

YESTERDAY AND TODAY: OF INDIANS, BREACH OF TRUST, MONEY, AND SOVEREIGN IMMUNITY

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I. INTRODUCTION

Twice in the past quarter century, the Supreme Court has composed a duet of Indian breach of trust decisions that, through dynamic counterpoint, complement each other to produce a reasonably harmonious arrangement. Each of these two judicial movements sets one decision that finds an actionable fiduciary relationship against another decision that rejects trust liability. This pairing of competing strains allows us to sound out the contrast between those claims against the federal government for default in trust responsibility that are redressable in damages and those claims that fail to state a cognizable cause of action and are barred by sovereign immunity. By listening for the variation between successful and unsuccessful passages, as well as appreciating the antiphony of the dissenting opinion in each suite, we can hear the thematic tones which together sound the chords that form an authoritative melody.

To fully appreciate the themes that recur throughout the entire overture, the Supreme Court's 2003 performance in *United States v. Navajo Nation*¹ and *United States v. White Mountain Apache Tribe*² must be heard together with the earlier 1980 and 1983 prelude of *United States v. Mitchell* ("Mitchell I")³ and *United States v. Mitchell* ("Mitchell II")⁴. Although the two sets of decisions are presented two decades apart, the Court is reading from much the same score in each recital. At the same time, the more recent pieces add further richness to the music, from which dispositive refrains begin to emerge. In other words, rather than marking a doctrinal revolution, this year's decisions are most important by way of confirmation and may comfortably be placed within the continuum established twenty years earlier. Still, the double act of 2003 is not merely a reprise of the past work but adds new bars to the concerto, thereby helping the litigative

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1. 537 U.S. 488 (2003).
2. 537 U.S. 465 (2003).
3. 445 U.S. 535 (1980).
4. 463 U.S. 206 (1983).

player to better read the notes for future programs and to choose the right instruments so as to bring his or her playing under the commanding direction of the judicial conductor.

The Supreme Court's composition efforts began nearly a quarter-of-a-century ago on a most discordant, even sour, note with its rejection of an Indian breach of trust claim in *Mitchell I*, an opinion that failed to recognize the power of the pertinent statutory waiver of sovereign immunity and that consequently applied a narrow and constrained reading to the legislation establishing a trust relationship. Fortunately, only three years later, *Mitchell II* introduced a more uplifting strain of governmental responsibility for management of Indian resources, a coda that better resonated with historical experience and the continuing reality of governmental interaction with the Indian peoples. While the most recent stanzas in *Navajo Nation* and *White Mountain Apache* will not appeal to all listeners, I suggest that the songs emanating from the Court on this occasion ought more to evoke hope than sadness for those advocating a more responsive approach to Indian trust problems. In any event, the Court's most recent rendition provides greater lucidity to the music.

Turning then from musical metaphor to plain—or at least ordinary legal—language, the four decisions discussed in this article have much to teach us about the amenability of the United States to suit for money relief and the cognizability of breach of trust claims by Native Americans. The lessons to be drawn from these decisions of yesterday and today may be collected into two categories; the first implicates generally the sovereign immunity of the federal government from liability for money damages, and the second applies only to the relatively unique trust relationship between the United States and Native Americans.

First, because the United States has waived sovereign immunity through the Tucker Act⁵ and the Indian Tucker Act⁶ for monetary claims, the search for a substantive cause of action for damages in another statute does not proceed under the strict rules of construction that otherwise apply to commencement of litigation against the federal government. Moreover, because of the peculiar relationship that has existed between the federal government and Native American populations, a finding of a fiduciary duty by the government toward Indians will be supplemented by the general trust doctrine to infer a right to monetary relief.

Second, in determining the circumstances under which the government may be held liable in money under the Indian trust doctrine, certain factors figure centrally in the analysis. These factors include the existence of actual trust language in the pertinent statute, the exercise by the government of plenary control over Native American assets pursuant to either detailed statutory rules for management or by actions in occupying Indian properties, and the countervailing purpose of Congress under certain statutes to promote Indian self-determination by restoring primary authority over resources to the tribes.

As a general theme, in the context of Indian breach of trust claims, we appear to have reached or at least neared the point where the line of sovereign immunity and the

5. 28 U.S.C. § 1491(a)(1) (2000).

6. *Id.* § 1505.

line of a cognizable cause of action have merged. When the federal government has defaulted on a genuine trust obligation, amenability to suit for the monetary consequences of that failure follows as a matter of course.

II. THE TUCKER ACT, THE INDIAN TUCKER ACT, THE COURT OF FEDERAL CLAIMS, AND THE INDIAN TRUST DOCTRINE

The United States Court of Claims, which was the predecessor to the modern United States Court of Federal Claims, was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts.⁷ In 1886, Congress enacted the Tucker Act, which today remains the “foundation stone” both for the disposition of non-tort money claims against the United States and for the adjudicative authority of the Court of Federal Claims.⁸

The Tucker Act is a jurisdictional statute that also waives the federal government’s sovereign immunity for monetary claims “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.”⁹ By its terms, the Tucker Act excludes cases “sounding in tort”;¹⁰ instead, the Federal Tort Claims Act,¹¹ subsequently enacted in 1946, waived sovereign immunity for suits in United States District Court seeking money damages for tortious wrongs by the federal government.¹²

Trial court jurisdiction over “Big” Tucker Act claims against the United States is assigned by § 1491(a)(1) of Title 28 of the United States Code to the United States Court of Federal Claims.¹³ The United States District Court retains concurrent jurisdiction over Tucker Act claims for \$10,000 or less under § 1346 of Title 28, which is commonly known as the “Little” Tucker Act.¹⁴ The Big Tucker Act and the Little Tucker Act differ only in terms of the designated forum; the substance of the statutory waiver of sovereign immunity is the same whether a Tucker Act claim is heard in District Court or in the Court of Federal Claims.

Beyond establishing jurisdiction and waiving sovereign immunity, the Tucker Act does not create substantive law or define the substance of a claim in and of itself. By its terms, the Tucker Act permits claims founded upon the Constitution, a federal statute or regulation, or contract. However, not every violation of or non-fulfillment of a constitutional or statutory mandate gives rise to a Tucker Act claim. In its classic and oft-cited 1967 opinion in *Eastport Steamship Corp. v. United States*,¹⁵ the Court of Claims held that the Tucker Act claimant must demonstrate that the source of substantive

7. *Act of Feb. 24, 1855*, ch. 122, 10 Stat. 612 (1855).

8. C. Stanley Dees, *The Future of the Contract Disputes Act: Is it Time to Roll Back Sovereign Immunity?*, 28 Pub. Contract L.J. 545, 546 (1999).

9. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

10. *Id.*

11. Pub. L. No. 79-601, tit. IV, 60 Stat. 842 (1946).

12. *See* 28 U.S.C. §§ 2671-2680.

13. *Id.* § 1491(a)(1).

14. *Id.* § 1346(a)(2).

15. 372 F.2d 1002 (Ct. Cl. 1967).

law relied upon “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”¹⁶ In 1976, in *United States v. Testan*,¹⁷ the Supreme Court adopted this same formulation, giving full credit to the Court of Claims for the concept.¹⁸ In sum, a claim is cognizable under the Tucker Act if it is founded upon a “money-mandating” statute or constitutional provision; that is, one that contemplates compensation in money for violation of the government’s duty.

However, the availability of the Tucker Act to Native American tribal claimants was doubtful in the past, and the manner of its application in the unique context of the trust relationship demanded special congressional attention. When the Court of Claims was originally created 150 years ago, claims by Indian tribes were excluded from the purview of the court.¹⁹ Accordingly, Indian tribes could seek redress in money damages in court only if Congress enacted special jurisdictional statutes, leaving the various tribes to regularly petition Congress for such extraordinary enactments. To avoid the “vast and growing burden”²⁰ of responding to such requests, Congress enacted the Indian Tucker Act in 1946.²¹ In the words of the House sponsor of the legislation, it would “never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future.”²²

The Indian Tucker Act directs the invocation of jurisdiction by the Court of Federal Claims

in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.²³

Tribal claimants through the Indian Tucker Act thus have access to the Court of Federal Claims in the same manner and under the same general terms as individual claimants have through what might be called the “regular” Tucker Act. Thus, the Tucker Act and its statutory cousin, the Indian Tucker Act, are congruous, differing only in the identity of the eligible claimant.

Moreover, the presence of a Native American claimant potentially implicates an area of substantive law beyond that available to the ordinary claimant. As noted earlier, a claimant seeking a monetary remedy against the United States must identify a source of

16. *Id.* at 1009.

17. 424 U.S. 392 (1976).

18. *Id.* at 400.

19. *Act of Mar. 3, 1863*, ch. 92, § 9, 12 Stat. 765, 767 (1863) (excepting claims “dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes”). As Nell Jessup Newton has noted, the plain language of the 1863 statute suggests that it excluded only treaty-based claims and did not deny access by tribes to the Court of Claims for other types of claims. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753, 770 (1992). Nonetheless, for the next eight decades, “all assumed that the clause excepted any claim brought by an Indian tribe against the Government.” *Id.*

20. *Mitchell II*, 463 U.S. at 214 (quoting H.R. Rpt. 79-1466 (1945)) (internal quotations omitted).

21. *See* 28 U.S.C. § 1505.

22. 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson).

23. 28 U.S.C. § 1505.

substantive law outside of the Tucker Act itself. The same is true of the Indian Tucker Act. While individual Native American and tribal claimants may pursue constitutional and statutory claims in the same manner as ordinary claimants for money against the federal government, the historical guardian-ward relationship between the federal government and indigenous peoples may also give rise to a special cause of action, which, as we shall see, is presumptively redressable in money damages.

One prominent commentator, Professor Robert A. Williams, Jr., summarizes Indian law in this manner:

Practitioners and students of United States Federal Indian Law are all intimately familiar with the three core, fundamental principles in the field from which all Supreme Court Indian law jurisprudence extends: the Congressional Plenary Power doctrine, which holds that Congress exercises a plenary authority in Indian affairs; the Diminished Tribal Sovereignty doctrine, which holds that Indian tribes still retain those aspects of their inherent sovereignty not expressly divested by treaty or statute, or implicitly divested by virtue of their status; and the Trust doctrine, which holds that in exercising its broad discretionary authority in Indian affairs, Congress and the Executive are charged with the responsibilities of a guardian acting on behalf of its dependent Indian wards.²⁴

The third of these core doctrines of Indian law—the trust doctrine—may give substance to a Tucker Act claim.²⁵ Indeed, it is in this category—the trust responsibilities of the federal government as steward or guardian of Indian assets—that civil claims by Indians and tribes against the United States are most likely to arise.²⁶ The remainder of this article, and the four Supreme Court decisions that are analyzed herein, addresses the fundamental question as to what circumstances, in terms of the underlying statutory schemes, the exercise of federal governmental power, and the animating congressional purpose, establish the elements of a cognizable Tucker Act/Indian Tucker Act claim for breach of trust by the United States.

III. YESTERDAY: *MITCHELL I* AND *MITCHELL II*

A. *Background: Government Mismanagement of Timber Resources Held in Trust for the Quinault Tribe*

Beginning in the 1850s, the United States uprooted Indian tribes from large areas of the Pacific Northwest and set them aside on reservations, eventually causing a

24. Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self Determination*, 8 *Ariz. J. Intl. & Comp. L.* 51, 67 (1991); see William C. Canby, Jr., *American Indian Law in a Nutshell* 1-2 (2d ed., West 1988); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 *Colum. L. Rev.* 809, 810-11 & n. 6 (1996). In addition, as evidenced by the language of the Indian Tucker Act, referring to claims arising under "treaties of the United States," tribes also may maintain a direct action against the United States alleging violation of governmental obligations in treaties with the various tribes. 28 U.S.C. § 1505. For a discussion of treaties with Indian tribes, see generally Canby, *supra* note 24, at chapter 6.

25. For a general discussion of the trust relationship, see Canby, *supra* note 24, at chapter 3.

26. See generally Gregory C. Sisk, *Litigation with the Federal Government: Cases and Materials* 500-17 (Found. Press 2000). For a general discussion of the evolution of statutory methods for Indian claims, including the Indian Tucker Act, see Newton, *supra* note 19, at 769-75.

particular group of Indians to settle on the Quinault Reservation, a heavily wooded area along the Washington state coast.²⁷

As part of a policy to reduce the power of Indian tribes as collective entities, the federal government in the late nineteenth and early twentieth centuries began to allot the reservation land to individual Indians.²⁸ In the case of the Quinault Reservation, each individual parcel originally amounted to about eighty acres of timbered land.²⁹ Under the General Allotment Act of 1887,³⁰ which codified this arrangement, the individual Indians became the beneficial owners of the parcel, but the United States government continued to hold the land in trust for them.³¹ The government purported to take responsibility for managing the allotted lands, including leasing them for timber harvest, and then paying the resulting revenues to the individual allottees.³²

In 1971, hundreds of Indians, as well as the Quinault Tribe, who owned interests in these allotted lands filed suit in the then-Court of Claims under the Tucker Act and the Indian Tucker Act, complaining of mismanagement by the government of the timber resources.³³ They sought damages for the government's failure, inter alia, to obtain a fair market value or even to secure any payment for the harvested timber, to uphold proper forestry standards in management of the properties, and to pay adequate interest on revenues held, as well as the government's exaction of excessive administrative fees from the Indians for the management of the lands.³⁴ The Court of Claims held that the General Allotment Act created a fiduciary duty on the part of the United States, as the holder in trust of the lands, to manage the timber resources appropriately, making the government amenable in damages for its default of that trust obligation.³⁵

B. *Mitchell I: No Actionable Claim Based Upon Limited Trust to Protect Land from Alienation or Taxation*

In 1980, the Supreme Court, in an opinion by Justice Marshall, reversed the judgment of the Court of Claims in favor of the Indians in *Mitchell I*.³⁶ The Court held that the General Allotment Act, which provided for division of the reservation lands into individual allotments, did not provide a substantive damage remedy enforceable through the Tucker Act.³⁷ Although acknowledging that the General Allotment Act indeed did establish a trust relationship on behalf of the Indians, the Court found the relationship to be a "limited" one "that [did] not impose any duty upon the Government to manage timber resources."³⁸ Under the Court's reading of the statute, the trust responsibilities of

27. *Mitchell II*, 463 U.S. at 207-08.

