1-1-1981

Comment, United States v. Mitchell

Gail F. Whittemore
Elisabeth Haub School of Law at Pace University, gwhittemore@law.pace.edu

INDIAN LAW — REMEDIES — STATUTORY CONSTRUCTION — TRUSTS — *United States v. Mitchell* — Prior to 1946, in order for tribal Indians to gain access to courts for consideration of claims arising out of treaties between Indians and the United States, a special act of Congress was required in each case conferring jurisdiction on the court of claims to hear a tribe's grievance.[1] Long delays, expense, and in many cases denial of access to court for Indians resulted.[2] Seeking to remedy the situation, in 1946, Congress enacted the Indian Claims Commission Act.[3] Under the Act, an Indian Claims Commission was given extremely broad jurisdiction to adjudicate the many outstanding Indian claims, including those "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."[4] The Indian Claims Commission Act was applicable, however, only to claims accruing before August 13, 1946,[5] and the Commission itself was to termi-

---

1. *House Comm. on Indian Affairs, Indian Claims Commission*, H.R. REP. No. 1466, 79th Cong., 2d Sess. 2, 5-7 (1946) [hereinafter cited as H.R. REP. No. 1466], *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1347, 1348, 1351-53 [hereinafter cited as CONG. SERV.]. During a period when a great deal of hostility existed between the government and Indian tribes, Congress adopted the Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, denying jurisdiction in the court of claims over those claims against the United States arising from Indian treaties. H.R. REP. No. 1466, *supra*, at 2, *reprinted in* CONG. SERV., supra, at 1348.

2. H.R. REP. No. 1466, *supra* note 1, at 5-7, *reprinted in* CONG. SERV., *supra* note 1, at 1351-53.

3. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (current version at 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. III 1979)). The statute provides in pertinent part:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Id. § 2, 60 Stat. at 1051 (codified at 25 U.S.C. § 70a (1976)).

4. *Id.* § 2.

5. *Id.* § 23.

nate within ten years of its first meeting.[6] Thereafter, Indian claimants were to be entitled to recover in the court of claims "in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity" as in cases brought by any other citizen.[7] Because of the unique nature of the relationship between the government and the Indians, and "the peculiar and complex problem of Indian claims,"[8] in many instances the courts have had difficulty providing an adequate judicial remedy under the present, more limited, jurisdictional statute.[9] This difficulty is illustrated in *United States v. Mitchell*,[10] where Indian claimants sought damages for an alleged breach by the government of a fiduciary duty owed to the Indians in managing Indian timber lands.

The action in *Mitchell* arose from a long factual history. In 1855, the government entered into a treaty with the Quinault, Quileute and several other Indian tribes by which the Indians' lands on the coast of Washington were ceded to the United States.[11] A 220,000-acre tract within the surrendered territory was set aside as a reservation for the Indians.[12] Subsequent to this treaty, in 1887, Congress enacted the General Allotment Act, which provided for allotment of lands within the reservation to individual Indians.[13] By 1933, the Quinault Reservation had been completely allotted.[14] Under the General Allotment Act, the government was to hold legal title to each allotment for twenty-five

---

6. *Id.*

7. *Id.* § 24 (current version at 28 U.S.C. § 1505 (1976)).

8. H.R. REP. No. 1466, *supra* note 1, at 8, *reprinted in* CONG. SERV., *supra* note 1, at 1353. The House Committee noted that the government has dealt with Indians by "treaty, agreement, and contract in buying and selling land, timber, and minerals, amounting in value to many hundreds of millions of dollars." *Id.* at 4, *reprinted in* CONG. SERV. , supra note 1, at 1350. These funds have generally been placed in special trust accounts maintained for the Indians in the United States Treasury. *Id.* The government has dealt with the Indian tribes as continuing corporate entities, holding payments on land, mineral and timber sales in trust for the benefit of later generations. Thus, Indian claims often have roots in treaties made eighty or ninety years previously, or relate to alleged maladministration of trust funds over long periods. *Id.* at 4-5, *reprinted in* CONG. SERV., supra note 1, at 1350-51. The Committee concluded, however, that "[t]he fact that the error was made many years ago does not make the present generation of Indians any less eager to correct a mistake which the Federal government admits it made but for which no adequate judicial remedy has yet been provided." *Id.*

9. Act of May 24, 1949, ch. 139, § 89(a), 63 Stat. 102 (1949) (codified at 28 U.S.C. § 1505 (1976)).

10. 445 U.S. 535 (1980).

