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Enforcing the Federal-Indian Trust Relationship After Mitchell

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ENFORCING THE FEDERAL-INDIAN TRUST RELATIONSHIP AFTER *MITCHELL* *

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I. THE TRUST RELATIONSHIP: AN UNCERTAIN DOCTRINE OF INDIAN LAW

The legislative,[1] judicial,[2] and executive branches[3] of the government have acknowledged Indian tribes' special relationship to the federal government. Borrowing concepts from trust law, courts have described this relationship most eloquently: the relationship is like "that of a ward to his guardian,"[4] imposing "moral obligations of the highest responsibility and trust,"[5] that should "be judged by the most exacting fiduciary standards."[6] For six decades courts invoked this relationship, primarily, however, as the source of federal "plenary" power to regulate exclusively a wide spectrum of Indian affairs—from the management of Indian land and resources,[7] to

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* On June 7, 1982, the Supreme Court granted petition for certiorari in Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1748).

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1. *See, e.g.*, Indian Child Welfare Act of 1978, § 2, 25 U.S.C. § 1901 (Supp. III 1979); Indian Health Care Improvement Act, § 2, 25 U.S.C. § 1601(a) (1976); 25 U.S.C. § 175 (1976) (United States Attorney shall represent Indians in lawsuits).

2. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 414-15 (1980) (guardianship limits government power to dispose of Indian land); Morton v. Mancari, 417 U.S. 535, 552 (1974) ("special relationship"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (guardian-ward relationship) (Marshall, C.J.).

3. "[T]he special relationship between the Indian tribes and the Federal government . . . continues to carry immense moral and legal force." Special Message to the Congress on Indian Affairs, 213 *Pub. Papers of Richard Nixon* 564, 566 (July 8, 1970). "[Y]ou will perceive . . . the fatherly care the United States intend to take of the Indians." President George Washington, *quoted in* Seneca Nation v. United States, 173 Ct. Cl. 917, 924 (1965) (emphasis omitted). *See also* letter from Leo M. Krulitz, Solicitor, United States Department of the Interior to James W. Moorman, Assistant United States Attorney General (Nov. 21, 1978) (affirming the Carter Administration's view of the relationship), *reprinted in* Brief for Respondent, Appendix, United States v. Mitchell, 445 U.S. 535 (1980).

4. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

5. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

6. *Id.*

7. *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (power to dispose of Indian land

the application of federal criminal laws to tribal members on reservations,[8] and even to the dissolution of Indian tribes' governing structures.[9]

During the last twenty years, Indian tribes have sought to establish that this right of exclusive federal regulatory power gives rise to concomitant fiduciary duties. In response to the essential fairness of this claim, courts awarded equitable relief, and even money damages, to tribes suing the federal government for breach of trust in a handful of cases[10] before

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as guardian of the tribe); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (power to lease Indian land as guardian).

8. United States v. Kagama, 118 U.S. 375 (1886) (upholding constitutionality of the Major Crimes Act as an exercise of congressional guardianship power).

9. *See* Act of Mar. 1, 1901, ch. 676, § 46, 31 Stat. 861, 872 (Creek Nation tribal government to cease as of March 4, 1906, unless extended by Congress); S.J. Res. 7, 34 Stat. 822 (1906) (extending tribal government until all tribal property distributed). *See generally* Board of Comm'rs v. Seber, 318 U.S. 705, 716 (1942).

10. This handful of cases becomes larger when two categories are added. The first category includes claims brought under special jurisdictional acts during the 83 years Indian tribes were explicitly barred from suing when the government waived its sovereign immunity for damage claims by creating the Court of Claims. Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767 (for a discussion of this statute and a criticism of the Indian law bar's ready acquiescence to and broad interpretation of the Act, see Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D.L. REV. 447, 461-62 n.108 (1981)). To sue, tribes had to petition Congress for a statute waiving sovereign immunity and vesting the Court of Claims with jurisdiction. *See, e.g.*, Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944) (construing Act of Sept. 3, 1935, ch. 839, 49 Stat. 1085, *as amended by*, Act of Apr. 8, 1938, ch. 120, 52 Stat. 208). Often these claims involved breach of trust, especially mismanagement of tribal trust funds. *See, e.g., Menominee Tribe*, 101 Ct. Cl. at 10. Some of these cases are gold mines of favorable language regarding the government's trust responsibilities. *See, e.g., supra* notes 5-6 and accompanying text. Nevertheless they are doubtful precedents, for the jurisdictional acts have been regarded as creating claims in and of themselves in recent years. *See* United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951). For example, in *Menominee Tribe*, the statute permitted the court to adjudicate claims based on treaty, statute or agreement *or* arising from mismanagement of property or money. Act of Sept. 3, 1935, ch. 839, § 1, 49 Stat. 1085, 1085. It also instructed the court to apply to the government the same standards applicable to a private trustee. *Id.* § 3. The Menominee Tribe successfully pressed several breach of trust claims under this statute. *See, e.g.*, Menominee Tribe v. United States, 67 F. Supp. 972 (1946) (mismanagement of trust funds); Menominee Tribe v. United States, 118 Ct. Cl. 290 (1951) (mismanagement of timber). *See also* Menominee Tribe v. United States, 119 Ct. Cl. 832 (1951) (all cases settled for $8.5 million). Other statutes were less explicit. *Compare, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 295 (1942) ("all legal and equitable claims") *with* United States v. Blackfeather, 155 U.S. 180, 195 (1894) (to recover money wrongfully diverted from tribal fund) *and* Sioux Tribe v. United States, 64 F. Supp. 312 (Ct. Cl. 1946) (to settle ownership of stock & funds held in trust). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 373-78 (1942 & photo reprint).

The second category comprises claims brought under the Indian Claims Commission Act, 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. III 1979), 28 U.S.C. § 1505 (1976). The Claims Commission Act set up a tribunal to adjudicate claims accruing before 1946 with appellate jurisdiction in the Court of Claims. These claims included breach of trust claims, usually brought as accounting claims. *See* 25 U.S.C. § 70(a) (1976). *See generally* UNITED STATES

1980.[11] Nevertheless, the exact source of this special relationship remains uncertain. Ownership of Indian land,[12] the helplessness of Indian tribes in the face of a superior culture,[13] higher law,[14] the entire course of dealings

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INDIAN CLAIMS COMMISSION, FINAL REPORT 8 (1978). Again, the decided cases often contain glowing language about the trust relationship, but must be regarded cautiously as precedent. *See, e.g.*, Northern Paiute Nation v. United States, 634 F.2d 594, 605-06 (Ct. Cl. 1980) (breach of fair and honorable dealings by abandoning tribal sawmill); Ottawa Tribe v. United States, 166 Ct. Cl. 373, 379, *cert. denied*, 379 U.S. 929 (1964) (application of private trust law principles to hold U.S. liable for conflict of interest of agent). These breach of trust decisions have also been regarded as exercises of the Commission's jurisdiction to decide "moral" rather than "legal" claims. *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 140 F. Supp. 776, 781 (Ct. Cl. 1956). *Cf.* United States v. Mitchell, 445 U.S. 535, 540 & n.2 (1980). *See also* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1214 n.8 (1975).

These pre-1946 Indian Claims Commission cases and special jurisdictional act cases are often cited indiscriminately by courts, especially as authority for the existence of a trust relationship. *See., e.g.*, Eric v. Secretary of United States Dep't of Hous. and Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978) (reliance on special act case; held U.S. had a trust duty to Alaskan natives); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1243, 1246 (N.D. Cal. 1973) (reliance on special act cases). Because of the doubtful precedential value of these special act cases, this article will focus on cases brought under traditional jurisdictional statutes.

11. *See* Oglala Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979) (injunctive relief awarded tribe because removing tribal president's brother from position as superintendent of tribe's BIA office violated specific statute, "letter and spirit of internal guidelines" and "distinctive obligation of trust"); White v. Califano, 581 F.2d 697 (8th Cir. 1978) (declaratory relief that trust relationship requires government to pay medical costs for indigent Indian); Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979) (injunctive and declaratory relief awarded tribe for mismanagement of oil and gas leases); Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978) (equitable relief and damages awarded for breach of trust in terminating rancheria unlawfully); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977) (equitable relief; same facts as *Smith*); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) (damages and equitable relief for mismanagement of trust funds); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (equitable relief; duty to avoid conflicts of interest in preserving water for tribal lake); Duncan v. United States, 597 F.2d 1337 (Ct. Cl. 1979) (damages awarded for breach of trust in terminating rancheria unlawfully), *vacated and remanded*, 446 U.S. 903 (1980), *decision on remand*, 667 F.2d 36 (Ct. Cl. 1981), *pet. for cert. filed*, 50 U.S.L.W. 3785 (U.S. Mar. 30, 1982) (No. 81-1747); Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) (damages awarded for breach of trust in sale of right-of-way for less than fair market value); Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) (order partially disposing of subordinate legal issues; trial judge to apply trust principles in determining whether Secretary of Interior breached trust in mismanaging trust funds).

12. *See, e.g.*, Nadeau v. Union Pac. R.R., 253 U.S. 442, 446 (1920); United States v. Cook, 86 U.S. (19 Wall.) 591 (1873); United States v. Leslie 167 F. 670 (D.S.D. 1909).

13. *E.g.*, DeCoteau v. District County Court, 420 U.S. 425 (1975); Monson v. Simonson, 231 U.S. 341, 345 (1913); Oneida Tribe v. United States, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964).

14. *See* United States v. Douglas, 190 F. 482, 490 (8th Cir. 1911).

between the government and Indian tribes,[15] treaties,[16] and "hundreds of cases and . . . a bulging volume of the U.S. Code"[17] have all been cited as the source.

Pressed by the necessity of determining whether a breach of trust has in fact occurred, courts have defined somewhat more specifically the scope of the federal government's fiduciary duties by looking to treaties,[18] statutes,[19] the federal common law of trusts (heavily influenced by the *Restatement of Trusts*),[20] and a combination of these sources for guidance. Furthermore, when relying on statutes and treaties as the source of enforceable fiduciary duties, courts have read them broadly,[21] often applying rules of construction favoring Indian tribes.[22] In the 1970's particularly,

15. *E.g.*, Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968); United States v. Seminole Nation, 299 U.S. 417 (1937); Menominee Tribe v. United States, 7 INDIAN L. REP. (AM. INDIAN LAW TRAINING PROGRAM) 5093 (Ct. Cl. Aug. 14, 1980).

16. *See* cases cited *infra* note 18.

17. White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978).

18. *E.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942); Yankton Sioux Tribe v. United States, 623 F.2d 159 (Ct. Cl. 1980); Menominee Tribe v. United States, 7 INDIAN L. REP. (AM. INDIAN LAW TRAINING PROGRAM) 5093 (Ct. Cl. Aug. 14, 1980); Confederated Salish & Kootenai Tribes v. United States, 175 Ct. Cl. 451 (1966).

19. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (Nonintercourse Act creates a trust relationship to protect Indian land); Oglala Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979) (Indian Reorganization Act); Quinault Allottee Ass'n v. United States, 485 F.2d 1391 (Ct. Cl. 1973) (construing 25 U.S.C. § 406(a) to permit deduction of expenses of administering timber reserves; therefore no breach of trust).

20. RESTATEMENT (SECOND) OF TRUSTS (1959). United States v. Mason, 412 U.S. 391 (1973) (the scope of fiduciary duties is a matter of federal common law); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) (applying Restatement).

21. *See, e.g.*, Duncan v. Andrus, 517 F. Supp. 1, 5 (N.D. Cal. 1977) (established law requires legislation to be interpreted for the benefit of Indians). *Cf.* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (Nonintercourse Act imposes a fiduciary duty on United States to protect Indian tribal lands).

22. From the beginning courts have employed liberal rules of construction to treaties affecting Indian tribes. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552-55, 582 (1832) (interpretation in light of Indian understanding); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation"); Tulee v. Washington, 315 U.S. 681, 685 (1942) (state licensing of fishing rights preempted by treaty). Similarly, statutes ratifying treaties or agreements also have been liberally construed, "doubtful expressions . . . resolved in favor of a weak and defenseless people." Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (collecting cases). A liberal rule also has been applied when statutory language is ambiguous. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (construing Act of Aug. 15, 1953, Pub. L. No. 280, § 4, 67 Stat. 588, 589) (current version at 28 U.S.C. § 1360 (1976 & Supp III 1979)); Squire v. Capoeman, 351 U.S. 1, 6-7, (1956) (tax exemption). *Compare* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 484 (1979) (Stewart, J.) *with* 439 U.S. at 507 (Marshall, J., dissenting) (collecting cases). *But cf.* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) (ascertainable congressional intent controls

the courts handed down many favorable decisions. For example, courts have held the government liable for mismanagement of property,[23] ordered the government to manage trust funds prudently,[24] and imposed duties on the government to preserve water for a tribal lake.[25] Nevertheless, before 1980 the scope of the government's fiduciary duties remained uncertain as the trust relationship doctrine continued its maturation. In 1980 that process took a decisive turn in *United States v. Mitchell*.[26] To understand this new direction, the prerequisites for suing to enforce the trust relationship must be understood.

To sue the government for breach of trust, a tribe must satisfy three major threshold requirements: bring its claim in a competent court, one statutorily vested with subject matter jurisdiction; escape the doctrine of sovereign immunity by establishing the government's consent to be sued; and, finally, assert a claim, a federally recognized right entitling it to the relief requested.[27]

The first requirement, subject matter jurisdiction, has been easily satisfied. Tribes seeking money damages for breach of trust have invoked the Tucker Act,[28] empowering the Court of Claims[29] (and the district courts in

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over understanding of Indians when statute is ambiguous). The trust responsibility has usually been cited as the source of the liberal rules. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 236 (1973).

23. Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979) (oil & gas leases); Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966) (helium lease).

24. *E.g.*, Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

25. Pyramid Lake Paiute Tribe v. United States, 354 F. Supp. 252 (D.D.C. 1973).

26. 445 U.S. 535 (1980), *decision on remand*, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1748).

27. The first and third requirements often coincide in Indian breach of trust claims, at least when the statutes discussed below are invoked as bases for jurisdiction. For instance, a court may determine federal question jurisdiction is not present because the plaintiff has not stated a claim based on federal law. *See., e.g.*, Epps v. Andrus, 611 F.2d 915, 917 n.2 (1st Cir. 1979) (no jurisdiction because no claim). Nevertheless, the two concepts are analytically distinct. *See, e.g.*, Duncan v. Andrus, 517 F. Supp. 1, 1-2 n.2 (N.D. Cal. 1977) (claim for equitable relief retained; claim for money damages transferred to the Court of Claims). *See also* Wheeldin v. Wheeler, 373 U.S. 647 (1963).

28. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified, as amended, in scattered sections of 28 U.S.C.).

