Reclaiming the Airwaves: An Analysis of Claims to Wireless Spectrum by Tribal Nations Based on Treaty Obligations and the Federal Trust Responsibility

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I. INTRODUCTION

Nowhere is the digital divide more apparent than in Indian Country. An estimated thirty-five percent of residents lack access to the Federal Communication Commission's (FCC) definition of broadband at 25 mbps down and 3 mbps up.[1] Referred to as "the technology of freedom," the Internet connects communities to resources capable of improving overall quality of life, such as telehealth services, online learning, and remote employment opportunities.[2] The emergence of the COVID-19 pandemic highlighted our dependence on Internet access to complete even the most basic of tasks.[3] According to a Pew Research Center poll, fifty-three percent of surveyed Americans agreed that Internet access was essential to their ability to perform everyday tasks during the pandemic.[4] Despite the Biden-Harris Administration's intention to lift the public health emergency order in May of 2023,[5] the pandemic has left a lasting impact on Internet usage in America.[6]

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1. 2018 Broadband Deployment Report, FCC 18-10, para. 50 (2018) https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report [https://perma.cc/PJE5-U7FN] [hereinafter, 2018 Broadband Report]; Hansi Lo Wang, *Native Americans on Tribal Land Are 'The Least Connected' To High Speed Internet*, NAT'L PUB. RADIO (Dec. 6, 2018). https://www.npr.org/2018/12/06/673364305/native-americans-on-tribal-land-are-the-least-connected-to-high-speed-internet [https://perma.cc/BF7E-C8FL]; *see also* 18 U.S.C. § 1151 (establishing the definition of "Indian Country" as encompassing (a) land within an Indian reservation, (b) dependent Indian communities, and (c) Indian allotments).

2. Manuel Castells, *The Impact of the Internet on Society: A Global Perspective*, OPENMIND BBVA, https://www.bbvaopenmind.com/en/articles/the-impact-of-the-internet-on-society-a-global-perspective/ [https://perma.cc/U5DC-2GQP]; Darrah Blackwater, *For Tribal Lands Ravaged by COVID-19, Broadband Access is a Matter of Life and Death*, INTERNET SOC'Y (May 15, 2020), https://www.internetsociety.org/blog/2020/05/for-tribal-lands-ravaged-by-covid-19-broadband-access-is-a-matter-of-life-and-death/ [https://perma.cc/PZB2-PGZY].

3. Colleen McClain et al., *The Internet and Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/ [https://perma.cc/P64X-BP2R].

4. Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the Covid-19 Outbreak*, PEW RSCH. CTR. (Apr. 30 2020), https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/ [https://perma.cc/WSG4-2ZG2].

5. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, SAP-H.R.-382-H.J.-RES.-7, STATEMENT OF ADMINISTRATIVE POLICY (2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf [https://perma.cc/PC4N-XHRZ].

6. *See, e.g.*, Kim parker et al., *Covid-19 Pandemic Continues To Reshape Work in America*, PEW RSCH. CTR. (2022), https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/ [https://perma.cc/D3L9-KJ2A] (attesting to the continued prominence of telecommuting arrangements two years after the public health emergency declaration); U.S. GOV'T ACCOUNTABILITY OFF., *Telehealth in the Pandemic – How Has it Changed Healthcare Delivery in Medicaid and Medicare?*, GAO WATCHBLOG (Sept. 29, 2022), https://www.gao.gov/blog/telehealth-pandemic-how-has-it-changed-health-care-delivery-medicaid-and-medicare [https://perma.cc/manage/create?folder=15737] (finding increased use of telehealth medicine services as a result of the COVID-19 pandemic).

It exacerbated an existing digital divide—namely the inequalities resulting from disparities between those with Internet access and those without.[7]

Lack of access to broadband in tribal communities is the result of a number of factors, including insufficient infrastructure, challenging topography that hinders infrastructure development, and an overall lack of financial incentive for telecommunications providers to invest in infrastructure.[8] Wireline options, such as fiber optic cable, are uniquely expensive to deploy in areas where the topography complicates the construction process.[9] Wireless solutions, such as Fixed Wireless Access (FWA), are often more feasible and can provide broadband Internet access to rural service areas.[10] Wireless Internet service requires access to spectrum: invisible radio waves divided into frequency channels that are used to transmit data and information over the air.[11]

The federal scheme governing the use of wireless spectrum disadvantages tribal communities and further warrants an inquiry as to why tribes lack access to the valuable resource in the first place.[12] Historically, the federal government has had a duty to act in a fiduciary capacity pursuant to a tribe's best interest, referred to as the federal trust responsibility ("trust responsibility").[13] By vesting the FCC with authority to assign access to wireless spectrum associated with tribal lands, the federal government arguably violated its trust responsibility. And, beyond the federal government's trust obligation, tribes were generally guaranteed protected access to valuable resources through treaties. While treaties entered into during the 18th and 19th centuries lack specific language guaranteeing a tribe's right to access wireless spectrum, language protecting resources considered valuable to tribes can be interpreted to imply access to spectrum.

This Note will analyze the legal claims to wireless spectrum tribes can assert as a result of both the failure of the federal government to uphold its trust obligation with respect to tribes' access to wireless spectrum licenses

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7. *Digital divide*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/digital%20divide [https://perma.cc/7746-CJ9G] (last visited Dec. 5, 2022).

8. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-189, CHALLENGES TO ASSESSING AND IMPROVING TELECOMMUNICATIONS FOR NATIVE AMERICANS ON TRIBAL LANDS (2006), https://www.gao.gov/assets/gao-06-189.pdf [https://perma.cc/D35Y-7NSC].

9. Sophia Campbell et al., *The Benefits and Costs of Broadband Expansion*, THE BROOKINGS INST. (Aug. 18, 2021), https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion/ [https://perma.cc/WV4B-67HN].

10. CTIA, *5g Fixed Wireless Broadband: Helping Bridge the Digital Divide in Rural America* (2021), https://api.ctia.org/wp-content/uploads/2021/11/CTIA-Rural-HHs-mini-POV-V2-20211115.pdf [https://perma.cc/2BUR-UT7D].

11. *What Is Wireless Spectrum? Here's What You Should Know*, AURORA INSIGHT (Mar. 9, 2021), https://aurorainsight.com/what-is-wireless-spectrum-heres-what-you-should-know/ [https://perma.cc/5JLQ-A2L8].

12. Brian Howard, *Spectrum Airwaves: A Natural Resource Tribes Must Leverage*, AM. INDIAN POL'Y INST. (Oct. 16, 2019), https://aipi.asu.edu/sites/default/files/10.16.2019_aipi_fcc_spectrum_policy.pdf [https://perma.cc/WPU7-QHRH].

13. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] at 412 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK].

and its failure to deliver on treaty promises to protect tribal access to valuable resources. Beginning with an overview of the regulatory scheme governing wireless spectrum allocation in the U.S., an explanation of the federal trust responsibility pertaining to the management of tribal property, and the federal government's obligations to honor Indian treaties, this Note further explores legal remedies available to tribes in addition to actions the FCC can adopt to increase tribal access to spectrum.

II. BACKGROUND

A. Wireless Spectrum Allocation in the United States

Access to wireless spectrum, or the radio waves necessary to transmit data for wireless Internet service, in the U.S. is governed by the Communications Act of 1934 (Communications Act).[14] The Communications Act authorizes the National Telecommunications and Information Administration (NTIA) to oversee federal spectrum use while authorizing the FCC to manage and assign all non-federal use of wireless spectrum.[15] Non-federal use includes spectrum use by state and local governments.[16] Title III of the Communications Act further establishes the overarching regulatory scheme by which wireless spectrum is governed and defines the tools at the FCC's disposal.[17]

The FCC may designate spectrum frequency bands for specific services and uses and may also determine methods for assigning licenses for particular frequencies. This authority is subject to the condition that the FCC discharge its duty in accordance with "the public convenience or interest or . . . public necessity."[18] Generally, the FCC designates spectrum frequencies as either licensed or unlicensed. While unlicensed spectrum allows service providers to access a valuable resource without the financial cost of obtaining a license, unlicensed bands are often subject to signal interference that lowers the quality of the wireless Internet connection.[19] Licensed spectrum, alternatively, guarantees a license holder exclusive use of a particular

14. The Communications Act of 1934, 47 U.S.C. § 151 (1934).

15. 47 U.S.C. § 305 (reserving to the President of the U.S. the right to assign federal use of spectrum frequencies); *see also Who Regulates the Spectrum*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/book-page/who-regulates-spectrum#:~:text=As%20shown%20above%2C%20the%20use,FCC%20manages%20all%20other%20uses [https://perma.cc/WNA7-X9X3] (last visited Nov. 6, 2023) (explaining that the President's authority to act under this section is currently delegated to the Administrator for the National Telecommunications and Information Administration).

