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Take-or-Pay Royalties, the Trust Doctrine, and the Shoshone Case

Christopher S. Kulander
South Texas College of Law Houston

NOTES

TAKE-OR-PAY ROYALTIES, THE TRUST DOCTRINE AND THE *SHOSHONE* CASE

*Dr. Christopher S. Kulander**

This note examines the portion of the *Shoshone Indian Tribe of the Wind River Reservation v. United States* case that deals with whether royalties are owed on take-or-pay payments and the trust doctrine establishing a fiduciary relationship between tribes and the federal government. This note describes why the exclusion of royalties derived from take-or-pay settlements, as described in *Shoshone*[1] and made under the authority of the Indian Mineral Development Act of 1938, violated the fiduciary obligation of the Secretary of the Interior.

Because this note will be of interest to two often distinct types of lawyers, those in oil and gas and those involved in Federal Indian law — neither of whom might be familiar with the appropriate tenets of the other field's body of law — this note will first address the fundamental legal concepts at play in both bodies. On the Indian law side, the fiduciary relationship of the United States to tribes in general will be addressed first. Second, the tribes as mineral lessors and the processes by which the Secretary represents them will be discussed. Turning to oil and gas law, the practice of take-or-pay payments for gas transport will be described first. Second, royalties in general and how royalties are calculated for take-or-pay settlements will be briefly explained.

Both of these bodies of law are tied together under the facts of the ongoing *Shoshone* take-or-pay royalty case. In particular, the two primary arguments under which the federal government attempted summary

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* Third-year student, University of Oklahoma College of Law.

The author holds a Ph.D. in Geophysics (Petroleum Seismology) from Texas A & M University, 1999, and an M.S. in Geophysics from Wright State University, 1995. The author would like to thank Steve Gordon and Lynn Calkins of Holland & Knight LLP for graciously providing copies of many motions and briefs cited within this note. The author gratefully acknowledges the assistance of Professor Owen Anderson and Professor Taiawagi Helton at the University of Oklahoma, and Dr. Byron Kulander at Wright State University. This note is dedicated to the memory of John Sullivan (1918-2000).

1. Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639 (2003).

judgment: the "maximization" claim and the take-or-pay royalty claim. For each of these two claims, both the defendant's and plaintiff's arguments will be examined, and the court of claims ruling will be explained and then analyzed. Finally, a possible exception to the maximization rule is presented and a recommended change to the present federal take-or-pay royalty problem is proposed.

I. Tribal Lands and the Federal/Indian Relationship

A. The Federal-Indian Trust Relationship

All three branches of the federal government have recognized that a general fiduciary relationship exists between the federal government and the tribes.[2] In *Cherokee Nation v. Georgia*, the Supreme Court said that the relationship was "that of a ward to his guardian,"[3] and that "moral obligations of the highest responsibility and trust"[4] exist that should "be judged by the most exacting fiduciary standards."[5] For over forty years, tribes have fought to translate the accepted plenary power that the federal government has over tribes into the recognition of a parallel series of fiduciary duties.[6] Courts have responded to these claims by looking closely at statutes, treaties and federal common law related to trust.[7]

Like all suits brought against the government generally, a three-part threshold test must be met for a suit by a tribe against the government for breach of trust to proceed.[8] First, the tribe must choose a court with subject matter jurisdiction over the claim.[9] Here, the Shoshone Tribe of the Wind River Reservation (the Tribe) has invoked the Tucker Act,[10] which allows the

2. Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635, 635 (1985).

3. *Id.* (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

4. *Id.* (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

5. *Id.* (quoting *Seminole*, 316 U.S. at 297).

6. *Id.* at 636.

7. *Id.* at 638.

8. *Id.* at 639.

9. *Id.*

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

court of claims[11] to hear claims "founded . . . upon . . . any Act of Congress."[12] Second, the government must have created a statutory avenue to accept suit.[13] The Tribe has no problem with this step because Congress changed the Administrative Procedure Act (APA) in 1976, expressly waiving sovereign immunity for claims arising from the APA.[14] Third, the tribe must state a claim upon which relief may be granted.[15] The government finds the third point unmet in their motions for dismissal.

In 1980 and 1983, a pivotal pair of cases, known as *Mitchell I*[16] and *Mitchell II*,[17] signaled a new course for the trust relationship. In *Mitchell I*, a case involving the timber rights of the Quinault and Quileute tribes in Washington State, the Court overruled the court of claims and ruled that the General Allotment Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the government to manage timber resources."[18] The case was remanded to the court of claims, who then found that the federal statute (the Tucker Act) *and regulations promulgated within these statues* placed implicit fiduciary duties upon the United States in its management of reservation timber and that these regulations and statutes could give rise to damages if the fiduciary duty related to them was breached.[19] The court of claims therefore ruled that the respondents could proceed with their claim.[20] *Mitchell I* established a base level of trust where remedies are limited to enforcement of the specific purposes of the regulation or statute.[21]

The duty described in *Mitchell II* is, in contrast to the general level of trust found in *Mitchell I*, is a strict fiduciary duty rooted in the actual federal government's direction of the Indian asset and benefits and defined by specific

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11. 28 U.S.C. § 1491 (2000).

12. *Id.* "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ." *Id.*

13. Newton, *supra* note 2, at 642.

14. *Id.*

15. *Id.*

16. United States v. Mitchell, 445 U.S. 535 (1980). This case is generally referred to as *Mitchell I.*

17. United States v. Mitchell, 463 U.S. 206 (1983). This case is generally referred to as *Mitchell II.*

18. United States v. Mitchell, 445 U.S. 535, 542 (1980).

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

20. *Id.* at 274.

21. *Mitchell I*, 445 U.S. at 542.

regulations and statutes.[22] Thus, the two *Mitchell* cases suggest that there are two other types of trust relationships above the general trust relationship founded in *Cherokee Nation.*

B. Development of Indian Land and the Trust Doctrine

Tribal land is exceptional in that the equitable title is held by the whole tribe for the benefit of all the individuals in the tribe.[23] Individual members have no inheritable title in tribal land.[24] Most lands held by tribes is by aboriginal title arising from governmental recognition of the Indians' right to quiet enjoyment of the lands even after the fee of such land becomes vested in the federal government.[25] Land protected under aboriginal title may be recognized by treaty,[26] as was the Shoshone tribal land constituting most of the Wind River reservation in Wyoming.