29. 28 U.S.C. § 1491 (1976 & Supp. III 1979). Effective October 1, 1982, the Federal Courts Improvement Act will make some radical changes in Courts of Claims structure, by merging the present Court of Claims and Court of Customs and Patent Appeals into a new court of appeals, the United States Court of Appeals for the Federal Circuit and by creating an Article I trial court, the United States Claims Court, to handle the present trial jurisdiction of the Court of Claims. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 105, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 25-28 (to be codified at 28 U.S.C. §§ 41, 171-77). This statute will speed up the resolution of Indian claims and also

cases involving less than $10,000)[30] to hear a variety of claims against the government, including claims "founded . . . upon . . . any Act of Congress."[31] Since many statutes refer directly[32] or indirectly[33] to a trust relationship, the Court of Claims generally has invoked this provision as the basis for its jurisdiction.[34] In the federal district courts, tribes usually have invoked general federal question jurisdiction[35] or the Administrative Procedure Act (APA)[36] as the jurisdictional bases of claims for declaratory[37]

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provide uniformity in the law by requiring many Tucker Act claims to be appealed to the Federal Circuit Court. *Id.* at §§ 127, 128. It does not affect any of the substantive issues discussed in this paper. For the legislative history see S. REP. NO. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CONG. & AD. NEWS 11.

30. 28 U.S.C. § 1346(a)(2) (1976). The Federal Courts Improvement Act provides that concurrent Tucker Act cases based on an act of Congress will still be presented to the regional courts of appeal instead of the new Court of Appeals for the Federal Circuit. Federal Court Improvement Act of 1982, §§ 127-128. *See generally* S. REP. NO. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 30.

31. "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ." 28 U.S.C. § 1491 (1976). A treaty has been held to be an Act of Congress for purposes of Tucker Act jurisdiction. Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970). For a history of the Tucker Act, see Hughes, *supra* note 10, at 451-54; Orme, *Tucker Act Jurisdiction Over Breach of Trust Claims*, 1979 B.Y.U. L. REV. 855-60. The Court of Claims may only award equitable relief as an adjunct to its primary jurisdiction to award money damages. Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962); Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483, 487 (1966) (tribe may only sue for an accounting of trust funds after it has demonstrated government has violated a statutory duty requiring an accounting to assess damages).

32. *E.g.*, 25 U.S.C. § 463(d) (1976 & Supp. III 1979) (title to lands acquired for Umatilla reservation to be held "in trust" by the United States); *id.* § 348 (allotted land to be held "in trust for the sole use and benefit" of the Indian allottee).

33. *E.g.*, 25 U.S.C. § 155 (1976) (miscellaneous revenues derived from Indian reservations to be deposited in the Treasury "for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes"); *id.* § 158 (Secretary empowered to invest payments for land at a minimum 5% interest).

34. *See, e.g.*, Quinault Allottees Ass'n v. United States, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973). *But cf.* Fields v. United States, 423 F.2d 380, 383-84 (Ct. Cl. 1970) (no Tucker Act jurisdiction over claim by alleged heir to share in oil and gas proceeds; state courts vested with exclusive jurisdiction over heirship matters); Gila River Pima-Maricopa Indian Community v. United States, 140 F. Supp. 776 (Ct. Cl. 1956) (claim of mismanagement filed in Court of Claims suspended pending the Indian Claims Commission's determination of whether its jurisdiction encompassed wrongs continuing after 1946). Examples of federal district courts invoking concurrent Tucker Act jurisdiction to litigate breach of trust claims are rare, because of the $10,000 limit on money damages. *See, e.g.*, Smith v. United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

35. 28 U.S.C. § 1331 (1976 & Supp. III 1979) (general federal questions), 28 U.S.C. 1362 (1976) (federal questions brought by Indian tribal plaintiffs).

36. 5 U.S.C. §§ 551-706 (1976 & Supp. IV 1980).

37. The Declaratory Judgment Act gives federal courts the power to issue declaratory

and injunctive relief against agencies of the federal government.[38] Except when tribes have attempted to avoid the Court of Claims by masking a money claim as one for equitable relief,[39] federal district courts have accepted jurisdiction willingly over breach of trust claims.[40]

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judgments in cases otherwise "within [their] jurisdiction." 28 U.S.C. § 2201-2202 (1976 & Supp. III 1979). Thus, the Act itself is not a basis for federal court jurisdiction. "Congress enlarged the range of remedies available in the federal courts, but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

38. *See, e.g.*, White v. Matthews, 420 F. Supp. 882 (D.S.D. 1976), *aff'd sub nom.* White v. Califano, 581 F.2d 697 (8th Cir. 1978) (§ 1331); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975) (§§ 1331, 2201, & APA), *aff'd*, 528 F.2d 370 (1st Cir. 1975); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973) (§ 1331 & APA); Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1119, 1136 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979) (§ 1362) (jurisdiction to seek injunction against United States to restrain diversion of tribal water rights). Another basis of jurisdiction successfully invoked by Indian tribes is the Mandamus and Venue Act, 28 U.S.C. § 1361 (1976). *See, e.g.*, Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) (§§ 1361, 1362, & APA). A final basis of federal court jurisdiction is a provision giving the federal district courts jurisdiction over suits "involving the right of any person, in whole or in part of Indian blood or descent," to an allotment of land. 25 U.S.C. § 345 (1976). *See also* 28 U.S.C. § 1353 (1976), a jurisdictional recodification of § 345 (construed in Scholder v . United States, 428 F.2d 1123, 1126 n.2 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970) (judicial focus has been on § 345)). In the cases coming within this narrow definition and involving an asserted breach of trust, Indian claimants have been successful in obtaining both specific relief and money damages. *See, e.g., Scholder*, 428 F.2d at 1126 & n.3 (9th Cir. 1970) (section 345 need not be limited to granting of allotment in first instance, but can be invoked to challenge governmental actions having the effect of putting a lien on allotted land). One court has held that since the government policy of allotting Indian land has been abandoned, a successful plaintiff may only receive money damages. Antoine v. United States, 637 F.2d 1177 (8th Cir. 1981). *But see* Vicenti v. United States, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973) (section 345 only permits declaratory relief because it does not also waive sovereign immunity).

39. *See, e.g.*, Alamo Navajo School Bd. v. Andrus, 664 F.2d 229 (10th Cir. 1981). Such cases can be transferred to the Court of Claims. 28 U.S.C. § 1406(c) (1976). *See, e.g.*, Hoopa Valley Tribe v. United States, 596 F.2d 435 (Ct. Cl. 1979). *See also* Cape Fox Corp. v. United States, 456 F. Supp. 784, 791-98 (D. Alaska 1978) (extensive discussion of district court jurisdiction), *modified*, 646 F.2d 399 (9th Cir. 1981).

40. *See, e.g.*, Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1136 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) (Indian federal question jurisdiction over mismanagement of water rights; obligation of federal courts to exercise their jurisdiction). *See also supra notes 35-37. Cf.* Epps v. Andrus, 611 F.2d 915, 917 n.2 (1st Cir. 1979) (no jurisdiction over claim by individual Indians for breach of trust because individuals are not beneficiaries of the Nonintercourse Act). District courts may sometimes award money damages when exercising jurisdiction under the Tucker Act, or § 345. *See supra* notes 30 & 38 and accompanying text. When the breach of trust can be characterized as a tort, an aggrieved person or tribe could also invoke the Federal Tort Claims Act (FTCA) for jurisdiction and as an explicit consent to be sued in the federal district courts. 28 U.S.C. § 1346(b) (1976). *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 150 (1972) (jurisdiction under FTCA, but no liability because no duty to terminated tribe). The FTCA has not been widely used, however, probably because of the need to prove negligence, the exemption for discretionary duties, 28 U.S.C. § 2680(a) even when discretion has been abused, and the need to file an

The second requirement, a statutory consent to be sued,[41] has posed no real problem, especially after Congress amended the Administrative Procedure Act in 1976, explicitly waiving sovereign immunity for claims based on the APA.[42] Even before the amendment, however, many district courts had readily found consent to be sued in the APA[43] and various other statutes,[44] when they considered the question at all.[45] The Court of Claims also found consent to be sued by viewing the same Tucker Act provision granting jurisdiction for claims based on statutes to be a waiver of immunity for such claims.[46]

The final requirement, a claim upon which relief can be granted, has also been easily met, but based on uncertain analysis. In recent breach of trust claims, courts have turned most often to statutes and regulations, but sometimes to treaties and even the federal common law, as a basis for tribal claims for equitable remedies and money damages.[47]

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administrative claim before suing. 28 U.S.C. § 2675(a). *See generally* Note, *A Remedy for a Breach of the Government-Indian Trust Duties*, 1 N.M.L. REV. 320, 326-28 (1971). In a proper case a district court can, of course, award both money damages and equitable relief. *See, e.g.*, Smith v. United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978) (concurrent Tucker Act and federal question jurisdiction).

41. *See, e.g.*, Naganab v. Hitchcock, 202 U.S. 473, 475-76 (1906) (sovereign immunity barred equitable relief for breach of trust); National Indian Youth Council v. Bruce, 485 F.2d 97, 99 (10th Cir. 1973) (28 U.S.C. § 1331 jurisdiction; no waiver of sovereign immunity); Skokomish Indian Tribe v. France, 269 F.2d 555, 558, 560 (9th Cir. 1959) (28 U.S.C. § 1331 jurisdiction; trust relationship alone cannot waive sovereign immunity). *See generally* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3654 (1976 & Supp. 1981).

42. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (current version at 5 U.S.C. § 702 (1976)).

43. *See, e.g.*, Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 254 (D.D.C. 1973); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971). *Contra, e.g.*, Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974).

44. *See, e.g.*, Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973) (28 U.S.C. § 1331 & APA); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 38 (N.D. Cal. 1973) (28 U.S.C. §§ 1361, 1362 & APA).

45. For a contrast to the perfunctory treatment of sovereign immunity in the cases cited in *supra* notes 43-44 and an analysis of the exceptions to the doctrine when agents of the United States are sued, see Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970) (construing 28 U.S.C. §§ 1353, 1361, 1362 (1976)).

46. *See* Mitchell v. United States, 591 F.2d 1300, 1303 (Ct. Cl. 1979) (collecting cases), *rev'd*, 445 U.S. 535 (1980). A tribe may sue only agents of the federal government, not Congress itself. *See* Menominee Tribe v. United States, 607 F.2d 1335 (Ct. Cl. 1979) (trust relationship not enforceable against Congress).

47. *See, e.g.*, Duncan v. Andrus, 517 F. Supp. 1, 5 (N.D. Cal. 1977) (statute); Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536, 540, 547, 550 (D.N.M. 1972) (regulations); Edwardsen v. Morton, 369 F. Supp. 1359, 1375 (D.D.C. 1973) (common law); Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1400-01, (Ct. Cl. 1973) (treaty & statute).

Thus, tribes have had little difficulty in gaining access to courts to raise trust claims.[48] Although few in number, these decisions have sparked a great deal of interest.[49] In his influential *Handbook of Federal Indian Law* published in 1946, Felix Cohen devoted little attention to the trust relationship;[50] in contrast, since the 1970's, the trust relationship has become a major doctrine of Indian law, with its enforceability virtually taken for granted. For example, in *Mitchell v. United States*,[51] the Court of Claims held that a claim for money damages against the government for mismanagement of land and its valuable timber resources based on a General Allotment Act provision stating that certain land was to be "held in trust" for the Indian owners, was "founded . . . upon . . . any Act of Congress"[52] within the meaning of the Tucker Act. Accordingly, the court had jurisdiction, sovereign immunity from money damages was waived, and a cause of action asserted.[53]

In reversing *Mitchell*, the Supreme Court called for a halt to the somewhat casual attitude of the Court of Claims toward consent to be sued and the establishment of a cause of action for money damages.[54] The Court first held that although the Tucker Act grants subject matter jurisdiction for money damages, it does not waive sovereign immunity for a claim based on a statute. Waiver must be found independently, and while it may be found in a statute creating a cause of action, that statute must specifically impose a duty on the federal government and mandate compensation for breach of that duty. Then, narrowly construing the Allotment Act provision putting the tribal land in trust, the Supreme Court concluded that the statute created only a limited trust relationship to prevent alienation or taxation of the land and did not explicitly impose a duty on the United States to manage the timber properly. Since there was no statutory duty,

48. Of course, they have not always been successful on the merits. *See, e.g.*, United States v. Mason, 412 U.S. 391 (1973) (U.S. acted reasonably in failing to challenge inheritance tax imposed on Indian allottee); Donahue v. Butz, 363 F. Supp. 1316 (N.D. Cal. 1973) (trust relationship does not mandate return of aboriginal lands wrongfully taken); Quinault Allottee Ass'n v. United States, 485 F.2d 1391 (Ct. Cl. 1973) (no violation of treaty, contract or fiduciary duties).

49. *See, e.g.*, D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 204-52 (1979); Chambers, *supra* note 10. *See generally* AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TRUST RESPONSIBILITIES & THE FEDERAL-INDIAN TRUST RELATIONSHIP (1976).

50. *Compare* F. COHEN, *supra* note 10, at 169-76 *with* HANDBOOK OF FEDERAL INDIAN LAW 220-28 (1982 ed.).

51. 591 F.2d 1300 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980).

52. *See supra* note 31.

53. *See infra* notes 130-51 and accompanying text.

54. United States v. Mitchell, 445 U.S. 535 (1980).

the Court did not reach the question whether Congress also intended the Act to waive sovereign immunity. Accordingly, the claimants were foreclosed from bringing suit for money damages.[55]

The Court's opinion has implications reaching far beyond issues of waiver of sovereign immunity. First, *Mitchell* appears to require the statute relied on in the Court of Claims to be read narrowly from the standpoint of whether the United States has any duties. Thus, claimants can no longer depend on courts to construe general statutes liberally as creating a trust relationship that by its own accord imposes broad fiduciary duties on the government. Second, reading *Mitchell* as signaling a restriction in Court of Claims jurisdiction, tribes may be forced to bring claims for equitable remedies and to abandon efforts to bring claims based on statutes not specifically waiving sovereign immunity for money damages. Third, *Mitchell* also has implications for district court suits seeking equitable relief. In two recent cases in the District of Columbia Circuit, courts have had occasion to interpret the Supreme Court's requirement that statutes describe explicitly the duties imposed on the federal government. Although the *Mitchell* Court emphasized explicitness in the duty imposed only when discussing the topic of sovereign immunity, the District of Columbia Circuit has required the same standard of statutory explicitness be used to delineate the nature and scope of *any* alleged trust obligation of the federal government.[56] If other federal courts concur, tribal breach of trust claims in district courts, too, may be curtailed. Although this trend would have the salutory effect of bringing some order to an unsatisfactorily amorphous area of law,[57] it may leave Indian tribes in the unhappy position they were in during the six decades before the trust law victories: the government manages most of their assets and resources, often without explicit statutory authorization, yet cannot be held strictly accountable for mismanagement, either through legal or equitable remedies.

The *Mitchell* decision has been criticized appropriately as breaking with precedent on both Court of Claims jurisdiction and Indian trust law.[58] As-

55. *See infra* notes 144-51 and accompanying text.

56. Hopi Indian Tribe v. Block, 8 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3073 (D.D.C. June 15, 1981); North Slope Borough v. Andrus, 642 F.2d 589, 611-13 (D.C.Cir. 1981). For an analysis of these cases, see *infra* notes 242-76 and accompanying text.

57. For an argument in favor of keeping the trust relationship undefined, see AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG, 1ST SESS., FINAL REPORT 132-33 (Comm. Print 1977).