16. *Radio Spectrum Allocation*, FED. COMMC'NS COMM'N https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation [https://perma.cc/A2XM-2LYA] (last visited Jan. 12, 2023).

17. 47 U.S.C. § 301.

18. 47 U.S.C. § 303(f).

19. SPECTRUM POLICY TASK FORCE, FCC, SPECTRUM POLICY TASK FORCE REPORT NO. 02-135 (Nov. 2002), https://docs.fcc.gov/public/attachments/DOC-228542A1.pdf [https://perma.cc/G4QN-WDR4].

spectrum band in a defined geographic area, allowing service providers greater control and autonomy over the quality of their connectivity.[20]

Historically, the FCC assigned spectrum licenses through a combination of comparative hearings and lotteries.[21] In 1993, Congress granted the FCC authority, for a limited time, to issue licenses via competitive bidding.[22] Congress has since extended this authority several times, most recently in the Consolidated Appropriations Act of 2023, which extended the FCC's auction authority through March 9, 2023.[23] While Congress failed to renew the FCC's spectrum auction authority for the first time in thirty years when it expired on March 10, 2023, FCC Chairwoman Rosenworcel and others have called on Congress to swiftly restore the FCC's authorization.[24]

The FCC conducts spectrum auctions under the theory that the auctions result in an efficient allocation of spectrum resources, with licenses going to the entities who will put them to their most valuable use.[25] Those interested in acquiring licenses are required to submit an entrance fee to gain access to the auction itself, and the licenses are ultimately awarded to the highest bidder at the auction's conclusion.[26] Incentive auctions leave lower-resourced parties, such as tribes, at a disadvantage against national wireless carriers who bid hundreds of millions of dollars in spectrum incentive auctions annually.[27] Since 1993, the FCC has conducted over 100 auctions generating approximately $230 billion in revenue.[28]

In 2019, the FCC adopted its Tribal Priority Filing Window for the 2.5 GHz band which gave tribes an unprecedented opportunity: they could obtain

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20. Christopher Trick, *Licensed vs. Unlicensed Spectrum: Key Differences and 5G Use Cases*, TRENTON SYS. (Nov. 7, 2022), https://www.trentonsystems.com/blog/licensed-vs-unlicensed-spectrum [https://perma.cc/G3QU-VSZ9].

21. STUART MINOR BENJAMIN & JAMES B. SPETA, INTERNET AND TELECOMMUNICATION REGULATION § 5.C.2 (1st ed. 2019).

22. *About Auctions*, FED. COMMC'NS COMM'N https://www.fcc.gov/auctions/about-auctions [https://perma.cc/XN7D-XL5X]; *see also* JILL C. GALLAGHER & PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., R47258, FCC SPECTRUM AUCTION AUTH.: BACKGROUND AND PROPOSALS FOR EXTENSION 1 (2022), https://crsreports.congress.gov/product/pdf/R/R47258#:~:text=On%20July%2027%2C%202022%2C%20the,auction%20authority%20through%20March%202024 [https://perma.cc/8DSM-HGN8] [hereinafter FCC Spectrum Auction Authority].

23. Gallagher & Figliola, *supra* note 22.

24. Tom Butts, *Congress Lets FCC's Spectrum Auction Authorization Lapse*, TV TECH. (Mar. 13, 2023) https://www.tvtechnology.com/news/congress-lets-fccs-spectrum-auction-authorization-lapse [https://perma.cc/M72X-W7KN.

25. *About Auctions*, *supra* note 22; *see also* FCC SPECTRUM AUCTION AUTHORITY (2022).

26. *How is an Auction Conducted?*, FCC https://www.fcc.gov/conducting-auctions [https://perma.cc/23U3-FHEW] (last visited Nov. 6, 2023).

27. Roslyn Layton, *Spectrum Auctions Have Raised $230 Billion; The FCC's Authority To Conduct Them Will Lapse Soon If Congress Doesn't Act*, FORBES (Apr. 29, 2022), https://www.forbes.com/sites/roslynlayton/2022/04/29/spectrum-auctions-have-raised-230-billion-the-fccs-authority-to-conduct-them-will-lapse-soon-if-congress-doesnt-act/?sh=126021c0908e [https://perma.cc/2U7A-GPZT].

28. *Id*.

unallocated spectrum in the 2.5 GHz band without paying for the licenses.[29] The FCC's Report and Order detailing its decision to adopt a priority filing window for tribes acknowledged its duty to tribal nations, noting that tribes were "eligible to receive certain protections by virtue of their federally-recognized status."[30]

B. Federal Trust Responsibility & Treaty Obligations

The federal government maintains a special relationship with Indian tribes and is obligated to act pursuant to their best interest.[31] This obligation is described as "the concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court."[32] Despite this obligation, the government has regularly failed to uphold its trust responsibility.[33]

1. Supreme Court Jurisprudence on the Trust Responsibility

The Supreme Court first recognized a special relationship between the federal government and tribes with respect to resource and property management in *Johnson v. M'Intosh* when Chief Justice John Marshall concluded conquest by the U.S. divested tribes of the underlying fee title to their historic homelands.[34] While the United States' retention of legal title prohibited tribes from exercising the right to transfer their lands, tribes nonetheless retained the right of occupancy and use consistent with their status as sovereign entities.[35] The Court's analysis ultimately formed the foundation upon which the government's duty to protect tribal property and resources is based.[36]

A decade later, the Chief Justice described tribes as domestic dependent nations relying on the federal government for protection in *Cherokee Nation v. Georgia*.[37] The relationship between the two sovereigns was further described as that of a "ward to his guardian," and the Court concluded the

29. Transforming the 2.5 GHz Band, *Report and Order*, 34 FCC Rcd 5446 (2019); *see also 2.5 GHz Rural Tribal Window*, FED. COMMC'NS COMM'N, https://www.fcc.gov/25-ghz-rural-tribal-window [https://perma.cc/QAE2-78CE] (stating that successful applicants will be issued a license by the FCC and retaining the license is subject to meeting build-out requirements) (last visited Nov. 6, 2023).

30. Transforming the 2.5 GHz Band, *supra* note 29, at para. 49.

31. COHEN'S HANDBOOK § 5.04[3][a] at 412.

32. *Id*.

33. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968); Sioux Tribe of Indians v. United States, 316 U.S. 317, 327 (1942); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

34. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

35. *Id*.

