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Katherine Graham
University of Georgia School of Law

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Cover Page Footnote

J.D. Candidate, 2022, University of Georgia School of Law; B.A., 2019, University of Georgia. I would like to thank the 2020–21 and 2021–22 law review staff members for their thoughtful and diligent assistance with this Note. I would also like to thank my family and my fiancé for their constant support.

TO TRUST OR NOT TO TRUST: NATIVE AMERICAN HEALTHCARE IMPROVEMENT IN THE SUPREME COURT'S HANDS

Katherine Grace Graham[*]

The United States federal government's relationship with Native American tribes has long been tenuous. Despite years of unjust and inhumane treatment of Native Americans by the government, Congress has attempted to rectify or limit the government's harm to Native American people but has fallen short of upholding all agreements intended to improve United States-tribal relations. In particular, the government has not always followed treaties between the government and tribes, and the United States Supreme Court has failed to protect Native American rights in many cases. Central to this issue is the 1868 Treaty of Fort Laramie, in which the United States government agreed to provide physician-led healthcare to tribes, including the Rosebud Sioux Tribe. Prior to the treaty's execution, the Court held that the government has a unique, general trust responsibility to tribes. Since the treaty's execution, Congress has passed legislation on the implementation of tribal healthcare. The Eighth Circuit has concluded that the United States has a trust duty to provide healthcare to Native Americans, while the Ninth Circuit has concluded that the United States has no such duty. The Supreme Court has never expressly addressed this question.

This Note examines Supreme Court precedent to create an analytical framework for determining when trust duties attach to the government in its dealings with tribes in the healthcare context. This Note concludes that, considering this framework, the current composition of the Supreme Court, and policy concerns surrounding racial justice, the Court will likely hold

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that the United States has a trust duty to provide healthcare to Native Americans.

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I. INTRODUCTION

In 1868, the United States and the Sioux Nation signed the Treaty of Fort Laramie.[1] Under the terms of the treaty, the United States agreed to provide for and to fund a physician for the Sioux Nation.[2] Since the treaty's enactment, the Unites States has established the Indian Health Service (IHS), an agency within the U.S. Department of Health and Human Services.[3] The IHS's mission is "to raise the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level" by providing "comprehensive, culturally appropriate personal and public health services."[4] The U.S. Congress funds the IHS,[5] but the IHS has proven ineffectual and inadequate, largely due to underfunding,[6] and the health of Native Americans suffers disproportionately as a result.[7]

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[1] Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, Apr. 29, 1868, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 998, 998 (1904) [hereinafter Treaty of Fort Laramie].

[2] *See id.* at 999, 1002 (providing that the United States agreed "to furnish annually to the Indians the physician . . . 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" and to provide "a residence for the physician").

[3] *See About IHS*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/ (last visited Apr. 10, 2022) ("The Indian Health Service, an agency within the Department of Health and Human Services, is responsible for providing federal health services to American Indians and Alaska Natives.").

[4] *Id.*

[5] *See Annual Budget*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/annualbudget/ (last visited July 27, 2021) ("The information provided in the annual IHS budget justification is reviewed by Congressional staff and assists them in making funding decisions.").

[6] *See* Daniel I. Rey-Bear & Matthew L. 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, 458–59 (2017) ("As the most recent Assistant Secretary of the Interior for Indian Affairs has acknowledged, 'many existing programs are ineffectual precisely because they are underfunded.'").

[7] Mary Smith, *Native Americans: A Crisis in Health Equity*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/ (last visited Apr. 15, 2022) ("Congress has consistently underfunded the agency, forcing hospital administrators to limit the services offered. As a result, tribal members have a different health care reality than many other U.S. citizens.").

Since 2020, the fight for racial justice in the United States has moved to the center stage.[8] For example, the Standing Rock Sioux Tribe recently protested the construction of the Dakota Access Pipeline because of the threats that the pipeline poses to the tribe's physical health and cultural resources, garnering national attention.[9]

The United States' duties to Native Americans arise from a general trust duty between the government and the tribes, recognized by the Supreme Court numerous times.[10] This general trust duty serves as a baseline that can be bolstered by treaties and federal legislation to create a specific trust duty.[11] When the United States has a specific trust duty to Native Americans, the United States, as a trustee, has fiduciary duties, and a tribe can sue the government for breach of those fiduciary duties.[12]

The U.S. Supreme Court may have the opportunity to promote racial equality by narrowing the healthcare disparity for Native Americans. If a case like *Rosebud Sioux Tribe v. United States*[13] reaches the Court, the Court will likely settle the circuit split regarding whether the United States has a trust duty to provide healthcare to Native Americans. The Eighth and Ninth Circuits disagree on whether the United States has a specific trust duty to provide healthcare to Native Americans.[14] In *Rosebud Sioux Tribe*

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[8] *See, e.g.*, Charlotte Alter, *How Black Lives Matter Could Reshape the 2020 Elections*, TIME (June 17, 2020, 5:40 PM), https://time.com/5852534/black-lives-matter-2020-elections-voting/ (discussing the Black Lives Matter movement's impact on the 2020 election).

[9] *Treaties Still Matter: The Dakota Access Pipeline*, SMITHSONIAN INST., https://americanindian.si.edu/nk360/plains-treaties/dapl (last visited Jan. 6, 2022).

[10] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) (describing the "undisputed existence of a general trust relationship between the United States and the [Native] people" that has been repeatedly recognized by Courts).

[11] *See, e.g.*, *id.* at 228 (holding that regulations and statutes can create specific fiduciary responsibilities for the federal government to manage Native property).

[12] *See* United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (requiring the tribe to point to "a substantive source of law" to receive monetary damages); *see also* Blue Legs v. U.S. Bureau of Indian Affs., 867 F.2d 1094, 1098–99 (8th Cir. 1989) (describing how, under the Resource Conservation and Recovery Act of 1976's prohibition on "the open dumping of solid waste," agencies partaking in this practice are subject to liability in court).

[13] *See* Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1022, 1026 (8th Cir. 2021) (affirming the district court's ruling that the United States has a "duty 'to provide competent physician-led healthcare to the Tribe's members'" (quoting Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 1003 (D.S.D. 2020))).

[14] *Compare* White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (holding that the United States has a trust duty to provide Native Americans with healthcare), *with*

v. United States, the U.S. Court of Appeals for the Eighth Circuit held that "[t]he Treaty created a duty, reinforced by the Snyder Act and the [Indian Healthcare Improvement Act (IHCIA)], for the Government to provide competent, physician-led healthcare to the Tribe and its members."[15] Previously, the Eighth Circuit also held that the United States has a duty to provide healthcare to tribes, stemming from the general trust relationship between the United States and tribes, in addition to treaties and acts of Congress.[16] The Ninth Circuit has held that the United States does not have such a specific duty because no trust corpus exists; therefore, no specific trust duty attaches to the United States' promises to provide healthcare to tribes.[17] A district court in the Ninth Circuit has also held that no specific trust duty attaches for the same reason and determined that the government can only assume trust duties expressly via statutes.[18] The U.S. Supreme Court has not specifically addressed whether the federal government has a specific trust duty to provide healthcare to Native Americans.

This Note addresses the legal question presented by *Rosebud*: Does the United States have a specific trust duty to provide healthcare to Native Americans? The United States' general trust relationship with tribes, the 1868 Treaty of Fort Laramie, the IHCIA, the Snyder Act, and the Court's methods of interpretation used in similar cases all support the argument that the United States has a specific trust duty to provide healthcare to Native Americans. Therefore, the Supreme Court will likely hold that the

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Quechan Tribe of Ft. Yuma Indian Rsrv. v. United States, 599 F. App'x 698, 699 (9th Cir. 2015) (holding that the United States does not have a trust duty to provide healthcare to Native Americans).

[15] *Rosebud Sioux Tribe*, 9 F.4th at 1026.

[16] *See Califano*, 581 F.2d at 698 (stating that "Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians," which can be traced to hundreds of cases, as well as portions of the U.S. Code).

[17] *See Quechan Tribe of Ft. Yuma Indian Rsrv.*, 599 F. App'x at 699 ("[B]ecause there is no specific, unequivocal statutory command requiring IHS to do so . . . this court . . . cannot compel IHS to allocate greater funding . . . because IHS's allocation of the lump-sum appropriation for Indian health care is committed to its discretion.").

[18] *See* Gila River Indian Cmty. v. Burwell, No. CV-14-00943, 2015 WL 997857, at *5 (D. Ariz. Mar. 6, 2015) ("The federal government 'assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.'" (quoting United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011))). The Ninth Circuit has also held that "trust obligations of the United States to the Indian tribes are established and governed by statute." *Quechan Tribe of Ft. Yuma Indian Rsrv.*, 599 F. App'x at 699.

United States has a trust duty to provide healthcare to Native Americans.

Part II of this Note examines the U.S. government's trust duty to tribes. Part III lays out the U.S. Supreme Court's method of interpretation for determining when specific trust duties attach to the government and demonstrates how the Supreme Court and the Eighth and Ninth Circuits have applied this interpretive framework. Part IV applies the Court's method of interpretation to the Treaty of Fort Laramie, the IHCIA, and the Snyder Act to determine whether a specific trust duty attaches to the U.S. government's obligations to provide healthcare to Native Americans. Part V discusses how the Supreme Court will likely rule in a case like *Rosebud* considering current events. Part VI concludes.[19]

II. BACKGROUND

A. THE GENERAL TRUST DUTY

A trust is an interest in specific property held by one person at the request of another person for the benefit of a third person.[20] Therefore, the elements of a trust are that (1) the trustor's words are imperative and impose an obligation on the trustee, (2) the trust corpus is ascertainable, and (3) the beneficiary of the trust is ascertainable.[21]

The general trust relationship between the United States and Native American tribes arises from the U.S. Constitution, treaties

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[19] For the sake of brevity, this Note does not consider jurisdictional issues that arise when tribes bring suits alleging breaches of fiduciary duties by the U.S. government.