Treaties typically involve federal recognition of aboriginal title.[27] Congress stopped making treaties with Indians in 1871.[28] In *United States v. Shoshone Tribe*, the Supreme Court held that the overall goal of the federal government in treaties was to deal equitably with tribes and to seek no reward for itself.[29] Thus, the treaty with the tribe was found to include the mineral rights under the land turned over to the tribe, even though the treaty made no mention of the mineral rights.[30] Such an inquiry is usually conducted on a case-by-case basis and requires an examination of the treaty.[31] After the treaty period, the government has relied on statutes to carry out its land dealings with Indian tribes.[32] However, between 1871 and 1919, the President could use executive orders to set land aside.[33] In 1919, Congress took exclusive control of this power.[34]

22. *Mitchell II*, 463 U.S. at 206.

23. ROCKY MT. MIN. L. FOUND., LAW OF FEDERAL OIL AND GAS LEASES § 26.01[2] (2001) (Tribal Lands) [hereinafter LAW OF FEDERAL OIL AND GAS LEASES].

24. *Id.*

25. *Id.* § 26.01[2][a].

26. *Id.*

27. *Id.* § 26.01[2][b].

28. *Id.* § 26.01[2][b].

29. United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938).

30. LAW OF FEDERAL OIL AND GAS LEASES, *supra* note 23, § 26.01[2][b].

31. *Id.*

32. *Id.* § 26.01[2][c].

33. *Id.* § 26.01[2][d].

34. *Id.*

Tribes are considered to be "domestic, dependent nations," a status rooted in the ancient and aboriginal nature of the Tribes.[35] As a result of this status, the federal government recognizes a fiduciary relationship between the United States, Indian tribes, and their individual members.[36] Because of this relationship, the federal government is the guardian of tribes and members and must assume that all government actions affecting tribes, individual Indians, or their property are in the Indians' "best interest."[37] The federal government, through the Secretary of the Interior, must meet the strictest fiduciary principles.[38]

C. Tribes as Mineral Lessors

Beginning in 1790, Congress passed a series of acts, commonly known as the Indian Non-Intercourse Acts, to govern and regulate the sale of tribal lands.[39] Such acts commonly stipulated that no sale of land by any tribe or individual was valid unless concluded in accordance with a treaty between the federal government and the appropriate tribe.[40] These acts are important to mineral lessees because all leases and mineral agreements entered into by a tribe or individual Indian must be examined and approved by the Secretary.[41] In addition, any lease farmout agreements and modifications of a previously approved lease or agreement must also be approved by the Secretary.[42]

The Indian Mineral Leasing Act (IMLA) of 1938 arose from a need to consolidate and simplify lease provisions and practices.[43] The 1938 Act had three express aims.[44] First, the Act attempted to establish one single set of leasing procedures.[45] Second, the IMLA was passed to help achieve the goal of tribal revitalization — the primary goal of the Indian Reorganization Act

35. *Id.* § 26.02[1].

36. *Id.* § 26.02[2].

37. *Id.* (quoting Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont., 792 F.2d 782, 794 (9th Cir. 1986)).

38. *Id.*

39. *Id.* § 26.02[3].

40. *Id.*

41. *Id.*

42. *Id.*

43. Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 558 (1994).

44. *Id.*

45. *Id.*

of 1934.[46] Third, the Act was to encourage economic development and to insure tribes "the greatest return for their tribal minerals."[47]

Specifically, the Act established requirements for surety bonds, bonuses, rents, and royalties for mineral leases.[48] Unfortunately, the IMLA leasing system was fraught with implementation problems which led to corruption — theft and fraud.[49] The Act also gave the tribes a limited right to sue for breach of trust.[50] During the duration of a lease, the Secretary is required to watch over the lessee's performance in order to guard the Indian's mineral assets and economic potential — which includes overseeing actions mandated by both federal regulations and the terms of the lease.[51]

Although flawed, particularly in its "one size fits all tribes" approach to development, the IMLA represented a major advance for mineral-owning tribes.[52] In *Jicarilla Apache Tribe v. Supron Energy*, after listing the extensive responsibilities of the government in representing tribes in leasing negotiations, the court noted, "the evident purpose of the statute is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing."[53]

The Omnibus Leasing Act makes all oil and gas lease activities on Indian lands subject to the regulations of the Secretary.[54] In addition, a 1909 Act authorizing the leasing of allotted lands also authorizes the Secretary to "make such rules and regulations as may be necessary . . . ."[55] Section 8 of the IMLA mandates that the Secretary will execute regulations to assist achievement of the Act's purpose.[56] The chief purpose of the operating regulations for leases is to help assume that exploitation activities are performed so as to achieve the greatest recovery with minimum waste.[57]

Royalty accounting and payments for Indian leases are generally governed by the lease provisions, related regulations, and by the notices of oil and gas

46. *Id.*
47. *Id.*
48. *Id.* at 565.
49. *Id.* at 567.
50. *Id.* at 569.
51. *Id.* at 570.
52. *Id.* at 560.
53. Jicarilla Apache Tribe v. Supron, 728 F.2d 1555, 1570 (10th Cir. 1980).
54. LAW OF FEDERAL OIL AND GAS LEASES, *supra* note 23, § 26.01[2][b].
55. 25 U.S.C. § 396 (2000).
56. LAW OF FEDERAL OIL AND GAS LEASES, *supra* note 23, § 26.01[2][b].
57. *Id.*

lease sales.[58] Royalties are set by the Secretary.[59] The Mineral Management Service (MMS) regulations, controlling the value of royalties for oil and gas from Indian lands, are very similar to the regulations addressing valuation for federal oil and gas leases.[60] The regulations are generally the same for leases on both reservation lands and allotted lands, and provide broadly that, with the exception of advance payments to the superintendent of the reservation after the first year of the lease, payments of rentals and royalties are controlled by statute.[61]