36. COHEN'S HANDBOOK § 5.04[3][a] at 413.

37. Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831).

federal government owed a duty of protection to tribes.[38] In *Worcester v. Georgia*, tribes were deemed distinct political communities with authority to exercise self-governance to the exclusion of state authority, but nevertheless remained under the protection of the national government.[39] These three cases, known as the Marshall Trilogy, establish the trust responsibility's foundation.

a. Courts on Congress's Obligation to Act Pursuant to the Trust Responsibility

The trust responsibility also serves as a foundational concept informing, and in some instances limiting, Congress's plenary power over Indian affairs.[40] Courts have relied upon Congress's plenary power to uphold federal action affecting a tribe's property interests.[41] Congress's plenary power derives from the same Constitutional sources as the trust responsibility—the Indian Commerce Clause and Treaty Clause—and is further reinforced by the federal government's duty of protection to tribes.[42] The Supreme Court acknowledges Congress's broad authority to legislate with respect to tribal nations. Since the Marshall Trilogy, the Court has upheld Congressional actions both beneficial and hostile towards tribal interests.[43]

For example, the Court in *United States v. Sioux Nation of Indians* (*Sioux Nation*) concluded that Congress violated the trust responsibility, despite its broad legislative authority over Indian affairs, when it divested the Great Sioux Nation of its treaty-protected claim to the Black Hills in South Dakota through legislation.[44] In contrast, courts have also upheld congressional actions to the detriment of tribal interests—such as diminishment and disestablishment of reservation boundaries guaranteed by express treaty language,[45] and termination of a tribe's federal recognition[46]—as valid exercises of both the trust responsibility and plenary power.

b. Courts Recognize the Executive Branch's Duty to Uphold the Trust Responsibility

The executive branch is equally required to uphold the trust responsibility. The Bureau of Indian Affairs (BIA) within the U.S.

38. *Id*.
39. Worcester v. Georgia, 31 U.S. 515, 557 (1832).
40. COHEN'S HANDBOOK § 5.02[1] at 391; United States v. Lara, 541 U.S. 193, 200 (2004).
41. *Lone Wolf*, 187 U.S. at 556.
42. *Lara*, 541 U.S. at 200.
43. *See, e.g.*, *Lone Wolf*, 187 U.S. at 556; *Tee-Hit-Ton Indians*, 348 U.S. at 278; *Menominee Tribe of Indians*, 391 U.S. at 412; *Sioux Tribe of Indians*, 316 U.S.at 327; *Lyng*, 485 U.S. at 453.
44. United States v. Sioux Nation, 448 U.S. 371, 416 (1980).
45. *Lone Wolf*, 187 U.S. at 556.
46. *Menominee Tribe of Indians*, 391 U.S. at 412; Menominee Tribe v. United States, 221 Ct. Cl. 506, 511-12 (1979) (rejecting Tribe's challenge to Termination Act based on violation of trust responsibility on jurisdictional grounds).

Department of the Interior may designate land into trust for the benefit of tribes and individual Indians[47] and is tasked with managing certain tribal assets, such as minerals and timber, by approving leases with private parties.[48] The BIA has promulgated extensive regulations governing their authority to oversee management of resources held in trust for the benefit of tribes and individual Indians.[49] Furthermore, many tribes who enacted constitutions pursuant to the Indian Reorganization Act of 1934 (IRA) require the Secretary of the Interior's approval before adopting constitutional amendments.[50]

The Court has upheld executive branch action detrimentally affecting tribal interests despite the duty to uphold the trust responsibility. Specifically, in *Lyng v. Northwest Cemetery Protective Association*, the Court upheld action by the U.S. Forest Service (USFS) in defiance of its impact on the religious and cultural practices of the Yurok, Karok, and Tolowa tribes in California.[51] The USFS sought to construct a road through a sacred site near the Hoopa Valley Reservation which would cause irreparable harm to the Tribes' use of the sacred site.[52] Despite the significant harm to the Tribes' ability to continue utilizing the site for religious and cultural purposes, the Court upheld the USFS's approval of the road's construction.

Notwithstanding the past failure to uphold the trust responsibility, courts, Congress, and the executive branch continue to acknowledge their duty to act as trusted stewards of tribal interests.[53]

2. Treaties as a Source of Specific Trust Responsibility Obligations

The federal government's authority to act with respect to Indian tribes derives from express provisions in the U.S. Constitution.[54] During the late 18th and early 19th centuries, Congress often exercised this power by entering into treaties pursuant to the Indian Commerce Clause and the Treaty Clause.[55] While distinct in their subject and provisions, most treaties contain promises

47. *See* Indian Reorganization Act, 25 U.S.C. § 465; *see also* 25 C.F.R. § 152 (1982).

48. *See* Indian Mineral Leasing Act, 25 U.S.C. § 396; *see also* 25 C.F.R. §§ 163, 200, 211, 212, 225 (2023).

49. *See, e.g.*, 25 C.F.R. § 163 (2023) (regulations pertaining to management of forest lands); 25 C.F.R. § 200 (2023) (regulations affecting coal leases on tribal lands); 25 C.F.R. § 211-212 (2023) (regulations for entering into leases for mineral development on tribal lands); 25 C.F.R. § 225 (2023) (regulations governing oil and gas, geothermal, and solid mineral agreements).

50. *See* Indian Reorganization Act, 25 U.S.C. § 5123.

51. *Lyng*, 485 U.S. at 453.

52. *Id*. at 442.

53. COHEN'S HANDBOOK § 5.04[3][a] at 412.

54. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2; *see also* COHEN'S HANDBOOK §§ 5.01[1-3] at 383-89.

55. COHEN'S HANDBOOK § 5.01[2, 3] at 386-89.

by the government to protect a tribe's access to specific resources in exchange for a cession of land or other resources.[56]

The trust responsibility originates in part in the Supreme Court's interpretations of treaty provisions,[57] which highlighted the tribe's dependency on the federal government for protection after ceding land and other resources.[58] In fact, it was often this guarantee of protection that induced the tribes' assent to the treaties in the first place.[59] Many treaties included a government pledge to manage tribal affairs.[60] However, the duty to manage the affairs of tribes did not result in the loss of the tribe's inherent right to self-governance.[61] Instead, such language often set forth the government's duty to act as a trustee for the benefit of tribes: "For the benefit and comfort of the Indians . . . the United States in Congress assembled shall have the sole and exclusive right of . . . managing all their affairs in such manner as they think proper."[62]

A foundational concept of Indian treaty interpretation is the Reserved Rights Doctrine established by the Court in *United States v. Winans*.[63] The doctrine presupposes that tribes reserve all rights not expressly ceded in treaties. When describing the Treaty of 1855 with the Yakima Nation in *Winans*, the Court explained, "the [T]reaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted."[64] The Court went on to explain that in executing the Treaty, the federal government did not grant the Tribe access to usual and accustomed fishing places. Rather, the Tribe continued to retain those rights by virtue of its sovereign status.[65]

A treaty promise can be established by an express grant of a right to a resource.[66] For example, the Stevens treaties entered with the tribes of the Pacific Northwest guaranteed the "right of taking fish, at all usual and accustomed grounds and stations."[67] However, treaty language is often not all-encompassing. When treaties are ambiguous, courts utilize the Canons of

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56. *See, e.g.*, Treaty with the Cherokee, Cherokee-U.S., art. 4, 9, Nov. 28, 1785, 7 Stat. 18; Treaty with the Creeks, Creeks-U.S. art. 3, 5, 6, 8, 9, Aug. 16, 1856, 11 Stat. 699; Treaty with the Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee-and Arapaho, 1868, April 29, 1868, art. 2, 15 Stat. 635 [hereinafter Treaty of Fort Laramie].

57. COHEN'S HANDBOOK § 5.04[a][3] at 412.

58. *Cherokee Nation*, 30 U.S. at 10 ; *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1496 (1994).

59. *Id.*

60. Treaty with the Cherokee, *supra* note 56, art. 9.

61. *Worcester*, 31 U.S. at 553-54.

62. Treaty with the Cherokee, *supra* note 56, art. 9.

63. United States v. Winans, 198 U.S. 371, 381 (1905).

64. *Id*.

65. *Id*.

66. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668 (1979) [hereinafter Fishing Vessel] (concluding the Stevens Treaties protected the "right of taking fish, at all usual and accustomed grounds and stations" for the tribes named as signatories to the Treaty).

67. *Fishing Vessel*, 443 U.S. at 658; United States v. Washington, 827 F.3d 836, 841 (9th Cir. 2016).