28. *Id.* at 208-09; see Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 6 (1995) (describing the allotment policy as "[t]he greatest and most concerted attack on the territorial sovereignty of the tribes").

29. *Mitchell II*, 463 U.S. at 209.

30. 24 Stat. 388 (1887) (repealed by Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 2007 (2000)).

31. *Id.* at 389.

32. *Mitchell II*, 463 U.S. at 209.

33. *Id.* at 210.

34. *Id.*

35. *Id.* (citing *Mitchell v. U.S.*, 591 F.2d 1300 (1979) (en banc)).

36. 445 U.S. 535 (1980).

37. *Id.* at 541-46.

38. *Id.* at 542.

the federal government under the General Allotment Act were merely to prevent alienation of the land—that is, prevent the transfer of title to the land away from the Indian beneficiary—and to hold the land “immune from . . . state taxation.”³⁹

Although rejecting the claim as premised on the General Allotment Act, the Supreme Court remanded the case back to the Court of Claims for consideration of whether other statutes might provide a basis for liability.⁴⁰ In sum, while finding that the timber mismanagement claim as it came before the Court in *Mitchell I* had been premised upon an unavailing statute, the Court deliberately left the door open to continued pursuit of the claim under alternative sources of law. The claimants walked through that door in the next stage of the case which came before the Supreme Court for further review as *Mitchell II*, which is discussed later.⁴¹

Justice White, joined by two other members of the Court, dissented, arguing that the General Allotment Act “creates a bona fide trust, imposes fiduciary obligations on the United States as trustee in the management of allotted timberlands, and provides a damages remedy against the United States for breach of these obligations.”⁴² Although departing from the Court’s conclusions as applied to the particular statute at issue in this case, Justice White’s dissent made several points that proved prescient for future development of the caselaw. First, the dissent emphasized that the actual “language of the Act, which is the starting point for all statutory interpretation, explicitly creates a ‘trust.’”⁴³ Second, the dissent urged the Court to consider the real-world context, noting that the timberlands at issue in the case “cannot, as a practical matter, be managed by the Indian allottees,”⁴⁴ meaning that the government must have assumed management responsibilities. Third, having concluded that fiduciary obligations should attach, the dissent argued that the government should be regarded as having consented to monetary liability because it “follows naturally from the existence of a trust and of fiduciary duties.”⁴⁵

C. *Mitchell II: Approving Liability in Damages for Breach of Fiduciary Duties Arising From Comprehensive Management Statutes*

On remand in the *Mitchell* case from the Supreme Court, the Court of Claims again held in favor of the claimants, holding that various timber management statutes enacted after the General Allotment Act of 1887, together with other statutes regulating governmental handling of Indian funds, imposed a fiduciary duty upon the United States for management of these allotted lands.⁴⁶ By virtue of that fiduciary relationship, the

39. *Id.* at 544.

40. *See id.* at 546.

41. *See infra* pt. III.C.

42. *Mitchell I*, 445 U.S. at 550 (White, Brennan & Stevens, JJ., dissenting).

43. *Id.* at 547.

44. *Id.* at 549.

45. *Id.* at 550.

46. *U.S. v. Mitchell*, 463 U.S. 206, 211 (1983) (“*Mitchell II*”) (citing *Mitchell v. U.S.*, 664 F.2d 265 (1981) (en banc)).

court ruled that the statutes were implicitly money-mandating within the meaning of the Tucker Act.⁴⁷

On certiorari review for a second time, the Supreme Court, in a majority opinion that again was written by Justice Marshall, affirmed the Court of Claims' decision and permitted the Tucker Act suit to proceed.⁴⁸

Justice Marshall began by examining the history and nature of the then-Court of Claims, the Tucker Act, and the Indian Tucker Act.⁴⁹ In particular, the majority opinion emphasized that the Tucker Act consistently had been understood, at least until recently, as constituting the government's express consent to suit for the types of claims listed in the statute.⁵⁰ Justice Marshall then corrected the erroneous suggestion in two prior Court decisions—*United States v. Testan* and *Mitchell I*—that the Tucker Act was merely a jurisdictional provision and did not waive sovereign immunity.⁵¹ The Court explained that the Tucker Act itself accomplishes the waiver of sovereign immunity, in addition to directing claims to the appropriate forum through its jurisdictional directives.⁵² The Court thus clarified that the Tucker Act speaks both to subject matter jurisdiction in the federal courts and to the amenability of the United States to suit.

Accordingly, after *Mitchell II*, while a party must find a substantive right—that is, a cause-of-action—outside of the Tucker Act, the party need not point to a separate waiver of sovereign immunity.⁵³ Nor is the interpretation of that source of substantive law subject to the strict construction rule that otherwise controls the threshold determination of whether the government has consented to suit.⁵⁴ The Tucker Act *is* the necessary waiver. The constitutional provision, statute, regulation, contract, or trust relationship upon which the claimant relies need only set forth a right to monetary relief.

Having clarified the framework for analysis of the pertinent statutes, the Court turned to the question of whether the Indian plaintiffs had identified a statutory right to recovery of money.⁵⁵ First, the Court reviewed its holding in *Mitchell I*, which had found the General Allotment Act to be an inadequate foundation for imposition of fiduciary obligations upon the federal government.⁵⁶ As Justice Marshall explained, the General Allotment Act established a trust relationship between the government and the Indians only to the extent of preventing unwise sales of the lands and holding the lands immune from state taxation.⁵⁷

Second, the Court asked whether other sources of statutory law established a fuller, more complete fiduciary relationship that specifically addressed management of the

47. *See id.*

48. *Id.* at 228.

49. *Id.* at 211-19. For a discussion of this history, see generally *supra* Part II.

50. *Mitchell II*, 463 U.S. at 215-16.

51. *Id.* at 216 (saying that, while adhering to the result in *Testan*, "this isolated language [regarding waiver of immunity] should be disregarded").

52. *Id.* at 212, 215-16.

53. *Id.* at 218.

54. *See id.* at 218-19.

55. *See Mitchell II*, 463 U.S. at 216-18.

56. *See id.* at 217-18.

57. *Id.*

timber lands on behalf of the Indians.⁵⁸ The Court examined various timber management statutes enacted subsequent to the General Allotment Act, which direct the government to manage the Indian forest resources, obtain revenue thereby, and pay the proceeds to the owners of the allotted lands.⁵⁹ The Court found that these statutes imposed strict duties upon the government to manage these lands and specifically required the government to take into account the maintenance of the productive use of the land, the highest and best use of the land, and the financial needs of the owner and his heirs.⁶⁰ The Court determined that the language of these statutes confirms the existence of a fiduciary relationship, especially given the pervasive and complete control exercised by the government over these lands.⁶¹

Finally, Justice Marshall, for the majority, concluded that because of this fiduciary relationship specifically prescribing management of Indian timber resources, these statutes may fairly be interpreted as mandating the payment of money—thereby satisfying the standard for a Tucker Act cause of action.⁶² Moreover, the Court stated, absent a damages remedy, the fiduciary obligations of the United States would be largely unenforceable, because prospective relief would be inadequate and fail to deter federal officials from defaulting in their trust duties.⁶³

Justice Powell, joined by two other members of the Court, dissented, arguing that Congress had no more authorized a suit for damages under the timber statutes than under the General Allotment Act.⁶⁴ The dissent reasoned that because none of the statutes “standing alone reflects the necessary legislative authorization of a damages remedy,”⁶⁵ Congress simply had not consented to a judicial action for money for mismanagement of timber resources.⁶⁶ Disagreeing with the majority, the dissent insisted that, notwithstanding the Tucker Act, a strict standard of construction should be applied in interpreting the pertinent statutes.⁶⁷ Finally, the dissent argued that even if a fiduciary obligation was established, the remedy of money damages did not necessarily follow.⁶⁸

Mitchell I and *Mitchell II*, and the contrasts between and within them, set the stage for future Indian trust doctrine disputes. Indeed, given the parallels between the two sets of decisions discussed in this article, the *Mitchell* pair proves to be a preview of coming attractions when we examine the Court’s revisit of the trust doctrine through two more decisions in the spring of 2003.

58. *Id.* at 218-19.

59. *Id.* at 219-24.

60. *Mitchell II*, 463 U.S. at 219-24.

61. *See id.*

62. *See id.* at 224-27.

63. *Id.* at 227-28.

64. *See id.* at 228-38 (Powell, Rehnquist & O’Connor, JJ., dissenting).

65. *Mitchell II*, 463 U.S. at 230 (Powell, Rehnquist & O’Connor, JJ., dissenting).

66. *See id.* at 230-32.

67. *Id.* at 232-33.

68. *Id.* at 234-37.

IV. TODAY: *NAVAJO NATION* AND *WHITE MOUNTAIN APACHE*A. Navajo Nation: *Rejecting Breach of Trust Liability when an Indian Tribe Retains Substantial Control over Resources*

1. Background: Royalty Rate on Coal Leases Between Private Companies and the Navajo Nation

Before 1938, the federal government maintained control of Indian mineral resources held in trust on reservation lands, including the power to grant leases for development of oil, gas, and coal deposits, even over the objection of the tribes.⁶⁹ With the enactment of the Indian Mineral Leasing Act of 1938,⁷⁰ the tribes secured the power to negotiate coal mining leases themselves, relegating the government primarily to a supervisory or approval role. The extent of the government's responsibility to intervene and protect the tribes from exploitation by private entities, however, remained a contested matter in the litigation that ensued.

The Indian Mineral Leasing Act of 1938 provides in pertinent part:

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.⁷¹

In 1964, the Navajo Nation, with the approval of the Secretary of the Interior, entered into a lease with the corporate predecessor of the Peabody Coal Company for mining of coal on tribal lands.⁷² The original lease provided for very low royalty payments to the tribe.⁷³ Pursuant to the negotiated terms of the lease, the tribe and the mining company agreed to delegate power to the Secretary of Interior to adjust the royalty rate to a "reasonable level on the twentieth anniversary of the lease."⁷⁴ By the 1980s, the royalty payments to the Navajo Nation were yielding only "about 2 percent of gross proceeds"⁷⁵ on the coal, which was well below the twelve-and-a-half percent royalty that Congress had established as the minimum rate for coal mined on federal lands.⁷⁶

As the twentieth anniversary date approached, and anticipating that the Secretary of Interior would exercise the power conferred in the lease to revise the rate upward, the Navajo Nation instituted department proceedings to request a substantial adjustment.⁷⁷

69. See *U.S. v. Navajo Nation*, 537 U.S. 488, 494 (2003).

70. Pub. L. No. 75-506, 52 Stat. 347 (1938).

71. 25 U.S.C. § 396a (2000).

72. *Navajo Nation v. U.S.*, 46 Fed. Cl. 217, 221 (2000).

73. *Id.*

74. *Id.*

75. *Navajo Nation*, 537 U.S. at 495 (quoting *Navajo Nation v. U.S.*, 263 F.3d 1325, 1327 (Fed. Cir. 2001)) (internal quotations omitted).

76. *Id.* at 496.

77. *Navajo Nation*, 46 Fed. Cl. at 221.

In 1984, a lower-level official within the Department of Interior decided that the lease should be adjusted to a twenty percent royalty rate, a decision that Peabody Coal Company appealed to high level officials within the department.⁷⁸ By mid-summer 1985, both parties apparently became aware that the department planned to deny the Peabody appeal and uphold the royalty rate increase to twenty percent.⁷⁹

Then matters took a disturbing turn, although the full truth of what had transpired was not uncovered until years later. After a secret meeting between Interior Secretary Donald Hodel and a representative of the Peabody Mining Company, the Secretary directed that the parties be informed that no decision on the appeal was imminent and that the tribe and the mining company would be well-advised to reach their own agreement on the appropriate royalty rate.⁸⁰ Although the tribe was not informed that the Secretary had intervened or that Peabody had engaged in ex parte communications with the Secretary, the tribe learned that a decision apparently would not be forthcoming in the near future and that it should return to the bargaining table.⁸¹

Subsequently, the Navajo Nation and the Peabody Mining Company reached an agreement, which raised the royalty rate to twelve-and-a-half percent, retroactive to 1984, and included other concessions such as coal company acceptance of tribal taxation of coal production.⁸² In 1987, after the Navajo Tribal Council approved the lease amendments and a final agreement was signed, Secretary Hodel approved the negotiated agreement.⁸³

2. Court of Federal Claims Decision: Rejecting Trust Liability

In 1993, the Navajo Nation filed suit in the Court of Federal Claims under both the Tucker Act and the Indian Tucker Act, claiming that the Secretary of Interior breached the government's trust obligations by approving the 1987 amendments to the lease.⁸⁴ Specifically, the tribe contended that the Indian Mineral Leasing Act of 1938⁸⁵ "imposes a fiduciary obligation [on the Secretary of Interior] to maximize the financial returns from coal leases"⁸⁶ and that the twelve-and-a-half percent royalty rate approved in 1987 was manifestly inadequate.⁸⁷

In 2000, Judge Baskir of the Court of Federal Claims concluded that, although Secretary Hodel's ex parte contacts with the mining company and secret intervention to prevent a department decision in favor of the tribe was a breach of the general duties owed by a fiduciary to a beneficiary, the Indian Mineral Leasing Act did not impose specific trust obligations upon the government sufficient to establish a cause of action on

78. *See id.*

79. *Id.*

80. *Navajo Nation*, 537 U.S. at 497.

