No. 00-1262

In the Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
ELIZABETH A. PETERSON
DEBORAH M. REYHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the United States may resolve an enforcement action under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, against the non-Indian owner of a facility on fee land within the boundaries of the Shoshone-Bannock Indian reservation by entering into a consent decree that is consistent with RCRA and federal regulations and was negotiated in consultation with the Shoshone-Bannock Tribes, but that does not contain all the terms desired by the Tribes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is unpublished, but the decision is noted at 229 F.3d 1161 (Table). The decision of the district court (Pet. App. 7a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on October 5, 2000 (Pet. App. 1a). On December 19, 2000, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including February 2, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and the Hazardous and Solid Waste Amendments of 1984 (HSWA), see 42 U.S.C. 6901 *et seq.* (hereinafter referred to collectively as RCRA), was enacted to address the increasingly serious environmental and public health dangers arising from waste generation, management, and land disposal. 42 U.S.C. 6901(b). Congress was particularly concerned about the management and disposal of hazardous wastes. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. Pt. I, at 2-3 (1976). Congress required the Environmental Protection Agency (EPA) to implement a national regulatory program to ensure that hazardous-waste management practices are conducted in a manner that protects human health and the environment, and to minimize the generation and land disposal of hazardous wastes. See *id.* at 21-26.

RCRA governs two types of waste: solid waste and hazardous waste. "[S]olid waste" includes "any garbage, refuse, sludge * * * and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations." 42 U.S.C. 6903(27); see 40 C.F.R. 261.2. Solid waste is regulated under Subtitle D of RCRA, 42 U.S.C. 6941-6949a (1994 & Supp. IV 1998). "[H]azardous waste" is a subset of solid waste, consisting of those wastes that may "significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness," or that may pose "a substantial present or potential hazard to human health or the environment when improperly treated, stored,

transported, or disposed of, or otherwise managed." 42 U.S.C. 6903(5); see 40 C.F.R. 261.3. Hazardous wastes further fall into two classes: "listed" wastes, which contain certain identified toxic constituents, and "characteristic" wastes, which exhibit one or more of the characteristics of ignitability, corrosivity, reactivity, and toxicity. 42 U.S.C. 6921; see 40 C.F.R. Pt. 261. Hazardous waste is regulated under Subtitle C of RCRA, 42 U.S.C. 6921-6939e (1994 & Supp. IV 1998).

For materials falling within the regulatory definitions, EPA regulations establish "a 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste." *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). Those EPA regulations establish strict requirements for all matters relating to the handling of hazardous wastes, including record keeping, permits, treatment, storage, disposal, and transportation. 42 U.S.C. 6922-6925 (1994 & Supp. IV 1998). RCRA also establishes restrictions on the land disposal of certain hazardous wastes. 42 U.S.C. 6924(d). Those land disposal restrictions (LDRs) prohibit the placement of hazardous wastes on the land unless such wastes either comply with treatment levels specified by EPA or are determined by EPA to be protective of human health and the environment based on a petitioner's demonstration that there will be "no migration" of hazardous constituents from the disposal unit for as long as the wastes remain hazardous. 42 U.S.C. 6924(d)(1). EPA regulations governing land disposal of hazardous wastes additionally require comprehensive waste analysis and recordkeeping to certify that a waste is eligible for land disposal (40 C.F.R. 268.7), specify procedures for obtaining exemptions (40 C.F.R. 268.6),

and specify treatment standards for the land disposal of restricted wastes (40 C.F.R. Pt. 268, Subpt. D).

As originally enacted, RCRA exempted from EPA regulation certain kinds of wastes. The Bevill Amendment, 42 U.S.C. 6921(b)(3)(C), 6982(p), directed EPA to study those exempted wastes before determining whether they should be regulated under the RCRA scheme. Those wastes exempted by the Bevill Amendment included the process wastes generated from the beneficiation and processing of minerals and ores. On September 1, 1989, the Bevill exemption was removed for all wastes from the production of elemental phosphorous, with the exception of furnace off-gas solids, for which the exemption was removed on January 23, 1990. See 54 Fed. Reg. 36,592; 55 Fed. Reg. 2322. Those wastes then became subject to full regulation under RCRA. EPA regulations prescribe, for such wastes newly subject to regulation under RCRA, a period of four years during which a facility must either bring surface impoundments storing such wastes into compliance with minimum technology requirements or cease the storage or disposal of hazardous waste in such ponds and commence closure. See 40 C.F.R. 265.221(h).

