No. 06-1672

In the Supreme Court of the United States

GROS VENTRE TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner Indian Tribes did not possess a claim for breach of trust against the United States, arising out of a federal agency's management of third-party mining activity on non-tribal land located off the Tribes' reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 469 F.3d 801. The opinion of the district court (Pet. App. 40-58) is reported at 344 F. Supp. 2d 1221. A prior opinion of the district court (Pet. App. 28-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2006. A petition for rehearing was denied on March 16, 2007 (Pet. App. 59). The petition for a writ of certiorari was filed on June 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gros Ventre Tribe and Assiniboine Tribe (collectively, the Tribes) reside on the Fort Bel-

knap Indian Reservation in north-central Montana. Pet. App. 3. From 1979 until it declared bankruptcy and ceased operations in 1998, Pegasus Gold Corporation (Pegasus) and its wholly owned subsidiary Zortman Mining, Inc. (ZMI) operated two gold mines, known as the Zortman and Landusky mines, in the Little Rocky Mountains of north-central Montana. *Id.* at 5-6, 28-29. A portion of the Little Rocky Mountains was once located within the Fort Belknap Indian Reservation, but the land was sold and ceded to the federal government by the Tribes in the late 1800s for the purpose of allowing gold mining. *Id.* at 4, 29, 42. The Zortman and Landusky mines are situated partly on federal and partly on private land. *Id.* at 28, 42. The mines are not located within the Fort Belknap Indian Reservation but are near its southern boundary. *Id.* at 5, 29, 42-43.

In 1992, ZMI submitted a plan for an expansion of the Zortman mine. Pet. App. 6. The federal Bureau of Land Management (BLM) decided to prepare an environmental impact statement (EIS) to evaluate the expansion proposal. *Id.* at 29. In the course of reviewing the proposal, BLM and the Montana Department of State Lands (DSL) determined that acid rock drainage (ARD) had become widespread at both the Zortman and Landusky mines. *Id.* at 6, 29.[1] In light of the ARD problem, BLM ordered ZMI to submit modified plans of operations for both mines. *Id.* at 29. In 1994, BLM de-

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[1] "ARD occurs when rock containing sulfides is exposed to air and water during mining operations. The water becomes acidic, sometimes containing metals such as lead, arsenic, zinc, copper, and silver." Pet. App. 6 n.2. In 1996, petitioners, the United States, and others entered into a consent decree settling federal Clean Water Act lawsuits "relating to the discharge of mine drainage and other mine wastewaters" at or from the Zortman and Landusky mines. *Id.* at 31.

cided to enlarge the scope of the expansion EIS to include mine expansion and reclamation requirements at both operations. *Id.* at 30.

In 1996, after completing an EIS, BLM and the Montana Department of Environmental Quality (DEQ), a successor agency to DSL, issued a record of decision (ROD). Pet. App. 6 & n.3, 44. The 1996 ROD approved expanded operations at both mines, and it required the implementation of reclamation plans, including specific measures to control the development of ARD. *Ibid.*; Supp. C.A. E.R. 63, 82-99, 100, 101-102.[2] In late 1996,the Tribes (and other groups) appealed BLM's decision to the Interior Board of Land Appeals (IBLA). Pet. App. 6, 31; see *Island Mountain Protectors*, 144 I.B.L.A. 168 (1998). IBLA stayed BLM's decision pending disposition of the administrative appeal. See *id.* at 170.

In 1998, while the Tribes' administrative appeal was pending before IBLA, ZMI and Pegasus declared bankruptcy. Pet. App. 6, 44. The companies abandoned their plans to expand the mines and announced that they would close and reclaim the mines instead. *Id.* at 6. In May 1998, IBLA issued a decision on the Tribes' administrative appeal. *Ibid.* IBLA concluded, *inter alia*, that in approving the 1996 ROD, "BLM did not fully observe its trust responsibility to the Tribes." *Island Mountain Protectors*, 144 I.B.L.A. at 203. The 1996 ROD was vacated in part and remanded to BLM. *Ibid.*

In June 1998, BLM issued a second ROD in response to the companies' bankruptcy filing. Pet. App. 6, 32. The 1998 ROD required reclamation of existing distur-

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[2] "Supp. C.A. E.R." refers to the supplemental excerpts of record filed by the United States in the court of appeals.

bances using mitigation measures developed by BLM. *Id.* at 6; see *id.* at 32. However, because BLM had relied on the 1996 EIS in preparing the 1998 ROD, IBLA vacated the 1998 ROD on the same ground that it had vacated the 1996 ROD. *Id.* at 6-7, 32.