Indian Treaty and Statutory Construction.[68] The Canons include construing ambiguities in the light most favorable to tribes and interpreting treaty language in the manner the tribe would have understood at the time of its creation.[69] Utilizing the Canons, the Supreme Court has interpreted treaties to obligate the federal government to protect tribal interests generally.[70] For example, the Court has interpreted treaty provisions to protect property interests, such as the scope of a tribe's reservation,[71] access to usual and accustomed hunting and fishing locations,[72] access to fish for subsistence and trade,[73] and access to water sources.[74]

The Court has also recognized *implied* property rights in the absence of express treaty language.[75] In *Winters v. United States*, the Court implied a right to water in an Act of Congress ratifying an 1888 executive order establishing the Fort Belknap Reservation despite no express language referencing water.[76] The Court based its conclusion on the purpose of creating the reservation, which was to establish a permanent homeland capable of supporting the tribe's survival. The Court explained that while the executive order lacked express language referencing water, access to water was implied by its necessity in establishing a sustainable homeland. Additionally, the Court referenced the Canons of Construction in its opinion, concluding that both the tribes and the federal government would have understood the agreement to guarantee water access at the time it was created.

Congress may abrogate treaty promises, but the courts require that it clearly state its intent to do so.[77] Courts are reluctant to infer such an intention absent express language.[78] This is illustrated by the Court's interpretation of the Treaty with the Creeks establishing the Muscogee Creek Nations' reservation in *McGirt v. Oklahoma*. In *McGirt*, the Court considered the extent to which Congress disestablished the Tribe's reservation in its subsequent actions, including allotment of lands within the reservation's boundaries and adoption of legislation aimed at limiting the Tribe's self-governance.[79] The Treaty defined geographical boundaries for the Tribe's newly reserved territory, "securing a country and permanent home to the whole Creek Nation of Indians."[80] While the Court explained that abrogation of a treaty provision establishing a tribe's reservation "never required any

68. COHEN'S HANDBOOK § 2.02[1] at 113.

69. *Id*.

70. *See, e.g.*, *Lone Wolf*, 187 U.S. at 556; *Tee-Hit-Ton Indians*, 348 U.S. at 278; *Menominee Tribe of Indians*, 391 U.S. at 412; *Sioux Tribe of Indians*, 316 U.S. at 327; *Lyng*, 485 U.S. at 453.

71. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

72. *Winans*, 198 U.S. at 378.

73. *Fishing Vessel*, 443 U.S. at 668.

74. Winters v. United States, 207 U.S. 564, 576 (1908).

75. *Id.* at 576; *Winans*, 198 U.S. at 381.

76. *Winters*, 207 U.S. at 576 (applying the Canons of Construction to a congressional act ratifying an agreement with the Tribe to establish the Tribe's reservation by executive order).

77. *Lone Wolf*, 187 U.S. at 556; *see also* COHEN'S HANDBOOK § 5.01[2] at 387.

78. 42 C.J.S. *Indians* § 27 (2022); *see also* Solem v. Barlett, 465 U.S. 463, 470 (1984) (concluding "diminishment will not be lightly inferred").

79. *McGirt*, 140 S. Ct. at 2465-67.

80. *Id.* at 2460 (quoting Treaty with the Creeks, *supra* note 56, art. XIV).

particular form of words," it must occur pursuant to a clear congressional statement indicated by express references "to cession or other language evidencing the present and total surrender of all tribal interests."[81] Finding no explicit reference to cession in any subsequent act of Congress, and therefore no clear statement, the Court concluded that Congress never disestablished the Muscogee Creek Nation's reservation.

Furthermore, courts also look for evidence that Congress considered the effect of the abrogation on the tribe's protected rights and chose to abrogate the treaty anyway.[82] When considering the effect of the Bald and Golden Eagle Protection Act (BGEPA) on the Yankton Sioux Tribe's 1858 Treaty provision guaranteeing the Tribe's right to hunt bald eagles, the Court in *United States v. Dion* explained that when analyzing congressional actions purporting to terminate treaty rights "what is essential is that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[83] In *Dion*, the Court found the BGEPA's legislative history indicative of Congress's consideration of the BGEPA on both the Tribe's cultural and religious interests, but because Congress chose to adopt the legislation regardless, the Court found the Treaty right clearly abrogated. However, this principle could be applied to support a finding in favor of upholding treaty rights in future cases.

Despite Congress's plenary power over Indian affairs, courts continue to hold the federal government accountable to tribes for its treaty obligations.[84]

3. Statutes Articulating Obligations to Uphold the Trust Responsibility

Congress possesses plenary power over Indian affairs and has often spoken directly to the federal government's duty to Indian tribes by enacting legislation—such as the Northwest Ordinance, the Non-Intercourse Acts, and the Indian Child Welfare Act—expressly articulating this obligation.[85]

The Northwest Ordinance further formalized the federal government's fiduciary duty to act in good faith with respect to tribal property and resources and applies to tribes in modern-day Illinois, Indiana, Michigan, Wisconsin and portions of Minnesota.[86] It provides "the utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken

81. *Id*.
82. United States v. Dion, 476 U.S. 734, 740 (1986).
83. *Id*.
84. *See, e.g.*, *Worcester*, 31 U.S. at 553; United States v. Mitchell, 463 U.S. 206, 225 (1983) [hereinafter Mitchell II]; Cobell v. Salazar, 573 F.3d 808, 815 (D.C. Cir. 2009).
85. Northwest Ordinance of 1787, art. 3; Non-Intercourse Act, 25 U.S.C. § 177 (1834); Indian Child Welfare Act, 25 U.S.C. § 1901 (1978).
86. Wood, *supra* note 58; *see also Historical Highlights: The Northwest Ordinance of 1787*, U.S. HOUSE OF REPRESENTATIVES https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787/ [https://perma.cc/2URZ-N6FS] (last visited Jan. 23, 2023).

from them without their consent; and in their property rights and liberty, they never shall be invaded or disturbed."[87] In 1977, the U.S. District Court for the Northern District of Indiana in *Swimming Turtle v. Board of County Commissioners of Miami County* held that Article III of the Ordinance prohibits the state (in this case, Indiana) from confiscating or taxing Indian property without consent.[88]

The Non-Intercourse Act of 1834 gave the federal government the exclusive authority of conducting trade with and acquiring land from tribes.[89] The purpose of the Act was to enforce recognized treaty protections in an effort to eliminate hostile and often unfair commercial interactions between Indians and non-Indians.[90] Courts have long recognized that the Act creates a fiduciary duty requiring the federal government to act as a trustee in the management of tribal lands.[91] The Second Circuit characterized it as both protecting a tribe's right of occupancy and "prevent[ing] the unfair, improvident, or improper disposition of Indian lands."[92] Furthermore, the Second Circuit has rejected the assertion that Congress at any point terminated that duty through subsequent actions.[93] Because the Non-Intercourse Act applies to "any . . . tribe of Indians," courts have construed it to apply to all tribes, regardless of federal recognition.[94]

Taken together, these Acts illustrate the federal government's fiduciary duty to tribal nations.[95]

4. Framework for Judicially Enforceable Remedies

While the trust obligation itself has a broad reach, the ability to recover damages for its breach is very limited. Recovery is restricted to circumstances in which a specific statute or regulation sets forth the government's obligation.[96] Historically, the U.S.'s sovereign immunity has limited tribes' ability to sue the federal government for failure to uphold trust obligations.[97] Tribes generally lacked a forum to bring such claims until Congress created the Indian Claims Commission (ICC) in 1946.[98] The ICC created a Court of Claims, which initially had jurisdiction to hear only land claims by tribes that accrued prior to the year 1946, and required these claims to be brought within

87. Wood, *supra* note 58.

88. Swimming Turtle v. Bd. of Cnty. Com'rs of Mia. Cnty., 441 F.Supp 374, 377 (N.D. Ind. 1977).

89. 25 U.S.C. § 177.

90. FRANCIS PAUL PRUCHA, THE GREAT FATHER 30 (1986).

91. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

92. *Id*. at 377.

93. *Id.* at 380.

94. *Id*. at 376-77.