11. Treaty of Olympia, 12 Stat. 971 (1859).

12. *Id.* art. II.

13. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-358 (1976 & Supp. III 1979)).

14. 445 U.S. at 536.

years "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . ."[15] The trust period was extended indefinitely by the Indian Reorganization Act of 1934.[16]

Congress' original plan was that allottees would reside on their allotments and use the land for "agricultural or grazing purposes,"[17] but the heavy forestation of most of the Quinault Reservation made the plan impracticable.[18] In 1910, Congress authorized the sale of selected timber from the allotments by Indian allottees with the consent of the Secretary of the Interior.[19] In 1920, the government formally undertook management of the Quinault tracts, selling the timber and taking general care of the proceeds from the tracts and other Indian monies.[20]

---

15. General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 389 (current version at 25 U.S.C. § 348 (1976)).

16. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 462-479 (1976 & Supp. III 1979)). The purpose of the Indian Reorganization Act was to provide for the conservation and development of Indian lands and resources, and to extend to Indians certain rights of home rule, including the right to form businesses and other organizations and credit systems. Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1976)). Section 2 of the Act extended the existing periods of trust for allotments "until otherwise directed by Congress." *Id.* § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1976)).

17. General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (current version at 25 U.S.C. § 331 (1976 & Supp. III 1979)).

18. Quinault Allottee Assoc. v. United States, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974).

> [O]nly 2 percent of the 220,000-acre reservation was suitable for cultivation or for homesites. The great expanse of the 220,000-acre tract was, and still is, rain forest covered with huge, coniferous trees, some several hundred years old. Settlement on the tract was impossible except in random clearings where those Indians moving to the tract formed small villages.

Id. at 1394.

19. Act of June 25, 1910, ch. 431, §§ 7 & 8, 36 Stat. 857 (current version at 25 U.S.C. §§ 406 & 407 (1976)). The Act provided that proceeds of sales of timber were to be paid directly to allottees, or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior.

> From the time the Reservation was established, the Government exercised complete control over its land and timber. However, it was not until the Act of June 25, 1910 . . . that the Secretary of the Interior was authorized to sell Indian timber. Starting in 1920, the Government began to undertake sales of the Quinault allottees' timber, usually under long-term, large-volume contracts made up of many allotments. There have been 14 such contracts since 1920, one of which (the Crane Creek Unit) is still ongoing, and another of which, (the Taholah Unit) was just completed in April, 1979.

Brief for Respondents at 4-5, United States v. Mitchell, 445 U.S. 535 (1980).

20. Act of February 14, 1920, ch. 75, 41 Stat. 408 (codified in scattered sections of 25 U.S.C. (1976)). The Secretary was also authorized to charge reasonable fees for work incident to sales of land and the timber and administration of Indian forests, to be paid from the proceeds of sale and deposited in the U.S. Treasury. *Id.* § 1, 41 Stat. 415 (cur-

In 1971, Quinault Indians filed an action in the United States Court of Claims for damages allegedly arising from breaches of trust by the government in managing and selling the timber on the Quinault Reservation.[21] Plaintiffs' main claims were that the government had failed to obtain adequate prices for timber sold and, in addition, had failed to arrange for reforestation after logging.[22] It was contended that by various treaties,[23] statutes,[24] executive pronouncements[25] and conduct,[26] the United States had undertaken a fiduciary relationship with

---

rent version at 25 U.S.C. § 413 (1976)).

21. Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980). The plaintiffs were (1) 1,465 individuals owning interest in the trust allotments on the reservation, (2) the Quinault Allottees Association, an unincorporated association to protect and promote the interests of the allottees, and (3) the Quinault Tribe, which now holds as beneficiary about 4,000 acres on the Quinault Reservation. *Id.*

22. Reforestation and other modern logging practices were objectives expressed in the Report of the Committee on Interior and Insular Affairs:

> One great need that this legislation will serve is that of modernizing timbering operations on Indian reservations . . . . Amendment of section 8 of the 1910 act is needed to provide better methods than the law now provides for the sale and management of timber on Indian trust land . . . . In all events, the Secretary is instructed, by the terms of the bill, to give consideration not only to the state of the land and timber, but also to "the present and future needs of the owner and his heirs." In enacting S. 1565 the committee wishes it to be clearly understood that modern means of reforestation practices as well as harvesting operations will be pursued in the implementation of the legislation.

H. R. REP. No. 1292, 88th Cong., 2d Sess. 1-2 (1963). This report forms legislative history for Pub. L. No. 88-301, 78 Stat. 187 (1964) (codified at 25 U.S.C. § 406(a) (1976)).

23. Plaintiffs specified only the Treaty of Olympia, 12 Stat. 971 (1859). Brief for Respondents at 16, United States v. Mitchell, 445 U.S. 535 (1980).

24. The statutes cited by the plaintiff were: 25 U.S.C. §§ 406 & 407 (1976) (directions as to sale of timber); *id.* § 466 (operation and management of Indian forestry units on sustained-yield principles); *id.* § 413 (collection of reasonable fees for work done for Indians); *id.* § 372 (issuance of fee patents to heirs of deceased allottees found to be competent and capable of managing their own affairs); *id.* §§ 318(a), 323-325 (concerning roads and rights-of-way through reservations); and *id.* § 162 (a) (investment of tribal and individual Indian funds). Brief for Respondents at 32-38, United States v. Mitchell, 445 U.S. 535 (1980).

25. President George Washington, in discussing the Indian Nonintercourse Act of 1790, 1 Stat. 137 (repealed 1933), spoke of "the fatherly care the United States intend to take of the Indians." Brief for Respondents at 18, United States v. Mitchell, 445 U.S. 535 (1980). In a press release from the White House, July 16, 1976, President Gerald Ford spoke of the government's "very unique relationship . . . of a legal trust and a high moral responsibility" with the Indians. *Id.* at 19. On August 30, 1978, President Jimmy Carter, in a message from the White House to delegates of the National Congress of American Indians, stated: "I would like to reaffirm my resolve to honor this country's legal and moral responsibilities to American Indians in protecting their land, water and natural resources." *Id.* at 20.

26. Plaintiffs gave no specific instances of government conduct demonstrating its fiduciary duty toward American Indians. *See generally* Brief for Respondents at 9-20,

the Indians of this country.[27] In particular, plaintiffs argued that the General Allotment Act created an express trust relationship between the United States and the Indians, and that the government's inadequate management of timber on allotted lands was a breach of its fiduciary duty owed to the Indians.[28]

Plaintiffs invoked the jurisdiction of the court of claims under section 1491 of title 28 of the United States Code [The Tucker Act][29] for the individual claimants, and section 1505[30] for the tribal claimants.[31] The United States objected, relying on the holding in *United States v. Testan*,[32] where the Supreme Court held that the Tucker Act merely confers jurisdiction on the court of claims whenever a substantive right exists founded on some other statute, and that entitlement to money damages depends upon whether the other statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[33] The government argued that the Indians' case rested on "unanchored judge-created principles of fiduciary law,"[34] unconnected with the Constitution, statutes, treaties, regulations or executive orders of the United States, and, therefore, was outside the court of claims' jurisdiction under sections 1491 and 1505.

The court of claims rejected the government's claim, concluding that the Indians' case relied on specific legislation, the General Allotment Act, in which a trust relationship was expressly established.[35]

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

27. *Id.* at 9.

28. 591 F.2d at 1301 & n.4, 1302.

29. The Tucker Act, 28 U.S.C. § 1491 (1976), provides in pertinent part:

> 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, 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.

Id.

30. *Id.* § 1505 (originally enacted as Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (1946)). This section of the Act was applicable to future claims, as opposed to those sections that dealt with the resolution of claims arising before 1946. For the relevant text of § 1505, *see* text accompanying note 7 *supra*.