II. Take-or-Pay Payments and Royalties on Take-or-Pay Payments

A. Take-or-Pay Payments Generally

Producers (typically an oil company who has leased from a landowner) sell gas to various purchasers. Either the producers or purchasers arrange to transport the gas via a common-carrier pipeline, typically a local gas distributor or industry.[62] Historically, producers sold gas to pipeline companies who transported the gas for resale to local distributors or industry. Under either marketing scenario, however, the gas sale contract may be on a take-or-pay basis. In the event the purchaser takes less than the minimum quantity of gas required by the contract, the purchaser must pay for gas not taken. Payments made for gas not taken are known as take-or-pay payments.[63] For example, assume that Producer *A* agrees to sell $200 worth of gas to Purchaser *B* with which he has a 25% take-or-pay agreement. When the time for the production and shipment occurs, Purchaser *B* is overbooked and cannot take the gas. Under the take-or-pay provision, Purchaser *B* will pay Producer *A* $50. Take-or-pay contracts provide the producer with a stable revenue flow to cover the expenses related to development, production, gathering, and (sometimes) processing and treatment during times when the gas market is slack.[64]

If within a set period of time from the making of the take-or-pay payment, the pipeline can take extra gas over what it currently must buy from the producer, that extra or "make-up" gas will be credited against the money paid

58. J.S. LOWE ET AL., OIL AND GAS LAW 932 (4th ed. 2002).
59. *Id.*
60. *Id.*
61. 30 C.F.R. § 218.51 (2002).
62. LOWE ET AL., *supra* note 58, at 941.
63. *Id.*
64. *Id.*

earlier on the take-or-pay agreement.[65] In the example in the previous paragraph, if within an expiration date expressed in the take-or-pay agreement, Purchaser *B* can take more gas over-and-above its periodic obligation to Producer *A*, that extra gas will be credited toward the $50 it paid earlier. However, if within the agreed-upon time window the Purchaser is unable to take makeup gas, the make-up right simply expires.

Royalty on take-or-pay disputes arose because the supply shortages that caused rising prices for natural gas in the 1970s led some purchasers to compete for additional supply by offering to "take or pay" for high percentages of well delivery capacity.[66] Up until the middle of the 1980s, most of the gas produced in the United States was sold via long-term contracts at, or close to, the Federal Energy Regulatory Commission (FERC)-maximum lawful price.[67] When demand for gas fell in the 1980s, purchaser take-or-pay liabilities became so substantial that they were forced to breach their take-or-pay obligations or face bankruptcy.

As the 1980s progressed, due to sudden and long-lasting price declines, the pipeline companies found themselves in deepening financial straits concerning take-or-pay payments because they could not resell the great volumes of high-priced gas they were obliged to take under the long term contracts they signed when prices were high.[68] As a result, the pipelines began to build-up large volumes of take-or-pay liabilities.[69] Not only could they not sell all the gas they were forced to pay for under the take-or-pay contracts, they could never go beyond that and purchase any make-up gas — the gas that they could not take earlier.[70] Since they could not take the make-up gas in a timely manner, the credit expired and they could thus never hope to make up the take-or-pay payment made earlier.[71] In short, the declining market set up a downward spiral for the pipelines: they had to pay high prices for gas they could not sell, and worse, they could never go further and take the "make up" gas they needed to take to bring down the amount of take-or-pay payments they were being forced to make.[72] The system they had set up in the realm of climbing

65. *Id.*
66. *Id.*
67. *Id.*
68. LOWE ET AL., *supra* note 58, at 941.
69. *Id.* at 942.
70. JAMES M. GRIFFEN & HENRY B. STEELE, ENERGY ECONOMICS AND POLICY 303 (2d ed. 1986).
71. *Id.*
72. *Id.*

prices in the 1970s threatened to ruin them in the long period of declining prices in the 1980s.[73]

The producers realized that to hold the pipelines to the take-or-pay contracts would, in many cases, simply result in the pipelines going into bankruptcy, nobody getting paid anything and further havoc in the gas markets.[74] Accordingly, the first wave of take-or-pay litigation led largely to settlements. Many producers decided to cut their losses and allow the pipelines to either "buy out" or, less commonly, "buy down" the take-or-pay liabilities they had incurred.[75] A "buy out" take-or-pay settlement is one where the pipeline pays a sum and simply is released from the gas contract and any further liability.[76] A "buy down" take-or-pay settlement continues the contractual relationship but with a lower take-or-pay liability and lower gas prices.[77]

B. Royalties on Take-or-Pay Payments and Take-or-Pay Settlements Generally

In the aftermath of the initial round of take-or-pay litigation between producers and purchasers, litigation erupted over whether royalty was due on take-or-pay payments.[78] The litigation resulted in two views. The first is that royalty is not owed until there "actual production." Thus, take-or-pay benefits were not subject to royalty because they were payments made in lieu of production.[79] Under these cases, the royalty was due when the purchaser finally did take production in the form of "make-up" gas.[80] In contrast, another line of cases had said that take-or-pay payments are immediately royalty bearing and thus royalty is due on take-or-pay benefits immediately upon receipt by the producer because the lease royalty clause is a statement of the general expectations of the parties and the take-or-pay benefits constitute part of the total proceeds paid for gas.[81] Under both lines of cases, provided the make-up gas is eventually produced, the royalty owner gets paid. The difference is when the royalty is paid.

73. *Id.*
74. *Id.*
75. FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 590 n.4 (1st ed. 2000)
76. *Id.*
77. *Id.*
78. *Id.* at 244.
79. *Id.*
80. *Id.*
81. *Id.*

With the signing of the more common "buy out" variety, any future production was negated; therefore no royalties would ever be collectable under the agreements if the "actual production' doctrine was required for royalties to be due. This meant that the producer who first was paid take-or-pay payments and did not have to pay royalty on them because no 'actual' production had yet occurred could also accept the settlement and would *never* have to pay royalty on either any previously-accepted take-or-pay payments or the gas contract settlement, no 'actual' production attributed to the agreement would *ever* take place. Thus, in states that required actual production and, after the *Diamond Shamrock* case, in federal leases, royalty owners were not getting royalties for take-or-pay gas contract buyouts.[82]

This is the situation that the Indians found themselves in when they brought suit. By retroactively changing the royalty accounting practices and by accepting the oil company producer's classification of roughly half the gas contract settlement as non-royalty bearing, the federal government knowingly denied the Shoshone Tribe the opportunity to collect royalty on 47% of $39 million or $2 million.[83]

C. Royalties on Take-or-Pay Payments and Take-or-Pay Settlements on Tribal Lands

The government did not always use the "actual production" rule to determine when take-or-pay payments became royalty bearing.[84] Before November 1988, the government had a long-standing policy that royalties were immediately payable on take-or-pay payments received by a producer. Actual production, or the taking of make-up gas, was not necessary for the tribes to get their royalties for take-or-pay.[85]

In the 1988 regulation, however, the government altered its decades-old practice of making take-or-pay settlements royalty bearing upon receipt by the lessee.[86] The decisive cases causing the government to change its policy over take-or-pay payments and royalty were the Fifth Circuit's ruling in *Diamond Shamrock Exploration Co. v. Hodel*[87] and *Independent Petroleum Ass'n of*

82. LOWE ET AL., *supra* note 58, at 942.

83. Brief for Appellant at 12-13, Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639 (2003) (No. 458-79 L).

84. *Id.* at 7.

