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FEDERAL GOVERNMENT HELD ACCOUNTABLE FOR DAMAGES ON THEORY OF BREACH OF TRUST

Indians—Reservation Lands: Indian tribes and individuals may recover damages for government mismanagement of Indian lands and resources. *United States v. Mitchell II*, 103 S.Ct. 2961 (1983).

INTRODUCTION

Individuals owning interests in allotted lands on the Quinalt Indian Reservation,¹ an unincorporated association of allottees, and the Quinalt Tribe filed actions in the Court of Claims² seeking to recover damages from the federal government for alleged mismanagement of timber lands on the reservation. Plaintiffs asserted that this mismanagement constituted a breach of the United States' fiduciary duty to the Indians as trustee under various federal statutes and regulations.³ The Court of Claims held that the General Allotment Act⁴ imposed a fiduciary duty on the United States to manage timber resources properly and thereby provided the necessary authority for recovery of damages against the United States.⁵

The U.S. Supreme Court reversed the Court of Claims, finding that the Tucker⁶ and Indian Tucker⁷ Acts are "only . . . jurisdictional act(s)"; they do not "create any substantial right enforceable against the United States for money damages."⁸ Because the General Allotment Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resources,"⁹ the Supreme Court found the Indians had no right to recover money damages from the federal government.¹⁰ The Court concluded that some source other than the General Allotment Act must be found for the

1. The Reservation was established in 1873 by an Executive Order setting aside about 190,000 acres on the Pacific Ocean side of the Olympic Peninsula. Ninety-eight percent of the Reservation was covered with dense coniferous forests.

2. *Mitchell v. United States*, 519 F.2d 1300 (Ct.Cl. 1979) (en banc), *rev'd*, 445 U.S. 535 (1980).

3. Statutes include timber management statutes, 25 U.S.C. §§ 406–407 (1982); regulations and sustained yield, 25 U.S.C. § 466 (1982); various federal statutes governing road building and rights-of-way, 25 U.S.C. §§ 318a, 323–325 (1982); and the General Allotment Act, 25 U.S.C. §§ 331–358 (1982).

4. 25 U.S.C. §§ 331–358 (1982).

5. 591 F.2d at 1302.

6. 28 U.S.C. § 1491 (1982).

7. 28 U.S.C. § 1505 (1982). Section 24 of the Indian Claims Commission Act, 28 U.S.C. § 1505 (1982), provides tribal claimants the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491 (1982).

8. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

9. *Id.* at 542.

10. *Id.* at 546.

Indians to recover damages for government mismanagement of timber resources¹¹ (*Mitchell I*).

On remand, the Indians argued to the Court of Claims that federal fiduciary responsibility is created or recognized by three statutes: 25 U.S.C. §§406–407 (timber sales); 25 U.S.C. §466 (regulations and sustained yield); and 25 U.S.C. §§318a, 323–325 (rights-of-way). The Court of Claims held that these statutes did give federal officials full authority to manage Indian forest property and land, thereby creating a fiduciary relationship. The Court of Claims concluded that plaintiffs could recover, on proof, for breach of this fiduciary obligation and obtain compensation provided by the statutes.¹²

In a 6–3 decision, the U.S. Supreme Court upheld the Court of Claims. The Court found that the United States can be held accountable in money damages for breaches of trust in connection with its management of forest resources on allotted lands on the Quinalt Reservation¹³ (*Mitchell II*).

This note will discuss the possible effects of *Mitchell II* on federal management of Indian lands and resources. Only the federal-Indian trust relationship will be discussed. The jurisdictional and sovereign immunity issues of this case have been addressed in other articles.¹⁴

THE TRUST RELATIONSHIP

The *Mitchell II* Court found that the timber management statutes,¹⁵ and the timber management regulations¹⁶ gave the federal government full responsibility to manage Indian resources and land for the benefit of Indians.¹⁷ The Court of Claims found these statutes to have a common thread: (1) they deal with Indian-owned property; (2) are managed and controlled by federal officials as fiduciaries; (3) are in the express interest of and for the benefit of the Indians; and (4) reflect Congress' intent for the Indians to obtain the financial benefits.¹⁸ The Court of Claims and the U.S. Supreme Court found that a fiduciary relationship had therefore

11. *Id.*

12. *Mitchell v. United States*, 664 F.2d 265 (Ct.Cl. 1981) (en banc).

13. *United States v. Mitchell*, 103 S. Ct. 2961 (1983).

14. See Hughes, *Can the Trustee Be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. REV. 447 (1981); Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U.L. REV. 635 (1982); Note, *Indian Breach of Trust Suits*, 33 RUTGERS L. REV. 502 (1981); and Orme, *Tucker Act Jurisdiction Over Breach of Trust Claims*, 1979 B.Y.U. L. REV. 855.

15. 25 U.S.C. §§406–407, and 466 (1982). Breach of trust claims also were alleged under the statutes governing Indian funds and government fees, 25 U.S.C. §§162a, 413 (1982).

16. 25 C.F.R. §141 (1981).

17. *Mitchell II*, 103 S. Ct. at 2972.

