely new to the native peoples of the Americas. European ships, with their fleets of people and animals and plants, brought along, unseen, battalions of diseases: smallpox, measles, diphtheria, trachoma, whooping cough, chicken pox, bubonic plague, malaria, typhoid fever, yellow fever, dengue fever, scarlet fever, amoebic dysentery, and influenza. . . . The consequence was catastrophe.”). See generally DANIEL K. RICHTER, *Epidemics, War, and the Remapping of a Continent*, in BEFORE THE REVOLUTION: AMERICA'S ANCIENT PASTS 143, 143–70 (2011) (detailing the destruction wrought on Native populations from both European diseases and armed conflicts).

99. LEPORE, *supra* note 40, at 19; see also Betty Pfefferbaum et al., *Learning to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 367 (1995) (describing the devastating consequences of new European diseases introduced to the

medical remedies developed over millennia, but much of this wisdom was destroyed during the conquest and settlement.¹⁰⁰ The mass death brought on by disease made appropriation of Native land—by both violent and diplomatic means—much easier for the Europeans, who consequently saw their conquest and settlement as divinely ordained.¹⁰¹

Early treaties between Europeans (and later Americans) and American Indian tribes often included the provision of physicians and medical services as part of the exchange for lands,¹⁰² but there was no organized public health policy (neither for Americans in general nor for American Indians specifically) until the nineteenth century.¹⁰³ In the early nineteenth century, provision of medical services to American Indians centered around military outposts because the War Department managed Indian affairs at the time.¹⁰⁴ Congress first provided funds for Indian health care in 1832, when it appropriated \$12,000 to hire physicians and provide vaccinations against infectious diseases to which American

indigenous peoples of North America who had no immunity to them); Massimo Livi-Bacci, *The Depopulation of Hispanic America after the Conquest*, 32 POPULATION & DEV. REV. 199, 205 (2006) (discussing the arrival of new diseases from Europe in the Americas).

100. Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 212–13 (1997); see also B. Pfefferbaum et al., *supra* note 99, at 367 (noting archaeological and historical evidence indicating that Native Americans had healthy lifestyles and “natural and traditional” health wisdom).

101. LEPORE, *supra* note 40, at 20 (“Diseases spread ahead of the Spanish invaders, laying waste to wide swaths of the continent. It became commonplace, inevitable, even, first among the Spanish, and then, in turn, among the French, the Dutch, and the English, to see their own prosperity and good health and the terrible sicknesses suffered by the natives as signs from God.”); see also WALTER L. HIXSON, *AMERICAN SETTLER COLONIALISM: A HISTORY* 11 (2013) (“Settler colonials typically viewed their own projects as divinely inspired and providentially destined.”).

102. COHEN’S HANDBOOK, *supra* note 33, § 1.03[1] (citing e.g., Treaty with the Miamies, art. 6, Oct. 23, 1826, 7 Stat. 300, 301; Treaty with the Great and Little Osages, art. 6, June 2, 1825, 7 Stat. 240, 242; Treaty with the Chocktaws, art. 2, Jan. 20, 1825, 7 Stat. 234, 235) (“Provisions [in treaties] were also commonly made for health and education services.”). The 1868 Treaty of Fort Laramie, at issue in the *Rosebud Sioux Tribe* case, also provided that “in exchange for mutual peace and vast forfeiture of land by the Sioux Nation, ‘[t]he United States hereby agrees to furnish annually to the Indians the physician . . . and that such appropriations shall be made from time to time, on the estimate of the Secretary of the Interior, as will be sufficient to employ such persons.’” *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 996 (D.S.D. 2020) (alteration in original) (citing 1868 Treaty of Fort Laramie, art. XIII).

103. B. Pfefferbaum et al., *supra* note 99, at 368–69 (discussing the history of federal public health policy and the provision of healthcare services to American Indians); see also Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 122 (2019) (describing the earliest federal provisions of health care services to American Indians).

104. See B. Pfefferbaum et al., *supra* note 99, at 368–69 (stating that it was “not surprising” that the primary focus was on Indians residing near military posts since the War Department was responsible for health care); Hoss, *supra* note 103, at 122 (“In an effort to prevent the spread of infectious disease to United States soldiers, military physicians and missionaries treated Indians for diseases such as smallpox throughout the early 1800s.”).

Indians were particularly susceptible.¹⁰⁵

Coordination of Indian medical services transferred to civilian control in 1849 when the Department of the Interior took over the Bureau of Indian Affairs (BIA), but resources were scarce.¹⁰⁶ Although the BIA created a Division of Education and Medicine in 1873, the medical section was discontinued four years later for lack of funding.¹⁰⁷ Provision of services throughout the late nineteenth and early twentieth century continued to be sporadic, underfunded, and largely ineffective at stopping infectious disease outbreaks, which continued to plague Indian populations crowded together on reservations and in boarding schools.¹⁰⁸ Federal policy for Indian health care services struggled both to define and meet the scope of its obligations to American Indians given the inherent contradiction between their status as both noncitizen members of other sovereign nations¹⁰⁹ and also as “wards” of the U.S. government.¹¹⁰

2. The Snyder Act of 1921

The Snyder Act of 1921¹¹¹ broadly authorized the BIA to spend congressional appropriations for various services, including health care, to American Indians.¹¹² Congress thus declared an explicit, nationwide

105. B. Pfefferbaum et al., *supra* note 99, at 369; *see also* Hoss, *supra* note 103, at 122 (“The first congressional action regarding Indian health occurred in 1832, which authorized the Army to administer smallpox vaccinations for Indians.”).

106. COHEN’S HANDBOOK, *supra* note 33, § 22.04[1] (explaining that while the transfer brought attention to health care, “resources were never sufficient to address the need”); *see also* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 4 (2004) (noting the establishment of the Bureau of Indian Affairs within the Department of War in 1834 and its transfer to the Department of the Interior in 1849).

107. B. Pfefferbaum et al., *supra* note 99, at 369.

108. *See id.* at 369–73 (discussing the various policies and challenges regarding the provision of health services); *see also* Hoss, *supra* note 103, at 122 (“With the spread of disease throughout Indian reservations and crowded boarding schools [in the late nineteenth century], Congress was pressured to increase health care appropriations for Indians.”).

109. American Indians were not considered United States citizens until 1924, when Congress passed the Indian Citizenship Act. *See* Act of June 2, 1924, Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401).

110. B. Pfefferbaum et al., *supra* note 99, at 372.

111. Snyder Act, 25 U.S.C. § 13 (“The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: —General support and civilization, including . . . For relief of distress and conservation of health. . . . For the employment of . . . physicians . . .”).

112. COHEN’S HANDBOOK, *supra* note 33, § 1.04. The context for this policy was a shift in national policy to “civilization and assimilation,” since by the early twentieth century, the vast majority of remaining tribes had either been removed to reservations or divested completely of any right of occupancy of their own land. *Id.* The shift was motivated by a desire “[t]o assure that white values lived and Indian civilization died,” so “federal policy used the full power of law.” *Id.*

Indian health policy for the first time.¹¹³ The Snyder Act did not create any specific health care programs;¹¹⁴ rather, it authorized general congressional appropriations to fund a wide range of social development programs for the BIA to carry out.¹¹⁵ But the BIA, housed within the Department of the Interior, struggled to execute the Snyder Act's health care mandate.¹¹⁶

Indian health care programs transitioned in 1954 to the Public Health Service (PHS) within the Department of Health, Education, and Welfare (HEW), predecessor to the current Department of Health and Human Services (HHS).¹¹⁷ Now, the Indian Health Service (IHS) within HHS coordinates federal health care services and programs for American Indians.¹¹⁸ The reorganization in the 1950s greatly increased the number of American Indians that IHS served.¹¹⁹ The agency bore increased costs without receiving increased congressional appropriations; between 1955 and 1976, appropriations were "arbitrary."¹²⁰ IHS needed more systematic funding.

3. The Indian Health Care Improvement Act of 1976 (IHCA)

As context for the passage of the IHCA in 1976, federal Indian policy in the twentieth century shifted dramatically in a matter of decades. The destructive assimilation policies of the late nineteenth and early twentieth

113. R. Pfefferbaum et al., *supra* note 100, at 215; Hoss, *supra* note 103, at 122–23 (noting the passage of the Snyder Act in 1921 to provide appropriations for health and other general benefits).

114. B. Pfefferbaum et al., *supra* note 99, at 376–77 ("The Act, however, established only discretionary programs rather than entitlement to specific services. It did not adequately define eligibility, nor did it identify levels or goals for funding. Programs remained under the general direction of Congress." (footnotes omitted)).

115. See McCarthy, *supra* note 106, at 118–19 ("The [Snyder Act] is liberally construed for the benefit of Indians."). Other programs funded under the Snyder Act's auspices included those for education, economic development, administration of property, public facilities, law enforcement, and transportation. *Id.* at 118.

116. See McCarthy, *supra* note 106, at 120–21 (describing the BIA as "ill equipped" to carry out the Snyder Act); see also Hoss, *supra* note 103, at 123 ("Although some improvements were seen, health services remained insufficient to serve Tribal communities.").

117. Hoss, *supra* note 103, at 123; see also 42 U.S.C. §§ 2001–2004 (outlining the maintenance and operation of Indian hospitals and health services); COHEN'S HANDBOOK, *supra* note 33, § 22.04[1] (describing the history of the Indian Health Service). Though the reorganization occurred in 1954, the PHS assumed legal responsibility for Indian health care in 1955. B. Pfefferbaum et al., *supra* note 99, at 382.

118. McCarthy, *supra* note 106, at 120–21; see also *Agency Overview*, *supra* note 4 (describing IHS's organizational relationship to HHS and its mission).

119. B. Pfefferbaum et al., *supra* note 99, at 384 ("In the two decades following transfer to the PHS, the number of individuals served by the IHS increased: hospital admissions in both IHS and contract hospitals doubled, and there was a five-fold increase in the number of outpatient visits. Unfortunately, there was no statutory mechanism to assure funding, congressional appropriations were arbitrary, and the budget process failed to respond to the increased numbers of individuals served" (footnotes omitted)).

120. *Id.*

centuries shifted in the mid-1920s through early 1940s toward “more tolerance and respect for traditional aspects of Indian culture” and resulted in somewhat improved protections for Indian land and other rights.¹²¹ This era was followed by a much more destructive period of “termination” policy from 1943 to 1961, in which Congress ended both federal recognition of certain tribes and federal trusteeship over many individual and tribal landholdings.¹²² Congress also shifted management and funding of federal programs to state governments, as well as transferred criminal and civil jurisdiction over Indian lands from federal to state governments.¹²³ The federal government aimed to end the trust relationship, so that American Indians would have no separately recognized political status as tribal citizens.¹²⁴ This resulted in the weakening of tribal sovereignty and worsening of poverty of American Indians.¹²⁵ Finally, in the years since the end of the termination era (1961 to present), federal policy shifted again to promote Indian tribes’ self-determination and self-governance.¹²⁶ The passage of numerous statutes expanding services to American Indians and Indian tribes reflected this

121. See COHEN’S HANDBOOK, *supra* note 33, § 1.05 (describing the “Indian Reorganization” period from 1928–1942); see also B. Pfefferbaum et al., *supra* note 99, at 379 (describing the New Deal Era, increased congressional appropriations, and the reversal of forced assimilation policies alongside the Indian Reorganization Act’s rejuvenation of tribal self-governance).

122. See generally COHEN’S HANDBOOK, *supra* note 33, § 1.06 (describing the “Termination” period from 1943–1961).

123. See *id.*

124. *Id.* (“[F]ederal policy dealing with Indian lands and reserves during the termination era focused primarily on ending the trust relationship between the United States and Indian tribes, with the ultimate goal being to subject Indians to state and federal laws on exactly the same terms as other citizens.”).

125. *Id.* (describing the impact termination had on tribal land and communities); see also B. Pfefferbaum et al., *supra* note 99, at 380–81 (“Indian termination policy began with the aim of reversing federal Indian policy by eliminating Native programs. Whatever the motivations for termination—acquisition of Native land and resources, elimination of favoritism toward Indians, assimilation of Indians into the mainstream, or response to continued condemnation of existing programs—the result was severe budget cuts and the identification of tribes for whom federal government responsibility could be eliminated.” (footnote omitted)).

126. See generally COHEN’S HANDBOOK, *supra* note 33, § 1.07 (describing the “Self-Determination and Self-Governance” period). “As federal policy gradually moved away from the termination era, there was a return to much of the basic philosophy and many of the policy objectives rooted in the Indian reorganization era (1928–1942). . . . It was rooted in a recognition of government-to-government relationships between the federal government and individual Indian tribes. . . . The self-determination era and the concept of self-governance are premised on the principle that Indian tribes are, in the final analysis, the primary or basic governmental unit of Indian policy.” *Id.*

shift.¹²⁷ In 1976, Congress passed the IHCIA.¹²⁸

The IHCIA unequivocally expressed Congress's policy to provide health care services as demonstrative of the federal government's trust obligations to American Indians and Indian tribes.¹²⁹ The IHCIA described this responsibility as not simply discretionary policy, but as legally required under the federal trust doctrine.¹³⁰ The IHCIA provided for a comprehensive range of programs, authorized appropriation of funds to achieve the law's policy objectives, and permitted Medicaid and Medicare to reimburse health care providers for IHS-administered services.¹³¹ But despite its lofty declarations of responsibility pursuant to federal trust obligations, American Indians continue to suffer worse health measures than any other minority population in the United States.¹³² The IHCIA, like the Snyder Act, continued to authorize

127. *See id.* (including the Indian Civil Rights Act of 1968, the Menominee Restoration Act of 1973, the Indian Self-Determination and Education Assistance Act of 1975, the Tribal Self-Government Act of 1994, the Indian Child Welfare Act, the Archaeological Resources Protection Act, the National Museum of the American Indian Act, the American Indian Religious Freedom Act, the Tribally Controlled Schools Act, the Indian Arts and Crafts Act, the Native Americans Graves Protection and Restoration Act, and the Indian Education Act, and the Alaska Native Claims Settlement Act, among others).

128. Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (codified in scattered sections of 25 U.S.C.).

129. *See* 25 U.S.C. § 1601(1) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."); *see also* McCarthy, *supra* note 106, at 121 (describing how the IHCIA is "notable" for expressly recognizing the federal government's legal responsibility for providing health care services).

130. 25 U.S.C. § 1602 ("[I]t is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians—(1) to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy . . ."). The IHCIA also declared federal policy to raise Indians' health status, ensure Indian participation in the provision of health care services, increase the proportion of health care providers serving American Indians, consult with tribes regarding implementation, work in a government-to-government relationship with tribes, and "to provide funding for programs and facilities operated by Indian tribes and tribal organizations in amounts that are not less than the amounts provided to programs and facilities operated directly by the Service." *Id.*

131. B. Pfefferbaum et al., *supra* note 99, at 386 (providing an overview of the Indian Health Care Improvement Act and its programs and objectives); *see generally* Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400.

132. *See, e.g., Disparities*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/factsheets/disparities/> [<https://perma.cc/JYA8-HKSV>] (last visited Apr. 10, 2021) ("The American Indian and Alaska Native people have long experienced lower health status when compared with other Americans. Lower life expectancy and the disproportionate disease burden exist perhaps because of inadequate education, disproportionate poverty, discrimination in the delivery of health services, and cultural differences."); COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, VULNERABILITIES AND RESULTING BREAKDOWNS: A REVIEW OF AUDITS, EVALUATIONS, AND INVESTIGATIONS FOCUSED ON SERVICES AND FUNDING FOR AMERICAN INDIANS AND ALASKA NATIVES 1 (2017), https://www.oversight.gov/sites/default/files/oig-reports/CIGIE_AIAN_Vulnerabilities_Report.pdf [<https://perma.cc/SLL6-GMQB>] (describing

discretionary congressional appropriations instead of creating an entitlement to specific services, and it did not establish consistent funding levels or goals going forward.¹³³

Though the IHCIA expired in 2000, the 2010 Patient Protection and Affordable Care Act (ACA) permanently reauthorized its main provisions.¹³⁴ In signing the law, President Obama alluded to the trust doctrine by acknowledging the federal government's responsibility, derived from the nature of its relationship with Indian tribes, to provide health care services to American Indians.¹³⁵ But the reauthorized IHCIA still did not require Congress to appropriate a specific amount of funds toward Indian health care services; nor did it generally require appropriated funds to be spent in particular ways.¹³⁶ Thus, current IHS funding levels remain inadequate to meet health care needs for the estimated 2.56 million American Indians who utilize IHS services.¹³⁷

In summary, the federal trust doctrine developed from international law, the treaty tradition, and the federal common law as expressed in the Supreme Court's early articulation of the legal relationship between the United States and Indian tribes. While these legal traditions were

health disparities that American Indians face, including an infant mortality rate about forty percent higher than the national rate, twice as high of a likelihood to develop diabetes when compared to the national population, and disproportionately high death rates from both accidental injuries and suicide).

133. R. Pfefferbaum et al., *supra* note 100, at 216 (noting the characteristics and limitations of the IHCIA); *see also* Hoss, *supra* note 103, at 124 ("In its aggregate history, IHS has remained chronically underfunded.").

134. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 10221, 124 Stat 119, 935 (2010); Holly E. Cerasano, *The Indian Health Service: Barriers to Health Care and Strategies for Improvement*, 24 GEO. J. ON POVERTY L. & POL'Y 421, 430 (2017); *see also* *Legislation*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/legislation/> [<https://perma.cc/X7A2-5RDS>] (last visited Apr. 10, 2021) (noting the IHCIA's expiration in 2000 and its permanent reauthorization under the ACA).

135. *Statement on the Reauthorization of the Indian Health Care Improvement Act*, *supra* note 31, at 406 ("Our responsibility to provide health services to American Indians and Alaska Natives derives from the nation-to-nation relationship between the federal and tribal governments.").

136. Cerasano, *supra* note 134, at 435 (describing the IHCIA's continued inadequate funding to meet health care needs of its constituents); *see also* NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP, RECLAIMING TRIBAL HEALTH: A NATIONAL BUDGET PLAN TO RISE ABOVE FAILED POLICIES AND FULFILL TRUST OBLIGATIONS TO TRIBAL NATIONS 3 (April 2020) [hereinafter RECLAIMING TRIBAL HEALTH], https://www.nihb.org/docs/05042020/FINAL_FY22%20IHS%20Budget%20Book.pdf [<https://perma.cc/8MZ6-UFGV>] ("The discretionary nature of the federal budget that systematically fails to fulfill Trust and Treaty obligation is a legal, ethical, and moral violation of the greatest order.").

137. *See* RECLAIMING TRIBAL HEALTH, *supra* note 136, at 1 (indicating that a fully funded IHS budget that ended health disparities between American Indians and other populations would require an appropriation of \$48 billion, but requesting a budget appropriation of \$12.759 billion for FY 2022); *IHS Profile*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/factsheets/ihsprofile/> [<https://perma.cc/F8DT-B3SD>] (last visited Apr. 10, 2021) (noting the FY 2020 budget appropriation of \$6.0 billion and citing the estimated population served by IHS as of January 2020).

premised on the era's racist assumptions of European supremacy over indigenous Americans, they also recognized American Indian tribal sovereignty, acknowledged the government-to-government relationship, and undertook ongoing fiduciary obligations inherent in a trust relationship. In early treaties with Indian tribes, the United States agreed to provide goods and services—including health care services, particularly relevant in light of the massive disease outbreaks following European colonization—in exchange for land.

But as federal policy shifted and settlers expanded westward, the United States either broke or failed to enforce agreements respecting tribal lands and resources. Crowded onto reservations throughout the nineteenth and early twentieth centuries, American Indians were forced to depend on federally provided resources. The federal government, however, did not pay corresponding attention to the provision of health care or other services inherent in treaty obligations and the trust relationship. Rather, the characterization of American Indians and Indian tribes as “wards” of the federal government influenced the Court's understanding of Congress's authority to control nearly all aspects of Indian life and to abrogate the terms of treaty or trust responsibilities if it so chose. One hundred years ago, Congress passed the Snyder Act, reflecting its acceptance of trust obligations for the provision of services like health care, but the Act neither guaranteed nor regularly appropriated funding.