85. *Id.*

86. *Id.* at 9.

87. Diamond Shamrock Exploration Co. v. Hodel, 853 F.2d 1159 (5th Cir. 1988).

America v. Babbitt (IPAA).[88] In *Diamond Shamrock*, the Fifth Circuit changed the federal (non-Indian) leases over to the "actual production" variety.[89] After *Diamond Shamrock*, the Department of the Interior (Interior) *voluntarily* changed to the "actual production" method of take-or-pay royalty collection.[90] In *IPAA*, the panel ruled that Interior could not meaningfully distinguish take-or-pay payments and take-or-pay settlements and thus, because of Interior's revised royalty regulations from 1988, take-or-pay settlements could not be royalty bearing until make-up gas was taken, which seldom occurred due to the fact most settlements were buyouts.[91]

III. The Shoshone Case: Take-or-Pay Royalty Payments and the Trust Doctrine

A. Case History

This case was filed in 1979 and has been divided into four phases for adjudication.[92] A more complete background of the other three parts can be found in the court's earlier opinions.[93] The contractual details of the "ARCO Settlement" that set into motion the events that led to this case are agreed upon by both parties.[94] ARCO, the producer and lessee, entered into an agreement with a pipeline company, Montana-Dakota Utilities, in order to settle a case that was underway in the District Court of Dallas, Texas.[95] Government records, the "Explanation to Accompany MMS Form 2014 Report," reveal that ARCO was to receive $39 million in cash to settle MDU's nonperformance under a Gas Purchase Contract over the lease area in Wyoming.[96] A portion of the settlement was classified as take-or-pay

88. Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248 (D.C. Cir. 1996).

89. *Id.* at 1253.

90. *Id.*

91. *Id.* at 1260.

92. Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639, 640 (2003).

93. *See* Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 51 Fed. Cl. 60 (2001) (deciding statute of limitations issue); Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 52 Fed. Cl. 614 (2002) (deciding pre-trial motions regarding claims for management of the Tribes' sand and gravel); Shoshone Tribe of Indians v. United States, 299 U.S. 476 (providing history of the joint occupancy by the Tribes of the Wind River Reservation).

94. *Shoshone*, 56 Fed. Cl. at 641.

95. *Id.*

96. *Id.*

settlement payments, which would not be royalty bearing because there would never be actual production.[97] *Shoshone* deals with portions of these lost royalties that would have gone to the Tribe, but did not because of this dubious classification.[98] Prior to the 1988 regulation, the government would have regarded this take-or-pay settlement as royalty bearing.

The Tribe sought damages, saying that the government failed in its trust duties by not challenging the classification of the $39 million ARCO settlement as take-or-pay and thus non-royalty bearing. The latest round of motions in this case concerned the motivations of the ARCO agreement and the government's lack of reaction to the classification of the take-or-pay settlement as non-royalty bearing. The government filed a motion for summary judgment on this issue, claiming that the tribe had no evidence that the allocation of the money into the non-royalty bearing category was improper, and thus the government's nonchallenging of the allocation was acceptable.[99] The Tribe responded saying that the government motion was premature and that the tribe's discovery efforts have not yet had a chance to bear fruit.[100] The court of claims in June 2003 denied the government's motion on this point.[101]

Despite decades of including take-or-pay payments in the calculation of royalty, the government issued a revised regulation in late 1988 that take-or-pay payment would no longer be included in the calculation of royalty on leases of federal lands.[102] This "Revision of Gross Proceeds Definition in Oil and Gas Valuation Regulations" was the federal regulation that was in effect when the ARCO settlement was made that the government used to calculate royalty.[103] The original leases were silent on the issue of whether the value of what was 'produced and saved' — that figure that represented the value from which royalty is calculated — included take-or-pay payments such as the ARCO settlement.[104] The Tribe, however, asserts that "the government had

97. *Id.*

98. *Id.* at 642.

99. Brief for Defendant, Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639 (2003) (No. 458-79 L).

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100. Brief for Plaintiff, Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639 (2003) (No. 458-79 L).

101. *Shoshone*, 56 Fed. Cl. at 651.

102. 53 Fed. Reg. 45,082-83 (Nov. 8, 1988) (codified at 30 C.F.R. § 206).

103. *Shoshone*, 56 Fed. Cl. at 641.

104. *Id.* at 650.

a well-established policy in effect which made it clear that take-or-pay amounts were to be included in calculating royalties."[105]

On January 3, 2003, the Tribe filed a "Brief Identifying the Issues to be Resolved at Trial of Oil and Gas Phase One" (Brief).[106] The government responded on January 31, 2003, raising several motions to dismiss for summary judgment, entitled "Defendant's Motion for Summary Judgment on Plaintiff's Claims of Breach of Trust on Plaintiffs' Take-or-Pay Claims" (Defendant's Motion).[107] In addition, on March 20, 2003, the government filed Defendant's Memorandum in Opposition to Tribe's Opposition to Defendant's Motion for Summary Judgment on Plaintiff's Take-or-Pay Claims.[108] At an April 7, 2003, status conference, the court decided to take up the issues presented by these motions.[109] On June 9, 2003, the court of claims, Judge Emily C. Hewitt presiding, issued an opinion addressing the portion of the government's motion that concerned the law applicable to the take-or-pay claims.

B. The Current State of the Case

The current phase involves plaintiff's claims of breach of fiduciary duty by the MMS and its predecessors in the management and payment of royalties. The latest opinion addresses the statutory and regulatory framework pursuant to which the tribes receive royalties for the oil and gas extracted from their land and the interpretation of a 1989 settlement agreement between several oil companies regarding oil and gas extraction (the ARCO settlement).