[20] *Black's Law Dictionary* defines a trust as "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)" and further explains that "[f]or a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose." *Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Restatement (Third) of Trusts defines a trust as "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003).

[21] Unthank v. Rippstein, 386 S.W.2d 134, 136 (Tex. 1964) (quoting McMurray v. Stanley, 6 S.W. 412, 416 (Tex. 1887)).

between the U.S. government and tribes, and congressional acts.[22] The general trust relationship "entails duties of good faith, loyalty, and protection."[23] Additionally, the American Law Institute's draft provision on the Restatement on Federal Indian Law states the following:

> The United States' trust relationship with Indians and tribes authorizes the federal government to provide services to Indians and tribes. Through the treaty process, and the federal government's acquisition of and control over Indian and tribal trust assets, the United States agreed to provide Indians with access to governmental services, including without limitation education, housing, health care, and the preservation of law and order. Congress is fulfilling what it perceives as a special obligation to protect Indian tribes and their members.[24]

Scholars acknowledge that, although the trust relationship between the U.S. government and Native American tribes is unique compared to typical private trusts, the relationship is still governed by traditional fiduciary standards and is best understood when viewed and analyzed in the context of private trust jurisprudence.[25] Justice Sotomayor has also explicitly recognized that traditional rules should apply to these unique trusts when analyzing the United States' duty to provide healthcare to Native Americans.[26]

Additionally, the government's general trust duty is not given without legal consideration and is therefore not a gratuitous promise because the tribes give valid consideration—property—in

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[22] *See generally* Worcester v. Georgia, 31 U.S. 515, 556–60 (1832) (providing a historical overview of the various Congressional Acts that established this duty between the federal government and Native tribes), *superseded by statute*, McCarran Amendment, 43 U.S.C. § 666, *as recognized in* Arizona v. San Carols Apache Tribe, 463 U.S. 545 (1983).

[23] Rey-Bear & Fletcher, *supra* note 6, at 399.

[24] *Id.* at 424–25.

[25] *Id.* at 404, 411.

[26] *See, e.g.*, United States v. Jicarilla Apache Nation, 564 U.S. 162, 199, 208 (2011) (Sotomayor, J., dissenting) (reviewing the Third Restatement and Rule 26(b) of the Federal Rules of Civil Procedure to conclude that the federal government has mismanaged tribal trusts for decades).

exchange for promises from the government.[27] Congress continues to reaffirm the general trust duty by statute.[28]

The U.S. Supreme Court has held that neither a general nor a specific trust duty has to be spelled out in statutes or regulations for fiduciary duties to attach.[29] As such, a statute or other substantive source of law that a tribe relies on in litigation need not expressly provide a trust duty for the U.S. government to be bound by trust obligations.[30]

B. THE SPECIFIC TRUST DUTY

Statutes, treaties, and other sources of substantive law impose specific trust duties on the U.S. government that bolster its general trust duty to tribes. This Part explains that the 1868 Treaty of Fort Laramie, the IHCIA, and the Snyder Act create a specific trust duty for the federal government to provide healthcare to Native Americans.

In addition to the duties imposed on the government by the general trust duty, the specific trust duty also includes the fiduciary duties of "administration, loyalty, care, and impartiality, as well as the duty to keep and render accounts, furnish information, and limit delegation."[31] Therefore, if the Court finds that the United States has a specific trust duty to provide healthcare to Native Americans, then the United States owes fiduciary duties to provide that care, and a tribe can sue the United States when the care that it provides through the IHS is inadequate.

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[27] *See* Rey-Bear & Fletcher, *supra* note 6, at 403 n.23 (explaining that the assertion that the federal trust duty is gratuity is a misconception because Native Americans have often surrendered large tracts of land in exchange for promises by the government).

[28] *See id.* at 409–10 ("[A]lmost every modern federal law concerning Indian tribes contains a statement reaffirming the federal trust relationship to Indian tribes.").

[29] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) ("[T]he fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980))).

[30] *See id.* (holding that government control over tribal resources established a fiduciary relationship between the government and the tribe).

[31] Rey-Bear & Fletcher, *supra* note 6, at 406 (footnotes omitted).

Further, the federal government is bound by a treaty's terms until Congress shows clear intent to rescind the treaty.[32] Therefore, treaties between tribes and the federal government that Congress has not rescinded remain enforceable today. In short, when treaty agreements and other sources of substantive law come together to create the government's general and specific trust responsibilities to Native American tribes, those trust obligations remain enforceable today. If the Supreme Court interprets the Treaty of Fort Laramie in accordance with traditional trust law rules, the Court can help close the healthcare gap for Native Americans.

In response to the specific trust duty to provide healthcare to Native Americans, the federal government created the IHS, a division of the U.S. Department of Health and Human Services, to provide healthcare to tribes.[33] Executive Branch agencies must exercise statutory duties "consistent with their federal trust obligation" and "take 'all appropriate measures for protecting and advancing' . . . tribes' interests."[34] The IHS has fallen short of this mandate.[35]

In particular, care at the Rosebud hospital, a hospital on the Rosebud tribe's reservation in South Dakota and the basis for the

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[32] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–03 (1999) ("There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" (quoting United States v. Dion, 476 U.S. 734, 740 (1986))).

[33] *See About IHS*, *supra* note 3 (providing an overview of the program's strategic goals and responsibilities).

[34] Rey-Bear & Fletcher, *supra* note 6, at 408 (alteration in original) (citations omitted) (quoting HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000)).

[35] *See* 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 ("[T]he government health service charged with treating Native Americans failed to meet minimum U.S. standards for medical facilities, turned away gravely ill patients and caused unnecessary deaths, according to federal regulators, agency documents and interviews."); *see also Disparities*, INDIAN HEALTH SERV., https://www.ihs.gov/newsroom/factsheets/disparities/ (last visited July 27, 2021) ("Given the higher health status enjoyed by most Americans, the lingering health disparities of American Indians and Alaska Natives are troubling. In trying to account for the disparities, health care experts, policymakers, and tribal leaders are looking at many factors that impact upon the health of Indian people, including the adequacy of funding for the Indian health care delivery system.").

suit in *Rosebud*, is deplorable.[36] The Rosebud Sioux tribe has lost faith in the IHS.[37] The former chair of the Indian Affairs Committee U.S. Senator John Barrasso even remarked, "[P]eople are dying here as a result of the care they are not receiving, or the care they are receiving."[38] Although the IHS is attempting to rectify these wrongs already,[39] the care that IHS provides would likely improve further if the Court held that the government has a specific trust duty to provide care to tribes because that duty would trigger closer monitoring by federal officials.[40] Moreover, a trustee cannot allow the trust corpus "to fall into ruin on [the trustee's] watch,"[41] so the government would likely take its fiduciary duties more seriously (due to the possibility of damages awards)[42] and provide safe and

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[36] *See, e.g.*, Dana Ferguson, *Violated: How the Indian Health Service Betrays Patient Trust and Treaties in the Great Plains*, ARGUS LEADER (Dec. 13, 2019, 3:23 AM), https://www.argusleader.com/in-depth/news/2018/12/05/south-dakota-health-care-ihs-hospital-native-american-trust-violated/1728819002/ ("Dozens of patients have died needlessly due to errors made in IHS hospitals in South Dakota alone. Thousands more in the state's rural Indian reservations face limited access to primary care providers, long wait times for basic medical treatments and outstanding medical debt for necessary care sought outside the federally-funded facilities."); *see also* Acee Agoyo, *'No One Else Needs to Die': Biden Administration Faces Another Test of Commitment to Indian Country With Health Care Case*, INDIANZ.COM (Dec. 17, 2021), https://www.indianz.com/News/2021/12/17/no-one-else-needs-to-die-biden-administration-faces-another-test-of-commitment-to-indian-country ("President Scott Herman of the Rosebud Sioux Tribe said the IHS . . . is 'failing.' [IHS] . . . is no longer able to provide surgical services, emergency care or programs for pregnant people due to repeated cutbacks.").

[37] Agoyo, *supra* note 36 ("'A Rosebud mother gave birth on a hospital bathroom floor, when IHS medical personnel ignored her labor pains,' Herman told President Biden, Secretary Becerra and other members of Biden's cabinet.").

[38] Frosch & Weaver, *supra* note 35.

[39] *See id.* ("IHS is committed to improving patient safety and the quality of health care across the agency.").

[40] *Management of Indian Tribal Trust Funds: Hearing Before the S. Comm. Indian Affs.*, 107th Cong. 21 (2002) (statement of Thomas N. Slonaker, Special Trustee for American Indians) ("The Office of the Special Trustee (OST) will continue to focus on its oversight responsibilities. Therefore, OST must be provided appropriate resources and pursue every opportunity to ensure that trust reform is carried out effectively and efficiently.").

[41] *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) ("[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.").

[42] *See* Gila River Indian Cmty. v. Burwell, No. CV-14-00943, 2015 WL 997857, at *6 n.4 (D. Ariz. Mar. 6, 2015) ("Because the Court will dismiss the Community's breach-of-trust claim for reasons set forth above, the Court will not address the second part of *Navajo I*'s test: 'whether the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].""" (alterations in original)).

effective healthcare to Native Americans, rather than the substandard care provided now.

III. SIGNIFICANT CASELAW: *MITCHELL* AND ITS PROGENY

The general trust relationship between the United States and Native American tribes is well-established.[43] Although written treaties and federal statutes can elevate this general duty into specific trust duties,[44] the Supreme Court has held that the trust relationship does not have to be expressly stated in statutes; the specific trust duty can be inferred from the terms of an agreement.[45] The tribe must only point to a specific substantive source of law for the Court to find that a specific trust duty exists.[46]

To evaluate these allegations, the Court employs an established method to determine whether a trust duty exists. If ambiguities in the text exist, the ambiguities are resolved in favor of the tribe.[47] If the appropriations from the government are gratuitous

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[43] *See* United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 548 (1980) (White, J., dissenting) (noting that the General Allotment Act "was enacted against the backdrop of a relationship between the United States and the Indian tribes"); United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) ("Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."); United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 506 (2003) (acknowledging "the undisputed existence of a general trust relationship between the United States and the Indian people" (quoting *Mitchell II*, 463 U.S. at 225)); United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011) ("In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes.").