2. The United States initiated this enforcement action against respondent FMC Corporation for violations of RCRA at its elemental phosphorus production facility near Pocatello, Idaho. The FMC facility is located on 150 acres of land owned in fee by FMC within the boundaries of the Fort Hall Indian Reservation. See *FMC* v. *Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).[1] The RCRA violations alleged by the United

[1] Pursuant to 42 U.S.C. 6926, upon application by a State, EPA may authorize the State's hazardous-waste management program

States relate principally to FMC's failure to meet regulatory requirements for the management of hazardous wastes newly subject to RCRA, and in particular its management of such wastes in surface impoundments that do not meet RCRA requirements. Petitioner presented no evidence in district court that FMC's violations of RCRA have had any effect on human health or the environment outside the boundaries of the FMC facility. See Pet. App. 5a, 8a-9a.

3. In January 1997, after the complaint in this case obtained administrative approval within the Department of Justice, the government contacted the Tribes' Land Use Commission and legal counsel to invite the Tribes' participation in negotiations with FMC, pursuant to Executive Order No. 12,778, 56 Fed. Reg. 55,195 (1991). Representatives of the federal government also met with representatives of the Tribes, including counsel for the Tribes and members of the Business Council, the Tribes' governing body, to discuss the violations and the anticipated negotiation process.[2] The

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to operate in lieu of the federal program. Once a State's hazardous-waste management program has been authorized, it is enforceable by both the State and EPA. See 42 U.S.C. 6926, 6928. RCRA does not, however, authorize such state regulation of hazardous wastes on Indian reservations. See *Washington Dep't of Ecology* v. *EPA*, 752 F.2d 1465 (9th Cir. 1985). Accordingly, there is no authorized state program that operates in lieu of the federal RCRA program on the Fort Hall Indian reservation, and so the federal RCRA program is applicable. See 40 C.F.R. 271.1(h).

[2] The Tribes' suggestion (Pet. 4) that the Tribal governing decision-making body was never consulted by EPA is contradicted by the record, which shows that, on February 26, 1997, even before the government's first negotiating session with FMC, representatives of the federal government met with the Tribes' Land Use Commission, counsel for the Tribes, and various members of the Business Council, the Tribes' governing body, to discuss the viola-

Tribes participated fully in the United States' subsequent negotiations with FMC relating to injunctive relief and potential Supplemental Environmental Projects (SEPs), which are projects not otherwise required by any law that can result in penalty mitigation.[3] The negotiations spanned approximately 18 months, during which the Tribes were provided with all proposals and materials obtained from FMC, sampling results, and drafts of the attachments to the Consent Decree setting forth the injunctive relief and SEPs. See Gov't C.A. Supp. E. R. 36-40, 127-133 (responses to comments and affidavits describing EPA contacts with Tribes). The Tribes also were consulted privately by EPA in connection with the negotiations, and were regular participants in meetings and discussions with FMC regarding both injunctive relief and SEPs. Pet. App. 3a. The only discussions with FMC that were not open to the Tribes concerned the penalty amount to be paid by FMC to the United States as a result of its violations of federal law. *Ibid.*

4. In the settlement that emerged from the negotiations, FMC agreed to injunctive relief estimated to cost

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tions and the anticipated negotiation process. See Pet. App. 3a-4a (referring to memoranda and affidavits filed with the district court that documented the United States' contacts with the Tribes).

[3] SEPs are environmentally beneficial projects that a defendant undertakes in settlement of an enforcement action, but which the defendant is not otherwise legally required to perform. Under EPA's Supplemental Environmental Project Policy, EPA in some circumstances may mitigate civil penalties in settlement of an enforcement action if the defendant agrees to conduct an environmentally beneficial project not required by any law. See 63 Fed. Reg. 24,796 (1998). Such projects must be prompted by the enforcement action and must exhibit an appropriate nexus to the alleged violations.

more than $100 million, including the management of all wastes containing phosphorus as ignitable and reactive hazardous wastes, the construction of a waste treatment plant to render the facility's phosphorus waste non-hazardous and to comply with the LDR regulations (the LDR Treatment System), the closure of its illegal ponds according to various requirements, and compliance with RCRA regulations requiring secondary containment systems for tanks and pipes storing and carrying hazardous wastes. The Tribes issued permits to FMC for the continued operation of certain ponds pending completion of the LDR Treatment System. FMC further agreed to pay a civil penalty of $11,864,800, and committed to perform a number of SEPs to reduce particulate emissions from FMC by approximately 67%, or approximately 436 tons per year, with an estimated cost of $64 million. The SEPs also include a health-assessment project for the benefit of the Tribes valued at $1.65 million. See generally Pet. C.A. E. R. 32-127 (Consent Decree).

