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A REMEDY FOR A BREACH OF THE GOVERNMENT-INDIAN TRUST DUTIES

In the beginning there was the Indian. There then came to this land an onslaught of immigrants who ravaged the country with 'progress'. In the end the Indian was a ruin.[1]

INTRODUCTION

Since the enactment of the General Allotment Act of 1887,[2] which divided tribal lands into small parcels to be given to individual tribal members, the individuals receiving these small parcels were faced with a myriad of problems. To a large degree the people who hold these lands today are faced with the same and sometimes more complex problems. This Note will look not at the problems that exist today, for they are too numerous to mention, but rather will look at one possible remedy that individual Indians holding allotments might utilize upon having a wrongful action taken by the B.I.A. (Bureau of Indian Affairs) regarding their allotments.

With the passage of the General Allotment Act, Congress created a device by which an Indian receiving an allotment would be protected from the harsh and unscrupulous dealings of the white man. It was declared that trust patents would be issued to the allottee.[3] This meant that the Indian would be given equitable title to his allotment while the United States government held the legal title, in trust, for the allottee. The United States thus imposed upon itself the obligation to act as trustee for the Indians who had obtained an allotment under the allotment system throughout the country. It is the problems and possibilities of bringing a suit against the United States for the breach of these duties that will be explored here. Understandably an act that would constitute a breach of these duties may arise in any number of ways, and the remedy sought will have to be guided by the specific facts involved. It is also understandable that an article such as this is not sufficiently broad in scope to cover every detail of a suit to remedy a breach of the trust duty. Hence only the problems that each Indian-Plaintiff will be assured of facing will be discussed.

In times past, the individual has too often turned to the government via the B.I.A. to have a wrong remedied. This was the only procedure known, and it often resulted in simply asking the wrongdoer to correct his mistake. Satisfactory results were and are still not

1. D. Nash, The History of the Indian since Columbus, Nov. 1, 1970 (unpublished paper).
2. Act of Feb. 8, 1887, ch. 119 § 1, 24 Stat. 388.
3. 25 U.S.C. § 348 (1964).

frequently forthcoming. Consider, for example, an instance known by the author to have happened where a woman, who, according to recorded deeds, held a parcel of land in trust. For unknown reasons the county in which the land was situated began levying taxes against the property, and eventually it was sold for delinquent taxes. Letters were written by the woman to officials ranging from the superintendent of the local agency to the Commissioner of Indian Affairs asking to rectify the situation. In addition two attorneys wrote letters in her behalf to the Commissioner and to the B.I.A. area office. The reasons given for not assisting her in securing the land were fallacious legally, and reflected the Bureau's own laxness in not previously taking action. The time has come to bring this type of problem before the judicial eye. The time has come for the federal government to perform its duties as promised or add another chapter to the long history of broken promises.

Although the Indian occupies a tenuous position in the scheme of federal government–federal policies change each time a new administration is elected and Congress, holding plenary power over the Indian, has the power to legislate him out of existence–at present there is a clear recognition by the administration of the trust relationship that exists between the federal government and the Indian. The recognition was evidenced by a message from President Nixon to Congress on July 8, 1970, in which he stated:

> The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these confrontations, the federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of the land and water rights *and* the *private* interests of Indians on land which the government holds as trustee.
>
> Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation[4] and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of

4. A recognition of terminated tribes?

> the federal government is damaged whenever it appears that such a conflict of interest exists.[5]

The recognition by the President of the existence of a credibility gap between the federal government and the Indians would indicate that the time is ripe to bring a suit against the government for a breach of the trust duties it owes to the Indians. To do so successfully would be to establish a precedent of no small importance to Indians throughout the country. Several of the major issues bound to be present in such a suit will be explored here, namely: the nature of a trust; administrative remedies and the necessity of exhausting these remedies; sovereign immunity and applicable consent statutes relevant in a suit brought to remedy the breach of the trust duty relating to allotments; and finally a look at various statutes, case law and theories that would help put the Indian-Plaintiff on the road to success.