[44] *See Navajo I*, 537 U.S. at 506 ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred.").

[45] *See Mitchell II*, 463 U.S. at 225 (affirming the United States Court of Federal Claims' position in Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980), that statutes and regulations giving the United States government full responsibility to manage Native American resources and land for the benefit of Native Americans created a fiduciary relationship between the federal government and Native Americans).

[46] *See id.* at 216 (emphasizing that "the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as'" supporting his position (quoting United States v. Testan, 424 U.S. 392, 400 (1976))).

[47] *See* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174 (1973) ("[T]his Court in interpreting Indian treaties, . . . adopt[ed] the general rule that 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'").

appropriations, no trust responsibility attaches.[48] On the other hand, if appropriations are made to fulfill treaty obligations, a trust duty attaches.[49] This difference exists because with gratuitous appropriations, appropriated money belongs to the federal government, but when appropriations are made to fulfill treaty obligations, the money belongs to tribes and is merely administered to the tribes by the government.[50]

The Court explained how to interpret a statute alleged to be the basis of a governmental trust duty to a tribe in the *Mitchell I* and *Mitchell II* cases.[51] In the *Mitchell* cases, the Court was charged with determining whether and to what extent the U.S. government had a trust duty to manage timber resources on a Native American reservation.[52]

In 1980, in *Mitchell I*, individuals from the Quinault Tribe argued that the General Allotment Act of 1887[53] (the Act) imposed a specific trust duty on the government.[54] In *Mitchell I*, the Court held that the Act alone imposed only a limited relationship between the government and tribe and therefore did not impose a specific trust duty on the government.[55] In interpreting the Act, the Court

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[48] *See* Reuben Quick Bear v. Leupp, 210 U.S. 50, 80 (1908) (explaining that no trust duty attached because nothing within the government's control belongs to tribes; rather, the public money appropriated for tribal programs in this scenario was government property, leaving the government with no duty to use that money in accordance with trust principles).

[49] *See id.* at 77–82 (explaining that the "Treaty Fund" is money that belongs to the Native American tribes but is administered to them by the federal government, and "the money must not only be provided, but be expended, for their benefit").

[50] *See id.* ("One class of appropriations relates to public money belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government.").

[51] United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 546 (1980) (holding that no trust duty attached); *Mitchell II*, 463 U.S. at 228 (holding that a trust duty attached).

[52] *See Mitchell I*, 445 U.S. at 536 ("This case presents the question whether the Indian General Allotment Act of 1887 authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to Indians under that Act."); *Mitchell II*, 463 U.S. at 207 ("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.").

[53] General Allotment Act, ch. 119, §§ 1–4, 24 Stat. 388–89 (1887) (dividing reservation land for possession among individual Native Americans) (repealed 2000).

[54] *Mitchell II*, 463 U.S. at 210 (arguing the government failed to uphold its fiduciary duties).

[55] *Mitchell I*, 445 U.S. at 546 ("Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some other source than [the General Allotment Act].").

began with statutory interpretation, analyzing the language of the Act, the legislative history, and the events surrounding the Act's adoption to determine congressional intent.[56] Ultimately, the Court found that the statute did not unambiguously establish that the government took full fiduciary responsibilities.[57]

Justice White dissented.[58] He believed that the language in the Act established a clear specific trust relationship because the language would have been sufficient to establish a trust relationship had the United States not been a party.[59] He read the statute more broadly than the majority did, looking through the lens of the general trust relationship between the government and tribes.[60]

In 1983, in *Mitchell II*, individuals from the Quinault Tribe again raised the same issues, but this time the Court considered the General Allotment Act of 1887 along with additional federal regulations.[61] This time, the Court found that the statute and regulations established a specific trust duty for the federal government to manage forest resources on the Quinault Reservation.[62] When interpreting the Act along with the regulations, the Court made clear that the level of control that the government had over the tribe's resources was the weightiest factor in the analysis: because the Act and regulations together gave full responsibility to the government to manage the tribe's resources, the laws established a specific trust duty.[63] Nonetheless, the Court noted that such control is not a prerequisite to a specific trust duty.[64]

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[56] *Id.* at 542–46.

[57] *Id.* at 542.

[58] *Id.* at 546 (White, J., dissenting).

[59] *Id.* at 547.

[60] *See id.* (noting that the majority followed a narrower interpretation of Congress's intent).

[61] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 211, 219 (1983) (explaining that "Respondents have based their money claims against the United States on various Acts of Congress and executive department regulations," including timber management regulations, statutes governing the building of roads and rights of way, and statutes governing Indian funds and government fees).

[62] *Id.* at 224 (holding that a specific trust duty attached because the government had full control over the tribe's resources).

[63] *See id.* at 225 ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.").

[64] *See id.* (reasoning that full control over tribal resources was not a prerequisite to establishing a specific trust duty and noting that moral obligations were also a factor when analyzing whether a specific trust duty attaches).

Interestingly, the Court also considered morality in its decision making, stating that the federal government's failure in its guardianship of Indian lands was the chief cause of the Indians' plight.[65]

Viewing the General Allotment Act in conjunction with other regulations, the Court's interpretation of the documents was based on the government's general trust relationship with tribes.[66] The Court held that the laws together clearly showed that the government had "full responsibility to manage Indian resources and land for the benefit of the Indians," "establish[ed] a fiduciary relationship," and "define[d] the contours of the United States' fiduciary responsibilities."[67] Further, the Court held that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians."[68] In addition to the requisite control, the Court found that "[a]ll of the necessary elements of a common-law trust [were] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[69] Therefore, *Mitchell II* was a strong case for a trust duty to attach. Still, Justice Powell dissented, arguing that the difference between a private trust and the government's relationship with the Indians is substantial, and therefore, an even more significant amount of control is needed to impose trust duties on the government.[70]

Based on the *Mitchell* cases, the Court will likely analyze the cited substantive sources of law to determine if a specific trust duty attaches in future cases. Additionally, in *Mitchell II* and *Navajo I*, the Court affirmed that the substantive source of law to which the tribe pointed as establishing a specific trust duty does not need to

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[65] *See id.* at 221 ("Referring to the relationship between the Indians and the Government as a 'sacred trust,' Representative Howard stated that '[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the average Indian.'" (alteration in original)).

[66] *See id.* at 225 (describing the general trust relationship between "the United States and the Indian people" as "undisputed").

[67] *Id.* at 224.

[68] *Id.* at 225.

[69] *Id.*

[70] *Id.* at 234–36 (Powell, J., dissenting) (reasoning that nothing on the face of the statutes or their legislative history warrants a damages award).

expressly describe or create the duty.[71] Rather, the specific trust duty can be inferred from "nature of the transaction or activity."[72] Following the *Mitchell* cases, the Court will likely engage in a typical statutory interpretation analysis, as outlined in *Mitchell II*, to determine the level of control the government has over Native American resources and also consider the government's role in the plights faced by Native Americans.

A. SUPREME COURT

The Court has continued to apply the method laid out in the *Mitchell* cases. Lower courts have also used this method to reach conclusions about whether the United States has a trust duty to provide healthcare to Native Americans. The *Mitchell* progeny illustrates how various courts have applied the Supreme Court's method to determine when a specific trust duty attaches to the United States government in the tribal context. These cases will likely guide the Court in ruling on whether the government has a trust duty to provide healthcare to Native Americans in a future case.

In *Lincoln v. Vigil*, the Court did not discuss the United States' trust duty to tribes but instead reviewed IHS funding decisions regarding the Snyder Act[73] and the IHCIA under the Administrative Procedure Act.[74] In that case, the Court described two important principles that are useful in analyzing the United States' trust duty to provide healthcare to Native Americans. First,

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[71] *See id.* at 225 (majority opinion) ("[Where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." (alteration in original) (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980))); United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 506 (2003) ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions, however, need not expressly provide for money damages; the availability of such damages may be inferred.").

[72] *Navajo Tribe*, 624 F.2d at 987.

[73] The Snyder Act of 1921 instructs federal agencies to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for" among other things, "relief of distress and conservation of health" of Indians throughout the United States. 25 U.S.C. § 13.

[74] Lincoln v. Vigil, 508 U.S. 182, 184–85 (1993) (reviewing the Snyder Act and the IHCIA under the Administrative Procedure Act).

the Court affirmed that the federal government's duty to Indians is a duty to all Indian tribes, stating "[w]hatever 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."[75] Second, the Court found that the Snyder Act and the IHCIA "speak about Indian health only in general terms" but noted that the IHS imposes a "statutory mandate to provide health care to Indian people."[76] These principles establish that the government has a general trust duty to tribes that can be elevated to a specific trust duty by statutes and regulations.

In *Navajo I*, the Navajo tribe sued the federal government for breach of fiduciary duty, alleging that the government mishandled a mineral lease belonging to the tribe.[77] Here, the Court explained that "the undisputed existence of a general trust relationship between the United States and the Indian people" can "'reinforc[e]' the conclusion that the relevant statute or regulation imposes fiduciary duties," but that relationship alone could be "insufficient."[78] The Court found that the Act at issue and its implementing regulations did not impose obligations akin to "the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages."[79] The Court also found that imposing fiduciary duties in *Navajo I* would be inconsistent with the statute's purpose, which was to provide Native Americans with revenue in exchange for the lease of unallotted reservation lands by the government to companies with tribal approval.[80] The takeaway from this case, then, is that for the Court to impose fiduciary duties upon the federal government, the level of the government's control and responsibility over Native American resources must be similar to the level of control exerted in *Mitchell II*. Additionally, the fiduciary relationship must be consistent with the statute's purpose.

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[75] *Id.* at 195.

[76] *Id.* at 194.