Following a request by the Tribes to share in the penalty to be paid by FMC under the Consent Decree, EPA representatives met with the Tribes, and the United States subsequently agreed to delay signing and lodging the Consent Decree so that options for penalty sharing with the Tribes could be further explored. The United States then offered the Tribes an opportunity to become a formal party to the legal action by joining their own tribal claims with the federal claims and resolving those claims through the Consent Decree, which would allow the penalty to be shared with the Tribes.[4] See Gov't C.A. Supp. E. R. 41-42. The Tribes

[4] EPA's policy about penalty sharing, as set forth in EPA's memorandum entitled *Division of Penalties with State and Local*

declined that offer, however, and raised objections to the injunctive relief and SEPs embodied in the Consent Decree.

5. On October 16, 1998, the United States filed the Complaint against FMC and lodged the proposed Consent Decree with FMC resolving the government's claims. Pet. App. 7a. Consistent with Department of Justice regulations, 28 C.F.R. 50.7(a), the United States then provided the public an opportunity to comment before seeking entry of the Consent Decree. 63 Fed. Reg. 58,770 (1998) (establishing thirty-day comment period); *id.* at 66,582 (extending comment period). EPA also published notice of the settlement in the *Idaho State Journal* and *Sho-Ban News*, and conducted public sessions in Pocatello, Idaho, and on the Shoshone-Bannock Fort Hall Reservation, to answer questions about the Consent Decree. See Gov't C.A. Supp. E. R. 4. The Tribes submitted objections to the Consent Decree during the public comment period. See *id.* at 4-5. The United States formally responded to all comments in writing and, on March 29, 1999, moved to enter the Consent Decree in the district court, presenting both the comments and the responses to the district court.

Governments (Oct. 30, 1985), permits the sharing of "civil penalties that result from [state and local governments'] participation, to the extent that penalty division is permitted by federal, state, and local law, and is appropriate under the circumstances." The Memorandum notes, however, that penalty sharing outside its guidelines may run afoul of 31 U.S.C. 3302, which requires that "funds properly payable to the United States must be deposited in the Treasury." See *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General* (*In re Steuart*), 4B Op. Off. Legal Counsel 684 (1980); *Emery* v. *United States*, 186 F.2d 900, 902 (9th Cir.), cert. denied, 341 U.S. 925 (1951).

The Tribes intervened and opposed entry of the Consent Decree. The Tribes objected to the Consent Decree because it allows FMC to come into RCRA compliance over a period of several years, it allows waste in all but one of the ponds to be capped in place without deactivating and stabilizing the waste, and it does not dictate waste-treatment methods or additional requirements for air-pollution reduction SEPs. The Tribes asserted that the United States had breached a special trust responsibility to the Tribes in agreeing to those aspects of the settlement. The United States argued in response that RCRA, as a statute of general application, does not create any special rights for Tribes in connection with the enforcement of federal law, and that its inclusion of and consultation with the Tribes throughout negotiations fully satisfied its general trust responsibility to the Tribes.

6. On July 13, 1999, the district court approved and entered the Consent Decree. The court ruled that the Consent Decree is "fair, reasonable, [and] in the public interest," Pet. App. 10a, notwithstanding the opposition of the Tribes. On the matter of the United States' trust responsibility to the Tribes the court ruled that, "[r]egardless of which view of the scope of the United States' trust responsibilities is correct, the Consent Decree satisfies those responsibilities." *Id.* at 8a. The court explained that "[a] principle [*sic*] flaw in the Tribes' opposition is that, although the United States' trust responsibilities are significant and important, they do not allow the Tribes to prescribe the environmental-remediation measures the United States should pursue." *Ibid.* The district court further noted that "the record contains no legitimate basis on which the Court could conclude that capping [the waste storage ponds] allows an unreasonable health risk to go

unchecked." *Id.* at 8a-9a. The court also rejected the Tribes' claims that the air pollution reduction projects recognized as SEPs in the Decree were insufficient. *Id.* at 9a-10a. Given the lack of federal air-pollution regulations for particulate air emissions then enforceable against FMC, the court concluded that it was "very difficult for the Court to say that the United States was required to obtain more in order to settle its RCRA claims." *Id.* at 10a.