81. *Id.* at 498.

82. *Id.* at 498-500.

83. *Id.* at 500.

84. *Navajo Nation*, 46 Fed. Cl. at 220-21.

85. 25 U.S.C. §§ 396a-396g.

86. *Navajo Nation*, 46 Fed. Cl. at 220.

87. *Id.* at 220-21.

behalf of the tribe for damages.⁸⁸ The court agreed with the Navajo Nation that the Secretary by “deal[ing] in secret with a third party to his beneficiary’s detriment”⁸⁹ had transgressed “common law fiduciary responsibilities.”⁹⁰ Nor could the Secretary’s conduct be defended as merely allowing the parties to reach their own agreement through arms-length negotiations. As Judge Baskir noted, “[a] negotiator’s weapon is knowledge.”⁹¹ Not only did the Navajo Nation “no longer [enjoy] the benefit of the threat”⁹² that the department was about to issue a decision favorable to the tribe, but the tribe also was in the dark about the mining company’s awareness that the tribe “no longer [possessed] this competitive edge in its bargaining.”⁹³

Nonetheless, to warrant a remedy in the Court of Federal Claims, the court ruled that “a greater showing is required”⁹⁴ than an allegation that general common law principles had not been observed. The complaining tribe “must show that [the statute in question] imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages.”⁹⁵ A fiduciary obligation to manage resources is not established by reference to a statutory “process that was ‘designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior.’”⁹⁶ Rather, the court explained, the government by statute must have assumed “the task of managing economic assets.”⁹⁷

Applying that understanding of the requisite trust relationship, Judge Baskir ruled that while the government, through the Indian Mineral Leasing Act, has “assumed the responsibility to manage minerals such as coal in a fiduciary capacity,”⁹⁸ Congress also intended “to foster Indian self-determination”⁹⁹ and thus to subordinate the government’s role to Indian control.¹⁰⁰ On balance, the government’s role with respect to Indian coal mining leases is that of “approval only”¹⁰¹ of previously-negotiated and executed contracts between Indian tribes and private companies; the statute does not “impose an affirmative duty to interject government-dictated royalty rates.”¹⁰² Accordingly, the Court of Federal Claims concluded, the Navajo Nation had not alleged a breach of a specific trust duty that could be redressed through an award of damages.¹⁰³

88. *Id.* at 219.

89. *Id.* at 226.

90. *Id.*

91. *Navajo Nation*, 46 Fed. Cl. at 227.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Navajo Nation*, 46 Fed. Cl. at 228 (quoting *Mont. Bank of Circle, N.A. v. U.S.*, 7 Cl. Ct. 601, 614 (1985)).

97. *Id.*

98. *Id.*

99. *Id.* at 230.

100. *Id.* at 229-30.

101. *Navajo Nation*, 46 Fed. Cl. at 230.

102. *Id.* at 233.

103. *Id.* at 233-34.

3. Federal Circuit Decision: Approving Trust Liability

In 2001, the United States Court of Appeals for the Federal Circuit reversed, concluding that “a trust relationship indeed existed and exists with the Navajo Nation, and monetary damages are an available remedy for breach of this trust.”¹⁰⁴ In drawing the line between a limited trust relationship, which creates no legal rights, and a fully fiduciary responsibility, which may be the basis for legal recovery against the federal government, Judge Newman writing for the majority explained:

The difference lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians. When the United States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the duty of the United States is lessened appropriately.¹⁰⁵

In contrast with the ruling of the Court of Federal Claims, the Federal Circuit found the balance of responsibilities for the coal resources tipped toward governmental control.¹⁰⁶

The court of appeals placed little weight on the fact that coal leases were negotiated and agreed to by the tribe. Instead, the court insisted that, under the Indian Mineral Leasing Act and implementing regulations, the federal government retained “pervasive control . . . of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect the interests of the Indian tribes.”¹⁰⁷ In the light of prior circuit precedent, the court explained “that a full fiduciary duty exists even when the government has less than total control of management of the resources, and that participation by the Indians in resource management does not absolve the United States of its responsibility to act in the sole and best interests of the Indians.”¹⁰⁸ In this case, after noting the ultimate approval power of the United States and various legal requirements to which all leases must conform (regarding the size of the lease, the shape of leased land, terms of leases, etc.), the Federal Circuit concluded that “[t]he statute and regulations leave no significant authority in the hands of the Indian tribes whose reservation land contains the minerals”¹⁰⁹

Having determined the existence of an actionable trust creating a cognizable cause of action, the court majority next found that the Secretary of Interior had breached the fiduciary relationship by surreptitiously preferring the interests of the mining company to that of the Native American beneficiary.¹¹⁰ In addition to this violation of common law fiduciary duties, the Federal Circuit held that the government contravened what the court regarded as the statutory command “to obtain for the Indians the maximum return for their minerals.”¹¹¹

104. *Navajo Nation*, 263 F.3d at 1327.

105. *Id.* at 1329.

106. *Id.* at 1330-32.

107. *Id.* at 1331.

108. *Id.* at 1329.

109. *Navajo Nation*, 263 F.3d at 1331.

110. *Id.* at 1332.

111. *Id.*

Judge Schall dissented in part, although he agreed with the court majority that a valid cause of action for breach of fiduciary duties had been alleged by the tribe.¹¹² Judge Schall “part[ed] company with the majority”¹¹³ because he believed that, after finding a general fiduciary relationship, the court must then “determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities.”¹¹⁴ Based upon the absence of any specific statutory direction that had been transgressed, the dissent refused to premise liability upon breach of general duties of care, candor, and loyalty by engaging in and concealing ex parte communications with the mining company, the failure to decide the initial appeal of the royalty dispute in the tribe’s favor, the failure to supervise the negotiations, or the failure to secure the highest possible royalty rate.¹¹⁵ Instead, Judge Schall concluded that the only action that violated a specific fiduciary responsibility was the government’s endorsement of the renegotiated coal mining lease pursuant to its statutory approval power without conducting an economic analysis to determine whether the proposed lease was “financially beneficial for the Indians involved.”¹¹⁶

4. Supreme Court Decision: Rejecting Trust Liability

In 2003, the *Navajo Nation* case arrived at the Supreme Court upon the government’s petition for certiorari.¹¹⁷ Writing for a majority of six Justices, Justice Ginsburg began by reiterating the “axiomatic [doctrine] that the United States may not be sued without its consent,”¹¹⁸ the now-established understanding that the Tucker Act—and the Indian Tucker Act—both confers jurisdiction upon the Court of Federal Claims and provides the necessary consent to suit, and that the Tucker Act itself is not a source of substantive rights.¹¹⁹

The Court majority confirmed the continued primacy of *Mitchell I* and *Mitchell II* as “the pathmarking precedents on the question whether a statute or regulation (or combination thereof) ‘can fairly be interpreted as mandating compensation by the Federal Government.’”¹²⁰ The Court explained the contrast between *Mitchell I* and *Mitchell II* as that between a “bare trust” for limited purposes and “full responsibility” by the government for management of Indian resources.¹²¹ The Court held that the statutory “analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.”¹²² However, once such a full fiduciary duty has been

112. *Id.* at 1333-41 (Schall, J., concurring in part and dissenting in part).

113. *Id.* at 1339.

114. *Navajo Nation*, 263 F.3d at 1339 (Schall, J., concurring in part and dissenting in part).

115. *Id.* at 1339-41 & n. 5.

116. *Id.* at 1340.

117. *Navajo Nation*, 537 U.S. 488.

118. *Id.* at 502 (quoting *Mitchell II*, 463 U.S. at 212) (internal quotations omitted).

119. *Id.* at 502-03.

120. *Id.* at 503 (quoting *Mitchell II*, 463 U.S. at 218).

121. *Id.* at 505 (quoting *Mitchell II*, 463 U.S. at 224) (internal quotations omitted).

122. *Navajo Nation*, 537 U.S. at 506.

identified in the pertinent statute, the Court said that “the availability of . . . damages [as a remedy] may be inferred,”¹²³ even if not expressly referenced in the statute.

Turning then to the Indian Mineral Leasing Act, Justice Ginsburg did not find the statutory imposition of “detailed fiduciary responsibilities”¹²⁴ sufficient to support a claim for monetary relief. Instead, the Court ruled, “[t]he IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective and [further] authorizes the Secretary generally to promulgate regulations governing mining operations.”¹²⁵ In sum, far from being a case where the government had been “assigned a comprehensive managerial role”¹²⁶ over the mineral resources or given the “responsibility to secure ‘the needs and best interests of the Indian[s]’”¹²⁷ that would characterize a full fiduciary responsibility, the statute, by failing to introduce any managerial role for the government, did not “even establish the ‘limited trust relationship’”¹²⁸ found inadequate to support a claim for relief in *Mitchell I*.¹²⁹

By the Court’s reading of the statute, the Indian Mineral Leasing Act included no “substantive prescriptions”¹³⁰ regarding the Secretary’s approval power over leases that would “circumscrib[e] the Secretary’s affirmation of coal mining leases negotiated between a Tribe and a private lessee,”¹³¹ especially where the royalty rate in the lease approved exceeded regulatory minimums and indeed matched the rate the United States itself received from leases to mine coal on federal lands.¹³² The text of the statute did not define the Secretary’s limited approval function to include any duty “to ensure a higher rate of return for the tribe”¹³³ or “to conduct an independent ‘economic analysis’ of the reasonableness of the royalty to which a Tribe and third party have agreed.”¹³⁴ Moreover, while the Court hints at distaste for Secretary Hodel’s conduct,¹³⁵ no specific statutory or regulatory provision imposed any formal procedural constraints on the Interior Department’s evaluation of the matter.¹³⁶

As further support for the majority’s conclusion, Justice Ginsburg asserted that “imposing fiduciary duties on the Government here would be out of line with one of the statute’s principal purposes.”¹³⁷ Because “[t]he IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining

123. *Id.*

124. *Id.*

125. *Id.* at 507 (citations omitted).

126. *Id.*

127. *Navajo Nation*, 537 U.S. at 507-08 (quoting *Mitchell II*, 463 U.S. at 224).

128. *Id.* at 508 (quoting *Mitchell I*, 445 U.S. at 542).

129. *Id.*

130. *Id.* at 510.

131. *Id.*

132. *Navajo Nation*, 537 U.S. at 510-11.

133. *Id.* at 511.

134. *Id.*

135. *See id.* at 514 (saying “[h]owever one might appraise the Secretary’s intervention in this case,” there nonetheless was no statutory warrant to impose a duty with an accompanying damages remedy for breach).

136. *Id.* at 511.

137. *Navajo Nation*, 537 U.S. at 508.

leases with third parties,”¹³⁸ the congressional purpose would be defeated by “[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands.”¹³⁹

Justice Souter, joined by two other Justices, dissented.¹⁴⁰ The dissent disagreed that the Secretary’s function in approving mining leases was unguided by substantive standards, arguing instead that the Secretary had “a fiduciary responsibility to make a more ambitious assessment of the best interest of the Tribe before signing off.”¹⁴¹ Although Native Americans have been given greater responsibility for their own interests under the statute, Justice Souter insisted that the federal government retained meaningful protective duties and that the approval power was “a significant component of the Government’s general trust responsibility.”¹⁴² With this interpretive understanding of the pertinent history and statutory developments, the dissent concluded that the Secretary’s power of consent under the Indian Mineral Leasing Act was to be exercised so as to maximize revenues from Native American resources.¹⁴³

B. White Mountain Apache: *Upholding Breach of Trust Liability When the Government Assumes Control over Native American Assets*

1. Background: Government Occupation of Fort Apache Held in Trust for White Mountain Apache Tribe

In 1870, the United States Army established Fort Apache in the White Mountains of east-central Arizona.¹⁴⁴ In the 1920s, control of the fort was transferred to the Department of Interior, and part of the property was used as the Theodore Roosevelt Indian School.¹⁴⁵ In 1960, Congress declared that Fort Apache, including the improvements on the site, “be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.”¹⁴⁶ In 1976, the National Park Service designated the Fort as a National Historic Site.¹⁴⁷ As the Supreme Court subsequently noted, this “recognition was no augury of fortune, for just over 20 years later the World Monuments Watch placed the fort on its 1998 List of 100 Most Endangered Monuments.”¹⁴⁸

As alleged by the tribe, the Secretary of Interior exercised the statutory prerogative to use the property, including many of its buildings,¹⁴⁹ but then allowed Fort Apache to

138. *Id.*

139. *Id.*

140. *Id.* at 514 (Souter, Stevens & O’Connor, JJ., dissenting).