On June 9, 2003, the court of claims handed down a response to the government's two motions for dismissal. The first motion the court of claims addressed was that the government did not have to "maximize" the lease revenue to the Tribe (the "Maximization" Claim).[110] The second motion was that the government did not violate its fiduciary duty to the Tribe by allowing the producers to pocket the entire take-or-pay gas contract "buy-out" settlement (the aforementioned "ARCO settlement") without paying out any royalties to the Tribe and, by default, accepting the fact that no actual production would ever be made.[111] ARCO did not pay royalties on the

105. Brief for Plaintiff at 6-7, *Shoshone* (No. 458-79 L).
106. *Shoshone*, 56 Fed. Cl. at 642.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 643.
111. *Id.* at 649.

settlement on the grounds that royalties were not due under the government's 1988 regulation.[112] In short, the dispute here, as was the case in other litigation in the late 1980s and early 1990s, is whether the settlement amount allocated for gas not actually produced, but due under the terms of the contract, was royalty-bearing.

The remaining issues in Defendant's Motion were to be addressed later after the parties filed additional briefs and gave oral arguments in July 2003.[113] These additional briefs have yet to be acted on by the court of claims. This note will address issues in the Defendant's Motion, Plaintiff's Motion and the June 9 opinion of the court of claims.

C. The "Maximization Claim" Dismissal Claim

1. Defendant's Argument for Dismissal

The government's position is that, while they may have a general trust duty to the tribes, they do not have a duty to "maximize" the lease agreement such that a tribe gets the maximum possible return for the lease.[114] The government's motion to dismiss on the duty to maximize profits relies primarily on two cases to support its argument.[115] The first case is *Pawnee v. United States*.[116] In *Pawnee*, Indian tribes brought an action pertaining to the Indian Long-Term Leasing Act[117] claiming the government "breached a fiduciary obligation to provide that plaintiffs [the Tribe] received royalty based on 'the highest price paid or offered for like quality gas.'"[118]

Here, the government argues that, although the court in *Pawnee* found that the United States has a general trust duty to the tribes — much like the finding in earlier cases going back to Justice Marshall's opinion in *Cherokee Nation* — this does not mean that "any and every claim" by an Indian lessor necessarily promotes a suitable action for breach of trust.[119]

The government advises that careful consideration must be paid to any particular standards and responsibilities that are imposed by the regulatory and statutory scheme and argues that there is an absence in this case of any statute

112. 30 C.F.R. § 206 (1988).

113. *Shoshone*, 56 Fed. Cl. at 642.

114. *Id.* at 643.

115. *Id.*

116. Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

117. 25 U.S.C. § 396 (2000).

118. *Pawnee*, 830 F.2d at 191.

119. *Shoshone*, 56 Fed. Cl. at 643.

or regulation which requires the federal government to maximize the Shoshone's royalty income.[120] The government further argues that because the Tribe has not identified any duty that has been breached by the federal government's alleged failure to maximize profits from the Tribe's oil and gas leases, the case cannot be heard.[121] In short, the government argues that the claims by the Shoshone tribe are effectively identical to those in the *Pawnee* case where the plaintiff's claims were for "the highest price paid or offered for like quantity gas" were denied.

The second case relied upon by the government is *United States v. Navajo Nation.*[122] In *Navajo*, the Court held that there was no general fiduciary duty to "maximize" the profits from leases made on behalf of Indian tribes unless there are accompanied contractual, statutory or regulatory obligations.[123] Again, as in their comparison with the *Pawnee* case, the government asserted that since (they believe) no regulation exists mandating the maximization of the Tribe's lease revenue, that the Shoshone's claim should be summarily dismissed.[124] In addition, the United States argued that since the Tribe offered no proof of any duties that were breached by the government, the court of claims had no jurisdiction to hear the case.[125]

2. *Plaintiff's Argument Against Dismissal*

The Shoshone Tribe contended that the regulations and statutory authority governing the United State's management of the Tribes' oil and gas established a fiduciary duty of the federal government. The Tribe further argued that the Interior Department breached its duty established by the IMLA and subsequent regulations in failing to ensure that the Tribes received full value for their oil and gas.[126]

The Tribe also attempted to distance themselves from "maximization" arguments not grounded in a regulation or statute.[127] Instead, the Tribe turned their arguments to what they claim is a "money-mandating statutory and regulatory framework."[128] This framework is what the Tribe claims

120. *Id.* at 643.
121. *See id.*
122. United States v. Navajo Nation, 537 U.S. 488 (2003).
123. *Id.*
124. *Shoshone*, 56 Fed. Cl. at 645.
125. *Id.* at 642.
126. *Id.*
127. *Id.* at 644.
128. *Id.*

differentiates this case from the *Navajo* case, which considered coal, a commodity without any associated take-or-pay phenomena.[129]

Instead of *Navajo*, the Tribe argues this case more closely resembles *United State v. Mitchell* (*Mitchell II*).[130] In *Mitchell II*, the Court ruled that a "money-mandating" fiduciary obligation existed where it did not in *Mitchell I*, because of a specific revenue clause within the timber lease in question.[131] Both the lease in question here and the timber lease in the *Mitchell* cases were signed under the auspices of the 1938 Act,[132] which removed almost all control from the Indians over the lease specifics and instead allowed the government to control advertising and bidding of the land and resources. Contrasting *Navajo*, the leases in *Mitchell II* and *Shoshone* cover timber and oil and gas, respectively, both of which entail the Secretary to set up sales and examine and approve all leases and sales contracts.[133] Furthermore, the Secretary must oversee the continuing operation of the lease.[134]

A related question is also raised by the Tribe — that of the government's duty to accurately conduct an audit of the reasonableness of the royalty the Tribe was to receive under the lease the Secretary negotiated for them.[135] Despite the government's attempt to say this was purely at the discretion of the Secretary, the Tribe argues that the government cannot delegate its fiduciary duty away through cooperative agreements.[136]

3. The Court of Federal Claims' Decision

The government's motion to dismiss the Tribe's claim of breach by the government's failure to "maximize" the Tribes' oil and gas revenues was denied in part as to United States' failure to collect royalties based on the proper value of oil and gas and granted in part as to government's failure to "maximize" the Tribe's oil and gas revenues.[137]

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129. *See id.*

130. *Id.*

131. United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).

132. *Compare* 25 C.F.R. § 211.20 (1982), *and* 25 C.F.R. § 184.4 (1957) *with* 25 C.F.R. § 227.4 (1982) (addressing oil and gas), *and* 25 C.F.R. §§ 141.8, 141.9 (1979) (addressing timber).