7. The court of appeals affirmed. Pet. App. 2a-6a. The court held that, while the United States has a "general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes," and that RCRA is not a statute "aimed specifically at protecting Indian tribes." *Id.* at 4a. The court noted that it "has indicated [in prior cases] that the EPA should consult potentially affected tribes before taking action," but held that "the record disclosed a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and a reasonable settlement reached at arm's length between the government and FMC." *Id.* at 5a. Accordingly, the court ruled that "[t]he United States * * * satisfied its general trust duty to the Tribes." *Ibid.*

ARGUMENT

The court of appeals correctly held that the United States' trust responsibility to petitioner was fully discharged by its compliance with generally applicable federal statutes and regulations in enforcing RCRA by entering into a consent decree with respondent FMC.

Moreover, nothing in RCRA or this Court's decisions suggests that judicial deference to agency expertise in the implementation of a complex statute such as RCRA should be abandoned when the party challenging that implementation is an Indian Tribe. Nor does the court of appeals' decision conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner principally contends (Pet. 6-13) that, in enforcing RCRA against FMC based on FMC's violations of the statute within the boundaries of an Indian reservation, the United States was obligated to go beyond merely a proper adherence to RCRA and its implementing regulations, and was bound to engage in a form of heightened implementation of the statute and regulations. Petitioner bases that claim on the United States' "unique trust relationship" to Indian Tribes. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). That unique trust relationship that the Court has recognized, however, does not require the federal government, when it is implementing generally applicable federal statutes, to follow an enforcement policy for the benefit of Indian Tribes that is different from its enforcement policy for the benefit of the general public.

In cases where this Court has found a heightened trust obligation on the part of the United States to act for the benefit of Indian Tribes, the federal government was charged with administering statutes or regulations that were enacted for the special benefit of Tribes or their members. For example, in *United States* v. *Mitchell*, 463 U.S. 206 (1983), the Court recognized a cause of action for money damages against the United States arising out of a violation of the trust relationship

between Indian Tribes and the United States. That recognition, however, provides no support for petitioner's claim in this case. In *Mitchell*, the Indians seeking damages against the United States predicated their claims on specific statutes and regulations that gave the federal government "responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. Thus, the cause of action recognized in *Mitchell* was limited by the requirements of the federal statutory and regulatory provisions setting out the particular governmental responsibility. As the Court explained in *Mitchell*, such statutes and regulations both "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Ibid.* Accordingly, the United States may be required to compensate Indian Tribes whose resources it manages for any damages resulting from a breach of its trust obligation if, but only if, a fiduciary relationship has been established and defined by statute or regulation. *Id.* at 226.

The precondition that a specific obligation to Indians be established by positive law is fatal to petitioner's claim in this case. RCRA was not enacted for the specific protection of Tribes or tribal lands. It is, rather, a statute of general application. RCRA also does not create any specific obligations to Indian Tribes analogous to those created by the statutes addressed in *Mitchell*, and it does not impose any obligations or duties on the United States toward Tribes beyond the duties imposed on the United States generally with respect to all citizens.

Petitioner argues (Pet. 14) that, in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), this Court imposed a duty to adhere to special, heightened trust standards when the government's enforcement of a federal statute

implicates tribal interests. That reliance on *Ruiz* is misplaced for the same reason that petitioner's reliance on *Mitchell* is in error. *Ruiz* involved the Snyder Act, 25 U.S.C. 13, a statute enacted for the special benefit of tribal members, and the Court's decision in that case turned on the appropriate interpretation of that statute's coverage. See 415 U.S. at 205-206. The Court held that the Secretary of the Interior was required to promulgate regulations before excluding from eligibility for assistance payments Indians who had a legitimate expectation of eligibility to receive benefits under a statute enacted for the benefit of Indians. See *id.* at 236. This case, unlike *Ruiz*, does not involve a statute enacted for the special benefit of Indians or any claim that the agency failed to comply with its own internal procedures.