Although Congress's recognition of its trust responsibility to provide health care to American Indians has deepened over the past fifty years, as demonstrated in expansive federal legislation like the IHCA and ACA, the Court has simultaneously narrowed its general interpretation of the trust doctrine. The Court now requires specific, explicitly articulated fiduciary obligations grounded in express statutory language before it will enforce such obligations against the federal government. In recent years, the Court has all but ignored the common law origins of the federal trust doctrine. Given this trend, the issue of whether the IHCA creates an affirmative, judicially enforceable trust obligation for the federal government to provide necessary health care services to Indian tribes remains in doubt, despite Congress's intention in the statute's text to uphold its legal trust responsibility.

III. THE IHCIA IN THE EIGHTH AND NINTH CIRCUITS

Few appellate-level cases have directly addressed the sources, scope, and enforceability of the federal government's affirmative trust obligations to provide health care to American Indians under the IHCIA.¹³⁸ The Eighth and Ninth Circuits—the only federal courts of

138. A September 13, 2020 Westlaw search of “U.S. Courts of Appeals Cases” including the word “trust” and the phrase “Indian Health Care Improvement Act” yielded nineteen results. The author reviewed each result, including *Quechan Tribe of the Fort Yuma Indian Reservation*, 599 Fed. App'x 698, 699 (9th Cir. 2015), discussed at length in this Comment (*see* discussion *infra* Section III.B) and including the Tenth Circuit predecessor of *Lincoln v. Vigil, Vigil v. Rhoades*, 953 F.2d 1225, 1231 (10th Cir. 1992) (holding that the district court appropriately exercised judicial review of the IHS's termination of an IHCIA-funded health care program for Indian children and affirming its finding that the APA notice and comment proceedings were required before the agency took such action, particularly in light of the federal trust relationship), *rev'd sub nom.* *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that Congress's lump-sum appropriations for Indian health care were not judicially reviewable under the APA as spending decisions were a matter of agency discretion). *See also* discussion *supra* Section II.A.3.

Of the remaining seventeen cases, an Eighth Circuit case, subsequent to and consistent with *White v. Califano*, noted that the Snyder Act imposed “affirmative obligations on BIA to relieve distress and conserve Indian Health,” while the IHCIA similarly obligated the IHS pursuant to its trust obligations “to refrain from contributing to poor health conditions on the Reservation.” *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 & n.5 (8th Cir. 1989) (holding that the BIA and IHS had a duty to clean up hazardous waste sites on reservations that they contributed to creating).

Two Ninth Circuit cases appeared to reach a different conclusion regarding the federal trust doctrine than was reached in *Quechan Tribe of the Fort Yuma Indian Reservation*, as discussed *infra* Section III.B. *See McNabb ex rel. McNabb v. Bowen*, 829 F.2d 787, 794–95 (9th Cir. 1987) (holding that Congress intended, consistent with its federal trust responsibility to provide health care to American Indians, that the federal government must meet Indians' health care needs that were unmet under state and local health care programs); *Arizona v. United States*, No. 87-2523, 1988 WL 96613, at *4–5 (9th Cir. Sept. 12, 1988) (noting the conclusion in *McNabb* that congressional intent as expressed through the Snyder Act and the IHCIA did not give the federal government exclusive responsibility for Indian health care, and that this conclusion was not inconsistent with the federal trust doctrine).

The Federal Circuit rejected a tribe's claim that 25 U.S.C. §§ 1632, 1621, and 1603 of the IHCIA, read in combination with other statutes at issue, demonstrated that the United States had accepted a common-law fiduciary duty to manage the tribe's water resources. *Hopi Tribe v. United States*, 782 F.3d 662, 669–71 (Fed. Cir. 2015). But this holding is not directly applicable to this Comment's focus, because despite being an action for breach of trust and implicating the IHCIA, the tribe was (1) seeking monetary damages rather than equitable relief, and (2) the alleged breach ultimately concerned the federal government's obligation to ensure safe drinking water on a reservation, not provision of health care services. *Id.* at 671.

In three cases, the respective courts either did not reach the issue of affirmative trust responsibilities under the IHCIA or did not discuss the issue at length. *See Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 570, 575 (9th Cir. 1980) (concluding that the IHS breached its statutory responsibilities to California Indians under the Snyder Act to develop distribution criteria that were rationally aimed at an equitable division of funds, without reaching the question of whether this also breached federal trust responsibilities); *Yankton Sioux Tribe v. U.S. Dept. of Health & Hum. Servs.*, 533 F.3d 634, 644 (8th Cir. 2008) (“The Tribe has not identified any [health care-related] assets taken over by the government such as tribally owned land, timber, or funds which would give rise to a special trust duty.”); *Blatchford v. Alaska Native Tribal Health Consortium*, 645 F.3d

appeals with cases directly on point—have diverged in their approaches to this issue.¹³⁹ As the district court in *Rosebud Sioux Tribe* identified, the Eighth Circuit found that enforceable trust obligations arose under the IHCIA, and because the district is within the Eighth Circuit’s jurisdiction, its rationale controls.¹⁴⁰ But the district court also acknowledged that the Ninth Circuit had found otherwise and held that the IHCIA did not create specific, judicially enforceable trust obligations.¹⁴¹ This part will address the two circuits’ divergent holdings and the district court’s application of the Eighth Circuit’s reasoning to *Rosebud Sioux Tribe*.

1089, 1092–93 (9th Cir. 2011) (holding that 25 U.S.C. § 1621e(a) of the IHCIA gave health care providers the right to recover costs of treating Indians only against third parties, not against the individual to whom it provided services, without holding on the trust responsibility).

Six of the cases briefly mentioned the IHCIA in lawsuits arising under other statutes, but in unrelated contexts. *See* *Preston v. Heckler*, 734 F.2d 1359, 1372–73 (9th Cir. 1984) (noting the IHCIA in discussing general federal policy to ensure high quality health care services to American Indians); *Tsosie v. United States*, 452 F.3d 1161, 1166–67 (10th Cir. 2006) (noting the IHCIA in discussing whether a physician hired through a nonpersonal services contract to treat patients at IHS facilities are considered independent contractors for purposes of the Federal Tort Claims Act); *Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536, 1542 (5th Cir. 1992) (holding that the IHCIA and the ISDEAA did not preempt the collection of state sales taxes for the off-reservation purchase of a van used for the tribal health service with federal grant money); *Malone v. Bureau of Indian Affs.*, 38 F.3d 433, 438 (9th Cir. 1994) (noting that the IHCIA’s 1988 amendments extended eligibility to members of some tribes without federal recognition and analogizing to the BIA’s administration of the Higher Education Grant Program); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir. 1999) (citing the IHCIA as an example of Congress’s policy to promote tribal self-determination); *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov’t*, 101 F.3d 1286, 1298 (9th Cir. 1996) (noting the IHCIA along with other federal statutes as examples of Congress’s continued intent to provide benefits and protections to Alaska Natives after the Alaska Native Claims Settlement Act) *rev’d*, 522 U.S. 520 (1998).

Finally, the two remaining cases were completely irrelevant, as they challenged the constitutionality of the ACA. *See* *Florida ex rel. Att’y Gen. v. U.S. Dept. of Health & Hum. Servs.*, 648 F.3d 1235, 1249 (11th Cir. 2011) (noting the IHCIA within the structure of the ACA); *Texas v. United States*, 945 F.3d 355, 418 (5th Cir. 2019) (King, J., dissenting) (mentioning the reauthorization and amendment of the IHCIA as part of the ACA).

139. *Compare* *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (holding the IHCIA created an obligation to provide health care services to an indigent Indian woman), *and* *Blue Legs*, 867 F.2d at 1100 (holding that the Snyder Act and IHCIA imposed affirmative trust obligations and citing *White v. Califano* in support), *with* *Quechan Tribe*, 599 Fed. App’x at 699 (holding that there are no affirmative, judicially enforceable trust obligations that flow from the IHCIA). *But see also* *McNabb ex rel. McNabb v. Bowen*, 829 F.2d 787, 794–95 (9th Cir. 1987) (holding that Congress intended, consistent with its federal trust responsibility to provide health care to American Indians, that the federal government must meet Indians’ health care needs that were unmet under state and local health care programs); *Arizona v. United States*, No. 87-2523, 1988 WL 96613, at *4–5 (9th Cir. Sept. 12, 1988) (noting the conclusion in *McNabb* that congressional intent as expressed through the Snyder Act and the IHCIA did not give the federal government exclusive responsibility for Indian health care, and that this conclusion was not inconsistent with the federal trust doctrine).

140. *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 998 (D.S.D. 2020) (citing the Eighth Circuit’s holding in *White v. Califano*).

141. *See id.*

A. White v. Califano

Two years after the IHCIA's passage in 1976, the U.S. Court of Appeals for the Eighth Circuit first considered in *White v. Califano* the federal government's trust obligation to provide health care services to American Indians.¹⁴² The story behind the case began in April of 1976,¹⁴³ just a few months before Congress passed the IHCIA.¹⁴⁴ Plaintiff Georgia White acted as guardian ad litem for her sister Florence Red Dog, a member of the Oglala Sioux Tribe and resident of the Pine Ridge Indian Reservation in South Dakota.¹⁴⁵ Ms. Red Dog suffered from severe mental illness and needed immediate inpatient mental health treatment to protect herself and others from physical harm.¹⁴⁶ Some of the plaintiff's

142. The Eighth Circuit decided the *White* case in 1978, only two years after the IHCIA was passed. *White*, 581 F.2d at 697; see also *White v. Califano*, 437 F. Supp. 543, 554, 556 (D.S.D. 1977) (identifying the enactment of the IHCIA as the "latest statement[s]" of Congress regarding its intent to uphold its trust responsibilities for providing health care to Indians). No earlier U.S. Court of Appeals cases were found implicating the IHCIA and the federal trust responsibility. See cases cited *supra* note 138.

143. *White*, 437 F. Supp. at 545 ("On April 13, 1976, J. W. Brantley, an Indian Health Service psychiatric social worker determined that Florence Red Dog was mentally ill and in such condition that immediate treatment was necessary for her protection from physical harm and for the protection of others.").

144. The IHCIA was enacted as Public Law 94-437 on September 30, 1976. Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. § 1601 *et seq.*).

145. *White v. Matthews*, 420 F. Supp. 882, 884 (D.S.D. 1976). In the first reported disposition in this case, the defendants were listed as David Matthews, etc., et al. and Richard Kneip, etc., et al. *Id.* at 882. The first named defendant, "David Matthews," referred to F. David Mathews, Secretary of Health, Education, and Welfare during the Ford administration until 1977. See *David Mathews*, GERALD R. FORD FOUND., <https://geraldrfordfoundation.org/centennial/oralhistory/david-mathews/> [<https://perma.cc/8QR5-G4SS>] (last visited May 27, 2021). The second named defendant, Kneip, represented the relevant group of state and county officials who were "persisting in their refusal to commit Florence Red Dog to the Human Services center in Yankton." *White*, 420 F. Supp. at 884. The federal and state officials filed cross claims against each other for the responsibility for and cost of providing inpatient psychiatric care to Ms. Red Dog, and the state officials also filed a third-party suit against the Oglala Sioux Tribe, as responsible for the cost of medical care jointly or in the alternative to the federal government. *Id.* at 884-85. The court dismissed the claim against the Oglala Sioux Tribe in a prior hearing, and the federal defendants moved to dismiss the state defendants' cross-claim. *Id.* at 885. The court denied the federal defendants' motions to dismiss. *Id.* at 890. In the subsequent published decision, 437 F. Supp. 543, the first named defendant was replaced with Joseph Califano, Secretary of Health, Education, and Welfare under President Carter from 1977-79. See *Joseph A. Califano, Jr. (1977-1979)*, UVA MILLER CTR., <https://millercenter.org/president/carter/essays/califano-1977-secretary-of-health-education-and-welfare> [<https://perma.cc/5HNX-C5VV>] (last visited May 27, 2021). Thus, the substitution of the named defendant in the case name between 1976 and 1977.

146. *White*, 437 F. Supp. at 545; see also *White*, 420 F. Supp. at 884 ("[The complaint alleged] that Florence Red Dog was in a dangerously mentally ill condition and had threatened and physically attacked other persons and attempted suicide; that she was as of April 15 incarcerated in the Pine Ridge tribal jail, was heavily sedated and all her clothing had been taken away to prevent suicide attempts; that state officials had refused to act in accordance with state law to provide necessary emergency medical treatment . . .").

claims against state and county officials, who denied responsibility to care for Ms. Red Dog in the county's public health facility, raised complex jurisdictional questions between tribal and state jurisdiction.¹⁴⁷ But her claims against the federal defendants implicated the federal trust doctrine.¹⁴⁸ The district court framed the federal question as whether the government had a statutory or regulatory duty to provide inpatient mental health care to American Indians.¹⁴⁹

To determine whether the IHCA created affirmative trust obligations under the federal trust doctrine in this case, the U.S. District Court for the District of South Dakota recounted the original sources of these obligations.¹⁵⁰ The court detailed the history of the expansion of health care services provided to tribes and their members, first by military personnel and funded according to treaty provisions, then by BIA after the creation of the Department of the Interior, and finally under federal statute.¹⁵¹ In describing this history in detail, the district court emphasized the expansive responsibility and control the federal government had taken over centuries to provide health care services to American Indians.¹⁵² But in 1971, IHS decided to become "residual"

147. See *White*, 437 F. Supp. at 545–51 (discussing whether state officials had the jurisdictional authority to intrude onto tribal jurisdiction to involuntarily commit a tribal citizen and concluding that the state does not have such authority).

148. See *id.* at 553 ("Plaintiff's position is that the decision to become a 'residual' supplier of services is incompatible with the federal government's trust responsibility and with statutes and regulations pertaining to Indian health care. Plaintiff admits that no statute states with specificity that the I.H.S. must provide care for persons requiring involuntary commitment, but she does argue that such a duty is implicit in the unique legal relationship that exists between the Indian tribes and the federal government.").

149. *Id.* at 551 ("The question presented . . . is as follows: Whether Federal Defendants have a duty under statute and/or regulation to provide directly or by contract for inpatient mental health care to reservation Indians . . ."). The court also noted IHS treated some mental health conditions, but that the local IHS hospital at Pine Ridge was not equipped to provide inpatient mental health treatment, so would outsource this treatment to other non-IHS facilities. *Id.* at 552 ("The policy of IHS with respect to inpatient mental health treatment is that alternative state resources will be relied on in the allocation of IHS resources. This policy was followed in every state."). Since 1971, IHS had refused to pay for the full cost of inpatient mental health treatment to the state of South Dakota, despite the state continuing to bill IHS for it. *Id.*

150. See *id.* at 551–53 (tracing the development of federal Indian health policy). The court paid special attention to the provision of mental health care as especially relevant to this case. *Id.*

151. See *id.* at 553 (describing history of Indian health care services). The court noted the Snyder Act's authorization for the BIA to spend appropriations for health care services to American Indians. *Id.* ("[The Snyder Act] specifically authorized the B.I.A. to spend money on the Indian people 'for relief of distress and conservation of health.' 25 U.S.C. § 13. Under this act funds were appropriated specifically for health services to Indians.").

152. See *id.* The court noted that after the Snyder Act's passage in 1921, health care services expanded in 1934 with congressional authorization for the Department of the Interior to contract with states, counties, private, and public institutions to provide health care. *Id.* In 1955, the Public Health Service created a new Division of Indian Health—renamed the Indian Health Service (IHS) in 1968—under the auspices of the Department of Health, Education, and Welfare. *Id.*

suppliers of certain Indian health services and to require tribal members to use state resources first and then only resort to federal resources if state resources were not available.¹⁵³ The plaintiff argued the federal government's position was incompatible with its trust responsibility and with federal law and its implementing regulations.¹⁵⁴ The federal government denied any trust responsibility to provide specific health care services unless statutes explicitly required them.¹⁵⁵

The court did not expressly define the contours of federal trust responsibility's scope, alluding to its complexity and indefiniteness.¹⁵⁶ But the court *did* indicate that the recently passed IHCIA represented Congress's expression of its trust obligation to provide health care to American Indians.¹⁵⁷ The court directly quoted the IHCIA, grounding the source of this trust obligation in the statute's language.¹⁵⁸ The court reasoned this language was sufficiently explicit to create legally cognizable trust obligations.¹⁵⁹ The court then concluded that the federal government was obligated to care for Ms. Red Dog.¹⁶⁰ In the court's view, Congress's declaration of policy in the IHCIA was specific enough to require the IHS to provide inpatient mental health care services to Ms. Red Dog, who otherwise would have had nowhere else to turn for care.¹⁶¹

153. *White*, 437 F. Supp. at 553.

154. *Id.* Although the plaintiff conceded that there was "no statute [that] states with specificity that the IHS must provide care for persons requiring involuntary commitment," the plaintiff argued that "such a duty is implicit in the unique legal relationship that exists between the Indian tribes and the federal government." *Id.*

155. *Id.* at 554. According to the federal government, "whatever federal responsibilities might be, they are not to be guessed at by reference to the vague idea of 'trust responsibility.' Duty, if any can only be found by reference to specific statutes." *Id.*

156. *See id.* ("Defining the dimensions of the trust relationship between Indians and the federal government as that relationship has evolved could consume much time and labor, and we are doubtful that probing history can give us more than a framework within which to analyze the present issue.").

157. *Id.* ("We think that statute [the IHCIA] embodies the most relevant legislative material available for ascertaining the intent of Congress on the subject of federal responsibility toward Indians' health needs, and is the latest statement of what the trust responsibility requires in the area of health care.").

158. *Id.*; *see also* Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, §§ 2-3, 90 Stat. 1400, 1400-01 (codified at 25 U.S.C. §§ 1601-1602).

159. *White*, 437 F. Supp. at 555.

160. *Id.* The court had already concluded in its opinion that the state had no jurisdiction to intrude onto tribal lands and commit Ms. Red Dog involuntarily. *Id.*

161. *See id.*

The Eighth Circuit adopted verbatim the district court's reasoning and articulation thus far of the government's obligation, so the district court's language bears restating here:

We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the "unique relationship" between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U.S. Code pertains only to Indians.

It matters not at this juncture whether the federal government is called a residual supplier or a primary supplier of services. We determined earlier in this opinion that the State of South Dakota has no jurisdiction to involuntarily commit Florence Red Dog. The question then became, not whether the federal defendants are residual or primary suppliers, but whether they can abandon Florence Red Dog entirely. We hold here that they cannot abandon her if she requires involuntary commitment. The federal defendants are free to call themselves "residual suppliers" if that fits in better with their policy statements, but where the state cannot act, they must.¹⁶²

This was arguably a narrow holding. The Eighth Circuit did not further define the full scope of what the federal trust responsibility required under the IHCA in all cases.¹⁶³ In contrast, the district court defined a mechanism by which the IHS should weigh its limited resources with its obligations under the trust doctrine, and it rebutted the federal government's rejection of any trust obligation to provide specific health care services, discussed below.

The district court acknowledged IHS's limited resources,¹⁶⁴ and indicated that courts should not generally dictate agencies' spending discretion.¹⁶⁵ For guidance, the district court looked to a somewhat analogous situation in *Morton v. Ruiz*, where funding was inadequate to meet the demands of statutory obligations.¹⁶⁶ Following the reasoning in

162. *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (quoting *White*, 437 F. Supp. at 555).

163. *See id.* (affirming the district court's reasoning and conclusions as related directly to the quoted language).

164. *White*, 437 F. Supp. at 555 ("We are not unmindful of the fact that this is no simple matter for I.H.S. officials. The I.H.S. staff on the Pine Ridge Reservation does not presently have adequate facilities or manpower to treat Florence Red Dog and other similarly situated persons; moreover, they cannot create programs out of the bald statements of Congress but must work with the funds Congress appropriates.").