133. *Shoshone*, 56 Fed. Cl. at 644.

134. *Id.*

135. *Id.* at 645.

136. Brief for Appellant at 18, Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States, 56 Fed. Cl. 639 (2003) (No. 458-79 L).

137. *Shoshone*, 56 Fed. Cl. at 649.

Although the court of claims found this case to resemble *Mitchell II* more than *Mitchell I* and *Navajo Nation* because of the complex nature of the oil and gas lease specifically and the extensive statutory framework related to collection of royalty as detailed in the Federal Oil and Gas Royalty Management Act (FOGRMA)[138] and the Indian Mineral Leasing Act (IMLA)[139] generally, it did not find that there was an overall duty to maximize the royalty to the Indians on every point in the claim. On the other hand, the government was found to have a duty to provide an accurate economic analysis of the value of the oil and gas produced from Indian land. In addition, *not* doing this analysis was *not* within the discretion of the Secretary despite the inclusion of the clause "if data are available" in the lease. The Court ruled that this created a condition precedent which did not make the subsequent decision to not provide an accurate valuation discretionary.

4. Analysis

Despite *Mitchell I*, egregious failures of the government's general fiduciary duty to the tribes such as in this case should give rise to a breach of trust action. The third goal of the 1938 Indian Mineral Leasing Act was to insure tribes "the greatest return for their property."[140] This broad goal, however, yields to specific particulars when considering the actual terms of the lease and the government's fiduciary duty.[141] In *Pawnee*, the lease regulation expressly said: "for the major portion of the gas 'produced and sold from the field'."[142] The court in that case said that the tribe wanted the Secretary to go beyond the regulation.[143] Despite the general duty to bring in the greatest return in the 1938 statute, the specific duty called for in *Pawnee* merely said "the major portion" in the lease.[144] The tribe in that case therefore had not proved that the Secretary had breached her duty because they did not prove the 'major portion' criterion and had asked the federal government to go beyond what was required in the lease.[145]

When the government here argued that the Tribe's maximization claims were in effect the same as the Tribe's in *Pawnee* and because the royalty

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138. 30 U.S.C. §§ 1701-1757 (2000).
139. 25 U.S.C. §§ 396a-396g (2000).
140. S. REP. NO. 985, at 2-3 (1937); H.R. REP. NO. 1872, at 1-3 (1938).
141. United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).
142. United States v. Pawnee, 830 F.2d 187, 191 (Fed. Cir. 1988).
143. *Id.*
144. *Id.*
145. *Id.*

valuation regulations were identical in *Pawnee* and in this case, they missed both the obvious difference between the root cause of the present claim and that in the *Pawnee* case and, perhaps, a practical difference as well. In *Pawnee*, the dispute was over the valuation of the royalties — were they to be measured from "the average of the three highest prices at the time of and in the county where it was produced" or were they to be measured basis on value "for the major portion" of the gas "produced and sold from the field where the leased land are situated?"[146] The regulations involved in that case made it clear: "the major portion" calculation was to be used. The tribe there clearly wanted the federal government to go beyond what the leases and regulations called for to value royalty.[147] Such is not the case here. A better argument is that, whether or not the pre-1988 policy of take-or-pay royalties is judged to have the weight of a specific regulation under which a fiduciary responsibility exists.[148] A better policy is that, when the choice is simply between maintaining the long-standing policy of royalty collection on take-or-pay payments or using the 1988 regulation to stop collecting money on *pre-existing* leases until actual production, that the payments be included because that is what is clearly in harmony with a general fiduciary relationship since the take-or-pay gas contract settlement will not be royalty bearing otherwise.

In addition, practically speaking, why a court, absent a specific regulation to maximize a particular aspect of a lease, would hesitate to allow a breach of trust claim for every possible instance where value was not maximized, is easy to understand. Oil and gas leases can be very complex.[149] In addition, they also can last years or even decades. They commonly involve a great deal of risk and speculation. Often, only when the lease and production are long done can hindsight effectively image what would have been the optimal position the government should have taken with regard to its fiduciary duty to negotiate the best lease for a tribe. If breach of trust actions arose from every possible lack of maximization claim not rooted in a specific statute or regulation, but rather in the general fiduciary duty of the government to the tribe, the potential for litigation would multiply.

146. *Id.*

147. *Id.*

148. United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).

149. For example, the definitive treatise on oil and gas law, the *Kuntz Law Oil and Gas* series, devotes hundreds of pages of text in the original volume and the supplements to laws and concepts revolving around oil and gas leases.

However, this does not mean that where a governing statute or regulation — or policy, as will be subsequently covered — might be lacking should no breach of trust claim *ever* be allowed. In *Pawnee*, as in many royalty calculation disputes, the correct values may be hard to determine. Should the court use the "amount received" or the "market value" approach to determine royalty?[150] Are the post-production sales really being conducted at arm's length?[151] Should the "work back"[152] method for royalty calculation be employed? These can be difficult questions even with regulations and statutes to guide the government.

In the *Shoshone* case, in contrast, the question over valuation is clear. The Tribe either received the royalty on the 47% of $39 million or they did not. Lease negotiations were not underway. These two outcomes represented the options available to the government when they invoked the dubious 1988 regulation to stop collecting royalties on leases until production, which in turn resulted in no royalty being paid to the Tribe — the wards to which they owe a fiduciary duty — when the ARCO settlement occurred. This is not a question based on recondite administrative law doctrine or difficult questions-of-fact. It is rather a clear failure to get the greatest benefit for the Tribe in a lease that the Tribe, because of the stipulations of the 1938 Indian Mineral Leasing Act, had negligible input into making.[153] Where a long-standing policy of an agency is changed and a new approach is formulated such as will both have a retroactive application and a clearly negative impact with no offsetting gain on a ward of that agency — *that* is where a general fiduciary duty should be applied

150. The proceeds method calculates royalty based on the amount of money the producer itself makes at sale. The "market value" is just that, the value of the oil or gas on the current market when the hydrocarbons are produced. Both methods lend themselves to fact-intensive questions, such as the market value to use, timing, production cost deductibles, etc. 3 EUGENE KUNTZ, LAW OF OIL & GAS §40.4(a), at 322-26.