[77] *See* United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 493 (2003) ("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 . . . .").

[78] *Id.* at 506 (alteration in original) (quoting United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 219, 225 (1983)).

[79] *Id.* at 507.

[80] *Id.* at 508.

In *United States v. White Mountain Apache Tribe*, the White Mountain Apache tribe sued the federal government for breach of a fiduciary duty to manage land and improvements that the United States occupied but held in trust for the tribe.[81] The tribe pointed to the Indian Tucker Act—which gave the Court of Federal Claims jurisdiction to render judgment when certain claims are brought by tribes against the United States—as the substantive source of law giving rise to the fiduciary duty.[82] The Court held that a fiduciary duty existed under the Act, the government breached that duty, and the tribe was entitled to damages.[83] The Court reasoned that

> [w]hile it is true that the . . . Act does not, like the statutes cited in [*Mitchell II*], expressly subject the Government to duties . . . , the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation . . . was incumbent on the United States as trustee.[84]

The Court supported this reasoning with the basic trust law concept that "a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[85] Put simply, if the United States occupies the trust corpus because of express trust language, it does not matter if a statute does not expressly state which fiduciary duties the government has. The duties are implied from the fact that the property itself is expressly subject to a trust relationship.

In *Navajo II*, the Navajo tribe again argued that the federal government breached its fiduciary duty in the handling of a mineral lease belonging to the tribe.[86] The Court found that the statutes and regulations that the tribe pointed to in litigation did not provide a

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[81] *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 467 (2003) (holding that the government breached its fiduciary duty, giving rise to a claim for monetary damages).

[82] *Id.* at 468 (noting that the question of the case arises under the Indian Tucker Act).

[83] *Id.* at 475–76.

[84] *Id.* at 475.

[85] *Id.*

[86] *See* United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 289 (2009) ("[T]he Navajo Nation has been pursuing a claim for money damages against the Federal Government based on an asserted breach of trust by the Secretary of the Interior in connection with his approval of amendments to a coal lease executed by the Tribe.").

basis for a specific trust duty under the *Mitchell* standard.[87] Although the government exerted a significant amount of control over the mining, the Court stated that control alone could not create a judicially enforceable fiduciary duty.[88] The Court restated the steps of analysis that it laid out in *Navajo I*, explaining that

> the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a "conventional fiduciary relationship," *then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages." But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.[89]

Here, Justice Scalia writing for a unanimous Court laid out a cognizable restatement of the Court's methods of interpretation for statutes and regulations that are alleged to impose a specific trust duty on the U.S. government.

In *United States v. Jicarilla Apache Nation*, the Court examined whether the United States had a fiduciary responsibility to the Jicarilla Apache tribe under the American Indian Trust Fund Management Reform Act of 1994.[90] The Court held that, considering the statutory provisions, the general trust relationship between the government and tribes was not similar enough to a private trust to justify applying the fiduciary exception to attorney-client privilege to the general trust relationship between the United States and the Indian tribes.[91]

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[87] *Id.* at 302 ("Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating.").

[88] *Id.* at 301 ("The Federal Government's liability cannot be premised on control alone.").

[89] *Id.* (alteration in original) (citations omitted).

[90] United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011) ("In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes.").

[91] *Id.* at 181–82 (noting that "when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its

The Court explained that "the organization and management of the [Native American] trust is a sovereign function subject to the plenary authority of Congress," and the difference between a common law trust and the statutory Native American trust results from the government's status as a sovereign.[92] The Court stated that the United States' trust obligations to Native American tribes "are established and governed by statute rather than the common law," so when the government fulfills treaty obligations, it is actually fulfilling statutory duties as the sovereign.[93] As a result, the Court found that common law trust duties did not apply to the federal government in this case.[94]

The Court further reasoned that because the government is not a private trustee, the relevant statutes must create a judicially enforceable trust duty in order to bind the government to these responsibilities.[95] Still, the Court acknowledged that judicially enforced trust duties do not always attach, even when Congress refers to the relationship between the United States and the tribes as a trust; Congress's intent controls.[96] Therefore, the Court reasoned that when a "[t]ribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter."[97] Thus, the Court concluded that the government assumes trust duties only to the extent that it does so by statute.[98]

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sovereign interest in the execution of federal law," or put simply, "the Government seeks legal advice in a 'personal' rather than a fiduciary capacity").

[92] *Id.* at 174–75.

[93] *Id.* at 165.

[94] *Id.* at 165–66 (holding that the government was acting in its sovereign interest of executing the law rather than as a private trustee by fulfilling its statutory duties).

[95] *Id.* at 173–74 (holding that the trust between the government and the tribe "is defined and governed by statutes rather than the common law").

[96] *Id.* at 174 ("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.").

[97] *Id.* at 177 (alterations in original) (quoting United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 302 (2009)).

[98] *Id.* ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.").

The Court also highlighted the "moral obligation" that the government owes to tribes.[99] Nevertheless, in this case, the Court did not think that the statutory duty was strong enough to create a judicially enforceable duty, and the moral obligation factor did not outweigh that finding.[100]

Justice Sotomayor dissented.[101] After analyzing the facts under the Supreme Court's rules for determining when a specific trust relationship exists between the government and tribes, she concluded that the government had the requisite amount of control needed under the *Mitchell II* standard for trust duties to attach.[102] She vehemently disagreed with the way that the majority merely paid "lipservice" to precedent in the case,[103] indicating that "[t]he majority's conclusion employs a fundamentally flawed legal premise. We have never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation."[104] She noted that the government's sovereign interests will not always align with its trustee interests in the tribal context but emphasized that this is not a unique situation to tribal trusts; rather, the same issue arises in the private trust context when trustees' fiduciary interests differ from their personal interests.[105] Therefore, she applied common law trust doctrine in the tribal context, taking into account unique governmental

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[99] *Id.* at 176 ("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.'" (citations omitted) (first quoting Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942); and then quoting Heckman v. United States, 224 U.S. 413, 437 (1912))).

[100] *See, e.g.*, *id.* at 179 ("The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe.").

[101] *Id.* at 188 (Sotomayor, J., dissenting).

[102] *Id.* at 194–95 (claiming that "the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries").

[103] *Id.* at 204.

[104] *Id.* at 202 ("[W]here, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe 'bears the hallmarks of a conventional fiduciary relationship,' we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations." (citation omitted) (quoting United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 301 (2009))).

[105] *Id.* at 199 ("Indeed, the issue of competing interests arises frequently in the private trust context.").

interests. Justice Sotomayor makes a strong argument that the majority's opinion ignored years of relevant caselaw and statutes and left the door open for Native Americans to be stripped of their rights.

B. EIGHTH CIRCUIT

Lower courts have also ruled on this issue. In 1978, the U.S. Court of Appeals for the Eighth Circuit considered whether the United States has a trust duty to provide healthcare to Native Americans in *White v. Califano*.[106] A member of the Oglala Sioux tribe relied on federal statutes, including the IHCIA, and regulations as substantive law imposing a trust duty on the government.[107] The court determined

> 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.[108]

In *White*, the Eighth Circuit found that the IHCIA sufficiently bolstered the general trust duty to impose a specific trust duty on the government.[109]

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[106] White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (holding that the United States has a trust duty to provide healthcare to Native Americans).

[107] *See id.* at 697–98 (noting that the federal policy was "reflected by legislative and administrative action").

[108] *Id.* The district court's opinion in *White* noted "that the IHCIA was '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.'" Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 998 (D.S.D. 2020) (quoting *White*, 437 F. Supp. at 555). In *White*, the Eighth Circuit found that the IHCIA sufficiently bolstered the general trust duty to impose a specific trust duty on the government. White v. Califano, 437 F. Supp. 543, 557 (D.S.D. 1977), *aff'd per curiam*, 581 F.2d 697 (8th Cir. 1978).

[109] *See White*, 581 F.2d at 698 ("[F]ederal policy as reflected by legislative and administrative action places responsibility for providing the necessary care upon the United States.").

In 2020, a South Dakota district court confirmed that *White* is still good law—not contradicted or overruled by the *Mitchell* progeny or subsequent Supreme Court cases—when it decided that the government had a specific trust duty to provide healthcare to Native Americans in *Rosebud Sioux Tribe v. United States*.[110] The specific trust duty was imposed under the general trust duty between the government and all tribes, the 1868 Treaty of Fort Laramie, the IHCIA, and the Snyder Act.[111] The court held that, under the treaty, the government has, at a minimum, a duty to provide "to the Indians [a] 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."[112]

In *Rosebud*, the government argued that no trust duty should attach because there was no substantive law explicitly creating a trust duty and because there was no trust corpus.[113] In response, the tribe argued that the substantive sources of law that it cited and the general trust duty come together to impose a specific trust duty for the government to provide healthcare at "the highest possible level."[114] The court agreed with the tribe, noting that although the IHCIA and Snyder Acts are general healthcare laws, there is nevertheless a statutory duty to at least specifically provide a physician and the necessary funding for that physician to the tribe.[115]

Further, the court reasoned that Congress's decision to expand—rather than repeal—the treaty favors the existence of a trust

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[110] Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 1005 (D.S.D. 2020) ("[T]he 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.").

[111] *Id.* at 996 ("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.").

[112] *Id.* (quoting Treaty of Fort Laramie, *supra* note 1, at art. 13).

[113] *Id.* at 999 ("[T]he Government argues that no fiduciary duty exists regarding Indian health care for the Tribe and its members . . . . This Court does not accept the Government's conclusion that it owes no duty for health care to the Tribe or its members.").

[114] *Id.* at 1002.