18. *Mitchell v. United States*, 664 F.2d at 273.

been established and the contours of the United States' fiduciary responsibilities defined.¹⁹

This fiduciary relationship was first established in the federal government's dealings with Indian tribes through treaties.²⁰ Indian tribes frequently were recognized in treaties as sovereign powers with title to the land which they occupied.²¹ Many of the terms familiar to international treaties were used in Indian treaties.²² Mutual pledges of peace and friendship,²³ as well as provisions for passports,²⁴ extradition,²⁵ and restrictions on foreign relations²⁶ are found in many of the early treaties.

Indian tribes were not recognized by the federal government as foreign nations, however. Numerous treaty provisions established their status as dependent nations.²⁷ Indian tribes often ceded land to the United States in return for goods and services.²⁸ Certain land areas also were set aside for the Indians' continued use. When the federal government failed to

19. *Mitchell v. United States*, 664 F.2d at 270 and *Mitchell II*, 103 S. Ct. at 2972.

20. Art. II, § 2, cl. 2 of the U.S. Constitution gives the President the power to make treaties with the advice and consent of the Senate, provided two-thirds of the Senators present concur. Congress passed the Act of Aug. 20, 1789, ch. 10, 1 Stat. 54, to defray the expense of negotiating and treating with Indian tribes.

21. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). The original inhabitants were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion. Their right to complete sovereignty, as independent nations, was necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

22. See, e.g., Treaty with the Comanches and Wichetaws, Aug. 24, 1835, art. 9, 7 Stat. 474, 475 (the United States desired that "perfect peace shall exist between the nations or tribes named" and the Republic of Mexico); Treaty with the Creeks, Aug. 9, 1814, preamble, 7 Stat. 120 (some of the Creek Nation acted "contrary to national faith" and suffered themselves to be instigated to violations of their national honor).

23. E.g., Treaty with the Sacs, May 13, 1816, 7 Stat. 141; Treaty with the Choctaws, Jan. 3, 1786, 7 Stat. 21 (Treaty at Hopewell); Treaty with the Delawares, Sept. 17, 1778, art. 2, 7 Stat. 13.

24. E.g., Treaty with the Cherokees, July 2, 1791, art. 9, 7 Stat. 39, 40; Treaty with the Creeks, Aug. 7, 1790, art. 7, 7 Stat. 35, 37.

25. Treaty with the Sisseton and Wahpaton Bands of Dakotas or Sioux, June 19, 1858, art. 6, 12 Stat. 1037, 1039; Treaty with the Poncas, March 12, 1858, art. 7, 12 Stat. 997, 1000; Treaty with the Choctaws, Sept. 27, 1830, art. 8, 7 Stat. 33, 334 (Treaty of Dancing Rabbit Creek).

26. Treaty with the Poncars, June 9, 1825, art. 3, 7 Stat. 247, 248; Treaty with the Chickasaws, Jan. 10, 1786, art. 8, 7 Stat. 24, 25; Treaty with the Cherokees, Nov. 28, 1785, art. 9, 7 Stat. 18.

27. Provisions often provided for the protection of Indian tribes from other tribes and all other persons by the United States. E.g., Treaty with the Kaskaskias, Aug. 13, 1803, art. 2, 7 Stat. 78; Treaty with the Ottoways and others, Nov. 17, 1807, art. 7, 7 Stat. 105; Treaty with the Creeks, Aug. 7, 1790, art. 2, 7 Stat. 35. The U.S. Supreme Court in 1831, found that all Indian tribes are "domestic dependent nations" in regard to the United States, rendering these kind of provisions unnecessary. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 217 (1831).

28. Goods and services included farming utensils, cattle, blacksmith and such agricultural assistance as the President may deem expedient (Treaty with the Chippewas, Sept. 24, 1819, art. 8, 7 Stat. 203); 200 cattle, 200 hogs, plus 2000 pounds of iron, 1000 pounds of steel and 1000 pounds of tobacco annually, and the assistance of laborers (Treaty with the Miamis, Oct. 23, 1826, art. 4, 7 Stat. 300); and the payment of annuities in the form of money, merchandise, provisions, or

fulfill the terms of the treaty²⁹ or was unable or unwilling to prevent states,³⁰ or white people,³¹ from violating treaty rights of the Indians, enforcement of the treaty terms did not occur until the courts and Congress recognized that the United States had an obligation to protect Indian tribes.³²

Indian treaties are recognized as part of the supreme law of the land³³ and "regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."³⁴ All Indian treaty provisions, except those abrogated by Congress,³⁵ remain operative today. In construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians,³⁶ that ambiguous expressions in treaties be resolved in favor of Indians,³⁷ and that treaties be construed as the Indians would have understood them.³⁸ These canons of construction were developed by the courts in recognition of the disadvantaged position which tribes occupied in relation to the federal government during treaty negotiations.

The policy of Indian treaty making ceased in 1871.³⁹ The federal government, however, continued to make agreements for land cessions. Treaties and agreements are recognized as having the same legal force,⁴⁰ except

domestic animals, at the option of the Indians (Treaty with the Osages, June 2, 1825, art. 3, 7 Stat. 240).