58. Hughes, *supra* note 10. *See also* Note, *Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror*, 33 RUTGERS L. REV. 502 (1981); Note, *Whom Can Indians Trust After Mitchell?*, 53 U. COLO. L. REV. 179 (1981).

suming this break with tradition was intentional, however, this article will focus on *Mitchell*'s effects on breach of trust litigation in the Court of Claims and the federal district courts. To provide an understanding of the state of the law at the time *Mitchell* was decided, the article begins with a discussion of the influential breach of trust cases decided before *Mitchell*.[59] Next, Justice Marshall's analysis in the majority opinion will be examined in fuller detail.[60] The article will then turn to an analysis of *Mitchell*'s effects. Focusing on Tucker Act claims, a two-pronged analysis will be employed. First, the previous breach of trust cases based on the Tucker Act will be reexamined to ascertain whether any of these cases could meet the stricter tests enunciated in *Mitchell*. Second, three Tucker Act cases decided by the Court of Claims after *Mitchell* will be analyzed: one attempting to avoid *Mitchell* and two others holding that more specific statutes meet the requirement of *Mitchell*.[61] Focusing next on claims for equitable relief, decisions relying on *Mitchell* will be analyzed and contrasted with similar claims made before *Mitchell*.[62] Finally, conclusions will be drawn from this analysis regarding the broader implications for Indian law and policy that may flow from *Mitchell*.

II. LITIGATING THE SCOPE OF FIDUCIARY DUTIES BEFORE *MITCHELL*

Whether by fiat, tribal choice, or inertia, the federal government holds many Indian tribal funds and most Indian land in trust, exercising pervasive authority over almost every aspect of property management.[63] The value of this property is significant. Indian tribes earned $197 million from development of mineral resources in fiscal 1980, most of it from oil and gas.[64] In addition, tribes received $117 million for forestry rights and $55 million for grazing and other surface rights.[65] Not surprisingly, the earliest decisions holding the government liable for breach of trust resulted from claims alleging mismanagement of resources and money. For instance, the government not only failed to invest tribal trust funds, but often failed to pay any interest on funds held in the United States Treasury on the ground

59. *See infra* notes 63-111 and accompanying text.

60. *See infra* notes 144-51 and accompanying text.

61. *See infra* notes 152-240 and accompanying text.

62. *See infra* notes 242-76 and accompanying text.

63. For a review of differing views of the murky origins of the trust relationship, see AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP; INCLUDING TREATY REVIEW 47-53 (1976).

64. COMMISSION ON FISCAL RESPONSIBILITY OF THE NATION'S ENERGY RESOURCES, FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES 116 (1982) [hereinafter cited as the LINOWES REPORT].

65. *Id.* at 6.

that neither was required by statute.[66] In *Manchester Band of Pomo Indians v. United States*,[67] a California district court exercising concurrent Tucker Act jurisdiction blazed a new trail by holding the government liable for mismanagement of tribal trust funds. In an analysis that has become a model for later decisions, Judge Renfrew first accepted the existence of a trust relationship as "unquestioned," relying on previous court decisions and federal statutes pertaining to Indian funds.[68] Next, reading those statutes liberally "to the benefit of the Indians,"[69] he determined that the laws required Indian funds to earn at least four percent interest and authorized higher-yielding investments. Judge Renfrew turned to common law to determine the fiduciary duties imposed on the government, reasoning that the government should be held to the same standards as private trustees.[70] Finally, applying these standards the court held the government liable for failing to invest the tribe's money.[71] The Court of Claims soon followed suit in a broadly written opinion stating that the United States, by the very act of keeping Indian money in the Treasury, "in effect impose[d] trust status on the Indian funds," even when the statutes authorizing deposit of Indian money in the Treasury did not use the word "trust."[72] The Court then directed the trial judge to apply private trust law standards to measure the government's management of the funds at issue.[73]

A beneficial effect of these two cases is that Indian tribal funds no longer languish in the Treasury earning low rates of interest, or none at all. Perhaps because the evidence of mismanagement was so strong, however, both courts were relatively cavalier in determining they had jurisdiction[74]

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66. *See generally* Note, *Indian Tribal Trust Funds*, 27 HASTINGS L.J. 519 (1975).

67. 363 F. Supp. 1238 (N.D. Cal. 1973).

68. *Id.* at 1243.

69. *Id.* (quoting Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973)).

70. 363 F. Supp. at 1245.

71. *Id.* at 1247.

72. Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390, 1392 (Ct. Cl. 1975).

73. *Id.* at 1395. The Court found the case in a posture inappropriate for summary judgment, but invoked Court of Claims Rule 101(e) to dispose partially of some of the subsidiary issues, primarily the scope of the Secretary's fiduciary duties. *Id.* at 1394-95. *But cf.* United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975) (no duty to invest trust funds absent statute, treaty, contract, or constitutional provision). For a comparison of these two cases, see *infra* note 167.

74. In *Manchester Band*, the court invoked concurrent Tucker Act jurisdiction for the money damages claim without any explanation. In addition, the court invoked various bases of jurisdiction for equitable relief, including the APA, but did not discuss sovereign immunity from suit. 363 F. Supp. at 1242-43. In *Cheyenne-Arapaho*, the Court of Claims asserted that its jurisdiction under 28 U.S.C. § 1505 "is broad enough to cover the types of claims made here." 512 F.2d at 1392.

and, more important in applying private trust law to the government in a case "founded . . . upon . . . any Act of Congress" within the meaning of the Tucker Act.[75]

Early cases regarding mismanagement of trust property also presented appealing facts. In *Navajo Tribe v. United States*,[76] the Court of Claims analogized to private trust law in holding the government liable for arranging an assignment of a helium lease it supervised for the tribe for a nominal consideration when the assignor had announced its intention to surrender the lease to the tribe. (According to the court the Bureau of Mines was eager to develop a helium plant because of war-time need and feared that turning the lease over to the tribe and then obtaining the lease from the tribe would result in "complications.")[77] Reasoning that the government's supervision of oil and gas leases on tribal property created at the very least a "special duty of care regarding the property,"[78] the court likened the situation to "that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself."[79] Although stressing the United States might not be a trustee "in the technical sense,"[80] the court took a broad view of both the source and the scope of the government's duties. The same approach was characteristic of later Court of Claims decisions. In *Coast Indian Community v. United States*,[81] the court held the government liable for breach of trust in granting a county a right of way worth $57,000 over Indian land for only $2,500. The source of the duty was much clearer in this case, because a statute required the Secretary of the Interior to pay "such compensation as [he] shall determine to be just."[82] Nevertheless, the court never referred to that provision, instead relying on the trust status of the land and a provision authorizing the Secretary to grant rights of way by exercising "the Government's authority as guardian or trustee over Indian property."[83] The court then referred to common law in measuring the government's liability.[84]

Two 1973 decisions of the United States District Court for the District of Columbia demonstrate the courts' receptiveness to breach of trust claims

75. *Compare Manchester Band of Pomo Indians*, 363 F. Supp. at 1245-46 *with Cheyenne-Arapaho*, 512 F.2d at 1394 (relying on the RESTATEMENT (SECOND) OF TRUSTS (1959)).
76. 364 F.2d 320 (Ct. Cl. 1966).
77. *Id.* at 323.
78. *Id.* at 322.
79. *Id.* at 324.
80. *Id.* at 322.
81. 550 F.2d 639 (Ct. Cl. 1977).
82. 25 U.S.C. § 325 (1976 & Supp. III 1979).
83. 550 F.2d at 652.
84. *Id.* at 653 & n.43.

concerning Indian land. In *Edwardsen v. Morton*,[85] Judge Gasch held that Alaskan Natives had stated a claim for breach of fiduciary duty against federal officers who permitted oil companies to trespass on Native lands in the period before the Settlement Act extinguished Native title.[86] As to the source and scope of the trust relationship, the court relied on previous court decisions[87] including dicta in one case stating that the government has a duty to protect Indian land from third party intrusions.[88] As a result of this decision, the United States agreed to sue the trespassers on behalf of the Natives.[89] A second decision that year, *Pyramid Lake Paiute Tribe v. Morton*,[90] reached the merits of a claim, brought under the Administrative Procedure Act, alleging that the Secretary of the Interior violated his duty to the tribe by sacrificing the tribal interest in keeping Pyramid Lake full in order to protect the Bureau of Reclamation's interest in diverting water from the lake as part of an irrigation project. (The problem of divided loyalty is a continuing source of concern for Indian tribes because the Secretary of the Interior oversees the Bureau of Indian Affairs as well as such traditional opponents of Indian interests as the Bureau of Land Management, the Forest Service, and the Bureau of Reclamation.)[91] In holding the Secretary's action to be arbitrary, Judge Gesell relied on the trust relationship. Citing case law and the "detailed statutory scheme for Indian affairs set forth in Title 25 of the United States Code" as sources of this relationship,[92] the court ordered the Secretary to submit new regulations consistent with his duty to do the utmost to preserve water for the lake.[93]

Significantly, in *Pyramid Lake* no statute or treaty required the Secretary of the Interior to do what the court ordered. As one commentator has stated:

> The diversions violated no specific treaty or statutory provision,

85. 369 F. Supp. 1359 (D.D.C. 1973).

86. *Id.* at 1378-79.

87. *Id.* at 1367 (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Navaho Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); Territory of Alaska v. Annette Island Packing Co., 289 F. 671 (9th Cir.), *cert. denied*, 263 U.S. 708 (1923)).

88. *Id.* at 1375 (quoting Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955)).

89. The tribe lost on the merits. *See* United States v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir. 1980) (claims extinguished by Native Claims Settlement Act).

90. 354 F. Supp. 252 (D.D.C. 1973).

91. *See generally* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974).

92. 354 F. Supp. at 256 (citing 25 U.S.C. §§ 174, 476 (1976)).

93. 354 F. Supp. at 258.

> but the court held the operation of the project violated the government's trust responsibility to the tribe. The case, therefore, imposes a duty of loyalty on federal officials, and suggests that when actions or projects of federal agencies conflict with the trust responsibility to Indians, the non-Indian federal activity should be operated so as to avoid interference with Indian trust property.[94]

Immediately before *Mitchell* was decided, this receptiveness to claims based on the trust relationship had begun to extend beyond claims of land and money mismanagement. In *White v. Califano*,[95] the United States Court of Appeals for the Eighth Circuit issued a declaratory judgment that the trust relationship required the government to pay the hospital costs of an indigent Sioux committed to a state hospital by a tribal court. Again the facts were appealing—the woman needed hospitalization, the tribe had no facilities, and both the state and the federal government had refused to pay. Still, no statute or regulation imposed such a duty; in fact the Indian Health Service had determined that since Indians are citizens, states are obligated to provide them off-reservation health care. Nevertheless, the court cited the trust relationship as the source of this duty.[96]

Finally, several suits successfully alleged the Secretary of Interior breached his trust by unlawfully terminating federal supervision over groups of California Indians and their rancherias,[97] small congressionally created reservations established in California in the early 1900's. Termination, a now abandoned national policy prevalent in the late 1950's, involved the termination of the special relationship between certain Indian tribes and the government, and was designed to force Indian tribes to assimilate into the mainstream of American life by making Indians ordinary state citizens. This policy was effectuated by granting the states regulatory jurisdiction over the affected Indian tribes, including taxing power, ending the Indians' entitlement to federal programs, and providing for the sale of

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94. Chambers, *supra* note 10, at 1233-34 (footnotes omitted).

95. 581 F.2d 697 (8th Cir. 1978).

96. *Id.* at 698. For a criticism of the decision as undercutting tribal sovereignty and an argument that federal statutes could have been relied on instead of the trust relationship, see Gonzalez & Henderson, *Health Care for Tribal Citizens: A Criticism of White v. Califano*, 7 AM. IND. L. REV. 245 (1979).

97. Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978) (money damages and equitable relief); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977) (equitable relief only); Duncan v. United States, 597 F.2d 1337 (Ct. Cl. 1979), *vacated and remanded*, 446 U.S. 903 (1980), *remand decision*, 667 F.2d 36 (Ct. Cl. 1981), *petition for cert. filed* 50 U.S.L.W. 3785 (U.S. Mar. 30, 1982) (No. 81-1747). In addition, one such case was decided after *Mitchell*. Table Bluff Band v. Andrus, 9 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3005 (N.D. Cal. Sept. 22, 1981). For a discussion of *Table Bluff Band* and the remand opinion in *Duncan*, see *infra* notes 188, 211, 282 and accompanying text.

Indian property or other assets with the proceeds divided up among the tribal members. Usually, though not always, tribal consent was obtained before termination.[98]

The affected tribes were awarded equitable relief including orders determinating the rancherias;[99] in addition, some plaintiffs were awarded money damages either in the district court or the Court of Claims.[100] The same analysis is common to each of these cases, for each involves the same legislation and secretarial action. *Duncan v. United States*[101] is representative of the analysis in these cases. More important, as a Court of Claims decision, it represents the high-water mark of litigation to enforce fiduciary duties before *Mitchell*.

The California Rancheria Act, the termination legislation involved in all the cases, directed the Secretary of the Interior to construct whatever irrigation and sanitation systems, "including domestic and community water supplies," the Indians and Secretary agreed the United States should complete.[102] In *Duncan*, the tribe approved a distribution plan drawn up by the Secretary containing a provision stating only that the Indians "requested" the Bureau of Indian Affairs to provide water for certain residences. As to sanitation, the tribe never obtained an adequate sewage system.[103]

The Court of Claims held the Secretary of Interior had breached his fiduciary obligations to the tribe by terminating federal supervision without installing adequate water and sanitation systems. The court held the Secretary liable for whatever direct damages the tribe could prove flowed from the breach.[104] Although acknowledging that the parties never agreed the Secretary would "guarantee an adequate year-round water supply,"[105] the court, nevertheless, held the Secretary breached his trust in not providing such a supply.

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98. *See generally* Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 148-51 (1977). Tribes in the west were particularly affected by termination, losing a great deal of their land. *See* AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., 1ST SESS., FINAL REPORT 447-54 (Comm. Print 1977).

99. *Compare* Smith v. United States, 515 F. Supp. 56, 62 (N.D. Cal. 1978) *with* Duncan v. Andrus, 517 F. Supp. 1, 6 (N.D. Cal. 1977).

100. *Compare* Duncan v. United States, 597 F.2d 1337, 1345 (Ct. Cl. 1979) (Tucker Act jurisdiction); *with* Smith v. United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978) (concurrent Tucker Act jurisdiction).

101. 597 F.2d 1337 (Ct. Cl. 1979).

102. Act of Aug. 18, 1958, Pub. L. No. 85-671, § 3(c), 72 Stat. 619, 619-20, *amended by* Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390.

103. 597 F.2d at 1340.

104. *Id.* at 1347. The court refused to award consequential damages for "personal suffering or injury to the native culture" as outside its limited waiver of sovereign immunity. *Id.* at 1345.

105. *Id.* at 1340.

