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# NOTHING IS OVER: FTCA CLAIMS FOR TOXIC TORTS ON NATIVE LANDS

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## I. INTRODUCTION

Hazardous substances disproportionally impact minority communities, particularly NN's. As of 2014, roughly twenty-five percent of the United States superfund sites, could be found on land in Indian Country.[1] For Native communities, whose cultural identities are intertwined with the land around them, harm to the environment can be profoundly destructive. Professor Rebecca Tsosie suggests that an Native world view can be defined as: "a perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people[.]"[2] This world view sets the foundation for understanding environmental harms in Indian Country through an ecological model, studying interactions between humans, animals, plants, and their physical surroundings.[3] This note examines harms caused to the environment greater than merely disrupting a natural balance that previously existed, specifically harms caused by noxious substances that are poisonous to the land.

The EPA website begins its Environmental Justice timeline with the Memphis Sanitation Strike in 1968.[4] This civil-rights era strike helped pave the way for later protests when a small African American Community in Warren County, North Carolina was selected as a dumping site for Polychlorinated biphenyls ("PCB"), gathering national attention.[5][6] Protestors believed that Warren

1 Terri Hansen, *Kill the Land, Kill the People: There Are 532 Superfund Sites in Indian Country!*, Indian Country Today, June 17, 2014, https://intercontinentalcry.org/kill-land-kill-people-532-superfund-sites-indian-country-24366 [https://perma.cc/879A-GAVH]; CERCLA is informally known as the Superfund, which allows the EPA to clean sites contaminated from hazardous waste, known as superfund sites, https://www.epa.gov/superfund/what-superfund [https://perma.cc/CMM2-9357].

2 Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, 21 Vt. L. Rev. 225, at 226 (1996).

3 "Indian Country" is the legal term of art for the geographic territory governed by a tribal government, and today is defined by federal statute at 18 U.S.C. Section 1151. MELISSA L. TATUM & JILL KAPPUS SHAW, LAW, CULTURE & ENVIRONMENT 19 (2014).

4 Environmental Protection Agency, *Environmental Justice Timeline*, EPA.GOV, www.epa.gov/environmentaljustice/environmental-justice-timeline [https://perma.cc/99T6-M36U] (last updated June 2, 2017).

5 Office of Legacy Management, *Environmental Justice History*, ENERGY.GOV, www.energy.gov/lm/services/environmental-justice/environmental-justice-history [https://perma.cc/H2FC-PHQD] (last visited November 15, 2019).

6 Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters,* 49 PHYLON 151 (2001).

County, and similar communities chosen for dumping hazardous waste, were selected based on race and income.[7] In *Environmental Law in Indian Country*, William Rodgers argues that Chairman of the Yakama Nation, Alex Saluskin, first outlined the concept of environmental justice when he wrote "Statement of The Yakama Indians in Defense of Their Vested Fishing and Property Rights as Celilo Falls in the Columbia River that will be Destroyed by the Construction of the Dalles Lock and Dam" ("Saluskin Document") in 1953.[8] The thirty-seven page Saluskin Document pointed out the disproportionate method used to measure the costs and benefits of the Dalles Dam.[9] The Dam benefited a few, but planners neglected to look at value the site had for the Native people. Celilo Falls, which by today's standards would likely be a UNESCO World Heritage site, was considered the "Wall Street of the West" for the prosperity it brought to surrounding NN's. [10] [11]

On March 10, 1957, observers stood around Celilo Falls and watched the water trapped by the newly completed dam rising to drown the falls, silencing the previous roar, and destroying over one hundred fishing platforms and "dip-net" stations.[12] Today only records remain of the names of hundreds of fishing spots extinguished by the Dalles Dam.[13] The Bureau of Reclamation and the Corps of Engineers found that the ratio of benefits to cost for building the dam, even if the Native Americans caught the maximum amount of fish reasonable, was 1:22.[14] Unlike traditional indigenous worldviews that consider connections between the physical world, social welfare, and spirituality when making decisions about how to use an environmental resource, Western law

[7] *Id*.
[8] 1 William H. Rodgers & Elizabeth Burleson, Environmental Law in Indian Country 381 (2005).
[9] *Id*.
[10] Tom Base, *Proposal To Resurrect Columbia River's Celilo Falls Draws Flak,* NW NEWS NETWORK (Apr. 16, 2015), www.nwnewsnetwork.org/post/proposal-resurrect-columbia-rivers-celilo-falls-draws-flak [https://perma.cc/46ZM-UJU7].
[11] Emily Alpert, *Remembering Celilo Falls*, THE DALLES CHRONICLE (July 10, 2006), https://www.thedalleschronicle.com/news/remembering-celilo-falls/article_f6ab05c0-5593-11e9-8a39-a340f9430234.html [https://perma.cc/T32T-UU3Z].
[12] Rodgers, *supra* note 9, at 380.
[13] *Id.* at n.71.
[14] *Id*. at n.74.

and policy does not contemplate this relationship.[15] The Saluskin Document points out that the federal government did not consider the cultural and religious significance of the Falls to the surrounding Native community when making a decision, only the economic gains of electric power from the dam.[16]

This note examines harms caused to the environment greater than merely disrupting a natural balance that previously existed, specifically harms caused by noxious substances that are poisonous to the land. By nature, harms caused by toxic torts are particularly difficult to remediate adequately. A monetary number cannot sufficiently remediate damages to the health of an individual, their child, or the life of a loved one due to contact with hazardous substances that are not properly disposed of or stored. Essentially creating a "scorched earth" effect, these substances turn a once valuable natural resource into a toxic well—a permanently dangerous contamination of the land or water that people must avoid for their safety.

When the federal government commits toxic torts on tribal lands by contaminating natural resources, NNs should be able to bring FTCA claims to obtain damages. By creating the FTCA, the U.S. government waived its sovereign immunity to allow private citizens to obtain compensation when harmed by torts caused by the government.[17] Although the jurisdiction to sue the federal government is broad, the FTCA is not without exceptions. One of the most consequential exceptions is the Discretionary Function Exception in § 2680(a) of the FTCA, which shields the government from liability when there is a policy choice involved. When the federal government assumes responsibility for an aspect of governance or policy on NNs by requiring BIA approval and controlling decisions in that aspect, there should be a carve-out within the discretionary function exception. The Trust Doctrine, combined with statutory requirements outlined in CERCLA and RCRA, along with the duties to conserve health outlined within the

[15] Robert A. Williams Jr., Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World, 96 W. VA. L. REV. 1133, 1164 (1994).
[16] *Supra* note 15.
[17] David S. Fishback, The Federal Tort Claims Act is a Very Limited Waiver of Sovereign Immunity – So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems, 59 U.S. ATT'YS' BULL. 16 (Jan. 2011), https://www.justice.gov/sites/default/files/usao/legacy/2011/02/03/usab5901.pdf [https://perma.cc/K6VA-969T].

Snyder Act, should overcome that exception, allowing NNs to bring successful FTCA claims.

## II. TOXIC HARMS AND TRIBES

In the opening scene of the 1980 film *Rambo: First Blood*, Sylvester Stallone's character John Rambo, eagerly knocks on the door of a house looking for his friend who served in Vietnam with him, only to discover that his buddy "Got himself killed in 'Nam... didn't even know it. Cancer ate him down to the bone."[18] This scene was a reference to the toxic tort pollution Vietnam soldiers experienced that would later result in the 1984 Agent Orange settlement; at 180 million dollars, this was the largest settlement in history and led the way for mass toxic tort litigation.[19] Toxic Tort claims are made when exposure to hazardous substances causes injury, and the victim of that injury seeks redress from the person who allegedly caused the exposure.[20]

Generally speaking, a hazardous substance is an agent that causes death or health problems, including behavioral and genetic abnormalities, through direct or indirect contact.[21] The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") also known as Superfund, has a more

[18] *Rambo: First Blood (1982) Movie Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfieldspringfield.co.uk/movie_script.php?movie=rambo-first-blood [https://perma.cc/6AWH-SYDE] (last visited Apr. 10, 2018); There are many interesting parallels between *Rambo: First Blood* and the history of indigenous peoples in the United States. The character, Rambo, according to the second film is part Navajo. In the first movie, although he contributed greatly to the United States military efforts by serving in Vietnam as a Green Beret, he was harassed by U.S. law enforcement, who treated him with contempt. U.S. law enforcement instigated an aggressive situation, leading to the phrase, "They drew first blood, not me."
Likewise, indigenous people have routinely been victims of U.S. aggression. In spite of the great contributions made by indigenous people to national security interests of the United States by serving in the military at a higher percent than any other ethnic minority, and the specific contribution as wind talkers, a vital aspect in WWII, along with suffering radiation exposure to mine the uranium necessary to get ahead in the nuclear arms race, the U.S. legal system has failed to provide justice in return.

[19] Ralph Blumenthal, *Veterans Accept $180 Million Pact on Agent Orange*, N.Y. TIMES (May 8, 1984), www.nytimes.com/1984/05/08/nyregion/veterans-accept-180-million-pact-on-agent-orange.html [https://perma.cc/M95Q-CFE4].