141. *Id.* at 515.

142. *Navajo Nation*, 537 U.S. at 516 (Souter, Stevens & O’Connor, JJ., dissenting).

143. *Id.* at 516-18.

144. *White Mt. Apache Tribe v. U.S.*, 46 Fed. Cl. 20, 22 (1999).

145. *Id.*

146. Pub. L. No. 86-392, 74 Stat. 8, 8 (1960).

147. *White Mt. Apache*, 46 Fed. Cl. at 22.

148. *U.S. v. White Mt. Apache Tribe*, 537 U.S. 465, 469 (2003).

149. *Id.*

fall into disrepair, failing to perform necessary maintenance on the properties.¹⁵⁰ The tribe “commissioned an engineering assessment of the property [which reported that] as of 1998 it would cost about \$14 million to rehabilitate the property . . . in accordance with standards for historic preservation.”¹⁵¹

2. Court of Federal Claims Decision: Rejecting Trust Liability

In 1999, the White Mountain Apache Tribe filed suit in the United States Court of Federal Claims under the Tucker Act and the Indian Tucker Act seeking \$14 million (the projected cost of repairs to Fort Apache) in damages for breach of trust, as well as additional compensation for economic loss.¹⁵² The United States moved to dismiss, denying that it had any trust responsibility for maintenance or restoration of the Fort Apache property.¹⁵³ Judge Firestone of the Court of Federal Claims granted the motion to dismiss.¹⁵⁴

Relying upon *Mitchell I* and *Mitchell II* as “establish[ing] the parameters for [the] inquiry,”¹⁵⁵ the court explained that “[i]n order to demonstrate that a fiduciary relationship exists, the claimant must either point to specific statutes or regulations that impose a duty upon the government to manage tribal resources for the benefit of the tribe or demonstrate that the government has actually undertaken to do so.”¹⁵⁶ Although the 1960 Act stated that Fort Apache would be held in trust for the tribe, the court ruled that the trust obligation was subject to an exception for the government’s own use of the land.¹⁵⁷ Thus, rather than “direct[ing] the government to manage the Fort Apache site for the benefit of the Tribe,”¹⁵⁸ the court read the statute as “reserv[ing] the Fort Apache site for the federal[] government’s benefit.”¹⁵⁹ Moreover, without any statutory “mandate to generate income from the property”¹⁶⁰ for the benefit of the Indians, the government lacked a fiduciary duty to maintain or restore the property as a tribal income-generating asset.¹⁶¹

Nor did the Court of Federal Claims believe that the federal government’s “day-to-day occupation, use, control, or supervision of Fort Apache”¹⁶² generated an actionable fiduciary relationship.¹⁶³ The fact of control alone was insufficient; rather, the court held, a fiduciary duty arises only when the federal government takes “control for the purpose of protecting the Indians’ financial interests.”¹⁶⁴ In the case of Fort Apache, the

150. *White Mt. Apache*, 46 Fed. Cl. at 22.

151. *White Mt. Apache*, 537 U.S. at 469.

152. *White Mt. Apache*, 46 Fed. Cl. at 22-23.

153. *Id.* at 23.

154. *Id.* at 29.

155. *Id.* at 23.

156. *Id.* at 24 (citing *Mitchell II*, 463 U.S. at 224-25).

157. *See White Mt. Apache*, 46 Fed. Cl. at 26.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *White Mt. Apache*, 46 Fed. Cl. at 27.

163. *Id.*

164. *Id.*

court again understood the purpose of the 1960 Act as “allow[ing] the government to manage and operate the land and buildings for its own benefit for as long as it needs them.”¹⁶⁵ In sum, any failure of the government to maintain the property redounded to its own detriment, at least from a legal standpoint, because the government had no duty to manage the property for the benefit of others.

Finally, the court rejected the tribe’s argument that, by using property held in trust, the government assumed the common-law duty of a trustee to preserve the property, such that the government’s failure to maintain it constituted “permissive waste” in breach of the trust.¹⁶⁶ Even assuming a cause of action for permissive waste could be stated, the court asserted that the traditional remedy generally is an injunction, not money damages, which is a remedy beyond the jurisdictional authority of the Court of Federal Claims to grant.¹⁶⁷

3. Federal Circuit Decision: Approving Trust Liability

In 2001, the United States Court of Appeals for the Federal Circuit reversed, recognizing a fiduciary obligation on the part of the federal government to maintain or restore the buildings which it had occupied under the 1960 Act.¹⁶⁸ Writing for the majority, Judge Dyk emphasized that the 1960 Act, by its very terms, creates a “trust” and that the elements of a common-law trust were present, “namely, a trustee, a beneficiary, and a trust corpus.”¹⁶⁹ Although the “mere fact”¹⁷⁰ of a trust relationship admittedly is not sufficient,¹⁷¹ the court further concluded that an actionable fiduciary obligation had been statutorily created as well.¹⁷²

The Federal Circuit disagreed with the government’s argument, which had been accepted by the Court of Federal Claims, that a fiduciary duty arises only when the pertinent statute directs the federal government to manage the assets for the benefit of the Indians, an express direction that is not to be found in the 1960 Act.¹⁷³ Instead, the court of appeals held, “control alone is sufficient to create a fiduciary relationship.”¹⁷⁴ The 1960 Act authorizes the government to use the Fort Apache trust property, and “to the extent that the government has actively used any part of the Tribe’s trust property, and has done so in a manner where its control over the buildings it occupies is essentially exclusive,”¹⁷⁵ the court held that the government thereby had assumed a fiduciary duty to protect the parcels of property so controlled in the manner of a common-law trustee.¹⁷⁶

165. *Id.* at 28.

166. *Id.* at 28-29.

167. *White Mt. Apache*, 46 Fed. Cl. at 28-29.

168. *White Mt. Apache Tribe v. U.S.*, 249 F.3d 1364, 1383 (Fed. Cir. 2001).

169. *Id.* at 1373.

170. *Id.*

171. *Id.*

172. *Id.* at 1375-77.

173. *White Mt. Apache*, 249 F.3d at 1375.

174. *Id.*

175. *Id.* at 1377.

176. *Id.* at 1376-77.

Although the 1960 Act may not explicitly define the government's trust duties, once an enforceable fiduciary duty is found, the court then looks to the common law of trusts "for assistance in defining the nature of that obligation."¹⁷⁷ "Under the common law of trusts,"¹⁷⁸ the court wrote, "it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property."¹⁷⁹ The government therefore had a duty to maintain and make reasonable repairs to the buildings on the Fort Apache site.¹⁸⁰ However, absent some support for an alternative conclusion in the statutory text, background, or legislative history, the court qualified that the government's duty was to maintain the property for economic use, not for aesthetic or historical purposes.¹⁸¹

Finally, the court of appeals concluded that, if the tribe were to prove the breach of the government's duty to maintain and repair the property, an award of money damages was an appropriate remedy.¹⁸² The court of appeals disagreed with the conclusion of the Court of Federal Claims that the duty to avoid permissive waste was enforceable only through an injunction, ruling instead that under traditional trust principles, the beneficiary of a trust (other than one holding a mere future contingency interest) has an immediate claim for money damages for any failure by the trustee to preserve the trust property.¹⁸³

Chief Judge Mayer of the Federal Circuit dissented, agreeing with the Court of Federal Claims that the 1960 Act, by reserving to the government the right to use the property, thereby limited the government's obligation to the tribe.¹⁸⁴ "Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe,"¹⁸⁵ wrote Chief Judge Mayer, "and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust."¹⁸⁶ Moreover, the dissent contended that the tribe's interest in the property indeed was contingent, as the government has the right to use the property in perpetuity, and further argued that the owner of a contingent future interest may not sue for damages based upon permissive waste.¹⁸⁷

4. Supreme Court Decision: Approving Trust Liability

In 2003, the Supreme Court, by a five-to-four decision, affirmed the court of appeals and upheld the finding of an actionable fiduciary relationship in *United States v. White Mountain Apache Tribe*.¹⁸⁸ Writing for the majority, Justice Souter began by emphasizing that, although an unequivocal waiver of sovereign immunity is a predicate

177. *Id.* at 1377.

178. *White Mt. Apache*, 249 F.3d at 1378.

179. *Id.*

180. *Id.* at 1379.

181. *Id.* at 1380.

182. *Id.* at 1381-83.

183. *White Mt. Apache*, 249 F.3d at 1381-83.

184. *Id.* at 1384 (Mayer, C.J., dissenting).

185. *Id.*

186. *Id.*

187. *Id.* at 1384-85.

188. 537 U.S. at 468, 479.

to any suit against the United States, the Tucker Act and its companion statute, the Indian Tucker Act, provide such a consent.¹⁸⁹ To be sure, neither the Tucker Act nor the Indian Tucker Act creates a cause of action, requiring that the plaintiff premise the substantive right upon a statute that “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”¹⁹⁰ However, because the Tucker Act itself provides the necessary sovereign immunity waiver, a strict construction rule does not apply to this stage of the analysis.¹⁹¹ Thus, the pertinent statute need only “be reasonably amenable to the reading that it mandates a right of recovery in damages”;¹⁹² that is, “a fair inference will do.”¹⁹³

Referring to the *Mitchell* pair as “the two seminal cases of tribal trust claims for damages,”¹⁹⁴ Justice Souter said these two decisions “give a sense of when it is fair to infer a fiduciary duty qualifying under the Indian Tucker Act and when it is not.”¹⁹⁵ In light of the contrasting outcomes in *Mitchell I* and *Mitchell II*, the crucial inquiry is whether the trust is “bare” or “limited,” that is, whether the pertinent statute does not impose upon the government any specific duty to manage Indian resources, or instead whether a full fiduciary relationship exists by virtue of “comprehensive control”¹⁹⁶ and a “pervasive”¹⁹⁷ role in management of the assets.¹⁹⁸

In light of the *Mitchell* guidelines, the Court in *White Mountain Apache* concluded that the Fort Apache trust statute “goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach.”¹⁹⁹ First, the 1960 Act “expressly defines a fiduciary relationship”²⁰⁰ by providing that Fort Apache be “held by the United States in trust for the White Mountain Apache Tribe.”²⁰¹ Second, the United States exercised its discretionary authority to make actual use of the property, thus “not merely exercis[ing] daily supervision but . . . enjoy[ing] daily occupation”²⁰² at the Fort Apache site. Accordingly, the Court held, when the government assumes “plenary” control over assets held in trust, the government likewise assumes an obligation as trustee to preserve those assets, even absent express statutory delineation of duties of management and conservation.²⁰³

As the Court observed, “elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”²⁰⁴ Further, the Court explained, while the fact of a trust

189. *Id.* at 472.

190. *Id.* (quoting *Mitchell II*, 463 U.S. at 217) (internal quotations omitted).

191. *See id.* at 472-73.

192. *Id.* at 473.

193. *White Mt. Apache*, 537 U.S. at 473.

194. *Id.* at 470.

195. *Id.* at 473.

196. *Id.* at 474 (quoting *Mitchell II*, 463 U.S. at 209) (internal quotations omitted).

197. *Id.* (quoting *Mitchell II*, 463 U.S. at 219) (internal quotations omitted).

198. *White Mt. Apache*, 537 U.S. at 473-74.

199. *Id.* at 474.

200. *Id.*

201. 74 Stat. at 8.

202. *White Mt. Apache*, 537 U.S. at 475.

203. *Id.*

204. *Id.*

relationship between the United States and Native Americans alone is not enough to imply a remedy in damages, and thus “a further source of law [is] needed to provide focus for the trust relationship[,] . . . once that focus [is] provided, general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation.”²⁰⁵

Justice Souter, for the majority, also turned away the government’s “carve-out” argument—accepted by the Court of Federal Claims and by the dissent in the Federal Circuit—which postulated that because the 1960 Act allowed for governmental use, the government accordingly was excepted from fiduciary responsibilities for the property.²⁰⁶ The Court held that this argument would defeat the “straightforward reading”²⁰⁷ of the statute, which expressly established a trust, and one that presumably extended over the entire site and not only to those parcels left unoccupied by the government.²⁰⁸

Finally, the Court regarded as “clearly wrong”²⁰⁹ the contention that damages were inappropriate because injunctive relief is the sole remedy suitable for such an occupation.²¹⁰ First, the Court observed, “an affirmative order to repair [the buildings] is merely . . . the economic (but perhaps cumbersome) equivalent of damages.”²¹¹ Second, limiting relief to an injunction would not only leave the tribe uncompensated for past harm but also would fail to deter the government from engaging in such waste in the period before a tribe sought legal relief.²¹²

Justice Ginsburg authored a concurring opinion joined by Justice Breyer.²¹³ Justice Ginsburg had authored the majority decision in *Navajo Nation*, which issued on the same day and reached the opposite conclusion that an enforceable fiduciary relationship did not exist.²¹⁴ But she saw no inconsistency between the negative outcome in *Navajo Nation* and the positive outcome in *White Mountain Apache*, given the different underlying statutory schemes and circumstances.²¹⁵ Given that the Fort Apache statute speaks in the language of trust, that the government chose to exercise daily supervision and enjoy daily occupation of the site, and that the government thereby exercised “plenary control” of the property, Justice Ginsburg agreed that the government had assumed a fiduciary duty that was enforceable under the Indian Tucker Act by a remedy of damages.²¹⁶

Justice Thomas, joined by three other members of the Court, dissented.²¹⁷ As an important preliminary matter, the dissent argued that the majority had altered the applicable canons of interpretation by permitting recovery if “common-law trust

205. *Id.* at 477.