[115] *Id.* at 1003 ("[T]he Government's duty . . . requir[es] the Government to provide competent physician-led health care to the Tribe.").

duty.[116] The court stated that some of the money appropriated to the IHS belongs to the Native Americans because they gave up their lands in return for healthcare under the treaty, creating a trust corpus.[117] Last, the court reasoned that the funds provided by the IHS, at least in part, are given to fulfill treaty obligations, further supporting attachment of a trust duty.[118]

The Eighth Circuit affirmed this decision.[119] It held that the Treaty of Fort Laramie, reinforced by the IHCIA and the Snyder Act, imposed a specific trust duty on the government to provide healthcare to the Rosebud Sioux Tribe.[120] This Note will later examine the arguments offered by the tribe and government in more detail and discuss how the Supreme Court will likely rule if a case like *Rosebud* makes its way to the Supreme Court.[121]

C. NINTH CIRCUIT

The Ninth Circuit has split with the Eighth Circuit on the issue of whether the United States has a trust duty to provide healthcare to Native Americans.[122] The Ninth Circuit and a district court in the Ninth Circuit have held that the United States does not have such a trust duty.[123] In *Quechan Tribe of Fort Yuma Indian Reservation v. United States*, the Ninth Circuit considered whether the United States has a specific trust duty to provide healthcare to Native

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[116] *Id.* 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.").

[117] *Id.* at 996 (finding that the healthcare obligations of the government were, in part, consideration for "vast forfeiture of land by the Sioux Nation").

[118] *Id.* at 1001 ("[T]he money allocated to Rosebud IHS Hospital represents, at least in some measure, the performance of a treaty obligation, and therefore a trust duty attaches.").

[119] Rosebud Sioux Tribe v. United States, 9 F.4th 1018 (8th Cir. 2021).

[120] *See id.* at 1026 ("The Treaty created a duty, reinforced by the Snyder Act and the IHCIA, for the Government to provide competent, physician-led healthcare to the Tribe and its members.").

[121] *See infra* Part V.

[122] *Compare* Quechan Tribe of Fort Yuma Indian Rsrv. v. United States, 599 F. App'x 698, 699 (9th Cir. 2015) (mem.) (finding no trust duty), *with* White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978) (per curiam) (finding a trust duty).

[123] *See Quechan Tribe*, 599 F. App'x at 699 (finding that "Indian health care is committed to [the IHS's] discretion"); Gila River Indian Cmty. v. Burwell, No. CV-14-00943, 2015 WL 997857, at *4 (D. Ariz. Mar. 6, 2015) ("The statutes and regulations . . . simply do not give the federal government full responsibility to manage Indian resources for the benefit of Indians.").

Americans under the general trust relationship between the government and tribes, the IHCIA, and the Snyder Act.[124] The court held that no such duty attaches under any of these substantive sources of law.[125] The court ruled that the general trust relationship between the government and tribes on its own is not enough to create a trust duty to provide healthcare, and neither the IHCIA nor the Snyder Act contains specific enough language to create a specific trust duty because both statutes speak about healthcare only in general terms and do not provide a specific standard of care.[126] The court suggested that Congress would need to expressly create a judicially enforceable duty to provide healthcare to Native Americans.[127]

In *Gila River Indian Community v. Burwell*, the U.S. District Court for the District of Arizona reviewed the United States' trust duty to the Tohono O'odham Nation under public health statutes and regulations.[128] The court held that the United States does not have a specific trust duty to provide healthcare to members of the tribe.[129] The court took issue with the lack of a trust corpus.[130] The court found that there was no traditional trust corpus and that the tribe had not demonstrated the requisite amount of control by the government over healthcare resources for a specific trust duty to be implied.[131] The tribe countered this argument with the *Navajo I* standard—namely that no express trust language is necessary to establish a trust relationship between the government and the

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[124] *Quechan Tribe*, 599 F. App'x at 699–700 ("[W]e 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.").

[125] *Id.* at 699 ("This court cannot compel IHS to maintain the Unit because there is no specific, unequivocal statutory command requiring IHS to do so.").

[126] *Id.* ("IHS's allocation of . . . appropriation for Indian health care is committed to its discretion.").

[127] *Id.* at 700 ("[T]he solution lies in Congress and the executive branch, not the courts.").

[128] *Gila River Indian Cmty.*, 2015 WL 997857, at *4 (determining the United States' trust duties under 42 C.F.R. § 137.144 (2021), 25 U.S.C. § 458aaa-6(c)(1)(B), 25 U.S.C. § 458aaa-4, and 25 U.S.C. § 458aaa-6(f)).

[129] *Id.* at *6 ("[T]he Court finds that the Community's breach-of-trust claim fails . . . .").

[130] *Id.* at *5–6 ("The Court cannot conclude . . . that a general appropriation by Congress, without more, satisfies the corpus requirement of a trust claim.").

[131] *See id.* (explaining why the court could not find a traditional trust corpus).

tribes—but the court rejected the *Navajo I* standard's application.[132] Instead, the court reasoned that the substantive sources of law did not supply the government with the requisite amount of control to establish a specific trust duty and that there was no trust corpus to establish a trust duty.[133] The court also relied on the principle from *Jicarilla* that the federal government only assumes trust duties to Native Americans expressly by statute.[134] The court found that the IHCIA and the Snyder Act did not expressly impose a specific trust duty on the government to provide healthcare to Native Americans, so no duty attached.[135] The above precedent is instructive in how the U.S. Supreme Court will likely analyze a case like *Rosebud*.

IV. INTERPRETING THE RELEVANT SUBSTANTIVE LAW IN *ROSEBUD*

A. FRAMEWORK FOR ANALYSIS

The general trust relationship between the U.S. government and Native American tribes has consistently been reaffirmed by both the Supreme Court and Congress.[136] This general duty is a duty to all tribes.[137] When a court seeks to determine if the United States has a trust duty to provide healthcare to Native Americans, it should predicate its analysis on the fact that the United States has a general trust duty to Native Americans.

First, when interpreting laws in this area generally, several overarching principles apply, as outlined in the U.S. Supreme

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[132] *See id.* at *3–4 (finding that this court could not apply the *Navajo I* standard to this case because "a mere substantive source of statutory or regulatory duties is not sufficient to give rise to a breach-of-trust claim").

[133] *See id.* at *6 ("The Community has failed to identify the kind of elaborate, full-control statutes and regulations that were held necessary for a breach-of-trust claim in *Navajo I*.").

[134] *Id.* at *5 (stating that the government "assumes Indian trust responsibilities only to the extent that it expressly accepts them through statute" (quoting United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011))).

[135] *Id.* ("The Court cannot conclude that the statutes and regulations relied on by the Community show that the United States has accepted trust responsibilities for the healthcare related duties the Community seeks to enforce.").

[136] *See Jicarilla*, 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.").

[137] *See* Lincoln v. Vigil, 508 U.S. 182, 195 (1993) (mentioning that this fiduciary duty is an obligation to all tribes).

Court's method discussed in Part III.[138] If all the elements of a common law trust are met, common law trust principles will apply in determining whether a breach of fiduciary duties occurred.[139]

The Supreme Court has made it clear that for a specific trust duty to attach, the tribe must point to a substantive source of law giving rise to the trust duty.[140] But that substantive source of law need not expressly state the trust duty.[141] Instead, the trust duty can be inferred from "the nature of the transaction or activity."[142] One case rejected this stance, though: in *Jicarilla*, the Court held that in order for a specific trust duty to attach, the duty must be expressly stated by statute.[143] As Justice Sotomayor pointed out in her dissent, this standard contradicts years of precedent and could result in the government denying Native Americans the rights they are owed.[144]

A court should consider all statutes, treaties, regulations, and other substantive sources of law together when determining whether a trust duty attaches.[145] When turning to the substantive statutory sources of law, a court should engage in statutory interpretation, looking to the statute's plain language, legislative

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[138] *See supra* Part III.

[139] *See Jicarilla*, 564 U.S. at 188 (Sotomayor, J., dissenting) ("Where, as here, the governing statutory scheme establishes a conventional fiduciary relationship, the Government's duties include fiduciary obligations derived from common-law trust principles.").

[140] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 216 (1983) ("A substantive right must be found in some other source of law . . . ."); United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 302 (2009) (emphasizing that the tribe must point to some substantive source of law); *Jicarilla*, 564 U.S. at 177 (same).

[141] *See Mitchell II*, 463 U.S. at 225 ("[T]he fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980))); United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 506 (2003) ("[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions, however, need not expressly provide for money damages; the availability of such damages may be inferred.").

[142] *Navajo Tribe of Indians*, 624 F.2d at 987.

[143] *See Jicarilla*, 564 U.S. at 177 ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.").

[144] *See id.* at 188 (Sotomayor, J., dissenting) (discussing the majority's "disregard for our settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes").

[145] *See Mitchell II*, 463 U.S. at 216 (explaining where a substantive right must be found).

history, and events surrounding adoption of the act.[146] Likewise, for treaties, a court should look to a treaty's plain meaning and the historical events surrounding the signing,[147] including the principle that a trust duty must be consistent with the relevant statute or regulation's purpose.[148] Even if some of the sources of law are insufficient to create a trust duty alone, multiple sources of law can be read together as creating a trust duty.[149]

Next, a court should evaluate whether the government has "full responsibility to manage [the Native American] resources" at issue.[150] While this elaborate level of control is not a prerequisite to establishing a trust duty, it is strong evidence of one.[151] The substantive source of law does not have to expressly give the federal government a particular level of control; control can be inferred by the source's text and the government's actions.[152] A court must decide if the level of control is adequately similar to the level of control that the government had in *Mitchell II* and therefore should give rise to fiduciary duties.[153]

A court should also consider the federal government's moral obligation to Native Americans as a factor in its final decision,[154] but based on the principles laid out above, a moral obligation alone is

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[146] *See, e.g.*, United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 542–46 (1980) (deciding the issue by generally considering and applying different methods of statutory interpretation).

[147] *See* Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1028–29 (8th Cir. 2021) (Kobes, J., dissenting) (analyzing the plain language and historical background of the Treaty of Fort Laramie).

[148] *See* United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 508 (2003) (discussing the Indian Tucker Act's purpose and how it does not contain any trust language).