95. Northwest Ordinance of 1787, art. 3; Non-Intercourse Act, 25 U.S.C. § 177.

96. United States v. Jicarilla Apache Nation, 564 U.S. 162, 166 (2011).

97. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

98. JUDITH ROYSTER ET. AL., NATIVE AMERICAN NATURAL RESOURCES LAW 186 (4th ed. 2018).

a six-year period.[99] Claims that accrued after 1946 can still be heard in the Court of Claims today pursuant to the Indian Tucker Act.[100]

Under the Indian Tucker Act, a tribe may bring a claim against the Government for breach of trust.[101] In *United States v. Mitchell* (*Mitchell II*), the Court considered the extent to which the BIA's alleged mismanagement of timber resources within the Quinault Reservation constituted a breach of the trust responsibility warranting damages. The BIA exercised "comprehensive control over the harvesting of Indian timber" pursuant to statutes and BIA regulations.[102] The Court explained that ". . . a fiduciary relationship arises when the Government assumes control over . . . property belonging to Indians," finding the BIA's actions and failure to uphold the trust responsibility warranted damages.[103]

Furthermore, the Court in *Mitchell II* found the existence of a fiduciary relationship supporting an Indian Tucker Claim "even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."[104] Generally, however, this precludes a tribe from seeking to enforce a trust obligation based on common law trust principles.[105] Utilizing the *Mitchell II* framework, claimants must show that the source of law upon which their claim is based "can fairly be interpreted as mandating compensation by the federal government for the damages sustained."[106]

Tribes have successfully sought redress for wrongfully abrogated treaty promises by showing that the harm warranted just compensation pursuant to the Fifth Amendment, as illustrated in *Sioux Nation*.[107] The procedures governing these actions are similar to those described previously for breach of trust actions in the Court of Claims under the Indian Tucker Act.[108] A successful takings claim must pass the Fort Berthold test set forth in *Sioux Nation*. The claim must demonstrate that Congress did not make a good faith effort to provide the tribe with compensation equal to the full value of the resource in question by transmuting the property interest from land to money.[109]

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99. 28 U.S.C. § 1505; *see also* 28 U.S.C. § 2501 (establishing a six-year statute of limitations for claims brought in the U.S. Court of Federal Claims).

100. *Id*.

101. *Id*.

102. *Mitchell II*, 463 U.S. at 209; *see also* 25 U.S.C. §§ 406-07, 5109.

103. *Mitchell II*, 463 U.S. at 225 (quoting Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980)).

104. *Id.*

105. *Jicarilla Apache Nation*, 564 U.S. at 165.

106. *Mitchell II*, 463 U.S. at 216-17 (citing United States v. Testan, 424 U.S. 392, 400 (1976)).

107. *Sioux Nation*, 448 U.S. at 416.

108. *See* discussion *infra* Section III.B.4 "Framework for Judicially Enforceable Remedies".

109. *Sioux Nation*, 448 U.S. at 416.

III. ANALYSIS

A. Wireless Spectrum Law Analogized to the Law of Property

Generally, the physical characteristics of spectrum and, by extension, the property interests that accompany spectrum licenses can be analogized to those traditionally associated with land, such as the right to exclude and the right to transfer.[110] Historically, the concept of *cujus est solum ejus est usque ad coelum* (*ad coelum*), or the Latin phrase for "whoever owns land it is theirs up to the heavens and down to hell,"[111] was thought to extend a landowner's property rights to space above and below the land's surface.[112] While the Communications Act itself limits the comparison between wireless spectrum and land by defining the FCC's purpose to manage spectrum as ". . . provid[ing] for the use of such channels, but not the ownership thereof,"[113] licensees nevertheless retain the ability to exclude others and to transfer their interest to other parties, subject to FCC approval.[114]

Like land, wireless spectrum is a scarce resource.[115] Spectrum may differ from land in terms of its physical characteristics, but the basic property principles applicable to both remain similar. Rights to both resources are acquired via financial transactions, and property interest holders can expect to have their interests protected from intrusion by outside entities.[116] Landowners retain the right to file an action for trespass against an unwelcome entrant, and spectrum licenses inherently exclude those without a license from operating within a particular frequency.[117]

Furthermore, both landowners and spectrum license holders may transfer their property interest to another party.[118] Landowners may do so in part or in full, through easements or via a sale of the landowner's fee simple interest.[119] While the transfer of spectrum licenses is subject to FCC review and determination that the proposed transfer is consistent with the "public interest, convenience and necessity," the underlying right to transfer remains.[120] Other similarities exist as well such as the application of regulations that may affect a property interest, including zoning ordinances

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110. John W. Berresford & Wayne A. Leighton, *The Law of Property and the Law of Spectrum: A Critical Comparison*, 13 COMMLAW CONSPECTUS 35, 36 (2009).

111. LAURA K. DONAHUE, WHO OWNS THE SKIES? AD COELUM, PROPERTY RIGHTS, AND STATE SOVEREIGNTY 1 (2021).

112. *See id*. at 1-3 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *18).

113. 47 U.S.C. § 301; *see also* Radio Act, 47 U.S.C. § 4 (1927) (establishing the basis for declaring wireless spectrum incompatible with private ownership).

114. *See* 47 U.S.C. § 309 (vesting the FCC with the authority to grant applications for spectrum licenses).

115. *See* Berresford & Leighton, *supra* note 110.

116. *Id* at 39.

117. *Id*.

118. *Id.* at 39-40; *see also Spectrum Leasing*, FED. COMMC'NS COMM'N, https://www.fcc.gov/wireless/bureau-divisions/technologies-systems-and-innovation-division/spectrum-leasing [https://perma.cc/SRY3-7QLT].

119. Berresford & Leighton, *supra* note 110, at 39-40.

120. *Id.* at 40 ; *see also* 47 U.S.C. § 301.

affecting land and designation of certain spectrum frequencies for particular uses.[121]

Both land and wireless spectrum are valuable resources. The value of wireless spectrum is relevant in two respects: First, tribes need access to wireless spectrum both to deploy broadband services within their respective territories and to leverage the licenses as revenue-generating assets. Both are essential to furthering federal and tribal interests in promoting tribal self-determination and economic development.[122] Second, the immense financial value associated with spectrum licenses underscores the severity of the tribe's loss as a result of the federal government's failure to protect tribal access to a valuable resource. For these reasons, it is crucial that tribes assert their rightful claim to the wireless spectrum corresponding to their respective tribal territories.

B. Federal Trust Responsibility Analysis

The federal government failed to fulfill its trust obligation to protect tribal access to wireless spectrum beginning with Congress' assignment of authority over all wireless spectrum in the U.S. to the FCC in the Communications Act and continuing today with the FCC's assignment of spectrum licenses over tribal territories to non-tribal entities.[123] As wireless spectrum resembles land in its property interests, the trust responsibility should be similarly interpreted as applicable to wireless spectrum where it corresponds to tribal territories.[124]

First, while the Court concluded tribes lack full fee simple ownership over their ancestral homelands, tribes were nevertheless recognized as retaining valuable property rights apart from the right to transfer.[125] When treaties set forth the physical boundaries of a tribe's reservation, the federal government recognized the rights of occupancy and use of the land, otherwise known as original Indian title, remained with the tribe.[126] The right of occupancy and use includes the right to utilize spectrum corresponding with tribal lands. A court should similarly conclude that the trust responsibility obligates the government to recognize similar property rights in wireless spectrum. All spectrum licenses corresponding to a tribe's reservation or territory should be included in the resources recognized as warranting protection.

Second, when Congress authorized the FCC in the Communications Act to manage all non-federal use of wireless spectrum in the U.S., it divested tribes of their rightful ownership of the spectrum associated with their

121. Berresford & Leighton, *supra* note 110, at 39-40.

122. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 203 (1987) (recognizing an inherent federal interest to promote tribal self-determination and economic development).

123. 47 U.S.C. § 301.

124. Berresford & Leighton, *supra* note 110, at 36.

125. *Johnson*, 21 U.S. at 573.