206. *Id.* at 476.

207. *White Mt. Apache*, 537 U.S. at 476.

208. *Id.*

209. *Id.* at 478.

210. *Id.* at 478-79.

211. *Id.* at 478.

212. *White Mt. Apache*, 537 U.S. at 478-79.

213. *Id.* at 479 (Ginsburg & Breyer, JJ., concurring).

214. *Navajo Nation*, 537 U.S. at 493; *see supra* pt. IV.A.

215. *White Mt. Apache*, 537 U.S. at 480-81 (Ginsburg & Breyer, JJ., concurring).

216. *Id.* at 481.

217. *Id.* (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

principles permit a 'fair inference' that money damages are available"²¹⁸ rather than examining "whether an Act 'can fairly be *interpreted* as mandating compensation by the Federal Government for the damage sustained.'"²¹⁹ Thus, the dissent contended, a distinct statutory reference to money damages is necessary, and "the existence of a trust relationship does not itself create a claim for money damages."²²⁰ Moreover, in Justice Thomas's view, the Court majority gave "far too much weight to the Government's factual 'control' over the Fort Apache property"²²¹ in ruling that the government had assumed fiduciary obligations.²²² Nor should "'control' alone" be understood, without congressional consent, to give rise to a duty to preserve the property.²²³ In any event, the dissent read the 1960 Act as specifically carving out the government's right to unrestricted use of the Fort Apache property, for its own benefit and not that of the Indians.²²⁴ Justice Thomas concluded that "the Court radically alters the relevant inquiry from one focused on the actual fiduciary duties created by statute or regulation to one divining fiduciary duties out of the use of the word 'trust' and notions of factual control."²²⁵

V. DRAWING LESSONS FROM YESTERDAY AND TODAY

A. *Sovereign Immunity and Substantive Rights under the Tucker Act and the Indian Tucker Act*

1. General Lesson About Sovereign Immunity and the Substantive Right to Monetary Relief under the Tucker Act

In *Mitchell I*, the Supreme Court demanded that an individual claimant "look beyond" the Tucker Act to find a waiver of sovereign immunity.²²⁶ In so doing, the Court perpetuated an error that had originally appeared in *United States v. Testan* four years earlier. In *Testan*, the Court mistakenly described the Tucker Act as an unadorned jurisdictional statute that not only failed to create any substantive right to relief (a point of common understanding) but that also did not constitute consent to suit against the sovereign (a misguided interjection).²²⁷ As Mary Christina Wood aptly labels it, the judicial nullification of this statutory waiver of sovereign immunity was "a bizarre lapse from standard Tucker Act analysis."²²⁸ Fortunately, this slip in reasoning soon was corrected.

218. *Id.* at 482 (quoting *id.* at 473 (majority)).

219. *Id.* (quoting *Testan*, 424 U.S. at 400).

220. *White Mt. Apache*, 537 U.S. at 483 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

221. *Id.* at 484-85.

222. *Id.*

223. *Id.* at 486.

224. *Id.* at 484.

225. *White Mt. Apache*, 537 U.S. at 487 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

226. 445 U.S. at 538.

227. 424 U.S. at 398.

228. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1518 n. 218; see Richard W. Hughes, *Can the Trustee Be Sued for Its*

In *Mitchell II*, the Supreme Court clarified that the Tucker Act itself accomplishes the waiver of sovereign immunity, in addition to directing claims to the appropriate forum through its jurisdictional directives.²²⁹ Both *Navajo Nation* and *White Mountain Apache* now have confirmed this basic proposition that the Tucker Act is consent to suit and that a second waiver of sovereign immunity in some other statute is not expected.²³⁰ Thus, while a party still must find a substantive money-mandating source of law for a claim beyond the Tucker Act, the party need not find a separate waiver of sovereign immunity elsewhere; nor is the interpretation of that proposed source of substantive law subject to the strict construction rule that otherwise controls the threshold determination of whether the government has waived immunity.

To appreciate the significance of this clarification/confirmation on sovereign immunity, it is helpful to return to the Court's original affirmation of this essential point in *Mitchell II*. Comparing the majority and dissent in *Mitchell II*, two points of fundamental disagreement emerge, a detailed examination of which is instructive both for understanding the *Mitchell* line of cases and for appreciating the recent reiteration—and indeed solidification—of this point in *White Mountain Apache*. In the *Mitchell II* debate between the majority and the dissent, the first point of departure concerned whether the Tucker Act accomplished the requisite waiver of sovereign immunity. The second, which will be addressed in the next subsection of this article, concerned whether a monetary remedy may be inferred in the Indian trust context when the pertinent statutes do not in so many terms refer to money.²³¹

On the question of sovereign immunity, Justice Marshall, for the *Mitchell II* majority, recognized the Tucker Act as both a jurisdictional grant and a congressional consent to suit.²³² By contrast, Justice Powell, in dissent, adhered to the deviating and isolated statements in *Testan* and *Mitchell I* that viewed the Tucker Act merely as locating jurisdiction in the Court of Claims without waiving federal sovereign immunity.²³³ For that reason, Justice Powell approached the timber management statutes at issue in *Mitchell II* from a very different and more demanding perspective than Justice Marshall. Whereas the majority of the Court examined these statutes only to find a substantive right to relief,²³⁴ Justice Powell stipulated that these statutes, by express terms, must produce a right to judicial action for damages.²³⁵

In other words, Justice Powell insisted that the timber management statutes be construed strictly and narrowly to determine whether they actually include an express waiver of sovereign immunity. Given that, admittedly, none of these statutes make any direct reference to a right to file a lawsuit, a negative result was foreordained under the dissent's analysis. By contrast, having found the waiver of sovereign immunity in the

Breach? The Sad Saga of United States v. Mitchell, 26 S.D. L. Rev. 447, 456-60, 490-93 (1981) (criticizing the Court's refusal in *Mitchell I* to recognize the Tucker Act as a waiver of sovereign immunity).

229. 463 U.S. at 212-16.

230. *Navajo Nation*, 537 U.S. at 502-03; *White Mt. Apache*, 537 U.S. at 472-73.

231. See *infra* pt. V.A.2.

232. 463 U.S. at 216-19.

233. *Id.* at 230-33 (Powell, Rehnquist & O'Connor, JJ., dissenting).

234. *Id.* at 219-27.

235. *Id.* at 231-32 & n. 6 (Powell, Rehnquist & O'Connor, JJ., dissenting).

Tucker Act itself, the majority was not obliged to apply a rule of strict and narrow construction.²³⁶ Because the Tucker Act, by its plain language, legislative history, and a hundred years of court precedent, grants consent to suit against the United States for money damages, the *Mitchell II* dissent's refusal to accept the Tucker Act as a waiver of sovereign immunity was standing against the weight of text, history, and practice.²³⁷

As noted, both *Navajo Nation* and *White Mountain Apache* echo the teaching of *Mitchell II*.²³⁸ *White Mountain Apache* provides the clearest and most affirmative directive to date, as the Court majority explained that the "'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity."²³⁹ Moreover, the Court stated:

To the extent that the Government would demand an explicit provision for money damages to support every claim that might be brought under the Tucker Act, it would substitute a plain and explicit statement standard for the less demanding requirement of fair inference that the law was meant to provide a damages remedy for breach of a duty.²⁴⁰

Because every member of the Court, without exception, joined either the majority in *Navajo Nation* or the majority in *White Mountain Apache*, even if he or she dissented in one or the other, presumably there is now unanimous consent on the elementary proposition that the Tucker Act, in both its "regular" and Indian varieties, is an express statutory waiver of sovereign immunity.

Although the dissent in *White Mountain Apache* complained that the Fort Apache statute did not provide "evidence of congressional intent to authorize a suit for money damages,"²⁴¹ the context of the discussion indicates that the dissent was criticizing the majority's inference of money damages as a *remedy* for the government's assumption of control but was not demanding that an alternative statute be cited for purposes of *consent to suit*.²⁴² In other words, the dissent was not insisting upon *strict* construction of the pertinent statute so much as *focused* construction; that is, an examination of the statute for indicia that it contemplated monetary compensation for governmental defaults rather than merely outlined governmental responsibilities without suggesting payment of money for mismanagement. As discussed further below, the dissent's more rigorous approach is sound in the context of most claims against the federal government seeking monetary redress, and was rejected by the *White Mountain Apache* majority only in the context of the unique trust relationship that has prevailed between the United States and the Indian peoples.²⁴³ In sum, on the threshold question of whether the Tucker Act constitutes an express statutory waiver of sovereign immunity, all judicial players now appear to be on the same page.

236. *Id.* at 218-19.

237. *Mitchell II*, 463 U.S. at 212-16; *see supra* nn. 226-28 and accompanying text.

238. *See supra* n. 230 and accompanying text.

239. 537 U.S. at 472.

240. *Id.* at 477.

241. *Id.* at 483 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

242. *See id.* at 481-84.

243. *See infra* pt. V.A.2.

2. Particular Lesson Regarding the Role of the Indian Trust Doctrine in
Inferring a Substantive Right to Monetary Relief under the Indian Tucker Act

While the Supreme Court has clearly established that the Tucker Act itself accomplishes the requisite waiver of sovereign immunity, the plaintiff still must identify a right to monetary relief from another source of law. For ordinary litigants, while they have been relieved of the requirement of making the rigorous showing that another statute also includes consent to suit (because the Tucker Act serves that purpose), they still must demonstrate that the substantive right found in that other statute is a right to money, that is, money-mandating in nature. However, when the grievances of Native Americans against the government for neglect of trust responsibilities are at issue, the trust doctrine itself provides the right to a monetary recovery. On this point, disagreement among the members of the Supreme Court persists, although the majority's mandate is increasingly clear.

As with the sovereign immunity matter, returning to the foundational precedent from two decades ago is a worthwhile exercise. A more detailed examination of the disagreement between the majority and dissent in *Mitchell II* sharpens our understanding of both the nature of the issue and the significance of the majority's resolution. In *Mitchell II*, the timber management statutes themselves, while imposing detailed managerial obligations on the government, did not directly suggest that money damages ought to be paid for the government's failure to properly manage these resources. Nonetheless, Justice Marshall, for the majority, concluded that the statutes were money-mandating in nature precisely because they did create a fiduciary relationship.²⁴⁴ Thus, the majority's ruling in *Mitchell II* appeared to state a tautology: if a full fiduciary relationship was created, then any breach of the government's obligations was redressable in money damages. In other words, if a genuine trust obligation was found, then money followed.

In so ruling, the *Mitchell II* Court diverged from the analytical approach ordinarily applied to statutory claims under the Tucker Act, wherein the pertinent statute is inspected to see if it directly contemplates compensation in money for violation of the government's duty.²⁴⁵ Not every violation or non-fulfillment of a statutory mandate gives rise to a Tucker Act claim.²⁴⁶ For example, a military base might be closed in violation of a statutory procedure or even in contravention of a directive by Congress that facilities of a certain nature not be closed. But that statutory violation by itself would not support a Tucker Act claim by businesses in the community surrounding the base for damages in the form of lost business profits. Similarly, if the Federal Communications Commission unlawfully denied a radio license, that statutory violation likely would not permit a Tucker Act claim by the radio station for lost economic

244. *Mitchell II*, 463 U.S. at 224-27.

245. For a discussion of the "money-mandating" requirement, see generally Sisk, *supra* note 26, at 461-62, 468-69.

246. *Mitchell II*, 463 U.S. at 216 ("Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act."); David M. Cohen, *Claims for Money in the Claims Court*, 40 Cath. U. L. Rev. 533, 535 (1991) ("[T]he nature of the statute upon which the plaintiff relies is significant because the United States clearly is not required to respond with the payment of money in every case in which the government violates a statute.").

opportunities. Either case might give rise to a claim under the Administrative Procedure Act asking the court for specific relief in the form of an order that the base be reopened or the radio license be given. But presumably no claim for money damages under the Tucker Act would be allowed.²⁴⁷

By contrast, in the context of a claim of breach of trust by Native Americans, Justice Marshall, for the *Mitchell II* majority, adopted a two-step alternative process for inferring a compensatory remedy: (1) the Court determines whether the statutes create a full fiduciary relationship, distinctively related to the management of the resources at issue in the case, and then having so determined, (2) the Court rules that the fiduciary obligation itself entails payment of damages for default.²⁴⁸ As Justice Marshall wrote, “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.”²⁴⁹

Justice Powell’s disagreement as to the first step of this analysis, that is, his refusal to find an enforceable fiduciary relationship in *Mitchell II*, reflected his strict and narrow reading of the statutes. As discussed above, Justice Powell’s persistent refusal to recognize the Tucker Act as a waiver of sovereign immunity was a departure from established Tucker Act doctrine.²⁵⁰ However, as to the second step, Justice Powell fairly drew attention to a major doctrinal development which, although consistent with prior precedent, had never been so boldly articulated and applied before. Because the timber management statutes interpreted in *Mitchell II* directed governmental management of a resource, but did not explicitly suggest that damages ought to be paid for errors or defaults in that management, Justice Powell described the majority’s use of a trust relationship to create a fiduciary obligation—and thereby declare the statutes as money-mandating despite the absence of compensatory language—as bootstrapping one stage of analysis into a fragile conclusion.²⁵¹

On balance, however, Justice Marshall had the stronger side of the argument for two reasons. First, the timber management statutes dealt not only with the supervision of the timber lands but also with payment of revenues obtained to the Indians, thus at least touching upon matters of money and finances.²⁵² While this statutory reference likely would not be enough to support a Tucker Act claim for compensatory damages outside of the Indian trust context (although a claim to release unpaid revenues being held by the government surely would be cognizable), the statutes at issue in *Mitchell II* at least implicated governmental responsibilities beyond management of the land itself.