31. 591 F.2d at 1301.

32. 424 U.S. 392 (1976). In *Testan*, government trial attorneys argued that the Tucker Act conferred jurisdiction on the court of claims over their suit for reclassification of their positions to a higher government grade and for back pay. The Court concluded that neither the Classification Act, 5 U.S.C. § 5101 (1976), nor the Back Pay Act, *id.* § 5596 (amended 1980), relied upon by the claimants created such a substantive right to reclassification and back pay claimed, but that administrative relief was available to the claimants as an alternative remedy. 424 U.S. at 393-407.

33. 424 U.S. at 400 (quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

34. 591 F.2d at 1302.

35. *Id.* The court stated:

The court did not require that Congress specifically provide that damages be recoverable for breach of the trust.[36] According to the court, a claimant could properly come to the court of claims if, by a fair interpretation of the statute, a right to monetary recovery was granted either expressly or by implication.[37] The court supported the inference that money damages might be recovered under the General Allotment Act in three ways.

The first was the absence of alternative remedies for the plaintiff Indians, "since there is no administrative channel for obtaining compensation, and prospective judicial relief by way of injunction or mandamus (assuming such a remedy exists at all) would be meaningless for damage already done."[38]

Further support was found in previous cases to which the court had extended jurisdiction by finding a cause of action within sections 1491 and 1505 in federal legislation relating to Indian tribes.[39] In *Klamath and Modoc Tribes v. United States*,[40] the court granted Indian plaintiffs "a forum for the recovery of any damages to which they are entitled because of the government's mishandling of tribal funds and

---

> Defendant suggests that the trust created by the General Allotment Act is solely to prevent improvident alienation of the tract by the Indian beneficiaries, and has no other incidence. But that is not what the statute says, nor is it the way in which the Act has been administered. The legislation states that the Government is to "hold" the allotted land "in trust *for the sole use and benefit of the Indian*" thus indicating that the Government, as trustee, is to manage and conserve the property for the Indian, on a continuing basis, so long as the land remains in trust. And the Interior Department has regularly sought to fulfill that trust; it does not confine its oversight just to sales or outright transfers of the tract itself.

Id. at n.11 (citation omitted).

36. *Id.* at 1302.

37. *Id.* at n.12 (citing Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967)).

38. *Id.* at 1302-03. *But see* Petition for Certiorari at 9-10, United States v. Mitchell, 445 U.S. 535 (1980):

> [A]llottees are not wholly without remedies to protect their interest in the allotted lands. Alleged violations of "trust" duties under the General Allotment Act may be remediable by injunction or mandamus actions against the Secretary under 28 U.S.C. 1331(a), 1361. *See* also 5 U.S.C. 702. Furthermore, actions by the Secretary that constitute an appropriation of the allotted lands may be remediable in a suit for damages under the Fifth Amendment.

Id.

39. 591 F.2d at 1303.

40. 174 Ct. Cl. 483 (1966). In *Klamath*, Indians alleged that an unconstitutional fifth amendment taking by the government and a breach of fiduciary duty resulted from the appraisal and sale of Indian lands. The court stated that under §§ 1491 and 1505 of title 28, the Indians had a forum for their suit in the court of claims. *Id.* at 486-87.

property" under sections 1491 and 1505.[41] The court in *Mason v. United States*,[42] held that a claim based on the Osage Allotment Act,[43] which followed the pattern of the General Allotment Act, was within section 1491 as a claim founded upon an act of Congress.

Third, the court considered the legislative history leading to passage of the Indian Claims Commission Act in order to determine Congress' expectations as to future Indian claims, and in general the government's duty toward the Indians.[44] It concluded that, in light of the plainly-expressed congressional objectives in adopting the Indian Claims Commission Act, Indian trust legislation such as the General Allotment Act "supplies a proper foundation for Indian monetary suits in this court to recover compensation for proven breaches of those trusts."[45]

The court, having determined that the General Allotment Act in

---

41. *Id.* at 491-92.