Petitioner contends (Pet. 6-7), however, that a heightened duty of the United States to Tribes under RCRA may be inferred from the fact that RCRA may be enforced on Indian reservations only by the United States, whereas the statute allows States to apply for federal authorization of their own hazardous-waste programs, which then operate in lieu of the federal program if the state program is approved by EPA as "equivalent to the Federal program." See 42 U.S.C. 6926(b). But the fact that RCRA does not establish a program for either tribal or state hazardous-waste programs to be authorized and operate in lieu of implementation of federal requirements on tribal lands does not create a federal trust obligation comparable to management of tribal land or resources for the special benefit of a Tribe. RCRA does not grant the United States a role in enforcing RCRA Subtitle C in Indian country that is different from, or greater than, the federal RCRA Subtitle C program outside Indian

country. Moreover, the federal government has the same authority to enforce RCRA nationwide, even in States with authorized programs. 42 U.S.C. 6928(a)(2). And RCRA does not mandate specific enforcement actions in Indian country or anywhere else. See 42 U.S.C. 6928(a)(1) (EPA "may" take enforcement action upon learning of violation). RCRA therefore does not create in the United States a special trust obligation to Tribes in the implementation and enforcement of RCRA.[5]

The court of appeals' decision is consistent with a long line of similar decisions in the courts of appeals holding that, absent special statutes or regulations like those at issue in *Mitchell* that create a particular trust duty, the United States satisfies its trust responsibility to Indian Tribes through the proper implementation and enforcement of generally applicable federal law.[6]

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[5] Nor are the Tribes wholly dependent upon the United States for the regulation of hazardous waste on reservation lands. While a tribal program, unlike a state program, may not be authorized to operate "in lieu of" federal regulations under RCRA, see 42 U.S.C. 6926(b), nothing in RCRA affects a Tribe's ability to establish its own waste programs and enforcement authorities. See *Backcountry Against Dumps* v. *EPA*, 100 F.3d 147, 151 (D.C. Cir. 1996) (although EPA could not approve tribal solid waste management plan, "[w]ith its comprehensive environmental codes and an agency and court devoted solely to enforcing tribal and federal environmental regulations, the tribe has as much authority to create and enforce its own solid waste management plan as it ever had"); *Washington Dep't of Ecology*, 752 F.2d at 1471 (recognizing a "federal commitment to tribal self-regulation in environmental matters"). Tribes also have the right to institute citizen suits against an alleged offending facility. 42 U.S.C. 6972; see *Backcountry Against Dumps*, 100 F.3d at 152.

[6] See *Osage Tribal Council* v. *United States Dep't of Labor*, 187 F.3d 1174, 1183-1184 (10th Cir. 1999) (holding that Tribes did not

And no court of appeals decision holds that the United States must adhere to a special, heightened trust obligation to Indian Tribes when it is enforcing a generally applicable statutory provision in a situation that affects members of the Tribe.

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identify any breach of the Secretary of Labor's fiduciary duty to Tribe in "carrying out his duties with respect to Congress' mandate on safe drinking water"), cert. denied, 120 S. Ct. 2657 (2000); *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("[U]nless there is a specific duty that has been placed on the government with respect to Indians, this [trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Skokomish Indian Tribe* v. *FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (the "Tribe's permit application is barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance"); *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."); *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410, 1418-1421 (9th Cir. 1990) (holding that Navy satisfied trust responsibility to Tribe to preserve and protect fishery through actions compelled by the Endangered Species Act, and was not obligated as a matter of trust responsibility to adopt alternative conservation proposals advanced by the Tribe); *Washington Dep't of Ecology*, 752 F.2d at 1472 (holding that EPA may promote tribal participation in hazardous waste management under RCRA but "need not delegate its full authority to the tribes"); *Nance* v. *EPA*, 645 F.2d 701, 711 (9th Cir.) (holding that EPA fulfilled its trust responsibility to the affected Tribes by performing its responsibilities under the Clean Air Act before approving air quality redesignation), cert. denied, 454 U.S. 1081 (1981); cf. *North Slope Borough* v. *Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.").