Second, and more importantly, Justice Marshall brought the timber management dispute into the particular context of Indian law, with the integral element of the general trust relationship being placed at the center of the discussion.²⁵³ Focusing exclusively upon statutory text, Justice Powell regarded the trust element as incidental or inapposite

247. Sisk, *supra* n. 26, at 461-62.

248. See 463 U.S. at 224-28.

249. *Id.* at 226.

250. See *supra* pt. V.A.1.

251. *Mitchell II*, 463 U.S. at 234 (Powell, Rehnquist & O’Connor, JJ., dissenting).

252. *Id.* at 219-20.

253. *Id.* at 225-26.

to the question of damages as a remedy.²⁵⁴ In the words of the *Mitchell II* majority, the “construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.”²⁵⁵

In the case of a Native American claimant, where the government has assumed pervasive control over Indian assets, the trust doctrine unavoidably overlays and infuses the legal analysis. At each step of the statutory interpretation process, the trust doctrine dominates and influences the analysis. The inevitable conclusion then is that a fiduciary responsibility relating to the most fundamental form of wealth, that is, real property and its resources, is of monetary consequence. To be sure, absent the special trust relationship between the federal government and the Indian peoples, it is doubtful that the type of governmental duties prescribed in the timber management statutes at issue in *Mitchell II*—duties regarding land use and care, supervision and regulation of timber cutting, etc.—would be viewed as “money-mandating” in nature so as to give rise to a Tucker Act claim. However, unless the Court were to retreat into an artificial construction of each individual statutory embodiment of the general trust relationship, the Court cannot neglect the omnipresent implications of that elaborate bond between the United States and the Indian peoples.

Although the Court even today is not yet of a single mind on the matter, a clear majority in each of the 2003 decisions ruled that a monetary remedy indeed is implicit in the trust relationship. In *Navajo Nation*, the majority said that in looking for a substantive right to relief in a statute in an Indian breach of trust case, “the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred.”²⁵⁶ Likewise in *White Mountain Apache*, the Court held that once the “focus” of a specific fiduciary duty has been provided, “general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation.”²⁵⁷

The dissent in *White Mountain Apache*, relying upon precedent that applies to Tucker Act claims founded upon statutes outside of the Indian trust context, refused to go along and argued that a monetary remedy should not be inferred where the statute not only fails to “specifically authorize the award of money damages[,] . . . [but] does not even ‘spea[k] in terms of money damages or of a money claim against the United States.’”²⁵⁸ But the *White Mountain Apache* majority responded that this demand for an express statutory reference to money damages “would read the trust relation out of Indian Tucker Act analysis.”²⁵⁹ As the Court said, if the right-creating statute specifically provides for monetary compensation for a violation, then the statute standing alone would mandate recompense, while identification of a trust obligation and application of trust law would become superfluous.

254. *See id.* at 233-35 (Powell, Rehnquist & O’Connor, JJ., dissenting).

255. *Id.* at 225.

256. 537 U.S. at 506.

257. 537 U.S. at 477.

258. *Id.* at 482 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting) (quoting *Gnotta v. U.S.*, 415 F.2d 1271, 1278 (8th Cir. 1969)).

259. *Id.* at 477.

3. Persisting Differences between “Regular” and Indian Tucker Act Claims
When Identifying a Substantive Right to a Monetary Remedy

In sum, while *Mitchell II* and *White Mountain Apache* significantly ease the burden upon any person or entity who pursues a monetary remedy against the federal government, the burden is made even lighter for Indian claimants, at least in terms of recourse to money as a remedy. Accordingly, significant differences remain for court recognition of what we might call “regular” Tucker Act claims as contrasted with claims by Native American parties asserting breach of trust. For the ordinary Tucker Act litigant, the removal of the strict construction rules for waivers of sovereign immunity is the primary boon granted by the Court’s breach of trust decisions. For the Native American claimant, the additional removal of the requirement that the underlying statutory right be defined in terms of money becomes a further advantage in litigation.

The permissive inference that breach of the governmental duty necessarily justifies a monetary remedy simply is not available to the ordinary litigant seeking to hold the federal government amenable to damages, when there is not “any trust relationship in the mix of relevant fact.”²⁶⁰ If a plaintiff pursues a “regular” Tucker Act claim, the substantive right adduced from a statute must be one that entails the payment of money; that is, one that mandates compensation. Thus, while the statute need not authorize judicial action or even contemplate the prospect of litigation—the Tucker Act expressly creates the right to file suit—the statute must speak in the dialect of lucre. Without some reference to money or financial consequences in the statute relied upon for the cause of action, the statute cannot be fairly interpreted as conveying a right to monetary compensation within the meaning of the Tucker Act. When the case is one for breach of the government’s fiduciary responsibilities to indigenous peoples, by contrast, the monetary nature of the remedy is implicit in the trust doctrine.

B. *Factors in Finding and Defining an Enforceable Fiduciary Relationship under the Indian Tucker Act*

Dean Nell Jessup Newton observes that the Supreme Court identified three species of trust relationships in the *Mitchell* breach of trust decisions.²⁶¹ First, as a background concept, a “general trust”²⁶² relationship “is merely the statement of the historic relationship between Indian tribes and the Government,”²⁶³ which generates no enforceable duties although significantly “it provides the rationale for reading statutes liberally.”²⁶⁴ Second, a “limited trust”²⁶⁵ is one that is “established for a narrow and limited purpose,”²⁶⁶ which presumably is enforceable according to its restricted terms but creates no broader governmental responsibilities.²⁶⁷ Third, a “full fiduciary

260. *Id.*

261. Newton, *supra* n. 19, at 801.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Newton, *supra* n. 19, at 801 (footnote omitted).

267. *See id.* at 801-02.

relationship”²⁶⁸ is that which places more general responsibilities upon the federal government in managing Indian assets.²⁶⁹

In *Mitchell II* and *White Mountain Apache*, the Supreme Court confirmed that a genuine fiduciary relationship between the United States and an Indian tribe creates a duty enforceable through the remedy of a Tucker Act or Indian Tucker Act action for damages.²⁷⁰ While this is a vital declaration as a general proposition—offering the possibility of victory in litigation in the abstract—the decisive inquiry in any particular case remains whether the government has assumed a full fiduciary relationship with its attendant responsibilities. As discussed in the succeeding subsections of this article, through *Navajo Nation* and *White Mountain Apache*, the Court has identified certain factors that weigh in one direction or another,²⁷¹ factors that have roots in the majority or dissenting opinions from the *Mitchell* sequence some twenty years earlier.

1. The Concept of Trust in Statute and Common Law

- a. *Express Statutory Denomination of Trust*

If the statute upon which an Indian breach of trust claim is premised actually employs the word “trust,” one might expect that textual term of art to be dispositive. But when the Court started down the path in the *Mitchell* breach of trust cases a quarter of a century ago, it directly refused to accept the plain language of trust as controlling on the question of broader fiduciary responsibilities. Yet, after the Court’s most recent dissertation on the question, congressional use of terms of “trust” now may figure more centrally in the analysis.

In the *Mitchell* sequence of cases more than twenty years ago, the Court steered between the opposite shores of ruling that the use of the word “trust” in a statute compelled a finding of a full fiduciary relationship and of dismissing the existence of a trust as entirely irrelevant to the question of whether a monetary remedy against the sovereign was permissible.

In *Mitchell I*, the statute under review, the General Allotment Act, was explicit in stating that the United States held the lands allotted “in trust for the sole use and benefit of the Indian to whom such allotment shall have been made.”²⁷² Justice White, in dissent, described the statutory language “explicitly creat[ing] a ‘trust’”²⁷³ as “the starting point for . . . statutory interpretation.”²⁷⁴ Indeed, given his stress upon giving the words of the statute their ordinary meaning, it is fair to say that this statutory denomination of a trust led directly toward an ending point for Justice White’s analysis

268. *Id.* at 802.

269. *Id.*

270. *See supra* pts. III.C, IV.B.4 (discussing *Mitchell II* and *White Mountain Apache* respectively).

271. The following list is not designed to be all-inclusive, that is, encompassing every factor that possibly could prove relevant to determining whether an actionable fiduciary relationship has been assumed by the government. Rather, the factors addressed here are those that are most prominently displayed in the four Supreme Court breach of trust decisions discussed in this article.

272. 24 Stat. at 389.

273. *Mitchell I*, 445 U.S. at 547 (White, Brennan & Stevens, JJ., dissenting).

274. *Id.*

as well.²⁷⁵ However, under Justice Marshall's reading of the statute, the trust obligations of the federal government prescribed by the General Allotment Act were merely to prevent alienation of the land (that is, prevent the transfer of title to the land away from the Indian beneficiary) and to hold the land immune from state taxation.²⁷⁶ Because the Native American claimants in *Mitchell I* sought redress, not for loss of the land itself or because of imposition of state taxes, but for the government's alleged mismanagement of the timber resources on the land, the Court found the General Allotment Act to be inapposite authority. In sum, the Court declined to infer a broader fiduciary relationship based upon the presence of a particular word in a statute.

At the same time, the limited trust acknowledged in *Mitchell I* presumably was not entirely devoid of content. Although the Court in *Mitchell I* found the statutory trust too narrow in scope to encompass duties of resource management, we may imagine that had the federal government breached the particular trust obligations mandated by the General Allotment Act, by allowing the sale of the land or by permitting state taxes to be withheld from profits earned on the property, the government would have been liable for damages under the General Allotment Act as applied through the Tucker Act.²⁷⁷ Thus, even under the constrained *Mitchell I* precedent, the language of "trust" likely had the legal effect of imposing an enforceable duty upon the government, although the scope would vary according to the breadth of the governmental role in relation to Indian property or resources.

In *Mitchell II*, by contrast, the Court found that a set of statutes and regulations providing for comprehensive governmental management of timber lands gave rise to an actionable fiduciary relationship redressable for breach by money damages.²⁷⁸ Although the Court did not cite specific "trust" language in the pertinent statutes as supporting the result, the statutes and regulations established pervasive governmental control and supervision of the Indian timber resources.²⁷⁹ And, of course, those timber management statutes had been enacted as a supplement to the original General Allotment Act, which plainly did establish a limited form of trust over the allotted lands, as recognized even in *Mitchell I*.²⁸⁰ Significantly, the dissent in *Mitchell II* contended that "[t]he mere application by a court of the label 'trust' cannot properly justify disregard of an immunity from damages the Government has never waived."²⁸¹ In the dissent's view, "even the existence of a trust does not necessarily establish that the Government has surrendered its immunity from damages."²⁸² By instead holding that a fiduciary relationship implies the right to recovery in damages for its breach, the *Mitchell II*

275. See *id.* at 547-48.

276. *Id.* at 544 (majority).

277. See Newton, *supra* n. 19, at 806 ("[I]f an allottee could establish that the Government stood by and did nothing while the state taxed the land and subsequently sold it to collect taxes, it would seem that this failure to act in contravention of the purpose of the limited trust would ground a claim for money damages." (footnote omitted)).

278. 463 U.S. at 219-25.

279. See *id.*

280. *Id.* at 224 (referring to the General Allotment Act as interpreted in *Mitchell I*).

281. *Id.* at 238 (Powell, Rehnquist & O'Connor, JJ., dissenting).

282. *Id.* at 234-35 n. 8.

majority confirmed at least that statutory creation of a trust has powerful legal potential.²⁸³

Coming forward to the present day, the Court's most recent decision in *White Mountain Apache* appeared to place greater significance upon the appearance of the word "trust" in the pertinent statute. Both the majority and the concurrence placed singular weight upon the "trust" language in the statute. Justice Souter gave priority of analytical order to the presence of "trust" terms, by beginning the statutory interpretation phase of the majority opinion with the observation that "[t]he statutory language, of course, expressly defines a fiduciary relationship in the provision that Fort Apache be 'held by the United States in trust for the White Mountain Apache tribe.'"²⁸⁴ The Court immediately dismissed any suggestion that such language created a mere "bare trust," observing that the statute grants the government power to make direct use of the corpus of the trust.²⁸⁵ In her concurrence, Justice Ginsburg likewise emphasized that the statute "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations."²⁸⁶

In sum, while perhaps not a talisman that magically gives rise to a fiduciary relationship whenever it appears, the word "trust" has become more than a mere rhetorical launching point in the interpretive journey. When Congress does bring the word "trust" (or, presumably, a synonym such as "fiduciary") into play when describing the relationship of the United States to the Indian peoples, the persuasive burden then ought to shift to the government to prove that the intended trust is narrowly circumscribed. When Congress denominates the relationship as one founded upon "trust," a presumption should follow that the relationship is pregnant with fiduciary responsibilities. While the absence of the word "trust" in a statute should not detract from judicial enforcement of fiduciary responsibilities that arise from a comprehensive statutory scheme, the actual presence of that term of art in the statute places the entire inquiry on a different plane.

b. Role of General Trust Relationship and Common Law of Trust

Neither the general trust relationship that has historically existed between the United States and the Indian peoples nor elements of the common law of trust may, standing alone, impress enforceable fiduciary duties upon the federal government. At the same time, however, history does frame a context within which statutory interpretation should proceed in breach of trust cases. And the familiar standards of the common law of trust may be drawn upon to flesh-out the skeleton of a statute-based relationship.²⁸⁷

283. *Mitchell II*, 463 U.S. at 225-28.