126. *Id.*

respective tribal territories.[127] This is illustrated by the Communications Act's reference to radio spectrum as a resource incompatible with ownership and instead directing the FCC to allocate spectrum licenses pursuant to the "public interest, convenience and necessity."[128] Congress expressly violated its trust responsibility by transforming wireless spectrum into a resource incapable of traditional ownership, ignorant of the reality that tribes at least retained the right of occupancy and use of the spectrum.[129] Today, those rights would be realized by a tribe's ability to retain spectrum licenses themselves rather than competing for licenses in incentive auctions, by excluding others from use in particular frequencies, and by exercising self-determination in making decisions about how best to utilize spectrum for the benefit of the tribal community.

Third, the federal government continues to act in opposition to the trust responsibility by not only refusing to amend the Communications Act to recognize tribal ownership of spectrum corresponding to tribal territories, but also by continuing to grant spectrum licenses within tribal territories to non-tribal entities.[130] While data on the number of tribes with wireless spectrum licenses is scarce, non-tribal ownership of licenses corresponding to tribal lands is demonstrated by comparing the list of published license winners following the conclusion of each incentive auction with the geographic boundaries of tribal communities.[131] Additionally, the FCC maintains a spectrum license search tool on its website that allows any user to quickly observe that wireless carriers unassociated with tribes retain spectrum licenses within tribal territories.[132] With each new approval of a license corresponding to a tribe's territory to a non-tribal entity, the federal government continues to act in defiance of its obligation to manage tribal resources for a tribe's benefit.

C. Treaty Analysis

Congress abrogated an implied treaty right to wireless spectrum when it transferred authority to manage wireless spectrum to the FCC in the Communications Act.[133] While treaties entered into with tribes lack an express guarantee to wireless spectrum access, courts could imply treaty rights to wireless spectrum.

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127. *See* 47 U.S.C. § 301.

128. *Id.*; *see also* Radio Act, 47 U.S.C. § 4 (1927) (establishing the basis for declaring wireless spectrum incompatible with private ownership).

129. *Johnson*, 21 U.S. at 573.

130. *See License Search*, FED. COMMC'NS COMM'N, https://wireless2.fcc.gov/UlsApp/UlsSearch/searchLicense.jsp [https://perma.cc/B33N-YUX4] (showing a list of incumbent license holders corresponding to all of the U.S., including tribal lands) [hereinafter FCC License Search].

131. *See, e.g.*, *id.*; Press Release, *FCC Announces Winning Bidders in C-Band Auction,* FED. COMMC'NS COMM'N (Feb. 24, 2021), https://docs.fcc.gov/public/attachments/DOC-370267A1.pdf [https://perma.cc/5PNG-PJGD].

132. *See* FCC License Search, *supra* note 130.

133. *See* 47 U.S.C. § 301.

U.S. courts have yet to recognize an implied right to wireless spectrum based on treaty language. However, the idea is not without precedent. The Waitangi Tribunal in New Zealand concluded that the Treaty of Waitangi protected the Maori's *rangatiratanga*, or right to exercise self-determination, pertaining to its radio spectrum allocation.[134] The Tribunal further held that the English Crown was obligated under the Treaty's Article II provisions to recognize and protect the Maori's claim to radio spectrum; this not only prohibited the Crown from transferring the Maori's property interest to another party without the express consent of the tribe, but also guaranteed the Maori's full autonomy to manage its spectrum interests.[135] The Tribunal's determination was based on its characterization of wireless spectrum as a natural resource, and was further informed by the following language:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession . . . [136]

Specifically, the Tribunal found the language guaranteeing "full exclusive and undisturbed possession" informative of the Crown's duty to recognize and respect the Maori's property interests in natural resources existing within the Maori territory.[137] The Tribunal characterized spectrum as such a resource and further recognized its potential to contribute to the preservation of Maori culture and language.[138]

Tribes in the U.S. can argue an implied treaty right to wireless spectrum exists on two grounds. First, as discussed above, tribes can point to the purpose for which their treaties were entered into, to create a home for the tribe, to support their claim.[139] While neither the tribes nor the federal government were aware of the physical properties of wireless spectrum and its future value at the time treaties were entered into, tribes can attest to the fact that Internet access has since become, like other natural resources, an essential component of making a home sustainable.[140]

Second, language similar to the Waitangi Treaty can be found in treaties negotiated between the U.S. and tribes such as the Arapaho and Sioux tribes, including the Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet,

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134. WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON CLAIMS CONCERNING THE ALLOCATION OF RADIO SPECTRUM 9 (1990).

135. *Id*.

136. Treaty of Waitangi, NZ-Waitangi, art. 2 [1840] 1840 NZTS 04 ("signed 2 June 1840, entered into force 2 June 1840").

137. WAITANGI TRIBUNAL, *supra* note 134.

138. *Id*.

139. *See Winters*, 207 U.S. at 565 (explaining that the purpose of creating the reservation was to establish a permanent home for the Tribe, and concluding the Treaty impliedly guarantees the Tribe access to waterways to effectuate that purpose).

140. *See* McClain et al., *supra* note 3.

Cuthead, Two Kettle, Sans Arcs, and Santee that were parties to the Fort Laramie Treaty of 1868.[141] Article II of the Treaty "set apart for the absolute and undisturbed use and occupation of the Indians herein named" the Great Sioux Reservation in exchange for ceding thousands of other valuable acres to the U.S.[142] Utilizing the Waitangi Tribunal's analysis, tribes can argue that language similar to the phrase highlighted in the Fort Laramie Treaty protects a tribe's property interests in wireless spectrum.

Upon finding an implied treaty right to spectrum, the Reserved Rights Doctrine further strengthens a tribe's claim to spectrum as tribes inherently reserve all rights not expressly ceded in treaties.[143] Because treaties lack express language referencing spectrum, it necessarily follows that tribes did not cede their spectrum rights in treaties and retain those rights today.

Congress may only abrogate treaty promises subject to an explicit intention to do so and upon evidence that it considered the effect of abrogation on the tribe's protected rights and chose to abrogate anyway.[144] One could argue that the Communications Act is itself a clear statement by Congress to abrogate an implied treaty right to wireless spectrum by virtue of its assignment of authority to the FCC to manage spectrum. However, the Communications Act lacks any express language referring to a tribe's claims to spectrum, and in fact, the word "tribe" does not appear in the Communications Act at all.[145] Therefore, this argument would be based on an implied abrogation, pursuant to the language conferring onto the FCC the authority to manage all non-federal use of spectrum. An implied abrogation argument hardly passes the clear statement standard. There is no evidence that Congress considered the effect of the Communications Act on a tribe's spectrum interests, as evidenced by the fact that the Act does not refer to tribes or tribal governments once.[146] Absent additional evidence that Congress contemplated the consequences of stripping tribes of their spectrum property interests, abrogation that meets the clear statement standard cannot be inferred.

However, tribes asserting this argument must address the U.S. District Court for the District of South Dakota's holding in *Alltell Communications, LLC v. Oglala Sioux Tribe*, which rejected the Tribe's claim that the Treaty of Fort Laramie vested the Tribe with a property interest in the spectrum corresponding to the Tribe's territory.[147] The court considered the claim by

141. Treaty of Fort Laramie, *supra* note 56, art. 2; *see also* Treaty of Fort Laramie, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/fort-laramie-treaty#:~:text=In%20the%20spring%20of%201868,and%20Santee)%20and%20the%20Arapaho. [https://perma.cc/X8NH-GXJG] (last visited Nov. 9, 2023) (identifying the list of tribes that were parties to the Treaty).

142. *Id*.

143. *Winans*, 198 U.S. at 381.

144. *Lone Wolf*, 187 U.S. at 556 (establishing Congress's authority to abrogate treaty promises); *see also Dion*, 476 U.S. at 740 (explaining the requirement that Congress must consider the effect of the abrogation on tribal interests).

145. *See* 47 U.S.C. § 151.

146. *Id*.