165. *Id.* ("Courts have no expertise for deciding how limited resources should be allocated.").

166. *Id.* at 555-56. The dispute in *Morton v. Ruiz* concerned the availability of BIA general assistance (i.e., welfare) benefits to tribal members living nearby their tribe's reservation but not on the reservation itself. *Morton v. Ruiz*, 415 U.S. 199, 204-05 (1974). The Supreme Court reviewed the history of congressional proceedings and found that the BIA had not always exclusively

Morton, the district court concluded that IHS must look to its agency regulations to determine the bounds of its discretion in spending its congressional appropriations.¹⁶⁷ Regulations promulgated under the IHCIA emphasized the relative need and access to other arrangements for health care.¹⁶⁸ Thus, the district court reasoned that Ms. Red Dog's care took priority because of the "extreme" nature of her need and her lack of access to any other resources, given the state's inability to provide it.¹⁶⁹

The district court also flatly rejected the federal government's position that it had no trust responsibility, standing alone, to provide specific health care services to any particular American Indian.¹⁷⁰ The court reasoned that the IHCIA represented an expansive statement of Congress's recognition of an affirmative trust obligation to provide health care services to American Indians.¹⁷¹ The court distinguished Congress's

limited its general assistance programs to tribal members living on the reservation, and that Congress had understood and sanctioned this benefit to extend to those living near reservations. *Id.* at 229–30. Recognizing BIA's limited resources, however, BIA had to develop a rational eligibility standard for benefits, apply it consistently, and ensure its communication with relevant stakeholders. *Id.* at 231.

167. *White*, 437 F. Supp. at 556; *see also Morton*, 415 U.S. at 236 (holding that the BIA had to follow the Administrative Procedure Act to develop eligibility requirements for assistance benefits and apply them to determine priority for scarce agency resources).

168. *See White*, 437 F. Supp. at 556; *see also* 42 C.F.R. § 36.1(a) (1977) ("The regulations in this part establish the general principles to be followed in the discharge of this Department's responsibilities for continuation and improvement of Indian health services. Officers and employees of the Department will be guided by these policies in exercising discretionary authority with respect to the matters covered."); *id.* § 36.12(c) ("Priorities when funds, facilities, or personnel are insufficient to provide the indicated volume of services. Priorities for care and treatment, as among individuals who are within the scope of the program, will be determined *on the basis of relative medical need* and access to other arrangements for obtaining the necessary care." (emphasis added)).

169. *White*, 437 F. Supp. at 556.

170. *See id.* at 554 ("Ultimately, [the federal defendants] rest on the assertion that, whatever federal responsibilities might be, they are not to be guessed at by reference to the vague idea of 'trust responsibility.' Duty, if any can only be found by reference to specific statutes. Finding no statute that specifically creates a duty for I.H.S. to care for persons in the class of Florence Red Dog, federal defendants deny that there is such a duty."). The government's argument in the *Rosebud Sioux Tribe* case forty years later would prove to be remarkably consistent with its argument in *White*, even before the *Mitchell* cases and their progeny required trust obligations to be explicitly grounded in statute in breach of trust claims for money damages. *See* discussion, *infra* Section IV.B (analyzing the government's argument on appeal in the *Rosebud Sioux Tribe* case in relation to case law from 1980 to 2011).

171. *White*, 437 F. Supp. at 557 ("If Congress had, at some point in history stated that a trust responsibility existed, and never said more, then in the absence of controlling precedent this Court would scarcely be able to conclude that care for Florence Red Dog was included within the federal government's trust responsibility. But, the Congress has taken the well-accepted concept of trust responsibility and has said a great deal about what it means; in particular, the Congress in 1976 stated that the federal government had a responsibility to provide health care for Indians. Therefore, when we say that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract but rather to a congressionally recognized duty to provide services for a particular category of human needs. The trust responsibility, as recognized and defined by statute, is the ground upon which the federal defendants' duties rest in this case.").

intention in passing legislation providing services to American Indians from other types of legislation. In no other context, the court acknowledged, does Congress legislate specific protections, benefits, and services that apply exclusively to a community of people recognized on the one hand for their ethnic and racial origins, and on the other for their ancestors' history with the United States government.¹⁷² The court therefore reasoned that the duties arising under the IHCIA can only be justified with reference to the federal trust doctrine, itself a product of the historical relationship between the federal government and Indian tribes.¹⁷³ But the Eighth Circuit's opinion did not explicitly affirm this rationale or finding by the district court.¹⁷⁴

Thus, the rationale the Eighth Circuit adopted in *White v. Califano* recognized the historical origins of the federal government's obligation to provide health care services to American Indians under the trust doctrine.¹⁷⁵ This "legal responsibility," the Eighth Circuit affirmed, originated not with the IHCIA nor with any of the other statutes in the "bulging volume of the U.S. Code" concerning Indians, tribes, and tribal members.¹⁷⁶ Rather, the IHCIA, like the Snyder Act and other congressional actions, reflected Congress's expression of the government's historical trust obligation.¹⁷⁷ Applying this reasoning to the specific case of Florence Red Dog, the Eighth Circuit affirmed the district court's order that IHS provide for her care.¹⁷⁸

Whereas in *White v. Califano* the Eighth Circuit recognized the IHCIA as the most recent expression of the federal trust doctrine and affirmed a legally cognizable trust obligation to provide health care in at least some contexts, the Ninth Circuit advanced an alternative interpretation. As next discussed, in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, the Ninth Circuit held that neither the IHCIA nor the

172. *Id.* ("When the Congress legislates for Indians only, something more than a statutory entitlement is involved. Congress is acting upon the premise that a special relationship is involved, and is acting to meet the obligations inherent in that relationship. If that were not the case, then most of 25 U.S.C. could not withstand an equal protection analysis for the reason that the legislation embodied in that volume is aimed at a class defined on the basis of race.")

173. *See id.* ("We have, therefore, read and construed the Indian Health Care Improvement Act as a manifestation of what Congress thinks the trust responsibility requires of federal officials, with whatever funds are available, when they try to meet Indian health needs.")

174. *See White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (declining to extend its affirmation beyond the district court's rationale for providing health care to Florence Red Dog specifically).

175. *See id.* (quoting *White*, 437 F. Supp. at 555) ("This stems from the 'unique relationship' between Indians and the federal government . . .").

176. *Id.* (quoting *White*, 437 F. Supp. at 555) ("We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians."); *see also* 25 U.S.C. (the volume dedicated to Indian law).

177. *White*, 581 F.2d at 698.

178. *Id.* at 698.

general trust relationship sufficed as a source of law to allege the government's failure to provide adequate health care services.

B. Quechan Tribe of the Fort Yuma Indian Reservation v. United States

In contrast to the Eighth Circuit in 1978, the Ninth Circuit held in 2015 that no affirmative, judicially enforceable trust obligations flowed from the IHCA or the general trust relationship.¹⁷⁹ Like *White v. Califano*, the Ninth Circuit issued a brief memorandum opinion affirming the lower court's judgment and rationale without much additional analysis.¹⁸⁰ The district court's fact-finding and reasoning is therefore necessary to understand the Ninth Circuit's holding.

The Quechan Tribe received health care from the IHS Fort Yuma Service Unit and alleged that these IHS medical facilities were so badly maintained and ill-equipped that they were hazardous.¹⁸¹ Unlike in *White*, this case did not allege inadequate care for specifically named tribal members.¹⁸² Rather, the tribe asserted claims on behalf of all its members and sought equitable relief to guarantee that IHS facilities met the minimum standard of care.¹⁸³ Three of the tribe's causes of action alleged breaches of trust obligations arising under the Snyder Act, the IHCA, and the federal trust doctrine at common law.¹⁸⁴ The Quechan Tribe sought a declaratory judgment to enforce the claimed trust

179. *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015).

180. The Eighth Circuit's per curiam opinion affirming the district court's judgment in *White v. Califano* spanned only two pages in the reporter (697–98); likewise, the Ninth Circuit's memorandum opinion affirming the district court's judgment in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States* was just over one full page (699–700).

181. *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *1 (D. Ariz. Mar. 31, 2011) (“Plaintiff alleges that the physical facilities at Ft. Yuma are in disrepair and unsafe, that Ft. Yuma lacks basic medical equipment, and that Ft. Yuma affords unsafe and unhealthy medical care as evidenced, for example, by an ‘exposure event’ in which members of the Tribe received wound care and were possibly exposed to blood borne pathogens due to improper sterilization.”).

182. Compare *White v. Matthews*, 420 F. Supp. 882, 883–84 (D.S.D. 1976) (noting the plaintiff Georgia White acting as guardian ad litem for Florence Red Dog), with *Quechan Tribe*, 2011 WL 1211574, at *1 (indicating the Quechan Indian Tribe as bringing claims on behalf of its citizens).

183. *Quechan Tribe*, 2011 WL 1211574, at *1.

184. *Id.* at *1 (“Claim one alleges a breach of the duty to provide health care services and facilities in compliance with minimum standards of professional medical care. Claim two asserts a breach of the duty to preserve and maintain trust property. Claim three asserts a breach of defendants’ duty as a health care provider.”). The tribe also asserted claims under the Administrative Procedure Act, 5 U.S.C. § 702, the Due Process Clause and Equal Protection Clause of the Fifth Amendment, U.S. CONST. amend V, and claims for a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 and a writ of mandamus under 28 U.S.C. § 1361. *Id.* Analysis of these claims is outside the scope of this Comment.

obligations.¹⁸⁵ The government argued that these sources of law did not create specific, judicially enforceable fiduciary duties and moved to dismiss for failure to state a claim.¹⁸⁶

First, the U.S. District Court for the District of Arizona analyzed the federal trust doctrine and found that under controlling Ninth Circuit case law, the general trust relationship did not create legal obligations.¹⁸⁷ The district court then cited the Supreme Court's 2003 holding in *United States v. Navajo Nation* for the principle that tribal breach of trust claims for damages against the federal government must be grounded in an explicit, statutorily imposed fiduciary duty.¹⁸⁸ This narrow reading of when the trust doctrine supported breach of trust claims for money damages extended in Ninth Circuit case law to breach of trust claims for equitable relief as well.¹⁸⁹

The district court analogized the Quechan Tribe's claims to those brought under the General Allotment Act (GAA) in *Mitchell I* and under the various timber management statutes in *Mitchell II*.¹⁹⁰ The district court noted that the *Mitchell* cases turned on "whether a statute creates only a 'bare trust' or establishes specific legal duties," and declared, without citation, that "the trust responsibility arises when the United States holds *tribal* property in trust."¹⁹¹ The court found the Snyder Act and the IHCA to be similar to the GAA in *Mitchell I* in that their respective language created only a "bare trust" and was too broad to impose any specific duties on the government.¹⁹² Therefore, the district

185. *Quechan Tribe*, 2011 WL 1211574, at *1; see also 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."); 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

186. *Quechan Tribe*, 2011 WL 1211574, at *1.

187. *Id.* at *2 (citing *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008)).

188. See *id.* ("When a tribe sues the government for damages, it 'must identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government has failed faithfully to perform those duties.'" (quoting *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 506 (2003))).

189. See *id.* (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

190. *Id.* (citing *Mitchell v. United States (Mitchell I)*, 445 U.S. 535, 542 (1980); *Mitchell v. United States (Mitchell II)*, 463 U.S. 206, 224 (1983)). But the district court did not distinguish the Quechan Tribe's claim for equitable relief from the claims in the *Mitchell* cases, which sought money damages. *Id.*

191. *Id.*

192. *Quechan Tribe*, 2011 WL 1211574, *2-3 ("The Snyder Act consists of extremely broad language . . . like the GAA . . . [and] [t]he Snyder Act fails to impose an affirmative duty on

court found that the Quechan Tribe had failed to state a claim for breach of the duty to provide medical services meeting a specific standard of care.¹⁹³ According to the court, no judicially enforceable fiduciary duty existed under the IHCIA, the Snyder Act, or common law.¹⁹⁴ The court dismissed all the tribe's claims against the government,¹⁹⁵ so the tribe appealed to the Ninth Circuit.¹⁹⁶

The Ninth Circuit affirmed the district court's ruling that neither the general trust relationship nor the IHCIA created a judicially enforceable duty for the federal government to provide any specific standard of health care services to Indian tribes.¹⁹⁷ The Ninth Circuit also cited *Lincoln v. Vigil* in declaring the Snyder Act and IHCIA addressed health care services to American Indians "only in general terms,"¹⁹⁸ so there was not "sufficient trust-creating language" on which to base breach of trust claims.¹⁹⁹ Moreover, the Supreme Court had recently ruled in *United States v. Jicarilla Apache Nation* that the federal government was not a private trustee when it fulfilled its statutorily imposed trust obligations.²⁰⁰

In the subsequent controversy between the Rosebud Sioux Tribe and the federal government regarding the operation of IHS hospital facilities, the district court addressed both the Eighth and Ninth Circuit holdings on this issue. As next addressed, that district court followed the Eighth Circuit's approach.

defendants to provide a specific level of health care or to maintain facilities at a certain level. . . . We next turn to the IHCIA to determine whether it 'unambiguously provides that the United States has undertaken full fiduciary responsibilities' as to the management of Indian health care. . . . While [its] provisions are more exacting than those in the Snyder Act, they still do not impose a duty on defendants to provide a certain level of health care, preserve and maintain tribal property, or be a health care provider." (quoting *Mitchell v. United States* (*Mitchell I*), 445 U.S. 535, 542 (1980)).

193. *Id.* at *4.

194. *Id.* at *2 (citing *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008) ("The general trust relationship between the United States and Indian tribes, alone, is insufficient to create legal obligations in the United States."); *id.* at *4 ("[P]laintiff's *parens patriae* lawsuit asking us to find a specific standard of care established in the Snyder Act and the IHCIA fails to state a valid cause of action for breach of statutory or fiduciary duties.")).

195. *Id.* at *7.

196. *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015).

197. *Id.* ("[T]he federal-tribal trust relationship does not, in itself, create a judicially enforceable duty. . . . Neither the Snyder Act nor the Indian Health Care Improvement Act contains sufficient trust-creating language on which to base a judicially enforceable duty.").

198. *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993)).

199. *Id.*

200. *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) ("[T]rust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.")). For analysis of the Ninth Circuit's application of the holdings in *Jicarilla Apache Nation* to its reasoning and holding in *Quechan Tribe*, see Section IV.A, *infra*.

C. *Recent Application in Rosebud Sioux Tribe v. United States*

In *Rosebud Sioux Tribe v. United States*, the U.S. District Court for the District of South Dakota considered the reasoning and holdings of both the Eighth and Ninth Circuits²⁰¹ when ruling on cross motions for summary judgment.²⁰² The Eighth Circuit's holding in *White v. Califano* bound the district court in *Rosebud Sioux Tribe* as precedent.²⁰³ But in his opinion for the court, Chief Judge Roberto Lange also illustrated why—contrary to the Ninth Circuit's reasoning—the Supreme Court's holdings in the *Mitchell* cases, *Lincoln v. Vigil*, the *Navajo Nation* cases, and *Jicarilla Apache Nation* did not foreclose a finding that the government owed the Rosebud Sioux Tribe a duty to provide health care services.²⁰⁴

IHS placed Rosebud Hospital on “divert status” on December 5, 2015, after federal inspectors found its conditions unsafe and unsanitary.²⁰⁵ In April 2016, while the hospital's emergency services department (ED) remained closed, the tribe filed an action seeking a declaratory judgment and injunction for the alleged violation of the federal government's treaty, statutory, and common law trust duties to provide health care services, among other claims.²⁰⁶ The court denied the government's

201. See *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 998–99 (D.S.D. 2020) (describing the respective reasoning and holdings in *White v. Califano* and *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*).

202. See *id.* at 989 (noting the procedural history of the case and the cross motions for summary judgment before the court).

203. See *id.* at 998 (noting the Eighth Circuit's recognition of an enforceable duty under the IHCA). The U.S. District Court for the District of South Dakota is within the jurisdiction of the U.S. Court of Appeals for the Eighth Circuit. *South Dakota Courts*, U.S. CT. OF APPEALS FOR THE EIGHTH CIR., <https://www.ca8.uscourts.gov/south-dakota-courts> [<https://perma.cc/PS5M-QU3A>] (last visited May 28, 2021).

204. See *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998–99 (explaining that the Supreme Court's holdings subsequent to the Eighth Circuit's holding in *White* did not invalidate it); see also discussion *supra* Section II.A.3 (describing the Supreme Court's holdings in the major federal trust doctrine cases decided since 1980).

205. See *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 989–90 (describing the background facts of the case); see also discussion *supra* Part I (describing the chronology of the hospital's closure and its consequences).

206. 61. The federal government has a specific, special trust duty, pursuant to the Snyder Act, the IHCA, the Treaty of Fort Laramie, and federal common law, to provide health care services to the Tribe and its members and to ensure that health care services provided to the Tribe and its members do not fall below the highest possible standards of professional care.

62. Having undertaken responsibility for Indian health care at the Rosebud Hospital, IHS has a statutory and fiduciary trust obligation to provide health care to permit the health status of the Tribe and its individual members to be raised to the highest possible level.

63. The United States breached and continues to breach its trust duty to the Tribe and its members by providing health services to the Tribe at a level that falls substantially below the highest standards of health care and that are inadequate to maintain the health

motion to dismiss, and the action proceeded to discovery.²⁰⁷

On cross motions for summary judgment following discovery, the court detailed the undisputed factual findings relevant to both the federal government's and the Rosebud Sioux Tribe's positions.²⁰⁸ The court found IHS had (1) faced funding challenges for major expenses over a span of years;²⁰⁹ (2) often resorted to placing struggling hospitals on divert status;²¹⁰ (3) provided access to care relative to patients' ability to pay;²¹¹ and (4) failed to solve the staffing inadequacies and rampant turnover evident before, during, and after the closure of Rosebud Hospital's ED.²¹² The court's factual findings incorporated sources

of the Tribe's members.

....

65. For these reasons, the Tribe is entitled to a declaratory judgment that IHS has violated its trust duty owed to the Tribe arising under the Treaty of Fort Laramie, the Snyder Act, the Indian Health Care Improvement Act, and federal common law, to ensure that health services provided to members of the Tribe permit the health status of Indians to be raised to the highest possible level.

66. The Tribe is also entitled to a mandatory injunction requiring IHS to comply with its trust duties to the Tribe, protect the Tribe's entitlement to health care services, and take sufficient measures to ensure that health services are provided to members of the Tribe to permit the health status of Indians to be raised to the highest possible level.

Complaint, *supra* note 5, at 16–18 (citations omitted). This comprised Count III of the tribe's four count claim. *See id.* at 12–21 (alleging the violation of 25 U.S.C. § 1631(b)(1) in Count I, the violation of the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* in Count II, and the violation of equal protection and due process under the Fifth Amendment of the U.S. Constitution in Count IV). The court granted the government's motion to dismiss Counts I, II, and IV for other reasons in an earlier disposition of the case. *Rosebud Sioux Tribe v. United States*, No. 16-CV-03038, 2017 WL 1214418, at *10 (D.S.D. Mar. 31, 2017).

207. *Rosebud Sioux Tribe*, 2017 WL 1214418, at *10 (denying the government's motion to dismiss Count III of the Rosebud Sioux's complaint).

208. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 989–95 (detailing the undisputed facts most relevant to the government's position and the tribe's position).

209. *See id.* at 992 (“Although the overall amount allocated to the Rosebud IHS Hospital increased by more than 11.5% between 2010 and 2017, allocations for some budget line items for the facility decreased, notably for ‘hospitals and clinics (clinical services).’ According to . . . the Deputy Director for Management Operations of the IHS, the line item ‘hospitals and clinics’ is the ‘major funding support for a hospital or clinic,’ and pays for salaries and supplies among other expenses.”).