The court's analysis parallels that in the earlier cases. First, the court established that a trust relationship existed from 1906 until termination. To identify the claim as one founded upon an act of Congress and thus within its jurisdiction, the court took pains to establish this trust relationship as "statutorily created."[106] The statute creating the rancheria system in 1906 referred to the land as a reservation land at one point. Thus, the court reasoned, Congress must have regarded the land as having "the same status as reservation lands,"[107] which are held in trust, even though the legislation did not use the term "trust." The court bolstered this conclusion by noting continuous administrative interpretation and a reference in the 1958 termination legislation to a "Federal trust relationship."[108] Second, the court measured the scope of the government's fiduciary duties by reference to the requirements of the statute and the common law. The court interpreted the statutory provision regarding irrigation to mean that Congress intended "to provide the Indians with sufficient water systems to become self-sufficient by the time of termination."[109] Applying "exacting fiduciary standards"[110] required by the trust relationship to the Secretary's actions, the court then determined the Secretary breached his duty by failing to disclose to the Indians adequate information concerning the sewage problem. The court concluded "the distribution plan's agreement on water supplies was so vague and uncertain as to breach the trustee's duty of fair dealing," citing the *Restatement of Trusts* and Scott's treatise.[111]

In sum, all the above cases share similar tendencies. The courts found no substantial barriers to exercise of subject matter jurisdiction or to prevent a claimant from suing the government. As to the requirement of a federal claim, both the district courts and the Court of Claims had adopted a similar analysis: interpreting a broad statute liberally as creating a trust relationship, the courts measured the government's fiduciary duties by analogizing to private trust law and the growing body of decisional law in the area of Indian trust claims. *Mitchell*, however, brought this process to an abrupt halt.

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106. *Id.* at 1346.
107. *Id.* at 1342.
108. *Id.* at 1343.
109. *Id.*
110. *Id.* at 1344.
111. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); 2 A. SCOTT, THE LAW OF TRUSTS § 170 at 1298 (1967)).

III. *UNITED STATES V. MITCHELL*

A. Precursors

In one sense, *Mitchell* represented nothing new because previous decisions had indicated that in a case founded on a statute, a Tucker Act claimant needed a claim for money damages to prevail. Two of these decisions figured prominently in *Mitchell* and thus merit closer attention. In *Eastport Steamship Corp. v. United States*,[112] the Court of Claims held it had no jurisdiction over a claim for business loss damages resulting from the Federal Maritime Commission's wrongful withholding of approval of a sale foreign of a ship first obtained from Germany as war reparations. Noting a series of earlier decisions had held the Commission's policy of requiring a penalty fee before approval to be illegal,[113] the court nevertheless refused to give relief beyond the return of the penalty required by the Tucker Act provision that permitted a claim for "money wrongfully withheld."[114] The court stressed that plaintiffs may not invoke the Tucker Act's jurisdiction over statutory claims merely by making a claim "intimately involv[ing]" a federal statute, but requiring recourse to some other principle of law as mandating a damage recovery. Instead, the plaintiff must demonstrate that the statutes relied on "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[115] The statute relied on in *Eastport* could not be read as creating any sort of claim for resulting business loss because it merely authorized the Commission to approve foreign sales of the type of vessel involved.[116] According to the court, the statute did not differ from statutes authorizing various federal agencies to grant licenses or permission for numerous types of activities. To hold the government liable for business loss money damages upon wrongful delay or denial in such cases was a "giant step"[117] calling "for a drastic extension of federal liability to all of these fields."[118]

In its discussion of Tucker Act jurisdiction, the court never mentioned sovereign immunity and its concomitant doctrine of strict construction. The claimants lost because their only claim was for "misfeasance in government"[119] and neither the language of the statute, the legislative history,

112. 372 F.2d 1002 (Ct. Cl. 1967).
113. *Id.* at 1006 (collecting cases).
114. 28 U.S.C. § 1491 (1976 & Supp. III 1979).
115. 372 F.2d at 1009.
116. 46 U.S.C. § 808 (1976).
117. 372 F.2d at 1009.
118. *Id.* at 1010.
119. *See* Mitchell v. United States, 664 F.2d 265, 280 (Ct. Cl. 1981) (Nichols, J., dissent-

nor precedent in interpreting such statutes justified a money judgment for business loss in such a case.

The Supreme Court quoted *Eastport* with approval in *United States v. Testan*.[120] Like the claimant in *Eastport*, the claimants in *Testan* alleged pecuniary harm resulting from wrongful federal agency action in the administration of a general regulatory scheme. The claimants alleged the Civil Service Commission wrongfully denied them reclassification and back pay retroactive to the date of denial of their applications.[121] As in *Eastport*, the claimants in *Testan* had a federal claim: a detailed administrative scheme for challenging a wrongful classification with the likelihood of federal district court mandamus review.[122] Nevertheless, as in *Eastport*, the statutes relied on could not "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[123]

The real importance of *Testan*, however, is that the Supreme Court, for the first time, referred to the process of looking for a claim mandating money damages as an analysis required by the doctrine of sovereign immunity, and thus an inquiry requiring the statute in question to be strictly construed. Refuting the notion that the Tucker Act itself waives sovereign immunity whenever a substantive right exists, the Court stated: "there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of *amici* that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation."[124] Although the Court quoted the *Eastport* language that implied a statute need not expressly mandate compensation, it also quoted an earlier Supreme Court decision stating that a waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed."[125] More important, in its examination of the statutes relied on by the *Testan* claimants, the Court looked for mandatory language regarding back pay for one arguing wrongful failure to upgrade a classification, thus intimating express language might be required.[126]

As one commentator has reported, the government began to make *Testan* arguments in the several Indian breach of trust claims working their

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ing) (*Eastport* a claim for "misgovernment, *i.e.*, for misfeasance in the exercise of peculiarly governmental functions").

120. 424 U.S. 392 (1976).

121. *Id.* at 394.

122. *Id.* at 403.

123. *Id.* at 400 (quoting *Eastport*, 372 F.2d at 1009).

124. *Id.* at 400-01.

125. *Id.* at 399 (quoting United States v. King, 395 U.S. 1, 4 (1969)).

126. 424 U.S. at 399-400.

way through the federal district courts and the Court of Claims.[127] Although the government was successful in the Tenth Circuit,[128] the Court of Claims en banc rebuffed the government's attempt to dismiss *Mitchell* on jurisdictional grounds.[129] The Court of Claims adopted the basic analysis required by *Testan* but found the new requirements easy to meet, especially in light of the doctrine requiring liberal construction of statutes benefiting Indians.

B. Timber Mismanagement in Mitchell

The Quinault Tribe was not the only plaintiff in *Mitchell*: the tribe's original executive order reservation had been divided into individual allotments between 1905 and 1933 during the era when federal Indian policy called for assimilating Indians into the mainstream by turning them into farmers and ranchers.[130] Although commentators may differ on the purity of motives inspiring this allotment policy, all agree that the administration of the policy was a disaster.[131] For instance, the Quinault allottees received land so densely covered with timber as to be useless for any activity other than forestry, an industry not lending itself to profitability when carried out by individuals owning, at most, 160 acres.[132] Furthermore, intestate succession to allotments is governed by state law.[133] Most allottees do not make wills; through the years many heirs claim small amounts of land. A state court cannot order an allotment sold and the proceeds divided among the heirs, for allotted land has been placed in trust indefinitely with the federal government as trustee. Consequently, an original allotment of 160 acres can today be owned by several hundred heirs of the original allottee. The multiple heirship problem makes effective use of the land by the allottees themselves impossible.[134]

Beginning in 1910,[135] Congress enacted a series of statutes authorizing the Bureau of Indian Affairs to contract for the sale of timber on allotted land and generally manage the day-to-day business of harvesting, selling,

127. Hughes, *supra* note 10, at 464-65 & n.127.

128. Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979) (concurrent Tucker Act jurisdiction) (no statute created trust fund of judgment funds distributed by government, therefore no jurisdiction).

129. Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979).

130. General Allotment Act, 25 U.S.C. §§ 331-358 (1976 & Supp. III 1979).

131. *See generally* S. TYLER, A HISTORY OF INDIAN POLICY 95-124 (1973).

132. *See* Brief for Respondents at 4, United States v. Mitchell, 445 U.S. 535 (1980).

133. 25 U.S.C. § 348 (1976 & Supp. III 1979).

134. *See generally* Williams, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709 (1971).

135. Act of June 25, 1910, ch. 431, § 8, 36 Stat. 855, 857 (current version at 25 U.S.C. §§ 406-407 (1976)).

and replanting timber.[136] The Quinault Allottee Association alleged pervasive mismanagement of their timber resources and the trust fund derived from those resources. Specifically, they alleged seven basic claims, including: the government permitted clear-cutting of timber in violation of a statutory provision requiring sustained yield, failed to get fair market value for timber or for rights of way and easements it granted on Indian land, and failed to invest Indian allottees' trust money.[137]

Like so many of the prior Indian trust cases, *Mitchell* presented appealing facts: some allotments were owned by more than a hundred heirs of the original allottee; some heirs alleged they had no idea where their land was located on the reservation. Hence allottees could not use the land themselves. Even if they overcame the inertia created by decades of federal control of their land and banded together to form a collective timber enterprise, they could not sell their land or timber without government approval. Surely it was understandable that the individual allottee, who might receive income from his or her holding only once or twice in a lifetime, would rely justifiably on the government to manage the timber business expertly.[138]

C. Court of Claims Decision

The Allottee's Association and the tribe filed suit for breach of trust in 1971. In 1977, after trial on some of the issues had taken place, the government filed for a motion to dismiss, relying on *Testan* and the Tenth Circuit case, *Whiskers v. United States*.[139] In sustaining its jurisdiction, the court stated that here "the Indians do not rest their case on unanchored, judge-created principles of fiduciary law but point to and rely upon specific legislation as creating the trust relationship."[140]

The court cited *Testan* but adhered to its *Eastport* analysis: no mention was made of sovereign immunity, the court focusing instead on whether the Allotment Act created a claim for money damages. Although plaintiffs had also relied on other statutes referring to the Secretary of the Interior's duties in greater detail, such as a statute requiring forests to be managed on a sustained yield basis, the Court of Claims stated it need look no further than the general wording of the Allotment Act to sustain

136. 25 U.S.C. §§ 406-407 (sale of timber), 413 (collection of administrative expenses), 466 (sustained-yield management of forests) (1976).

137. *See* United States v. Mitchell, 445 U.S. 535, 536-37. For a detailed background of the *Mitchell* litigation, see *Hughes, supra* note 58, at 448-51.

138. *See* Brief for Respondents at 4-6, United States v. Mitchell, 445 U.S. 535 (1980).

139. 600 F.2d 1332 (10th Cir. 1979).

140. Mitchell v. United States, 591 F.2d 1300, 1302 (Ct. Cl. 1979).

jurisdiction.[141]

The court gave two reasons for concluding the Allotment Act created a trust relationship including the full panoply of fiduciary duties attaching to a normal trust relationship. First, the statute expressly states: "the United States does and will hold the land thus allotted . . . in trust for the sole use and benefit of the Indian[s] . . . ."[142] Second, the Interior Department has in fact acted as a trustee since the passage of the Allotment Act. Having found a duty implicit in this use of the term "trust" and in subsequent administrative action, the court then held that the duty mandated compensation because the very nature of a trust relationship requires an effective remedy for breach. Since equitable relief would be unavailing for "damage already done,"[143] a money damage remedy was necessary.

In sum, the court did not see the case as presenting a sovereign immunity issue. At most, it saw the case as turning on whether the tribe had a substantive claim, an issue it readily resolved using a combination of liberal statutory construction and the common law regarding fiduciaries.

D. The Supreme Court Decision

In reversing the Court of Claims, the Supreme Court in *United States v. Mitchell*[144] made it clear that *Testan* was not merely an aberration "contrary to doctrines of federal jurisdiction in general, and the Tucker Act in particular."[145] Instead, the Court used *Mitchell* as a vehicle to reaffirm *Testan*'s fundamental change in Tucker Act analysis: that the Act itself does not waive sovereign immunity, but merely confers subject matter jurisdiction.[146] Because the Court of Claims relied only on the Allotment Act, the Supreme Court applied the *Testan* analysis to this statute alone, pointing out that on remand the Court of Claims could consider the other more specific statutes regarding the Secretary's duties.

Once the question is posed as a search for a statutory waiver of sover-

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141. *Id.*

142. *Id.* (quoting 25 U.S.C. § 348 (1976 & Supp. III 1979)).

143. 591 F.2d at 1302.

144. United States v. Mitchell, 445 U.S. 535 (1980).

145. Orme, *Tucker Act Jurisdiction Over Breach of Trust Claims*, 1979 B.Y.U. L. REV. 855, 874.

146. 445 U.S. at 538. The Court also held that the Indian Claims Commission Act provision granting jurisdiction in the Court of Claims for Indian tribal claims accruing after 1946 was not a separate basis for jurisdiction or source of waiver. *Id.* at 538-39 (construing 28 U.S.C. § 1505 (1976)). Instead, the court interpreted § 1505 as merely removing previous barriers to the Indian tribal claims in the Court of Claims. *See supra* note 10. Thus, the Court concluded, § 1505 gives tribes only the same access to the Court of Claims the Tucker Act gives to individuals. 445 U.S. at 539.

eign immunity, the doctrine of strict construction must be addressed, and a general statute, such as the Allotment Act, has little chance of being viewed as a waiver. The Court noted that the Allotment Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."[147] Referring to other provisions in the Act expressing a congressional intent that the allottee be responsible for grazing or farming the land and to the legislative history indicating congressional concern that the unsophisticated allottee might lose the land, the Court concluded the trust relationship created by the Act was limited to the concerns of preventing alienation and providing immunity from state taxes.[148] That this relationship could not extend to any duties regarding timber was especially apparent to the Court, since at the time of the Act's passage Congress believed Indians did not have ownership rights sufficient to permit them to treat timber on their lands as an income-producing resource. Thus, Congress could not have intended to assume any duties to manage timber resources it believed Indians were not entitled to in the first place.[149]

In *Testan*, the Court had stressed that the claimants had failed only in suing for money damages—the federal district courts were still available to redress the claim of improper classification by granting prospective relief. In other words, the Court made it clear that the claimants had a claim; they simply did not have a claim for money damages.[150] In contrast, the claimants in *Mitchell* lost because they had no claim at all. The statute relied on imposed no enforceable duties to manage timber. Thus, the Court did not have to answer the second question required by *Testan*: "whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity."[151]

Properly viewed, *Mitchell* not only reaffirms *Testan*, but takes it further. *Testan* did not construe strictly the existence of a statutory duty, but only whether the statute creating the duty mandated money damages for a breach. *Mitchell*, on the other hand, applied the strict construction approach to the question of whether a statute created any enforceable duty at all. This approach could greatly curtail Indian breach of trust claims in both the Court of Claims and the federal district courts.

147. 445 U.S. at 542.
148. *Id.* at 543.
149. *Id.*
150. *Testan*, 424 U.S. at 403.
151. 445 U.S. at 542.