42. 461 F.2d 1364 (Ct. Cl. 1972), *rev'd* , 412 U.S. 391 (1973). In *Mason*, an Oklahoma inheritance tax was assessed against the estate of an Indian who had received an allotment under the Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906). The government paid the tax in reliance on a Supreme Court decision upholding the validity of the tax. West v. Oklahoma Tax Comm'n, 334 U.S. 717 (1948). That decision was later overruled, Squire v. Capoeman, 351 U.S. 1 (1956), and the Indian heir filed suit for breach of trust by the government. Although the Court later reversed the court of claims' decision for the plaintiff on the merits, the court's jurisdiction in *Mason* was not questioned:

> A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress .... The Osage Allotment Act implies that, if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States.

Mason v. United States, 461 F.2d at 1374, *quoted in* Mitchell v. United States, 591 F.2d at 1303.

43. Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906).

44. Congressman Jackson, the principal sponsor of the Indian Claims Commission bill in the House of Representatives, stated that the purpose of § 24 of the Indian Claims Commission Act (which later became 28 U.S.C. § 1505 (1976)) was to cover the post-1946 "legal" claims (claims other than purely moral) of Indians "so that it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriation of Indian funds or of any other Indian property by federal officials that might occur in the future." 92 CONG. REC. 5313 (1946), *quoted in* 591 F.2d at 1303-04.

> [T]he present generation of Indians is entitled to claim the funds that were set aside in trust for them, in place of the lands that they would own today if these transactions had never been consummated. If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.

H.R. REP. No. 1466, *supra* note 1, at 5, *reprinted in* CONG. SERV., *supra* note 1, at 1351.

45. 591 F.2d at 1304.

itself sustained the plaintiffs' right to pursue their breach of trust claim, did not consider the other legislation invoked by plaintiffs in support of their claim.[46] It also dismissed, somewhat summarily, numerous cases cited by the government to support its argument that the court lacked jurisdiction.[47] These cases were distinguished because in each there was either no statute which could be read as establishing a trust relationship and imposing fiduciary duties on the government, unlike the General Allotment Act;[48] or because there was no statute empowering the court to grant the requested remedy, unlike sections 1491 and 1505 of title 28.[49]

---

46. The court did explain, however, that "[a]t the least, the other legislative provisions on which plaintiffs rely can furnish congressional gauges of proper trustee conduct, once it has been established, as here, that the Government is a trustee." *Id.* at 1305.

47. *Id.*

48. *See* Gila River Pima-Maricopa Indian Community v. United States, 140 F. Supp. 776, 780-81 (Ct. Cl. 1956) (suit by Indians alleging deprivation of water rights, and seeking damages under 28 U.S.C. § 1505 (1976), where court concluded existence of legal guardian/ward relationship between United States and an Indian tribe depends upon express provisions of a particular treaty or statute); Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1198 (Ct. Cl.), *cert. denied*, 400 U.S. 819 (1970) (claim for damages based on government's alleged breach of general obligations as guardian of Indians held too broad to come within Indian Claims Commission Act); Skokomish Indian Tribe v. France, 269 F.2d 555, 559-62 (9th Cir. 1959) (Indian action to quiet title to lands claimed under treaty and executive order, in which federal court found jurisdiction but held neither United States nor State of Washington could be made parties as they had not consented to the suit); Donahue v. Butz, 363 F. Supp. 1316, 1323 (N.D. Cal. 1973) (failure by Secretaries of Agriculture and Interior to set aside land for Karuk Indians held not a violation of federal law within meaning of jurisdictional statute in suit alleging that such failure violated government's trust responsibility).