THE TRUST

A trust is defined simply enough as:

> . . . a fiduciary relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another.[6]

Within this definition it is the term "fiduciary relationship" that gives rise to the obligations of a trustee. Bogert, in his treatise on trust law, goes on to discuss this relationship and, when compared to the government-Indian relationship, the anomaly is readily discernible. "The relation between trustee and beneficiary is particularly intimate. The beneficiary is obliged to place great confidence in the trustee". (Has the Indian had any choice in the past?) "The trustee has a high degree of control over the affairs of the beneficiary." (See 25 U.S.C. and 25 C.F.R.) "The relation is not an ordinary business one. The court of equity calls it 'fiduciary', and places on the trustee the duty to act with *strict honesty and candor and solely in the interest of the beneficiary.*"[7] (Emphasis supplied.)

5. The President goes on to recommend the formation of an Indian Trust Council Authority, a group of lawyers independent from any governmental department, whose sole job would be the enforcement of trust obligations relating to natural resources held by Indians. While the basic idea sounds desirable the specifics of the proposal have come under fire by various Indian groups and the authority's success, indeed creation, remains to be seen.

6. Bogert, Handbook of the Law of Trusts § 1 (4th ed. 1963).

7. *Id.*

Has this been the relationship that has existed between the Indians and the federal government in years past, and does it exist at the present time? It is submitted that it does not exist. It is when the government does not act with "strict honesty and candor and solely in the interest" of the Indian with regard to property that is held in trust that, at least in theory, the Indian who suffered damage should be able to bring suit. Such an instance might arise, for example, when the agency charged with fulfilling the trust obligations (the B.I.A.) allows a third person to gain possession or title to what should be trust land. This may occur by some direct transaction such as an illegal sale, or by the B.I.A. allowing a county to levy taxes on trust property[8] and eventually sell the land for past due taxes and give a tax deed to a purchaser at a tax sale.

ADMINISTRATIVE REMEDIES AND THE REQUIREMENT OF EXHAUSTION

The Bureau of Indian Affairs is the agency charged with fulfilling the government's obligations to the Indian. For purposes of discussion it will be assumed that when an individual Indian incurs damages due to a wrongful act by a B.I.A. employee that involves restricted land, such act occurs on the local agency level. That being the case, his administrative remedies are controlled by the regulations in 25 C.F.R., under which the B.I.A. operates. The remedy provided is found in Subchapter A, Procedures; Practice, Part 2—appeals from administrative actions. It is stated in Subpart A, § 2.3 that,

> . . . any interested party adversely affected by a decision of an official under the supervision of an Area Director of the Bureau of Indian Affairs may appeal to the area director; an appeal may be taken to the Commissioner of Indian Affairs from a decision of the area director; and an appeal may be taken to the Secretary of the Interior from a decision of the Commissioner.

Subparts B through C set out the procedures relating to time limits, petitions, answers, service of documents, and effect of the decision at each of the three appeal levels. This procedure, as with judicial appeal, is often time consuming and costly to the person pursuing it.

8. ". . . the allotment lands provided for in the Act of 1887 are exempt from state and territorial taxation upon the ground above stated . . . Namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a federal power, and therefore outside the province of state or territorial authority". 19 Op. Atty. Gen. 161, 169 (1887).

It is clear that an allotment made under the General Allotment Act remained exempt from taxation so long as the land was held in trust by the United States. *United States v. Richert*, 188 U.S. 432 (1903). The trust period has been extended regularly and still exists today. For outline of past extensions see 25 C.F.R. 415-18 (1970).

Having looked at the administrative remedies provided where a decision adverse to one's interests in an allotment occurs, we now turn to the question of whether such appeals are necessary prior to the bringing of a legal action to remedy an administrative decision that could be termed a breach of the fiduciary duty.

The general rule is that judicial relief must be denied until administrative remedies have been exhausted.[9] However, as many cases show, there are several exceptions to this general rule.[10] It appears that the true rule is that sometimes exhaustion is required and sometimes it is not. Exhaustion is not required generally when pursuit of the administrative remedy would cause irreparable injury, when there is doubt as to the agency's jurisdiction, and when an administrative remedy would be inadequate or its pursuit futile.[11] Of these exceptions the one most susceptible of use in situations involving the government's breach of trust duties would be the latter. However, the decision to invoke that exception should be approached with caution, for it is not always an absolute exception to the general rule.[12]

As with the use of a legal action to remedy a breach of the fiduciary relationship, the use of any of the exceptions will depend largely on the fact pattern involved. Further, the fact that perfecting an appeal as provided in the Code of Federal Regulations may be time consuming and expensive should be given consideration. In any event, should the appeal procedure not be utilized, no matter how stable one's position under one of the exceptions to the exhaustion requirement, he will at some point in the litigation be required to convince the court that his is truly an exception to the general rule.