151. An "arm's length" deal is between two independent parties who are both (presumably) governed by self-interest such as they want the best deal they can individually get. A "non-arm's length" deal is one where two affiliated companies are dealing with one another and thus give rise to the specter of "sweetheart" deals wherein the price agreed upon may not represent the true value of the product and possibly hurting the royalty owner. *Id.* at 332.

152. The "work back" method is commonly used to determine what the true price of a refined hydrocarbon product is for royalty valuation. The sales history of the final product is traced back to a point in the transportation/refining progression of the product to that represents what the lease, case law, or governing statute dictates is the price to be used for royalty valuation. LOWE ET AL., *supra* note 58, at 243.

153. Royster, *supra* note 43, at 580.

with the greatest vigor. Otherwise, the government's general fiduciary relationship is just a tapestry of empty words.

The finding by the court of claims that the Secretary is required to properly value the oil and gas upon which royalties are paid is also important.[154] This, combined with the fiduciary duties of the government to tribes, means that the federal government can only be thought to have constructive knowledge that their decision to allow take-or-pay royalties to not be paid on the ARCO settlement would result in a huge loss to the Indians. That this loss is actionable seems unquestionable.

D. Take-or-Pay Royalty Claim

1. Defendant's Arguments for Dismissal

The government argued that under the applicable law and precedents, the take-or-pay portions of the ARCO settlement at issue were not royalty-producing.[155] While the government acknowledged a duty under various leases to pay royalties at certain percentage rates, it argued that the leases do not define what oil and gas shall be subject to the obligation to pay royalties.[156] Royalty valuation, according to the government, is therefore governed by the regulations which are in effect when the royalties are made, instead of the policy in place when the leases were constructed.[157] The government agreed that if a regulation or statute is in effect at the time of the signing of the lease it should then continue to regulate.[158] However, they also maintain that, absent an express authorization of Congress to change it, the policy of making take-or-pay payments royalty-bearing should not have the weight of an actual regulation because it was not stated expressly in the lease and was not on any actual administration regulatory books.[159]

2. Plaintiff's Arguments Against Dismissal

The Tribe countered that the government seeks to apply current regulations retroactively. Instead, the Tribe argues that regulations and policies that were in effect when the lease was entered into should govern.[160] The Tribe also argued that the agency's interpretation at the time the leases were signed was

154. *Shoshone*, 56 Fed. Cl. at 649.
155. *Id.* at 642.
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.* at 650-51.
160. *Id.* at 642.

what was relied upon by the parties, and that allowing the DOI to change the rules now would hurt the Tribes by binding them into long-term leases that can be altered at any time at the whim of the United States.[161]

3. *The Court of Claims' Decision*

The Court of Claims ruled that the government's motion for summary judgment on the Tribe's claims of breach of trust on their take-or-pay claims was to be granted in part as to the applicability of the November 1988 regulations to the ARCO settlement.[162] The Court of Claims ruled that the November 1988 regulation amenable with the *Diamond Shamrock* decision could be validly applied retroactively. The Court relied on a narrow reading of the previous Supreme Court ruling that the *Chevron* deference applies to "a formal adjudication" but not to "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law . . . ." to rule that the *Chevron* deference does not apply to the pre-1988 principal.[163] The Court of Claims went on to reason that the lack of precedent for *Chevron* deference being applied to an agency weighed against the Tribe.[164] In short, even though the government's new regulation opened the door to the Indians losing the royalty on the gas contract settlement, the court of claims ruled that the government was permitted to rely on it because of a relatively obscure administrative law doctrine and because the lease which the government wrote for the Tribe in the 1940s and early 1960s was silent on the subject of take-or-pay gas contract settlements, a phenomenon unique to the 1980s and beyond.[165]

4. *Analysis of the Take-or-Pay Decision*

The government's position is untenable. Even if the general fiduciary duty of the government will not give rise to an action for breach of trust, the specific nature of the oil and gas lease and the government's long standing policy of making royalties on take-or-pay payments due when the payments are received by the producer should allow a breach of trust action under *Mitchell II*.

161. *Id.* at 642-43.
162. *Id.* at 651.
163. Christensen v. Harris County, 529 U.S. 576, 587 (2000).
164. *Shoshone*, 56 Fed. Cl. at 650.
165. *Id.*

Indeed, in September 2003, the court of claims addressed various summary judgment motions advanced by the government.[166] Denying a motion for summary judgment on the claim that the government had not violated the fiduciary duty to collect royalties, the court noted that the Federal Oil and Gas Royalty Management Act was "duty imposing"[167] and thus met the basic threshold to defeat a claim for summary judgment under the duties imposed under *Mitchell II.*[168]

The general principles of the 1938 Indian Mineral Leasing Act are clear. One of them is that the Act was to insure tribes "the greatest return for their property."[169] How, then, did the 1988 regulation get passed if it potentially retroactively lowered — sometimes down to zero as in this case — the value of the lease royalties that tribes would receive on a portion of the lease? No compelling reason for this retroactive change in royalty valuation has ever been presented by the MMS.

The court in *Jicarilla Apache Tribe v. Supron Energy Corp.* noted that "[i]f the Secretary is obligated to act as a fiduciary to the Tribe in his administration of the Tribe's oil and gas reserves, and in his determination of what royalties the Tribe is due, then his actions must not merely meet the minimum requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary."[170]

Furthermore, the government can still decide to make nonrecoupable gas contract settlement payments royalty bearing. In *Chevron USA Production Co. v. U.S. Department of the Interior*, a federal district court held that the decision of Interior to charge royalties on a nonrecoupable settlement payment made to cancel an existing take-or-pay contract was not arbitrary and capricious.[171] The court reasoned that designation of a payment as "nonrecoupable" does not settle the matter, that "the fact that a purchaser receives a reduced price on the gas the purchaser previously contracted to take as a higher price on gas the purchaser previously contracted to take at a higher price constitutes a nexus with production" sufficient to support royalty. If Interior can rule gas contract settlement payments to be royalty bearing for

166. *Id.*

167. 30 U.S.C. § 1701(b)(3) (stating that FOGRMA's purpose is "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues to . . . Indian lessors")

168. *Shoshone*, 58 Fed. Cl. at 92.