IV. THE AFTERMATH OF *MITCHELL*

A. Mitchell's Effect on Tucker Act Claims

1. The Continuing Validity of Successful Breach of Trust Claims Litigated Before Mitchell

Which, if any, of the five successful claims for money damages for breach of trust discussed above[152] could prevail today? This is not an idle academic question, for most of those cases concerned issues of mismanagement of land and money common to many Indian tribes. A reexamination of these earlier precedents is thus necessary to predict the outcome of later breach of trust claims.

One of these cases can be disposed of rather easily. *Coast Indian Community*[153] should pass the *Mitchell* test, because a specific statute existed, although it was not relied on by the Court of Claims. The statute states that: "[N]o grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just."[154] *Mitchell* requires strict construction of the existence of a duty and the remediability of a breach of a duty by money damages. Applying this analysis, *Coast Indian Community* should be decided favorably; the statute's mandatory language surely creates a duty and the requirement that the Secretary pay just compensation certainly can be interpreted as fairly mandating compensation for the damage sustained by sale of the right-of-way at five percent of its true value. If *Coast Indian Community* does not meet the *Mitchell* test, it is hard to conceive of a statute that would satisfy *Mitchell*, other than one explicitly stating an aggrieved party may sue in the Court of Claims for money damages. The Supreme Court, however, has not required an explicit waiver of sovereign immunity. In *Testan*, the Court rejected such an argument by implication, citing with approval a Court of Claims case relying on a statute stating that certain officers merited "the basic pay of a rear admiral (lower half) or brigadier general, as appropriate," but not explicitly stating that the aggrieved officer could sue for monetary relief in the Court of Claims.[155]

Thus, a sale of a right-of-way below fair market value should be remediable under the Tucker Act without having to rely on the trust relationship itself as a source of possible duties. In the remand of *Mitchell*, the Court of

152. *See supra* notes 63-111 and accompanying text.

153. 550 F.2d 639 (Ct. Cl. 1977).

154. Act of Feb. 5, 1948, ch. 45, § 3, 62 Stat. 18 (codified at 25 U.S.C. § 325 (1976 & Supp. III 1979)).

155. 37 U.S.C. § 202(*l*) (1970) (construed in Selman v. United States, 498 F.2d 1354 (Ct. Cl. 1974), cited in *Testan*, 424 U.S. at 402-03)).

Claims found it had jurisdiction of the right-of-way sales involved in that case.[156]

On the other end of the spectrum opposite *Coast Indian Community* is *Duncan v. United States*,[157] discussed earlier as the high-water mark of Indian trust litigation before *Mitchell*. Not surprisingly, the decision in *Duncan* was vacated and remanded for reconsideration in light of *Mitchell*.[158] On remand the Court of Claims reasserted jurisdiction over the claim for breach of trust in terminating the tribe.[159] The remand decision will be discussed in the next section dealing with claims decided after *Mitchell*.[160]

Whatever ultimately happens in *Duncan* and other claims based on unauthorized terminations of California Rancherias, the effects will be limited to a relatively small number of California Indians. In contrast, the garden variety claims involving mismanagement of land and money are common to most tribes, and involve potentially large money judgments against the government. On the one hand, many statutes refer fairly specifically to aspects of property and fund management. Perhaps these statutes can be interpreted as creating duties in spite of the *Mitchell* strict construction requirement. The major question will then shift to the second inquiry mandated by *Mitchell*: can these statutes be read as contemplating a remedy of monetary damages?

The Funds Cases

Many statutes govern Indian funds. Three laws figured prominently in the two trust fund cases discussed earlier, and the Court of Claims remand decision in *Mitchell*. Two laws require four percent simple interest to be paid on certain trust funds, common to most tribes and held in the Treasury, including the funds at issue in the three cases.[161] Another authorizes

156. Mitchell v. United States, 664 F.2d 265, 273 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1748).

157. 597 F.2d 1337 (Ct. Cl. 1979).

158. 446 U.S. 903 (1980).

159. Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981), *petition for cert. filed*, 50 U.S.L.W. 3875 (U.S. Mar. 30, 1982) (No. 81-1747).

160. *See infra* notes 188-201 and accompanying text.

161. Act of Feb. 12, 1929, ch. 178, 45 Stat. 1164, *amended by*, Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584 (codified at 25 U.S.C. §§ 161(a)-(d) (1976); Act of April 1, 1880, ch. 41, 21 Stat. 70 (codified at 25 U.S.C. § 161 (1976)). To simplify somewhat, at issue in *Manchester Band of Pomo Indians* and *Mitchell* are proceeds from land, authorized to be deposited in the Treasury under § 161, and required to earn four percent simple interest under § 161(b). *Cheyenne-Arapaho* dealt with trust funds required by § 161(b) to earn four percent. *See generally 1982* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 50, at 549-52 (sources of tribal trust funds).

the Secretary of the Interior in his discretion to deposit this trust fund money in bank accounts or otherwise invest it in certain safe securities, if the money can earn more than the statutory four percent interest.[162]

These laws were interpreted in *Manchester Band* and *Cheyenne-Arapaho* as setting a mandatory floor of four percent for Indian money while permitting the Secretary to obtain a higher yield. In addition, because the funds became trust funds on deposit in the Treasury, the courts held the ensuing trust relationship by its own force mandated the Secretary to invest the money to obtain the highest secure yield.[163] In the decision on remand of *Mitchell*, the Court of Claims reaffirmed the analysis of *Cheyenne-Arapaho* and allowed the plaintiffs to recover any interest that would have been earned on the proceeds of timber sales deposited into these funds had they been invested as the *Cheyenne-Arapaho* guidelines direct.[164]

This analysis may not survive *Mitchell*, however. In the first place, only sections 161, and 161(a) and (b) of title 25[165] contain mandatory language. The requirement that four percent simple interest be paid surely can be read as mandating compensation for failure to pay the four percent on funds actually deposited in these accounts. Thus, both duty and waiver are present. But no statute requires the Secretary of the Interior to invest trust money. Section 162(a) of title 25 merely authorizes the Secretary to exercise his discretion.[166] Thus, section 162(a) fails the first prong of the *Mitchell* analysis—it creates no duty to make the trust fund productive. This analysis greatly reduces recoverable damages. Damages cannot be measured by the difference between actual interest payments made and what the money would have earned had it been invested properly—a great difference considering today's high interest rates. Moreover, four percent interest must be paid, but since compound interest is not permitted, the interest payments can once again, as they were before the earlier funds cases, be deposited in the Treasury in non-interest bearing accounts.[167]

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162. Act of June 24, 1938, ch. 648, § 1, 52 Stat. 1037 (codified at 25 U.S.C. § 162(a) (1976)).

163. *See supra* notes 67-75 and accompanying text.

164. 664 F.2d at 274.

165. *Compare* 25 U.S.C. § 161 (1976), "the United States shall pay interest . . . at the rate per annum stipulated by treaties or prescribed by law") *with* §§ 161(a) & 161(b) ("shall bear simple interest at the rate of 4 per centum per annum").

166. "The Secretary of the Interior is authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks . . . the common or community funds of any Indian tribe . . . held in trust by the United States." 25 U.S.C. § 162a (1976).

167. *See Cheyenne-Arapaho*, 512 F.2d at 1393. This conclusion is reinforced by a decision reached in an appeal of an Indian Claims Commission funds mismanagement case

2. *Breach of Trust Cases Litigated After Mitchell: Mitchell II & Duncan II*

In *Mitchell II*, the Court of Claims purported to cleave to the Supreme Court's mandate in *Mitchell I*, but a careful reading of the en banc opinion reveals the court still adhered to the trust analysis it employed in its earlier cases.[168] *Mitchell II* interpreted the specific legislation regarding forest management that the Supreme Court held was not properly before it in *Mitchell I*. Twelve provisions were in issue,[169] but those regarding timber sales and sustained-yield forestry management were the most important. Thus, this analysis will focus on the court's treatment of those provisions, referred to as the 1910 Act.[170]

Sections 406 and 407 of title 25 permit the sale of timber on "Indian land held under a trust." In the case of an individual owner's lands, the proceeds are "to be paid to the owner or owners or disposed of for their benefit,"[171] and, in the case of tribal allotted land, such proceeds are to be "used for the benefit of the Indians who are members of the tribe or tribes

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announced six months after *Cheyenne-Arapaho*. United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975). *Mescalero Apache* involved, with one exception, the same statutes as *Cheyenne-Arapaho*, but the court applied the rule that interest cannot be paid on a judgment against the United States in the absence of a fifth amendment claim, contract, treaty, or statute. 28 U.S.C. § 2516(a) (1976). The Court of Claims treats this no-interest rule as requiring a separate waiver of sovereign immunity and thus requiring strict construction, whenever a judgment includes any amount of money that can be called interest. Since damages for failure to invest must be measured by the interest lost, the court applied the no-interest rule. 518 F.2d at 1315. The majority did not distinguish *Cheyenne-Arapaho*, in which it neither discussed nor applied the no-interest rule. The court rather candidly alluded to the fiscal concerns behind the decision, however, stating that since millions of dollars had lain dormant in trust funds for many years, the resulting judgment could be "astronomical." *Id.* at 1333. In recent years, the court has distinguished the two cases out of hand as "involv[ing] different statutes and periods of time." Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981). The dissent in *Mescalero Apache* essentially distinguished the cases on the ground that § 162(a), the one statute not in issue in *Mescalero Apache* meets the stringent requirements of the no-interest rule. 518 F.2d at 1334 n.1 (Davis, J., dissenting). The distinction is strained, however, because § 162(a) is phrased in discretionary language. In *Mescalero Apache* a statute explicitly required all government trust funds to be invested to earn at least five percent per annum, yet the Court of Claims majority, applying strict construction, held the statute was inadequate. 31 U.S.C. § 547(a) (1964), *construed in* 518 F.2d at 1324-32. It is hard to see how § 162(a) could survive this type of strict reading.

168. *Mitchell II*, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1748).

169. 25 U.S.C. §§ 161(a); 162(a) (1976) (funds); *id.* §§ 319, 323-325 (rights of way); *id.* §§ 349, 378 (patents to competent allottees); *id.* §§ 406-407 (timber sales); *id.* § 413 (deduction of administrative expense); *id.* § 466 (sustained-yield forestry).

170. Act of June 25, 1910, ch. 431, §§ 7-8, 36 Stat. 855, 857 (codified as amended at 25 U.S.C. §§ 406-407 (1976)).

171. 25 U.S.C. § 406(a) (1976).

concerned . . . ."[172] Section 466 directs the Secretary of the Interior to regulate "the operation and management of Indian forestry units on the principle of sustained-yield management."[173]

The Court of Claims did not begin its opinion by construing these statutes strictly, as *Mitchell* seems to require. Rather, the court stressed at the outset only that portion of *Mitchell* requiring that the legislation indicate Congress intended to make available a remedy in money damages, pointing out that *Mitchell* did *not* require that "the substantive right to money must always be explicitly stated in the substantive legislation itself."[174] Next, the court reviewed the history of the federal government's pervasive involvement in Indian forestry management, and concluded that this involvement itself created a fiduciary relationship. According to the court:

> [W]here the Federal government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) 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.[175]

The court often used this trust relationship, arising from the fact of government supervision and control of Indian property, to interpret the statutes liberally. Although the word "trust" was not used in the 1910 Act, the court noted, "this long-continuing doctrine of government fiduciary obligation in management of Indian property was infused into the 1910 and later statutes."[176] These statutes had broadened the Allotment Act, according to the court, creating "a general fiduciary obligation on the Government in the management and operation of the forest lands with which Interior was entrusted."[177] If *Mitchell* requires strict construction on the issue of a statutory duty, as it appears to, the Court of Claims definitely set out on the wrong foot in its remand opinion.

Having thus finessed the troublesome question of the existence of a duty, the court next turned to a discussion of the provisions of the 1910 Act, to answer the "crucial question"[178] mandated by *Mitchell*: whether Congress intended that compensation be available for breach. Here, too, trust doctrines figured more prominently than strict statutory construction. For in-

172. *Id.* § 407.
173. *Id.* § 466.
174. 664 F.2d at 268.
175. *Id.* at 270 (quoting Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980)).
176. *Id.* at 270.
177. *Id.*
178. *Id.*

stance, section 406 and 407 refer to the proceeds being used for the benefit of the Indians. If "actual proceeds of actual sales"[179] were not either paid over to them or placed in trust funds, one could argue the provisions, referring directly to money, could be read as both creating a duty and mandating compensation for breach. The Court of Claims went further, however, finding that the Act, when read *in pari materia* and in light of later Interior Department regulations, requires the government to obtain the greatest revenue from the timber and thus contemplates money damages for the difference between the actual proceeds obtained and the greatest revenue that could have been yielded through prudent management.[180]

In sum, the court read the 1910 Act as requiring "mismanagement damages" by the following analysis: first, Congress intended to create a trust relationship requiring Interior prudently to manage forestry resources. Second, the 1910 Act evidenced a congressional purpose that the Indians receive the benefit of the timber sales. Third, Congress must have intended to allow Indians to seek a remedy for breach of trust because the nature of a trust at common law is that the beneficiary is entitled to compensation for breach.[181] Finally, the court liberally construed sections 406 and 407, noting that the statutes did not *negate* the existence of a claim for compensation and that the term "proceeds" must be read to include the proceeds the Indians would have received had Interior managed the trust properly. The court bolstered this construction by noting that without it, Indians would have no effective remedy for the failure to get fair market value (or any compensation at all as occurred in some instances). Nor would they have redress for failure to make timely payments and subsequent diminution of the resulting gains owing to the nonproductivity of money paid late.[182]

The court's interpretation of the sustained-yield provision mirrored the above analysis. Congressional intent to impose a duty was clearer because the legislative history indicated an intent to ensure the continued productivity of Indian forests.[183] But the court's analysis of the waiver issue again relied on liberal, not strict construction, to determine that Congress must have intended the Indians to receive the financial benefits of sustained yield. Again, the court relied on the existence of remedies for breach of trust at common law and the lack of other remedies for the Indians at the

179. *Id.* at 271.

180. *Id.*

181. *Id.* (citing G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 862 (2d ed. 1965); 3 A. SCOTT, THE LAW OF TRUSTS § 205 (3d ed. 1967)).

182. *Id.* at 271.

183. *Id.* at 272.

time the laws were enacted, because sovereign immunity barred equitable suits to prevent mismanagement at that time.[184]

Judge Nichols, concurring and dissenting, charged the court with not taking its jurisdictional limitations seriously.[185] He dissented from that part of the court's opinion allowing compensation for mismanagement and breach of congressional requirements for clear cutting. Although concededly the statutes created legal duties, they did not create a claim for money damages "as a semantically separate and analytically independent proposition"[186] as required by *Testan*. To Judge Nichols, the majority opinion's major flaw was its assumption that once a trust relationship was established the trust relationship could then be bootstrapped into a mandate for compensation. Congress's function as trustee of money and property has always been treated differently from that of a private trustee, Judge Nichols pointed out. In fact, this very position as trustee has been used to justify assertions of federal power over Indians, even against their consent. Thus, Judge Nichols concluded, the court must be wary of resorting to "using the mere label of trust plus a reading of *Scott on Trusts* to impose liability on claims where assent is not unequivocally expressed."[187]

Two months after issuing its opinion in *Mitchell II*, the Court of Claims decided that *Duncan*, remanded to it by the Supreme Court for reconsideration of its holding that the termination of a California Rancheria without adequate water was a breach of trust,[188] met the Supreme Court's requirements for jurisdiction. The statutes involved were far more general than those in *Mitchell II*, however.[189] For instance, the only provision addressing water and sanitation merely "directed" the Secretary to provide such systems "as he and the Indians affected agree" were needed.[190] Furthermore, the Secretary had prepared a plan, agreed to by the Indians of the Rancheria, which merely stated the Indians "request[ed]" water for certain homes under construction.[191] It can be argued that the statutory language at best creates an illusory promise, or a condition precedent to termination, complied with when the agreement requesting water supplies was made.