[20] Anthony Z. Roisman, et. al., *Preserving Justice: Defending Toxic Tort Litigation,* 15 FORDHAM ENVTL. L. REV. 1 (2004).

[21] 29 CFR § 1910.120.

exhaustive definition, including about 800 substances.[22] This Act also allows for agencies to have the discretion to designate additional substances as a hazard when necessary.[23]

Bringing a Toxic Tort claim against a citizen defendant can be difficult because plaintiffs must find evidence that establishes causation and find credible expert witness testimony that relies on published scientific studies.[24] Plaintiffs bringing a case against the government must overcome additional threshold requirements to gain redress, making the process more complicated than against a private individual or entity.

### A. *Tribes, Toxic Harms, Difficulties with Recovery*

The American West is known for its pristine national parks and is an increasingly popular tourist destination for those seeking outdoor activities such as hiking, rock climbing, and rafting.[25] Still, little is known about how these same landscapes have also been desecrated in a way that directly effects the health of the communities who first lived there and continue to do so. This section tells the story of how the federal government directly contaminated two Native Nations in the Southwest and then considers possible means of redress.

#### 1. Navajo Nation Uranium

In March 1979, the Three-Mile Island spill in Pennsylvania received national attention. The New York Times documented the chronology of the "nightmare," referring to it as the "worst accident in the quarter-century history of this country's nuclear power program."[26] In July of that same year, the largest nuclear spill in U.S.

[22] 42 U.S.C. § 6921, 33 U.S.C. § 1317(a), 42 U.S.C. § 7412, 15 U.S.C. § 2606.
[23] 42 U.S.C. § 9602(a) (Westlaw current through P.L. 116).
[24] Michael D. Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation, 86 NW. U. L. REV. 643 (1992).
[25] Jenny Rowland Shea and Nicole Gentile, Outdoor Recreation Is Big Business, A State Scorecard and Policy Menu for Growing the Outdoor Recreation Economy in 11 Western States, Center for American Progress (September 27, 2017) https://www.americanprogress.org/issues/green/reports/2017/09/27/439530/outdoor-recreation-big-business/ [https://perma.cc/6K8Z-VKC4].
[26] B. Drummond Ayres Jr., *Three Mile Island: Notes From a Nightmare*, N.Y. TIMES (Apr. 16, 1979), www.nytimes.com/1979/04/16/archives/three-mile-

history occurred at Church Rock, New Mexico.[27] Over 1,100 tons of uranium tailings and approximately 100 million gallons of radioactive wastewater was dumped into the Rio Puerco River on the Navajo Nation when a mud dam failed.[28] More than three months later, The New York Times reported "Navajos Worry about Uranium Pollution of River."[29] The outraged protestors and demonstrators reacting to the Three-Mile Island spill did not make an appearance for the Navajo people.

The site was created decades ago, during the nuclear arms race, when the United States government was developing the Manhattan project. The majority of the United States uranium supply came from the southwest region of the country.[30] During the era of the uranium boom, from the late 1940s to the 1970s, men in the local Navajo community were inclined to work in the mines because they were near to their homes, and there were few other options available. At the time, "radiation" did not translate into the Navajo language.[31] Being an isolated community with little knowledge about the hazards of the mining occupation, most of the people were unaware of the long-term health risks.[32] By the late 1930s, policymakers and scientist knew radon was hazardous.[33]In spite of the Treaty of 1868 between the Navajo Nation and the United States, forming a trust relationship where the Navajo Nation expected the United States to have their best interest, the United States did little to prevent the following public health crisis from radon exposure.[34]

island-notes-from-a-nightmare-three-mile-island-a.html [https://perma.cc/8P7K-DUF6].

27 Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 217 (2015).

28 *Id.* (*citing* Barbara Rose Johnson, Susan Dawson & Gary Madsen, *Uranium Mining and Milling: Navajo experiences in the American Southwest*, INDIANS AND ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST 111, 117 (Sherry Smith & Brian Frehner eds., 2010)).

29 *Navajos Worry About Uranium Pollution of River*, N.Y. TIMES (Nov. 18, 1979), www.nytimes.com/1979/11/18/archives/navajos-worry-about-uranium-pollution-of-river.html [https://perma.cc/PPF2-RVTU].

30 Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, AM. J. PUB. HEALTH 92 (2002), www.ncbi.nlm.nih.gov/pmc/articles/PMC3222290/ [https://perma.cc/K28P-ZWGJ].

31 *Id*.

32 *Id*.

33 *Id*.

34 Id.

2. San Carlos Apache Agent Orange

In the 1960s and 70s, the United States Forest Service sprayed an herbicide containing dioxin called Silvex along the fifteen-mile portion of the Gila River running through the San Carlos Apache Reservation.[35] Silvex is the name used in the U.S. for 2,4,5-Trichlorophenoxyacetic acid, an insoluble substance used to destroy broad leaf plants by essentially interfering with the growth hormones vital to photosynthesis.[36] This substance was combined in equal parts with 2,4-Dichlorophenoxyacetic acid to create Agent Orange, used in the Vietnam War.[37] According to the U.S. Geological Survey ("USGS"), the Reservation portion was selected for efficiency purposes; permission from multiple landowners was not necessary for the project, only approval from the BIA.[38] This action was part of an assignment called the Gila River Phreatophyte Project, which was created to reduce the vegetation believed to consume too much of the water necessary for the growing city of Phoenix.[39] This vegetation included not only the invasive salt cedar species but also the native Phreatophyte, such as the local cottonwoods and black willows that benefit the flow of the river, protect the quality of water, and stabilize the banks.[40] Unfortunately, Silvex destroyed both indiscriminately.

[35] Tanya H. Lee, *Poisoned Lands: San Carlos Apache Indian Reservation Steeped in Dioxin*, INDIAN COUNTRY TODAY (Mar. 16, 2017), https://newsmaven.io/indiancountrytoday/archive/poisoned-lands-san-carlos-apache-indian-reservation-steeped-in-dioxin-ICSCFZkJxEeNPCV0RdDthQ/ [https://perma.cc/5NJJ-F3MK].
[36] U.S. National Library of Medicine, *2,4,5-Trichlorophenoxyacetic Acid*, NAT'L CENTER FOR BIOTECH. INFO. PUBCHEM COMPOUND DATABASE, www.pubchem.ncbi.nlm.nih.gov/compound/2_4_5-trichlorophenoxyacetic_acid#section=Top [https://perma.cc/JK2J-63K9].
[37] Jeanne M. Stellman and Steven D. Stellman, "Agent Orange During the Vietnam War: The Lingering Issue of Its Civilian and Military Health Impact," 108, n. 6 (June 2018).
[38] *Supra* note 36.
[39] R.C. Culler et. al., *Objectives, Methods, and Environment-Gila River Phreatophyte Project, Graham County, Arizona*, 655 A GEOLOGICAL SURVEY PROF. PAPER (1970), https://pubs.usgs.gov/pp/0655a/report.pdf [https://perma.cc/7Q5K-TK99].
[40] Pa. Land Trust Ass'n, *The Science Behind the Need for Riparian Buffer Protection*, CONSERVATIONTOOLS.ORG, http://conservationtools.org/guides/131-the-science-behind-the-need-for-riparian-buffer-protection [https://perma.cc/Z94J-9W5N] (last visited November 15, 2019).

The Phreatophyte project did not only destroy the delicate and complicated riparian buffer zone but also left toxic contaminants.[41] The San Carlos Apache believe that these contaminants have harmed the community's health to this day.[42] After decades of Agent Orange litigation, science shows that dioxins can cause major health problems such as birth defects and cancer.[43] In the neighboring town of Globe, Arizona, local non-Indian residents who had been sprayed by Agent Orange brought a class action suit against Dow Chemical and settled for an undisclosed amount in 1981.[44] The class action arose when the United States Forest Service sprayed Kuron, a defoliant related to Agent Orange on the Pinal Mountains of the Tonto National Forest in an attempt to diminish foliage and increase water runoff between 1968 and 1969.[45]

Considering that the Bureau of Indian Affairs ("BIA") approved the Phreatophyte program, there is a possibility that the Bureau and the U.S. forest services could be liable for failing to warn of the potential harms caused by dioxins. Although non-Indian residents of Globe were able to get compensation for harms resulting from Agent Orange, the United States, as a trustee of the San Carlos Apache, neglected to ensure that the residents of the reservation were safe from the spraying. If military victims of Agent Orange were able to find redress, as well as the Globe residents, surely there must be a route for compensation for the tribal members harmed by the same toxic substance.[46] If the perpetrators who created the toxic tort situation on the San Carlos Apache Reservation or the Navajo Nation were a private company, the NNs would be able to sue them for exposure as private tortfeasor. Even though the FTCA was originally designed by Congress to provide a route for plaintiffs harmed by government tort actions, the obstacles here for tribes to gain compensation is the Discretionary Function Exception within the statute. The federal government has a heightened responsibility

41 *Supra* note 38.
42 *Supra* note 41.
43 Richard Stone, *Agent Orange's Bitter Harvest*, 315 SCIENCE 176 (Jan. 12, 2007), https://science.sciencemag.org/content/315/5809/176 [https://perma.cc/6BU3-8CYL].
44 *Herbicide Case in Arizona is Settle*, N.Y. TIMES (Mar. 5, 1981), www.nytimes.com/1981/03/05/us/herbicide-case-in-arizona-is-settled.html [https://perma.cc/T9SH-DZW8].
45 *Id*.
46 *Supra* notes 18, 38.

to tribes as opposed to the responsibilities of private companies, yet the DFE allows the government to have a stronger defense from liability than private tortfeasors. This note argues there are various legal regimes that create duties and obligations for the government. On their own, these regimes create limited remedies, and should be read together with the FTCA to allow Native Nations to obtain compensatory damages at least equal to what they could obtain from a private company.