29. KINNEY, *A CONTINENT LOST—A CIVILIZATION WON* 68 (1937) (hereinafter cited as KINNEY); HOOPEES, *INDIAN AFFAIRS AND THEIR ADMINISTRATION, WITH SPECIAL REFERENCE TO THE FAR WEST* 180, 218, 219 (1932) (hereinafter cited as HOOPEES); and SCMECKEBIER, *THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 62 (1927) (hereinafter cited as SCMECKEBIER).

30. KINNEY, *supra* note 30 at 71.

31. KINNEY, *supra* note 30 at 148, 149, 174, 184, 208; HOOPEES, *supra* note 30 at 84, 226, 228–232; SCMECKEBIER, *supra* note 30 at 44.

32. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 525, 559 (1832).

33. *Worcester*, 31 U.S. (6 Pet.) at 559, and *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 196 (1876).

34. *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1828).

35. The power of Congress to abrogate provisions of Indian treaties unilaterally was upheld by the U.S. Supreme Court in *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903).

36. *E.g.* *Choctaw Nation v. United States*, 318 U.S. 423, 431–432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

37. *E.g.* *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 176 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576–577 (1908).

38. *E.g.* *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

39. The Appropriation Act of March 3, 1871, ch. 120, 16 Stat. 544, 566, R.S. § 2079, 25 U.S.C. § 71 (1982).

40. Agreements with Indian tribes are interpreted according to the same principles as treaties. *Martin v. Lewallen*, 276 U.S. 58, 64 (1928). They can be modified, except that the rights created by carrying the agreement into effect cannot be impaired. *Choate v. Trapp*, 224 U.S. 665, 671 (1912).

that treaties were ratified by the Senate, while agreements required the approval of both houses of Congress.⁴¹

Congressional enactments provided for governmental acquisition of Indian lands and resources after treaty making ceased. The first general statutory provision relating to disposition of Indian resources is found in a paragraph of section 2 of the Act of March 3, 1883.⁴² The Act provides that the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation are to be deposited in a treasury for the benefit of the tribe.⁴³ The funds then are to be made available for tribal use as determined by the Secretary of Interior.⁴⁴

In 1887, Congress enacted the General Allotment Act⁴⁵ which allowed the federal government to parcel out tribal lands to individual tribal members.⁴⁶ The federal government held the allotment in trust for twenty-five years or longer.⁴⁷ During the trust period, any purchase money paid to the tribe for surplus land remaining after the allotments were made was required to be held in trust for the benefit of the tribe.⁴⁸ At the end of the trust period, the federal government conveyed a patent in fee to the allottee or his heirs.⁴⁹ The Indian Reorganization Act of 1934,⁵⁰ ended the practice of allotments and extended indefinitely the trust period for existing allotments still in trust. The Act also authorized the Secretary of Interior to restore to tribal ownership any "surplus" lands acquired from the tribes under the General Allotment Act, so long as third parties had not acquired rights to that land.⁵¹

The fiduciary relationship between the federal government and the Indian tribes is neither stated expressly nor is it defined in statutes that require the federal government to manage Indian lands and resources. The nature of a fiduciary duty developed as a judicial and administrative

41. See Act of March 8, 1871, ch. 18, 16 Stat. 66.

42. Ch. 141, 22 Stat. 582, 590, 25 U.S.C. § 155 (1982).

43. *Id.*

44. This provision was later supplemented by the Act of Feb. 16, 1889 (ch. 172, 25 Stat. 673, 25 U.S.C. § 196 (1982)), authorizing the sale of dead timber on Indian reservations under such regulations as the President might prescribe.

45. 25 U.S.C. §§ 331-358 (1982).

46. 25 U.S.C. § 331 (1982).

47. 25 U.S.C. § 348 (1982).

48. *Id.*

49. 25 U.S.C. § 349 (1982).

50. 25 U.S.C. §§ 461-479 (1982).

51. 25 U.S.C. § 463 (1982). Various statutes have been enacted since the passage of the General Allotment Act that allow the federal government to acquire Indian lands and resources. See, e.g., Act of March 3, 1909, ch. 263, 35 Stat. 781, 782 (acquisition of lands for reservoirs or materials); Act of Feb 8, 1887, ch. 119, as added June 21, 1906, ch. 3504, 34 Stat. 327 (sale of lands within reclamation projects); Act of Oct. 9, 1972, Pub. L. No. 92-472, §§ 86 Stat. 788 (Coeur d'Alenes); Act of Aug. 10, 1964, Pub. L. No. 88-413, 78 Stat. 387 (Eastern Shawnees).

doctrine during the nineteenth century.⁵² The trust responsibility was first articulated by Chief Justice Marshall in *Cherokee Nation v. Georgia*⁵³ and *Worcester v. Georgia*.⁵⁴ Marshall analogized the relationship between the United States and the Indian tribes as resembling that of a "ward to his guardian," stating, however, the relationship was unique.⁵⁵ He characterized Indian tribes as "domestic dependent nations" and declared that all federal legislation, from the beginning, had considered the Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within these boundaries, which is not only acknowledged, but guaranteed by the United States."⁵⁶