147. Alltell Commc'ns, LLC. v. Oglala Sioux Tribe, No. 10-5011-JLV, 2011 WL 796409, at *6 (D.S.D. Feb. 28, 2011).

analogizing spectrum to land rather than a natural resource, framing the inquiry as the extent to which the spectrum constituted part of the land upon which the Tribe exercised undisturbed use and occupation.[148] The Court inaccurately concluded on two grounds: (1) the Treaty's recognition of the Tribe's undisturbed use and occupation of the territory did not extend to the spectrum above[149]; (2) even if the Tribe's property interest in land did include spectrum, the FCC's current regulation of the spectrum does not interfere with the Tribe's undisturbed use and occupation of its territory.[150]

Tribes within the court's jurisdiction or signatories to the Treaty of Fort Laramie can attack both conclusions as follows. In support of its first conclusion, the court rejected *ad coelum* as a justification for finding a claim to the physical property both above and below the surface of the Tribe's territory.[151] The Court declined to recognize the maxim as applicable here, articulating a concern that such recognition would necessarily lead to troubling practical implications, including tribes initiating trespass actions against parties, such as aircraft, unlawfully violating the airspace above tribal land.[152] These concerns, however well-intentioned, are misplaced and fail to recognize that the property interest vested in spectrum license holders today is limited to the frequency associated with the license.[153]

First, the re-recognition of a tribe's claim to wireless spectrum could similarly be limited to the use of the spectrum in the deployment of telecommunications services, not extending to trespass or any other claim unrelated to the use of the spectrum for telecommunications purposes. This type of limited-use property claim is consistent with Indian title, or a tribe's recognized right of occupancy and use, over its land.[154] Second, the court could have evaluated the Tribe's claim by comparing spectrum to a treaty-protected natural resource, rather than by considering whether the Tribe's land rights extended to it a claim to the airspace above. A natural resource-based analysis would follow the reasoning employed by the Waitangi Tribunal in its evaluation of the Maori's claim to spectrum and could be further bolstered by a reference to the *Winans* implied rights doctrine.[155] Lastly, the court's emphasis on wireless spectrum's incompatibility with private ownership accepts without question the harm at the very issue of this inquiry.[156] It is precisely Congress' transformation of spectrum into a resource inconsistent with private ownership that injured tribes in the first place, divesting them of access to a valuable resource. Instead of accepting as lawful the FCC's regulatory authority over spectrum associated with tribal lands, courts must reevaluate each spectrum claim at the harm's origin or beginning

148. *Id.* at *4.
149. *Id*.
150. *Id.* at *6.
151. *Id*. at *4.
152. *Id.*
153. *See* Trick, *supra* note 20.
154. *See Johnson*, 21 U.S. at 573.
155. *See* discussion i*nfra* IV.C "Treaty Analysis."
156. 47 U.S.C. § 301; *see also* Radio Act, 47 U.S.C. § 4 (1927) (establishing the basis for declaring wireless spectrum incompatible with private ownership).

with the recharacterization of spectrum as incompatible with private ownership.

Regarding its second finding, the court rationalized that the Tribe could still access and use the spectrum associated with its territory through participation in the FCC's regulatory scheme, or by simply purchasing and competing for licenses like any other prospective licensee.[157] In fact, the court referenced actions taken by the Tribe, including submissions made to the FCC, in concluding the Tribe suffered no actual harm by the FCC's regulation of the spectrum corresponding to its territory.[158] However, in so holding the court ignores the reality that spectrum licenses can only be acquired at an immense financial cost.[159] A treaty-protected right to spectrum lawfully empowers tribes to use the spectrum without expending unnecessary financial resources to gain access to it in the first place. Additionally, the Tribe's efforts to gain access to spectrum through compliance with the FCC's regulations should not be construed as the Tribe's recognition that the current regulatory scheme is lawful. The court's decision penalizes the Tribe for taking action to bolster Internet access within its territory, relying on these actions to justify barring the Tribe from challenging the FCC's authority to regulate access to spectrum in the future.

Despite the court's holding, tribes retain valid claims to wireless spectrum and must consider adjudicating these claims in court.

D. Judicial Claims

Prior to addressing each independent statutory source, it is important to note that a claim purely based on Congress's assignment of authority over spectrum in the Communications Act will likely be time-barred as a result of the ICC's requirement that all claims accruing before 1946 be brought within five years of the ICC's establishment.[160] Congress could, if it wished, pass a special jurisdictional act waiving sovereign immunity and granting tribes the opportunity to seek redress.

However, even in the absence of such action, tribes can file a claim under the Indian Tucker Act based on the FCC's assignment of spectrum licenses to non-tribal entities after 1946 subject to a six-year statute of limitations.[161] To demonstrate a judicially enforceable claim against the Government under the Indian Tucker Act under the *Mitchell II* framework, tribes must point to Acts of Congress, statutes, regulations or other sources of law independent from the Indian Tucker Act itself that establish a duty fairly determined to warrant damages.[162] Taken together, (1) the Communications

157. *Alltell*, 2011 WL 796409, at *6.
158. *Id*.
159. *See* Layton, *supra* note 27.
160. Indian Claims Commission Act, 25 U.S.C. § 2A (1946).
161. Indian Tucker Act, 28 U.S.C. § 1505; *see also* 28 U.S.C. § 2501 (establishing a six-year statute of limitations for claims brought under Indian Tucket Act).
162. *Mitchell II*, 463 U.S. at 216.

Act itself, (2) the Non-Intercourse Act of 1834, and (3) the Northwest Ordinance warrant damages to tribes.[163]

Alternatively, tribes can assert a claim for wrongful taking in violation of the Fifth Amendment utilizing the analysis in *Sioux Nation* and by satisfying the Fort Berthold test.[164]

1. Breach of Trust Claim

a. The Communications Act of 1934

The language set forth in the Communications Act provides for the taking of wireless spectrum ownership from tribes in favor of the FCC.[165] Utilizing the *Mitchell II* framework, a court could conclude that the FCC's control over wireless spectrum assets belonging to tribes creates a judicially enforceable fiduciary duty.[166] While the statutes at issue in *Mitchell II* concerned managing timber harvests for the benefit of Tribe, the Court's conclusion was based in large part on the fact that the BIA had assumed comprehensive control over tribal assets.[167]

The comprehensive control exercised by the FCC over all non-federal use of wireless spectrum likely satisfies the *Mitchell II* standard and thus imposes a fiduciary responsibility capable of supporting an action under the Indian Tucker Act. While the Communications Act fails to set forth a duty to manage wireless spectrum on behalf of tribes expressly, the *Mitchell II* framework does not require an express reference to a fiduciary duty to warrant damages.[168] Consequently, a fiduciary relationship should nevertheless be implied as a result of the robust and comprehensive control exercised by the FCC over spectrum assets belonging to tribes.[169]

b. The Non-Intercourse Act of 1834

Failure to protect a tribe's wireless spectrum access similarly violates the trust responsibility under the Non-Intercourse Act of 1834 to dutifully manage tribal lands.[170] While the Non-Intercourse Act imposes a fiduciary duty on the federal government with respect to tribal land, it remains the law today[171], and courts could extend its applicability to wireless spectrum given the similarity in property rights between land and spectrum discussed previously.

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163. 47 U.S.C. § 151; Northwest Ordinance of 1787, art. 3; Non-Intercourse Act, 25 U.S.C. § 177 (1834).
164. *Sioux Nation*, 448 U.S. at 407.
165. *See* 47 U.S.C. § 301.
166. *Mitchell II*, 463 U.S. at 225-26.
167. *Id*. at 224.
168. *Id*.
169. *See* 47 U.S.C. § 151.
170. *See* 25 U.S.C. § 177 (establishing a duty to duly manage tribal lands).
171. *Id*.

c. The Northwest Ordinance of 1787

Because the Ordinance only applies to a small subset of states, only tribes within that area would be able to rely on it. Tribes can point to the U.S. District Court for the for the Northern District of Indiana's conclusion in *Swimming Turtle* that the Ordinance prohibits government interference with property owned by tribal members.[172] This precedent could easily enable a court to recognize an analogous prohibition against seizure of a tribe's spectrum access in the Ordinance's pledge to observe and respect a tribe's property rights.