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184. *Id* at 272 & n.11.

185. *Id.* at 277-79 (Nichols, J., concurring & dissenting).

186. *Id.* at 283.

187. *Id.*

188. Duncan v. United States, 597 F.2d 1337 (Ct. Cl. 1979), *vacated and remanded*, 446 U.S. 903 (1980), *remand decision*, 667 F.2d 36 (Ct. Cl. 1981), *petition for cert. filed*, 50 U.S.L.W. 3789 (U.S. Mar. 30, 1982) (No. 81-1747).

189. Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981), *petition for cert. filed* 50 U.S.L.W. 3785 (U.S. Mar. 30, 1982) (No. 81-1747).

190. *See supra* note 102.

191. 597 F.2d at 1340.

Despite the paucity of specific language regarding either trust duties or compensation, the court did not construe the statute strictly. Instead, the court examined the statute only from the standpoint of whether it took anything away from the "general trust relationship" between the government and the rancheria inhabitants.[192] In the course of its analysis, the panel also commented on the court's en banc opinion in *Mitchell II*.[193] As a result, the approach of the Court of Claims in Indian law breach of trust cases has apparently crystallized. Nevertheless, whether it meets with Supreme Court approval is another matter.

In *Duncan II*, Judge Davis interpreted *Mitchell II* as follows: "*Mitchell II* rules that, if a statute creates *or recognizes* the United States as general trustee of Indian property, that legislation ordinarily founds a substantive monetary claim for breach of that trust . . . ."[194] As in *Mitchell*, the court also emphasized that the supervision of Indian property alone creates a trust relationship, even though statutes authorizing such control do not use the word "trust."[195]

Although its discussion of jurisdiction was new, most of the court's decision concerning the Secretary's duties merely repeated the earlier opinion in the same case, vacated by the Supreme Court. Briefly, the court held that a "statutorily-created"[196] trust relationship existed, looking to the statutes creating the rancheria system, administrative interpretation, and termination legislation itself, referring to a "Federal trust relationship."[197] A new portion countered the Justice Department's argument that "a federal trust must spell out specifically all the trust duties of the Government as trustee."[198] On the contrary, when the government exercises pervasive supervision as it does in managing Indian property, "[a] broad-scale Congressional establishment of a trust is enough."[199] The court added, however, that specific duties could be found in the termination legislation. Specifically, the court read the termination legislation in light of its purpose to render Indians self-sufficient and to ensure they "receive the lands, assets, and monies to which they were legally entitled."[200] Moreover, the court read section 3(c) of the Act, quoted above, to evidence a legislative purpose to provide the Indians with adequate water facilities. Finally, the

192. Duncan v. United States, 667 F.2d at 40.
193. *Id.* at 40-41.
194. *Id.* (emphasis added).
195. *Id. at 41-42.*
196. *Id.* at 47.
197. *Id.* at 42.
198. *Id.*
199. *Id.* at 43.
200. *Id.*

court found the required congressional mandate for compensation in the nature of a trust, as it had in *Mitchell*. Since nothing in the statutes abrogated "the trustee's normal duty of monetary liability for breach,"[201] the court held money damages appropriate.

3. Conclusion: Indian Breach of Trust Analysis After Mitchell II and Duncan II

The approach of the Court of Claims in Indian breach of trust claims can be summarized as follows:

1. The court will determine whether a tribe and the federal government have a trust relationship. If any legislation authorizes the Interior Department to supervise or control Indian property and money, and if the Secretary in fact does exercise pervasive authority, the court will read this authorizing legislation as creating a general fiduciary relationship.[202] Even broadly worded statutes will suffice if actual management has taken place, despite *Mitchell*.[203]

2. Once the relationship has been established, the court then determines what duties exist, and whether the government has breached those duties. The duties may be found in specific legislation,[204] broad legislation read liberally,[205] or in the general common law of trusts.[206]

3. Finally, whether compensation has been mandated is determined by asking whether any of the statutes in question abrogate the traditional common law remedies for breach of trust.[207] If the statutes are silent, Congress must have intended to grant a remedy.

Contrast *Mitchell*. The Supreme Court: (1) looked only to the particular statute at issue to determine whether that statute created a trust relationship;[208] (2) refused to construe a broad statute liberally, even when it determined the statute created some sort of trust relationship, rejecting the argument that administrative interpretation and later statutes can be used

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201. *Id.* at 44.

202. *Compare Mitchell II, supra* notes 174-77 and accompanying text, *with Duncan II, supra* notes 192-95 and accompanying text.

203. *Compare Mitchell II, supra* notes 174-77 and accompanying text, *with Duncan II, supra* note 192 and accompanying text.

204. *See Mitchell II*, 664 F.2d at 272-73 (rights of way).

205. *See Duncan II*, 667 F.2d at 43 (Rancheria Act).

206. *Compare Mitchell II*, 664 F.2d at 271 (duty to compensate for breach), *with Duncan I*, 597 F.2d at 1344 (duty of fair dealing), *cited with approval in Duncan II*, 667 F.2d at 45.

207. In *Mitchell II*, the court stated: "A trust normally entails the right to compensation for the trustee's breach . . . and this statute does not in any way suggest otherwise." 664 F.2d at 271 (citations omitted). *Cf. Duncan II*, 667 F.2d at 42-43 (Rancheria Act, creating broad-scale, unlimited trust, also set forth specific government trustee obligations).

208. *See* 445 U.S. at 542-46.

to infuse an earlier statute with trust duties;[209] and (3) insisted that even if specific duties existed the statute must still be read strictly to determine whether compensation, rather than equitable relief, is appropriate.[210]

In *Duncan II*, the Court of Claims said that *Mitchell*, "which dealt with a quite different statute and set of facts, bears only indirectly on the present case . . . ."[211] Only time will tell if the court is correct. All that can be said is that *Duncan II* and *Mitchell II* surely do not represent the last word on Court of Claims jurisdiction.[212] The body that has that last word may be moved by the equities of these cases, in which the United States has all of the power, but few of the duties, to mitigate its requirement of strict construction of the statutory duty of Indian breach of trust cases. If it is not so moved, *Mitchell II* and *Duncan II* may wither under the harsh light of the Supreme Court's *Mitchell I* analysis.

B. Mitchell's Effect on Claims Made Under Other Provisions of the Tucker Act.

Although *Mitchell* appears to require a "semantically separate and analytically independent"[213] waiver of sovereign immunity for *all* provisions of the Tucker Act, it might be limited to those claims "founded . . . upon . . . any Act of Congress."[214] Since one sure result of *Mitchell* will be the increased use of these other provisions to redress claims for breach of trust, a brief review of these provisions is appropriate.

1. Claims Founded on the Constitution: Mismanagement and the Fifth Amendment Taking Clause

One of the little known aspects of *Navajo Tribe*, the helium lease case discussed earlier,[215] is that despite the court's discussion of trust principles, it ultimately held the helium lease was a property interest taken in violation of the fifth amendment taking clause.[216] *Mitchell* and *Testan* reaffirmed that a claim based on the fifth amendment taking clause can be

209. *Id.*
210. *Id.* at 540-42.
211. *Duncan II*, 667 F.2d at 40.
212. Court of Claims jurisdiction will be considered by the Supreme Court in the 1982-83 term in *Mitchell II*, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1748) and possibly in *Duncan II*, 667 F.2d 36 (Ct. Cl. 1981), *petition for cert. filed*, 50 U.S.L.W. 3785 (U.S. Mar. 30, 1982) (No. 81-1747).
213. *Mitchell II*, 664 F.2d at 283 (Nichols, J., dissenting).
214. 28 U.S.C. § 1491 (1976 & Supp. III 1979).
215. *See supra* notes 76-80 and accompanying text.
216. 364 F.2d at 345-46.

brought under the Tucker Act without separate waiver.[217] Thus, Indian plaintiffs may seek to avoid *Mitchell* by characterizing their claims as fifth amendment takings, especially in a case like *Navajo Tribe*, in which the government itself benefited from the mismanagement. Significantly, the Supreme Court implied that trust fund mismanagement could sometimes be a violation of the just compensation clause.[218] The Court of Claims has not been receptive to such an argument, however, holding in a 1966 case that extraordinary circumstances must be present to justify ever treating a taking of money held in trust as an act of eminent domain.[219]

Moreover, recovery of damages for a fifth amendment taking has long been considered difficult in the Court of Claims, partly because of the trust relationship. Judge Nichols's concurring and dissenting opinion in *Mitchell II* addressed the irony implicit in the relationship of breach of trust claims to fifth amendment taking claims. The Supreme Court has adopted a standard immunizing Congress to a great extent from liability under the just compensation clause when it serves as a trustee of Indian property.[220] Furthermore, in determining whether Congress acted as a trustee in order to apply this immunity, the Court looks not at statutory language, but at evidence Congress acted in good faith.[221] Thus, the test is easily satisfied, although, as Judge Nichols stated, "the shrinkage of Indian property [has been] considerable."[222]

Perhaps all that can be said at this point is that *Mitchell* may persuade the Court of Claims to overcome its traditional reluctance to find that plaintiffs have stated a fifth amendment taking claim, a reluctance partly explainable by the court's belief that a breach of trust remedy was readily available to the aggrieved tribes.

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217. *Compare Testan*, 424 U.S. at 401 *with Mitchell*, 445 U.S. at 540 n.2.

218. *Mitchell*, 445 U.S. at 540 n.2.

219. Confederated Salish & Kootenai Tribes v. United States, 175 Ct. Cl. 451, 455-56 (1966) (trust money cannot be equated with private property because U.S. holds legal title). *Accord*, Hoopa Valley Tribe v. United States, 596 F.2d 435, 443-44 (Ct. Cl. 1979). The plaintiffs were not without a remedy, however, because they recovered damages for breach of a treaty obligation when the United States used their trust funds to pay for a survey contrary to treaty provision. *See* Confederated Salish and Kootenai Tribes v. United States, 167 Ct. Cl. 405 (1964) (liability phase).

220. United States v. Sioux Nation, 448 U.S. 371, 416-17 (1980). (When United States acts as a guardian in disposing of land without tribal consent, it will not be subject to liability for a fifth amendment taking).

221. *Id.*.

222. *Mitchell II*, 664 F.2d at 283 (Nichols, J., concurring in part and dissenting in part).

2. *Claims Founded Upon Any Express or Implied Contract with the United States: Menominee Tribe*

In *Testan*, the Supreme Court excepted contract actions from its waiver analysis.[223] Thus, the Tucker Act itself can be said to waive sovereign immunity for contractual claims. Moreover, the Court of Claims has asserted that it has jurisdiction over implied-in-fact contracts,[224] including at least one case involving Indian funds.[225] Of course, the same act of holding money has also been characterized as creating a trust for purposes of claims founded upon any Act of Congress, at least when statutes existed referring to Indian trust funds. As the Court explained in one case: "The jurisdiction of this court over actions for money encompasses actions for money held by the Government for Indians, whether the relationship is called a trust . . . or a holding pursuant to an implied contract . . . ."[226]

It can be expected that tribes will rely on this Tucker Act provision to avoid *Mitchell*'s strict construction requirement. For instance, in an opinion issued within a few months of *Mitchell*, trial Judge Spector of the Court of Claims relied on the trust relationship in finding a breach of an implied-in-fact contract requiring the federal government to manage the Menominee Tribe's sawmill prudently, entitling the tribe to over five million dollars in damages.[227] Since the claim involved the same type of property mismanagement at issue in *Mitchell*, the judge's analysis merits further attention.

Judge Spector distinguished the case from *Mitchell* because the trust involved, although not statutorily expressed, had "broader support," arising as it did from "several historical sources and a long course of conduct."[228]

223. *Testan*, 424 U.S. at 400 ("The respondents do not rest their claims upon a contract. . . . It follows that the asserted entitlement to money damages depends upon whether any federal *statute* can fairly be interpreted as mandating compensation . . . ." (quoting *Eastport*, 372 F.2d at 1009)).

224. *See, e.g.*, Army & Air Force Exchange Service v. Sheehan, 50 U.S.L.W. 4562 n.10 (U.S. June 1, 1982); Cities Serv. Gas Co. v. United States, 500 F.2d 448, 451 (Ct. Cl. 1974).

225. *See* Fields v. United States, 423 F.2d 380, 383 (Ct. Cl. 1970) (dictum) (jurisdiction based on express or implied contract). *Fields* is doubtful precedent, however, because the court did not reach the merits, but instead dismissed because state courts had been vested with exclusive jurisdiction over suits regarding heirship to allotted Indian lands. *See id.* at 384.

226. Hoopa Valley Tribe v. United States, 596 F.2d 435, 444 (Ct. Cl. 1979) (government did not breach trust in assuring Hoopa tribe that they were sole beneficiaries of revenues when a later suit by excluded tribe resulted in government being forced to pay some of the fund to the excluded tribe, in light of government's vigorous defense of Hoopa Tribe's rights and fact that government belief that Hoopa tribe was entitled to the money was not insubstantial).

227. Menominee Tribe v. United States, 7 INDIAN L. REP. 5093 (Ct. Cl. Aug. 14, 1980).

228. *Id.* at 5094-95.

Reviewing the pervasive control the government has exercised by managing the tribe's assets for 107 years, the trial judge concluded ample evidence existed "that the parties had a tacit but clear understanding of their fiduciary relationship,"[229] giving rise to contractual damages measured by the loss of profits due to mismanagement.

Although analytically appealing as an end-run around *Mitchell*, the reasoning of the case is quite extraordinary. There is no evidence that Congress intended federal officials managing trust property from the turn of the century until recent years to be treated as common law fiduciaries. In fact, the evidence is exactly contrary. The trust was a source of power over Indian lands, derived from a duty to manage lands for the Indians because of their perceived helplessness, but certainly not also obligating officials to manage Indian resources as if they were non-Indian businesses.[230] Or, as a contracts professor might say, this was not a bargain relationship with a contemplated exchange of values, but a gratuitous relationship. Prompted by only arguably noble motives, the government aided the Indian tribes; but as in so many promises motivated by moral obligation, the promisor either did not feel obligated to carry out his promise or, at best, did not feel obligated to do a very good job of it.

If there is a contract in mismanagement cases, surely it is implied in law, imposed by the courts to do justice in a given case. Certainly the one-sided federal-Indian relationship, with such great power on the side of the gov-

229. *Id.* at 5095.