CONSENT STATUTES

The judge-made doctrine that the sovereign is immune from suit is well established in the United States.[13] As a result, the United States cannot be sued without its specific consent, which must be given by Congressional enactment. Usually, when one brings suit against the United States, he must, after finding a statute providing consent to be sued, find a proper jurisdictional statute since the jurisdiction of the federal courts over actions brought against the United States is quite limited. Hence, the individual seeking to sue the federal government must specifically and expressly plead the jurisdictional ground

9. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Davis, Administrative Law Text, § 20.01 (1959).

10. *See,* Davis, Administrative Law Text § 20.01 (1959) where such cases are discussed.

11. 3 Davis, Administrative Law Treatise § § 20.01-20.10 (1958).

12. *Id.* at § 20.07.

13. Lavine & Horning, Manual of Federal Practice § 1.129 (1967).

on which he is bringing the action.[14] The requirement of finding two statutes, one granting consent and another granting jurisdiction, is not applicable here since the statutes to be discussed waive immunity of the United States to suit and grant, either expressly or impliedly, jurisdiction of such suits to the federal district courts.

When an act or omission on the part of a government employee results in damage to a restricted individual Indian, the particular facts may show that the employee was negligent, and the case would therefore sound in tort. If such be the case, the Federal Tort Claims Act[15] provides consent by the United States to be sued and provides a jurisdictional basis for bringing the suit in federal district court. The immediately relevant portions of these statutes provide:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for . . . loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[16]
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages.[17]

At first glance these statutes appear to provide a perfect ground for bringing a suit for breach of the trust obligation, since the standards to which a private individual acting as trustee is held are extremely strict and the actions of the government as trustee, when compared to this standard, are somewhat less than sufficient. There are, however, exceptions to the Tort Claims Act which complicate, but do not necessarily eliminate, its use for this particular purpose. A considerable number of exceptions are set out in the statute itself.[18] Of the many exceptions, there is one that could cause particular difficulty in the bringing of a suit for the breach of trust obligations. That section, 28 U.S.C. 2680 (a), provides:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to (a) any claim based upon an act or omission of an

14. *Id.*
15. 28 U.S.C. § § 1346(b), 2671-2680 (1964). Venue requirements for suits under the Tort Claims Act are set out in 28 U.S.C. § 1402(b) (1964).
16. 28 U.S.C. § 1346(b) (1964).
17. 28 U.S.C. § 2674 (1964).
18. 28 U.S.C. § 2680 (1964).

> employee of the Government, exercising due care, in the execution of a statute or regulation whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

From the face of this statutory exception two points should be noted. First, it would appear that one could bring suit for a claim based upon an act or omission of a government employee in the execution of a statute or regulation but a lack of due care would have to be proved. This is nothing more than is required in a regular negligence action. Second, since an abuse of discretion does not impose liability on the United States under 28 U.S.C. 1346 (b)[19], one would have to show that the act wrongly performed or not performed at all was mandatory. One might be aided in this regard by using the test provided by the statute itself, *i.e.* comparing the United States to a private individual similarly situated—a person acting as a trustee in a private trust. For example, consider the situation where the federal government refused to take action to secure the return of an allotment that was wrongfully sold for taxes by the county. Is there any doubt that to a private individual acting as trustee for a private trust such action would be mandatory to prevent the depletion of the trust res? The same standards should be applicable to and enforced against the United States as trustee of Indian land.

There is also an exception to the exception which states that while an act or omission in the performance of a governmental function is excepted from the operation of the Federal Tort Claims Act, an act or omission, merely incidental to the performance of a discretionary function and not involving the exercise of policy judgement and decision is not excepted.[20]

A final point to be noted about the Tort Claims Act is that prior to a 1966 amendment of 28 U.S.C. 2675 (a) (entitled "Disposition by federal agency as a prerequisite; evidence") it was generally held that the filing of an administrative claim was not a prerequisite to filing or maintaining a civil action against the United States.[21] How-

19. United States v. Morrell, 331 F.2d 498 (10th Cir. 1964).

20. Huslander v. United States, 234 F.Supp. 1004 (W.D. N.Y. 1964).

21. Schlingman v. United States, 229 F.Supp. 454 (S.D. Cal. 1963); Whistler v. United States, 252 F.Supp. 913 (N.D. Ind. 1966).