## III. How Tribes Can Recover

Keeping in mind the history of environmental degradation committed by the federal government on land assigned to the jurisdiction of NNs, this section addresses how NN's can potentially recover monetary damages. Part A summarizes the Federal Tort Claims Act and explains why it is an important tool for NNs to use because of their unique status as quasi-sovereign nations within the United States. Part A then explains the exceptionally challenging burden of overcoming the Discretionary Function Exception. Part B(1) outlines first the way NNs have struggled to overcome the DFE, and then circumstances where Tribes have been able to overcome it. Part B(2) will distinguish these situations.

### A. *Legal Barrier: The Federal Tort Claims Act (FTCA)*

#### 1. FTCA Basics

Because of the historical discriminatory treatment of Native Nations in respect to environmental torts, the FTCA is a valuable procedural tool for these nations to obtain remediation in and around Indian Lands. The discretionary function exception, which is discussed in this chapter, is a significant hurdle that must be overcome to gain compensation through this act. On account of the unique relationship between Native Nations and the federal government, courts should consider the duties of the government agency under the trust responsibility when analyzing whether the contested action falls under this exception. If the action does not fall under the exception, NNs can bring a successful FTCA claim.

Prior to the FTCA's passage in 1946, private citizens seeking redress for injury caused by federal government agencies or

employees had to lobby congress for private rights of action. [47] Congress was inundated by private claims bills consuming much of the House's time and budget of the bills introduced and only a small percentage passed.[48] By waiving the United States Government's Sovereign Immunity and conferring administrative settlement authority upon federal agencies and jurisdiction upon federal courts, the FTCA attempts to relieve Congress of the burden of creating private rights of action and provide justice to those who have been harmed by government negligence.[49]

Section 2672 of the FTCA authorizes the head of any federal agency to settle claims cognizable under the FTCA and allows such agencies to use alternative dispute resolution methods. 28 U.S.C § 2677 authorizes the United States Attorney General to arbitrate, compromise, or settle tort claims. Congress's burden is relieved by essentially substituting its duty to confer rights of action for private citizens to administrative agencies and the judicial system.[50]

Under the FTCA, the United States is liable for torts in the same manner and to the same extent as a private individual under similar circumstances.[51] The primary difference, however, is that the United States cannot be held liable for interest prior to judgment or for punitive damages. In the case of death, where a state jurisdiction may only allow for punitive damages, the federal government shall be liable for actual or compensatory damages.

Six conditions must be met in order to hold the United States liable under the FTCA.[52] These conditions are: "1) The claim must be against the United States; 2) The claim must be for monetary damages; 3) The damages claim must be for injury or damage to or loss of property, personal injury, or death; 4) The wrongful actor must be federal employee; 5) The wrongful actor was acting within

[47] David S. Fishback & Gail Killefer, The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz, 25 IDAHO L. REV. 291, 293 (1988-1989).
[48] H.R. 562, 77th Cong., 2d Sess. (January 14, 1942); 88 *Cong. Rec.* 313-314 (1942).
[49] State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737, 738 (1st Cir. 1949)
[50] *Report of the Joint Committee on the Organization of Congress to Accompany S. 2177,* S. Rep. No. 1400, 79th Cong., 2d Sess. (1946).
[51] 28 U.S.C. § 2674
[52] Erin Murray Watkins, The Scope of Employment Requirement of the Federal Tort Claims Act: The Impropriety and Implications of the Montez Decision, and the Superior Jurisdictional Prima Facie Approach, 17 GEO. MASON L. REV. 533, 538 (2009-2010).

the scope of his office or employment, and; 6) Under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[53]

To bring a FTCA claim, the plaintiff must be sure that the administrative remedies through the agency have been completely exhausted.[54] The plaintiff must present an administrative tort claim to the appropriate government agency for adjudication before filing suit in federal court.[55]

The federal government's liability is determined by the law of the state where the act or omission occurred.[56] The federal government's liability is "in the same manner and to the same extent as a private individual under like circumstances ..."[57] and Premature claims are not actionable.[58]

2. The Discretionary Function Exception

The strongest defense against an FTCA claim is the Discretionary Function Exception (DFE). Exceptions to the FTCA include "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[59] This means that even if the federal entity is abusing its discretion, it cannot be held liable. The DFE was designed to "protect the Government from liability that would seriously handicap efficient government operations," and it has continued to do just that.[60]

The test for the Discretionary Function Exemption is announced in *Berkovitz v. U.S.*, where a user who contracted polio

[53] 28 U.S.C. § 1346(b) (Westlaw current through P.L. 116-73).
[54] McNeil v. United States, 508 U.S. 106, 112-
113 S.Ct. 1980, 124 L.Ed.2d 21 (1993).
[55] 28 U.S.C. § 2675(a) (Westlaw current through P.L. 116-73).
[56] 28 U.S.C. § 1346(b) (Westlaw current through P.L. 116-73); *Richards v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).
[57] 28 U.S.C. § 2674 (Westlaw current through P.L. 116-73).
[58] Thompson v. United States, 215 F.2d 744 (9th Cir. 1954).
[59] 28 U.S.C. § 2680(a) (Westlaw Current through P.L. 116-73).
[60] United States v. Muniz, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed.2d 805 (1963).

after using a polio vaccine sued the National Institute of Health.[61] The Supreme Court held that:

> "the language, purpose, and legislative history of the discretionary function exception, as well as its interpretation in this Court's decisions, establish that the exception does not preclude liability for any and all acts arising out of federal agencies' regulatory programs, but insulates from liability only those governmental actions and decisions that involve an element of judgment or choice and that are based on public policy considerations."[62]

In *Berkovitz*, the Court first determined whether the action was a choice. "[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[63] If there is no opportunity to choose, there is no discretion. When a government action is challenged under the FTCA, the court must consider whether the employee had to follow a specific course of action.[64] When policy, procedure, or the law compels an employee to choose a course of action based on their own judgement, not because of protocol, the first prong of the *Berkovitz* test is met.[65]

Second, *Berkovitz* specifies that the discretionary choice must be the kind that the "discretionary function exception was designed to shield."[66] The legislature created the discretionary function to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[67] The decision further clarified, stating that courts should focus on whether the type of action taken is subject to a policy analysis by nature, not on the second prong of the *Berkovitz* test on the agents "subjective intent."

[61] Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531(1988).
[62] *Id.*
[63] *Id.* at 536.
[64] *Id*. at 542.
[65] *Id*. at 545.
[66] *Id*. at 536.
[67] *Id*. at 537.

[68] The Supreme Court has held that regulatory activity by an agency falls within the DFE.[69]

The DFE is a defense that has been used in ways that seem almost shocking in light of the facts. On September 26, 1950, a United States Navy ship began spraying a mysterious substance into the air roughly 2-miles from the Northern California Coast, near the thriving city of San Francisco.[70] This was the beginning of a six-day exercise, called "Operation Sea-Spray" by the U.S. military to simulate and study the effects of germ warfare on a major city.[71] The substance, also deposited along the Golden Gate Bridge, was a peculiar strain of bacteria called *Serratia marcescens*.[72] At the time, the military believed the bacteria was harmless to humans, and it was ideal for tracing because it left bright red spots on foods it infected.[73] This belief that it was harmless proved wrong a week after the test when eleven local residents checked in to Stanford University Hospital suffering from urinary tract infections.[74] As doctors investigated, they discovered the source, a pathogen with a bright red hue, *Serratia marcescens*.[75] Edward Nevin, recovering from prostate cancer, died from a bacterial heart infection a month after the Sea-Spray experiment.[76]

After the experiment became public knowledge, his family brought an FTCA claim for wrongful death, claiming that he died because of the military's actions in Operation Sea-Spray.[77] In this case, *Nevin v. the United States*, The Ninth Circuit held that the

[68] United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984).
[69] *United States v. Gaubert,* 499 U.S. 315, 111 S.Ct.1267, 113 L.Ed.2d 335 (1991).
[70] Helen Thompson, *In 1950, the U.S. Released a Bioweapon in San Francisco*, SMITHSONIAN INST. (July 6, 2015), www.smithsonianmag.com/smart-news/1950-us-released-bioweapon-san-francisco-180955819/ [https://perma.cc/JM8X-YZU5].
[71] *Id*.
[72] *Judge's Decision Expected Soon in California Germ Warfare Case,* N.Y. TIMES (Apr. 15, 1981), www.nytimes.com/1981/04/15/us/judge-s-decision-expected-soon-in-california-germ-warfre-case.html [https://perma.cc/5K8A-DHZN].
[73] *Id*.
[74] *Id*.
[75] Richard P. Wheat et. al., *Infection Due to Chromobacteria*, AM. MED. ASS'N. ARCHIVES OF INTERNAL MED. (Oct. 1, 1951), www.jamanetwork.com/journals/jamainternalmedicine/fullarticle/555999 [https://perma.cc/W77W-AWZE].
[76] *Id*.
[77] *Id*. at n. 73.

