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The Binding Guidance Principle: Using the Indian Trust Doctrine to Trump the APA

Cover Page Footnote

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THE BINDING GUIDANCE PRINCIPLE: USING THE INDIAN TRUST DOCTRINE TO TRUMP THE APA

John Robinson Jr.*

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INTRODUCTION

In 1979, the Eighth Circuit Court of Appeals held the Bureau of Indian Affairs (BIA) accountable to its internal tribal consultation policy in *Oglala Sioux Tribe of Indians v. Andrus*.¹ This holding contradicted the Administrative Procedure Act's (APA) general rule that an agency's internal policy and guidance are *not* judicially enforceable.² It also established a precedent that supported a small line of cases that held similarly—in some circumstances, Eighth Circuit courts have forced agencies to follow their internal guidance when it comes to dealing with Indian tribes.

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¹ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979).

² See *infra* Part II.

This Article examines the Eighth Circuit's divergence from normative judicial enforcement under the APA and the ramifications thereof. This divergence has only been applied in narrow circumstances so far, namely, where an Indian tribe is the party seeking enforcement and the defendant agency has a consultation policy that applies to the situation. In such circumstances, federal common law attaches to the agency action through the Indian trust doctrine³ and results in judicial enforcement where there otherwise would be none. In this way, federal common law trumps the APA, a concept that this Article designates the binding guidance principle ("the Principle").

After analyzing the Eighth Circuit's jurisprudence and explaining the Principle, this Article asks whether Indian tribes can expand the Principle to provide protection against adverse agency action outside of the tribal consultation context. For instance, the Environmental Protection Agency (EPA) promulgated an Environmental Justice Policy in 2010 ("EJ Policy") in which it sought to avoid unfair treatment of indigenous populations.⁴ Under a typical APA analysis, this document would merely provide guidance to the EPA and would not create rights for Indian tribes—the EPA may *strive* to act in accordance with the policy, but the policy does not force it to do so. This Article uses the EPA's EJ Policy as a foil, and suggests that tribes should leverage the Principle to render the EJ Policy, or policies similar to the EJ policy, enforceable.

To those ends, this Article proceeds in three parts. Part I addresses background material and focuses on how the Indian trust doctrine arose, why it is important, and the canons of the doctrine itself. Part II examines the judicial enforceability of agency policy and guidance generally. It then explains the Indian trust doctrine's affect on judicial enforcement of agency policy in the Eighth Circuit. That analysis also shows the genesis and application of the Principle. Finally, part III distills a succinct rule and evidences

³ See *infra* Part I.B (explaining the Indian Trust Doctrine).

⁴ OFFICE OF POLICY, ECON. & INNOVATION, U.S. ENVTL. PROT. AGENCY, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION (July 2010), http://www.fs.fed.us/emc/nepa/includes/considering_ej_in_rulemaking_guide072010.pdf [hereinafter EJ POLICY].

how the Principle allows tribes to hold more agencies accountable to more of their policy and guidance documents.

I. BACKGROUND

Federal Indian law describes the body of law developed to deal with the relationship between the federal government, the Indian tribes, and the states. Indian law generally, however, may reference non-federal sources: tribal law, international law, executive orders, treaties that predate the Constitution, and state law.⁵ Under this umbrella, federal common law treats Indian tribes as “domestic, dependent nations”—domestic because they exist within the borders of the United States and dependent because they are subject to United States’ power.⁶ However, Indian tribes retain some trappings of sovereign nationhood because they exercise many police powers within their own boundaries.⁷

This part proceeds in two sections. First, section A provides a brief history of white colonial expansion and its effects on the Indian population. Indeed, “Indian law and history are the opposite sides of the same coin.”⁸ That history is requisite for understanding the Indian trust doctrine itself, explained in section B below.

A. Historical Perspective: European Interaction with Indian Peoples

Historical perspective gives context to the philosophical underpinnings of Indian law. Context is of central importance to Indian law because the Indian trust doctrine developed in direct response to the horrible treatment of Indian populations in the Americas. Indeed, history is the “most significant” source within the “wealth of seemingly non-legal data [that] affects the legal relationship between Indians and the federal government.”⁹

⁵ See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW §§1–2 (2012 ed.).

⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). For instance, Indian tribes cannot negotiate with foreign nations on a government-to-government basis—for such purposes they are considered under the jurisdiction of the United States. *Id.*; see also COHEN, *supra* note 5.

⁷ See *Cherokee Nation*, 30 U.S. at 16 (explaining that the relationship between Indians and the U.S. “is perhaps unlike that of any other two people in existence”).

⁸ COHEN, *supra* note 5, § 1.01.

⁹ *Id.*

European justification for colonization in the “New World” extends back at least to the Crusades, when the Vatican announced a papal right to use force against non-Christian peoples.¹⁰ Implicit in this papal right, was the Church’s condonation of taking non-Christian lands by the sword. Somewhat later, in the wake of heinous Portuguese and Spanish brutality in the New World,¹¹ a Dominican theologian named de Victoria argued against and changed somewhat the earlier attitude. Under de Victoria’s new analysis, legal acquisition and political domination of Indian lands required the prior consent of the Indian tribes.¹² Essentially, de Victoria rejected the notion that European powers could simply take the land they wanted by force. He also rejected the idea that the Indians held no right to their land simply because they were non-Christian.¹³ Accordingly, simple discovery of the Indian lands alone did not convey *complete* title and ownership to the “discoverer” under de Victoria’s theory.¹⁴

Chief Justice Marshall explained this theory—the doctrine of discovery—in *Johnson v. M’Intosh*.¹⁵ In that case, Chief Justice Marshall explained, “the great nations of Europe were eager to appropriate to themselves” as much of the New World as they could.¹⁶ They assumed that “the superior genius of Europe might claim an ascendancy” over the Indians, which they justified by “convincing themselves that they made ample compensation to the [Indians] by bestowing on them civilization and Christianity.”¹⁷

However, said Chief Justice Marshall, the European nations needed some way to avoid constant war amongst themselves as they all sought fulfillment of the same goal—acquisition of the extensive, newly discovered lands.¹⁸ To that end, they needed to

¹⁰ *Id.* § 1.02.