Marshall's guardianship or trust responsibility concept was later employed by the Court in *United States v. Kagama*⁵⁷ to justify the imposition of federal regulations over Indian reservations. The Court upheld the constitutionality of the Major Crimes Act,⁵⁸ relying principally on the government's fiduciary duty to protect its Indian wards. The federal relationship to the Indian tribes, however, no longer *resembled* that of a guardianship. The Court in *Kagama* held that a guardianship *actually* existed.⁵⁹

Executive officials administering Indian property have been held to the ordinary standards of a private fiduciary.⁶⁰ In *Creek Nation v. United States*,⁶¹ the tribe filed an action in the Court of Claims under a special jurisdictional act to adjudicate all legal and equitable claims that the tribe may have had against the United States arising under the treaties or acts of Congress.⁶² On appeal, the U.S. Supreme Court affirmed the Court of Claims award to the tribe for money damages against the United States for lands excluded from their reservation and sold to non-Indians following an incorrect federal survey of reservation boundaries.⁶³ The Court based its decision on the federal trust doctrine, finding that the tribe was

52. R. P. CHAMBERS, CONFLICTS OF INTEREST IN THE ADMINISTRATION OF THE FEDERAL TRUST RESPONSIBILITY 6 (1972) (available in University of New Mexico Law School Library).

53. 30 U.S. (5 Pet.) 1 (1831).

54. 31 U.S. (6 Pet.) 515 (1832).

55. 30 U.S. (5 Pet.) at 17.

56. 31 U.S. (6 Pet.) at 559.

57. 118 U.S. 375 (1886).

58. Act of March 3, 1885, sec. 9, ch. 341, 23 Stat. 385 (codified at 18 U.S.C. §§ 1153, 3242 (1982)).

59. 118 U.S. at 383-384.

60. *E.g.*, *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Creek Nation v. United States*, 295 U.S. 103 (1935).

61. 78 Ct.Cl. 474 (1933).

62. Act of May 20, 1924, ch. 162, 43 Stat. 133.

63. 295 U.S. 103 (1935).

a dependent Indian community under the guardianship of the United States, and therefore, its property and affairs were subject to the control and management of the government.⁶⁴

Other decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian properties have held executive officials to a "moral obligation of the highest responsibility and trust" and "the most exacting fiduciary standards."⁶⁵ In *Seminole Nation v. United States*,⁶⁶ the tribe brought an action against the United States for breach of fiduciary duty growing out of treaty obligations. Federal officials were allegedly paying to the tribal council sums it was obligated by treaty to pay per capita to individual members. Plaintiffs claimed that these federal officials knew that the council was corrupt and would divert the funds paid to it to its own use. The Court reviewed the administrative conduct of the federal officials involved and held the federal officials liable to the tribal members for the sums paid to the tribal council.

The Supreme Court and several other federal courts have consistently recognized "that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."⁶⁷ Monetary damages have been limited to tangible direct injuries to property or to direct losses due to denials of required services.⁶⁸ The *Mitchell II* Court is the first court to grant damages for breaches of the ordinary standards applicable to a private fiduciary.⁶⁹

64. *Id.* at 110.

65. *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

66. 82 Ct.Cl. 135 (1935).

67. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 295-300 (1942); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Moose v. United States*, 674 F.2d 1277, 1281 (9th Cir. 1982); *Whiskers v. United States*, 600 F.2d 1332, 1335 (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Smith v. United States*, 515 F. Supp. 56, 60 (N.D. Cal. 1978); *Mancester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243-1248 (N.D. Cal. 1973); *Coast Indian Community v. United States*, 152-156, 550 F.2d 639, 652-654 (Ct.Cl. 1977); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1392 (Ct.Cl. 1975); *Mason v. United States*, 461 F.2d 1364, 1372-1373 (Ct.Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); *Navajo Tribe v. United States*, 364 F.2d 320, 322 (Ct.Cl. 1966); *Klamath & Modoc Tribes v. United States*, 174 Ct.Cl. 483, 490-491 (1966); *Menominee Tribe v. United States*, 102 Ct.Cl. 555, 562 (1945); *Menominee Tribe v. United States*, 101 Ct.Cl. 10, 18-20 (1944).

68. *See, e.g.*, *Coast Indian Community v. United States*, 550 F.2d 639 (Ct.Cl. 1977); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct.Cl. 1975); *Quinalt Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); *Capoeman v. United States*, 440 F.2d 1002 (Ct.Cl. 1971); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct.Cl. 1966); *Klamath & Modoc Tribes v. United States*, 174 Ct.Cl. 483 (1966).

69. The substantive claim for monetary compensation is created by the statute(s) which formed and continued a general trust and laid down specific duties. The right to sue the Government in the Court of Claims was completed by the Tucker Act, 28 U.S.C. § 1491. *Duncan v. United States*, 667 F.2d 36, 44 (Ct.Cl. 1981).