284. *White Mt. Apache*, 537 U.S. at 474-75 (quoting 74 Stat. at 8) (footnote omitted).

285. *Id.*

286. *Id.* at 480 (Ginsburg & Breyer, JJ., concurring).

287. Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 Ga. L. Rev. 1307, 1373 (2003) (stating that, once a right to breach of trust relief is established in statute, "the common law of trust will aid in fleshing out the obligations of the government").

Twenty years ago, in *Mitchell II*, the Court insisted that the “sources of substantive law”²⁸⁸ upon which breach of trust claims must be based are “various Acts of Congress and executive department regulations.”²⁸⁹ Thus, congressional enactments or administrative regulations must be adduced to “establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.”²⁹⁰ Today, in *Navajo Nation*, the Court has again explained that the search for an actionable fiduciary relationship “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.”²⁹¹ In sum, a Native American claim for breach of trust against the federal government must be constructed upon a statutory foundation.

However, while neither the guardian-ward concept that has dominated federal government relations with the tribes nor general rules of common law that govern assumption of control over another’s property may create a legally-cognizable fiduciary relationship, that historical concept and those trust principles are important interpretive aids. First, as the Court directed in *Mitchell II*, “the undisputed existence of a general trust relationship between the United States and the Indian people”²⁹² should be appreciated as “reinforc[ing]” the process of statutory interpretation.²⁹³ In other words, a court should give a liberal construction to the statutes, generously reading ambiguities in the context of “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”²⁹⁴

Second, common law trust principles may be consulted in determining whether the government’s duties created or outlined by a statute have been executed in a manner that comports with fiduciary standards:

Once [the court has] determined that a fiduciary obligation exists by virtue of the governing statute or regulations, it is well established that [the court] then look[s] to the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*, for assistance in defining the nature of that obligation.²⁹⁵

To be sure, the statute establishes both the fiduciary relationship and the subject of that governmental responsibility. Then, in evaluating whether the government’s conduct offended the fiduciary expectations inherent in such a trust relationship, reference to the common law of trusts is appropriate to identify the standards for measurement.

The Supreme Court’s recent *White Mountain Apache* decision exemplifies this analytical process. The Court first determined, based upon the explicit trust language of the statute and the government’s decision to occupy the trust property, that an enforceable fiduciary relationship existed.²⁹⁶ The Court then turned directly to “elementary trust law”²⁹⁷ to give content to the government’s duty by drawing upon the

288. 463 U.S. at 219.

289. *Id.*

290. *Id.* at 224.

291. 537 U.S. at 506.

292. 463 U.S. at 225.

293. *Id.*

294. *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942).

295. *White Mt. Apache*, 249 F.3d at 1377.

296. *White Mt. Apache*, 537 U.S. at 474-75.

297. *Id.* at 475.

common law duty of the trustee to preserve and maintain trust assets from deterioration.²⁹⁸

In sum, a common law duty cannot give rise to a legally cognizable right by the tribes against the government for breach of trust. A statutorily-created fiduciary relationship remains an indispensable prerequisite. But the common law may be indispensable in providing further substance to the relationship, especially when evaluative standards are not provided by the statute that created the substantive right. And, of course, as discussed above, the propriety of damages as the remedy for breach of trust is derived from the common law standards.²⁹⁹

2. Control of Indian Resources by Government under a Comprehensive Management Statute or Actual Occupation

Each of the four Supreme Court decisions discussed in this article are ultimately about power over Indian resources, who has it and how much of it. As discussed below, *Mitchell I* and *Navajo Nation* were decided against the Indian claimants in lesser or greater part because of the Court's reading of the pertinent statute as giving the Indians themselves, rather than the government, primary control of the resources.³⁰⁰ By contrast, in *Mitchell II* and *White Mountain Apache*, the government's pervasive control of Indian assets directly led to the finding of an actionable fiduciary duty.

Twenty years ago, in *Mitchell II*, the Supreme Court ruled that the governing statutes imposed an actionable fiduciary duty to manage timber resources for the Indians because the government, by statute, had "assume[d] such elaborate control over forests and property belonging to Indians."³⁰¹ In *Mitchell II*, the government's assumption of control over the resources was pursuant to comprehensive congressional directions regarding how timber resources were to be managed, the lands were to be used, revenue to be produced, and profits to be paid.³⁰²

Coming forward in time to the present, in *White Mountain Apache*, the Court again found that the government's assumption of control carried with it fiduciary responsibilities for the assets it held. When Congress placed the Fort Apache property in trust with the government for the tribe, the United States was granted authority to make use of portions of that property.³⁰³ As Justice Souter, for the majority, described the government's subsequent action and its legal significance, the government then "availed itself of its option,"³⁰⁴ the government "not merely exercised daily supervision but has enjoyed daily occupation"³⁰⁵ of the property, and the government accordingly "has obtained control at least as plenary as its authority over the timber in *Mitchell II*."³⁰⁶

298. *Id.* at 475-76.

299. *See supra* pt. V.B.1.a.

300. *See infra* pt. V.B.3.

301. 463 U.S. at 225.

302. *See id.* at 219-24.

303. *White Mt. Apache*, 537 U.S. at 475.

304. *Id.*

305. *Id.*

306. *Id.*

To be sure, *White Mountain Apache* is an extension of *Mitchell II*'s control principle. In comparison with *Mitchell II*, the government's managerial control of the Indian asset in *White Mountain Apache* was not mandated and was not regulated in detail by a comprehensive statutory design. Instead, in *White Mountain Apache*, the government exercised discretion to make use of certain property held in trust for the tribe. Indeed, Justice Thomas, in dissent, protested that "the majority gives far too much weight to the Government's factual 'control' over the Fort Apache property."³⁰⁷ Instead, the dissent contended, a Tucker Act or Indian Tucker Act claim for damages must be founded "in the actual text of the relevant statutes"³⁰⁸ and not be based merely on "notions of factual control."³⁰⁹

For theoretical and practical reasons, the *White Mountain Apache* majority has the better of the arguments. First, the dissent makes too much of a purported dichotomy between factual control and statutory managerial prescriptions, suggesting that the majority departed from Tucker Act precedent that mandates finding a substantive right in the text of a pertinent statute and that does not permit implication of a right to recovery based upon circumstances or conduct between the parties. However, the government's conduct with respect to the Fort Apache property cannot be divorced from the 1960 Act which imposed a trust obligation on the government; indeed, the same statute establishing a trust in favor of the tribe was the source of the governmental power to take possession of the property. Although the Act did not *require* the government to assume control, it *permitted* such control. When the government then chose to take physical possession of the tribal assets, it did so pursuant to express statutory sanction. Thus, the Tucker Act claim for breach of trust in *White Mountain Apache* truly was founded upon a statute that conferred upon the government the necessary power to take control, from which the fiduciary relationship emerged.

By contrast, if the government were to act *ultra vires* without congressional authority and seize control of Indian property, that case would be on a very different footing than the tribal claim in *White Mountain Apache*. In such a case of unauthorized governmental usurpation, the government's conduct would be that of a trespasser or a property taker, which would be redressable in court either through a claim under the Federal Tort Claims Act for trespass³¹⁰ or under the Tucker Act for a taking under the Fifth Amendment of the Constitution.³¹¹ Plainly, such was *not* the case in *White Mountain Apache* nor presumably in most cases in which the government exercises factual control over Indian property.

Second, recognition of factual control of property as inherently including a fiduciary duty to protect those assets is not a novel improvisation in *White Mountain Apache*, but rather had been anticipated by the Court twenty years earlier. Quoting

307. *Id.* at 484-85 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

308. *White Mt. Apache*, 537 U.S. at 485 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

309. *Id.*

310. 28 U.S.C. §§ 1346(b), 2671-2680.

311. U.S. Const. amend. V. For a discussion of taking claims against the United States under the Tucker Act, see generally Sisk, *supra* note 26, at 576-79.

favorably from a lower court decision, the *Mitchell II* Court summarized the control principle in this manner:

[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.³¹²

Based upon this language, scholars predicted that pervasive factual control would be accepted as a sufficient basis upon which to rest a breach of trust claim, even absent a statute that prescribes a detailed management role for the government.³¹³

Third, *White Mountain Apache* brings legal doctrine into conformity with pragmatic reality, by giving full effect to the factual control assumed by the government over Indian assets, that is, requiring the government to take the bitter with the sweet. The presence or absence of a meaningful trust relationship turns upon whether one of the parties has a substantial degree of control over the other. In the ordinary case, if a federal statute fails to direct the government to undertake comprehensive managerial duties for an Indian asset, the natural assumption will be that the Indian tribe or individual Indians retain the autonomous power to make independent decisions regarding that asset. By contrast, when the government takes direct and physical possession of property, the tribe then loses that control. No less than when a statutory scheme establishes comprehensive managerial control, the government's exclusive occupation of Indian property necessarily forces the tribe to rely upon the government for proper maintenance of that resource. From such dependence, especially when it is forced, fiduciary obligations naturally flow.

Fourth, as discussed above, while the existence of an actionable fiduciary relationship must have a statutory genesis, the common law of trust remains an appropriate source of law to provide a standard by which to measure the government's fulfillment of its duties.³¹⁴ When the government exercises pervasive actual control, the need for a detailed statutory demarcation of each element of governmental responsibility fades, as the government's plenary control triggers familiar fiduciary obligations developed over centuries in the common law of trust. As the Court held in *White Mountain Apache*, notwithstanding the absence of specific statutory prescription of duties to manage and conserve the property, the fact that the government occupied property expressly subject to trust "supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee."³¹⁵

312. *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. U.S.*, 624 F.2d 981, 987 (Ct. Cl. 1980)) (internal quotations omitted).

313. Newton, *supra* n. 19, at 805 (arguing that, for purposes of breach of trust claims, "[i]f the statutory scheme is not comprehensive, pervasive actual control will probably suffice, with the caveat that control must rest with the Government and not the individual [Indian]"); Wood, *supra* n. 228, at 1519 (observing that the *Mitchell II* Court "suggested that, even apart from statutory expression of a trust, a fiduciary relationship arises whenever the executive branch maintains extensive control over Indian property").

314. *See supra* pt. V.B.1.

315. 537 U.S. at 475.

3. The Counter-Factor of a Statutory Purpose to Encourage Indian Self-Determination

If pervasive and plenary control is the *sine qua non* of a fiduciary relationship per *White Mountain Apache*, then the surrender of governmental oversight per *Navajo Nation* is its antithesis. If the United States renounces its historical domination over the Indian peoples by yielding management, supervision, and possession of Native American resources, and thereby restoring autonomous and independent control to the tribe or individual property owners, the governmental fiduciary role fades accordingly. In *Navajo Nation*, the Court found that the government had not been assigned an extensive managerial role in the Indian Mineral Leasing Act, thus leaving the primary power to negotiate and transact coal mining leases to the tribes.³¹⁶ With the statutory design so understood, there was no room for significant governmental intervention with attendant fiduciary responsibilities.

The converse of the control principle exemplified by *Mitchell II* and *White Mountain Apache* is the self-determination factor relied upon by the Supreme Court in denying implication of a fiduciary duty in *Navajo Nation*. If the Court divines that the underlying congressional purpose is to foster Indian self-determination, then it will be inclined to regard inference of a fiduciary responsibility as “out of line” with the statutory design.³¹⁷ As Justice Ginsburg, for the majority, explained in *Navajo Nation*, if Congress “aims to enhance tribal self-determination”³¹⁸ by conferring primary authority over resources to the tribe, reserving only a “more limited *approval* role”³¹⁹ to the government, then judicial insistence that the government must intervene to second-guess tribal decisions would undermine the congressional intent.³²⁰ After *Navajo Nation*, the self-determination factor, when identified as fundamental to the statutory scheme, may create a modest presumption that any residual governmental role is limited.

However, before declaring that self-determination is the cornerstone of a particular statutory framework, a court must carefully consider whether the governmental role in a particular case is best described as one of engaged management of mineral resources or one of detached supervision of largely independent Indian management of their own resources. In exploring the answer to that question of characterization, the court should (1) act with a strong measure of judicial humility and (2) always be informed by the distinctive statutory and regulatory rules pertinent to the singular factual context of the case. Even when legislation returns some jurisdiction over resources to the tribe, the government nonetheless must be held responsible for conscientious execution of those obligations that endure in the statutory text despite the transfer of a degree of authority.

First, given the uneven course of dealings between the United States and the Indian peoples over the centuries, marked as it is by episodic and dramatic fluctuations in basic policy, any court ought to hesitate before assuming that Congress has wholly withdrawn governmental accountability and utterly abandoned fiduciary commitments. In this

316. 537 U.S. at 507-08.

317. *Id.* at 508.

318. *Id.*

319. *Id.* at 509.

320. *Id.* at 508-10.

regard, the *Mitchell* couplet offers a sobering object lesson about the danger of judging precipitously before the entire statutory and circumstantial context has been fully presented and sensitively appreciated. As with the other factors that emerged as important in the 2003 duet of cases, the self-determination factor also appeared in the earlier *Mitchell* sequence, although the initial encounter turned out to be a misleading diversion from the critical path.