United States Government was protected from liability by the discretionary Function Exception.[78] The Court considered whether the decision was made at a planning level, making it discretionary, and if judicial review would impair effective administration of government.[79] Because the decision to use that particular strain of bacterium was made by the Chief Chemical Operator at the planning level, and the court not equipped to weigh the factors that led to the policy choice, the decision was protected by the discretionary function exception.[80]

Although the previously decided case, *Varig Airlines* made it clear that it was the nature of the conduct, not the status of the actor, that determines whether or not the DFE applies, the 9th Circuit pointed out that the higher the rank of the official making the decision, the greater the likelihood policy implications are considered.[81]

The *Nevin* case directly affects NN's abilities to successfully bring an FTCA toxic tort case. In *Begay v. United States*, Navajo plaintiffs suffering from the Radiation exposure discussed above brought an FTCA claim, asserting that U.S. agencies were negligent because they failed to warn of radiation damage, and did not establish and enforce rigid safety standards.[82] The plaintiffs also alleged that a study performed by the United States Public Health Service (PHS), looking for radiation exposure, was negligent because of failure to warn miners of possible radiation damage.[83] The 9th Circuit upheld the district court holding that creating and enforcing standards, as well as choosing not to warn participants in the PHS study were "based on judgement" and therefore discretionary.[84] The court followed the logic of *Nevin*, holding that the PHS decision to not tell miners about health hazards for fear they would quit, resulting in interruption of uranium production, thus jeopardizing national security, was protected because high level government officials were making discretionary policy choices.[85] Even though the nature of the conduct is what determines if the discretionary function exception applies, the 9th Circuit has

78 Nevin v. United States, 696 F.2d 1229, 1231 (9th Cir. 1983).
79 *Id*. at 1230.
80 *Id.* at n. 79.
81 *Id*.
82 Begay v. U.S., 768 F.2d 1059 (9th Cir. 1985).
83 *Id*. at 1060.
84 *Id*. at 1065-1066.
85 Begay v. U.S., 591 F.Supp. 991, 1011 (1984).

affirmed with *Nevin* and *Begay* that the higher ranking the official is, and the level of national security impacts at stake heightens the likelihood that the DFE will apply. Clearly, the policy interest the court is most concerned with protecting is the federal government's ability to make policy decisions that might sacrifice the lives and health of a minority for the sake of protecting the larger U.S. population. Yet such logic, when applied too generously, results in *Korematsu* type holdings that have not withstood the test of time.[86]

From a practical perspective, advocates attempting to overcome the DFE must bolster arguments that the policy decision is non-discretionary, making clear distinctions from *Begay* and *Nevin*. To make such distinctions, advocates for native nations should argue that the official making the decision was not comparably high ranking and there was no national security interest considered. For example, in the case of the San Carlos Apache, the phreatophyte program was for the purpose of making the water flow more efficiently to the city of Phoenix, not to combat an outside threat. Advocates should not rely on such distinctions but recognize that they are a factor in the court's decision.

### B. *Native Nations and the Discretionary Function Exemption*

#### 1. How Native Nations have been able to overcome the DFE

Although *Begay* serves as an example of how NN's have been hindered from recovering due to the DFE, there are circumstances where NN's overcame the DFE to successfully bring FTCA claims in both the 9th Circuit and the D.C. Circuit. In the 9th Circuit case, the Court held that because the government had widespread control over the NN's logging activity, they had a duty to ensure basic safety measures. Although the government had discretion over granting the contract, the DFE did not shield the government from negligence. In the D.C. Circuit Case, the Court held that the DFE did not protect the actions of government agents acting outside the scope of their authority. Since Courts have allowed NN's to win FTCA claims and consider the fiduciary duty of the government in these cases, NN's should be able to succeed bringing FTCA claims for toxic torts as well. Statutory duties that

[86] Trump v. Hawaii, 138 S.Ct. 2392, 2423, 201 L.Ed.2d 775 (2018).

prevent the government from committing toxic torts can be found in CERCLA and RCRA. As will be discussed later, because CERCLA is remedial, this moral duty combined with the statutory duties of CERCLA and RCRA should be enough to overcome the DFE to bring a FTCA claim on behalf of NN's. The following two cases, *Marlys Bear Medicine* and *Red Lake Band of Chippewa Indians* are examples of when Native Nations have successfully brought FTCA claims and have been able to overcome the DFE.

a. Marlys Bear Medicine v. U.S. ex rel. Secretary of Dept. of Interior

In *Marlys Bear Medicine*,[87] the Department of the Interior, through the BIA, had a responsibility under federal regulations and statutes to manage the forest and logging activities on the Blackfeet Reservation.[88] The BIA authorized a contract between the NN and a logging company to do business on the reservation.[89] In the contract there was a safety provision ensuring the right of the BIA to inspect and suspend the business operations if the company did not comply with the contract.[90] Leland Kicking Woman, was fatally injured while working on the site for the logging company.[91] Kicking Woman's estate brought an FTCA claim against the BIA for negligence.[92]

The district court held that the DFE barred this claim but the 9th Circuit reversed, saying that even though the DFE is designed to "avoid judicial second guessing" it is not intended to "create inconsistent liabilities between private and government employees performing identical acts."[93]Although federal statute requires the BIA to consider factors such as economic impacts when authorizing timber sales on Indian Land held in trust, there is no instruction on how to weigh these factors, ultimately allowing the agency to have discretion.[94] Because the statute leaves the agency with a choice, the decision to grant the contract with the logging company is protected

87 Marlys Bear Medicine v. U.S. Dept. of Interior, 241 F.3d 1208 (2001).
88 *Id*. at 1211.
89 *Id*. at 1212.
90 Id.
91 *Id*. at 1211.
92 *Id*.
93 *Supra* note 88 at 1213.
94 *Id*. at 1214.

by the DFE.[95] On the other hand, failing to ensure safety even though the responsibility was assumed by the BIA in the contract is not protected by the DFE.[96] The 9th Circuit concluded that "[t]he Government cannot claim that both the decision to take safety measures and the negligent implementation of those measures are protected policy decisions."[97] If the government undertakes responsibility for a project's safety, the DFE cannot shield itself from liability for failing to fulfill the assumed requirement. [98] The 9th Circuit also recognized that when a fiduciary duty exists, the United States has an obligation to act in the best interest of the beneficiary, in this instance, the Blackfeet Nation.[99] Because the BIA has "pervasive" and "comprehensive" control over the Nation's logging, it had a duty to ensure basic safety measures.[100]

b. Red Lake Band of Chippewa Indians v. United States

As the sun rose on May 19, 1979, a group of dissident Red Lake Band of Chippewa Indians seized several hostages on their reservation in an uprising protesting actions taken by the chairman of their Nation.[101] After BIA and local law enforcement personnel contained the insurrection to one building, a single FBI agent, responding to a request for assistance, unilaterally ordered the withdrawal of all law enforcement from the premises.[102] Although the hostages were eventually released, the NN claimed it suffered property damage from law enforcements' evacuation.

The government argued that the FBI agent's actions were protected by the DFE because he had a duty to act in favor of protecting human life, and the FBI had a policy to not assume a peace-keeping role on the Reservation.[103] As established law found that government decisions are only protected by the DFE if they involve discretion and use policy considerations, Circuit Judge Bork reasoned that because "a government official has no discretion to

95 *Id*.
96 *Id*. at 1215.
97 *Id*.
98 *Id*.
99 *Id*. at 1219.
100 *Id*. at 1219-1220.
101 Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187, 1187-88 (D.C. Cir. 1986).
102 *Id*. at 1190.
103 *Id*. at 1193.

violate the binding laws, regulations, or policies that define the extent of his official powers" he cannot be using the type of discretion the DFE was designed to protect when committing such violations.[104] The government's defense could apply if the FBI agent had merely ordered other FBI agents to leave, but because the agent had ordered all law enforcement off the premises, and he did not have the authority to do so, he was acting outside the scope of his authority. Since he was acting outside the scope of his authority, his actions were not protected by the DFE.

Here, if an agent of the BIA makes a decision that results in a toxic tort injury on a NN, then the NN, as a sovereign, should verify that the federal agent had the authority to do so. If there is no source of authority for the agent to permit such actions, then the agent's decisions cannot be protected by the DFE, and the NN should be able to bring a successful FTCA claim.

When a federal agent has acted within the scope of their authority, a statutory duty is required in order to overcome the DFE. Such statutory duties to behave in a way that prevents the government from committing toxic torts can be found in CERCLA and RCRA. Because CERCLA is remedial and RCRA only allows for injunctive relief, these statutes alone are not enough to provide compensatory damages for tribes. The Indian Trust Doctrine creates a moral responsibility for the federal government to protect Native Nations. This moral duty combined with the statutory duties of CERCLA and RCRA should be enough to overcome the DFE to bring a FTCA claim on behalf of NNs.