[149] *See Mitchell I*, 445 U.S. at 542–43 (leaving open the possibility for multiple sources of law to create a trust duty cumulatively); *Mitchell II*, 463 U.S. at 219 (illustrating when multiple sources of law are read together to create a trust duty).

[150] *Mitchell II*, 463 U.S. at 224.

[151] *See id.* at 225 ("Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.").

[152] *See* Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980) (holding that control does not have to be expressly stated).

[153] *See Navajo I*, 537 U.S. at 506 (analyzing the case under *Mitchell II*); United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 294 (2009) (comparing the case to *Mitchell II*).

[154] *See Mitchell II*, 463 U.S. at 221 (mentioning the government's moral obligations to the Native Americans and what impact they could make); United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) (discussing the government's moral obligations of responsibility and trust to the Native Americans).

insufficient to establish a trust duty.[155] In sum, although a court should keep moral obligations in sight, a trust duty will only attach if, in addition to the general trust relationship, a substantive source of law establishes a trust duty, either on its face, by giving the federal government full responsibility over the Native American resource at issue, or both.

B. SUBSTANTIVE SOURCES OF LAW RELIED ON BY THE ROSEBUD SIOUX TRIBE IN *ROSEBUD*

The Rosebud Sioux tribe brought the Native American healthcare disparity to light in *Rosebud*.[156] Because the tribe relied on a Reconstruction Era treaty between tribes and the United States government and modern statutory law, the case provides an excellent opportunity for the Supreme Court's method of interpretation in this area of law to be tested. Next, this Note applies the Supreme Court's interpretive method to the *Rosebud* case.

1. Conventional Trust Relationship. As stated in *Navajo II,* the court must first inquire into whether the substantive sources of law pointed to by the tribe have the "hallmarks of a conventional fiduciary relationship."[157] The general trust relationship between the United States government and Native American tribes provides the basis for the fiduciary relationship.[158] The court must then examine the substantive sources of law that the tribe has pointed to in order to see if those sources impose any specific rights.[159]

In *Rosebud*, the district court found that a trust corpus existed.[160] Specifically, at least some of the money appropriated to the IHS

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[155] *See Mitchell II*, 463 U.S. at 216 (holding that a substantive right must be found in some other source of law as well); *Navajo II*, 556 U.S. at 302 (stating that the tribe could not point to a specific source of law); *Jicarilla*, 564 U.S. at 177 (emphasizing that the tribe must point to a substantive law).

[156] Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986 (D.S.D. 2020).

[157] *Navajo II*, 556 U.S. at 301 (identifying when "trust principles . . . could play a role").

[158] *Mitchell II*, 463 U.S. at 225 (noting an "undisputed existence of a general trust relationship between the United States and the Indian people").

[159] *Id.* at 216–17, 219 (explaining that the Court examines the specific substantive source of law that the tribe identifies in order to examine whether the right argued for is in fact provided by that particular source of law).

[160] *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 1002 ("This Court recognizes that other provisions in the IHCIA place affirmative duties on the Government for Indian health care.");

contributes to the federal government fulfilling its obligations under the 1868 Treaty of Fort Laramie.[161] Therefore, that money belongs to the tribe and is a trust corpus that is merely distributed by the government. These appropriations are not gratuitous because the tribe gave up land for the promises made in the treaty; as a result, a trust duty attaches to the government's responsibilities under the treaty.[162] Although the United States–Native American trust is not perfectly analogous to the private common law trust,[163] jurists and scholars agree that the best means of analyzing the United States–Native American trust is to apply private trust law principles with considerations for the unique elements of the relationship that stem from the federal government's status as a sovereign.[164] Therefore, as long as the substantive sources of law that the Rosebud Sioux tribe points to provide specific rights or duties, the relationship between the tribe and government will have the hallmarks of a conventional fiduciary relationship.

2. Indian Healthcare Improvement Act. The Rosebud Sioux tribe pointed to the IHCIA as establishing a specific trust duty for the federal government to provide healthcare to the tribe.[165] The congressional findings section of the IHCIA states that "[a] major national goal of the United States is 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."[166] The declaration

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Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1026 (8th Cir. 2021) ("The Treaty created a duty, reinforced by the Snyder Act and the IHCIA, for the Government to provide competent, physician-led healthcare to the Tribe and its members.").

[161] *Rosebud Sioux Tribe*, 9 F.4th at 1020 (noting that the United States agreed to provide a physician and a residence for the physician to the tribe).

[162] *See supra* notes 47–50.

[163] *See* United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011) (noting that "this analogy cannot be taken too far").

[164] *See, e.g.*, United States v. Jicarilla Apache Nation, 564 U.S. 162, 199 (2011) (Sotomayor, J., dissenting) ("The majority provides no reason why federal courts applying the fiduciary exception in the Indian trust context could not similarly adopt a workable framework that adequately takes into account any unique governmental interests that bear on the application of the fiduciary exception in any given circumstance."); *see also, e.g.*, Rey-Bear & Fletcher, *supra* note 7, at 440 n.253 (citing cases in which private trust law principles were applied in Indian law cases).

[165] *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 995–96 ("[T]he Tribe points to language in the . . . Indian Health Care Improvement Act (ICIA) as substantive sources of law imposing a duty on the Government to provide the Tribe with adequate health care.").

[166] 25 U.S.C. § 1601(3).

of national Indian health policy in the Act states, "Congress declares that it 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. . . ."[167] Later sections of the IHCIA, however, "[set] forth specific programs or services the Secretary [of Health and Human Services] 'shall' implement or provide."[168] These sections provide specific legal obligations requiring the federal government to provide healthcare to Native Americans, possibly supporting the tribe's argument for a specific trust duty.

The IHCIA is a substantive source of law. The act recognizes the federal government's general trust duty to Native Americans when it references the "historical and unique legal relationship with, and resulting responsibility to, the American Indian people" and the "special trust responsibilities and legal obligations to Indians."[169] Under the plain language of Sections 1601 and 1602, providing healthcare to tribes is a goal of the IHCIA.[170] If Congress intended for the IHCIA to establish a trust duty, Congress would not have characterized the federal government's actions as a goal, rather than as a duty, obligation, requirement, etcetera. If the Court followed the *Jicarilla* standard,[171] these sections would not create an express statutorily created trust duty on their face. Therefore, these sections alone likely do not create a trust duty.

Nevertheless, other sections of the IHCIA require the federal government to create specific programs to implement these goals. For example, Section 1621b(a) states that the IHS "shall provide health promotion and disease prevention services to Indians so as to achieve the health status objectives set forth in §1602(b)."[172] Section 1621(k) requires the IHS to provide mammography services

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[167] 25 U.S.C. § 1602(1).

[168] *Rosebud Sioux Tribe*, 450 F. Supp. 3d at 997 (summarizing 25 U.S.C. §§ 1621b(a), 1621k, and 1665c).

[169] 25 U.S.C. §§ 1601(1), 1602(1).

[170] *Id.* §§ 1601–02.

[171] United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011) (reasoning that "[w]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter" (alterations in original) (citing United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 302 (2009))).

[172] 25 U.S.C. § 1621b(a).

to Native American women aged thirty-five years and older.[173] And Section 1665(c) mandates that the IHS provide behavioral health prevention and treatment.[174] These sections specifically impose legal obligations on the federal government to provide particular healthcare services to Native Americans.

Furthermore, the IHCIA is codified as an entire chapter of the United States Code, Chapter 18.[175] It covers Indian health professional personnel, health services, health facilities, access to health services, health services for urban Indians, organizational improvements, behavioral health programs, and more.[176] Here, the federal government is involved in every facet of healthcare for Native Americans and meets the requisite level of control needed under *Mitchell II*: "full responsibility to manage Indian resources" (funds held by the government to fulfill legal obligations for Native Americans) and healthcare "for the benefit of the Indians."[177] This act also passes the *Jicarilla* standard because the trust duty is promulgated by Congress via statute here.[178] Additionally, the IHCIA was created to help remedy the disparity in the quality of healthcare that Native Americans receive compared to other Americans; that is, Congress took into account the moral obligation that the government has to tribes.[179]

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[173] *Id.* § 1621k.

[174] *Id.* §1665(c).

[175] *Id.* §§ 1601–85.

[176] *Id.*; *see also id.* § 1601 ("The Congress finds the following: (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. (2) A major national goal of the United States is to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.").

[177] United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983) (noting how this level of control demonstrates the fiduciary relationship that the U.S. Government has with the Indian tribes).

[178] United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011) (noting that "[t]he Government assumes Indian trust responsibilities . . . to the extent it expressly accepts those responsibilities by statute").

[179] *See Legislation*, INDIAN HEALTH SERV., https://www.ihs.gov/aboutihs/legislation/ (last visited Apr. 16, 2022) ("The act implements the Federal responsibility for the care and education of the Indian people by improving the services and facilities of Federal Indian health programs and encouraging maximum participation of Indians in such programs.").

In *Rosebud*, the federal government argued that the IHCIA spoke of healthcare in too general of terms to create a judicially enforceable trust duty, but the Eighth Circuit rejected this argument.[180] In 1993, the Supreme Court held that the IHS has a "statutory mandate to provide health care to Indian people."[181] The current version of the IHCIA, passed in 2010,[182] is even more comprehensive and therefore imposes a greater statutory mandate for the government to provide healthcare to tribes than that which existed in 1993. Therefore, the Court would likely find that the IHCIA outlines part of the government's statutory duty to provide healthcare to Native Americans if it decided the *Rosebud* case today.

3. Snyder Act. The tribe also points to the Snyder Act as establishing a specific trust duty for the government to provide healthcare to the tribe.[183] The Snyder Act is a substantive source of law in the form of a congressional act. Although the act instructs the government to fund Native American healthcare, its plain language is too uncertain to provide a definite trust duty because it only states that "Congress may from time to time appropriate" money for Native American healthcare.[184] This language also clearly does not give the government extensive control or full responsibility over Native American healthcare. Thus, although the Snyder Act alone may not establish a trust duty for the government to provide healthcare to Native Americans, the Snyder Act can serve as evidence that the government has the duty to provide healthcare to Native Americans. Therefore, the Court will likely read the Snyder Act in conjunction with the IHCIA.