MITCHELL II

Before *Mitchell II* was decided, the federal government's fiduciary duties seemed to involve (a) a duty of reasonable care in the protection and preservation of the trust *res*, and (b) a duty of loyalty, with an attendant prohibition against self-dealing or misappropriating the trust *res*.⁷⁰ Damages were awarded for two types of standard trust claims—losses due to mismanagement of trust funds⁷¹ and losses due to mismanagement of tangible trust properties.⁷² The *Mitchell II* Court, in reviewing the statutes and regulations and prior case law, concluded that an express trust had been established by the statutes and, because a private express trust normally imports a right to recover damages for breach, Congress necessarily must have authorized recovery of damages for failure to perform the statutory duties properly.⁷³

The *Mitchell II* Court set forth a two-part test that must be met before money damages may be awarded for a breach of trust claim:

1. Is there a statute(s) that imposes a fiduciary responsibility on the federal government to manage the Indian land or resource at issue?
2. Does the statute(s) confer a substantive right to recover monetary damages?

Under the *Mitchell II* analysis, the statute at issue must "clearly establish" the fiduciary obligations of the government in the management and operation of Indian lands and resources.⁷⁴ The *Mitchell I* Court recognized that the General Allotment Act created a trust relationship between the United States and Indian allottees, but concluded that the trust relationship was limited.⁷⁵ Section 5 of the Act provides that the United States "does and will hold the land . . . in trust for the sole use and benefit of the" allottee.⁷⁶ The Court found that this language, read *in pari materia* with other sections of the Act,⁷⁷ indicated that the allottee and not the United States was to manage the land.⁷⁸ The Court also reviewed the legislative history of the Act and found that Congress did not intend to impose a fiduciary responsibility on the United States to manage forests

70. Chambers, *supra* note 52 at 12.

71. See *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct.Cl. 1975); *Quinalt Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); *Capoeman v. United States*, 440 F.2d 1002 (Ct.Cl. 1971).

72. See *United States v. Mitchell*, 445 U.S. 535 (1980); *Coast Indian Community v. United States*, 550 F.2d 639 (Ct.Cl. 1977); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct.Cl. 1966); *Klamath & Modoc Tribes v. United States*, 174 Ct.Cl. 483 (1966).

73. *Mitchell II*, 103 S. Ct. at 2972-2973.

74. *Id.*

75. *Mitchell I*, 445 U.S. 535, 542 (1980).

76. *Id.* at 541.

77. *Id.* at 542-543.

78. *Id.* at 543.

located on allotment land.⁷⁹ Congress simply “wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.”⁸⁰

The Court of Claims and the Supreme Court in *Mitchell II* found that the timber management statutes, the various federal statutes governing rights-of-way, Indian funds and government fees, and the regulations promulgated under these statutes impose a fiduciary duty upon the United States for management of forests on allotted lands. Courts have long recognized that “where 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.”⁸¹ In this instance, the timber management statutes and regulations, and the various federal statutes governing rights-of-way, Indian funds and government fees were intended by Congress to create a trust relationship and impose a fiduciary responsibility on the United States to manage forests located on allotted land.⁸²

The *Mitchell II* test is met if this fiduciary obligation imposed by the statute resembles that of a common law trust. The elements of a common law trust are present if there is: (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for the beneficiary’s benefit; and (3) trust property, which is held by the trustee for the beneficiary.⁸³ The *Mitchell II* Court found that a common law trust existed between the federal government and Indians over the exploited forests on the allotted lands because the government assumed such elaborate control over forests and property belonging to the Indians.⁸⁴ Federal officials determined what blocks (units) of timber would be put up for sale, secured powers of attorney from the allottee owners, and handled every detailed aspect of the sale—including advertising for bids; letting contracts; and supervising the loggers who built the roads, cut the timber, and hauled it off.⁸⁵ Federal officials saw to the counting and grading of logs, collected the money, deducted the fee, and credited the balance to the allottee’s (or the Tribe’s) BIA ac-

79. *Id.* at 543–546.

80. *Id.* at 544.

81. *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct.Cl. 1980).

82. *Mitchell II*, 103 S. Ct. at 2971–2972.

83. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

84. *Mitchell II*, 103 S. Ct. at 2972.

85. Brief for Respondents at 5–6, *United States v. Mitchell*, ___ U.S. ___, 103 S. Ct. 2961 (1983).

counts.⁸⁶ The Indians had nothing to do with the entire operation, except to sign the initial powers of attorney and to receive payment.⁸⁷

The fiduciary obligation imposed by the statutes and regulations at issue in *Mitchell II* was "interpreted as mandating compensation by the Federal Government for damages sustained."⁸⁸ The Court reasoned that the government should be liable in damages for the breach of its fiduciary duties.⁸⁹ The Indians asserted that,

an express trust is indistinguishable from . . . an express contract. Just as there is no need for a federal government contract to spell out expressly that the Government may be sued in damages for breach of contract—since, without such liability, the contract is no contract at all—so too, it is unnecessary for an express trust instrument to spell out that the Government may be sued in damages for breaches of its terms.⁹⁰