230. *See supra* cases cited in notes 7-9. Although many allotment-era Supreme Court cases speak in terms of an almost unreviewable plenary power of Congress over Indians, the author has not been able to find one such case imposing trust duties. For a comprehensive examination of 67 federal cases regarding guardianship of Indian lands, see Carter, *Race & Power Politics as Aspects of Federal Guardianship over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197 (1976). Nevertheless, a 1919 case is often cited. Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) (injunctive relief granted to prevent Secretary from sale of Pueblo land). At least one commentator regards *Lane* as the leading Supreme Court precedent permitting an equitable action for enforcement of the trust relationship. Chambers, *supra* note 10, at 1230-32. On the contrary, the Court did not hold the attempted involuntary transfer breached any federal trust responsibility to the tribe. Rather, the Court held that the lower court's ex parte permanent injunction was inappropriate, and remanded with directions to the lower court to enter a temporary restraining order pendente lite and permit the government to answer the tribe's allegations. 249 U.S. at 114. In this posture, the Court merely stated that if the transfer was unauthorized by Congress or a treaty, the tribe had a right as a property owner to block the sale. *Id.* at 113. As to the trust relationship, the Court assumed arguendo that the tribe was a ward of the government, but stated the relationship "has no real bearing on the point we are considering" because the relationship would not permit the Secretary to confiscate land under these circumstances. *Id. Cf.* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (Tribe may not enjoin Congress from involuntary transfer of tribal land). For a discussion of *Lone Wolf*, see United States v. Sioux Nation, 448 U.S. 371, 410-15 (1980).

ernment, should be persuasive reason for imposing the duty of a trustee on the government. Nevertheless, the Court of Claims is without jurisdiction over constructive contracts, for they are not true contracts, but quasi-contracts.[231] Moreover, the Supreme Court recently applied the *Testan* analysis to a claim based on an implied in fact contract, in *Army and Air Force Exchange Service v. Sheehan*.[232] An Army and Air Force Exchange Service (AAFES) employee argued that even if he did not have a formal employment contract with the exchange, the AAFES's own internal regulations "created an implied in fact contract that the Service would adhere to those regulations while the respondent remained in employment."[233] In reversing the Court of Claims, the Supreme Court held that the court erred in inferring an implied in fact contract from personnel regulations, because those regulations did not "explicitly authorize damage awards."[234] The decision was prompted by the Court's view that the claimant, who had essentially the same type of claim as the claimants in *Testan*, had attempted to "escape the force of *Testan*"[235] and to subvert a provision of the Back Pay Act expressly excepting AAFES employees from its provisions.[236] No statute expressly denies Indian tribes the right to recover for breach of trust; thus, *Sheehan* can be distinguished on this ground alone. Nevertheless, the Court's perception that the claimant was making an end-run around *Testan* influenced its decision. A similar attempt to avoid *Mitchell* might meet a similar fate. Otherwise, Indian tribes could merely rephrase their claims for breach of trust as implied in fact contract claims, arguing the same statutes regarded as insufficient to meet the *Mitchell* test, for a claim based on a statute can be read as creating an implied in fact contract. At the least, *Sheehan* casts doubt on the analysis in *Menominee Tribe*.

In conclusion, the contracts analysis may not succeed. While it is possible that the Supreme Court is willing to view the Indian tribes' original relinquishment of sovereignty and land as a bargained-for-exchange in return for the perpetual services of the federal government in managing their

231. *See, e.g.*, Merritt v. United States, 267 U.S. 338, 340-41 (1925). In *Mitchell II*, the court rejected the contracts claim, because there was no evidence that the government had ever entered into an agreement to manage the timber properly. 664 F.2d at 275. The court nevertheless stated that the plaintiffs could amend their petitions on remand if they had such evidence. *Id.* at 275-76.

232. 50 U.S.L.W. 4562 (U.S. June 1, 1982).

233. *Id.* at 4565.

234. *Id.* at 4566.

235. *Id.* at 4565.

236. 5 U.S.C. § 2105(c)(1) (1976, Supp. IV).

resources,[237] this analysis appears unlikely to emanate from the Court. Instead, the Court itself has continually referred to the process of acquiring authority over Indians and Indian lands as one of conquest[238]—a far cry from a bargain relationship.

3. Claims for Liquidated and Unliquidated Damages in Cases Not Sounding in Tort

The provision of the Tucker Act providing Court of Claims jurisdiction over claims for liquidated and unliquidated damages in cases not sounding in tort may seem to fit the breach of trust situation perfectly. When the breach of trust is not negligent and thus not a tort,[239] a claimant using this provision could avoid both the strict statutory construction of *Mitchell* and the strained contracts analysis of *Menominee Tribe*. The Court of Claims, however, has deliberately shied away from this provision, calling it "that still-amorphous and unfamiliar part of our jurisdiction . . . ."[240] Nevertheless, if the Supreme Court disagrees with the lower court's analysis of the statutes in *Mitchell II*, the Court of Claims may be forced to shape that provision into a remedy.

4. Conclusion

Other Tucker Act provisions may provide a vehicle for breach of trust claims, as sketched above. Still, it is hard to believe the Supreme Court's major concern was with the analysis by which the Court of Claims had been concluding the government was liable, rather than with the conclusion itself. In other words, the underlying value in *Mitchell* may well be the desire to protect the government—forced by circumstances into the role of manager of Indian land and money—from damages for mismanagement of property such as the timber in *Mitchell* and the sawmill in *Menominee Tribe*, and money, such as the trust funds in *Cheyenne-Arapaho*. One reason would be to protect the public fisc from payment of large damage awards, which has often been a covert and overt concern in Indian law cases.[241] A second reason would be that because the government gets none

237. For an eloquent argument in favor of viewing the entire federal tribal relationship as a contractual one, see R. BARSH & J. HENDERSON, THE ROAD: AMERICAN INDIAN TRIBES & POLITICAL LIBERTY (1979).

238. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955) (aboriginal Indian property is not property within the meaning of the fifth amendment taking clause because United States acquired title to all Indian land by conquest). *See generally* Carter, *supra* note 230.

239. *See supra* note 40.

240. Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1013 (Ct. Cl. 1967).

241. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290-91 (1955) (con-

of the benefits available to the private trustee, it should incur fewer duties, and then only those duties specifically mandated by statute. In light of these considerations, the Court could reason that availability of equitable remedies to prevent future breaches of trust is an acceptable trade-off for the loss of a damage remedy. Here too, *Mitchell*'s impact has been felt. Some district courts have begun to limit the trust relationship by requiring statutory creation and delineation of the scope of the relationship and by reading the statutes strictly, citing *Mitchell* for authority.[242] The next portion of this article will examine *Mitchell*'s effect on claims for equitable relief in the district courts. Though few in number, the cases may represent a trend having serious consequences upon the ability of Indian tribes to enforce the trust relationship.

C. Mitchell's Effect on Claims for Equitable Relief

The dissenting justices in *Mitchell* pointed out that the elimination of a money damages remedy destroys a powerful deterrent to mismanagement of Indian resources.[243] Yet the loss of a money damages remedy still leaves the possibility of equitable relief, desirable both to preserve trust property and money and to maximize its productivity. Preservation and maximization of existing resources is crucial for tribes attempting to strengthen their political autonomy and authority, for territory to govern and funds for government are essential.[244] Arguably, *Mitchell* will even strengthen a tribe's ability to obtain injunctive or declaratory relief, for with breach of trust claims limited, there is no adequate remedy at law and thus no bar to equitable relief.[245]

In suits for equitable relief, a few courts have required that trust relationship duties be stated expressly in a treaty, statute, or agreement,[246] but

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trary rule could lead to United States liability in the billions of dollars); Cherokee Nation v. United States, 270 U.S. 476, 492 (1926) (awarding compound interest might exceed the national debt); United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1333 (Ct. Cl.) (Although such concerns do "not govern the outcome of this suit," a contrary rule could expose the government to liability in an astronomical amount), *cert. denied*, 425 U.S. 911 (1975).

242. *See, e.g., infra* cases cited in note 246.

243. *Mitchell I*, 445 U.S. at 550 (White, J., dissenting) (joined by Brennan & Stevens, JJ.).

244. Chambers, *supra* note 10, at 1235-36.

245. *See generally* D. DOBBS, REMEDIES 27 (1973) (equitable remedy granted only when there is no adequate remedy at law). Furthermore, jurisdiction under the APA is premised explicitly on the absence of an adequate remedy at law. 5 U.S.C. § 704 (1976).

246. *See, e.g.*, Cape Fox Corp. v. United States, 456 F. Supp. 784, 799 (D. Alaska 1978); Donahue v. Butz, 363 F. Supp. 1316, 1324 (N.D. Cal. 1973) (trust relationship standing alone is insufficient to give rise to a claim; interference with present occupancy or breach of statutory requirements is necessary before court will order United States to create a reserva-

these cases usually involved tribes that had been terminated by positive congressional action.[247] For the most part, however, district courts have held the trust relationship to be a source of enforceable duties, or at least to require that relevant statutes be read liberally to create such duties, usually accepting the existence of such a relationship without question.[248] For example, in a case decided after *Mitchell*, the Ninth Circuit read a general statute granting authority over Indian health care as affirming "the principle that our government has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust. . . ."[249] The court thus held that the Indian Health Service "breached its statutory duty" in allocating California Indians, who comprise 10% of the Indian population, an average of only 1.18% of its funds.[250] The court distinguished *Mitchell* on two grounds. First, the court pointed out that its holding was based on statutes and not "the general trust relationship."[251] Second, because the plaintiff did not seek money damages, the *Mitchell* "jurisdictional dilemma" did not attach.[252]

The court's reasoning is apposite. *Mitchell*'s requirement of strict construction was governed by rules of interpretation regarding waivers of sovereign immunity; in suits for equitable relief invoking the Administrative Procedure Act, no waiver issue is present. Thus, although liberal rules of construction of statutes benefitting Indians arguably must give way in the *Mitchell* context, when they conflict with strict rules favoring the government,[253] liberal rules of construction favoring Indians can and should be

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tion out of national forest lands wrongfully taken from tribe). *See also* Skokomish Indian Tribe v. France, 269 F.2d 555, 559-60 (9th Cir. 1959) (trust relationship alone does not create consent to be sued, because trust relationship can only be found in treaty).

247. *See, e.g., Cape Fox Corp.*, 456 F. Supp. at 799 (Native Claims Settlement Act specifically disavows trusteeship over Alaskan Natives); *Donahue*, 363 F. Supp. at 1321-23 (action brought by unrecognized, landless tribe of California Indians).

248. *See supra* notes 67-73, 85-101 and accompanying text.

249. Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 572 (9th Cir. 1980) (emphasis omitted) (quoting Fox v. Morton, 505 F.2d 254, 255 (9th Cir. 1974)).

250. *Id.* at 571, 575.

251. Id. at 575 n.8. *Cf.* No Oilport! v. Carter, 520 F. Supp. 334, 373 (W.D. Wash. 1981) (the law does not recognize a generalized trust relationship; motion for summary judgment denied and case set for trial on whether specific treaty duties had been breached by pipeline project).

252. 618 F.2d at 575 n.8.

253. *See, e.g.*, Montana v. United States, 450 U.S. 544, 552-54 (1981) (presumption against conveyance of title to rivers to entities other than states defeated Indian tribe's claim that reservation of land for tribe in treaty included river); United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323 (Ct. Cl.), *cert. denied*, 425 U.S. 911 (1975) (strict construction necessitated by rule barring interest on money judgments against United States defeats tribal claim to damages for mismanaged trust funds measured by amount of interest the funds would have earned had they been managed correctly).

applied when there is no conflict with an established rule of strict construction.

Nevertheless, two cases in the District of Columbia Circuit have applied *Mitchell* in suits seeking equitable relief. Although the decision in each case is probably justifiable apart from *Mitchell*, continued reliance on strict construction could have a devastating effect on Indian attempts to bring about prudent management of their dwindling resources.

In *Hopi Indian Tribe v. Block*,[254] the district court refused to order an existing ski resort torn down or enjoin its expansion. The ski resort was located in an area acknowledged to be an important traditional religious site for both the Hopi and Navaho people. The plaintiffs had argued that the American Indian Religous Freedom Act[255] created a trust relationship obligating the government to "protect and preserve Indian religious freedom to believe, express, and exercise traditional religions."[256] In contrast, the court interpretated the legislative history as indicating only a policy requiring governmental agencies to consider the impact of actions on religious sites and not to deny freedom of worship.[257] Since the plaintiffs still had access to the religious site, the statute was satisfied. The court relied on *Mitchell* in reaching this conclusion, pointing out that although the Allotment Act, interpreted in *Mitchell*, contained much more explicit language than the Religious Freedom Act, the *Mitchell* court refused to construe it as placing full fiduciary obligations on the government.[258]

Arguably, *Hopi Indian Tribe* does no violence to the values protected by earlier district court trust relationship cases. As the court itself pointed out, there is ample authority for a court to refuse to impose enforceable duties on the government outside the realm of protection of Indian land, money, and entitlement to programs.[259] In addition, the Religious Freedom Act is in fact a general statement of policy, not amenable even to liberal interpretation as imposing an enforceable duty to prevent any further development of Indian religious sites that does not interfere with Indian access to the sites or exercise of religion.[260] Nevertheless, although the court probably

254. 8 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM 3073 (D.D.C. 1981).

255. 42 U.S.C. § 1996 (Supp. III 1979).

256. 8 INDIAN L. REP. at 3076.

257. *Id.*

258. *Id.* at 3077.

259. *Id.* at 3076.

260. The Act states:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession

could have reached the same conclusion, its reliance on *Mitchell* was misplaced and could be misleading.

C. Accommodating Competing Interests Within Federal Departments: Pyramid Lake & North Slope Borough

Pyramid Lake,[261] discussed earlier, was also a product of the District of Columbia district court and is the purest example of the use of a so-called "general trust relationship," not tied to statutes, treaties, or regulations. In *Pyramid Lake*, the court imposed a duty on the Secretary of the Interior not to balance away Indian interests in attempting to accommodate other interests within his jurisdiction. In effect, the court held the Secretary had a duty to do his utmost within the constraints of existing law, to preserve a valuable tribal resource. It has been argued that equitable relief is particularly appropriate "to accommodate the conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies."[262] Yet a recent decision from the District of Columbia Court of Appeals followed *Mitchell* in holding the Secretary of Interior's action in approving oil leases proposed by the Bureau of Land Management did not violate any general fiduciary duty to Indians.

To understand this conclusion, the case, *North Slope Borough v. Andrus*,[263] must be examined in greater detail. *North Slope Borough* was a broad-scale attack by environmentalist groups and the Inupiat Eskimo Tribe against off-shore leasing in the Arctic's Beaufort Sea. The principle concern of the plaintiffs was the preservation of the bowhead whale. The plaintiffs based their claims on several federal environmental laws, but were unsuccessful in preventing the leases from being executed. The court held that the Secretary had complied with all the environmental laws, at least at the leasing stage.[264]

The Alaskan natives' claim that the Secretary had breached his trust responsibility met a similar fate. The court first noted that the Inupiat's concerns were linked with the environment, because they hunted the bowhead whale.[265] The court then held the natives' concerns were adequately protected by the Endangered Species Act, which the court held the Secre-

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of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (Supp. III 1979)).