2. Petitioner also contends (Pet. 13-18) that the court of appeals erred in applying a deferential standard of review to the government's determination to implement RCRA in this case by entering into a consent decree with FMC. That deferential approach was entirely proper. In light of EPA's responsibilities, assigned to it by Congress, to evaluate the environmental consequences of a RCRA violation and any remedy ordered against the violator, as well as to balance important interests in deciding how to implement a complex statute like RCRA, "a district court reviewing a consent decree signed by the United States on behalf of the EPA must refrain from second-guessing the Executive Branch" in evaluating the proper means to enforce such a complex statute. Pet. App. 4a (internal quotation marks omitted). Moreover, there is no basis in this case for departing from the long-established proposition that the expertise of an agency charged with administering a highly technical statute is entitled to deference. See *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). Accordingly, the courts generally "decline * * * to assess the wisdom of the Government's judgment in negotiating and accepting [a] * * * consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 689 (1961).

The United States entered into this settlement upon concluding that any compromises made to achieve settlement and to avoid litigation on difficult issues will not jeopardize either human health or the environ-

ment.[7] As both the district court and the court of appeals noted, petitioner presented no evidence to the contrary. Pet. App. 5a, 8a-9a. The lower courts therefore properly deferred to EPA's environmental expertise in determining that the consent decree was fair, reasonable, and in the public interest. Moreover, because (as we have explained, pp. 12-14, *supra*) RCRA establishes no special statutory trust responsibility on the part of the United States to Indian Tribes, the question for the lower courts in deciding whether to approve the Consent Decree was whether EPA fulfilled its general trust responsibilities by implementing RCRA faithfully and in consultation with the Tribes. Petitioner contends that the United States' trust relationship with Indian Tribes imposed a specific responsibility on the part of the government to negotiate a consent decree that "best protect[s] the Tribes' interests" (Pet. 17), but petitioner points to no authority for that proposition, and indeed the courts are neither

[7] In particular, the settlement will require FMC to achieve RCRA compliance—based on EPA's interpretation of RCRA's requirements—much faster than would litigation, and provide substantial relief from air pollution that could not be legally compelled. Cf. *United States* v. *Georgia-Pac. Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996) (approving a consent decree that was "technically adequate," obtained compliance "in a far shorter time than if the parties had litigated the action," and included SEPs to "improve the air quality in the regional area impacted by the alleged violations"); *United States* v. *Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1075-1076 n.4, 1080 (W.D.N.Y. 1982) (approving consent decree requiring injunctive relief to control migration of chemicals in the groundwater, including use of temporary storage lagoons, which resolved claims on which "plaintiffs have no guarantee of ultimate success," thus achieving valuable environmental results "without the expenditure of considerable time, money, and effort in litigation"), aff'd, 749 F.2d 968 (2d Cir. 1984).

required nor authorized to substitute such scrutiny for the traditional deference given Executive Branch agencies in interpreting and implementing complex statutes such as RCRA.

Contrary to petitioners' suggestion that the lower courts erroneously deferred to EPA as an expert on Indian affairs (Pet. 17-18), those courts invoked well-established principles of judicial deference to agency expertise in assessing scientific and technical matters and in reviewing settlements based on that expertise. See, *e.g.*, *United States* v. *Cannons Eng'g Group*, 899 F.2d 79, 90 (1st Cir. 1990) (with respect to assessment of cleanup costs, "[i]f the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise"); *Conservation Law Found., Inc.* v. *Franklin*, 989 F.2d 54, 59 (1st Cir. 1993) ("[W]e recognize a strong and clear policy in favor of encouraging settlements, especially in complicated regulatory settings.") (internal quotation marks omitted); see also *United States* v. *Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (noting that those objecting to such a settlement have "a heavy burden of demonstrating that the decree is unreasonable"), cert. denied, 501 U.S. 1250 (1991).[8] The

[8] The Department of Justice also possesses relevant expertise in evaluating when a case should be settled rather than litigated. See *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir.) (Attorney General has discretion in "controlling government litigation and in determining what is in the public interest."), cert. denied, 429 U.S. 940 (1976); *United States* v. *Akzo Coatings, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) (recognizing a presumption in favor of government-negotiated settlements that is "particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative

court deferred to EPA in its role as evaluator of the environmental consequences of the identified RCRA violations and the measures undertaken by FMC to remedy those violations, not in any role (which EPA did not assume) as expert on Indian law or trust law. And because the lower courts properly deferred to EPA's assessment of those environmental consequences, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
ELIZABETH A. PETERSON
DEBORAH M. REYHER
Attorneys

APRIL 2001

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agency like EPA which enjoys substantial expertise in the environmental field").