¹¹ HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT 7 (Twentieth Anniversary ed. 1999) (quoting the priest Las Casas, who wrote that, by 1508, European occupation of Hispaniola had resulted in over 3 million Indian deaths).

¹² COHEN, *supra* note 5, § 1.02.

¹³ *Id.*

¹⁴ COHEN, *supra* note 5, § 1.02. On the other hand, a European power *could* gain land through a “just” war such as when an Indian tribe was the aggressor. *Id.*

¹⁵ *Johnson v. M’Intosh*, 21 U.S. 543, 576 (1823).

¹⁶ *Id.* at 572.

¹⁷ *Id.* at 573.

¹⁸ *Id.*

establish a common principle that all the nations would follow. “This principle was, that discovery gave title to the government by [whom] it was made.”¹⁹ However, acquiring title by discovery only worked to exclude the other *European* powers from the land—the Indians still held “a legal as well as just claim to retain *possession* of [their land].”²⁰ Thus, the doctrine of discovery vested title to the discovered lands in the discoverer, but did not grant a possessory interest—European ownership was subject to “the Indian right of occupancy.”²¹

Since the doctrine of discovery only gives the discoverer title, and not possession, European states still had to physically acquire the lands from the Indians by moving in on their land and taking possession of it. This idea, that Indians retained some, although limited, legal right to land colored dealings with the Indian tribes throughout the colonial and expansionist eras. Indeed, the earliest reservations, “which were steadily reduced in size,” arose out of peace treaties that (at least facially) respected an Indian right to land.²²

White settlers also bought Indian lands through trade by offering “new weapons, new drinks, and new tools, all of which were capable of destroying Indian life, health, and culture.”²³ Acquiring Indian lands “[i]n exchange for these deadly but apparently irresistible gifts” was seemingly easy.²⁴ However, these manipulative methods of gaining land necessarily stimulated resentment and animosity amongst the Indian tribes, and hostilities ensued. To appease the tribes and restore peace, the British government released the Royal Proclamation of 1763,²⁵ which reserved all lands west of the Appalachian Mountains to the

¹⁹ *Id.*

²⁰ *Id.* at 574 (emphasis added).

²¹ *Id.* But see Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 7 (1942) (“These are subtleties of feudal legal theory which meant nothing to the Indians.”).

²² BRUCE E. JOHANSEN, *THE NATIVE PEOPLES OF NORTH AMERICA: A HISTORY* 120 (2005).

²³ Cohen, *supra* note 21, at 6.

²⁴ *Id.*

²⁵ *The Royal Proclamation - October 7, 1763*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/proc1763.asp (“[A]nd whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians.”).

Indians and proscribed further land deals with the tribes. Unfortunately, the Proclamation's edicts did not last long.

After the American Revolutionary War, federalism issues continued to confuse relations between the Indians and the European settlers. The federal government strove for a conservative Indian policy, but the states remained eager to acquire Indian lands.²⁶ This federalist dynamic eventually resulted in article I, section 8 of the United States Constitution—the Congress shall have the power to regulate commerce with the Indian Tribes;²⁷ Congress did just that. The federal government's constitutional authority displaced the states and allowed it to take the lead in dealings with the tribes.

However, even those federal Indian treaties imbued with moral and legal force often went unfulfilled because the government was often unwilling to prevent states from violating the tribes' treaty rights.²⁸ During the early and middle 1800s, a states' rights movement was on the rise, which President Jackson generally supported.²⁹ The states felt that they did not need to comply with federal mandates and proclamations. Soon after Jackson assumed the presidency, Southern states began to pass laws encroaching on Indian sovereignty. These laws did away with the tribal unit and imposed taxes, while denying Indians the right to vote and encouraging whites to settle on Indian land.³⁰ Georgia, in particular, tried to completely evict the Cherokee Indians from within its borders.

The Tribe fought back in federal court. *Cherokee Nation v. State of Georgia*³¹ was the first major case to deal with Indian

²⁶ COHEN, *supra* note 5, § 1.02.

²⁷ U.S. CONST. art. I, § 8; *see also* COHEN, *supra* note 5, § 1.02, (comparing the Indian powers granted to the federal government in the Articles of Confederation and the Constitution).

²⁸ *See* COHEN, *supra* note 5, § 1.03. Additionally, not all treaties even had moral and legal force. "Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only small parts of the signatory tribes." *Id.* (citing FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1997)).

²⁹ *See* Matthew S. Brogdon, *Defending the Union: Andrew Jackson's Nullification Proclamation and American Federalism*, 73 REV. POL. 245 (2011) (reconciling Jackson's advocacy of states' rights with his Nullification Proclamation).

³⁰ ZINN, *supra* note 11, at 133.

³¹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

rights and marked the beginning of the Indian trust doctrine.

In it, the Cherokees sought to enjoin Georgia and its officers from enforcing the newly passed anti-Indian laws.³² The Cherokees cited a long list of treaties, all of which supported the Cherokee Nation's "exclusive right to their [own] territory, and the exclusive right of self government within that territory."³³ The tribe also alleged a long list of wrongs perpetrated by Georgia which if combined would "annihilate the Cherokees as a political society, and seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."³⁴

Under Georgia's new anti-Cherokee law, "the lands within the boundary of the Cherokee territory [were] to be surveyed, and to be distributed by lottery among the people of Georgia."³⁵ The Cherokees pleaded that, unless the court granted them relief from the anti-Cherokee law, only three alternatives remained: they would need to either surrender their land and doom their civilization, give up their sovereignty and rights, or "arm themselves in defenses [sic] of these sacred rights, and fall sword in hand, on the graves of their fathers."³⁶

In response, Chief Justice Marshall bluntly stated, "a case better calculated to excite [the Court's sympathies] can scarcely be imagined."³⁷ Despite these alleged sympathies, he found that the court did not have original jurisdiction to hear the case.³⁸ In order to arrive at that decision, Chief Justice Marshall examined the relationship between the Indian tribes and the United States.³⁹ Although the Indian nations had some familiar trappings of a

³² *Id.* at 1–2.