The *Mitchell II* Court found that the federal government should be liable in money damages for breaches of standards applicable to a private fiduciary, when the government is responsible for the management of Indian property and then violates that duty by mismanaging the property.⁹¹ Equitable remedies are totally inadequate in this instance because, "absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties."⁹² Also the damage to Indian resources may be so severe that any prospective remedy may be next to worthless.⁹³ Unless the government is held liable in damages for mismanagement of Indian property and resources, a trusteeship means little because the beneficiaries are precluded from meaningful recovery for their losses.⁹⁴

The dissent in *Mitchell II* found that the statutes did not contain any "provision . . . that expressly makes the United States liable,"⁹⁵ nor any indication in the legislative history of the statutes that Congress intended to consent to damages for government mismanagement of Indian forest resources and their proceeds.⁹⁶ Whether a private right of action should be inferred from a statute is determined by congressional intent, not by whether the Supreme Court thinks it can improve upon the statutory

86. *Id.* at 6.

87. *Id.*

88. *Mitchell II*, 103 S. Ct. at 2973.

89. *Id.*

90. Brief for Respondents at 29–30, *Mitchell II*.

91. *Mitchell II*, 103 S. Ct. at 2973.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Mitchell II*, 103 S. Ct. at 2975.

96. *Id.*

scheme that Congress enacted into law.⁹⁷ The statutes must “unambiguously” impose fiduciary responsibilities on the government.⁹⁸

The dissent then challenged the Court’s conclusion that because the statutes establish fiduciary obligations on the government, they can be interpreted as mandating compensation by the government for damages sustained. Justice Powell states,

there is a kind of a bootstrap quality of reasoning in saying that [the United States’] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee.⁹⁹

Justice Powell went on to state how the label of a trust will change the federal government’s control over Indian affairs. State governments may now intrude in those areas where at one time they were not allowed to interfere. The Court has invoked the fiduciary relationship primarily (1) to preclude unauthorized state interference in federal-Indian relations or other unauthorized exercise of state jurisdiction on Indian lands; (2) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property joined or represented; (3) to interpret doubtful or ambiguous treaty language in favor of the Indians; (4) to determine the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property; and (5) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians.¹⁰⁰ “The Court today turns this shield into a sword.”¹⁰¹

PROBABLE EFFECTS OF *MITCHELL II* DECISION

Mitchell II requires a review of the statutes and regulations at issue in a breach of trust claim against the federal government for mismanagement of Indian land and resources. The purpose and legislative history of statutes determine whether the statutes “clearly establish” the fiduciary relationship between the federal government and Indians with respect to the Indian lands and resources. The statutes need not contain the elaborate statutory and regulatory schemes established by Congress in the timber management statutes and regulations. There must be, however, some indication that Congress intended the federal government to manage and

97. *Mitchell II*, 103 S. Ct. at 2976.

98. *Id.* at 2977.

99. *Id.*

100. *Id.* at 2978.

101. *Id.*

operate the Indian land and resources at issue, and be responsible to the Indians when it fails to perform those duties.

Statutes such as the General Allotment Act and the Indian Reorganization Act do not impose such duties on the United States.¹⁰² Congress intended the Indians to manage the Indian lands and resources, not the United States.¹⁰³ Congress limited the scope of the fiduciary relationship between the United States and the Indians when it passed these Acts. No breach of trust can be found when Congress simply intended to prevent the alienation of Indian lands and did not intend the United States to be liable as a fiduciary for the mismanagement of Indian lands and resources.¹⁰⁴

The amount of control the Government assumes over the management and operation of Indian lands and resources pursuant to the relevant statutes is important in determining whether a trust relationship has been created. When Government control is exercised over Indian property and resources, the trust relationship exists unless Congress has expressly provided otherwise.¹⁰⁵ If the Indian property is generally run by the Indians themselves and the Government makes management decisions only when required by law,¹⁰⁶ previous court decisions have found that no trust relationship exists.¹⁰⁷ *Mitchell II* suggests that if Congress intended to make the Government liable for certain management decisions and the Government assumes control over the management of the Indian property, then the Government may be held accountable for the mismanagement of the Indian property in relation to its decision.¹⁰⁸

The *Mitchell II* Court liberally construed the statutes at issue. One of the canons in Indian law is that treaties and other federal actions shall be liberally construed to favor Indians.¹⁰⁹ Previous court decisions have

102. *Mitchell I*, 445 U.S. 535, 542 (1980) (General Allotment Act); *Hydaburg v. United States*, 667 F.2d 64, 69 (Ct.Cl. 1981) (Indian Reorganization Act).

103. *Mitchell I*, 445 U.S. 535, 543 (1980); *Hydaburg v. United States*, 667 F.2d 64, 65 (Ct.Cl. 1981).

104. *Mitchell I*, 445 U.S. 535, 544 (1980); *Hydaburg v. United States*, 667 F.2d 64, 69 (Ct.Cl. 1981).

105. *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct.Cl. 1980).

106. *E.g.*, *Hydaburg v. United States*, 667 F.2d 64, 65 (Ct.Cl. 1981). The Government made management decisions only when the Indian corporation's salmon canneries were facing bankruptcy. Governmental control over the Indian operations could not be established.