210. *Id.* (“A 2010 report to the Senate Committee on Indian Affairs related that the Great Plains Area [of the IHS] had a history of diverting health care service at its service units, including the Rosebud IHS Hospital, which impacts the consistency and level of care the units provide to patients.” (footnote omitted)).

211. *See id.* at 993 (“[W]hen an IHS facility cannot provide a needed service, it will refer the patient to another facility that can provide that service. However, . . . IHS typically only pays for referrals to other providers if the patient has an immediate risk of loss of life, limb, or a sense; and if the patient cannot afford to seek help at another facility, IHS provides less effective treatment options . . .”).

212. *See id.* at 994 (“The OIG [Office of Inspector General] found that staffing inadequacies and changing leadership were longstanding issues that contributed to the noncompliance which occurred before, during, and after the closure. The study noted that in September of 2018, Rosebud

concluding that health care services provided at many IHS facilities, including Rosebud Hospital, were inadequate.²¹³ Many of the cited reports showed similar problems persisted even after the ED reopened in July of 2016.²¹⁴ Congressional representatives and executive agencies were aware of IHS's issues, as numerous reports to congressional committees and executive agencies' internal reports detailed these deficiencies.²¹⁵

1. Considering When the Federal Government Owes a Trust Duty to Tribes

The court's discussion of the controlling law cited the well-established existence of a "general trust relationship" and distinguished between actions seeking money damages and those seeking equitable relief.²¹⁶ Whereas the general trust relationship alone is not sufficient to sustain a breach of trust suit when a tribe seeks money damages,²¹⁷ the court noted that the Rosebud Sioux Tribe sought equitable relief here.²¹⁸ When a tribe seeks equitable relief, the substantive source of law—such as a treaty, agreement, executive order, or statute—providing the basis for the breach of trust claim need not explicitly state the existence of a trust duty or define its precise contours.²¹⁹ Rather, the trust duty can be inferred from that source's provisions and reinforced by the general trust

IHS Hospital had 69 vacancies that were mostly filled by contracted providers and that between the Emergency Department's reopening in July 2016 and September 2018, the service unit had had six CEOs, three Clinical Directors, and nine Directors of Nursing.”)

213. *Id.* at 992–95 (noting the conclusions from a 2010 report to the Senate Committee on Indian Affairs, the testimony of a Rosebud IHS nurse and administrator, a January 2017 Government Accountability Office (GAO) report to the Senate's Indian Affairs Committee, the testimony of a GAO Director to the Senate Committee on Indian Affairs, a July 2019 report by the Office of Inspector General, an August 2018 GAO report to the Senate Indian Affairs Committee, and a July 2018 Centers for Medicare and Medicaid (CMS) survey).

214. *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 994–95 (citing reports from July 2016 through September 2018 describing rampant turnover, long-term vacancies in patient care positions, and deficiencies that prompted CMS to place Rosebud on Immediate Jeopardy status again).

215. *Id.*

216. *See id.* at 995 (citing *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*), *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo Nation I*), and *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) as sources recognizing the “general trust relationship”).

217. *Id.* (“[T]hat general trust relationship alone cannot sustain a tribe’s cause of action for breach of trust *when the tribe seeks money damages*. Rather, a tribe must point to a substantive source of law imposing specific duties upon the Government and allege that the Government failed to perform those duties.” (emphasis added) (first citing *Navajo Nation I*, 537 U.S. at 506; and then citing *United States v. Navajo Nation (Navajo Nation II)*, 556 U.S. 287, 290 (2009))).

218. *Id.* (“The Tribe is not seeking money damages in its complaint.”); *see also* Complaint, *supra* note 5, at 21–23 (describing the tribe’s requested declaratory judgment and injunction).

219. *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 995 (citing *Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094, 1100 (8th Cir. 1989)).

relationship.²²⁰ In other words, when seeking equitable relief, the trust obligation and its scope can be inferred from substantive legal sources and their historical context. The court thus clarified that it was not necessary, in claims seeking equitable relief, for a statute to explicitly mandate near-exclusive government control over tribal property as the Supreme Court had held in the *Mitchell* cases, where the plaintiff tribe had sought money damages for breach of trust.

Next, the court discussed when a trust duty arises under substantive legal sources.²²¹ The Rosebud Sioux Tribe had identified three substantive sources of law implicating a trust duty to provide health care services: a treaty source—the 1868 Treaty of Fort Laramie—and two statutory sources—the Snyder Act and the IHCIA as reauthorized by the ACA.²²² Considering these sources chronologically, the court first addressed the trust obligation arising under the 1868 Treaty of Fort Laramie.²²³ The court concluded that the treaty’s language specifically addressed the provision of a physician and appropriations made for his or her employment, which implied a trust obligation to provide health care services.²²⁴ Although IHS receives an annual congressional lump-sum

220. See *Blue Legs*, 867 F.2d at 1100 (“The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, ‘reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.’” (quoting *Mitchell II*, 463 U.S. at 225)). The *Rosebud* court also cited a case from the Court of Federal Claims as support for the proposition that the trust relationship can be inferred from rather than explicitly stated by a substantive source of law, and that the government’s equitable obligation to a tribe turns instead on the interpretation of the relevant document’s terms. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 995 (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987–88 (Ct. Cl. 1980)). Neither of these supporting cases is Supreme Court precedent. The district court relied on its own Eighth Circuit precedent and persuasive authority from the Court of Federal Claims. But the Supreme Court has not yet ruled definitively on the standard by which equitable claims for breach of trust will be judged when claiming judicially enforceable affirmative trust duties in statutes. See discussion *infra* Section IV.A.

221. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 996 (citing *Navajo Tribe of Indians*, 624 F.2d at 988) (“The first step in this Court’s analysis then is to look to the terms of the sources of law put forward and to determine whether a duty exists and the scope of that duty under applicable Supreme Court precedents.”).

222. Complaint, *supra* note 5, at 16–17 (alleging that the federal government breached its treaty, statutory, and common law trust duties arising under the Snyder Act, the IHCIA, the Treaty of Fort Laramie, and federal common law to provide health care services to the tribe and its members); see also Plaintiff Rosebud Sioux Tribe’s Combined Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment at 26–28, *Rosebud Sioux Tribe*, 450 F. Supp. 3d 986 (No. 16-CV-03038) [hereinafter *Rosebud Motion for Summary Judgment Brief*] (arguing that the federal government has a duty pursuant to legislation, treaty, and federal common law); *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 995–96 (citing the tribe’s brief in support of its motion for summary judgment).

223. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 996, 999–1000 (noting the provisions of the 1868 Treaty of Fort Laramie and applying its terms to the federal government’s claim that no duty existed under the treaty to provide health care services).

224. See *id.* at 1000 (“Under a fair but liberal construction of the language used to favor the

appropriation and has spending discretion, part of its allocation represents the performance of a trust obligation under the treaty.²²⁵ Ultimately, the court found that the trust obligation under the 1868 Treaty—not the IHCIA, as discussed below—provided the strongest justification to grant the tribe’s motion for summary judgment in part.²²⁶

2. Considering the Statutory Basis for the Breach of Trust Claim

The court next considered when statutes like the Snyder Act and the IHCIA may serve as the basis for finding a trust duty. According to the district court and contrary to the Ninth Circuit’s holding in *Quechan Tribe*, the Supreme Court’s holdings in the *Mitchell* cases, *Lincoln v. Vigil*, the *Navajo Nation* cases, and *Jicarilla Apache Nation* did not foreclose such a finding.²²⁷ The court explained that after *Mitchell I* and *Mitchell II*, a trust obligation could still arise under statute, even when the government had not therein expressly assumed a fiduciary relationship by managing tribal property.²²⁸ The court suggested that the *Mitchell* cases did not require this narrow reading of the trust relationship when a tribe sought an *equitable* remedy to assert and enforce affirmative trust duties.²²⁹ The court briefly noted the holdings in the *Navajo Nation* cases and read them as an extension of the *Mitchell* cases, without further

Tribe, the Sioux Nation and the United States as well at the time must have meant the clause—that the United States furnish ‘the physician’ and ‘that such appropriations shall be made from time to time . . . as will be sufficient to employ such persons’—to require the United States to provide physician-led health care to tribal members. Such physician-led health care may fairly imply some level of professional competency.”); *see also* Treaty Between the United States of America and Different Tribes of Sioux Indians, art. XIII, Apr. 29, 1868, 15 Stat. 635 [hereinafter 1868 Treaty of Fort Laramie] (“The United States hereby agrees to furnish annually to the Indians the physician . . . as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.”).

225. *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1001.

226. *See id.* at 1001, 1003, 1005 (indicating that the federal government owed an implied duty under the treaty’s terms to provide some measure of competent physician-led health care to the tribe, and granting the tribe’s motion for summary judgment to a declaratory judgment to that extent).

227. *See id.* at 997–99 (discussing the precedential Supreme Court, Eighth Circuit, and Ninth Circuit holdings on finding trust duties arising under statutes).

228. *Id.* at 997 (“Although the Supreme Court in *Mitchell II* noted that ‘a fiduciary duty necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians,’ *it does not make such control a prerequisite to establish a trust relationship.*” (emphasis added) (quoting *Mitchell II*, 463 U.S. at 225)).

229. *See id.* at 998–99 (explaining that although the *Mitchell* cases predated the Eighth Circuit’s decision in *White v. Califano*, the Supreme Court’s holdings had not contradicted the Eighth Circuit’s holding or reasoning). The *Rosebud* court suggests, therefore, that statutes need not mandate government control of all tribal health care facilities as assets held in trust to imply a duty to provide health care services. *Contra* *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *4 (D. Ariz. Mar. 31, 2011) (finding that, because the Fort Yuma IHS unit was not a tribal asset held in trust by the government, the government had no fiduciary duty to preserve or maintain it).

application to this case.²³⁰ The court also cited *Jicarilla Apache Nation* as support for the United States' moral responsibility to Indian tribes but did not address its reasoning as to whether the federal government acted as a trustee in this case.²³¹

The district court finally considered the most closely related Supreme Court precedential holding in *Lincoln v. Vigil*.²³² As the district court noted, the *Lincoln* Court focused on whether IHS's reallocation of its lump-sum congressional appropriation was reviewable under the Administrative Procedure Act (APA) and found it was not.²³³ But the district court also pointed out that the *Lincoln* Court had not addressed the general trust responsibility to provide health care services to Indian children.²³⁴ Although the *Lincoln* Court said the Snyder Act and IHCA

230. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 997–98 (describing the Supreme Court's holdings in *Navajo Nation I* and *Navajo Nation II* in light of the *Mitchell* cases). The district court's minimal analysis and application of the holdings of the *Navajo Nation* cases can seem difficult to reconcile at first, given the apparently related issues facing the court in the case at bar. This could, however, reflect the court's understanding that the plaintiffs in the *Navajo Nation* cases were, like in the *Mitchell* cases, seeking money damages in a breach of fiduciary duty claim against the federal government for trust duties allegedly arising under statutes related to mineral leases. See *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 493 (2003) (noting the controversy at issue); *United States v. Navajo Nation (Navajo Nation II)*, 556 U.S. 287, 289 (2009) (repeating the background of the case). The district court therefore may not have considered the Supreme Court's holdings in the *Navajo Nation* cases to have provided any additional relevant application to the issues presented in *Rosebud Sioux Tribe*, where the tribe asserted the federal government's trust duty to provide services—not to manage tribal property—and sought an equitable remedy, not monetary compensation. Compare *Navajo Nation I*, 537 U.S. at 493 (“The Tribe seeks to recover money damages from the United States for an alleged breach of trust in connection with the Secretary's approval of coal lease amendments . . .”), with *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 995 (noting the tribe is not seeking money damages).

231. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011)) (“Although a substantive source of law is required to establish and define an actionable fiduciary duty owed by the Government, the Supreme Court has also recognized the moral responsibility the United States owes to Indian Tribes. ‘The Government, following a humane and self[-]imposed policy . . ., has charged itself with moral obligations of the highest responsibility and trust . . . obligations to the fulfillment of which the national honor has been committed.’” (alterations in original)).

232. *Id.* at 998 (analyzing *Lincoln v. Vigil*). Unlike the *Mitchell* cases and the *Navajo Nation* cases, the tribal members in *Lincoln* sought an equitable remedy for an alleged breach of trust duty arising under statute. See *Lincoln v. Vigil*, 508 U.S. 182, 185–89 (1993) (describing the controversy and plaintiffs' argument that discontinuing a specific health care program violated the federal trust responsibilities to Indians and the Administrative Procedure Act). In *Lincoln*, tribal members accused the federal government of violating the Administrative Procedure Act (APA) and sought to compel reallocated IHS funds for a discontinued health care program for disabled Indian children as a trust obligation arising under the Snyder Act and the IHCA. *Id.* at 189; see also discussion *supra* Section II.A.3.

233. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998 (noting the holding in *Lincoln*); see also *Lincoln*, 508 U.S. at 193–94 (“The Service's decision to discontinue the Program is accordingly unreviewable under § 701(a)(2).”). See generally discussion *supra* Section II.A.3 (noting that an executive agency's spending discretion is not reviewable under the Administrative Procedure Act).

234. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998.

“speak about Indian health only in general terms,” the Court also recognized IHS’s statutory mandate to provide health care to American Indians.²³⁵ The Court in *Lincoln* did not fully explore the potential trust obligations arising under the IHCA, having stopped its analysis after holding that this specific claim was not reviewable under the APA. Thus, the district court observed that *Lincoln* did not foreclose a finding of a trust duty arising under the IHCA to provide some measure of health care services, much less define the potential scope of such a duty.

In addition to Supreme Court precedent, the district court relied on the Eighth Circuit’s reasoning and holding in *White v. Califano* to support the principle that the United States has a trust duty arising under the IHCA to provide health care services.²³⁶ The district court cited *White*’s language emphasizing the trust relationship and its connection with Congress’s policy declared in the IHCA to provide health care services.²³⁷ There was no conflict, according to the *Rosebud* district court, between the Eighth Circuit’s holding in *White* and the Supreme Court’s subsequent holdings in the *Mitchell* cases, the *Navajo Nation* cases, and *Lincoln*.²³⁸

Yet the *Rosebud* court also recognized the Ninth Circuit’s alternative reading of this precedent and its contradictory holding that no affirmative trust obligations flowed from the Snyder Act or IHCA.²³⁹ The court pointed to the Ninth Circuit’s reliance on the *Lincoln* Court’s statement that these statutes address Indian health in general terms, leading the Ninth Circuit to conclude that no judicially enforceable duty could be derived from them.²⁴⁰ But the *Rosebud* district court had already noted

235. *Id.* (quoting *Lincoln*, 508 U.S. at 194).

236. *Id.* (describing *White v. Califano*, 581 F.2d 697, 697 (8th Cir. 1978)).

237. *Id.* (citing *White*, 581 F.2d at 698) (“The Eighth Circuit’s opinion adopted the statement of facts and the reasoning of the district court, and specifically quoted District Judge Andrew Bogue’s opinion that through the IHCA: ‘Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the ‘unique relationship’ between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U.S. Code pertains only to Indians.’” (quoting *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977)). *See also* discussion *supra* Section III.A (noting that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians).

238. *See Rosebud Sioux Tribe*, 450 F. Supp. 3d at 998–99.

239. *See id.* at 999 (“The Ninth Circuit and a district court therein, however, have considered claims brought by tribes alleging a governmental duty to provide health care and found that no such trust duty existed.”).

240. *Id.*; *see also* *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, 599 Fed. App’x 698, 699 (9th Cir. 2015) (quoting *Lincoln*, 508 U.S. at 194) (“Neither the Snyder Act nor the Indian Health Care Improvement Act contains sufficient trust-creating language on which to base a judicially enforceable duty. Both statutes ‘speak about Indian health only in general terms.’”). The district court in *Rosebud Sioux Tribe* did not grapple with the Ninth Circuit’s reading of *Jicarilla*

that the *Lincoln* Court had not fully explored the scope of the trust relationship and whether any affirmative trust obligations arose under the IHCA.²⁴¹ Moreover, the court is within the Eighth Circuit's jurisdiction and thus bound to follow Eighth Circuit precedent in *White*.²⁴²

3. Applying *White* and Supreme Court Precedent to *Rosebud Sioux Tribe*

The district court then turned to apply the derived legal rules to the parties' respective arguments in their cross-motions for summary judgment.²⁴³ The court flatly rejected the government's argument that it owed no duty to provide health care to the tribe.²⁴⁴ It relied on *White v. Califano*'s holding as well as *Lincoln*'s general recognition of IHS's statutory mandate to support the existence of a cognizable duty under the IHCA.²⁴⁵ The court also disagreed with the government's argument that *Lincoln* foreclosed the existence of a duty to provide health care, explaining instead that *Lincoln* did not directly address this issue.²⁴⁶

But the *Rosebud* district court stopped short of interpreting the IHCA as supporting the specific, judicially enforceable trust duty asserted in this case. Neither did the court define the potential scope of this duty under the IHCA vis-à-vis Rosebud IHS Hospital. Rather, the court insisted that

Apache Nation and its application to *Quechan Tribe*, which was also crucial to the holding in *Quechan Tribe*. See *Quechan Tribe*, 599 Fed. App'x at 699; see also discussion *supra* Section III.B. It is unclear whether the district court in *Rosebud Sioux Tribe* declined to discuss this aspect of the Ninth Circuit's holding because the district court did not agree with the Ninth Circuit's analysis and application of *Jicarilla Apache Nation*, or whether the district court did not see *Jicarilla Apache Nation* as applicable to the legal rules for *Rosebud*, or for some other reason.

241. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1000–01.

242. See *South Dakota Courts*, *supra* note 203.

243. See *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999–1003 (first addressing the government's arguments for summary judgment and then the tribe's arguments for summary judgment). The government argued that the Rosebud Sioux had not identified any substantive source of law from which an enforceable trust duty arose. Defendants' Brief in Support of Motion for Summary Judgment at 9–18, *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986 (D.S.D. 2020) (No. 16-CV-03038). The tribe argued that "[t]he Government's specific trust obligation to provide adequate health care to Indians repeatedly has been codified through legislation, including in the Snyder Act of 1921, the Indian Health Care Improvement Act of 1976 ('IHCA'), and most recently, the Affordable Care Act ('ACA')." Rosebud Motion for Summary Judgment Brief, *supra* note 222, at 26.

244. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 999.

245. *Id.*

246. See *id.* at 1000–01 ("In *Lincoln*, the Supreme Court correctly characterized the plaintiff's claim as a challenge to the allocations IHS made to programs from the lump sum appropriations it received from Congress. The Court accordingly focused its attention on its authority to review IHS's discretionary spending under the APA. The Court in *Lincoln* did not address whether the United States had a duty to provide health care to tribal members or the scope of that duty. . . . *Lincoln* stands for the proposition that lump-sum appropriations, once given, allow IHS considerable discretion in how it executes its duties; *Lincoln* does not hold that the existence of lump-sum appropriations for IHS absolves IHS of any duty to provide health care to the Tribe and its members." (citations omitted)); see also discussion *supra* Section II.A.3 (discussing *Lincoln v. Vigil*).

the tribe had overstated the government's obligations arising under the IHClA.²⁴⁷ The court instead found that the IHClA's language invoked by the Rosebud Sioux Tribe represented Congress's aspirations in enacting the law, not an affirmative obligation.²⁴⁸ The court left the door cracked open just a bit, though, by recognizing "that other provisions in the IHClA place affirmative duties on the Government for Indian health care," but these duties were more limited than what the tribe had argued.²⁴⁹ The court denied the tribe's motion for summary judgment based on the alleged breach of trust arising under the IHClA.²⁵⁰

The court did not reject the tribe's underlying assertion that some trust duty to provide health care services to Indian tribes existed pursuant to the Snyder Act and the IHClA read together.²⁵¹ It found that the Rosebud Sioux Tribe had gone a bit too far in its assertions of the scope of this duty.²⁵² Furthermore, the court disagreed with the government's contention that it had no duty whatsoever, and it refuted the government's reasoning and its reading of precedent regarding the trust doctrine's enforceability in general.²⁵³ The court instead based its ruling for the tribe on the 1868 Treaty of Fort Laramie and the duty implied therein.²⁵⁴ This

247. See *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1002. The Tribe argued that it was "Congress's clear intention to obligate the federal government to provide for the highest level of health care services possible to tribes . . ." Rosebud Motion for Summary Judgment Brief, *supra* note 222, at 32; see also *id.* at 26 ("The IHClA identifies the . . . duty owed by the federal government to Indian tribes, requiring the federal government to provide 'the highest possible health status for Indians' and 'the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level.'" (quoting 25 U.S.C. §§ 1621(a)(1), 1601(3))).

248. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1002 ("As an expression of a national goal—to provide 'the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level'—is not the enforceable legal duty owed by the Government to the Tribe.").

249. *Id.*

250. *Id.* at 1002–03.

251. See *id.* at 999 ("This Court does not accept the Government's conclusion that it owes no duty for health care to the Tribe or its members. Although some courts have found that the Snyder Act and the IHClA speak of Indian health care in terms too general to create an enforceable duty, the Eighth Circuit has explicitly recognized that these acts create a 'legal responsibility to provide health care to Indians.' Furthermore, despite these 'general terms,' the Supreme Court made note of IHS's 'statutory mandate to provide health care to Indian people.'" (citations omitted) (first quoting *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978); and then quoting *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993))).

252. See *id.* at 1002 ("This Court recognizes that other provisions in the IHClA place affirmative duties on the Government for Indian health care. However, those duties are more limited in scope than the broad, aspirational duty proposed by the Tribe." (citation omitted)).

253. See *id.* at 999–1001 (rejecting the federal government's arguments supporting its motion for summary judgment).

254. *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1003 ("Now, on cross motions for summary judgment, the parties have framed the question of what duty the Government owes the Tribe and its members for health care. As to the tribes that entered into the 1868 Treaty of Fort Laramie for the reasons discussed above, the Government's duty—expressed at the time as 'furnishing to the

may point to a deliberate and strategic choice on the part of the judge in this case to ground the ruling for the tribe in treaty rights rather than the rights inferred from statutes.²⁵⁵ As discussed in the next part of this Comment, the judge may have anticipated an uphill battle on appeal if the ruling had been grounded in interpreting trust obligations arising under the IHCA and their enforceability.

The federal government appealed the district court's ruling and order to the Eighth Circuit, where it is pending.²⁵⁶ Although the Eighth Circuit's holding in *White v. Califano* supported judicially enforceable trust obligations under the IHCA, it is likely that the Supreme Court—increasingly hostile to recognizing the fiduciary responsibilities affirmed in statutes that the federal government owes to American Indian tribes²⁵⁷—would side with the Ninth Circuit's reading of precedent in *Quechan Tribe*, discussed next.

IV. THE TRUST DOCTRINE'S NARROWING ENFORCEABILITY

The circuit split between the Eighth and Ninth Circuit reflects the substantial narrowing over the past forty years of the Court's understanding of the federal trust doctrine and its sources, scope, and enforceability.²⁵⁸ This part will address the divergent approaches taken in the respective appellate courts regarding the enforceability of affirmative trust duties arising under statutes. This part will show that the Ninth Circuit's reasoning strays from the foundational common law principles of the trust doctrine. That court's reasoning, however, aligns with the government's position in *Rosebud Sioux Tribe v. United States* on appeal. Despite the logical inconsistencies of this approach, it appears

Indians the physician . . . and that such appropriations shall be made from time to time, on the estimate of the Secretary of the Interior, as will be sufficient to employ such persons'—can be interpreted under the canons of construction applicable to Indian treaties as requiring the Government to provide competent physician-led health care to the Tribe.”)

255. See discussion *infra* Section IV.B.3 (discussing the district court's possible anticipation of a Supreme Court that is favorable to the government's arguments for limiting the federal trust doctrine's enforceability).

256. Notice of Appeal, *supra* note 27, at 1–2 (appealing the Opinion and Declaratory Judgment from the U.S. District Court of the District of South Dakota to the Eighth Circuit).

257. See discussion *supra* Section II.A.3 (discussing the Court's increasingly narrow reading of the federal trust doctrine in the *Mitchell* cases, *Lincoln v. Vigil*, the *Navajo Nation* cases, and *Jicarilla Apache Nation*); see also *Rey-Bear & Fletcher*, *supra* note 32, at 443–44 (criticizing the Court's narrow interpretation of the trust doctrine in the *Navajo Nation* cases and *Jicarilla Apache Nation*); Wood, *supra* note 44, at 1516 (“Until recently, courts generally assumed a prevailing trust relationship between the executive branch and the tribes, and held that branch to fiduciary duties even absent explicit statutory expression of a trust duty. This was entirely consistent with the common law origins of the trust doctrine. In the early 1980s, however, the Supreme Court decided the *Mitchell* cases, which somewhat narrowed the application of the trust doctrine in the context of claims seeking monetary compensation for breach of fiduciary duty.” (footnote omitted)).

258. See sources and accompanying notes, *supra* note 257.

likely that the Court will agree with the Ninth Circuit's reasoning in *Quechan Tribe* and side with the government's position in *Rosebud Sioux Tribe*, should that case ever reach the Supreme Court.

A. Divergent Approaches to the Trust Doctrine in the Eighth and Ninth Circuit Courts of Appeals

The Eighth Circuit adhered in *White v. Califano* to the trust doctrine's foundational principles: that congressional legislative policy represents an ongoing fulfillment of trust obligations to tribes rooted in the common law trust relationship.²⁵⁹ Congress's expressed policy objectives must guide the executive branch's execution of these obligations.²⁶⁰ Moreover, the Eighth Circuit affirmed that courts properly serve as arbiters of whether the federal government has adequately fulfilled its policy toward Indian tribes.²⁶¹ In a case where health care services were critical and otherwise unavailable for a qualifying tribal member, the Eighth Circuit recognized that the federal government could not abdicate its legal responsibility to provide them.²⁶² But the Eighth Circuit declined to define the full scope of this responsibility beyond its application in Ms. Red Dog's case.²⁶³ It also declined to affirm, as the lower court had proposed, a mechanism for the agency to balance appropriation of its limited resources with meeting its trust obligations.²⁶⁴ In contrast, the Ninth Circuit read and applied more recent Supreme Court case law so as

259. *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (quoting *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977)) ("We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the 'unique relationship' between Indians and the federal government . . ."); accord *Rey-Bear & Fletcher*, *supra* note 32, at 403–04 (explaining that federal policies and benefits provided to tribes are not gratuities, but rather exist to fulfill historical promises in treaties whereby tribes surrendered land in exchange for compensation, including ongoing government-provided services).

260. See *White*, 581 F.2d at 698 ("[B]ecause Ms. Red Dog lacks an alternative source of health care, federal policy as reflected by legislative and administrative action places responsibility for providing the necessary care upon the United States."); see also *Wood*, *supra* note 44, at 1513 ("Over time, a fairly substantial body of caselaw has developed enforcing fiduciary duties against the executive branch in Indian affairs.").

261. See *White*, 581 F.2d at 697 (affirming the district court's order to the federal government to pay for health care for Ms. Red Dog).

262. See *id.* at 698 ("The United States cannot evade that responsibility . . .").

263. Compare *White v. Califano*, 437 F. Supp. 543, 557 (D.S.D. 1977) ("When the Congress legislates for Indians only, something more than a statutory entitlement is involved. Congress is acting upon the premise that a special relationship is involved, and is acting to meet the obligations inherent in that relationship. . . . We have, therefore, read and construed the [IHCIA] as a manifestation of what Congress thinks the trust responsibility requires of federal officials, with whatever funds are available, when they try to meet Indian health needs."), with *White*, 581 F.2d at 698 (confining the application of the district court's holding to the case of Florence Red Dog).

264. Compare *White*, 437 F. Supp. at 555–56 (proposing a reading of the priorities for congressional health care appropriations according to the regulations promulgated under the statute), with *White*, 581 F.2d at 698 (declining to propose a resolution to future Indian health care controversies where the IHS exercises discretion in spending its appropriations).

to divorce the government's trust obligations from its common law origins.²⁶⁵ In doing so, the Ninth Circuit arguably applied case law that did not fit the legal question at issue, leading to incorrect results, as discussed below.

In *Quechan Tribe*, the Ninth Circuit affirmed the district court's rationale relying on the Supreme Court's holdings in the *Mitchell* cases, the *Navajo Nation* cases, and *Lincoln v. Vigil*.²⁶⁶ But the district court had mischaracterized and improperly analogized the reasoning in those cases to the *Quechan Tribe* case. First, in the *Mitchell* cases, the tribe sought money damages for the federal government's mismanagement of tribal property.²⁶⁷ The *Navajo Nation* cases also dealt with breach of trust claims for money damages and reaffirmed the high standard for judicial review set in the *Mitchell* cases for tribes seeking compensation from the federal government.²⁶⁸ But the showing required for equitable relief is not the same as that for money damages.²⁶⁹ Equitable relief for agency action (or inaction) that harmed tribal interests is normally sought under the APA, in which the federal government consents to suits in equity for legal harms caused by federal agencies or employees.²⁷⁰ Once judicial

265. See *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015) (“[T]he federal-tribal trust relationship does not, in itself, create a judicially enforceable duty. Rather, ‘trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.’” (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011))).

266. See *id.* at 699 (affirming *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, No. 10-2261, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011)).

267. See *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 537 (1980) (“The respondents contended that they were entitled to recover money damages because [the Government’s] alleged misconduct breached a fiduciary duty owed to them by the United States as a trustee of the allotted lands under the General Allotment Act.”); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 207 (1983) (“The principal question in this case is whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation.”).

268. See *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 503 (2003) (“To state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law that ‘can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.’” (quoting *Mitchell II*, 463 U.S. at 218)).

269. See COHEN’S HANDBOOK, *supra* note 33, § 5.05[3][c] (“Much confusion arises because of the tendency of courts to fail to distinguish between money damages claims . . . and claims brought in federal court seeking equitable relief, which do not require the sharper focus on the statutory basis for a claim required in the Court of Federal Claims (CFC) [for money damages]. In particular, some courts have read the jurisdictional language in the CFC breach of trust cases broadly as requiring that the trust doctrine be limited to obligations specifically stated in statutes. This analysis has been rejected . . . and is no substitute for careful analysis of the statute in the context of the trust doctrine in a case seeking equitable relief.” (emphasis added) (footnotes omitted)).

270. See *Administrative Procedure Act*, 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of

review for equitable claims is established under the APA, the court can then analyze the claim's substance to determine whether the federal agency violated a duty to the plaintiff generally grounded in statute, treaty, or the common law, such that the tribe is entitled to relief.²⁷¹ Though useful to establish the court's jurisdiction over claims seeking equitable relief, further APA analysis is not required to show a trust obligation enforceable at equity, as shown in the Eighth Circuit's holding in *White v. Califano*, where the general and historic trust relationship was sufficient.²⁷² But the *Quechan Tribe* district court's failure to distinguish between the respective standards required for claims seeking equitable relief and those seeking monetary damages was the first misstep in its analysis.²⁷³

Second, even assuming claims for equitable relief required the same standard as those for damages, the *Quechan Tribe* district court also failed to identify the substantive distinction between the *Mitchell* cases, where the plaintiff sought compensation for mismanagement of tribal resources, rather than enforcement of a statutory duty to provide a service.²⁷⁴ Stated

the relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."); *id.* § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (D) without observance of procedure required by law . . ."); *see also* *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993) (holding that the tribe's claims for equitable relief were not subject to judicial review under the Administrative Procedure Act, because funding the program in question discontinued by IHS was committed to agency discretion per 5 U.S.C. § 701(a)(2)); *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1973) (holding that the BIA should promulgate eligibility requirements for general assistance benefits as required not only by its own procedures but also by the Administrative Procedure Act).

271. *See* COHEN'S HANDBOOK, *supra* note 33, § 5.05[1][a] (describing how tribes establish claims for equitable relief by establishing jurisdiction under the APA).

272. *See* discussion *supra* Section III.A (discussing *White v. Califano*).

273. *See* *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *2 (D. Ariz. Mar. 31, 2011) (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006), *cert. denied* 552 U.S. 824 (2007)). The Supreme Court has not yet ruled definitively on this issue, but Indian law treatises reaffirm that they require different analyses. *See, e.g.*, COHEN'S HANDBOOK, *supra* note 33, § 5.05[c].

274. To support its assertion that the same standard applies to equitable relief, the district court cited Ninth Circuit case law. *Quechan Tribe*, 2011 WL 1211574, at *2 (citing *Gros Ventre Tribe*, 469 F.3d at 812). Full review of Ninth Circuit case law on this issue is beyond the scope of this Comment; however, other authorities have criticized this improper mental shortcut. *See, e.g.*, COHEN'S HANDBOOK, *supra* note 33, § 5.05 n.99 ("Often broad statements about the applicability of the *Mitchell* line of cases in federal question jurisdiction case are made in opinions not involving

another way, asking for money as compensation for what the government has already done poorly (i.e., mismanaging timber held in trust, costing the tribe its valuable resources by breaching this duty) is not the same as asking the government to do something it has already promised to do (i.e., provide health care services for American Indians, to whom it owes affirmative duties). The district court failed to distinguish these situations, both of which implicate the federal trust doctrine but in different legal contexts.²⁷⁵ Thus, the district court failed to explore the scope of the trust doctrine's affirmative obligation to provide services, which is not necessarily the same as if the Quechan Tribe had sought monetary compensation for a breach of trust claim.

Third, although the court grounded its analysis primarily in the *Mitchell* cases assuming they were analogous, it found that neither the Snyder Act nor the IHCIA created judicially enforceable affirmative trust obligations to provide health care services.²⁷⁶ Under the *Mitchell* cases, the extent to which federal statutes and their implementing regulations create enforceable trust obligations turns on the government's exclusive control and management of tribal resources to infer a common law trust relationship.²⁷⁷ Again, this analogy is inapposite on its face because proving that the government manages tribal property is neither necessary nor relevant to showing that the government *also* has a separate duty to provide health care services, grounded in the common law trust doctrine and expressed in statute. Nevertheless, the court considered the language of both the Snyder Act and the IHCIA to be too broad to impose any specific obligations on the federal government.²⁷⁸

Assuming for the sake of argument that the *Mitchell* analogy worked,

management of trust funds or resources.”); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–73 (2003) (describing the standard for raising breach of fiduciary duty claims for monetary damages under the Tucker Act, as set forth in the *Mitchell* cases).

275. Management of trust resources implicates the trust doctrine's imposition of fiduciary duties where the federal government acts as a trustee of tribal resources for the tribe's benefit, which requires an analysis of the common law of trusts and fiduciary duties in a more traditional—and narrower—sense. In contrast, provision of services pursuant to the general trust relationship requires analysis of the full legal context of this relationship and its expression in treaties and federal common law as a government-to-government, mutually binding, and ongoing legal obligation affirmed in statutes.

276. *Quechan Tribe*, 2011 WL 1211574, at *2–3.

277. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 224 (1983) (“In 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. The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship.”); *see also* discussion *supra* Section II.A.3 (discussing the *Mitchell* cases).

278. *See Quechan Tribe*, 2011 WL 1211574, at *2–3 (considering the language of the Snyder Act and the IHCIA).

the *Quechan Tribe* district court's assessment of the Snyder Act was probably fair. The Snyder Act does include only "extremely broad language," and the full text of the Act is less than a full page; it only briefly mentioned the provision of health care services as authorized under its congressional appropriations.²⁷⁹ But by the *Mitchell* analogy's standards, the court's analysis of the IHCIA's language is perfunctory, as it noted only three specific citations to the statute.²⁸⁰ This statute describing the provision of health care services originally comprised fifteen pages,²⁸¹ was reauthorized and amended as recently as 2010,²⁸² and currently coincides with approximately thirty-eight pages of additional implementing regulations.²⁸³ The district court showed minimal analysis comparing the timber statutes and regulations discussed in *Mitchell I* and *Mitchell II* with the IHCIA and its implementing regulations before concluding the IHCIA was too broad to impose any affirmative obligations to provide health care services or meet any standard of care within the federal government's IHS facilities.²⁸⁴

Finally, the district court's unsupported assertion that the trust responsibility arises exclusively when the United States holds tribal property in trust further mischaracterized the federal trust doctrine.²⁸⁵ The district court conflated the federal trust doctrine—which was originally conceived as much broader than federal oversight of tribes' property interests alone—and the common law concept of trust property.²⁸⁶ The trust doctrine was founded upon government-to-government agreements, in which the United States made certain promises, whether explicitly or implicitly, to sovereign tribes in exchange

279. *Id.* at *2; see also discussion *supra* Section II.B.2 (discussing of the Snyder Act).

280. *Quechan Tribe*, 2011 WL 1211574, at *3 ("The IHCIA requires defendants to eliminate deficiencies in health status and resources, and to meet the health needs of Indians in an equitable manner. 25 U.S.C. § 1621(a); (c)(1). It also requires competent personal [*sic*], § 1661(c)(2), and facilities that meet accreditation standards, § 1631(a)(2). While these provisions are more exacting than those in the Snyder Act, they still do not impose a duty on defendants to provide a certain level of health care, preserve and maintain tribal property, or be a health care provider.").

281. Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400, 1400-14 (codified at 25 U.S.C. §§ 1601-1680v).

282. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10221(a), 124 Stat. 119, 935-36 (2010) (codified as amended at 25 U.S.C. §§ 1601-1680v) (reauthorizing the IHCIA).

283. 42 C.F.R. §§ 136.1-136.418 (2020).

284. See *Quechan Tribe*, 2011 WL 1211574, at *3-4 (discussing the IHCIA's language and requirements, which according to the court, did not rise to the level of imputing fiduciary duties on the federal government toward the tribe).

285. See *id.* at *2 ("Moreover, the trust responsibility arises when the United States holds *tribal* property in trust."). The court did not provide a citation for this assertion.

286. See *id.* at *3 ("Here, the United States does not even hold the Ft. Yuma facility in trust. It belongs to the United States. It is not held in 'trust' for the tribe."). *But see* Wood, *supra* note 44, at 1496-98 (describing the trust relationship as a "sovereign trusteeship" comprising obligations rooted in treaties and agreements between sovereign governments and reinforced in statute).

for their lands.²⁸⁷ But the district court's statement ignored precedent that recognizes trust responsibilities as extending beyond the government's management of tribal property.²⁸⁸ Even if the federal trust doctrine could be equated with the common law of trusts, the lack of specific trust "assets," as the court puts it, would not foreclose the existence of a broader trusteeship relationship with ongoing fiduciary duties beyond management of property interests.²⁸⁹ Thus, the *Quechan Tribe* district court interpreted the trust doctrine's scope narrowly without proper support.

By grounding its decision in this incorrect understanding of the federal trust doctrine and misapplication of the facts and holdings of Supreme Court case law, it is not surprising that the *Quechan Tribe* district court concluded that neither the Snyder Act nor the IHCA created judicially enforceable affirmative trust duties. Accepting the district court's findings, the Ninth Circuit did not interrogate the language of the IHCA or its implementing regulations to determine whether they might embody any trust obligations, as did the timber statutes and regulations in *Mitchell II*.²⁹⁰ The Ninth Circuit summarily stated without analysis that the IHCA

287. See discussion *supra* Section II.A.1 (describing the Marshallian conception of the trust relationship). It is also imperative to acknowledge that these were lands over which the federal government had already unilaterally declared a monopolistic right to extinguish Native title, and which were violently conquered when the federal government broke promises or deemed them inconvenient to uphold. *Id.* The district court failed to acknowledge any historic responsibility for this colonial legacy inherent in the trust doctrine and reduced it to a banal casualty of the present-day political process divorced from historical context. See *Quechan Tribe*, 2011 WL 1211574, at *7 ("At its core, plaintiff's complaint does not raise legal issues, but policy issues as to the proper allocation of resources for Indian health care. The Tribe is just one of many interest groups throughout the country competing for scarce resources. The Tribe's concerns are best addressed through the political process.").

288. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (holding that the BIA's denial of general assistance benefits to Indians living off but nearby the reservation was not consistent with the government's trust obligations); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed [*sic*] policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself 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."); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225–26 (1983) (collecting cases supporting the "undisputed existence of a general trust relationship between the United States and the Indian people").

289. See *Rey-Bear & Fletcher*, *supra* note 32, at 403–11 (arguing that a broad trusteeship relationship exists between Indian tribes and the federal government); see also Wood, *supra* note 44, at 1496–98 (describing the trust relationship as a "sovereign trusteeship" comprising obligations rooted in agreements between sovereign governments and reinforced in statute).

290. See *Mitchell II*, 463 U.S. at 219–27 (analyzing the language of several relevant timber statutes and regulations carefully and finding that they fairly expressed the government's undertaking of specific fiduciary obligations with respect to managing tribal timber resources).

and Snyder Act placed no affirmative duties on the government.²⁹¹

The Ninth Circuit also added new, misapplied, authority to its holding through *United States v. Jicarilla Apache Nation*, which the Supreme Court decided mere months after the district court's ruling in *Quechan Tribe*.²⁹² The appellate court quoted *Jicarilla Apache Nation* to support the misguided assertion that the trust doctrine originated exclusively in statute and thus requires narrow statutory interpretation.²⁹³ Taken out of context, the quotation the Ninth Circuit pulled from *Jicarilla Apache Nation* appears to show the Supreme Court has definitively settled the trust doctrine's sources and scope. But in context, the narrow question decided in *Jicarilla Apache Nation*—whether the fiduciary exception to the claim of attorney-client privilege applies to the general trust relationship between the United States and the Indian tribes during a breach of trust lawsuit²⁹⁴—is very different from the issue the Ninth Circuit faced. The latter court did not address or analyze why *Jicarilla Apache Nation*'s holding on such a narrow evidentiary privilege issue would completely foreclose any affirmative obligations under the trust

291. See *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015) (“Neither the Snyder Act nor the Indian Health Care Improvement Act contains sufficient trust-creating language on which to base a judicially enforceable duty. Both statutes ‘speak about Indian health only in general terms,’ and neither requires the United States to provide a specific standard of medical care.” (quoting *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993))).

292. See *Quechan Tribe*, 599 Fed. App'x at 699; *Quechan Tribe*, 2011 WL 1211574, at *1 (noting the district court's ruling on March 31, 2011); see also *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 162 (2011) (noting the Court's decision on June 13, 2011).

293. See *Quechan Tribe*, 599 Fed. App'x at 699 (“[T]rust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.” (quoting *Jicarilla Apache Nation*, 564 U.S. at 165)).

294. *Jicarilla Apache Nation*, 564 U.S. at 165 (“The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held that, the trustee cannot withhold attorney-client communications from the beneficiary of the trust. In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes.”). Similar to the *Marshall* cases and the *Navajo Nation* cases, *Jicarilla Apache Nation* also originated as a breach of trust action for money damages against the federal government for alleged mismanagement of trust assets. *Id.* at 166. During discovery for the breach of trust action, the government withheld some potentially relevant documents from the tribe, claiming attorney-client privilege. *Id.* Because the tribe identified itself as the beneficiary of the trust funds, the tribe moved to compel disclosure of the documents under the fiduciary exception to the attorney-client privilege. *Id.* at 167. The Court of Federal Claims and the Court of Appeals for the Federal Circuit both ruled in favor of the tribe. *Id.* at 167–69. The Supreme Court reversed and remanded. *Id.* at 169. The issue of the trust doctrine's scope in *Jicarilla Apache Nation*, therefore, was substantially narrower than that in *Quechan Tribe* or the subsequent *Rosebud Sioux Tribe*.

doctrine, much less any government obligation to provide health care services under the IHCA.²⁹⁵

Finally, the Ninth Circuit denied any judicial authority to order IHS to operate its facility safely or reallocate its internal funding.²⁹⁶ Neither did the court consider the Quechan Tribe's request for a declaratory judgment.²⁹⁷ The court ultimately deferred entirely to the authority of Congress and the executive agencies to define and implement Indian health care policy, abdicating any judicial oversight of such actions by the other branches.²⁹⁸

In sum, the Ninth Circuit's holding in *Quechan Tribe* rested primarily on the district court's misapplication of the *Mitchell* cases and the Ninth Circuit's additional inapposite application of *Jicarilla Apache Nation*. The district court inappropriately applied the *Mitchell* cases in the first place. In those cases, the plaintiffs sued for monetary damages, which entail a narrower reading of trust obligations arising under statute. But even had *Mitchell* provided the appropriate standard, the district court failed to apply it correctly. The court did not adequately analyze and compare the statutes at issue in those cases with the IHCA in *Quechan Tribe*. The district court's analysis was very thin in this regard. When the Ninth Circuit affirmed, the Court of Appeals inserted authority from *Jicarilla Apache Nation* to further narrow the scope of the government's trust obligations, despite that case's consideration of a very different question of the government's fiduciary duties in another context. Unfortunately, the government has picked up on this line of reasoning

295. Even if *Jicarilla Apache Nation* does govern the holding in this case, then it is unclear under the Ninth Circuit's reasoning how the federal government's "sovereign interest in the execution of federal law" is not implicated by its statutory obligations under the IHCA. See *Jicarilla Apache Nation*, 564 U.S. at 165 ("[I]n fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.").

296. *Quechan Tribe*, 599 Fed. App'x at 699 ("The Tribe also argues that this court should issue an order compelling IHS to maintain and operate the Fort Yuma Service Unit safely, and to allocate additional available funds to the Unit. This court cannot compel IHS to maintain the Unit because there is no specific, unequivocal statutory command to do so. This court also cannot compel IHS to allocate greater funding to the Unit, because IHS's allocation of the lump-sum appropriation for Indian health care is committed to its discretion." (citation omitted)).

297. *Id.* The relevant statutes give federal courts the authority to "declare the rights and other legal relations of any interested party seeking such declaration," and for the aggrieved party to then seek further relief based on the declaratory judgment. 28 U.S.C. §§ 2201, 2202.

298. *Quechan Tribe*, 599 Fed. App'x at 699–700 ("In closing, we emphasize that we appreciate the Tribe's commitment to ensuring adequate healthcare for its members, and we acknowledge the challenges faced by the Tribe in ensuring such care. However, the solution lies in Congress and the executive branch, not the courts."). In response to the court's direction to the federal political branches, it must be acknowledged that American Indians constitute a very small percentage of the United States population, scattered across various states, and with comparatively few resources. See *Rey-Bear & Fletcher*, *supra* note 32, at 448 (noting that because Indian tribes are small and only located in some states, Congress is not as familiar with Indian issues). It is therefore exceptionally difficult for American Indians to advance their interests in Congress. *Id.*

and carried it forward in its appeal in *Rosebud Sioux Tribe*, discussed next.

B. Narrowing the Federal Trust Doctrine in the Rosebud Sioux Tribe Appeal

In *Rosebud Sioux Tribe v. United States*, the parties' framing of the key issues on appeal to the Eighth Circuit demonstrate the continued divergence between Eighth Circuit and plaintiff tribes' understanding of the federal trust doctrine—including its proper sources, scope, and enforceability—and that of the federal government. The government (defendants-appellants in the suit) contends that there can be no enforceable trust obligations—whether grounded in treaty or statutory language—where the government does not manage tribal property, and where there is no explicit assumption of fiduciary obligations in a substantive source of law.²⁹⁹ The Rosebud Sioux Tribe (plaintiff-appellee in the suit) argues that trust responsibilities extend beyond the government's narrow framing. In particular, the tribe argues that the government's insistence on the management of tribal property (a trust corpus) as a necessary precondition to any trust obligations flowing from treaty or statutory sources would render the promises the United States originally made in treaties, and which Congress has repeatedly reinforced by statutes, meaningless and illusory.³⁰⁰

The government denied the existence of any enforceable trust duty under the Treaty of Fort Laramie of 1868, the IHCIA, or any other related statute to provide “competent physician-led health care” to the tribe and its members,³⁰¹ as the district court had ordered.³⁰² In its framing of the issue on appeal of whether the 1868 Treaty of Fort Laramie “gives rise to a duty . . . grounded in Indian trust doctrine” to provide such services to the Rosebud Sioux Tribe,³⁰³ the government reasserted its narrow understanding of federal trust doctrine's sources, scope, and enforceability.

299. Brief for Defendants-Appellants at 11, *Rosebud Sioux Tribe v. United States*, No. 20-2062 (8th Cir. July 9, 2020), 2020 WL 4060372 at *11.

300. Brief of Appellee Rosebud Sioux Tribe at 29, *Rosebud Sioux Tribe*, No. 20-2062, 2020 WL 5607354 at *29.

301. Brief for Defendants-Appellants, *supra* note 299, at 10, *10 (“IHS does not have an Indian trust duty under the Treaty of Fort Laramie of 1868, the IHCIA, and/or the Snyder Act to provide “competent physician-led health care” to the Rosebud Sioux Tribe’s members.”).

302. Judgment, *supra* note 26, at 1–2 (“[It is] [o]rdered, adjudged, and decreed that Summary Judgment on Count III enters for Plaintiff and against Defendants under Fed. R. Civ. P. 56 to the limited extent that this Court enters a declaratory judgment that the Defendants owe the Tribe a duty to provide competent physician-led health care to the Tribe and its members.”).

303. Brief for Defendants-Appellants, *supra* note 299, at 2, *2.

1. Narrowing the Sources of the Trust Doctrine

The government now rejects any common law basis for the trust doctrine,³⁰⁴ and it repeats the misapplied standard of the *Mitchell* cases, the *Navajo Nation* cases, and *Jicarilla Apache Nation* to insist that the trust doctrine requires both a trust corpus and a substantive legal source explicitly assuming and defining fiduciary responsibilities.³⁰⁵ Similar to the Ninth Circuit's holding,³⁰⁶ the government does not distinguish the monetary damages claims in this line of Supreme Court cases from the tribe's claim for equitable relief in *Rosebud*.³⁰⁷

It made sense in the *Mitchell* line of cases for the Court to identify both a trust corpus and require an explicit statutory basis for the government's fiduciary duty to manage tribal resources. The tribes in these cases sought monetary damages precisely for the government's alleged mismanagement (i.e., breach of fiduciary duty inherent in a traditional common law trust relationship) of tribal property.³⁰⁸ But as the *Rosebud* Sioux Tribe points out in its own brief on appeal, obligations arising under the common law trust relationship and further grounded in treaties and statutes are not limited to the compensatory interest in fiduciary duties that attach to a trust corpus.³⁰⁹

This is a fundamentally different type of claim. The tribe did not seek compensatory damages for mismanagement of tribal property but rather "a declaration of the rights and obligations" of the federal government to provide health care services, which originally arose under treaty and were

304. *Id.* at 11, *11 ("[A]ny specific obligations the Government may have under [the trust] relationship are 'governed by statute rather than the common law.'" (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011))).

305. *Id.* at 11, *11 (quoting *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 506 (2003); *accord United States v. Navajo Nation (Navajo Nation II)*, 556 U.S. 287, 296, 302 (2009)).

306. *See Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *2 (D. Ariz. Mar. 31, 2011) ("When a tribe sues the government for damages, it 'must identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government has failed faithfully to perform those duties.'" (quoting *Navajo Nation I*, 537 U.S. at 506 (2003)), *aff'd*, 599 Fed. App'x 698, 699 (9th Cir. 2015) (affirming the judgment and adopting the reasoning of the district court).

307. *See* Brief for Defendants-Appellants, *supra* note 299, at 11–12, *11–12 (citing the *Mitchell* cases, the *Navajo Nation* cases, and *Jicarilla Apache Nation* as support for the argument that "[a] trust duty only exists if the plaintiff can both identify 'a substantive source of law that establishes specific fiduciary or other duties' and establish that the United States has taken over tribal assets such as tribally owned land or timber." (citation omitted)).

308. *See* discussion and accompanying footnotes, *supra* Section II.A.3 (discussing the monetary damages claims in the *Mitchell* cases, the *Navajo Nation* cases, and *Jicarilla Apache Nation*).

309. *See* Brief of Appellee *Rosebud* Sioux Tribe, *supra* note 300, at 35, *35 ("The district court correctly rejected the Government's attempt to avoid its treaty and statutory obligations by grafting in a trust corpus requirement that does not fit the case.").

affirmed by statute.³¹⁰ It would make no sense to tie such obligations to the existence of a trust corpus. Nor does it follow that the existence of such obligations be denied altogether simply because there is no trust corpus to justify them. Rather, the government's affirmative trust obligations to provide services and benefits are grounded in—and should be judged according to—the generally accepted canons of construction for treaties and statutes governing the unique relationship between the United States and Indian tribes.³¹¹

If the Eighth Circuit accepts the government's argument that the trust doctrine applies only in the narrowest of circumstances, when there is (1) a trust corpus, and (2) statutes that explicitly undertake exclusive government responsibility for its management, this would divorce the federal trust doctrine entirely from its common law origins that implied an ongoing performance of responsibilities in exchange for the historic dispossession of land from Indian tribes.³¹²

2. Narrowing the Scope of the Trust Doctrine

Furthermore, the government has disclaimed any trust obligation arising under statute or the 1868 Treaty to provide specific health care services, claiming that any funds appropriated by Congress pursuant to the IHCA represented only gratuitous, lump-sum appropriations that IHS had complete discretion to spend as it saw fit.³¹³ The government rejected the Eighth Circuit's holding in *White*, arguing that *Lincoln* had effectively overturned it.³¹⁴ As the tribe observed, however, the government misinterpreted *Lincoln* because the *Lincoln* Court never

310. *Id.* at 35, *35 (noting the distinction between damages claims and equitable claims).

311. *See id.* at 20–21, *20–21 (explaining the relationship between Indian tribes and the United States through treaties as contracts between sovereign nations, and that traditional canons of construction interpreting treaties require fulfillment of the spirit of those agreements to tribes' benefit rather than strict adherence to the specific language); *see also* COHEN'S HANDBOOK, *supra* note 33, § 2.02[1] (“The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor.” (footnotes omitted)).

312. Brief of Appellee Rosebud Sioux Tribe, *supra* note 300, at 30, *30 (“The United States at times will manage a trust corpus and can be liable for mismanagement, but it is a *non sequitur* to conclude that all straightforward treaty obligations require a trust corpus for there to be a treaty violation. It would come as a rude shock to tribes all over the country, and would violate every principle of treaty construction and fair dealing if the conclusion were reached that all of the bargained-for treaty obligations that lack a corpus are unenforceable.”).

313. *See* Brief for Defendants-Appellants, *supra* note 299, at 15–17, *15–17 (arguing that the statutory language of the Snyder Act and IHCA did not create any specific trust obligation and that the treaty at issue did not contain language that could reasonably be interpreted as the district court did).

314. *Id.* at 19, *19 (“[T]he Supreme Court has held that IHS's appropriations, the Snyder Act, and the IHCA speak of Indian health only in general terms and do not impose trust obligations. This holding directly invalidates the *White* court's reliance on the IHCA” (citing *Lincoln v. Vigil*, 508 U.S. 182, 194–95 (1993))).

reached the issue of whether the IHClA implicated the trust doctrine.³¹⁵

The government's position implies that, if it owes no duty whatsoever and congressional appropriations to IHS are merely gratuitous, then IHS could completely "eliminate health care services to the Rosebud Tribe without violating any duty."³¹⁶ This absurd and unjust result illustrates that the government's position is extreme. Thus, the district court reasonably concluded that the scope of the government's duty includes some provision of health care services. It would also be absurd to agree with the government that, even if such a duty existed, it would be limited to merely employing and housing one physician on the tribe's land, per a strict reading of the treaty's language.³¹⁷ The tribe and the government, when the treaty was made, had to intend for this to represent the ongoing provision of meaningful health care services.³¹⁸ Congress's affirmations under the IHClA further reinforce this interpretation.³¹⁹ That the scope of the federal trust doctrine extends to provide "competent physician-led health care"³²⁰ is a far more reasonable conclusion.

3. Reducing the Enforceability of the Federal Trust Doctrine

Finally, the government argues the declaratory judgment issued by the district court was too vague to be enforced.³²¹ The declaratory

315. Brief of Appellee Rosebud Sioux Tribe, *supra* note 300, at 34, *34. The tribe correctly observed—as did the district court—that the *Lincoln* Court "held only that courts could not review the IHS's decision about the funds pursuant to the [Administrative Procedure Act]." *Id.*; *cf.* *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 998 (D.S.D. 2020) ("The Court however did not opine on the general trust responsibility IHS owed . . . to tribes."); *Lincoln*, 508 U.S. at 193 ("The Service's decision to discontinue the Program is accordingly unreviewable under § 701(a)(2) [of the Administrative Procedure Act].").

316. Brief of Appellee Rosebud Sioux Tribe, *supra* note 300, at 29, *29.

317. 1868 Treaty of Fort Laramie, *supra* note 224 ("The United States hereby agrees to furnish annually to the Indians the physician . . . as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons."). The *Rosebud* district court also noted the absurdity of the government's argument: "If this Court were to adopt a truly literal interpretation as the Government suggests, the Government could satisfy its duty by employing and furnishing a physician and housing him on the reservation without the physician providing any sort of services. This interpretation could not have been the intended result of the negotiating parties." *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1000 n.11.

318. The district court also recognized the historic reality that "treaties between the Government and tribes routinely were written by the Government in English rather than in the language spoken by tribal chiefs or members and frequently involved tribal representatives placed under extreme duress." *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1000 n.10. Thus, the court recognized the federal government's advantage in negotiating these terms in the first place.

319. See 25 U.S.C. § 1601(1) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.").

320. Judgment, *supra* note 26, at 2.

321. Brief for Defendants-Appellants, *supra* note 299, at 21, *21 ("Even if the Treaty did

judgment's lack of specificity, according to the government, originated precisely in the lack of a specific statutory or regulatory obligation.³²² But as the tribe explains, the parties had a right to seek the court's declaration of enforceable legal responsibilities to each other in this controversy.³²³ The trust obligations under the 1868 Treaty were just one aspect of that controversy, which the court defined according to its role.³²⁴ The resulting declaration can be enforced through the federal government applying its own stated standards of medical care (which already apply to Rosebud Hospital) and ensuring that IHS does, in fact, meet such standards.³²⁵ This judgment does not require the court to involve itself in the internal policy matters and demand specific budget allocations within IHS.³²⁶ Rather, the judgment declares that IHS take into consideration its obligation to provide competent, physician-led health care to the Rosebud Tribe during this budgetary process.

It is notable, however, that the district court's declaratory judgment was premised on trust obligations implicated in the 1868 Treaty's language, not the IHCIA.³²⁷ The government here persuasively points out that the district court did not ground its order and judgment in the enforceability of the IHCIA under the trust doctrine.³²⁸ The court explained that the tribe had overstated its duty under the IHCIA in this particular claim, but that there were enforceable affirmative duties to provide health care services under the IHCIA and the trust doctrine in

impose some general obligation to provide adequate health care, the district court independently erred by entering an abstract declaratory judgment that does not clearly define the rights and obligations of the parties in the context of any concrete controversy.”).

322. *Id.* (“Because the district court did not purport to identify any specific and concrete obligation grounded in a statute or regulation, it could not frame its declaratory judgment in concrete terms.”).

323. Brief of Appellee Rosebud Sioux Tribe, *supra* note 300, at 16–17, *16–17.

324. *Id.* at 17, *17 (“[The district court] just needed to declare the legal rights of the parties under the Treaty based on the set of concrete facts presented in this case. The district court’s opinion properly interpreted the Treaty and declared the respective rights of the parties thereunder.”).