³³ *Id.* at 4. In all, the complaint alleged that at least eight treaties existed between the Cherokees and British, its colonies, or the United States. *Id.* at 4–5.

³⁴ *Id.* at 15.

³⁵ *Id.* at 13. In fact, by the time *Cherokee Nation* actually came before the Court, a Cherokee Indian had been arrested, tried, and executed under Georgia law. To illustrate the contentiousness of the moment, Georgia hanged him in direct and open defiance of a writ of error to the state supreme court from Chief Justice Marshall himself. *Id.* at 12–13 ("[The state court] promptly resolved, in substance, that the supreme court [sic] of the United States had no jurisdiction over the subject, and advised the immediate execution of the prisoner.").

³⁶ *Id.* at 10–11.

³⁷ *Id.* at 15.

³⁸ *Id.*

³⁹ *Id.* at 16–18.

foreign state, the “condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”⁴⁰ Instead of existing as foreign nations, the Indian nations “may, more correctly, perhaps, be denominated domestic dependent nations . . . meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian”⁴¹ Because the Cherokee Nation was not a foreign nation cognizable under the Constitution, the Court dismissed the case for want of jurisdiction—“If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted.”⁴²

Chief Justice Marshall’s language in *Cherokee Nation* forked into two distinct prongs. First, his comparison of the federal government’s association with Indian tribes as a guardian-to-ward relationship established the idea that the government owed a fiduciary duty to the tribes. This was the first acknowledgement of what later became known as the Indian trust doctrine.

In stark contrast, the second prong of Marshall’s decision—the abdication of jurisdiction over Indian disputes with states—gave President Jackson the perfect tactic for Indian repression and removal. According to this reasoning, the federal government was not breaking its solemn word to the Indians when it failed to intervene in that repression and removal; the government was able to claim that it was powerless to assist the Indians in defending themselves against the states in the divided federalist system.⁴³ As President Jackson’s Secretary of War stated, “It is not your Great Father [the President] who does this; but the laws of the Country, which he and every one of his people is bound to regard.”⁴⁴ Based on this reasoning, the federal government would not *force* Indians to move westward because that would violate federal treaties. However, the federals warned, if Indians did not go west, state laws would apply, destroy the Indian’s tribal and personal rights, and render them “subject to endless harassment and invasion by

⁴⁰ *Id.* at 16.

⁴¹ *Id.* at 17.

⁴² *Id.* at 20.

⁴³ See generally COHEN, *supra* note 5, § 1.03.

⁴⁴ ZINN, *supra* note 11, at 133 (quoting Secretary of War Jon Eaton).

white settlers coveting their land.”⁴⁵

Without the protections offered in treaty by the federal government, whites displaced the Indians east of the Mississippi under color of state law.⁴⁶ As the process that continued across the continent, tribes were pushed west, isolated on small and remote reservations, and harassed. By the late 1800s, there was no place left for Indian; to be put and “there was little sympathy for the preservation of [their] way of life.”⁴⁷ Congress then shifted its efforts to assimilating Indians into white society, a process that resulted in the transfer of another 90 million acres away from the tribes into private hands, as well as a mass destruction of tribal culture.⁴⁸ This historical lens colored and controlled development of the Indian trust doctrine.

B. The Indian Trust Doctrine in Short

At the core, the Indian trust doctrine originates from tribal sovereignty that preexisted white settlement of this continent⁴⁹ and “the unique trust relationship between the United States and the Indians.”⁵⁰ The trust relationship grows out of early Supreme Court jurisprudence discussed above and encompasses the rules by which courts interpret treaties and agreements with the tribes, as well as federal statutes and executive orders. The doctrine includes the following four canons:

1. Courts give liberal construction to treaties, laws, and statutes in favor of the Indians;⁵¹
2. Courts resolve ambiguities in documents in favor of the Indians;⁵²
3. Courts construe agreements as the Indians would have understood them at the time of the agreement;⁵³

⁴⁵ ZINN, *supra* note 11, at 133.

⁴⁶ See generally COHEN, *supra* note 5, § 1.03.

⁴⁷ COHEN, *supra* note 5, § 1.04.

⁴⁸ *Id.*

⁴⁹ *Id.* § 1.01.

⁵⁰ *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985).

⁵¹ *E.g.*, *Oneida Indian Nation*, 470 U.S. at 247 (“[I]t is well established that treaties should be construed liberally in favor of the Indians.”).

⁵² *E.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (“[A]ny doubtful expressions in [documents] should be resolved in the Indians' favor.”).

⁵³ *E.g.*, *Choctaw Nation*, 397 U.S. at 631 (“[T]his Court has often held that treaties with the Indians must be interpreted as they would have understood

4. Statutes preserve Indian property rights and sovereignty unless Congress clearly intended otherwise.⁵⁴

The guardian-ward relationship announced in *Cherokee Nation* and described above does not explain all of these canons. Indeed, the canons gained a strong protective element in 1832, the year after *Cherokee Nation*. In that year, Georgia returned to the Supreme Court on a somewhat similar issue; this time the court found that it had jurisdiction over the case. In *Worcester v. Georgia*, a missionary appealed his conviction for living on Cherokee lands in violation of Georgia law, which required a permit to do so.⁵⁵ Chief Justice Marshall overturned Worcester's conviction and used the opportunity to expound upon the relationship between the federal government and the tribes.⁵⁶ The Cherokees, Justice Marshall said, "are under the *protection* of the United States."⁵⁷ However, according to the Chief Justice, being under federal protection did not completely take away the tribe's status as a distinct political entity—it retained some measure of sovereignty over its own lands. That is, being under the protection of the federal government "involved, practically, no claim [by the United States] to [Indian] lands, [and] no dominion over their persons."⁵⁸

Chief Justice Marshall further explained that "[p]rotection does not imply the destruction of the protected" and that the whole point of the reservation system was to ensure survival of the tribe.⁵⁹ The Chief Justice also announced that treaties should be construed in favor of the tribe,⁶⁰ a canon discussed below. He explained that it is "reasonable to suppose, that the Indians who could not write, and most probably could not read, who certainly were not critical

them.").