The Snyder Act was passed in 1921,[185] whereas the current IHCIA was signed into law in 2010.[186] Because Congress passed a much more comprehensive and definitive Native American healthcare plan with the IHCIA in 2010, one can conclude that Congress intended to impose greater legal obligations on the federal government to provide Native American healthcare through the

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[180] Rosebud Sioux Tribe v. United States, 9 F.4th 1024–25 (8th Cir. 2021).

[181] Lincoln v. Vigil, 508 U.S. 182, 194 (1993).

[182] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10221, 124 Stat. 119 (2010).

[183] *Rosebud Sioux Tribe*, 9 F.4th at 1023.

[184] *Id.* at 1021.

[185] Snyder Act, Pub. L. No. 67-85, 42 Stat. 208 (1921).

[186] Patient Protection and Affordable Care Act § 10221.

IHCIA than it previously did with the Snyder Act.[187] The Snyder Act was a precursor to the IHCIA and helps demonstrate the evolution of the government's duty to provide healthcare to tribes, from periodical assistance in 1921[188] to a judicially enforceable trust obligation beginning in 2010.[189]

In *Rosebud*, the federal government argued that the Snyder Act's language on healthcare was also too general to create a judicially enforceable trust duty.[190] In 1993, however, the Supreme Court held that the IHS has a "statutory mandate to provide health care to Indian people."[191] The current version of the IHCIA that became law in 2010 is even more comprehensive and imposes a greater statutory mandate for the federal government to provide healthcare to tribes than what existed in 1993.[192] Therefore, the Court will likely hold that the Snyder Act, combined with the IHCIA, outlines the federal government's statutory duty to provide healthcare to Native Americans, potentially creating a specific trust duty.

4. Treaty of Fort Laramie. Last, the tribe points to Article XIII of the 1868 Treaty of Fort Laramie as imposing a trust duty on the federal government to provide healthcare to the tribe.[193] In Article XIII of the Treaty, the government agreed to "furnish annually to the Indians the physician" and "that such appropriations shall be made . . . as will be sufficient to employ such persons."[194]

The Treaty is also a substantive source of law. The Treaty is a straightforward agreement for the government to provide healthcare to the Rosebud Sioux tribe in exchange for the tribe

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[187] *Compare* Indian Healthcare Improvement Act, 25 U.S.C. §§ 1601–85 (implementing comprehensive federal responsibility for Native American healthcare), *with* Snyder Act, 25 U.S.C. § 13 (authorizing funds for Native American healthcare).

[188] *See Legislation*, *supra* note 179 ("This Act was never superseded, authority only transferred and expanded.").

[189] *Rosebud Sioux Tribe*, 9 F.4th at 1026 ("The Treaty created a duty, reinforced by the Snyder Act and the IHCIA, for the Government to provide competent, physician-led healthcare to the Tribe and its members.").

[190] *Id.* at 1025 ("[T]he Treaty sets forth a duty that was consistently reinforced by the conduct of the Government decades before the adoption of the Snyder Act and IHCIA. The Snyder Act and the IHCIA merely reinforced a prior existing duty and relationship between the Tribe and the Government.").

[191] Lincoln v. Vigil, 508 U.S. 182, 194 (1993).

[192] *See* 25 U.S.C. §§ 1612–16 (requiring the federal government to create specific programs to carry out the IHCIA mandates).

[193] *Rosebud Sioux Tribe*, 9 F.4th at 1023.

[194] Treaty of Fort Laramie, *supra* note 1, at art. XIII.

conceding peace and land.[195] The land serves as valid consideration for the agreement.[196] As the Supreme Court found in *Mitchell II*, the Treaty imposes on the government the "full responsibility to manage Indian resources" (funds held by the government to fulfill the 1868 Treaty of Fort Laramie obligations) and healthcare "for the benefit of the Indians."[197] The Treaty has not been abrogated or rescinded by Congress; nor has Congress expressed any intent to do so.[198] Therefore, the Treaty is still in force today. The Treaty expressly states the government's legal obligation to provide healthcare.[199] The funds held by the government serve as the trust corpus because they belong to the tribe in exchange for the land given up under the treaty.[200] Essentially, the government occupies the trust corpus by running the IHS, analogous to occupation of the trust corpus in *White Mountain Apache*.[201] When the government occupies the trust corpus, it does not matter if the treaty does not expressly state which fiduciary duties the government has; the duties are implied from the fact that the property itself is expressly subject to a trust relationship.[202] The government therefore has fiduciary duties to keep up the trust corpus. Thus, here, the government has a duty to appropriate the funds to provide healthcare to Native Americans. Therefore, at a minimum, under the 1868 Treaty of Fort Laramie, the federal government must provide a physician and adequate funding to the Rosebud Sioux Tribe; at a maximum, because the general trust duty applies to all

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[195] *See id.* at arts. XIII, XI.

[196] *Id.* at art. XI ("In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservations as herein defined.").

[197] United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983).

[198] *See* Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 1000 (D.S.D. 2020) (noting that "Congress has not extinguished the 1868 Treaty of Fort Laramie").

[199] *See* Treaty of Fort Laramie, *supra* note 1, at art. XIII.

[200] *See id.* at arts. XIII, XI.

[201] *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) ("While it is true that the [act at issue in this case] does not, like the statutes cited in [*Mitchell II*], expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust corpus supports a fair inference that an obligation to preserve the property improvement was incumbent on the United States as trustee.").

[202] *Id.*

tribes, under the Treaty, the federal government has a trust duty to provide funding for physicians and quality healthcare for all tribes.

While the federal government argued that it is exceeding its duty under the Treaty by employing more than one physician at the Rosebud IHS Hospital, the Eighth Circuit rejected this argument, stating that the Treaty should be interpreted liberally and in such a way as "to give effect to the terms as the Indians themselves would have understood them."[203] Therefore, the federal government's limiting interpretation is inconsistent with how the Supreme Court will likely interpret the government's duties under the Treaty.

V. THE SUPREME COURT AND *ROSEBUD*

A. FACTORS INFLUENCING HOW THE SUPREME COURT WILL LIKELY RULE IN CASES SUCH AS *ROSEBUD*

The Supreme Court has historically tended to rule against tribal interests.[204] The Court ruled in favor of tribal interests in only twenty-eight percent of Federal Indian Law cases from the 1987–1988 term to the 2016–2017 term.[205] In the context of the federal government's trust responsibility to tribes, the Court "has done little to promise effective solutions to practical problems[] and seems more normatively concerned about . . . protecting federal agencies than it does about promoting a viable framework for protecting Indians from federal malfeasance in the twenty-first century."[206] For example,

> the United States government has used Indian difference to justify abhorrent acts against Indian tribes and Indian people . . . . [T]he Supreme Court has relied on such distinctions to deny First Amendment religious freedoms to American Indians and to hold that tribes

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[203] Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1024 (8th Cir. 2021) (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999)).

[204] *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, 334 (2018) ("[T]he overall trend in the cases does indicate that the Court is now more willing to accept the position of Indian nations as the Third Sovereign within our federalist system.").

[205] *See id.* at 282, 285–86 ("This represents a tribal win/loss ratio of only 28%.").

[206] Rey-Bear & Fletcher, *supra* note 7, at 442.

> were not entitled to compensation under the Fifth Amendment when the U.S. government seized aboriginal title. Understood in this light, theories of racial inferiority around Indianness directly fueled the jurisprudential exceptionalism that deprived Indians and Indian tribes of equal rights under American law.[207]

As a result, extrajudicial factors such as a Justice's sympathy towards Native American rights or the political climate surrounding a federal Indian law case may not sway the Court, but these factors are worth examining as evidence supporting the need for the Court to function as a "counter-majoritarian guardian for American Indian rights."[208]

1. Composition of the Court. Although Justice Neil Gorsuch is typically a conservative justice,[209] he has often been sympathetic towards Native American rights, both as a Supreme Court Justice and as a judge on the Tenth Circuit.[210] For example, Justice Gorsuch wrote the majority opinion in *McGirt v. Oklahoma*, acknowledging the U.S. government's promise to grant the Creek tribe a reservation in perpetuity and the government's obligation to uphold that promise.[211]

In October 2020, Justice Amy Coney Barrett was confirmed to the Supreme Court,[212] and it is unclear if she will be a supporter of

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[207] Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality,"* 130 HARV. L. REV. F. 173, 175–76 (2017) (footnotes omitted).

[208] Rey-Bear & Fletcher, *supra* note 7, at 443; *see* Chambers v. Florida, 309 U.S. 227, 241 (1940) (explaining that courts are "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice").

[209] *See Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch (last visited June 6, 2022) (describing Gorsuch's originalist views of the Constitution).

[210] *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2476–77 (2020) (writing for the Court and finding that much of eastern Oklahoma remains a Creek Reservation); *see also* Memorandum from Richard Guest, Staff Attorney, Native Am. Rts. Fund to Tribal Leaders and Tribal Attorneys, Nat'l Cong. of Am. Indians—Project on the Judiciary 4–5 (Mar. 16, 2017), https://sct.narf.org/articles/indian_law_jurispurdence/gorsuch-indian-law.pdf (describing Justice Gorsuch's opinions regarding tribal rights).

[211] *McGirt*, 140 S. Ct. at 2482 ("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. If Congress wishes to withdraw its promises, it must say so.").

[212] *Amy Coney Barrett*, OYEZ, https://www.oyez.org/justices/amy_coney_barrett (last visited Nov. 3, 2021).