107. *Mitchell I*, 445 U.S. 535, 542 (1980); *Hydaburg v. United States*, 667 F.2d 64, 69 (Ct.Cl. 1981). A limited trust relationships was found that does not impose any duty upon the Government to manage Indian resources.

108. *Mitchell II*, 103 S. Ct. at 2972.

109. *E.g.*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

construed statutes in this manner.¹¹⁰ The *Mitchell I* Court applied a strict standard of interpretation to the General Allotment Act and found the language of the Act not sufficiently "unambiguous" to create even a common law trust.¹¹¹

After a statute has been found to establish a fiduciary relationship, the next issue is whether the statute creates a substantive right to money damages. The U.S. Court of Appeals, Federal Circuit, addressed this part of the *Mitchell II* test in *Short v. United States*.¹¹² In an action on appeal against the United States by individual Indians seeking relief from alleged discriminatory distribution of proceeds from timber sales on the Hoopa Valley Reservation,¹¹³ the Court applied *Mitchell II* and found that the 1864 Act authorizing the establishment of the Reservation¹¹⁴ and the timber sales statute relating to unallotted lands¹¹⁵ established a fiduciary relationship with the Indians living on the Reservation. The 1864 Act did not restrict distribution of the monies to members of the Hoopa Valley Tribe. The plaintiffs who qualified to share in the Reservations' timber proceeds and other income have a right to sue for the parts of those funds improperly distributed to others or illegally withheld from those claimants.¹¹⁶

In relation to this part of the *Mitchell II* test, a liberal reading of the statute is applied to determine whether the statute creates a substantive right to damages. The *Mitchell I* Court insisted that even if specific trust duties existed under the General Allotment Act, the statute must still be read strictly to determine whether compensation, rather than equitable relief, is appropriate.¹¹⁷

Statutes that create a fiduciary relationship do not always create a substantive right to damages. The trust relationship created may be limited like the one found in *Mitchell I*. The federal government may "hold the land or resource in trust for the benefit of the Indian," but the land or resource may be under the management of the Indian or the tribe. The

110. *E.g.*, *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Choate v. Trapp*, 224 U.S. 665 (1912).

111. *Mitchell I*, 445 U.S. 535, 542 (1980).

112. 719 F.2d 1133 (Fed. Cir. 1983).

113. The Reservation located in California is made up of unallotted forest lands.

114. The Act of April 8, 1864, ch. 48, 13 Stat. 39.

115. 25 U.S.C. § 407 (1982).

116. *Short*, 719 F.2d at 1137-1138.

117. *Mitchell I*, 445 U.S. 535, 542 (1980). "We need not consider 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. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* at 542.

land or resource at issue must be reviewed to determine the federal government's role in the management of the property.

An express trust was established by the statutes in *Mitchell II*. Government and executive officials must now adhere to the ordinary standards of a private fiduciary when an express trust has been established.¹¹⁸ As a private fiduciary, the federal government is now accountable to Indians and Indian tribes for any loss or depreciation in the value of the trust estate resulting from the breach of trust, or any profit made by it through the breach of trust, or any profit which would have accrued to the trust estate if there had been no breach of trust.¹¹⁹ Federal officials may also be accountable for a breach of duty of loyalty,¹²⁰ for any interest incurred on trust funds received,¹²¹ for selling property which it is their duty to retain,¹²² for failing to sell property which it is their duty to sell,¹²³ for purchasing property which it is their duty not to purchase,¹²⁴ and for failing to purchase property which it is their duty to purchase.¹²⁵ A federal official, however, is not liable for a loss resulting from a breach of trust if the same loss would have been incurred if he had committed no breach of trust.¹²⁶

Lower court decisions have found that the general law of fiduciary relationships can be utilized to the extent appropriate.¹²⁷

This does not mean, however, that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. We refer to such rules as the principal that once a breach of fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability. In each situation, the precise scope of the fiduciary obligation of the United States and any liability for

118. *Mitchell II*, 103 S. Ct. at 2972. "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust." *Id.* at 2973. The Court then lists treatises on the law of trusts and the Restatement.

119. RESTATEMENT (SECOND) OF TRUSTS § 205 (1959).

120. *Id.* at § 206.

121. *Id.* at § 207.

122. *Id.* at § 208.

123. *Id.* at § 209.

124. *Id.* at § 210.

125. *Id.* at § 211.

126. *Id.* at § 212.

127. *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct.Cl. 1981).

breach of that obligation must be determined in light of the relationships between the Government and the particular tribe.¹²⁸

The standard of duty, however, for the United States as trustee for Indians is not mere "reasonableness," but the highest of fiduciary standards.¹²⁹ When a federal official fails to disclose adequately to the Indians their statutory rights to water-carried sewage systems or the limits on Congressional funds provided for pretermination services, a breach of trust has occurred.¹³⁰ When a governmental agency's distribution plan's agreement on the Indian's water supplies was so vague and uncertain, and so unlikely to fulfill the Congressional objective, which was to grant the Indians self-sufficiency by making their lands "livable and agriculturally viable," as to breach the trustee's duty of fair dealing, a serious breach of trust has occurred under the standards of *Mitchell II*.¹³¹

The federal government has been accorded wide-ranging discretion to manage trust property.¹³² Federal officials have had to balance private Indian property rights against public purposes and determine what Indian property would be appropriated for public use without compensation.¹³³ Private trust law does not allow the trustee to have this much discretion.¹³⁴ Under the *Mitchell II* standards, the court will have to review the relevant statutes at issue and determine whether Congress intended the United States to be liable as a fiduciary for what may appear as mismanagement of Indian property. If the relevant statute does not impose such a duty upon the United States, then no breach of trust will be found.