2. Path to Recovery: Finding a Non-Discretionary Function

The Civil Rights Era brought forth a wave of environmental justice concerns grounded in the concept that access to clean air and water is a basic human right. Considering indigenous environmental justice in the same vein as the rest of other underrepresented groups is an oversimplification. Native Nations (NN) possess an advantage known as the "trust responsibility," established by the Supreme Court during the foundational years of the United States.

[104] *Id*. at 1197.

a. The Trust Doctrine

The original rationale for the Indian Trust Doctrine was first outlined by Chief Justice John Marshall in *Cherokee v. Georgia*, where he defined NN's as "domestic dependent nations."[105] Marshall noted that the Commerce Clause of the Constitution contained a recognition of the sovereignty of NN's and "their exclusive right to give and to execute the law within that boundary."[106] In *Worcester v. Georgia*, Marshall further explained the relationship, stating that the status of NN's as "that of a nation claiming and receiving the protection of one more powerful," while they maintained their national character and right to govern internally.[107] Chief Justice Marshall derived this framework from the express and implied terms in the treaty relationship between the NN's and the United States Government, which can be referred to as a sacred trust.[108] Because of this framework, the United States had a duty to protect the rights of the Cherokee Nation.[109] In the following cases, the Courts have found that this responsibility of the United States to NN's is binding.

Under the Trust Doctrine, the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should, therefore, be judged by the most exacting fiduciary standards."[110] Although the moral responsibility the United States holds because of the Trust Doctrine has been beneficial to NN's, the Supreme Court has also interpreted the Trust Doctrine to uphold federal power over NN's.[111] Because the Trust Doctrine refers to their "dependent" nature, the Supreme Court found that it was a source of congressional power to unilaterally abrogate a treaty when necessary to "protect" NN's.[112] The power

105 Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
106 *Cherokee Nation*, 30 U.S. at 7.
107 Worcester v. Georgia, 31 U.S. 515, 555 (1832).
108 Robert A. Jr. Williams, People of the States Where They Are Found Are Often Their Deadliest Enemies: The Indian Side of the Story of Indian Rights and Federalism, 38 ARIZ. L. REV. 981 at 996 (1996).
109 *Id*.
110 Seminole Nation v. United States, 316 U.S. 286, 297 (1942).
111 Rebecca Tsosie, Conflict Between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians, 39 TULSA L. REV. 271, at 275 (2003).
112 *Id*.

of Congress to unilaterally abrogate treaties is known as "Plenary Power."[113] In *United States v. Kagama*, the Supreme Court utilized the Trust Doctrine to confirm Congress's ability to enact the Major Crimes Act, abrogating treaty rights to allow federal jurisdiction over Indian on Indian crimes, where the federal government had no jurisdiction before.[114]

In addition to the Trust Doctrine, the Supreme Court has used the Commerce Clause of the Constitution and Congress's power to make laws to enforce and execute treaties to reinforce Congress's Plenary Power over Indian affairs.[115] This plenary power extrapolated from the Trust Doctrine is in direct conflict with the understanding of the trust doctrine as a way to limit federal actions that infringe on the sovereignty of Native Nations to govern internal affairs.[116] In later cases, such as *Seminole v. United States*, the Supreme Court found that the Trust Doctrine provides that the United States uphold treaty obligations with the level of responsibility a private fiduciary would owe an individual whose assets they were responsible for managing.[117]

With the contemporary understanding of the Trust Doctrine, there are three different levels of duty the federal government is responsible for ensuring to Native Nations.[118] These can be described as a general trust principle, a "limited" trust responsibility, and a full fiduciary relationship.[119]

The first is the general trust principle, which is used when there are no specific statutes that create distinct federal duties for the goal of the statute.[120] This general trust principle is one that recognizes the government's obligation to protect Native Nations. Although not consistently used, the general trust principle provides a valuable canon of construction for courts to apply when interpreting legal duties. Because the general trust principle is not

113 Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. REV. 666, 679 (2016).
114 United States v. Kagama, 118 U.S. 375, 378 (1886).
115 Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TULANE L. REV. 509, at 521-522 (2007).
116 Tsosie, *supra* note 114, at 275.
117 *Seminole Nation*, 316 U.S. at 297.
118 Tsosie, *supra* note 114, at 276.
119 *Id.* at 276, 277.
120 *Id*. at 276

completely enforceable by courts, it is considered to be a broad "moral obligation."[121]

Under a limited trust responsibility, the government has enacted broad statutes containing duties necessary to fulfill the purpose of the legislation. If the federal government fails to meet the statutory obligation of performing the required duties, Native Nations may sue for "declaratory or injunctive relief to compel performance."[122] With this level of trust responsibility, NN's are not entitled to compensatory damages.

The highest level of trust responsibility entitles NN's to compensatory damages. According to *United States v. Mitchell* ("*Mitchell II*"), a fiduciary relationship is found where the United States, through statutes and regulations, created duties and standards particularly designed to financially benefit Native people. The court found that the relationship came from the language in statutes that expressly supports a financial responsibility by the government, as well as the extent that the government controls the assets. The court said that if the fiduciary language was not there when the government took elaborate control over tribal monies or property, a fiduciary trust relationship necessarily exists.[123] Although though the case in *Mitchell II* addressed a situation where statutes specified duties of the federal government to manage timber assets in a way that considered financial goals for Native People, the decision suggested that even without such statutory language, when the government has extensive control of a property, there is a fiduciary duty. To get monetary compensation from the government for the breach of a fiduciary duty, NN's must be able to identify a substantive source of law that mandates specific duties.

The highest level of trust responsibility should be implicated when the BIA, which should comply with CERCLA and RCRA, fails to do so and causes harm to the health of Native American communities. Although these are general statutes, the Snyder Act, as interpreted by the 8th Circuit in Blue Legs v. EPA, creates an absolute duty. If the Snyder Act creates an absolute duty for the BIA to expend money to comply with federal hazardous waste regulations, then it could potentially be used to overcome the DFE.

[121] *Id*.
[122] *Supra* note 121.Rebecca Tsosie, Conflict Between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians, 39 TULSA L. REV. 271, 276.
[123] United States v. Mitchell, 463 U.S. 206, 225 (1983).

b. The Snyder Act

For cases involving the BIA, the Snyder Act can create a duty for the BIA to comply with RCRA, and potentially CERCLA.[124] Under 25 U.S.C.A. §13, the BIA can expend money as appropriate from time to time, as Congress can, "for the benefit, care, and assistance of Indians throughout the United States" for specific purposes listed in the act. (Citation) "For relief of distress and conservation of health" is the most relevant purpose listed for the goal of this Note because hazardous substances on NN's land is highly threatening to the health and wellbeing of Native communities. (citation)

The 9th Circuit held that programs administered for the benefit of Indians under the Snyder Act must be liberally construed in their favor.[125] In *Blue Legs v. EPA*, as later discussed, the 8th Circuit found that when the BIA creates an injury that harms the health of the community it had a duty to take care of, the Snyder Act obligates the BIA to remedy that injury, beyond the proportion of the harm the BIA caused.[126] Potentially then, when the BIA approved Silvex to be sprayed on the San Carlos Apache Reservation, the Agency may have an "absolute" duty to relieve stress and conserve the health of that community.[127] Snyder is important to keep in mind because it could be used to argue that the BIA had a mandatory duty to relieve the distress on a reservation for health purposes, and used to overcome the DFE in an FTCA claim.

C. *CERCLA and RCRA: Limited, But Helpful*

On its surface, if analyzed in a vacuum without any historical or social context, the trust responsibility appears to be a sufficient legal doctrine that would prevent the federal government from committing outrageous toxic torts on Native land, or at a minimum allow redress for NN's that have been injured by the federal government. After all, the fact that the United States has "under a

[124] Mark J. Connot, Blue Legs v. United States Bureau of Indian Affairs: An Expansion of BIA Duties under the Snyder Act, 36 S.D. L. REV. 382, 399 (1991).
[125] Fox v. Morton, 505 F.2d 254, 255 (1974).
[126] Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1100 (8th Cir. 1989).
[127] *Id.*

humane and self-imposed policy…charged itself with moral obligations of the highest responsibility and trust," sensibly could be something that both "ordinary meaning" textualists and liberal progressive members on the court and in politics agree on.[128] The actuality is that the courts in the modern era have failed to uphold the federal-tribal trust relationship consistently.[129]

Finding a mandatory duty is fundamental to overcoming the DFE.[130] *In re Katrina Canal Breaches Litigation*, the court reviewed the National Environmental Policy Act (NEPA) and followed traditional jurisprudence, stating "a statute, regulation, or policy leaves it to a federal agency or employee to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary."[131] To overcome the DFE, NN's must look for statutes, regulations, and policies that are mandatory. For example, some statutes outline how Native Nations specifically are to be treated regarding regulation and will be discussed below.