In response to IBLA's decision, BLM and DEQ consulted with the Tribes concerning reclamation of the Zortman and Landusky mines. Pet. App. 7, 32. In 2001, pursuant to that consultation, BLM and DEQ prepared a supplemental EIS (SEIS), which examined six reclamation alternatives for each mine. *Id.* at 7, 44. In May 2002, based on the SEIS, BLM issued a new ROD. *Ibid.* The reclamation alternative selected for each mine was chosen in part because it "place[s] only the relatively non acid-generating waste rock as backfill in the mine pits, and leave[s] the most strongly acid-generating waste rock on the lined leach pads where any leachate will be easier to control and treat." Supp. C.A. E.R. 60.[3]

2. In April 2000 (*i.e.*, prior to the issuance of the SEIS and new ROD), the Tribes filed suit in federal district court seeking declaratory, injunctive, and mandamus relief against the United States, BLM, and other federal agencies. Pet. App. 7-8, 28, 32-33, 45.[4] Their

[3] The Tribes appealed the SEIS and 2002 ROD to IBLA. While the instant case was pending before the court of appeals, IBLA dismissed the Tribes' administrative appeal as moot. Pet. App. 9 n.4. IBLA concluded that the administrative appeal was moot because, "given the nature of, and authority under which, the 2002 ROD was issued and the mine operator's discharge in bankruptcy, there is no longer any effective relief the Board may grant, nor are the issues raised capable of repetition yet evading review." *Assiniboine & Gros Ventre Tribes*, IBLA No. 2002-444 (June 22, 2006), slip op. 13-14 (unreported order). The Tribes did not challenge the 2002 ROD in court. Pet. App. 33.

[4] Petitioner Fort Belknap Indian Community Council, the Tribes' governing body, was also a plaintiff in the district court. The Bureau of

complaint alleged that the federal government had breached a trust responsibility to the Tribes by approving, permitting, and failing to reclaim the Zortman and Landusky mines, the operation of which allegedly had diminished and continues to diminish the quality and quantity of water available to the Tribes. *Id.* at 7; see *id.* at 32-33, 44-45.

In its initial decision, the district court granted summary judgment in favor of the United States. Pet. App. 28-39. The court explained that, "[w]hile the Tribes have challenged the BLM's 1996 EIS and ROD, those decisions were vacated by the IBLA, and have been supplemented by the 2002 SEIS and ROD." *Id.* at 38. Because "the only remedy for a defective EIS has already been undertaken by the BLM in the form of the 2002 SEIS," the court concluded, "[r]eviewing the earlier decisions without reviewing the decision supplementing those decisions would be a futile exercise." *Ibid.*

In response to the Tribes' motion to alter or amend the judgment, the district court issued a second decision, which held that summary judgment in favor of the United States was warranted because the court lacked subject matter jurisdiction over the Tribes' claim. Pet. App. 40-58. The court explained that its jurisdiction over the Tribes' breach of trust claim "must rest upon the challenged action being a 'final agency action'" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 704. Pet. App. 46.[5] Applying the "final

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Indian Affairs and the Indian Health Service, respondents in this Court, were named as additional defendants in the district court. Pet. ii; Pet. App. 28.

[5] Section 704 provides in relevant part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." A different

agency action" requirement to the Tribes' breach of trust claim, the court found that the only such contested action falling within the six-year statute of limitations in 28 U.S.C. 2401(a) was the vacated 1996 ROD. See Pet. App. 54. The court held that the Tribes lacked standing to challenge the 1996 ROD because that decision was never implemented and therefore did not cause any injury to the Tribes. *Id.* at 54-55.