The pre-1966 version of 28 U.S.C. §2675(a) (1964) provided:

> An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrong-

ever, in the first case to interpret the provision as amended, *Beavers v. United States,*[22] the court stated that the clear language of the amended statute as well as the legislative history[23] dictated that the filing of an administrative claim is now a prerequisite to filing or maintaining a civil action under the Federal Tort Claims Act.

Another statute in which the United States waives its sovereign immunity to suit is the Tucker Act.[24] It provides:

> (a) The district court shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[25]

It is the language ". . . or for liquidated or unliquidated damages in cases not sounding in tort" that California Indian Legal Services in their *Native American Law Manual,* at p. 334, states should cover suits for violation of the government's fiduciary duty to Indians.

It is quite obvious from the face of this statute that it provides both consent to suit and a jurisdictional basis for the suit. The case of *McMichael v. United States*[26] discusses 28 U.S.C. 1346 (a) (2) as consent by the United States to suit, and jurisdiction under this statute is discussed in *Universal Transistor Products Corp. v. United States.*[27] When bringing an action under this statute in the district court, damages are automatically limited to $10,000. Any suit for an amount over $10,000 must be brought in the Court of Claims.[28] *Klamath & Modoc Tribes v. United States,*[29] is partially concerned

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> ful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

28 U.S.C. § 2675(a) (Supp. V 1970) states:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency.

22. 291 F.Supp. 856 (S.D. Tex. 1968).
23. S. Rep. No. 1327, 89th Cong., 2d. Sess., U.S. Code Cong. & Ad. News, p. 2515 (1966).
24. 28 U.S.C. § 1346(a) and (d), 1491 (1964).
25. 28 U.S.C. § 1346(a) (1964).
26. 63 F.Supp. 598, 599-600 (N.D. Ala. 1945).
27. 214 F. Supp. 486 (E.D. N.Y. 1963).
28. 28 U.S.C. § § 1346(a), 1491, 1505 (1964).
29. 174 Ct. Cl. 483 (1966).

with a breach of the fiduciary duties by the United States, and the Tucker Act provisions as related to the Court of Claims are discussed. There, the tribes concerned alleged that the fiduciary duty had been breached in the process of terminating federal supervision of the tribes' affairs in that land had been wrongfully taken and disposed of. They sought specific equitable relief in the form of a general accounting from the government. It was held that the court does not have jurisdiction to entertain a suit brought solely to obtain specific equitable relief such as a suit for a general accounting under the Tucker Act; that if it were proved that the government failed in its duties to the tribes, the court has the power to require an accounting in aid of its jurisdiction to render a money judgement on plaintiffs' claim; and that the plaintiffs must assume the burden of proving specifically how the government failed in its fiduciary duty.[30]

There is with the Tucker Act, as with almost every complex statute, a quirk which should be pointed out. The Court in *United States v. Sherwood,*[31] held that the United States may not be made a co-defendant where the claim against it is founded on the Tucker Act. In that case, where a person was suing the United States and a judgement debtor, it was stated that if the suit's maintenance against private parties is a prerequisite to prosecution of the suit against the United States, the suit must be dismissed, or "if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court."[32] This decision represents the present posture of the law and would dictate that if damages are to be sought from an entity or person other than the United States for a breach of the fiduciary duty, such action would have to be maintained in a different court or under another jurisdictional statute. One possibility in this situation where, for example, it had been contemplated that suit would be brought against both the United States and a state, would be to file a separate suit against the state in the appropriate court at the same time suit was filed against the government. Once both suits had progressed beyond the pleading stage, one would file a motion staying further proceedings in the action against the state pending the outcome of the case against the federal government. Thus, the person's right to recover

30. For other discussions of the granting of incidental relief in equity in and of a money judgement under the Tucker Act, see *Blanc v. United States,* 244 F.2d 708 (2d Cir. 1957), and cases cited therein. For a discussion of a district court's power to grant money damages and equitable relief against the United States even though "equity" was deleted from 28 U.S.C. § 1346(a)(2), see *Werner v. United States,* 10 F.R.D. 245 (S.D. Cal. 1950).

31. 312 U.S. 584 (1941).

32. *Id.* at 588.

from all parties who perpetrated the breach would be properly protected.

The final statutory possibility under which to bring a suit for breach of the fiduciary duty involves two very similar statutes. 28 U.S.C. 1353, entitled "Indian Allotments" only provides jurisdiction for a suit by an Indian for an allotment. The relevant portion of that statute states:

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any act of Congress or Treaty.