Statutes often impose dual responsibilities on federal and executive officials. One agency may be responsible for protecting the Indian interests and another agency within the same department responsible for someone else's interests. The U.S. Supreme Court, in *Nevada v. United States*,¹³⁵ stated that the federal government may not be held to the "fastidious standards of a private fiduciary, who would breach its duties to his single

128. *Id.*

129. *See, e.g.,* *United States v. Mason*, 412 U.S. 391, 398 (1973); *Duncan v. United States*, 667 F.2d 36, 45 (Ct.Cl. 1981); *Coast Indian Community v. United States*, 550 F.2d 1390, 1392 (Ct.Cl. 1975); *Mancester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

130. *Duncan*, 667 F.2d at 45.

131. *Id.*

132. CHAMBERS, *supra* note 52, at 15.

133. CHAMBERS, *supra* note 52, at 16.

134. CHAMBERS, *supra* note 52, at 15.

135. — U.S. —, 103 S. Ct. 2906 (1983). *Nevada v. United States* involved an action instituted by the Government seeking additional water rights to the Truckee River for the Pyramid Lake Indian Reservation. The Pyramid Lake Paiute Tribe intervened in the action. The Court held that *res judicata* prevented the United States and the Tribe from adjudicating the instant claim because all of the parties are found by the *Orr Ditch* decree. The United States, as a party to the *Orr Ditch* litigation acting as a representative for the interests of the Reservation and the Project, could not relitigate the Reservation's water rights.

beneficiary solely by representing potentially conflicting interests without the beneficiary's consent."¹³⁶ When a statute imposes a fiduciary obligation on the United States to represent Indians as well as perform a specific duty, no breach may be alleged when "Congress has decreed that the Government have dual responsibilities."¹³⁷

The finding of a breach of a fiduciary responsibility mandates compensation.¹³⁸ Damages have been limited, however, to direct damages.¹³⁹ No consequential or indirect damages have been awarded.¹⁴⁰ Courts have stated that the full panoply of damages applicable in a private trust suit are not applicable in an Indian breach of trust suit.¹⁴¹ In the absence of some indication of Congressional authorization and without statutory or common law standards of trustee duty and of compensation, courts cannot discover any mandate for compensation other than direct damages.¹⁴²

This seems inadequate in view of the fact that the tribe's natural resources have been completely depleted by the time litigation is completed. If equitable relief is available before the Indian's resources are completely depleted, a claim for monetary damages may be avoided.

Equitable remedies are still available in those situations that warrant such relief. Generally a trust beneficiary possesses five equitable remedies against the federal government as a private trustee: (1) specific enforcement of the duties of the trustee under the trust; (2) injunctive relief against a threatened breach of trust; (3) redress for breach of trust; (4) the appointment of a receiver; and (5) the removal of the trustee.¹⁴³ The third is the most common cause of action. The fourth and fifth are inappropriate for the fiduciary relationship that exists between the United States and the Indians. The first and second seem the more appropriate causes of action when the federal government has clearly or is about to breach one of its fiduciary responsibilities. The *Mitchell II* Court found that injunctive relief was totally inadequate in that instance and damages a more appropriate remedy.

If the courts allow a broader spectrum of remedies, this may perhaps motivate the Government to fulfill its role as a trustee to the Indians more

136. 103 S. Ct. at 2917.

137. *Id.* at 2973.

138. *Id.*

139. The Court of Claims, on remand, limited damages to direct damages in *United States v. Mitchell*.

140. The Indians in *Duncan v. United States* claimed damages for injury to Indian culture and subsequent emotional and psychological injuries.

141. *See, e.g.*, *Amer. Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (Ct.Cl. 1981); *Navajo Tribe v. United States*, 624 F.2d 981 (Ct.Cl. 1980).

142. *Duncan v. United States*, 667 F.2d 36, 48 (Ct.Cl. 1981).

143. A. SCOTT, TRUSTS § 199 (1939); RESTATEMENT (SECOND) OF TRUSTS § 199 (1959); G. BOGERT, TRUSTS AND TRUSTEES § 519-28, 543 (v), 861, 945-46 (rev. ed. 1978).

prudently. Tribal lands and resources may then be better used as sources that allow Indians to live out their lives as they wish.

CONCLUSION

The *Mitchell II* decision sets forth a test which courts will use to determine if a breach of trust has occurred and if monetary damages may be awarded. This decision broadens the federal government's trust responsibility to Indian tribes to include tribal natural resources like timber, and clarifies that the Government may be liable for damages.

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