⁵⁴ *E.g.*, *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("[A] clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.").

⁵⁵ *Worcester v. Georgia*, 31 U.S. 515, 542 (1832).

⁵⁶ *Id.* at 562.

⁵⁷ *Id.* at 521 (emphasis added).

⁵⁸ *Id.* at 552 (discussing a treaty with Britain but also assuming that similar language held a similar meaning with U.S.-made treaties).

⁵⁹ *Id.* at 552–53.

⁶⁰ *Id.* at 582.

judges of our language,” would not agree to treaty terms that violated their self-determination, so treaty terms should be understood “in the sense in which it was most obviously used [by the tribe].”⁶¹ He went on to couch Indian treaties in familiar federalist terms—a treaty was a grant of rights from the tribe to the federal government, with the tribe reserving for itself all the powers not explicitly given away.⁶² Chief Justice Marshall’s reasoning echoes the Tenth Amendment.⁶³

In many ways, *Worcester* used the paternalistic attitude that Chief Justice Marshall expressed in *Cherokee Nation* to establish and recognize the United States’ duty to protect the tribes, their lands, and their sovereignty. Originally, the protection extended to guard tribes against the individual states and the unrelenting pressure of white intrusion on Indian lands. Over time, though, the duty has expanded to issues including environmental, resource, and heritage. For instance, the Native American Grave Protection and Repatriation Act (NAGPRA)⁶⁴ aims to protect Indian cultural heritage by, among other things, returning control over remains and artifacts to Indian tribes.⁶⁵

The Indian trust doctrine does not work solely through affirmative congressional lawmaking. Indeed, the doctrine’s canons control because “the standard principles of statutory construction do not have their usual force in cases involving Indian law.”⁶⁶ In this way, the canons themselves give the Indian trust doctrine teeth—the trust relationship would be meaningless if the trust canons did not trump competing canons and prudential values.⁶⁷

For example, the Indian trust doctrine overrides the presumption that a state holds title to the beds and banks of its navigable water under the equal footing doctrine.⁶⁸ Indeed, the

⁶¹ *Id.*

⁶² *Id.*

⁶³ U.S. CONST. amend. X (“The powers not delegated to the United States by this Constitution . . . are reserved to the States.”).

⁶⁴ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006).

⁶⁵ *See id.* § 3002.

⁶⁶ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

⁶⁷ *See COHEN*, *supra* note 5, § 2.02.

⁶⁸ *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635–36 (1970) (holding that the Choctaw Nation, and not Oklahoma, owns the bed of the Arkansas River); *Idaho*

Indian trust can even override deference to agencies under *Chevron* because of “the trust relationship between the United States and the Indian American people.”⁶⁹

When invoked, the Indian trust doctrine is a powerful ally to the tribes in many circumstances. Through it, courts are able to protect tribal interests that would otherwise be disregarded. The remainder of this Article addresses one of those circumstances in which the trust doctrine is particularly powerful, specifically, the circumstance that arises when the Indian trust doctrine interacts with federal agency guidance and activates the Principle. The following analysis suggests that a strong understanding of the Principle empowers tribal litigation and may extend the federal government’s protection of tribes to cover enforcement of nonlegislative rules.

II. JUDICIAL ENFORCEMENT OF AGENCY POLICY & GUIDANCE

This part discusses the Administrative Procedure Act, specifically the sections that define a “rule.” Underneath the APA’s broad umbrella, any “agency statement of general or particular applicability and future effect” that “interpret[s], or prescribe[s] law or policy” counts as a “rule.”⁷⁰ However, agency rulemaking is a broad concept and therefore lawyers typically distinguish between legislative and nonlegislative rules. A legislative rule is, with limited exceptions, promulgated after undergoing a notice and comment period; it has binding legal effect.⁷¹ A nonlegislative rule, on the other hand, does not undergo notice and comment procedures, and typically lacks the force of law.⁷² Agency policy documents are nonlegislative rules, and are the focus of this Article. Section A discusses “normal” judicial enforcement of nonlegislative agency guidance and policy. Section

v. United States, 533 U.S. 262, 281 (2001) (holding that the Coeur D’Alene Tribe holds title to the bed of Lake Coeur d’Alene, not Idaho).

⁶⁹ Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001); *see also* Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997) (“[N]ormal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue.”) (quotation omitted).

⁷⁰ 5 U.S.C. § 551(4) (2011).

⁷¹ *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001).

⁷² *Id.*

B discusses the binding guidance principle, which arises when the Indian trust doctrine attaches to nonlegislative rules and binds the agency to act accordingly.

A. Judicial Enforcement of Agency Policy in Typical Circumstances

Typically, courts do not enforce nonlegislative rules because they fall under the exception to rulemaking described in section 553 of the APA.⁷³ Under the exception, policy documents do not undergo notice and comment. Without notice and comment, the documents are not legislative rules and therefore do not create rights or duties in the public.

However, the title an agency gives a document does not end the issue: a rule by any other name would still be a rule.⁷⁴ That is, an agency cannot promulgate a rule under cover of “guidance” to avoid legislative rulemaking procedures. Therefore, courts test the enforceability of a document by measuring what the document *does* rather than what it is called. If a document creates rights or duties in the public, then courts will enforce it. Otherwise, courts generally will not.⁷⁵

The Ninth Circuit developed a simple two-prong test to differentiate between legislative (enforceable) rules and non-legislative (not enforceable) ones. This Article uses the test announced in *United States v. Fifty-Three (53) Eclectus Parrots*⁷⁶ as an illustrative example for two reasons. First, the circuit commonly applies its test to the type of nonlegislative documents at issue in this Article.⁷⁷ Second, the Ninth Circuit’s reasoning in this area is clearer than that of the Supreme Court’s.

Under Ninth Circuit jurisprudence, courts apply a two-part test to determine whether an agency pronouncement may be enforced

⁷³ 5 U.S.C. § 553(b)(3)(A) (2015). For the purposes of this Article, there is no substantive difference between “policy” and “guidance.”