In *Mitchell I*, the Supreme Court read the General Allotment Act of 1887 as placing the managerial responsibility upon the individual Indian and thus imposing no fiduciary obligation upon the federal government:

[Two sections of the statute] indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. Furthermore, the legislative history of the Act plainly indicates that the trust Congress placed on allotted lands is of limited scope. Congress intended that, even during the period in which title to allotted land would remain in the United States, the allottee would occupy the land as a homestead for his personal use in agriculture or grazing. Under this scheme, then, the allottee, and not the United States, was to manage the land.³²¹

But, as subsequently revealed when the case returned to the Supreme Court as *Mitchell II*, with the benefit of a fuller record of the sad and failed legacy of allotment as a policy³²² and with a complete inventory of the governing statutory framework, the earlier impression that the governmental fiduciary role had been surrendered and that Indians had assumed effective control of resources proved to have been far wide of the mark. In *Mitchell II*, the Court acknowledged that, for the plaintiff Indians on the Quinault reservation, the allotments were too heavily timbered for use in agriculture or grazing, and, without saying so directly, the Court also appeared to understand that the parcels were too small to be productively managed for timber harvesting without collective governmental administration of the forest lands.³²³ Moreover, upon examining the extensive series of timber management statutes enacted in the many decades following the General Allotment Act of 1887, the Court recognized that the original allotment scheme had been superseded and that the government had assumed detailed and comprehensive responsibilities that amounted to pervasive control of the Indian timber resources.³²⁴

Perhaps the *Mitchell I* Court should not be blamed for having accepted the case for review under the shaky statutory premise that unwisely had been adopted by the lower court. Nonetheless, in the Court's first public performance, it consequently presented a fallacious and misguided rendition of the ballad of the Quinault people. To be sure, the *Mitchell I* Court itself apparently recognized the tentative and incomplete nature of its

321. 445 U.S. at 542-43 (citations and footnote omitted).

322. See generally Royster, *supra* n. 28. Professor Royster described the allotment policy as one which failed to "transform the Indians into yeoman farmers, but . . . did wreak destruction within tribal communities." *Id.* at 6.

323. 463 U.S. at 208-09; see Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship after Mitchell*, 31 Cath. U. L. Rev. 635, 654 (1982) (describing the factual context for the timber mismanagement claims in *Mitchell I*).

324. *Mitchell II*, 463 U.S. at 219-23; see Newton, *supra* n. 323, at 654-55 (outlining the series of statutes concerning management of timber resources on the allotments beginning in 1910).

disposition, given the Court's express encouragement to the claimants to look for an alternative statutory foundation for the timber mismanagement claims on remand.³²⁵ Fortunately, the acknowledged possibility of the need for a course correction was concretely realized in *Mitchell II*.

In the recent *Navajo Nation* decision, the Court likewise cabined the reach of the decision, explaining in the first paragraph of its decision that it applied only to coal mining leases negotiated and agreed to by the tribes under the Indian Mineral Leasing Act of 1938.³²⁶ In potential contrast, Justice Ginsburg noted early in the opinion that this statute envisions a different and potentially more comprehensive role for the Secretary of the Interior in approving and regulating leases for oil and gas on tribal lands, including criteria to be applied in administrative approval of royalty rates.³²⁷ For this reason, the Court later in the opinion carefully limited its ruling by stating that "[w]hether the Secretary has fiduciary or other obligations, enforceable in an action for money damages, with respect to oil and gas leases is not before us."³²⁸ The potential significance of this express reservation should be highlighted. Given that the Court necessarily understood that, with respect to gas and oil resources, the tribes possess original authority to negotiate and transact leases, the Court presumably contemplated that fiduciary duties for the government may coexist with some sizeable measure of Indian self-autonomy.³²⁹ Moreover, the Court acknowledged that the new 1996 regulations implementing the Indian Mineral Leasing Act require the government to consider the best interests of the tribe, although the Court understandably held these regulations inapplicable to a lease adopted in 1964 and amended in 1987.³³⁰ For that reason, a different fiduciary relationship analysis may apply even to coal mining lease cases arising in the future, under the new regulatory framework, because the Tucker Act applies not only to claims in which the substantive right is derived directly from a statute but also to those founded upon regulations.³³¹

In other words, self-determination and governmental fiduciary obligations are not always mutually exclusive. As Judge Baskir said when the case was before the Court of Federal Claims, even though he determined—as did the Supreme Court subsequently—that no breach of trust claim was stated in that particular case, such statutes implicate a

325. See 445 U.S. at 546 & n. 7.

326. 537 U.S. at 493 ("This case concerns the Indian Mineral Leasing Act of 1938 (IMLA), 52 Stat. 347, 25 U.S.C. § 396a *et seq.*, and the role it assigns to the Secretary of the Interior (Secretary) with respect to coal leases executed by an Indian Tribe and a private lessee.").

327. *Id.* at 494-95.

328. *Id.* at 507 n. 11.

329. Significantly, the *Navajo Nation* majority did not overrule (or for that matter even mention) an established line of precedent, cited in the dissent, in which governmental approval power, at least in certain circumstances, "was understood to be a significant component of the Government's general trust responsibility," even when the tribes were given greater responsibility for their own interests. See *id.* at 516 (Souter, Stevens & O'Connor, JJ., dissenting) (citing *Tiger v. W. Inv. Co.*, 221 U.S. 286 (1911) and *Anicker v. Gunsburg*, 246 U.S. 110 (1918)).

330. *Id.* at 508 n. 12 (citing 25 C.F.R. pt. 211 (1985)).

331. 28 U.S.C. § 1491 (authorizing claim "founded either upon . . . any Act of Congress or any regulation of an executive department").

“delicate balance . . . between exercising fiduciary responsibilities and respecting tribal sovereignty and self-determination.”³³²

Second, even when substantial power over mineral resources is restored to semi-autonomous tribal entities, meaningful content must be given to whatever administrative duties continued to be reposed by Congress in the executive departments of government. Justice Souter, in dissent in *Navajo Nation*, acknowledged that one of the statutory purposes was “to provide for greater tribal responsibility,”³³³ but argued that the statute also imposed a meaningful approval obligation upon the government for the protection of the Indians.³³⁴ In his view, the Court majority gave “overriding weight to the interest of tribal autonomy,”³³⁵ thus erroneously draining any substantive content from the Secretary’s approval obligation and consequently “losing sight of the mixture of congressional objectives.”³³⁶ Even if one agrees that the Court majority reached the right balance under the particular statute at issue in *Navajo Nation*, the dissent rightly admonished that discovery within a statute of a congressional purpose to enhance Indian autonomy should not effectively immunize the government from being held to account for its continuing fiduciary responsibilities. Accordingly, even when a court hearing a breach of trust claim detects a congressional purpose to encourage tribal self-determination as an element of the pertinent statutory framework, the court is not free to disregard the specific terms of the statute that balance tribal autonomy with a governmental supervisory role.

Still, after *Navajo Nation*, if statutory promotion of self-determination is not intended to supersede governmental fiduciary obligations, then the statute should be drafted so as to provide explicit guidance to the courts as to the extent of governmental responsibility and the standards that apply to evaluate the proper exercise of those duties.³³⁷ By providing specific prescription of duties and precise statutory definition of standards, a fiduciary relationship, even of limited scope and circumscribed content, is most assured of survival in the era of self-determination.

For example, as Professor Judith Royster has explained, the standard mining leases under the Indian Mineral Leasing Act of 1938 (IMLA) addressed by the Court in *Navajo Nation* are seldom used today.³³⁸ Instead, tribes tend to pursue mineral development agreements under the terms of the Indian Mineral Development Act of 1982 (IMDA),³³⁹ which the Supreme Court observed did not govern the coal mining lease at issue in

332. *Navajo Nation*, 46 Fed. Cl. at 231.

333. 537 U.S. at 517 (Souter, Stevens & O’Connor, JJ., dissenting).

334. *Id.* at 517-18.

335. *Id.* at 518.

336. *Id.*

337. *Cf. id.* at 510 (majority) (rejecting the argument that the Secretary’s approval power should have been exercised in the tribe’s best interests because there were no “substantive prescriptions” in the provision; that is, “no guides or standards circumscribing the Secretary’s affirmation of coal mining leases negotiated between a Tribe and a private lessee”).

338. Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. Rev. 327, 336 (1995).

339. Pub. L. No. 97-382, 96 Stat. 1938 (1982) (codified at 25 U.S.C. §§ 2101-2108).

Navajo Nation.³⁴⁰ In contrast with the IMLA of 1938, the IMDA of 1982 expressly requires the Secretary to determine whether the lease is “in the best interests of the Indian tribe”³⁴¹ when approving or disapproving transactions with private companies to develop mineral resources on tribal lands.³⁴² Thus, while Congress plainly intended “to accord tribes greater control over the development of their mineral resources”³⁴³—given that leases are negotiated by the tribes and may not be entered without tribal consent—Congress at the same time has preserved a central role for the Secretary and specified the basis upon which that governmental power is to be exercised.³⁴⁴ Even with the manifest congressional purpose of granting a considerable measure of independence to the tribe, the supervisory directive to the Secretary must be given full effect as well. Such specifically-defined statutory duties establish a fiduciary responsibility, even if limited in scope and even if its evaluation requires balancing the self-determination purpose. Indeed, Congress expressly admonished that the Indian Mineral Development Act of 1982 was not intended to “absolve the United States from any responsibility to Indians, including those which derive from the trust relationship.”³⁴⁵

In sum, while a congressional design to enhance tribal autonomy must be given appropriate weight and certainly moves the center of gravity for implication of fiduciary obligations, courts must remain alert for distinct statutory indications that Congress recognized a continued need for meaningful governmental protection.

VI. CONCLUSION: THE MERGER OF SOVEREIGN IMMUNITY AND CAUSE-OF-ACTION ANALYSIS IN INDIAN BREACH OF TRUST CASES

Given that each Indian breach of trust case will turn upon the individual facts of the case and peculiar facets of particular statutes, asking the entire orchestra of federal

340. 537 U.S. at 509. That the Indian Mineral Development Act of 1982 was inapplicable to the particular coal mining lease at issue in *Navajo Nation* was clear, given that the lease had originated in 1964 long before enactment of the IMDA in 1982 and that the lease had been transacted under the legal regime of the IMLA of 1938. The Supreme Court, in dismissing the IMDA as inapposite in *Navajo Nation*, stated: “The IMDA governs the Secretary’s approval of agreements for the development of certain Indian mineral resources through exploration and like activities. It does not establish standards governing the Secretary’s approval of mining leases negotiated by a Tribe and a third party.” *Id.* For the casual opinion reader unfamiliar with Native American mineral development and mining matters, this judicial dictum could lead to an unfortunate misunderstanding. By this statement, the Court was merely reiterating that a standardized and simple lease negotiated between a tribe and a private enterprise outside of the statutory parameters of the IMDA is beyond the fiduciary scope of the IMDA. The Court should not be understood as indicating that any agreement that is in the nature of a lease (that is, which creates a leasehold for the benefit of the mining company) and that was negotiated between a tribe and a third party necessarily and invariably falls “outside the IMDA’s domain.” *See id.* In fact, the IMDA authorizes “[a]ny Indian tribe, subject to the approval of the Secretary . . . [to] enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement,” for mineral resources owned by the tribe. 25 U.S.C. § 2102(a) (emphasis added). Thus, any suggestion that a “minerals agreement” under the IMDA arises only with respect to mineral exploration and not to extraction or that the IMDA authorizes only joint ventures between a tribe and a third party and not a lease arrangement would contravene the plain text of the statute. In any event, because the meaning and scope of the IMDA was not before the Court in *Navajo Nation*, the statement is dictum and should not affect future litigation regarding the fiduciary obligations that apply to minerals agreements, even if framed as leases, that are transacted under the IMDA regulatory scheme.

341. 25 U.S.C. § 2103(b).

342. *Id.*; see generally Royster, *supra* n. 338, at 334-38.

343. Royster, *supra* n. 338, at 337.

344. *Id.*

345. 25 U.S.C. § 2103(e).

judges to play the very same note at each performance is an unrealistic expectation. Disagreement in individual cases will persist. But, while we may not be able to achieve perfect harmony, all courts now should be reading from the same general score. And one melodic theme clearly should arise from the cacophony of sound—the musical blending together in Indian breach of trust cases of the subjects of sovereign immunity and cause-of-action.

As Judge Baskir of the Court of Federal Claims apprehended when the *Navajo Nation* case was before his court, the questions of jurisdiction and statement of a claim, although “conceptually different,”³⁴⁶ do “tend to merge”³⁴⁷ in the context of Indian trust cases. Because jurisdiction and sovereign immunity now have been recognized and confirmed as opposite sides of the same coin under the Tucker Act, this perceptive recognition of the conceptual merger applies as well to the question of governmental consent to suit in Native American breach of trust cases seeking the recovery of money damages.

If an Indian individual or tribal claimant is unable to establish a meaningful fiduciary relationship grounded in statute, then the lawsuit will fail, not for want of jurisdiction or withholding of consent by the government to suit, but because no cognizable cause-of-action has been stated that is redressable in money. But if such a claimant is able to demonstrate that the government by statute or by exercise of power has assumed fiduciary obligations, then the doors of the courthouse should be open to compensate by damages for the monetary value of the harm caused by breach of those duties.

346. 46 Fed. Cl. at 227.

347. *Id.*