As an alternative ground for its decision, the district court held that the Tribes had failed to identify with sufficient specificity any statutory obligation breached by the government. Pet. App. 48-53. The court explained that, "[i]n the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes." *Id.* at 48 (citing *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (*Morongo Band*)). The court noted that the Tribes' only statutory challenge was "brought under [5 U.S.C.] 706(1) for failure to act to prevent undue degradation of tribal lands." *Id.* at 51. The court further observed that "[t]he requirements for 'failure-to-act'

APA provision, 5 U.S.C. 702, states that "[a]n action in a court of the United States seeking relief other than money damages * * * shall not be dismissed * * * on the ground that it is against the United States." In the instant case, the district court concluded:

> [B]ecause the APA waives the government's sovereign immunity, the APA establishes the necessary prerequisites to the court's jurisdiction. "[T]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Judicial review under § 702 is expressly conditioned, under § 704, on the existence of a "final" agency action.

Pet. App. 47.

claims have recently been clarified by" this Court in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), and that, under *SUWA*, "the act sought to be compelled under [Section] 706(1) must be a specific, discrete action that is legally required." Pet. App. 51. The court concluded that petitioners had identified no such action here. *Id.* at 52-53.

3. The court of appeals affirmed. Pet. App. 1-27. The court concluded:

> Nothing within any of the statutes or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes. Because the Tribes do not have a common law claim for breach of trust—i.e., one that can be raised independently of any applicable statutes or regulations—the Tribes are forced to rely on the APA for a private right of action. In applying the APA to the Tribes' claims, the district court properly concluded that the Tribes did not have standing to challenge the vacated 1996 EIS or ROD. Moreover, the Tribes did not have a cognizable failure to act claim because the Tribes could not assert that the government has failed to take a discrete agency action that it is legally required to take. Therefore, the district court correctly dismissed the Tribes' claims for lack of jurisdiction.

Id. at 26-27.

The court of appeals identified a conflict in Ninth Circuit case law on the question whether 5 U.S.C. 702's waiver of sovereign immunity for non-monetary suits is subject to the "final agency action" requirement of 5 U.S.C. 704. Pet. App. 11; see *id.* at 12-14 (discussing *Gallo Cattle Co.* v. *USDA*, 159 F.3d 1194 (9th Cir. 1998),

and *Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518 (9th Cir. 1989)). The court determined, however, that en banc resolution of that conflict was unnecessary because, even if 5 U.S.C. 702 did waive the United States' sovereign immunity in the absence of "final agency action," "the Tribes do not have a common law cause of action for breach of trust." Pet. App. 14; see *id.* at 11 (stating that the intra-circuit conflict need not be resolved in this case "as we affirm the district court on its alternative holding").

Consistent with the district court's analysis, the court of appeals explained that, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Pet. App. 16 (quoting *Morongo Band*, 161 F.3d at 574). The court noted that "[h]ere, the Tribes cite the Treaty of Fort Laramie, the Treaty with the Blackfeet, and the Grinnell Agreement as instances where the government has committed itself to specific fiduciary obligations in the management of water resources existing off of the Reservation." *Id.* at 20; see pp. 13-16, *infra* (discussing Treaties and Grinnell Agreement). The court examined those materials and concluded that they did not constitute a commitment by the government "to manage off-Reservation resources for the benefit of the Tribes." *Ibid.* "Rather," the court concluded, "at most, the treaties merely recognize a general or limited trust obligation to protect the Indians against depredations on Reservation lands: an obligation for which we have no way of measuring whether the government is in compliance, unless we look

to other generally applicable statutes or regulations." *Id.* at 20-21.

Relying on this Court's decision in *SUWA*, the court of appeals also held that "the district court properly dismissed the Tribes' 'failure to act' claim for lack of jurisdiction." Pet. App. 24. The court noted that the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, on which the Tribes relied, "is primarily procedural in nature, and it does not provide a private right of action." Pet. App. 23. The court concluded that, "[e]ven assuming that the government has a common law trust obligation that can be tied to its statutorily mandated duties under FLPMA, the Tribes have no basis for arguing that these obligations require the government to take discrete nondiscretionary actions." *Id.* at 24.