⁷⁴ See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 1 (expressing this concept rather elegantly).

⁷⁵ The Indian trust exception to this “general” rule of thumb is the focus of this Article. See *supra* part II.B.

⁷⁶ *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982).

⁷⁷ Other circuits either use similar logic or directly incorporate the Ninth Circuit test. See, e.g., *Wilderness Soc’y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

against a federal agency. The agency's document must both: (1) prescribe substantive rules; and (2) conform to specific procedural requirements.⁷⁸ The first prong requires that the pronouncement in question be "legislative in nature"—an agency's "interpretive rules, general statements of policy or rules of agency organization, procedure, or practice" do not qualify as substantive.⁷⁹ The second prong examines whether the agency promulgated the pronouncement "pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress."⁸⁰

The Ninth Circuit applied this test in *River Runners for Wilderness v. Martin*, which is a prime example of application outside the Indian law context.⁸¹ There, plaintiff River Runners challenged the National Park Service's (NPS) 2006 decision to allow continued use of motorized rafts in Grand Canyon National Park.⁸² Plaintiffs based their claim, in part, on the fact that NPS's 2006 decision conflicted with NPS's then-existing policy to maintain the wilderness qualities of the park, which would exclude motorized travel. According to River Runners, NPS's 2001 Park Service Management Policy created an enforceable duty to restrict motorized rafts in the park, and that the 2006 NPS decision to *allow* such rafts was a violation of that duty.⁸³ Therefore, the case turned on whether the Management Policy placed a judicially enforceable duty on the Park Service.

The court applied the *Eclectus Parrots* test to River Runner's claims, and found that the "the 2001 [NPS] [p]olicies are not enforceable against the Park Service."⁸⁴ Under the test's first prong, the court noted that even NPS's use of mandatory language in the 2001 policies did not transform the document into a set of substantive rules.⁸⁵ Although the agency required its own

⁷⁸ *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (quoting the test as set forth in *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982)).

⁷⁹ *Id.* at 1071.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1067.

⁸³ *Id.*

⁸⁴ *River Runners*, 593 F.3d at 1073.

⁸⁵ *Id.* at 1071; *accord Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (examining the same policy and finding that the "document as a whole

adherence to the 2001 policy through the document's preamble, the court noted that NPS reserved the right to modify or waive the policy as necessary.⁸⁶ Therefore, the court concluded that the policies were "not intended to have the same force" as regulations, do not "purport to create substantive individual rights or obligations," and that NPS intended the policies "only to provide guidance within the Park Service, not to establish rights in the public generally."⁸⁷

Even though the NPS policy failed under the first prong of *Eclectus Parrots*, the court also examined whether the policy satisfied the requisite procedural requirements under the second prong of the test. The court found it "particularly noteworthy" that the APA required publication of substantive rules, and NPS never published the 2001 policy in the Federal Register or the Code of Federal Regulations.⁸⁸ Therefore, outside of Indian law, even seemingly binding language cannot create an enforceable duty without following correct legislative rulemaking procedure under the APA.

1. Disclaiming Language is Largely Irrelevant to Judicial Enforceability

As illustrated in *River Runners*, courts take note of the type of language agencies use in their policy documents. However, courts do not generally consider the presence or absence of a disclaimer within the policy document as dispositive on whether the document is judicially enforceable or not. Indeed, it would be

does not read as a set of rules").

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1072 (quoting *Wilderness Soc'y*, 434 F.3d at 595); *see also* W. Radio Servs. Co., Inc. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996) (determining that two agency documents failed the test because "[n]either is published in the Federal Register or the Code of Federal Regulation."); *accord* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir.1986) (holding that "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations"). *Contra* Davis v. Latschar, 202 F.3d 359, 366 (D.C. Cir. 2000) (holding that the NPS *did* bind itself through its Management Policy). The court in *Davis* facially reached the opposite result from *River Runners*. However, in *Davis*, the plaintiff claimed that the Management Policies were binding, and NPS did not argue otherwise. *Id.* Without briefing to the contrary, the court assumed that the Policies bound NPS. *Id.* at 366.

strange if an agency disclaimer could overcome the statutory rights accorded to citizens by the APA—Congress’s statutory language should control reviewability, not an agency’s disclaiming language. Instead, courts analyze how an agency actually *uses* the document in question.⁸⁹

For example, the D.C. Circuit examined a document that did not contain disclaiming language in *CropLife America v. EPA*.⁹⁰ The Environmental Protection Agency (EPA) argued that the document could not possibly be enforceable because it was only a press release.⁹¹ However, the court evaluated whether the agency used the document in a manner similar to a rule, rather than evaluating the type of document or its lack of disclaiming language.⁹² If an agency “self-servingly disclaims any intention to create a rule with the ‘force of law,’ but the record indicates otherwise,” then courts can review and enforce the document regardless.⁹³ Here, in spite of the document’s non-rule nature, the court found that EPA used “clear and unequivocal language” that “reflect[ed] an obvious change in established agency practice” and created a “binding norm.”⁹⁴ Therefore, the court held that the press release constituted a reviewable binding regulation.⁹⁵ However, the circuit court invalidated the press release because the EPA promulgated it without proper process.⁹⁶ That the EPA promulgated the document without notice and comment, yet still treated it as binding, made it invalid as a rule.⁹⁷

Likewise, courts do not let agencies hide behind a legal disclaimer. In *Appalachian Power Co. v. EPA*, the D.C. Circuit analyzed the EPA’s “Periodic Monitoring Guidance for Title V Operating Permits Programs.”⁹⁸ The EPA claimed that the Guidance was not enforceable because it was neither final nor

⁸⁹ *E.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (finding that an EPA guidance document carried the force and effect of law, and was therefore judicially reviewable, even though it contained a broad disclaimer).

⁹⁰ *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003).

⁹¹ *Id.* at 881.

⁹² *See id.* at 883.

⁹³ *Id.* at 883 (citing *Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002)).

⁹⁴ *Id.* at 881.

⁹⁵ *Id.* at 885.

⁹⁶ *Id.* at 884–85.

⁹⁷ *Id.* at 885.