325. *Id.* at 18, *18. (“[T]he federal government sets minimum standards for medical care across the country and enforces compliance with those standards, without any indication that such regulations are vague or meaningless.”).

326. Indeed, this concerns the matter decided in *Lincoln*, that IHS’s internal appropriations decisions regarding specific programs fell outside of judicial review, but *Lincoln* did not define the parties’ rights and obligations toward one another under the trust doctrine.

327. See discussion *supra* Section III.C.3.

328. See *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 1002–03 (D.S.D. 2020) (explaining why the government’s affirmative duties under the IHCIA do not extend as far as the tribe’s brief in support of its motion for summary judgment had asserted); see also *id.* at 1005 (“[T]his Court issues a declaratory judgment that the Defendants’ duty to the Tribe under the 1868 Treaty of Fort Laramie expressed in treaty language as furnishing ‘to the Indians the physician’ requires Defendants to provide competent physician-led health care to the Tribe’s members.”).

general, per *White v. Califano*.³²⁹ But it is also possible that Chief Judge Lange foresaw the challenges facing judicial enforcement of affirmative statutory duties under the IHCIA and other similar statutes.

The trend, as shown in the Ninth Circuit's *Quechan Tribe* holding and the evolution of the Supreme Court's increasingly narrow understanding of the trust doctrine, has meant fewer judicially enforceable rights for Indian tribes.³³⁰ In the *Marshall, Navajo Nation*, and *Jicarilla Apache Nation* cases, the Supreme Court opted to look to statutes over the common law as the primary sources for the trust doctrine, despite the doctrine's common law origins.³³¹ Because the interpretation of treaties is linked more closely to the common law tradition and origins of the trust doctrine, it is possible the *Rosebud* court saw the treaty language as more likely to be enforceable.³³² Treaties are more tangible embodiments of the ongoing promises that the federal government made to sovereign Indian tribes in exchange for their vast cessions of land.³³³ The Supreme Court has previously emphasized that treaties should be interpreted liberally and in tribes' favor when possible.³³⁴ Thus, the district court in *Rosebud Sioux Tribe* may have foreseen that appellate courts would be more likely to liberally interpret duties established by treaty rather than those duties affirmed by legislation. Some district courts have viewed the

329. See *id.* at 1002 (explaining that an affirmative duty exists under the IHCIA but that it is not coextensive with the broad policy claimed by the tribe).

330. See Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277, 291–92 (2018) (describing the Supreme Court's trend over the past thirty years that construes trust obligations narrowly); see also Wood, *supra* note 44, at 1507 (“The outright dismissal of the trust responsibility effectively drowns out any continuing special federal obligation toward tribes. It forecloses a potentially effective judicial avenue for requiring agencies to protect native lands and resources.”).

331. See discussion *supra* Section II.A.1, 3 (discussing the trust doctrine's origins in common law and the most recent Supreme Court interpretations).

332. See *Rosebud Sioux Tribe*, 450 F. Supp. 3d. at 1000 (“Congress has not extinguished the 1868 Treaty of Fort Laramie but has legislated to widen the Government's role in providing health care to tribal members generally.”). The *Rosebud* court also took care to outline the history of the 1868 Treaty and the common law canon of treaty interpretation that traditionally favors tribal interests, given the context in which they were negotiated that heavily favored the drafting party. *Id.* at 989–90, 1000.

333. See sources cited *supra* note 36 (describing the history of treaties between the federal government and Indian tribes).

334. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (citations omitted)). See also RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS, *supra* note 19, § 6 (“A treaty must be liberally interpreted in favor of the relevant Indian tribes to give effect to the purpose of the treaty. Courts apply the following canons of construction: (a) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the relevant Indian tribes. (b) An Indian treaty must be construed as the Indians understood it at the time of the treaty negotiation. (c) An Indian treaty must be construed by reference to surrounding circumstances and history.”).

latter as conferring to American Indians little more than a mere, voluntary gratuity.³³⁵

C. Predictions for the Supreme Court's Resolution of the Circuit Split

The Eighth Circuit may be persuaded by the Rosebud Sioux Tribe's arguments and by the Eighth Circuit's own line of precedent in *White v. Califano* supporting the enforceability of trust obligations, pursuant to treaty and statutory language in this case and other similar cases. But the Supreme Court is likely to prefer to extend its increasingly narrow view, as illustrated in recent case law, to apply to the trust obligation to provide health care services to Indian tribes under the IHCA and earlier treaties. This approach aligns more closely with the Ninth Circuit's reasoning in *Quechan Tribe* and with the government's position in *Rosebud Sioux Tribe*. If this case reaches the Supreme Court, the Court would likely hold that there is no specific, judicially enforceable trust obligation to provide health care that arises from either the IHCA or treaties like the 1868 Treaty of Fort Laramie.

First, the Court will likely agree with the government that trust obligations derive from both an existing trust corpus and from explicit provisions in statutes that assume near-exclusive government control of the management of that trust corpus. This would extend the Court's strict requirements for tribes' claims for monetary damages proclaimed in the *Mitchell*, *Navajo Nation*, and *Jicarilla Apache Nation* cases to future tribal claims for equitable relief. Such a holding would follow the Court's trend of seeking specificity in the plain text of statutes and treaties, divorced from consideration of the doctrine's broader historical context; the intent of the drafters; and common law principles.³³⁶ It also would follow a longer-term trend of the Court narrowing the government's federal trust obligations.³³⁷ By limiting the sources to derive enforceable

335. See, e.g., *Gila River Indian Cmty. v. Burwell*, No. 14-CV-00943, 2015 WL 997857, at *6 (D. Ariz. Mar. 6, 2015) (describing congressional appropriations made pursuant to statute as "gratuitous"); *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *2-3 (D. Ariz. Mar. 31, 2011) ("The provision of [health care] services under that [Snyder] Act is a *matter of grace*, not a legal obligation. . . . We do not disagree that the statutes discuss the *voluntary* assumption by the United States of the provision of some health care to Indians." (emphasis added)).

336. See *Skibine*, *supra* note 330, at 292 ("The Court . . . does not want to extend general principles of trust law to interpret the extent of the Indian trust doctrine unless specifically mandated to do so by Congress.").

337. See *Rey-Bear & Fletcher*, *supra* note 32, at 442 (describing the Court at odds over the past fifty years with the political branches, which have reaffirmed the federal trust responsibility as national policy); see also *Skibine*, *supra* note 330, at 291-92 (reviewing the eight Supreme Court cases in the past thirty years that implicated the trust doctrine, seven of which the tribes lost, indicating the trend in the Court's narrow interpretation of the trust doctrine and its reluctance to extend the trust doctrine's principles without an explicit congressional mandate).

trust obligation from, the Court would reduce the government's burden and substantially increase the tribes' burden, making it much harder for tribes to pursue claims for which the government has little incentive to be held accountable.

The Court would probably also go further and overrule the district court's reading of *White* and vacate any forthcoming Eighth Circuit decision that affirmed the district court's ruling in *Rosebud Sioux Tribe*. The Court would most likely emphasize that neither the 1868 Treaty nor the IHCA or other related health care statutes (i.e., the Snyder Act or the ACA) creates a judicially enforceable trust obligation. The Court will likely agree with the Ninth Circuit's interpretation of *Lincoln v. Vigil*, which the government relies on for its appeal in *Rosebud*, saying the language both in statutes and the treaty address health care "only in general terms." The Court will likely continue to interpret the scope of the federal government's trust obligations very narrowly, especially considering the relatively new composition of the Court.³³⁸ The Court

338. Since *Jicarilla Apache Nation* was decided in 2011, three justices have departed. Justice Antonin Scalia died in February 2016 and was replaced by Justice Neil Gorsuch in April 2017. *Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch [<https://perma.cc/U5J8-Q384>] (last visited May 29, 2021). Justice Anthony Kennedy retired in 2018 and was replaced by Justice Brett Kavanaugh in October 2018. *Brett M. Kavanaugh*, OYEZ, https://www.oyez.org/justices/brett_m_kavanaugh [<https://perma.cc/WX4D-9KFX>] (last visited May 29, 2021). Justice Ruth Bader Ginsburg died in September 2020. *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg [<https://perma.cc/F5PR-LZC8>] (last visited May 29, 2021). President Trump appointed Judge Amy Coney Barrett, sitting judge on the Seventh Circuit Court of Appeals, to replace Justice Ginsburg, and after receiving Senate confirmation, she was sworn in on October 27, 2020. *Judicial Oath Ceremony: The Honorable Amy Coney Barrett*, SUP. CT. U.S., https://www.supremecourt.gov/publicinfo/press/oath/oath_barrett.aspx [<https://perma.cc/6P5Q-GBYK>] (last visited May 29, 2021). Prior to Justice Ginsburg's death, the Court ruled 5–4 in *McGirt v. Oklahoma* to recognize that a treaty signed in 1832 between the Creek Nation and the federal government remained in effect. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Justice Gorsuch, writing for the majority, detailed the extensive history of the treaties and successive Acts of Congress that fractured the Creeks' lands and broke prior commitments. *McGirt*, 140 S. Ct. at 2460–68. But throughout that history, Justice Gorsuch explained, Congress never dissolved the Creek Tribe nor disestablished its reservation. *Id.* at 2468. Justice Gorsuch has thus been praised for his recognition of Indian rights, but the decision is firmly grounded on a strict reading of statute. *See, e.g.*, Ronald Mann, *Opinion Analysis: Justices Toe Hard Line in Affirming Reservation Status for Eastern Oklahoma*, SCOTUSBLOG (July 9, 2020, 7:15 PM), <https://www.scotusblog.com/2020/07/opinion-analysis-justices-toe-hard-line-in-affirming-reservation-status-for-eastern-oklahoma/> [<https://perma.cc/3EYK-ZFYN>]. Justice Kavanaugh joined Chief Justice Roberts's dissenting opinion in *McGirt*. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). The newest member of the Court, Justice Barrett has written of Indian law, "the peculiar circumstances surrounding the emergence of [canons of liberal construction for statutes related to Indian law]—particularly its grounding in treaty interpretation, where a court enforces an agreement reached by multiple parties rather than functioning solely as Congress's faithful agent—make its history of limited utility notwithstanding its presence on the list of old canons that modern courts continue to apply." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010). Therefore, given what is known of the records of the three newest additions to the Court in interpreting Indian law, the Court is likely to continue to favor narrow, textualist constructions of statutes related to the federal government's relationship with Indian tribes.

may also reject the *Rosebud* district court's declaratory remedy as "too vague," just as the government claimed in its brief.³³⁹ The Court may further decide this kind of claim is not justiciable at all, as it falls within the exclusive policy-making purview of Congress and the executive branch, just as Ninth Circuit declared in *Quechan Tribe*.³⁴⁰ As a consequence, Indian tribes would potentially lose access to judicial recourse to protect their rights under the federal trust doctrine for not only health care services, but potentially other types of government-provided services described in statute as well.³⁴¹

In conclusion, the Ninth Circuit's reasoning and holding in *Quechan Tribe* diverged significantly from that of the Eighth Circuit in *White v. Califano*, decided thirty-seven years prior. The Ninth Circuit affirmed the district court's reliance on the Supreme Court's holdings in the *Mitchell* cases and their progeny, despite the fact these cases invoked a higher standard for stating breach of trust claims more appropriate to claims for money damages rather than claims for equitable relief. Furthermore, the Ninth Circuit inappositely applied *Jicarilla Apache Nation* in order to assert unilaterally that in its relationship with Indian tribes, the government was not a private trustee, and thus it owed no specific, judicially enforceable fiduciary duties, including the claimed duty to provide health care services under the IHCA and other relevant statutes.

The Ninth Circuit's reasoning, however, is less an aberration than a continuation of a general trend by which the government has advanced—and the Supreme Court has endorsed—an increasingly narrow understanding of the federal trust doctrine and its sources, scope, and enforceability. Should the *Rosebud Sioux Tribe* appeal arrive at the Supreme Court following its pending disposition in the Eighth Circuit, the Court is likely to extend its narrow understanding expressed in case law regarding breach of trust claims for damages to cases seeking equitable relief. This reflects the forty-year trend that has hollowed out the trust doctrine's enforceability and Indian tribes' ability to vindicate their rights. This trend can only be reversed through a radical reinterpretation of the trust doctrine, discussed next.

339. Brief for Defendants-Appellants, *supra* note 299, at 23–24, *23–24. ("Both the declaratory relief requested by the Tribe and that awarded by the district court in this case are far too nebulous to constitute a conclusive decree on particular facts. . . . A vague directive [to provide competent physician-led health care] of this kind is not the proper subject of a declaratory-judgment action.")

340. *Quechan Tribe of the Fort Yuma Indian Rsr. v. United States*, 599 Fed. App'x 698, 700 (9th Cir. 2015) ("[T]he solution lies in Congress and the executive branch, not the courts.")

341. See, e.g., 25 U.S.C. § 1451 (financing); *id.* § 1802 (higher education); *id.* § 1902 (child welfare); *id.* § 2401 (employment); *id.* § 2501(b) (schools); *id.* § 2702(1) (gaming); *id.* § 3104(a) (forests); *id.* § 3502(a)(1) (energy resources); *id.* § 3601(2)–(7) (justice); *id.* § 3702(1), (4) (agriculture); *id.* § 4101(7) (housing); *id.* § 4301 (business development).

V. REHABILITATING THE TRUST DOCTRINE

This Comment proposes that the Court reinvigorate the trust doctrine's foundations in both federal common law and international law principles. The Court should construe congressional legislation so as to both protect tribal sovereignty and uphold the government's ongoing promises, made in exchange for land cessions and still in full effect. Additionally, the Court should incorporate contemporary principles of international law pertaining to human rights and indigenous peoples' rights into the interpretation of the federal trust doctrine. Such an approach is not inconsistent with the trust doctrine's origins. It aligns, in fact, with the trust doctrine's foundational principles and objectives.

This Comment further proposes that the Supreme Court affirm the approach of the U.S. District Court for the District of South Dakota in *White v. Califano*. The *White* district court offered a workable mechanism for determining whether IHS had complied with its trust obligations under the IHCA.³⁴² This could serve as a potential avenue of relief for Indian tribes against the federal government in future breach of trust claims for equitable relief implicating the IHCA.

A. Ground the Trust Doctrine in Its Common Law Origins

First and foremost, the Court should reject its *Jicarilla Apache Nation* holding and its line of precedent. These cases are premised on the false assertion that the United States' relationship with Indian tribes derives solely from—and should be interpreted exclusively pursuant to—congressional legislation.³⁴³ The Court has put on historical blinders in justifying its reliance on statutory interpretation alone to define the origins, scope, and enforceability of the federal government's obligations toward Indian tribes under the trust doctrine.³⁴⁴ This approach shields the

342. *White v. Califano*, 437 F. Supp. 543, 555–56 (D.S.D. 1977) (discussing the mechanism for determining, after it had established that an enforceable trust duty exists under the IHCA and the common law trust doctrine, how the court can analyze the statute and its implementing regulations to determine the scope of that duty, whether it has been breached, and what may be an appropriate equitable remedy); see also discussion of *White*, *supra* Section III.A.

343. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (“Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.”). In support of this assertion, the *Jicarilla* Court cited a line of precedent originating in *Cherokee Nation v. Hitchcock* and *Lone Wolf v. Hitchcock*, the problematic aspects of which are discussed *supra* Section II.A.2. On top of citing these problematic cases, the Court elevated mere footnote text from a 1982 case that stated, “The United States retains plenary authority to divest the tribes of any attributes of sovereignty.” *Jicarilla Apache Nation*, 564 U.S. at 175 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169 n.18 (1982)). These and the other several cited cases subjugated tribal sovereignty to Congress's discretion.

344. The Court's assertions of Congress's plenary authority over Indian tribes, derived from the

United States from accountability for its centuries of broken promises to American Indians.³⁴⁵ Further, this troubling rationale also directly opposes the principle of inherent tribal sovereignty—*not* subject to Congress’s power—which is one of the trust doctrine’s foundational principles expressed by the Marshall Court as grounded in the “law of nations.”³⁴⁶ As sovereign parties to government-to-government agreements, Indian tribes should be able to hold the United States accountable to its historic obligations rather than be considered just another interest group in the political process.³⁴⁷

Instead, the Court should return to the common law approach and consider the full historical context of the government’s relationship with Indian tribes.³⁴⁸ Under this approach, the “general trust relationship”

Lone Wolf line of cases, contradicted the Marshall Court’s conclusions about Indian tribes’ inherent sovereignty, conclusions which relied on English common law and European international legal principles. See discussion *supra* Section II.A.1.

345. See Rey-Bear & Fletcher, *supra* note 32, at 444 (“[I]t is troubling that the Supreme Court [in *Jicarilla Apache Nation*] overlooked or disregarded the contracts between Indian tribes and the federal government under which tribes gave up land and external sovereignty in exchange for the federal government’s commitment to the federal trust responsibility regarding Indians.” (citing Elizabeth Ann Kronk, *United States v. Jicarilla Apache Nation: Its Importance and Potential Future Ramifications*, FED. LAW., Apr. 2012, at 4, 4–6)); see also *id.* at 442 (“[T]he Supreme Court . . . seems more normatively concerned about undermining the federal trust responsibility and protecting federal agencies than it does about promoting a viable framework for protecting Indians from federal malfeasance in the twenty-first century.” (citing Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 8 (2002))).

346. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560–61 (1832) (“The very fact of repeated treaties with [the Cherokee tribe] recognizes [their title to self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.”); *cf.* Rey-Bear & Fletcher, *supra* note 32, at 413 (“As recognized in Emer de Vattel’s *The Law of Nations* in 1758, and in *Worcester* in 1832, a state which places itself under the protection of another without divesting itself of the right of government does not, because of that, cease to be an independent sovereign subject to the law of nations.”).

347. See, e.g., *Quechan Tribe of the Fort Yuma Indian Rsrv. v. United States*, No. 10-2261, 2011 WL 1211574, at *7 (D. Ariz. Mar. 31, 2011) (“The Tribe is *just one of many interest groups* throughout the country competing for scarce resources. The Tribe’s concerns are best addressed through the political process.” (emphasis added)).

348. *Cf. Jicarilla Apache Nation*, 564 U.S. at 192–93 (Sotomayor, J., dissenting) (“Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. Our decisions over the past century have repeatedly reaffirmed this ‘distinctive obligation of trust incumbent upon the Government’ in its dealings with Indians. Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, ‘[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.’ Against this backdrop, Congress has enacted federal statutes that ‘define the contours of the United States’ fiduciary responsibilities’ with regard to its management of Indian tribe property and other trust assets.” (citations omitted)).

grounded in common law *would* sustain an action for breach of trust without needing to point to statutory language where the government explicitly undertook the duties of a fiduciary trustee for Indian tribes.³⁴⁹ This approach maintains as its linchpin the inherent sovereignty of Indian tribes because it recognizes tribes as political entities with legal rights that predate Congress's authority by centuries.³⁵⁰ By centering *inherent* and *indissoluble* tribal sovereignty, as embodied in treaties and in the Marshallian articulation at common law, all branches of the federal government will be exhorted to uphold the historic body of promises the United States made to tribal governments and indigenous peoples over the course of centuries.

Statutory interpretation should still play an important role in the consideration of the government's trust obligations, particularly when Congress legislates in accordance with those obligations.³⁵¹ The proposed approach foregrounds the common law trust relationship as the underlying foundation for legislation, rather than divorcing statutes from their historical legacy and corresponding legal (not to mention moral) obligations. Embedding the trust doctrine in both common law and statutory sources should, therefore, enlarge rather than narrow the scope of the government's trust obligations. This would allow courts to follow the approach endorsed by the Eighth Circuit in *White v. Califano* and find that the IHCA imposed affirmative, judicially enforceable trust obligations to provide health care services to American Indians and Indian tribes.³⁵² Furthermore, the proposed approach would support the

349. These duties are implied by the general trust relationship. See *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) ("The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, 'reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.'" (quoting *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983))).