ARGUMENT

1. Petitioners seek this Court's review of the question whether the waiver of sovereign immunity contained in 5 U.S.C. 702 is limited by the "final agency action" requirement of 5 U.S.C. 704. See Pet. 15-19. The instant case would be an unsuitable vehicle for resolving that question, however, because the court of appeals explicitly reserved the issue and decided the case on other grounds. See Pet. App. 11-14. While acknowledging that an intra-circuit conflict existed with respect to the interplay between 5 U.S.C. 702 and 704, see Pet. App. 12-14, the court concluded that it "need not make a sua sponte en banc call to resolve this conflict because * * * the Tribes do not have a common law cause of action for breach of trust" under the circumstances presented here, *id.* at 14. In light of the court of appeals' disposition of this case, the question whether the Tribes'

failure to identify a reviewable "final agency action" provided an *additional* ground for dismissal of their suit does not warrant this Court's review.[6]

2. Petitioners contend (Pet. 20-29) that the court of appeals, in rejecting the Tribes' breach of trust claims for equitable relief, erred by applying principles articulated by this Court in tribal suits for money damages. The court of appeals' ruling is correct and does not warrant this Court's review.

a. In *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), this Court addressed Indian allottees' claims for damages under the Indian Tucker Act, 28 U.S.C. 1505. See 445 U.S. at 537, 538-539. The Court concluded that the Indian General Allotment Act, 25 U.S.C. 331 *et seq.*, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 542. The Court explained, *inter alia*, that the General Allotment Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.* After further proceedings on remand, however, the Court concluded that, unlike the General Allotment Act, the additional statutes and regulations on which the plaintiff allottees relied

[6] The position of the United States is that 5 U.S.C. 702 waives the government's sovereign immunity only in actions brought under the APA, and that the waiver is therefore subject to the limitations imposed by other APA provisions, including the "final agency action" requirement contained in 5 U.S.C. 704. The bases for that position are set forth in the government's brief in opposition (at 4-7) to the petition for a writ of certiorari in *Sample* v. *Miles*, No. 06-11003 (filed Apr. 23, 2007), which is currently pending before the Court. We have provided petitioners' counsel with a copy of the government's brief in opposition in *Sample*.

"clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*). The Court in *Mitchell II* further concluded that those sources of law "can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property." *Id.* at 228.

This Court recently summarized the governing principles as follows:

> To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* thus instruct, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. If that threshold is passed, the court must then determine 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 imposes.

United States v. *Navajo Nation*, 537 U.S. 488, 506 (2003) (brackets, citations, and internal quotation marks omitted); see *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473-474 (2003). Because petitioners' current suit is for equitable rather than monetary relief, the second prong of that two-part test is inapplicable here—*i.e.*, petitioners were not required to identify a source of substantive law that mandates *compensation* for breach of the government's trust responsibilities. The nature of the relief sought, however, provides no basis for dispensing with the antecedent requirement that petitioners "identify a substantive source of law that establishes specific fiduciary or other duties." *Na-*

vajo Nation, 537 U.S. at 506. The importance of identifying a source of law imposing specific trust responsibilities is particularly great in the present case, since the activities at issue here have occured *outside* of tribal land, and petitioners seek to compel the government "to regulate third-party use of non-Indian resources for the benefit of the Tribes." Pet. App. 21.

b. Petitioners contend (Pet. 23) that, insofar as the court of appeals applied *Mitchell I* and its progeny to the Tribes' claims for equitable relief, its decision conflicts with *Blue Legs* v. *United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), and *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975). Petitioners' reliance on those decisions is misplaced.

In *Blue Legs*, the district court found that two federal agencies had "contributed to open dumping on the Reservation by generating solid waste, contracting for its disposal and, in some instances, transporting solid waste to dumps operated in violation of federal law." 867 F.2d at 1099. Based on that finding, the court of appeals held that the agencies were required by the Resource Conservation and Recovery Act to undertake court-ordered remedial efforts. See *id.* at 1098-1100. Although the Eighth Circuit also stated that the agencies' "duty to clean up the dumps [wa]s buttressed by the existence of the general trust relationship between these agencies and the Tribe," *id.* at 1100, the equitable relief ordered in that case was firmly grounded in federal statutory law.