169. S. REP. NO. 985, at 2-3 (1937); H.R. REP. NO. 1872, at 1-3 (1938).

170. Jicarilla Apache Tribe v. Supron, 728 F.2d 1555, 1563 (10th Cir. 1980).

171. Chevron USA Prod. Co. v. United States Dep't of the Interior, 254 F. Supp. 2d 107 (D.D.C. 2003).

standard federal leases as in *Chevron*, how can they retroactively apply a regulation to make gas contract settlements related to an Indian lease non-royalty bearing, particularly with a beneficiary for whom the government does the meaningful lease negotiating for? The government here did not *have* to make the gas contract settlement payments to their Shoshone beneficiaries non-royalty bearing, and in light of the *Chevron USA* ruling, the action by the government here to make the gas settlement contract retroactively non-royalty bearing can be view as nothing but fickle and arbitrary.

Most dubious of all is the court of claims' agreement with the government's argument that narrowly defines the decades-long guiding principle of take-or-pay royalties being due on payment as a mere "policy" that can be blithely changed and applied retroactively by the making of an administrative regulation and with no act of Congress.[172] By hinging their argument on this wordplay, the government all but admits that, if the old take-or-pay policy was a regulation, the government could not have retroactively applied the 1988 take-or-pay regulation and that the 47% of the gas contract settlement made by ARCO and the pipelines could not have been designated as a non-royalty bearing take-or-pay settlement.[173] *Chevron* deference aside, that this chicanery could be applied to any contract with the government is bad enough, but to apply it to a beneficiary of a trust is absurd.

IV. A Possible Solution

Oil and gas contracts can be very complex instruments, containing many clauses that provide instructions and duties given the occurrence of any number of contingencies. In addition, many of the clauses require the presence of the expert witnesses, extensive discovery, and oil and gas attorneys to effectively litigate.

However, if the fiduciary duty of the Federal government to tribes to "ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing"[174] is going to be attenuated such that individual tenets of the lease — such as the no royalties on take-or-pay settlements involved here — are made retroactively applicable despite decades of harmonious previous contrary practice, this could make the maintenance of an action for the breach of the federal government's fiduciary duty very difficult for tribes to maintain. Since *Mitchell I*, the federal government's general

172. *Id.* at 115.
173. *Shoshone*, 56 Fed. Cl. at 650.
174. *Supron*, 728 F.2d at 1565.

fiduciary relationship is not actionable and thus tribes must always find a regulation, statute, or lease provision exactly on point over which to bring suit via *Mitchell II.* As far as lease provisions go, how can any tribe be expected to do this if they are not part of the process of lease construction, such as under the IMLA, which puts the Secretary in the role of negotiator?

A balance must be struck such that the Secretary of the Interior does not have to "maximize" *every* particular within an oil and gas lease for a tribe's benefit provided that the overall lease does indeed maximize the benefit to the tribe for the deal *as a whole.* Such give and take in the lease specifics reflects the realities of modern exploration and production. On the other hand, the fiduciary duty of the government is both a strict and high measure. Thus, if one or more items in a lease are not "maximized" for the tribes' benefit, then other portions of the lease must be increased so that the sum results in the highest value to the tribe.

Furthermore, the ruling in *Mitchell I* should not be used to simply do away with all general claims of breach of trust between the government and Indians. This might be a good basic policy to curtail litigation over small matters no one could foresee at the signing of the leases, but as this case clearly shows, circumstances can arise in which the federal government's duties as a guardian have been breached and yet a technical maneuver, such as the application of the *Chevron* doctrine here, renders a longstanding policy meaningless with regards to the specific statute and regulation requirement necessary to invoke the *Mitchell II* definition of a trust breach.

Finally, in the future, royalty interests for the leases on Indian lands that were signed under the IMDA should *never* be retroactively diminished through maneuvers such as the 1988 regulation. Specifically, if the lease has made take-or-pay payments royalty bearing upon amount received — and not actual production — for decades, no wiggle room exists in the trust doctrine for the federal government to change the policy of royalty collection, thus denying the tribes of a large royalty payment on a gas contract settlement.

V. Conclusion

The government failed in both the general fiduciary duty to tribes, founded in *Cherokee Nation* and the goals of the IMLA, and the specific fiduciary duty to tribes, as stipulated in *Mitchell II. Mitchell I* established that the general fiduciary duty of the government to tribes does not give rise to an action for money. However, *Mitchell II* ruled that specific duties could give rise to such an action. The government is now allowed to cease collection of royalties on take-or-pay settlements, not because they negotiated any kind of counterbalancing benefit for the Shoshone tribe but rather because Interior changed their internal policies in 1988. Although this may reflect the overall view of the federal government that take-or-pay payment royalties should not be included in federal leases until actual production is made, this policy should not apply retroactively regarding Indian lands where the Secretary has already negotiated oil and gas leases on behalf of Indian tribes — particularly if it clearly cuts a tribe out of a large royalty payment for no reason other than the government wanting to suddenly (and mysteriously) change a long-standing and (seemingly) harmonious, policy.[175] If the general fiduciary duty means anything, *Mitchell I* should at least include an exception providing a remedy for retroactive *and* detrimental policy changes that affect parties with a ward relationship to the government.

Even if the general fiduciary duty is still dogmatically found to be automatically not actionable, by not allowing the tribe to challenge this potential breach of a specific duty simply because the 1988 regulation is not considered to be under the rubric of the *Chevron* doctrine denigrates the overall ruling of *Mitchell II*. The government should not be the target of a claim for breach of trust for every possible subvalued royalty-bearing component of a complex lease exercised over a period of years or even decades that may not be maximized at every turn. The Secretary should have some wiggle room in lease construction, lowering some values of the whole in order to get a better return on other portions of the lease and hopefully increasing the final sum of the benefit to the tribe. In addition, if the passage of years and hindsight indicate that the good faith efforts by the federal government in negotiating a lease do not lead to the greatest possible maximization of valuation for a tribe, then that should not be actionable under the limitation of *Mitchell I* and *Navajo*. However, the fiduciary duty of the government, based on lease specifics and a long-standing policy stance of the government, demands that no portion of the overall value of a lease to a tribe be retroactively and arbitrarily lowered — or, as in this case, entirely eliminated — so as to lower the final benefit to the ward/lessor.

175. One wonders why the government would change the policy of the timing of take-or-pay payments. The money collected by the tribe here would have come from an oil company, not the government, and yet it is the government that gets sued. What possible motivation did Interior have to make this change and expose itself to liability? Was this a case of "pin the lawsuit on Uncle Sam" by government officials friendly with the oil industry? Given the circulation of people from industry to government and back, is that a possibility?