⁹⁸ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000).

binding.⁹⁹ However, the court disagreed; the guidance document contained statements of legal consequence, placing obligations on both “State regulators and those they regulate.”¹⁰⁰ Additionally, the court found the EPA’s disclaimer that the guidance was not enforceable to be meaningless in light of the document’s overarching purpose and effect.¹⁰¹

B. Atypical Circumstances: The Indian Trust Doctrine Modifies Enforceability

Although the general rule outlined above—guidance and policy cannot bind an agency—applies in most circumstances, outlier cases do exist. As this Article’s introduction explained, a small line of cases have challenged this norm. Taken together, the foundational cases are construed, at least in the Eighth Circuit, to require agencies to act in accordance with their policy documents in the context of Indian law.

The first of these outlier cases was *Morton v. Ruiz*, decided by the Supreme Court in 1974.¹⁰² The opinion included language suggesting that an agency could be in violation of the Indian trust doctrine if it failed to follow its own internal guidance.¹⁰³ Indeed, agency failure to follow its own procedure “is inconsistent with the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”¹⁰⁴

In *Morton*, the BIA’s internal procedure called for publication of “all directives that inform the public of privileges and benefits available and of eligibility requirements” in the Code of Federal Regulations (CFR).¹⁰⁵ However, the agency’s benefits manual, which the BIA never published in the CFR as required, stated that only Indians living “on reservations” could receive general

⁹⁹ *Id.* at 1020.

¹⁰⁰ *Id.* at 1023.

¹⁰¹ *Id.* at 1023 (“[T]hrough the Guidance, EPA has given the States their ‘marching orders’ and EPA expects the States to fall in line.”).

¹⁰² *Morton v. Ruiz*, 415 U.S. 199 (1974).

¹⁰³ *Id.* at 235 (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.”).

¹⁰⁴ *Id.* at 236.

¹⁰⁵ *Id.* at 235 (quotations omitted).

assistance benefits from the BIA.¹⁰⁶ Based on the benefits-manual language, the BIA denied an Indian couple's application for assistance because they lived several miles from the reservation's border. Because the benefits manual had not been published according to the internal procedure, the Court held that the BIA's "on reservation" requirement was invalid because it "amount[ed] to an unpublished ad hoc determination . . . that was not promulgated in accordance with [BIA's] own procedures."¹⁰⁷

In *Morton*, the BIA's "on reservation" requirement failed for two reasons. First, the eligibility requirement failed because a legislative rule would have been more appropriate to the BIA's purpose.¹⁰⁸ Because the Indian plaintiffs identified an underlying statutory duty, the Court could have struck down the BIA's denial of benefits under the APA on that basis alone, without reaching the issue of BIA's additional consultation procedure.

Although the Court could have stopped there, it also addressed a second and more important consultation analysis. The Court recognized that the BIA's internal guidance policy—requiring that the BIA publish eligibility requirements in the CFR—was a procedural requirement *additional* to the baseline requirements of the APA.¹⁰⁹ Accordingly, the "on reservation" requirement additionally failed because the BIA disregarded its own guidance.¹¹⁰ Essentially, the Court reasoned that it could hold the agency to a higher standard than the APA required because of the Indian trust doctrine.¹¹¹ The BIA violated the Indian trust doctrine when it failed to follow its own guidance because that guidance created an expectation (of a particular process) in the Indian community.

The Eighth Circuit followed the Supreme Court's lead in

¹⁰⁶ *Id.* at 199 (emphasis added).

¹⁰⁷ *Id.* at 236.

¹⁰⁸ *See id.* at 236 ("The conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective . . .").

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 235 ("[I]t is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

¹¹¹ The Court did not use the term "Indian trust doctrine," but it grounded its reasoning in the same principles intrinsic to the trust doctrine, like dependency and exploitation. *See id.* at 235–36.

Oglala Sioux Tribe of Indians v. Andrus.¹¹² There, the Eighth Circuit relied on the *Morton* precedent in its holding and explained that, when the BIA failed to follow its own Indian consultation policy, it violated the trust doctrine. The court held that “[f]ailure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decision making, but also violates ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’”¹¹³

In *Oglala Sioux*, the BIA removed a reservation’s Agency Superintendent because of a conflict of interest that arose when the Superintendent’s brother became the Tribe’s president.¹¹⁴ The BIA neglected to consult with the Tribe when it removed and replaced the Superintendent.¹¹⁵ The removal contradicted the BIA’s tribal consultation policy, which provided that “(t)ribes should be consulted on recommendations for selection of employees for the position of Agency Superintendent.”¹¹⁶ The *Oglala Sioux* court focused on the idea that the BIA’s consultation policy created and supported the Tribe’s expectation of additional procedure, namely that the Tribe would be an active participant in personnel decisions.¹¹⁷ The court also focused on the procedural aspect of the guidance despite the fact that it was a nonlegislative rule.¹¹⁸ The court held that the BIA violated its own guidelines by making a personnel change without conducting meaningful consultation and remanded the decision so that consultation could take place.¹¹⁹

Conversely, other circuits have declined to adopt the *Oglala Sioux* precedent. For example, in *Hoopa Valley Tribe v. Christie*, the Ninth Circuit Court of Appeals overturned a district court ruling that cited to *Oglala Sioux* in support of the proposition that

¹¹² *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979).

¹¹³ *Id.* at 721 (quoting *Morton*, 415 U.S. 199).

¹¹⁴ *Id.* at 710–11.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 717–18 (quotation omitted).