Because the decision in *Joint Tribal Council* predated *Mitchell I*, the First Circuit in that case had no opportunity to discuss the proper understanding of *Mitchell I* and its progeny. The First Circuit's decision,

however, is consistent with this Court's later holdings and with the court of appeals' analysis in the instant case. The court in *Joint Tribal Council* agreed with the State of Maine that "[a] fiduciary relationship in this context must * * * be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties." 528 F.2d at 379. The court held, however, that the Nonintercourse Act, 25 U.S.C. 177, "is such a statute" because it "imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act." 528 F.2d at 379.

Thus, the courts in both *Blue Legs* and *Joint Tribal Council* looked to relevant sources of positive law in determining the nature and extent of the federal government's fiduciary obligations. Neither of those decisions, moreover, suggested that the federal government has a trust responsibility to manage *non-tribal* lands to serve the interests of the Tribes. The decisions in *Blue Legs* and *Joint Tribal Council* therefore do not conflict with the Ninth Circuit's ruling here.

c. Petitioners contend (Pet. 24-26) that the court of appeals misconstrued treaties and agreements between the federal government and the Tribes. In the court of appeals, petitioners relied on the Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (Pet. App. 61-68); the Treaty with the Blackfoot Indians, Oct. 17, 1855, 11 Stat. 657 (Pet. App. 69-78), also referred to as the Treaty with the Blackfeet (Pet. App. 69); and an Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, Oct. 9, 1895, 29 Stat. 350 (Pet. App. 90-97), also referred to as the Grinnell Agreement. Pet. App. 4. Petitioners argued below that those documents were "instances where the government has committed

itself to specific fiduciary obligations in the management of water resources existing off of the Reservation." *Id.* at 20. The petition for a writ of certiorari offers no analysis of the language of those documents, however, nor do petitioners contend that any circuit conflict exists regarding the proper construction of the pertinent treaties and agreement. Further review is not warranted.

In Article 3 of the Treaty of Fort Laramie, the United States agreed to protect the petitioner Tribes "against the commission of all depredations by the people of the said United States, after the ratification of this treaty." Pet. App. 62. In Article 7 of the Treaty with the Blackfeet, 11 Stat. 658, the United States similarly agreed to protect the Tribes "against depredations and other unlawful acts which white men residing in or passing through their country may commit." Pet. App. 72. The court of appeals construed those treaties as expressing the United States' promise "to protect the Tribes from depredations that occurred only on tribal land." *Id.* at 22.

Petitioners offer no textual basis for rejecting that interpretation of the treaties.[7] Nor do petitioners iden-

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[7] The duty assumed by the government in the Treaty with the Blackfeet is expressly limited to the prevention of "depredations and other unlawful acts which white men *residing in or passing through [the Tribes'] country* may commit." Pet. App. 72 (emphasis added). Under Article 3 of the Treaty of Fort Laramie, the government's obligation to prevent "depredations" is not explicitly confined to acts occurring on tribal land. See Pet. App. 62. The government's promise to perform that protective function, however, was made in return for the Tribes' "recogni[tion]," in Article 2 of the treaty, of "the right of the United States Government to establish roads, military and other posts, within [the Tribes'] respective territories." Pet. App. 62. Read in con-

tify a contemporaneous understanding of the word "depredations" that would encompass the adverse impacts on water resources alleged in this case. Cf. 1 Noah Webster, *An American Dictionary of the English Language* 58 (1828) (defining "depredation" as "[t]he act of plundering; a robbing; a pillaging").[8] Thus, although petitioners contend (Pet. 21) that the court of appeals' decision is inconsistent with the canon that ambiguity in treaty language is to be resolved in favor of the Indians, they make no effort to show that any language in the foregoing treaties or agreement is ambiguous. "The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

The third document on which petitioners rely—the Grinnell Agreement—effected a cession of tribal land to

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junction with the preceding Article, Article 3 is naturally construed as obligating the United States "to protect the Tribes from depredations that occurred only on tribal land." *Id.* at 22.