350. As previously discussed, European governments, colonial governments, and later, the United States, negotiated treaties with Indian tribes from the seventeenth through nineteenth centuries. COHEN'S HANDBOOK, *supra* note 33, §§ 1.02–1.03. Congress ended this practice with the Appropriations Act of March 3, 1871, codified as amended at 25 U.S.C. § 71, which states: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

351. Cf. *White v. Califano*, 437 F. Supp. 543, 557 (D.S.D. 1977) ("When the Congress legislates for Indians only, something more than a statutory entitlement is involved. Congress is acting upon the premise that a special relationship is involved, and is acting to meet the obligations inherent in that relationship.").

352. *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam). The proposed approach, of course, would also support finding affirmative trust obligations grounded in other substantive sources of law, such as treaties, as the district court found in *Rosebud Sioux Tribe. Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 1001 (D.S.D. 2020). This approach may also support

mechanism offered by the district court in *White v. Califano* for courts to judge whether the executive branch is living up to its statutory and common law trust obligations, and to issue declaratory judgments and injunctions enforcing such obligations.³⁵³ This approach will be further discussed in Section C, below.

B. Update the Trust Doctrine with Contemporary Principles of International Law

Second, the original conception and purpose of the trust doctrine must also be updated to incorporate contemporary principles of international law regarding modern government relationships with indigenous peoples. The Court's original common law articulation of the trust doctrine was hampered by the prevailing attitudes of its era, and thus its limits must be acknowledged and recognized. Chief Justice Marshall subscribed to the Euro- and Anglo-supremacist views of the time.³⁵⁴ The Court also carried this racist ideology down through the ages.³⁵⁵ This can only be corrected through an active judiciary attentive to its role in the reproduction of systemic racism and committed to its reversal by enforcing Congress's

finding trust obligations grounded in other legal sources, such as executive orders, but exploring this possibility is outside the scope of this Comment.

353. See discussion of *White*, 437 F. Supp. at 555–56, *supra* Section III.A, and accompanying notes 164–173 (proposing that the court consider whether the executive branch (i.e., IHS) has acted consistently with Congress's expressed policy of upholding its affirmative trust obligations, and that when it falls short, the court look to Congress's intentions as expressed in statute and regulations regarding its priorities).

354. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("Meanwhile [Indians] are in a state of pupilage.").

355. See, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (calling American Indians "an ignorant and dependent race"); *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."); *Winters v. United States*, 207 U.S. 564, 576 (1908) ("The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people."); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955) ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (explaining that Indian tribes cannot exercise jurisdiction over criminal acts committed within their lands when doing so would be "inconsistent with their status" as contemplated by Congress).

self-declared policy to uphold the government's trust obligations.³⁵⁶

Rather than employing a neocolonial lens, the Court must reinvigorate the trust doctrine through the lens of reparations and human rights, as expressed by contemporary international law. Current principles of international law, declared under the United Nations Declaration on the Rights of Indigenous Peoples, require nation states to acknowledge the historic and ongoing harms indigenous peoples have suffered as a result of colonization.³⁵⁷ The Declaration emphasizes indigenous peoples' human rights,³⁵⁸ and exhorts nation states to take affirmative action to remedy these harms and uphold their obligations to indigenous peoples.³⁵⁹ Health care is considered a human right under international law.³⁶⁰ Indigenous peoples have "an equal right to the enjoyment of the highest attainable standards of physical and mental health" under

356. See statutes cited *supra* note 77 (noting congressional legislation that explicitly invokes the United States' trust obligations to American Indians and Indian tribes).

357. G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples, ¶ 6 (Sept. 13, 2007) ("Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests, . . .").

358. *Id.* at ¶ 18 ("Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, . . ."); *id.* at ¶ 22 ("Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples, . . .").

359. *Id.* at ¶ 19 ("Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments [such as treaties], in particular those related to human rights, in consultation and cooperation with the peoples concerned, . . .").

360. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (UDHR), art. 25(1) (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care . . ."). The UDHR is not a legally binding treaty document in and of itself, but it serves as the foundation for international human rights law and the basis for subsequent binding treaties. *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [<https://perma.cc/R42D-H9WB>] (last visited May 29, 2021). One such treaty based on the UDHR was the International Covenant on Economic, Social and Cultural Rights, which President Carter signed in 1977, but which was not ratified by Congress. *Chapter IV: Human Rights, 3. International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en [<https://perma.cc/5TWY-5AZL>] (last visited October 12, 2020). Thus, the treaty is not binding. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

international law.³⁶¹ These are not empty words; national governments must take affirmative action to meet this objective.³⁶²

Although the United States typically does not follow the international human rights approach in judicial interpretation of the government's obligations toward indigenous peoples,³⁶³ the federal government has recognized these international law principles as consistent with the federal trust doctrine's foundational principles.³⁶⁴ International law principles emphasize indigenous peoples' sovereignty and rights to political self-determination and cultural preservation.³⁶⁵ They also recognize and reinforce indigenous peoples' rights to economic and social benefits in part as remedial measures for the damage caused by governments of colonizers over centuries.³⁶⁶ These rights to benefits are thus framed through the lens of reparations. The United States remains financially and morally indebted to the indigenous peoples whose ancestors were slaughtered and whose descendants were thus deprived of an incalculable inheritance.³⁶⁷ Finally, Chief Justice Marshall built

361. G.A. Res. 61/295, *supra* note 357, at art. 24(2); *see also id.* at art. 21(1) ("Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.").

362. *Id.* at art. 24(2) ("States *shall* take the necessary steps with a view to achieving progressively the full realization of this right [to the highest attainable standards of physical and mental health]." (emphasis added)); *see also id.* at art. 29(3) ("States *shall* also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples . . . are duly implemented." (emphasis added)); *id.* at art. 21(2) "States *shall* take effective measures . . . to ensure continuing improvement of their economic and social conditions [such as health]. Particular attention *shall* be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities." (emphasis added)).

363. *See* Nicholas Kaldawi, Note, *Indigenous Health Policy in the United States and Latin America: The Marshall Trilogy and the International Human Rights Approach*, 33 ARIZ. J. INT'L & COMP. L. 481, 482–83 (2016) (comparing and contrasting the "Marshall model" of the United States with the "International Human Rights Approach" to health care followed in civil law countries).

364. U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2010), <https://2009-2017.state.gov/documents/organization/184099.pdf> [<https://perma.cc/3FES-BEJ9>]; *see also* Rey-Bear & Fletcher, *supra* note 32, at 419–20 (noting the U.S. Department of State's recent recognition of the UN Declaration on the Rights of Indigenous Peoples).

365. *See generally* G.A. Res. 61/295, *supra* note 357, at ¶ 19.

366. *Cf.* S. James Anaya, *The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role*, 24 SEATTLE U. L. REV. 229, 230 (2000) ("For a jurisprudence concerning indigenous peoples to be in any sense therapeutic from the standpoint of all concerned, it should include a recognition of the wrongful nature of historic events and the suffering those events have caused, rather than a reinforcement of the conquest myth. . . . When a court addresses a particular controversy involving an indigenous group, the history of wrongs that are relevant to the controversy should come to the fore.").

367. *See generally* Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *WHEN SORRY ISN'T ENOUGH* 261 (Roy L. Brooks

international law into the Court's original common law articulation of the United States' legal relationship with American Indians.³⁶⁸ In looking to updated international law principles incorporating contemporary human rights and indigenous peoples' rights, the Court would not act inconsistently with its common law history.³⁶⁹

C. Apply the Common Law and White District Court's Approach to Find Judicially Enforceable Trust Obligations under the IHCIA

Finally, this Comment proposes that in future interpretations of the IHCIA's legal obligations and their sources, scope, and enforceability under the trust doctrine, courts should center common law and international law principles described above. This approach both recognizes the United States' historic obligations to sovereign tribes and to American Indians, and it further incorporates the United States' contemporary obligations under international law. The district court in *White v. Califano* provided model jurisprudence consistent with this approach. If adopted by the Eighth Circuit and subsequently affirmed by the Supreme Court, then tribes in a similar position to the Rosebud Sioux Tribe could succeed in future breach of trust claims for equitable relief under the IHCIA.³⁷⁰

The *White* district court recognized—and the Eighth Circuit affirmed—the common law origins of the federal government's trust duty

ed., 1999) (describing the history of the United States' dispossession of Indian lands and resources, and American Indians' claims for restoration and remediation).

368. See discussion *supra* Section II.A.1 (detailing Justice Marshall's incorporation of international law into the common law relationship between the federal government and Indian tribes).

369. Cf. *Rey-Bear & Fletcher*, *supra* note 32, at 420 (explaining how the federal trust responsibility originated in international law, and that international law principles could be re-incorporated into the trust responsibility in useful ways).

370. It would not be possible in the pending *Rosebud Sioux Tribe* appeal to test this legal theory and provide model jurisprudence for a future Supreme Court to affirm or reject. The *Rosebud* district court discussed the sources of trust obligations as expressed in the 1868 Treaty of Fort Laramie, the Snyder Act, and the IHCIA, and it accepted that "[t]he United States does owe the Tribe some duty to provide health care to its members, even if the fiduciary duty judicially enforceable is just competent physician-led health care based on the construction of the 1868 Treaty of Fort Laramie . . ." *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 1001 (D.S.D. 2020). The *Rosebud* court did not foreclose judicially enforceable trust duties arising from the IHCIA, and in fact, stated that there *are* affirmative duties therein. *Id.* at 1002 ("This Court recognizes that other provisions in the IHCIA place affirmative duties on the Government for Indian health care."). But the tribe focused its argument for summary judgment on the Congressional Findings and policy sections of the IHCIA, 25 U.S.C. §§ 1601–1602, which the *Rosebud* court could not endorse. *Id.* at 1002. The court thus denied the "more stringent duty contained in § 1602" and granted only the tribe's motion for summary judgment on the basis of the treaty language, not the statutory language. *Id.* at 1002–03; see also discussion *supra* Section III.C. The scope and enforceability of the IHCIA's trust obligations expressed in its statutory language, therefore, were not issues available on appeal to the Eighth Circuit in this pending lawsuit.

to provide health care services to American Indians³⁷¹ and its subsequent expression in the IHCIA.³⁷² The respective courts found this affirmative trust duty sufficed to sustain this specific breach of trust claim.³⁷³ But the *White* district court also provided a mechanism for analyzing the scope and enforceability of the trust doctrine under the IHCIA in other similar cases for plaintiffs seeking equitable relief.³⁷⁴ Essentially, the mechanism looks to the agency's regulations for weighing competing priorities aligned with meeting the IHS's trust obligation to provide health care services.³⁷⁵ The regulations prioritize meeting the highest, most urgent medical needs first.³⁷⁶ Thus, life-sustaining medical services—such as emergency medical services—should be prioritized when resources are limited. This mechanism is also consistent with the principles of international law that recognize health care as a human right and the obligation of governments to ensure indigenous peoples have access to necessary services.³⁷⁷

Tribes in a position analogous to that of the Rosebud Sioux Tribe, whose only provider of emergency medical services is effectively shut down by IHS for failure to meet appropriate standards of care, could pursue a deliberate strategy that would encourage a court to employ the *White* mechanism in seeking equitable relief for breach of trust claims under the IHCIA. First, the tribe would need to identify the substantive

371. *White v. Califano*, 437 F. Supp. 543, 551–55 (D.S.D. 1977) (detailing the history of federal provision of health care services to American Indians).

372. *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (“We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the ‘unique relationship’ between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of U.S. Code pertains only to Indians.” (quoting *White*, 437 F. Supp. at 555)).

373. See *White*, 581 F.2d at 698 (quoting *White*, 437 F. Supp. at 555) (agreeing that the IHCIA, grounded in the federal government's trust obligation to provide health care services to American Indians, required the IHS to take responsibility for Florence Red Dog's care).

374. See discussion of *White*, 437 F. Supp. 543, *supra* Section III.A, and accompanying notes 164–173 (proposing that the court consider whether the executive branch (i.e., IHS) has acted consistently with Congress's expressed policy of upholding its affirmative trust obligations, and that when it falls short, the court look to Congress's intentions as expressed in statute and the executive agency's regulations regarding its priorities).

375. *White*, 437 F. Supp. at 556 (referencing regulations that set priorities for treatment when agency officials have limited funds to work with).

376. *Id.*; see also 42 C.F.R. § 136.12(c) (2020) (“Priorities when funds, facilities, or personnel are insufficient to provide the indicated volume of services. Priorities for care and treatment, as among individuals who are within the scope of the program, will be determined on the basis of relative medical need and access to other arrangements for obtaining the necessary care.”).

377. See discussion of the relevant international legal principles *supra* Section V.B, and accompanying notes 357–369. The *White* court did not discuss international law, but its recognition of the historic relationship between the United States and Indian tribes, as well as its insistence that the most emergent health care needs be prioritized, are both consistent with the international law principles explained above.

legal sources in both common law and statute for the government's trust duty to provide health care services.³⁷⁸ Then, rather than citing the aspirational policy language of the IHCIA's findings and declarations³⁷⁹ as defining the scope of the government's duty, a tribe with a shuttered health care facility should cite the IHCIA's language related to the provision of specific health care services³⁸⁰ and IHS's funding, equipment, and facilities.³⁸¹ Third, the tribe should cite the regulations that suggest prioritization of need, following the *White* court's example.³⁸² Together, the tribe could make a persuasive case that the cumulative effect of the trust doctrine's common law history, the IHCIA's statutory language, and the agency's implementing regulations

378. The tribe could follow a similar path as the Rosebud Sioux Tribe did for this first step, at least within the jurisdiction of the Eighth Circuit. *See* *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 996 (D.S.D. 2020) (“The first step in this Court’s analysis then is to look to the terms of the sources of law put forward and to determine whether a duty exists and the scope of that duty under applicable Supreme Court precedents.”) The court then reviewed the treaty and relevant statutes within the context of trust doctrine at common law. *Id.* at 996–99.

379. 25 U.S.C. §§ 1601, 1602.

380. For example, 25 U.S.C. § 1621(a) states:

The Secretary, acting through the Service, is authorized to expend funds . . . for the purposes of—

. . . .

(5) augmenting the ability of the Service to meet the following health service responsibilities with respect to those Indian tribes with the highest levels of health status deficiencies and resource deficiencies:

(A) Clinical care, including inpatient care, outpatient care . . . , primary care, secondary and tertiary care, and long-term care.

. . . .

(D) Mental health

(E) Emergency medical services.

Section 1621(c)(1) further states:

Funds appropriated under the authority of this section shall be allocated to Service units, Indian tribes, or tribal organizations. The funds allocated to each Indian tribe, tribal organization, or Service unit under this paragraph shall be used . . . to improve the health status and reduce the resource deficiency of each Indian tribe served by such Service unit.

Section 1621(d) goes on to indicate:

For the purposes of this section, the following definitions apply:

(1) The term “health status and resource deficiency” means the extent to which—

(A) the health status objectives set forth in sections 1602(1) and 1602(2) of this title are not being achieved; and

(B) the Indian tribe or tribal organization does not have available to it the health resources it needs, taking into account the actual cost of providing health care services given local geographic, climatic, rural, or other circumstances.

Taken together, this section of the IHCIA provides strong indications that the government must prioritize the highest-level health care needs of the respective tribal communities served by IHS.

381. *See, e.g.*, 25 U.S.C. § 1638e(c)(1) (“The Secretary, acting through the Service, shall establish, by regulation, standards for the planning, design, construction, and operation of health care or sanitation facilities serving Indians under this chapter.”).

382. *See* sources cited *supra* note 376.

support finding an affirmative government duty that includes keeping IHS emergency medical services open and operating according to the appropriate standard of care.

Provided the adjudicating court recognized the government's general trust duty under common law and the IHCA to provide health care services,³⁸³ the court could then address (1) the scope of that duty and (2) whether the government had breached that duty by analyzing the statute's language and implementing regulations, as in the *White* district court opinion. The tribe could then produce specific evidence to prove its alleged facts showing a breach of that duty. If this approach prevailed at the district court level, the court could craft appropriate equitable relief. Such relief may include ordering the IHS to reopen its emergency facilities and meet a medical standard of care defined according to federal public health regulations.

Thus, by following an approach grounded in the trust doctrine's common law origins and consistent with the *White* district court's jurisprudence, Indian tribes may be able to establish judicially enforceable trust obligations for the government to provide specific health care services. This would also be consistent with the international law principles described above. Should an appeal from such a case arrive at the Supreme Court, the Court could then finally recognize judicially enforceable trust obligations arising under the IHCA. The Court would thus act consistently with both the trust doctrine's historic, common law origins, as well as with the international law principles recognizing indigenous peoples' rights to health care.

To summarize this Comment's proposal, the Supreme Court should not consecrate the *Jicarilla Apache Nation* line of cases through the reifying gaze of the colonizer. Nor should the Court perpetuate its narrow understanding of the trust doctrine out of deference to formalist norms and stare decisis. Precedent does not exist in a historical vacuum. Rather, the Court should rehabilitate the federal government's obligations under the trust doctrine—as *already expressed and affirmed in statute*—pursuant to its common law origins as well as through the lens of reparations for the government's historic and continuing crimes against international law. The *White* district court offered model jurisprudence for doing so. Tribes that face the suspension of critical IHS services should pursue a litigation strategy that would encourage courts to follow

383. Currently, this is not the approach of the Ninth Circuit, nor the trend evolving in the Supreme Court's trust doctrine jurisprudence. See discussion *supra* Sections IV.A, C. But as previously discussed, the Eighth Circuit and some district courts therein have recognized the general trust obligation to provide health care services. See discussion *supra* Section III.A.

the *White* district court's approach, setting up the courts of appeals and the Supreme Court to affirm.

VI. CONCLUSION

Despite the federal trust doctrine's often misunderstood origins, its imprecise scope under ever-evolving Supreme Court articulations, and its uncertain enforceability under statutes that explicitly invoke its obligations to provide services to American Indians, this judicial creation of the early nineteenth century is worth the Court's careful attention if it is to fulfill its potential to redress historic injustices. The trust relationship between the United States and indigenous Americans developed out of and as a response to a history of conquest, colonialism, treaty-making and breaking, military force, federal policymaking, and executive action over more than four hundred years (and counting). But the Court has divorced the contemporary meaning of the trust doctrine from its history and its common law origins. In doing so, it has undermined the United States' moral and legal obligation to redress the harms caused to American Indians in innumerable contexts.

In the specific context of health care, the exigency of the Rosebud Sioux Tribe's lack of adequate IHS-provided emergency health care services demands adherence to the district court's declaratory judgment to provide competent, physician-led health care to the tribe. The Eighth Circuit has shown that Indian tribes can enforce this right under the trust doctrine as expressed in the IHCA, as well as other common law and treaty sources. The federal government, however, will likely find a Supreme Court receptive to the government's vigorous arguments to the contrary in its appeal. The most recent Supreme Court cases interpreting the trust doctrine and its sources, scope, and enforceability—inapposite as these cases may be to *Rosebud*—indicate a forceful trend away from the original common law articulation and objectives that the trust relationship served.

Justice and a true reading of the trust doctrine require the Court to radically overhaul its comparatively recent departure in precedent and to recognize judicially enforceable affirmative trust obligations. The Court may defy expectations and take this righteous path. Indeed, as Justice Neil Gorsuch wrote in the majority opinion of *McGirt v. Oklahoma*, discussing another facet of the United States' historically unjust dealings with American Indians:

[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. . . . To hold otherwise would be to elevate the most brazen and

longstanding injustices over the law, both rewarding wrong and failing those in the right.³⁸⁴

If the Court is willing, as Justice Gorsuch so implied, to correct its historic injustices with respect to its treatment of American Indians, it can start by overhauling the federal trust doctrine and realigning it with foundational common law principles of tribal sovereignty and international law principles of the rights of indigenous peoples.

384. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).