Several federal environmental laws allow the EPA to treat NN's as states (TAS) to implement environmental programs. The laws that expressly designate NN's TAS status are the Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA).[132] Although the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right to Know Act (EPCRA) do not mention NN's, the EPA through agency adjudication has determined that these acts allow tribal participation.[133] NN's are treated as states only in regards to response-related functions, including notification of releases, consultation on remedial action, access to information, and roles and responsibilities under the National Contingency Plan (NCP) and the

128 *Seminole Nation*, 316 U.S. at 286 (1942).
129 Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUMAN RIGHTS MAG 4 (Oct. 1, 2014), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/KP77-VL5Y], (Citing United States v. Navajo Nation, 537 U.S. 488 (2003) and United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011)).
130 Whisnant v. United States, 400 F.3d 1177, 1180–81 (9th Cir. 2005).
131 In re Katrina Canal Breaches Litig., 696 F.3d 436, (quoting *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)).
132 *Tribal Assumption of Federal Laws - Treatment as a State (TAS)*, EPA Environmental Protection Agency, (Jan. 17, 2018), www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas [https://perma.cc/68LH-GZDD].
133 *Id*.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[134] The Resource Conservation and Recovery Act, (RCRA), however, does not allow NN's to be treated as states, preventing NN's from exercising their sovereignty to implement their own hazardous waste programs. Through RCRA, the federal government maintains substantial involvement over managing tribal land and natural resources.

1. CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as the Superfund, was enacted in 1980 to manage the release of hazardous substances. The Act is a federal government program run in conjunction with the states to remediate and clean up hazardous materials.[135] To repair harmful conditions caused by improper disposal of poisonous chemicals, CERCLA holds the parties responsible for the situation accountable, requiring them to be liable for cost and cleanup.[136] The government is not liable for compensatory damages through CERCLA. While CERCLA is remedial and designed to correct past harms, RCRA is preventive, designed to address present and potential threats.[137]

2. How Indian Nations have used CERCLA

CERCLA provides only enough funds to care for the cost of cleaning up a site, not for torts resulting from the hazardous substances found within. Considering the vast amounts of harms these sites create to the health of local communities, CERCLA alone is not adequate to address injury to NN's. The following cases illustrate how Native Nations have been able to use CERCLA and RCRA to their advantage, but the solution is insufficient.

134 *Tribal Land Cleanup Laws and Regulations*, Environmental Protection Agency (May 19, 2017), www.epa.gov/tribal-lands/tribal-land-cleanup-laws-and-regulations [https://perma.cc/8BH8-ZSVZ].
135 Karen A. Gottlieb, *Toxic Torts Practice Guide*, Spring 2017 Edition.
136 U.S. v. Occidental Chemical Corp., 200 F.3d 143, 148 (3rd Cir. 1999).
137 S.C. Dep't of Health & Envtl. Control v. Commerce & Indus. Ins., 372 F.3d 245, 251 (4th Cir. 2004).

a. The Yakama ("A Growing Family")

The Yakama Nation is surrounded on three sides by Superfund sites. To the east is the Hanford Nuclear Reservation, north is the Holden Mine site on Lake Chelan, and south are the Bradford Island, Harbor Oil in North Portland, and Portland Harbor. According to the Treaty of 1855, the Yakama Nation has dominion over the territories in Oregon and Washington, guaranteeing rights over ceded land even if the lands are not part of the reservation.

The Hanford Nuclear Reservation was established in the 1940s to produce the plutonium that was used in the first nuclear bomb, and today it is the most contaminated nuclear site in the United States.[138] Daily, the site poisons groundwater and the toxic liquid is actively leaking into the Columbia River.[139] Because the Nation secured fishing rights in 1855 to fish local rivers, contamination in the Columbia River is a major impediment to their subsistence.[140] The EPA currently has an advisory against eating fish from a heavily polluted ten-mile stretch of water, and adequate cleanup is necessary to ensure the Yakama have healthy fish to feed their families.[141]

The Yakama recently won a judgment in the District Court of Oregon to recover the costs spent on containing the contamination at the Bradford Island site. The court found that under CERCLA, the Yakama is entitled to recover "all costs of removal or remedial action incurred by the . . . Indian tribe not inconsistent with the

138 Walter Pincis, *The Explosive Cost of Disposing of Nuclear Weapons*, THE WASHINGTON POST (July 3, 2013), www.washingtonpost.com/world/national-security/the-explosive-cost-of-disposing-of-nuclear-weapons/2013/07/03/64f896e0-e287-11e2-80eb-3145e2994a55_story.html?utm_term=.5a24c21466dd [https://perma.cc/794C-N8NP].

139 Karina Brown, *Surrounding Nuclear Site, a Natural Treasure Under Fire*, Homepage COURTHOUSE NEWS (June 28, 2017), www.courthousenews.com/surrounding-nuclear-site-natural-treasure-fire/ [https://perma.cc/2529-5NEB].

140 Ericka Cruz Guevarra, *Yakama Nation Demands Accountability f For Columbia River Sewage Spills,* OR. PUB. BROAD. (2017), www.opb.org/news/article/columbia-river-sewage-spill-yakama-nation-salmon/ [https://perma.cc/WQX3-B7PU].

141 Steve Law, *Yakama Nation Demands More Rigorous Cleanup of Superfund Site in Portland Harbor*, Pamplin Media Group (Jul. 25, 2016), https://pamplinmedia.com/sl/316234-195510-yakama-nation-demands-more-rigorous-cleanup-of-superfund-site-in-portland-harbor- [https://perma.cc/R9YA-QD3N].

national contingency plan."[142]

The Yakama Nation has spent vast sums of money defending their reserved fishing rights first acquired under the Treaty of 1855. After securing their fishing rights, they have been compelled to protect their subsistence by responding to the hazardous substances leaking into the Columbia River where the fish live. The Yakama has spent resources monitoring, assessing, and evaluating the "releases of hazardous substances and potential impact on the environment, and to the health and welfare of tribal members." The Yakama organized these actions to mitigate damage to the environment, actions that did not just benefit them, but also the non-Indian communities surrounding.

The United States has admitted to disposing of hazardous wastes in and around the Bradford Island site and directly into the Columbia River. The Yakama has incurred $99,798.32, verified and documented, for response actions to this contamination.[143] Because the Yakama's actions were consistent with a National Contingency Plan (NCP), they are entitled to recover the verified and documented expenses they incurred reacting to the hazardous wastes leaks under CERCLA § 9607(a)(4)(A), with interest.[144] There is no mention in this case, however, of the Yakama recovering damages for the fish resources they lost as a result of the government's action.

b. Navajo Nation

In *El Paso Natural Gas Co. LLC v. United States*, the United States argued that it was not liable for cleaning up a mine site because they have Sovereign Immunity and only own Fee Title of the Navajo Reservation.[145] Because their ownership interest is limited to holding the land in trust for the Navajo, they argued that they were not culpable because they were not the owner. The Circuit

142 42 U.S.C. § 9607(a)(4)(A).
143 *Yakama Motion for Summary Judgment*, Turtle Talk, turtletalk.files.wordpress.com/2016/02/20-yakama-motion-for-summary-j.pdf [https://perma.cc/S82X-VYJZ].
144 *Yakama Nation v. United States*, No. 3:14-CV-01963, 2016 WL 406344 (D. Or. Feb. 1, 2016).
145 Supplemental Brief for El Paso Nat. Gas Co. at 3, El Paso Nat. Gas Co. v. United States, No. 3:14-cv-081650-PCT-DGC, 2017 WL 2405266 (D. Ariz. June 2, 2016), *available at* https://turtletalk.wordpress.com/2017/08/16/federal-court-holds-us-govt-is-owner-of-indian-trust-land-under-cercla-for-liability-purposes [https://perma.cc/AUR3-PQLK].

Court disagreed and held that the United States waived its Sovereign Immunity to the extent it is liable under CERCLA and ordered more briefing from both the United States and the El Paso regarding who the land on the reservation within the meaning of the statute. After additional briefing, the Court found that although the Navajo Nation has substantial property interests, since the Navajo Nation cannot exclude the United States government from the reservation, and does not hold the power to supervise, alienate, and abrogate, it is not responsible for mine cleanup under CERCLA. As the fee titleholder, with the power to "enter, control alienation, and take," the United States is the owner under the purposes of CERCLA, and is responsible for the costs of cleaning up the mine site.[146] The Court decided not to determine at this time if the United States can limit the amount they are liable based on their fiduciary role.

3. RCRA

The Resource Conservation and Recovery Act, RCRA is a comprehensive regulatory scheme to govern the "treatment, storage, and disposal of hazardous wastes."[147] creates a right of action for citizens harmed by the federal government in three instances. The first is enforcing violations of permit standards or regulations, second, by abating imminent and substantial endangerments to health or the environment, and third, by forcing the Environmental Protection Agency (EPA) to perform a nondiscretionary duty.[148]

In reality, RCRA is the common name for a 1967 amendment to the Solid Waste Disposal Act of 1965. In Subtitle C, RCRA outlines the hazardous waste management program, while Subtitle D defines the solid waste management program.[149] As Subtitle C is currently written, the EPA directly implements hazardous waste programs, regulating the production, transportation, treatment, and disposal of hazardous waste in Indian

146 *Id*. at 9.
*147* Environmental Defense Fund v. E.P.A., 852 F.2d 1316, 1318 (D.C. Cir. 1988).
148 Ricky Nelson, Covert RCRA Enforcement: Seeking Compensatory Damages under the Federal Tort Claims Act for Environmental Regulation, 42 ENVTL. L. 909, at 911-912 (2012).
149 *Id*.