On the other hand 25 U.S.C. 345, "Actions for Allotments", is lengthier and broader in scope. It provides not only jurisdiction but also consent to suit by the United States. The statute provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) . . .

Of all the statutes discussed thus far, 25 U.S.C. 345 is the best under which to bring suit if the fact situation fits within the purview of the statute, since it is specifically enacted to allow the recovery of land. This statute was thoroughly examined and discussed in *Gerard v. United States,*[33] where it was specifically held that in a suit under 25 U.S.C. 345, Indians are entitled to join the United States as a party. In that case two Blackfeet Indians were seeking to establish title to land held by them under trust patents issued on land previously allotted to them. An unrestricted patent in fee was subsequently issued to them, and without their consent, the land was taxed and eventually sold at a purported tax sale. On the question of the right to join the United States as a party, the court cited *United*

33. 167 F.2d 951 (9th Cir. 1948).

States v. Hellard[34] wherein it was stated that "authorization to bring an action involving restricted lands confers by implication permission to sue the United States."[35]

The three different types of consent and jurisdictional statutes discussed thus far should provide a basis for an individual Indian who has suffered damages relating to trust property to get his suit into court.

STATUTES AND THEORIES DESIGNED TO PUT THE INDIAN IN A BETTER POSITION IN COURT

Once a suit against the government for breach of the fiduciary duty is in court, there are various statutes and theories which could place the Indian bringing the suit in a better position than he otherwise would be.

Despite the protective role the government supposedly plays in the Indian picture, there are very few preferences, commensurate with its role of trustee, given the Indian. In some instances a protective statute has been enacted and subsequently adulterated to the point where it is, in effect, totally ineffective. A grand example of this is 25 U.S.C. 175, which provides that "In all states and territories where there are reservations or allotted Indians, the United States Attorney shall represent them in all suits at law and in equity." From the plain wording of this statute and in light of rules of statutory construction that attach no small amount of significance to the use of the words "shall" and "all", it would seem safe to assume that this statute means what it says. However, cases interpreting this statute have held that its language is *not* mandatory.[36] Further, it appears to be a policy that the decision by the United States attorney to take any case on behalf of an Indian depends on the dollar amount in dispute, which also seems contrary to the wording of the statute. Still further, and still contrary to the clear language of 25 U.S.C. 175, 25 U.S.C. 346, which deals with proceedings in actions for allotments, provides that, ". . . It shall be the duty of the United States Attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit . . .". In addition to all this, questions have been raised in certain quarters as to the sufficiency of preparation and representation done by United States Attorneys when they do take a case on behalf of an Indian. This statute, 25 U.S.C. 175, is still on the books, providing a

34. 322 U.S. 363 (1944).

35. *Id.* at 368.

36. Siniscal v. United States, 208 F.2d 406 (9th Cir. 1953); Lyngstad v. Roy, 111 N.W.2d 699 (N.D. 1961).

direct conflict of interests and existing as a monument to the perpetual credibility gap that exists between the federal government and the Indians.

There is one statute that does put the Indian in a preferred position. That is 25 U.S.C. 194, which states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

This section was enacted to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare.[37] This statute would clearly be of great benefit in a suit concerning the title to an allotment or any parcel of land.

Another general rule of importance is that liberal construction in favor of the Indian is to be given to statutes relating to Indians.[38] This judge-made rule provides the Indian with a slight preference whenever, during the course of litigation, an interpretation of any such statute is required.

One final theory, supported by case law, of extreme importance will be touched on. One problem in bringing a suit concerning an allotment is that the wrongful act or omission that caused the damage might have occurred many years ago and might be barred by 28 U.S.C. 2401 (a), which states:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

The advantages of being able to circumvent this statutory limitation when trying to bring a suit for a cause of action that arose beyond the six year limit are obvious. Equally obvious is that the only way around that statute is for one to be under a legal disability or beyond the seas. From the time of the beginning of the allotment system in 1887 it is unlikely that many Indians have been beyond the seas when a cause of action concerning their allotment arose. Therefore, the discussion will focus on the term "legal disability".

The *Native American Law Manual,* at p. 333, suggests that Indians in circuits other than the 9th circuit might argue that the statute of limitations is always tolled because Indians are always under a legal

37. 34 Op. Atty. Gen. 439 (1925).