261. *See supra* notes 90-94 and accompanying text.

262. Chambers, *supra* note 10, at 1236.

263. North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980).

264. *Id.* at 598.

265. *Id.* at 593.

tary had satisfied.[266] Next, the court cited *Mitchell* for the proposition that the trust responsibility can be found only in statutes,[267] which must be strictly construed. The plaintiffs argued that the numerous exemptions from environmental laws for natives who hunted for subsistence purposes created a duty to protect the subsistence hunting life-style of natives.[268] The court rejected this argument, stating that "[w]ithout 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."[269]

Concededly the court went on to evaluate the Secretary's actions in light of his trust responsibility, "such as it is."[270] Thus, the court did not dismiss the natives' claim to a trust relationship out of hand, despite the strong language just quoted. The most troubling aspect of *North Slope Borough*, however, is that the court acknowledged the Secretary's discretion to balance the competing interests in these cases without giving an "overriding veto" to the claims of the Natives.[271] According to the court: "Each balance involves tension and compromise of dual values that are disappointing in some degree. The tension implicit in the Secretary's required actions—whether by statute or otherwise—cannot be transformed into a veto for any one particular set of interests which would halt the Secretary's delegated decision-making."[272]

Contrast *Pyramid Lake*. In that case the Secretary had argued he was forced by the need to balance competing interests to make a "judgment call" sacrificing the tribe's interests in preserving water for its tribal lake to the Bureau of Reclamation's interests. Judge Gesell rejected this argument, stating:

> A 'judgment call' was simply not legally permissible. The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. . . . The burden rested on the Secretary to justify any diversion of water from the tribe with precision. It was not his function to attempt an accommodation.[273]

Nevertheless, a *Mitchell* analysis was not necessary to reach a conclusion

266. *Id.* at 611.
267. *Id.*
268. *See id.* at 611-12.
269. *Id.*
270. *Id.*
271. *Id.* at 613.
272. *Id.*
273. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973).

adverse to the Natives, for several reasons. First, no present threat existed. The court's opinion discussed at length the limited effect of the leasing state of this massive project, particularly stressing that no drilling could be authorized until tests were undertaken by the lessees resulting in a comprehensive plan on the feasibility of the projects. Only if the lease stage was implemented could the Secretary accurately predict the effect on the evironment.[274] Furthermore, there was no evidence the limited physical intrusions made during the two-year leasing phase would affect the bowhead whale population. Second, Indian property was involved in *Pyramid Lake*, but not in *North Slope Borough*. Many courts, including the Court of Claims, have been reluctant to extend the trust relationship to include a duty to protect a tribe's autonomy or actual identity, regardless of the government's culpability.[275] The Inupiat Tribe does not own the bowhead whale; it merely claimed that hunting the whale was a necessary part of its people's subsistence culture. The court could have distinguished the case on this ground alone. Third, as the court noted,[276] Congress has terminated the trust relationship with Alaskan natives in the Alaska Native Claims Settlement Act (ANCSA).[277] One of the expressed purposes of ANCSA was to set up a system different from that in the lower forty-eight states.[278] Accordingly, the ANCSA model requires the Natives to set up their own corporations and manage all their own affairs.[279] In light of such clear legislative intent not to have a trust relationship with the Alaskan natives, a court properly should require any asserted trust relationship to be indicated clearly by statute. Other cases before *Mitchell* involving Alaskan Natives denied relief on these very grounds.[280]

D. Equitable Relief after Mitchell

Although two cases do not usually represent a groundswell, two cases

274. 642 F.2d at 593-94.

275. *See* Chambers, *supra* note 10, at 1242-46.

276. 642 F.2d at 612 n.151.

277. 43 U.S.C. §§ 1601-1628 (1976 & Supp. III 1979).

278. Congress's findings in the Act state in part: "[T]he settlement should be accomplished rapidly . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship . . . ." 43 U.S.C. § 1601(b) (1976).

279. For a description of the Act, see Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 U.C.L.A.-ALASKA L. REV. 89 (1979).

280. *See, e.g.*, Cape Fox Corp. v. United States, 456 F. Supp. 784, 800 (D. Alaska 1978). *Cf.* Carlo v. Gustafson, 512 F. Supp. 833 (D. Alaska 1981) (Native Townsite Act passed for the benefit of individual Natives obtaining townsites under its provision; court has jurisdiction to determine whether government breached). Jurisdiction in *Carlo* was premised on § 345. *See supra note 38.*

from such a prestigious circuit might have great influence. As stated above, neither case involved protection of Indian land and money or entitlement to government services given Indians generally.[281] The successful breach of trust cases before *Mitchell* all involved these sorts of claims. At the same time, district courts had refused to grant equitable relief for claims involving the protection of Indian sovereignty or cultural identity before *Mitchell*. Although this earlier narrowing of the trust relationship had not been without its critics,[282] it appeared to be settled law by the time of *Mitchell*. Thus, the analysis in *Hopi Tribe* and *North Slope Borough* relates to this earlier narrowing and can be distinguished solely on this ground.

On the other hand, if district courts follow *Mitchell* the consequences could be serious. The successful cases discussed earlier often involved statutes granting the Secretary authority to manage property or money but not mandating the exercise of that authority. For instance, recall that the district court in *Manchester Band* awarded equitable relief in the form of an order to invest tribal trust funds prudently, as well as money damages.[283] Yet, when that case was submitted to a *Mitchell* analysis the conclusion was that strict construction might permit only a holding that the tribes were entitled to a mandatory four percent simple interest.[284] If equitable relief were similarly limited, a tribe would be faced with the choice of demanding the right to take charge of its own investments or settling for being able to enforce only the four percent mandated by statute. Similarly, the plaintiffs in *Duncan* successfully obtained equitable relief in the district court before their money damage claim was transferred to the Court of Claims. The district court declared the rancheria "de-terminated" and ordered the defendants to rectify the water and sanitation problem.[285] If the *Mitchell* analysis were applied to such a case, the Indians in the terminated rancheria would have no remedy, as a federal district court for the Northern District of California recently concluded in dismissing a concurrent Tucker Act claim for breach of trust in termination of another California

281. *White v. Califano* and Rincon Band v. Harris are the clearest examples of this latter category. *See supra* notes 96-97, 247-50 and accompanying text. Usually these cases can be decided on narrower grounds because they involve analysis of legislation and administrative regulations. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199 (1974) (BIA benefits extended to Indians living near reservation because regulations excluding them were not properly promulgated) (jurisdiction under the APA). In such cases, the trust relationship functions more like "a sort of broad 'fairness doctrine' rather than a more precise doctrine that can be used to enforce particular rights." Chambers, *supra* note 10, at 1246.

282. *See supra* note 271.

283. *See supra* notes 67-71 and accompanying text.

284. *See supra* notes 161-67 and accompanying text.

285. *See supra* notes 97-111 and accompanying text.

rancheria.[286]

The remaining cases awarding equitable relief discussed earlier, *White v. Califano*[287] and *Edwardsen v. Morton*,[288] would meet a similar fate, for neither case involved statutory authorization much less a statutory mandate. On the contrary, in each case relief was granted, or at least contemplated, *despite* federal authorization for the action taken, because of a conflict with a federal trust relationship neither court felt impelled to anchor in federal statutes.

Mitchell, however, need not spell the end of the trust relationship as a doctrine enforceable against the federal government. The Tucker Act requirement of a claim based on a statute forces courts exercising Tucker Act jurisdiction to focus on statutes creating enforceable duties, applying the strict construction analysis mandated by *Testan* and *Mitchell*. On the other hand, the federal district courts have no such constraints. Of course, a statute creating a claim is helpful, though not necessary, for federal subject matter jurisdiction,[289] but the statutes relied on can be liberally construed both for jurisdictional purposes[290] and for purposes of awarding relief. Furthermore, claims based on the APA need no further waiver of sovereign immunity.[291] Thus, when cases involving mismanagement of property of money, or entitlement to federal services arise, district courts should follow the lead of the Ninth Circuit, distinguish *Mitchell*, and call the government to account for any abuses.

V. CONCLUSION

Before *Mitchell*, courts were satisfied with a fairly loose analysis in breach of trust claims. For the most part, they assumed the existence of the relationship, unless a particular tribe clearly had been terminated by federal statute. Moreover, they often measured duties imposed by the relationship by common law more than by federal statutes, treaties or regulations. *Mitchell* has forced a change in this procedure in claims for

286. Table Bluff Band v. Andrus, 9 INDIAN L. REP. 3005 (N.D. Cal. Sept. 22, 1981).

287. *See supra* notes 95-96 and accompanying text.

288. *See supra* notes 85-88 and accompanying text.

289. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("§ 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin").

290. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (Non-intercourse Act and federal policy of protecting Indian land sufficient to make claim against third parties for trespass one arising under federal law for purposes of federal question jurisdiction): Edwardsen v. Morton, 369 F. Supp. 1359, 1381 (D.D.C. 1973) (ANCSA and pre-Settlement Act duty to protect land sufficient for federal question jurisdiction; presumption in favor of judicial review).

291. *See supra* note 42.

money damages. At a minimum, general statutes putting land or money in trust will not suffice to create enforceable obligations unless the legislative history clearly so indicates. Unfortunately, since the trust reationship was considered only as a source of federal power during most of this Nation's history, such evidence is lacking. But *Mitchell* can be carried further, as this article demonstrates. For even if a statute delineates a duty with sufficient specificity to meet the requirements of *Mitchell*, the law or legislative history must also indicate Congress contemplated money damages as a remedy. Moreover, the Court's emphasis on specificity of the duty in *Mitchell* may inspire courts to narrow the trust relationship to become a creature wholly of statutory law, even though *Mitchell* is not a precedent when equitable relief is sought.

If the trust relationship does become a creature of statutory law, its efficacy as a legal theory will be greatly hampered, especially if these statutes are read strictly. Although many statutes govern Indian affairs, they usually grant authority to the federal government or state federal policy regarding Indians. Rarely do they impose enforceable obligations.

Nevertheless, this judicial narrowing of the enforceability of the trust relationship may have salutory effects. Unenforceable federal mismanagement may rally tribes to organize and supervise their own resources. If tribes do take over supervision at their own request, their revenues could increase.[292] A second and related benefit is that such tribes may then become stronger political units, and this political strength may, in turn, cause them to assert their tribal sovereignty in place of federal dependency. A third benefit, also related, is that tribal advocates may search for other theories to protect Indian land and money, instead of relying on the trust relationship with its patronizing, colonial overtones. For instance, tribes may rely with increasing sophistication on the APA, or on theories based on inherent tribal sovereignty. As an example, the Jicarilla Tribe has imposed a severance tax on oil and gas at the well-head,[293] and may now use the ensuing revenue to fund its own management program, necessary because its oil and gas resources were badly mismanaged by the government in the past.[294] Other tribes similarly may impose business taxes on lessees

292. *See* LINOWES, *supra* note 64, at 120-21. *See also* Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 UNIV. COLO. L. REV. 617, 642-47 (1976).

293. *See* Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982) (tribe's inherent sovereignty permits imposition of severance tax on non-Indian oil and gas lessees; tax does not violate negative implications of commerce clause).

294. *See* Jicarilla Apache Tribe v. Supron Energy Corp, 479 F. Supp. 536, 547-51 (D.N.M. 1979). In *Supron Energy Corp.*, the court held that the Secretary of Interior breached fiduciary duties by: (1) failing to see that oil and gas lessees diligently developed

and other users of Indian property for this purpose. Finally, tribes may rely increasingly on constitutional arguments. The trust relationship starts from the proposition that the federal government has plenary power over Indian tribes.[295] Instead of conceding this point,[296] tribes might begin both to challenge this practically unlimited power of Congress to run Indian affairs and to assert individual rights barriers to limit federal power.

Although this argument paints a rosy picture of Indian tribal autonomy, it must be remembered that many tribes, like the Quinault allottees in *Mitchell* and the rancheria inhabitants in *Duncan*, lack the sophistication or the political coherence to manage their own property. Moreover, most tribes, including the larger and more powerful ones, believe they need the federal government to protect them from outsiders, especially from the surrounding states.[297] Yet the federal government, whom they have embraced as the lesser of two evils, has abused its power over Indian tribes.

When federal power is abused, tribes have looked to the federal courts for protection. Moreover, the relatively recent activist response of the federal courts to Indian breach of trust claims seems particularly appropriate, in light of the history of the place of Indian tribes in the federal scheme and the resulting political powerlessness of Indian tribes. Courts should be zealous to protect Indian tribal rights, because Indian tribes represent only one half of one percent of the population, maintain separate cultures even at the end of the twentieth century, exercise inherent governmental powers, but have none of the rights accorded states by the Constitution, and, except for the well-organized and wealthy energy resources tribes, have very little lobbying power. Yet before the recent Indian law revolution, courts had been far more zealous to protect federal power. Furthermore, this tender solicitude continues today. The same year it handed down *Mitchell* the Supreme Court decided *United States v. Sioux Nation*.[298] The Court reaffirmed that Congress's trust relationship may shield it from fifth amendment liability when it takes Indian property without tribal consent if it does so as a guardian "transmut[ing] land into money" rather than as a sovereign exercising eminent domain.[299] Moreover, the Court relied on

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wells as required by lease; (2) failing to ensure protection of leased lands from drainage; and (3) failing to ensure the method used for computation of royalties was the method most likely to produce the highest royalties.

295. *See supra* cases cited in notes 7-9.

296. *See 1982* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 50, at 217-20.

297. *See*, 1 *American Indian Policy Rev. Comm'n Final Report, supra* note 98, at 447-56. *See generally*, OUR BROTHERS KEEPER 5-23 (E. Cahn & D. Hearne, eds. 1969); Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

298. 448 U.S. 371 (1980).

299. *Id.* at 409. *See also* Montana v. United States, 450 U.S. 544 (1981). (Indian tribal

"unanchored, judge-created principles of fiduciary law"[300] instead of specific language in statutes in adopting this standard.

In the final analysis, it is this two-faced role of the federal government that made the earlier breach of trust cases so appealing to the lower courts. As the Supreme Court noted in *Steele v. Louisville & Nashville Railway*: "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ."[301] If the trust relationship is a shield for the federal government, so should it be a sword for Indian tribes. Yet *Mitchell* has blunted that sword considerably. In conclusion, *Mitchell* was wrong. The Court should take the opportunity to limit its effect when *Mitchell II* and *Duncan II* come before it, and whatever the result, the federal district courts should not perpetuate it in suits seeking declaratory and injunctive relief. Despite the mixed feelings of Indian tribes about the federal government, any mention of the concept of termination of the trust relationship sends shock waves through Indian communities.[302] If a new termination era is to begin, it should be for Congress and not the courts to inaugurate.

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assertion of civil jurisdiction over nonmembers on non-Indian land within the reservation is inconsistent with their dependent status).

300. The government had characterized the plaintiff's claim in *Mitchell* in this fashion. *See Mitchell*, 591 F.2d at 1302.

301. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944).

302. *See supra* note 98.