Country.[150] If the EPA administrator deems it appropriate for the hazardous waste program, he or she is authorized to enter into an assistance agreement with IN's under 42 U.S.C. § 6908a. RCRA is limited in its ability to benefit tribes because it does not provide compensatory damages the same way an FTCA claim might, but only allows for injunctive relief.

a. How NN's have used RCRA

In *Blue Legs v. United States Environmental Protection Agency*, the estate of private citizen and enrolled member of the Oglala Sioux Nation, Maddie Blue Legs, brought a claim under RCRA seeking an injunction to end the improper maintenance of dumpsites on the Reservation by the Environmental Protection Agency ("EPA"), the BIA, Indian Health Services ("IHS"), and Oglala Sioux Nation. The district court recognized that the NN had a responsibility to comply with standards for open dumping of solid waste. Under RCRA, the NN has the same authority to implement a solid waste program as a municipality.[151] Because hazardous substances can cause more harm, there are heightened regulations regarding the management of hazardous waste, therefore the EPA has "congressionally [conferred] authority" over hazardous waste.[152]

Importantly, the BIA and IHS argued that RCRA did not obligate them to participate in compliance efforts.[153] By administering facilities that dispose of hazardous and solid wastes, both the IHS and BIA supervise activities the RCRA regulates.[154] Because IHS and the BIA administer programs that deal with the disposal of substances RCRA is meant to govern, the court held they had to comply with RCRA standards.[155] Additionally, the court found that the Snyder Act, which directs the BIA to expend appropriated funds for "the relief of distress and the conservation of health," imposes affirmative duties that the BIA knowingly violated

150 Fred E. Breedlove, Implementing the Resource Conservation and Recovery Act (RCRA) in Indian Country and Approaches for Amending RCRA to Better Serve Tribal Interests, 26 VT. L. REV. 881, 894 (2002).
151 Blue Legs v. U.S. E.P.A., 668 F. Supp. 1329, 1338 (D. S.D. 1987*), aff'd sub nom*. Blue Legs v. BIA, 867 F.2d 1094 (8th Cir. 1989).
152 *Blue Legs,* 668 F. Supp. at 1339.
153 *Id*. at 1098.
154 *Id*. at 1099.
155 *Id*.

in its management of hazardous substances on the reservation.[156] Although the BIA has some discretion over how to use allocated funds, when the agency causes harm for the beneficiaries of the Snyder Act, it has an absolute obligation to remedy the wrong.[157] This duty extends beyond the proportion of the harm caused by the BIA. *Blue Legs* leaves open the possibility that RCRA could be interpreted to create a full fiduciary duty since the government has full comprehensive control over hazardous waste that by nature affects NN's natural resources.

b. Common Principles Between the Indian Trust Doctrine and FTCA

The Indian Trust Doctrine is a valuable concept for Native Nations because it sets forth duties required by the federal government. Although the Indian Trust Doctrine is helpful, it is limited. The problem is that in spite of the potential to benefit tribes, Courts have not consistently applied the doctrine. Although the doctrine created a fiduciary duty for the federal government to manage a historic site in *White Mountain Apache v. United States* based on a 1960's act, the same doctrine did not find a statutory duty from the Navajo–Hopi Rehabilitation Act for the Navajo to invoke in the face of evidence of corruption by the Secretary of the Interior.[158] Such discrepancies feed the perception in Indian Country that the Indian Trust Doctrine is not a cause of action that can be relied upon in court. Therefore, NN's seeking compensation could have greater success in bringing an FTCA claim than a breach of trust action. The Trust Doctrine should still be used by courts adjudicating FTCA claims brought by NN's to interpret statutes favorably for tribes to find a statutory duty, overcoming the DFE.

[156] *Id*. at 1100; 25 U.S.C. § 13 (1998).
[157] *Blue Legs,* 867 F.2d at 1100 (citing *Morton* citing Cf., Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974)) (BIA must act consistently with their trust obligations); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256–257 (D.C. Cir.1973) (Secretary of the Interior must administer Reclamation statutes as to minimize adverse impact on Indian Reservations). *See also*, White v. Califano, 437 F. Supp. 543, 555 (S.D. 1977) *aff'd* 581 F.2d 697 (8th Cir. 1978) (per curiam) (IHS must provide care where state cannot).
[158] 88 Act of Mar. 18, 1960, Pub. L. No. 86–392, 74 Stat. 8 (codified at 25 U.S.C. § 277 (2000)1960 Act); United States v. Navajo Nation II, 556 U.S. 287, 299 (2009).

In the history of federal Indian Law, NN's have had to overcome major obstacles to hold the government accountable for damages caused by actions or failure to act by U.S. agents who were responsible for ensuring the wellbeing of the NN. According to *Mitchell II*, for a plaintiff Nation to gain monetary reparations, it must find a source of legislation that "can fairly be interpreted as mandating compensation by the federal government for the damages sustained."[159] In *Navajo Nation v. United States*, the NN sued the Secretary of the Interior for failing to act in the Navajo Nation's best interest.[160] The Indian Mineral Leasing Act of 1938 (IMLA) assigns responsibility to the Secretary of the Interior to approve leasing agreements between the IN's and private companies.[161] When the Navajo Nation attempted to negotiate a leasing rate of 20 percent of gross proceeds, Peabody coal directly contacted the Secretary of the Interior.[162] After meeting with representatives from Peabody coal, the Secretary of the Interior then postponed his approval of the lease, and told parties to reconsider. Ultimately, he approved a lease for only 12 percent of gross proceeds.[163] The Navajo Nation then sued, claiming that this was a breach of the Secretary's duty to act in the Nation's best interest.[164]

Despite the Trust Doctrine, the Supreme Court held that because the IMLA does not create a comprehensive regulatory regime, it is not substantive law, therefore it cannot be used to impose a fiduciary duty on the federal government to act in IN's best interest.[165] This reasoning is akin to the DFE, where unless plaintiffs can find substantive law that leaves no room for discretion, the United States cannot be held liable for a tort.

The Supreme Court in *Berkovitz* stated that the DFE does not apply when there is "a federal statute, regulation, or policy specifically prescribes a course of action."[166] In *White Mountain Apache Tribe v. United States*, the Nation sued the United States for failing to fulfill its obligations to manage and care for a historic military site on the NN's land. Congress, in 1960, had specified that the site be "held by the United States in trust for the White Mountain

159 *Mitchell II*, 463 U.S. at 218.
160 Navajo Nation v. United States, 537 U.S. 488, 493 (2003).
161 *Id*.
162 *Navajo Nation*, 537 U.S. at 497 (2003).
163 *Id*. at 488.
164 *Id*. at 489.
165 *Id*. at 507.
166 Berkovitz v. U.S., 486 U.S. 531, 536 (1988).

Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose."[167] There was no dispute that the Secretary utilized that right and that the government occupied the property, creating at the minimum a plenary control over the property equivalent to the control exercised by the United States in *Mitchell II*.[168] Because there was statutory language outlining that the United States would keep the property in trust, the court found that the government had a duty. Since the U.S. government allowed the historic site to fall into disrepair in spite of the legislation, the White Mountain Apache was able to sue the government for monetary damages. Although the *Berkovitz* test is arguably stricter, finding statutory language outlining a standard is key to both overcoming the DFE in FTCA claims and finding a fiduciary duty in claims made against the government on behalf of NN's.

Because RCRA and CERCLA outline comprehensive duties for the United States government regarding the cleanup of hazardous substances, NN's are entitled to monetary damages. If the federal government has failed to adhere to the duties in RCRA, the United States has breached its full fiduciary duty. Protecting the health of reservation residents is a sovereign interest under the Supreme Courts framework, and if the United States has substantial control over the regulatory scheme governing cleanup of toxic substances on tribal land and fails to adequately remedy the pollution, NN's can bring a Parens Patriae FTCA claim against the federal government.[169]

[167] 88 Act of Mar. 18, 1960, Pub. L. No. 86–392, 74 Stat. 8 (codified at 25 U.S.C. § 277 (2000)). Pub. L. 86–392, 74 Stat. 8 (1960 Act).

[168] White Mt. Apache Tribe v. United States United States, 537 U. S. 465, 475, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

[169] *Parens Patriae is a doctrine allowing a state to bring a suit on behalf of citizens to protect quasi-sovereign interests. See e.g.*, Jack Ratliff, *Parens Patriae*: *An Overview*, 74 TUL. L. REV. 1847, 1856 (2000) (noting that Parens Patriae is a doctrine allowing a state to bring a suit on behalf of citizens to protect quasi-sovereign interests).