Considered together, the Communications Act, the Non-Intercourse Act of 1834, and the Northwest Ordinance of 1787 establish the basis for a judicially enforceable breach of trust claim warranting compensation.[173]

2. Fifth Amendment Takings Claim

Assuming Congress did not successfully abrogate a tribe's implied treaty right to wireless spectrum, the treaty right itself remains a judicially enforceable property interest.[174] Therefore, the remedy would be similar to a breach of trust action under the Indian Tucker Act:[175] tribes can point to *Sioux Nation* to assert a claim for an unconstitutional taking in violation of the Fifth Amendment and argue that, at the very least, the taking of their wireless spectrum assets required just compensation.[176]

Much like the right to the Black Hills, the right to spectrum is similarly guaranteed by treaties, either impliedly by the necessity of Internet access for tribes to sustain a home or by specific language similar to the Treaty of Fort Laramie.[177] However, the federal government's actions do not pass the Fort Berthold test, as no attempt whatsoever to compensate the tribes for its divestiture of their spectrum assets has been made.[178] Just as the Court concluded the federal government failed to exercise a good faith effort to compensate the Sioux Nation for the taking of the Black Hills, so should a court conclude that the taking of a tribe's wireless spectrum interests warrants just compensation. While many tribes would rather have their claims to spectrum restored, spectrum is an incredibly valuable resource, and tribes should at least be compensated at a rate equivalent to the value of spectrum licenses sold at auction.

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172. *See Swimming Turtle*, 441 F.Supp. at 377.

173. *See* 47 U.S.C. § 151; Northwest Ordinance of 1787, art. 3; *see also* Non-Intercourse Act, 25 U.S.C. § 177 (1834).

174. *See* COHEN'S HANDBOOK § 5.01[2] at 387.

175. *See* discussion *infra* section IV.D "Judicial Claims."

176. *Sioux Nation*, 448 U.S. at 407-08.

177. *See* Treaty of Fort Laramie, *supra* note 56, art. 2.

178. *See Sioux Nation*, 448 U.S. at 416.

IV. ADDITIONAL REMEDIES

A. Actions by the FCC

The FCC has the authority to determine the method and manner by which spectrum licenses are allocated, assigned, and used.[179] While these actions must serve the "public interest, convenience, and necessity," the FCC can take a number of actions to restore—or, at the very minimum, increase—a tribe's access to spectrum.[180] Doing so would serve the public interest by equipping tribal communities with infrastructure capable of supporting robust broadband solutions.

1. Immediate Reassignment of Spectrum Licenses

From a practical standpoint, the greatest challenge to restoring tribal claims to wireless spectrum is the reality that many licenses corresponding to tribal territories have since been assigned to third-party entities unaffiliated with the tribes themselves.[181] These entities were likely either awarded the license via auction or acquired the license in an after-market transaction from an incumbent license holder. Regardless of the method, purchasing spectrum licenses often requires a significant financial investment and constitutes a property interest that any license holder would endeavor to keep. However, the fact that non-tribal entities now own these licenses does not change the reality that the spectrum was stolen from tribes in the first place, nor does it negate a tribe's rightful claim to its use.

Although it would be well within the authority of the FCC to do so, it is unlikely the FCC will elect to unilaterally reassign spectrum licenses to tribes for fear of enduring litigation, including a potential challenge to the agency's action under the Administrative Procedures Act (APA).[182] Tribes are nevertheless entitled to receive exclusive licenses to operate within every spectrum band corresponding to their respective tribal territories, and the FCC should reassign such licenses to tribal nations in an effort to right the wrongs of the past.[183]

The FCC may or may not consider compensating incumbent licensees for an amount equal to the cost of acquiring the license, whether at auction or by third-party transaction. Compensating licensees would require extensive financial resources to execute, but it would restore the license holders to their financial position prior to obtaining the license. Additionally, licensees may argue that their reliance interests warrant additional compensation related to the revenue they anticipated generating from putting their license to use. This

179. 47 U.S.C. § 303(y).

180. *Id*.

181. *See* FCC License Search, *supra* note 130 (showing list of licensees corresponding with tribal lands).

182. Administrative Procedures Act, 5 U.S.C. § 706(2)(a) (1966).

183. *See* discussion *infra* section IV.B "Federal Trust Responsibility Analysis."

may result in additional litigation that the federal government is likely to avoid.

2. Reassignment of Spectrum Licenses After Current Licenses Expire

Because spectrum licenses are limited in their duration to a set number of years, licensees must eventually seek renewal of their license from the FCC.[184] The FCC retains the right to elect not to renew a particular license if it finds that renewal will be contrary to the "public interest, convenience, and necessity." For reasons similar to those highlighted above, the FCC should consider electing not to renew licenses corresponding with tribal lands at the end of their term. The difficulty here is similarly demonstrating how nonrenewal will serve the public interest when the public encompasses both the interests of tribes and incumbent licensees. However, the federal trust obligation is a compelling interest worthy of sustaining a challenge to an agency's decision not to renew. If the FCC chooses to renew incumbent licenses regardless, tribes are nevertheless still owed compensation, and the FCC should dedicate a percentage of their license proceeds to compensating tribes whose spectrum is leased by a non-tribal entity.

3. Spectrum Sharing

Should the FCC elect not to reassign spectrum licenses to tribes, the FCC should adopt a spectrum-sharing policy allowing tribes to share access to a particular band of spectrum with the incumbent licensee. The goal of spectrum sharing is to utilize spectrum more efficiently while also minimizing interference between multiple users.[185] The feasibility of spectrum sharing is dependent upon the physical properties of each frequency itself.[186] Therefore, the FCC would likely need to evaluate frequencies for compatibility with a spectrum sharing solution, and further develop use rules to minimize interference between the incumbent licensee and the tribe.[187] This solution does not restore a tribe's exclusive access to spectrum, but it would at least provide tribes with some access to a resource critical to the successful deployment of broadband solutions.

4. Assignment of Unallocated Spectrum to Tribes

Finally, the FCC should immediately assign all unallocated spectrum, or whitespace, in every band associated with tribal territories to tribes. The FCC took similar action with regard to the 2.5 GHz band, assigning all unallocated spectrum associated with tribal territories to tribes at no cost.[188]

184. *See* 47 U.S.C. § 303.
185. Benjamin & Speta, *supra* note 21, at 123.
186. *Id.*
187. *Id.*
188. *See* Transforming the 2.5 GHz Band, *supra* note 29, at para. 47.

In doing so, the FCC acknowledged the duty of protection owed to tribes by the federal government.[189] This solution avoids the issue associated with taking a license away from an incumbent licensee because the spectrum in question is unassigned. Furthermore, assigning unallocated spectrum to tribes results in a more efficient use of spectrum overall, as otherwise, the spectrum remains unused and its benefits unrealized.

While the FCC assigned 2.5 GHz licenses to tribes without seeking payment for the license itself, it required tribes to comply with build-out requirements to retain the license long-term. The requirements include the tribe demonstrating that it can serve up to fifty percent of the population within its service area two years after acquiring the license.[190] This percentage increases to eighty percent at five years.[191] Meeting the FCC's build-out requirements will necessarily require a significant financial investment to purchase equipment and material to build infrastructure capable of providing Internet service. Access to capital continues to function as a barrier to infrastructure deployment within tribal communities. Therefore, the FCC should decline to include build-out requirements for future allocations of unassigned spectrum to tribes. Tribes should be given full autonomy to decide how and when to utilize their spectrum assets free of government oversight.

V. CONCLUSION

The history of the federal government's dealings with tribes is rife with empty promises and failure to uphold its trust obligation. Congress, the courts, and the FCC have the opportunity to address the wrongs committed against tribal nations by taking action to restore each tribe's claim to the wireless spectrum associated with their respective tribal territories. By pursuing the solutions explored, the U.S. can ensure that tribal nations are no longer left behind without the resources necessary to bridge the digital divide in tribal communities.

189. *Id*. at para. 49.
190. *See 2.5 GHz Rural Tribal Window*, *supra* note 29.
191. *Id*.