38. Cherokee Intermarriage Cases, 203 U.S. 76 (1906); United States v. Celestine, 215 U.S. 278 (1909); Choate v. Trapp, 244 U.S. 665 (1911).

disability as concerns the United States. They further suggest that courts in every circuit might hold that the statute of limitations is tolled when Indians are suing the government for mishandling trust property. The authorities cited after that statement can be found in *Dodge v. United States.*[39] The exclusion of the 9th circuit stems from its decision in *Mann v. United States*[40] which would be inapplicable to a suit brought for the mishandling of trust property since that case in no way involved trust property.

The question comes down to whether an Indian who has land held in trust by the United States is under a legal disability by virtue of that relationship so as to toll the statute of limitations when he brings a suit against the United States for mishandling the property. It has long been the rule that where the government holds property in trust for another, the statute of limitations on a claim involving the property does not begin to run until the trust is terminated or repudiated.[41] Therefore, if the trust continues in effect and the trustee never openly disavows the trust, an allottee is not barred from claiming any rights arising from the government's mishandling of his property notwithstanding the point in time at which the mishandling occurred.

An analogy in support of this proposition may be drawn from a line of authority involving taxation of trust land. 34 *Op. Atty. Gen.* 302, 305 (1924), in discussing the situation where the superintendent of an agency files tax returns for Indians and pays taxes with trust money and does not discover the error until the statute of limitations for recovering it has run, states:

> The Indian is not to blame for this; and, if the government could take advantage of the mistake of its own agent in this regard, it could go one step farther and in the interests of its revenue instruct the superintendent to allow such claims to lapse. It is needless to remark that such a practice would be repugnant to our conception of a just and fair government's policy toward this dependent people.

The *Dodge* case, in which this attorney general's opinion was cited, was referred to a Trial Commissioner for findings of fact and recommendations for conclusions of law. The court adopted his opinion in its entirety. The commissioner, in referring to the above-quoted opinion, noted that it is not directed toward a technical viewpoint of a legal trusteeship of the Indians' funds nor does it rest on their tax liability. "Rather, it concentrates on the necessity of dealing fairly

39. 362 F.2d 810 (Ct. Cl. 1966).

40. 399 F.2d 672 (9th Cir. 1968).

41. United States v. Taylor, 104 U.S. 216, 2212 (1882); Wayne v. United States, 26 Ct. Cl. 274, 289 (1891); Russell v. United States, 37 Ct. Cl. 113, 118 (1902); *see* Bogert, Trusts and Trustees § 951 (2d ed. 1966).

with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty' ". It seems that a person holding land held in trust by the federal government is in a like situation.

Further, in *Nash v. Wiseman,*[42] a case involving erroneous payment of taxes by a superintendent who refused to take any action, causing individual Indians to take action on their own when the statute of limitations had run, the court held, "a restricted Indian is a ward of the government and a refund claim can be filed for such a one at any time."[43]

The *Nash* rationale was followed in another case, *Daney v. United States,*[44] where the court held that the refund claim period did not commence to run until the restriction of non-competence had been removed from the plaintiff and that the claim was therefore timely since the plaintiff had filed his claim within three years of the removal of the restriction.

All the arguments set forth in these tax cases apply equally to the suit with which we are concerned here. Besides being a sound rule legally it is sound morally. It seems most unfair of the federal government to promise to handle Indian land as a trustee then refuse to give just reparation for wrongs it has committed by hiding behind a statute of limitation. To the argument that six years is a sufficient length of time to bring such a suit, consider the amount of legal knowledge, or better the lack of knowledge, a great majority of Indian people have had from 1887 to the present. No doubt many Indians living on reservations even today do not know what a cause of action is, let alone when they have one accruing, and in many instances they have not had sufficient legal counseling to guide them.

CONCLUSION

It is hoped that the small but ever increasing number of Indians who obtain a legal education, as well as lawyers who presently take a true interest in Indian affairs, will be quick to act when a situation arises in which such a suit may be brought. When an occasion comes about which will justify a suit, there cannot help but be many problems not touched on here that will plague the lawyers and individuals involved. The fight will be rough, but then, so have been many in which the Indian has sought what is rightfully his. But in this instance the end result will be a victory for the Indian.

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42. 227 F. Supp. 552 (N.D. Okla. 1963).
43. *Id.* at 556.
44. 247 F. Supp. 533 (D. Kan. 1965).

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