### D. *Statutory Regimes are Non-Discretionary when Conjoined with the Trust Doctrine*

#### 1. *Abreu v. United States*: How does the statutory scheme fit?

Direct violations of RCRA cannot be used to bring FTCA claims because jurisprudence has concluded that would be "indirect enforcement" as held in *Abreu v. United States*.[170] When courts look at claims brought under the FTCA, they must determine if damages liability would undermine an already-in-place statutory regime.[171] The First Circuit discussed the need for interpreting the waiver of sovereign immunity of some statutes in context with other statutes that provide a remedy.[172] The First Circuit focused on the Supreme Court's holding in *United States v. Fausto*, where the Court held that federal employees who were denied remedy by the Civil Service Reform Act ("CSRA") could not then obtain a remedy through the Back Pay Act ("BPA").[173] Because Congress enacted the CSRA as a comprehensive statutory scheme to address the problems of "haphazard arrangements", the CSRA denied judicial review under the Tucker Act and Back Pay Act.[174] In *Abreu*, the Court also looked to their obligation to interpret waivers of sovereign immunity narrowly.[175] Since the RCRA is a comprehensive statutory regime, and the court must construe the FTCA waiver of sovereign immunity narrowly, the court concluded that plaintiffs could not bring an FTCA claim for violations of RCRA.[176]

#### 2. *Myers* Overcomes the Discretionary Function Exception...For Now

The FTCA enables private parties to hold the United States liable for tortious conduct but for many private citizens harmed, the discretionary function exception serves as the primary defense for the government to prevent adequate compensation. The DFE protects the federal government from liability for tortious actions

170 *See* Abreu v. United States, 468 F.3d 20, 30 (1st Cir. 2006).
171 *Id.* at 30.
172 *Id*.
173 *Id*.
174 United States v. Fausto, 484 U.S. 439, 455 (1988).
175 *Abreu*, 468 F.3d at 30.
176 *Id*. at 31.

when an agency or a federal employee caused the tort while acting with discretion. The DFE cannot apply when the agency or individual acts outside of making a discretionary choice, such as failing to comply with specific duties outlined by legislation. When, however, plaintiffs have attempted to bring FTCA claims and overcome the DFE based on direct violations of RCRA, the First Circuit found that allowing so would undermine an already-in-place statutory regime.[177]

In *Myers v. United States*, the plaintiff overcame the DFE by citing agency policy based on a specific statute (RCRA). The *Myers* plaintiffs sought compensatory damages from the United States through an FTCA claim for negligence.[178] The plaintiffs were parents whose young daughter was injured after allegedly being exposed to thallium in soil leaked from a landfill, managed by the Navy, near their residence and the child's school.

The plaintiffs in *Myers* overcame the discretionary function exception because the Ninth Circuit found that the Navy failed to comply with two internal mandatory provisions. The first of these mandatory provisions was a safety and health program manual (Program Manual)[179] implemented by the Naval Facilities Engineering Command (Naval FEC). The second was a cleanup plan, known as a Federal Facility Agreement (FFA)[180], where the Navy was responsible for designating a Quality Assurance Officer (QAO) to verify that the plan was followed. Looking to *Bear Medicine* to determine the second provision,[181] the court found that language within the FFA was not mandatory, but scientific and professional judgment matters, especially regarding safety are not prone to "policy considerations" therefore the discretionary function does not apply.[182]

Ricky R. Nelson argues in *Covert RCRA Enforcement*[183] that *Myers* sets forth a way to use RCRA to overcome the discretionary function exception as long as the use is indirect. *Myers* got around

177 *Id.*
178 Myers v. United States, 652 F.3d 1021, 1027 (9th Cir. 2011).
179 *Naval Facilities Eng'g Command*, U.S. Navy, NAVFACINST 5100.11J 1, Safety and Health Program Manual (2000) [hereinafter Program Manual].
180 U.S. Dep't of Def., U.S. Dep't of the Navy & State of California, Camp Pendleton Marine Corps Base Federal Facility Agreement (1990).
181 Marlys Bear Medicine v. United States ex rel. Sec'y of the Dep't of Interior, 241 F.3d at 1208, 1213-17 (9th Cir. 2001).
182 Myers v. United States, 652 F.3d 1021, 1032 (9th Cir. 2011).
183 *Supra* note 26.

*Abreu*, by citing Agency Policy that was based on RCRA. Likewise, advocates for those who have been harmed by toxic torts potentially covered by RCRA should look for internal agency standards and guidelines that prohibit the action that caused damage.

3. Introduce the Trust Doctrine to Give *Myers* More Bite

An alternative strategy to argue that under FTCA, damages liability does not undermine CERCLA or RCRA, but is necessary to reinforce these statutes in instances involving NNs where the trust doctrine creates a duty, it reinforces these statutes. Neither *Myers* nor *Abreu*, however, addressed situations regarding Native Nations, where the United States has a heightened duty of responsibility.

In *Indian Towing Co. v. U.S.*, the Coast Guard used discretion in deciding to operate a lighthouse.[184] Once the Coast Guard exercised this discretion, it had a duty to use due care.[185] The federal government has full responsibility "to manage Indian resources and land for the benefit of the Indians."[186] When government agencies take on the responsibility to oversee certain aspects of managing the resources of NN's through the Department of the Interior, the government has a heightened duty of care, as the court found in *Marlys Bear Medicine*.[187] In a situation like San Carlos, where a federal agency contaminated a reservation by directly infecting the land with a toxic chemical after approval from the BIA, surely the BIA was exercising comprehensive control parallel to the control exercised in *Marlys Bear Medicine*. Additionally, the Snyder Act should impose a duty on the BIA to remedy the harm, as the court held the agency had a duty to do so in *Blue Legs v. EPA*. Once the government understood the harms Agent Orange exposure caused, the BIA and Forest Service should have taken steps to remediate the reservation and warn the community about potential health hazards.

If the plaintiff's in *Myers* were able to win a FTCA claim by merely citing internal agency policy, the Trust Doctrine should be able to create a heightened duty of enforcement for RCRA and CERCLA. If the only way to obtain damages is through "covert" use of RCRA and CERCLA, government agencies will eventually claim

184 Indian Towing v. United States, 350 U.S. 61, 62 (1955).
185 *Id*. at 64.
186 *Mitchell II*, 463 U.S. at 224.
187 *Marlys Bear Medicine,* 241 F.3d at 1220.

that like *Abreu*, enforcing FTCA liability for non-compliance with agency policy that mirrors statutes, would undermine statutory regimes.

When defending itself against NN's, the United States has been able to claim that the disputed choice was "discretionary," unless there is a distinct piece of legislation outlining a duty, such as in *United States v. White Mountain Apache Tribe*.[188] When reviewing torts from hazardous substances on tribal lands, however, the courts should look at violations of broad environmental statutes such as CERCLA and RCRA combined with considerations of the Snyder Act's obligations of the BIA to conserve health, and the heightened duty of the United States under the Trust Doctrine to overcome the DFE.

## IV. CONCLUSION

In the book of Matthew, Jesus said that it was easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of heaven. Winning an FTCA claim in federal court is just as difficult.[189] Apparently, neither are impossible, but in spite of the case law and theory that creates a plausible legal argument to support claims on behalf of Native Nations against the federal government for toxic torts, the realistic probability of being successful in federal court is slim.

Biblical scholars have been debating the interpretation of the phrase "through the eye of a needle" as well as the translation of "camel" for decades.[190] Similarly, "the discretionary function exception has become the most litigated provision of a much litigated statute".[191] The United States, though, took on a moral duty

[188] *White Mt. Apache Tribe,* 537 U.S. 481 (2003).
[189] *Matthew* 19:23-26 (NIV).
[190] *See e.g.*, Duncan, J., & Derrett, M., *A Camel Through the Eye of a Needle*, 32 NEW TESTAMENT STUDIES 3, pp. 32(3), 465--470. (1986); WERNER H KERBEL, THE ORAL AND THE WRITTEN GOSPEL: THE HERMENEUTICS OF SPEAKING AND WRITING IN THE SYNOPTIC TRADITION, MARK, PAUL AND Q, 73 (INDIANA UNIVERSITY PRESS, 1997). *but see*, Theodore R. Lorah, Jr., *Again—Camel or Rope in Matthew 19.24 and Mark 10.25?* (Jan. 28, 1996), http://tmcdaniel.palmerseminary.edu/camel-hawser.pdf [https://perma.cc/L7CJ-33YP]; James G. Crossley, *The Damned Rich (Mark 10:17–31)*, EXPOSITORY TIMES 397, 399 (2005).
[191] D. Scott Barash, The Discretionary Function Exception and Mandatory Regulations, 54 U. CHI. L. REV. 1300, 1301 (1987).

solidified by jurisprudence soon after the country's' inception.[192] This moral duty should be considered by courts looking to apply the DFE in specific circumstances regarding Native Nations. Because significant case law bolsters the legal argument for Nations to successfully overcome the DFE bring toxic tort FTCA claims, the Trust Doctrine should create a full fiduciary relationship, or, at the minimum, a limited trust responsibility. As seen in *Marlys Bear Medicine*, where the DFE could not be used to protect the federal government from liability inconsistently from how a private defendant would be liable, the DFE should not protect the United States from liability for egregious toxic torts in Indian Country.[193]

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[192] *Seminole Nation*, 316 U.S. at 297.
[193] *Marlys Bear Medicine,* 241 F.3d at 1213.