¹¹⁷ *Id.* at 721 (stating that the BIA “failed to comply with its own procedures” and “[f]ail[ed] . . . to comply with its own policy” in the same paragraph).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 714 (“We also agree that the Bureau’s action was procedurally defective in that it was not made in accordance with the Bureau’s own procedure requiring prior consultation with the Tribe.”).

the BIA's consultation guidelines bound the agency.¹²⁰ On review, the Ninth Circuit distinguished the Eighth Circuit precedent: in *Oglala Sioux*, the BIA *conceded* the binding nature of the consultation guidelines; in *Hoopa Valley*, the BIA did not.¹²¹

Despite *Hoopa Valley*, the line of cases supporting the assertion that the Indian trust doctrine renders agency policy enforceable continues to grow. Examples that are more recent can be found in the Eighth Circuit, where a number of decisions follow the *Oglala Sioux* precedent. For example, the United States District Court for the District of South Dakota explicitly rejected the Ninth Circuit's *Hoopa Valley* decision and affirmed on different facts that the BIA's consultation policy bound the agency to bring an effected tribe into its decision making process.¹²²

In that case, *Lower Brule Sioux Tribe v. Deer*, the BIA made personnel changes that affected the Tribe without following its own tribal consultation policy.¹²³ The *Deer* court reviewed a thorough history of the BIA's consultation procedures, including Consultation Guidelines, letters to the tribes, and a clarifying order, which stated, "[b]ureaus and offices are required to consult with the recognized tribal government."¹²⁴ Based on that well-developed record, the court decided that, "[c]learly, [the personnel decision] in question falls within these policies of consultation and solicitation of advice."¹²⁵ Therefore, the court held that the "BIA is not to be permitted to disavow its own policies and directives."¹²⁶

Even more recently, the United States District Court for the District of South Dakota required consultation with the plaintiff tribe, but found that duty to be present in a policy document and in

¹²⁰ *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1101 (9th Cir. 1986).

¹²¹ *Id.* at 1103 ("The [agency guidelines] are not conceded by the Bureau to have the force of law, in contrast to the governmental concession made in *Oglala Sioux*.").

¹²² *See Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399 (D.S.D. 1995) (quoting *Oglala Sioux*'s holding). *See also* *Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 157 (D.S.D. 1996) (holding that BIA has the discretion to terminate employees, but must consult with tribe first).

¹²³ *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D. 1995).

¹²⁴ *Id.* at 399.

¹²⁵ *Id.* at 398.

¹²⁶ *Id.* at 400 (explicitly rejecting the Ninth Circuit's distinction in *Hoopa Valley*); *accord Winnebago*, 915 F. Supp. at 168 (finding the same result on "substantially similar" facts).

the applicable statute.¹²⁷ In this case, the district court enjoined the BIA from conducting a school restructuring plan without first consulting the affected Tribe.¹²⁸ The court framed the consultation obligation as follows: “Where the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given.”¹²⁹ This is powerful language.

III. DISTILLATION AND APPLICATION

This analysis begins by examining selected points from the jurisprudence discussed above. Section A condenses those points into a succinct statement of the binding guidance principle and then applies the Principle to the EPA’s EJ policy in section B. Finally, it suggests that Indian tribes should leverage the Principle to render the EJ policy, or other similar policy documents, judicially enforceable.

A. Distillation of a Useful Rule

As shown through the cases discussed in Part II.B, the Eighth Circuit holds at least some agencies accountable to their Indian consultation policies. Two common themes in these cases are worth noting. First, many of the cases involve situations where the affected tribe also had an independent statutory ground for review, such as underlying violation of the APA. This Article takes the position that an underlying violation is helpful, but not necessary for application of the Principle. Although an underlying statutory violation seems to make a case’s outcome more certain, when courts review a policy standing alone, like in *Lower Brule Sioux*, they may still hold agencies accountable.

Second, the BIA is generally the acting agency when courts apply the Principle, which may carry an inherent bias in the courts. For example, the BIA’s mission statement suggests a clearly delineated interaction between the agency and Indian tribes, an

¹²⁷ *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 785 (D.S.D. 2006).

¹²⁸ *Id.* at 785.

¹²⁹ *Id.* at 784 (citing *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D. 1995)).

interaction that does not explicitly exist in other agencies. In fact, the BIA's mission statement embodies the Indian trust doctrine itself: "The Bureau of Indian Affairs' mission is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives."¹³⁰

However, no court's opinion treats the BIA as a "special" agency under the Principle, and there is no statutory basis for such differentiation under the APA. This Article takes the position that the Indian trust doctrine, and thus the binding guidance principle, applies to the federal government as a whole, not only to individual agencies. Therefore, this Article separates the component parts and takes a broad view of the binding guidance principle's potential applicability.

Taken as a whole, Part II.B shows that Indian tribes have a valid cause of action in the Eighth Circuit to make agencies follow their own tribal consultation policies. The key question that arises then is whether disaggregation of the binding guidance principle allows tribes to expand its applicability beyond just the BIA. That is, do the underlying tenets of the binding guidance principle constrain it to a narrow scope, or are they broad enough to encompass and protect other tribal interests?

To answer that question, this Article collates the Eighth Circuit jurisprudence into discrete elements. The courts do not articulate any particular test, but a workable paraphrase of their reasoning hinges on the question of whether the agency's consultation policy actually creates an expectation of meaningful interaction between a given Tribe and an agency. For example, the BIA's consultation guidelines speak specifically about personnel changes; Indians could reasonably understand such language to give them the *right* to consult with the BIA, not just the possibility.

The powerful language in *Yankton Sioux* illustrates the broader applicability of the Principle: "Where the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made,

¹³⁰ *Mission Statement*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/BIA/> (Dec. 10, 2013).

that opportunity must be given.”¹³¹ To the court and the tribes, the operative elements in that passage are not the *BIA* and *consultation*, but that a tribe has *justified expectation* of a *meaningful opportunity* to affect policy decisions.

The binding guidance principle stands for the proposition that consultation is meaningless unless tribal input actually affects substantive decisions as is common amongst procedural requirements. For example, the comment procedures of legislative rulemaking assure “that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.”¹³² Likewise, the National Environmental Policy Act does not “mandate particular results,” but it does require consideration of “relevant environmental information.”¹³³ Similarly, the binding guidance principle incorporates the Indian trust doctrine’s protectionist values by making sure that Indian tribes can take an active role in the decision making process—a *meaningful opportunity* means that tribes can help protect themselves.

Combining the above concepts with Eighth Circuit jurisprudence results in a three-part test:

1. Does the Indian trust doctrine apply set of facts?
2. Does an agency policy or guidance document address this particular situation?
3. Does the document create a justified expectation of certain treatment?