Native American rights. Justice Barrett is an originalist and is expected to continue to be a staunchly conservative justice.[213] The Native American Rights Fund examined Justice Barrett's record on Indian law across her entire career as a judge, law clerk, and scholar and found little on her record regarding Native American rights.[214] Her record in this area is limited and "gives very little insight into how Barrett thinks about Indian law issues, much less how . . . Justice Barrett might approach Indian law questions coming before the U.S. Supreme Court."[215] During her first term, the Court heard several Indian law cases. In *Yellen v. Confederated Tribes of the Chehalis Reservation*, Justice Barrett sided with the Court's majority, which ruled that Alaska Native regional and village corporations are Indian tribes under the CARES Act.[216] In *United States v. Cooley*, she joined the Court's unanimous opinion, which ruled that a tribal police officer has authority to detain and search non-Indians in certain circumstances and that Indian tribes have a degree of authority to enforce federal law.[217]

In April 2022, Judge Ketanji Brown Jackson was confirmed to the Supreme Court.[218] The Native American Rights Fund also examined her limited record on Indian law and found that her record does not indicate whether she is likely to support tribal interests.[219] Judge Jackson ruled against the tribes in both cases

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[213] *See* Amelia Thomson-DeVeaux, *The Cases Where Amy Coney Barrett's Presence on the Supreme Court Could Make a Difference Immediately*, FIVETHIRTYEIGHT (Oct. 26, 2020), https://fivethirtyeight.com/features/what-kind-of-supreme-court-justice-will-amy-coney-barrett-be/ (describing Justice Barrett's judicial philosophy as reliably conservative).

[214] *See* Memorandum from Joel West Williams, Senior Staff Attorney, Native Am. Rts. Fund to Tribal Leaders, Nat'l Cong. of Am. Indians—Project on the Judiciary 2–4, (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf (discussing Justice Barrett's record on Indian law throughout her career).

[215] *Id.* at 2.

[216] Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S.Ct. 2434, 2438 (2021) (holding that the corporations are Indian tribes); *see* 42 U.S.C. 801(g)(1).

[217] United States v. Cooley, 141 S.Ct. 1638, 1641 (2021) (holding that tribes have authority to enforce federal law).

[218] *The Senate Confirms Ketanji Brown Jackson to Serve on the U.S. Supreme Court*, WHITE HOUSE, https://www.whitehouse.gov/kbj/ (last visited Apr. 15, 2022).

[219] *See* Memorandum from Joel West Williams, Senior Staff Attorney, Native Am. Rts. Fund to Tribal Leaders, Nat'l Cong. of Am. Indians—Project on the Judiciary 7, (Mar. 17, 2022), https://sct.narf.org/articles/indian_law_jurispurdence/Ketanji%20Brown%20Jackson%20-%20Indian%20Law%20(final).pdf.

concerning Indian law that she heard as a federal judge, but both cases were fact-specific with neither requiring the application of broad Indian law principles.[220] Thus, there is much uncertainty as to how Jackson will rule if a case like *Rosebud* comes before the Court.

2. COVID-19 and the IHS. The COVID-19 pandemic highlighted inequalities in the American healthcare system, with severe negative impacts on Native Americans.[221] IHS hospitals were ill-prepared to fight the pandemic and failed to help tribes adequately respond to outbreaks.[222] As a result, tribal officials have spent millions of dollars of tribal funds to enact COVID-19 restrictions.[223] Frank Armao, the chief medical officer at the Winslow Indian Health Care Center, an IHS hospital, stated that the pandemic "started as a complete nightmare" and described the difficulty that the hospital faced in obtaining personal protective equipment for healthcare workers.[224] Many of Armao's patients had to be transferred to other hospitals "because the health care system was not equipped to treat them."[225] An IHS official wrote in an email to IHS hospitals, "We can get you N95s (they're expired, but the C.D.C. and I.H.S. say that they're still OK to use)."[226] Worse yet, when Esther Lucero, Chief Executive Officer of the Seattle Indian Health Board, requested COVID-19 tests, she received body bags instead.[227] Clearly, both the quality and quantity of care provided

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[220] *Id.*

[221] *See* Sarah M. Hatcher et al., *COVID-19 Among American Indian and Alaska Native Persons — 23 States, January 31–July 3, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1166, 1169 (2020) (finding that in 23 selected states, "the cumulative incidence of laboratory-confirmed COVID-19 cases among [Native Americans and Native Alaskans] was 3.5 times that among non-Hispanic white persons").

[222] *See* Mark Walker, *Pandemic Highlights Deep-Rooted Problems in Indian Health Service*, N.Y. TIMES, https://www.nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html (Oct. 8, 2021) (describing how the Indian Health Service "was plagued by shortages of funding and supplies, a lack of doctors and nurses, too few hospital beds and aging facilities").

[223] *See id.* (stating that "systematic weaknesses in the health system forced tribal officials to take matters into their own hands, spending millions of dollars of tribal money to bolster the response").

[224] *Id.* (quoting Frank Armao's perspective on the COVID-19 pandemic in IHS hospitals).

[225] *Id.*

[226] *Id.*

[227] *See id.* ("At one point, [Esther Lucero] requested more coronavirus tests and instead received body bags.").

by the IHS need improvement. By reaffirming the United States' trust duty to provide healthcare to Native Americans, the Supreme Court can influence Congress to reform IHS care.

B. HOW THE SUPREME COURT WILL LIKELY RULE IN CASES SUCH AS *ROSEBUD*

Based on the analysis in Part IV, the Supreme Court will likely find that the sources of law that the Rosebud Sioux tribe cited in *Rosebud*—when viewed together with the government's general trust duty to tribes—impose a trust duty on the federal government to provide healthcare to Native Americans. First, the IHCIA gives the federal government full control over IHS funding for Native American healthcare.[228] Second, at least some IHS funds belong to the tribes in exchange for the lands that they gave the government under the 1868 Treaty of Fort Laramie, creating a trust corpus.[229] Third, the Snyder Act serves as further evidence of Congress's intent to provide quality healthcare to Native Americans.[230] Therefore, if the Court interprets the sources of law broadly, it will likely hold that the federal government has a duty under the 1868 Treaty of Fort Laramie and the IHCIA to provide funding for healthcare for all tribes. Moreover, even if the Court interprets the sources of law strictly, it will likely hold that the government has, at a minimum, a specific trust duty to provide a physician and adequate funding for healthcare to the Rosebud Sioux tribe under the 1868 Treaty of Fort Laramie.[231]

Policy concerns also support the legal argument in favor of finding that the United States has a trust duty to provide healthcare to Native Americans. First, the Court has a moral obligation to Native Americans,[232] underlined by movements for racial justice in

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[228] *See supra* notes 167–174 and accompanying text.

[229] *See supra* note 198 and accompanying text.

[230] *See supra* Section IV.B.*3*.

[231] *See* Treaty of Fort Laramie, *supra* note 1, at art. XIII.

[232] *See* United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) ("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.'" (citations omitted) (first quoting Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942); and then quoting Heckman v. United States, 224 U.S. 413, 437 (1912))).

America gaining traction.[233] Second, the IHS has failed to provide adequate healthcare to Native Americans, failing to fulfill its promises to the tribes. For example, "[d]espite IHS's mission to raise the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level, health disparities and inadequate health care for those populations continue."[234] Further, "American Indians and Alaska Natives experience lower health status, lower life expectancy, and disproportionate disease burdens compared to other Americans."[235] The care at the Rosebud IHS Hospital is particularly abysmal.[236] Third, the Court should be a "counter-majoritarian guardian" of the rights of people of color in America.[237] In essence, the Court has the opportunity to uphold its obligations to Native Americans by ruling in favor of tribal rights in this case.

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[233] The Black Lives Matter movement has brought racial justice to the forefront of American consciousness. *See, e.g.*, Marya Hannun, *How Black Lives Matter Changed the American Conversation About Israel and* Palestine, SLATE (May 14, 2021, 2:21 PM), https://slate.com/news-and-politics/2021/05/black-lives-matter-israel-palestine.html ("The protests of [summer 2020], spurred by the police killing of George Floyd pushed Black Lives Matter to the center of U.S. political discourse, transforming it from a controversial movement (in the eyes of some) to a mainstream political force that was impossible to ignore."). The Black Lives Matter movement inspires hope in many Native Americans. *See* Gail Schontzler*, Native Americans See, e.g.*, *Hope in Black Lives Matter Protests*, BOZEMAN DAILY CHRON. (June 28, 2020), https://www.bozemandailychronicle.com/news/native-americans-see-hope-in-black-lives-matter-protests/article_6fb93041-f029-5d15-a0f7-79da3a5cf027.html ("The thousands who turned out for Bozeman's two Black Lives Matter rallies also gave him hope."). Some Native Americans identify with the Black Lives Matter movement because of the "similar history of oppression, violence and discrimination" that both African Americans and Native Americans have faced. *Id.* For example, in the 1960s, the American Indian Movement was formed to protest police brutality. *Id.* Throughout modern history, these movements have highlighted racial inequality and injustices in American institutions. *See id.* (noting that a consultant with Native Nexis believes that the Black Lives Matter movement is "hopeful because people are recognizing that a lot of injustices have occurred over hundreds of years," which are "embedded in 'institutions in our society used to hold back people of color'"). Therefore, by holding that the United States has a trust duty to provide healthcare to tribes, the Court can redress some of the government's wrongs and affirm that social reform is underway, even at the judicial level.

[234] Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 991 (D.S.D. 2020).

[235] *Id.* (footnote omitted).

[236] *See id.* at 992–95 (describing the issues surrounding the operation of the Rosebud IHS Hospital).

[237] Rey-Bear & Fletcher, *supra* note 7, at 443.

VI. CONCLUSION

Although lower courts are divided, if a case like *Rosebud* reaches the Supreme Court, the Court will likely hold that the United States has a trust duty to provide healthcare to Native Americans. Although the Ninth Circuit and District of Arizona disagree, the Eighth Circuit and the District of South Dakota have highlighted that substantive sources of law can give rise to a trust duty for the United States to provide healthcare to Native Americans. The Court will likely follow the Eighth Circuit's approach because it is consistent with Supreme Court precedent, including *Mitchell* and its progeny, and upholds the United States government's obligation to honor Native American rights.