[8] Petitioners quote the district court's statement that the serious adverse impacts of the Zortman-Landusky mines on tribal land and water resources is "undisputed." Pet. 12 (quoting Pet. App. 38); see Pet. 24. Earlier in the same opinion, however, the district court correctly noted that "[t]he government * * * disputes the Tribes' claim that mining has affected water quantity and water quality on the reservation." Pet. App. 33-34. BLM's stated view is that (1) the quality of water upstream from the reservation meets applicable health standards at the reservation boundary; (2) the Tribes have not shown that the quantity of water flowing onto the reservation from the Little Rocky Mountains is insufficient to meet their needs; and (3) Spirit Mountain (see Pet. 11 n.1), located on private land, was unavailable for traditional cultural practices and was covered by a dense grid of exploration roads and prospect pits that existed prior to the permitting of the Landusky mine by the State of Montana in 1979. See Gov't C.A. Opp. to Tribes' Pet. for Reh'g en Banc 15 n.11 (filed Feb. 9, 2007).

the United States in return for certain commitments from the government. See Pet. App. 90-95. The text of the agreement contains no language that can be construed to prohibit the governmental actions that are alleged to constitute a breach of trust in this case. Petitioners contend that a Senate document concerning the Grinnell Agreement "reflects, verbatim, the very specific understanding that the Indians of Fort Belknap had of [that agreement]." Pet. 24-25 n.7; see S. Doc. No. 117, 54th Cong., 1st Sess. (1896) (Pet. App. 99-172). The statements of three individual Indians on which petitioners rely (see Pet. App. 118-119, 121; Pet. 24-25 n.7), however, indicate only that some Indians were unwilling to "sell" the water in the lands ceded via the Grinnell Agreement and did not want the federal government to "shut off" that water. The court of appeals' construction of the agreement is consistent with those statements. Cf. *Fort Belknap Indian Community*, 11 Ind. Cl. Comm. 479, 489 (1962) (evidence does not establish that "there was any understanding and agreement between the parties that * * * water rights would be reserved from the area ceded").[9]

d. Petitioners contend (Pet. 26-29) that the government's trust responsibilities are effectively rendered nugatory if the plaintiff in a breach of trust suit is re-

[9] Petitioners also rely on another part of the Senate document concerning the Grinnell Agreement, which reflects that the federal commissioners assured the Fort Belknap Indians that they retained sufficient water for their "needs" and "uses." Pet. 24 n.7 (citing Pet. App. 104, 105). Petitioners have not contended in this case, however, that the operation of the Zortman and Landusky mines has deprived the Tribes of the quantity of water necessary to meet their "needs" or "uses." Rather, the Tribes have simply asserted that the operation of the mines has diminished the quantity and quality of water available to them. Pet. App. 7; see *id.* at 32-33, 44-45.

quired to establish a violation of some specific provision of law. That argument ignores the fact that specific provisions of treaties, statutes, and agreements are the means by which the United States *defines* its relationship with Indian Tribes, and therefore are the only proper source of legally enforceable obligations on the part of the United States. At the same time, however, those instruments afford Tribes substantial protection, as demonstrated by this Court's many decisions enforcing their provisions. The court of appeals' decision—declining to find legally enforceable trust obligations outside of the governing treaties, statutes, and agreements—thus scarely "empties the trust obligation of all meaning." Pet. 27. Petitioners acknowledge, moreover, that the Ninth Circuit's analysis on this point is consistent with the D.C. Circuit's decisions in *North Slope Borough* v. *Andrus*, 642 F.2d 589, 611-612 (1980), and subsequent cases. See Pet. 27-28.

Petitioners' objection to the Ninth Circuit's approach is particularly misplaced in a case, like this one, that involves the management of *non-tribal* resources. Petitioners contend that, even if the land-management practices at issue in this case comply with all environmental statutes and regulations of general applicability, and with the treaty obligations that the United States has assumed to the Tribes, a court may declare the government to be in breach of trust obligations if the court deems BLM's practices insufficiently protective of tribal interests. Petitioners, however, point to no source of constitutional authority for courts to impose binding legal obligations on the United States, unanchored in any source of positive law, based on judicially-crafted common-law notions and generalized considerations of a relationship of trust or guardianship between the

United States and Indians in a historical, political, or moral sense. A vast number of federal actions, moreover, could be alleged to have some indirect impact on tribal resources. Petitioners identify no workable standard by which a court could determine when the trust responsibilities they posit preclude the government from undertaking otherwise-lawful actions not involving the management of tribal property. Cf. *Navajo Nation*, 537 U.S. at 506.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007