If all three are met, then the Principle applies, the document is judicially enforceable, and the agency must follow its own guidance or face a court order mandating that it do so.¹³⁴

B. Applying the Rule to Environmental Justice

EPA’s EJ Policy consists of fifty-three pages and lays out the agency’s thoughts on the environmental issues that face low-

¹³¹ *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 785 (D.S.D. 2006).

¹³² *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

¹³³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

¹³⁴ The expression might be written as: federal Indian trust common law + policy document + justified expectation = judicial enforcement of the policy.

income and minority communities.¹³⁵ The EPA understands that disadvantaged populations often bear a disproportionate environmental burden and expressly includes indigenous populations among the disadvantaged groups. More specifically, according to the EJ, an explicit concern is the “actual or potential lack of fair treatment or *meaningful involvement* of . . . tribes in the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹³⁶

Accordingly, the EJ Policy shows many similarities with Indian-specific consultation policies. For example, the “meaningful involvement” language in the EJ Policy mirrors the “meaningful and timely input” language used in the BIA’s tribal consultation policy.¹³⁷ On the other hand, the EJ policy uses soft non-binding language: the EJ document “*helps* rule writers understand and identify potential EJ concerns.”¹³⁸ The EJ Policy also includes an explicit disclaimer that it “is not legally enforceable.”¹³⁹ However, as discussed above, soft and disclaiming languages are not likely to control.

As a test, let us hypothetically assume that the EPA has taken some action that violates its EJ Policy by placing a disproportionate environmental burden on an Indian tribe and failing to meaningfully involve the tribe.¹⁴⁰ Assume that the tribe then challenged the EPA’s action in court, first under the “normal” analysis of the Ninth Circuit and then under the binding guidance principle of the Eighth Circuit.

Assessing the EJ Policy under the normal framework shows

¹³⁵ EJ POLICY, *supra* note 4.

¹³⁶ *Id.* at 6 (emphasis added).

¹³⁷ BUREAU OF INDIAN AFFAIRS, GOVERNMENT-TO-GOVERNMENT CONSULTATION POLICY § B.3 (2000), <http://www.bia.gov/cs/groups/public/documents/text/idc-002000.pdf>; *see also* U.S. ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES § II (2011), <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>.

¹³⁸ EJ POLICY, *supra* note 4, at ii (emphasis added).

¹³⁹ *Id.*

¹⁴⁰ EPA does have its own tribal consultation policy. *See* BUREAU OF INDIAN AFFAIRS, *supra* note 137. EPA does not always consult tribes. This situation might arise, for instance, when a tribe intervenes in a suit between EPA and a state or private party. When the tribe holds a tertiary interest in EPA’s action, the EJ Policy is a more on-point guidance document. Comparative analysis of the two is beyond the scope of this Article.

that a court would not force EPA compliance with the EJ Policy. It certainly fails the first prong of the *Eclectus Parrots* test because it constitutes a general statement of agency policy rather than a substantive rule.¹⁴¹ Further, the EPA did not produce the EJ Policy in conformance with the legislative rulemaking requirements of the APA, nor did it publish the EJ Policy in the CFR. Therefore, the EJ Policy fails the second prong of the *Eclectus Parrots* test as well—the EJ Policy does not conform to the procedural requirements of legislative rulemaking imposed by Congress. Therefore, a reviewing court would not remand the EPA’s action and force tribal involvement under the normal test.

Further, in the typical situation addressed here, the procedural requirements imposed by Congress through the APA means that any plaintiff asserting that the EJ Policy created an enforceable duty would also be asserting that the EPA promulgated the EJ Policy improperly. In fact, to argue that the EJ Policy is binding is necessarily to argue that it *should* have undergone official APA rulemaking. Even if a plaintiff successfully argued that the Policy created an enforceable duty, a court would strike down the EJ Policy as improperly promulgated.¹⁴²

Now, let us assume that the tribe brought a cause of action that relied on the Indian trust doctrine. Applying the new test extracted above yields a result different from the normal test:

1. Does the Indian trust doctrine apply? Yes, this is an Indian tribe bringing suit in federal court, so the trust doctrine applies.
2. Does an agency policy document address this situation? Yes, the EJ Policy states that indigenous communities should not carry a disproportionate environmental cost and should also be part of the decision making process.
3. Does the document create a justified expectation of certain treatment? Yes, the EJ Policy states both that the tribe should receive fair treatment in comparison to other groups, and that the tribe should be meaningfully involved in the agency’s action.

¹⁴¹ See *supra* Part II.A.

¹⁴² See, e.g., *CropLife Am. v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (addressing this very situation) (discussed in part II.A.2).

This new test focuses on the substance of the expectation created, whether it was justified or not. When the Principle is applied to a document, the disclaimer and promulgation procedure fade into obscurity. Indeed, the Principle binds the EPA to the proffered purpose of the EJ policy: to “act consistently with the federal trust responsibility when taking actions that affect tribes.”¹⁴³ Therefore, how the EPA promulgated the EJ Policy makes no difference under the binding guidance principle. However, the justified expectation of meaningful tribal involvement does.

CONCLUSION

This Article has attempted to distill a new theory—the binding guidance principle—from the case law. Under some circumstances, the Indian trust doctrine attaches to agency policy and guidance documents and makes them judicially enforceable when they would not be otherwise. This forms the substance of the Principle.

At this time, this narrow the Principle exists within the Eighth Circuit and has been applied in only limited circumstances. However, deeper analysis of the Principle suggests that it need not be construed so narrowly because its foundations build on broad concepts of general applicability. In this way, tribes have a viable and non-frivolous way to make agencies adhere to their own guidance documents. Moreover, agencies do not always act in the way their own guidance documents suggest—that is a good thing.

It is at least possible, if not likely, that a concentrated effort could expand the Principle both within the Eighth Circuit and to other circuits. One can easily imagine tribal interest in holding various agencies to any number of their policies, whether in terms of environmental justice or otherwise. I hope that this Article is useful to those ends.

¹⁴³ EJ POLICY, *supra* note 4, at 14.