49. 591 F.2d at 1305-06. Most of these suits were for equitable rather than monetary remedies. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 139 (1972) (suit by tribal association for distribution of proceeds from sale of mineral rights dismissed for want of jurisdiction as an unconsented suit against the United States); Naganab v. Hitchcock, 202 U.S. 473, 475 (1906) (suit to compel Secretary of Interior to sell Indian trust lands and use the proceeds to benefit Indians held in effect a suit against the United States, and in the absence of waiver of sovereign immunity, outside the Court's jurisdiction); National Indian Youth Council v. Bruce, 485 F.2d 97, 98 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974) (district court held it had no jurisdiction over action to replace a Navajo boarding school with adequate school facilities on the reservation); Vicenti v. United States, 470 F.2d 845, 846-47 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973) (action to recover allotment lands and for damages, in which the court held that statute conferring federal jurisdiction in suits by Indians against United States to recover title to and possession of land (25 U.S.C. § 345 (1970) did not confer jurisdiction to award damages where the government had received no money from the lands)); Motah v. United States, 402 F.2d 1, 2 (10th Cir. 1968) (action contesting tribal election to determine whether tribe should have separate constitution from other tribes held not to involve subject matter within jurisdiction of district court as a federal question); Harkins v. United States, 375 F.2d 239, 240 (10th Cir. 1967) (held United States is immune from suit seeking adjudication against it and recovery for violation of trust by government representatives in improperly paying taxes out of Indian trust funds); Twin Cities Chip-

The trust relationship between government and Indians has traditionally been interpreted by the courts in two ways. An early decision by Chief Justice Marshall in *Cherokee Nation v. Georgia*[50] emphasized that Indian lands "compose a part of the United States,"[51] subject to commercial regulations imposed by Congress under the Constitution, and that Indian tribes are "domestic dependent nations,"[52] their relation to the United States resembling "that of a ward to his guardian."[53] This guardianship was treated as a source of federal power over Indians, in addition to and apart from the express power in the Constitution to regulate commerce with the Indian tribes,[54] as illustrated by *United States v. Kagama*,[55] which upheld Congress' power to enforce federal criminal law on Indian reservations.[56] "These Indian tribes . . . are communities dependent on the United States . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power.[57] In *Lone Wolf v. Hitchcock*,[58] Congress' "plenary power" to manage Indian property was held to justify abrogation of the terms of a treaty which conflicted with a later congressional allotment statute, and which was considered as operating "to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians."[59]

Some cases have emphasized another approach, derived from the first: together with its *power* over Indian affairs, the government has assumed a *responsibility*, a "distinctive obligation of trust . . . in its dealings with these dependent and sometimes exploited people."[60] On

---

pewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 530 (8th Cir. 1967) (action to invalidate Indian tribal election dismissed for lack of jurisdiction in absence of congressional consent to suit expressed in statute); United States v. Eastman, 118 F.2d 421, 422 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941) (suit by Quinault Indian allottees to enjoin enforcement of regulations of Secretary of Interior respecting sales of timber held not within 25 U.S.C. § 345, which authorizes actions in district court for allotments of land; therefore, court had no jurisdiction in absence of government consent to suit).

50. 30 U.S. (5 Pet.) 1 (1831). In *Cherokee Nation*, the tribe challenged the applicability of state statutes to residents of Indian lands secured to the Cherokees by federal treaties. The relationship between the United States and the Indians established by those treaties was an issue discussed by Justice Marshall. *Id.* at 17. *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1216 (1975) [hereinafter cited as *Judicial Enforcement*].

51. 30 U.S. (5 Pet.) at 17.

52. *Id.*

53. *Id.*

54. *See Judicial Enforcement*, *supra* note 50, at 1223.

55. 118 U.S. 375 (1886).

56. *Id.* at 383-84.

57. *Id.*

58. 187 U.S. 553 (1903).

59. *Id.* at 564.

60. Seminole Nation v. United States, 316 U.S. 386, 396 (1941). This case involved a

this basis, the government has been held to at least the standards of performance applicable to private trustees,[61] or even to "moral obligations of the highest responsibility and trust."[62]

Such a fiduciary obligation limits the government's exercise of its controlling authority. In *United States v. Creek Nation*,[63] the Supreme Court affirmed a money damage award to Creek Indians whose lands had been sold to settlers because of an erroneous survey, proceeds of the dispositions being retained by the government. "[T]his power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions."[64] The Supreme Court has held that federal legislation concerning Indians should not be disturbed so long as it has a rational relation to the fulfillment of Congress' "unique obligation toward the Indians,"[65] but has refused to find that congressional exercise of control over tribal property is final and not subject to any judicial scrutiny at all.[66]

Before determination on the merits can be made in Indian suits against the United States, a waiver of the government's sovereign immunity from suit must be found.[67] In the absence of an authorizing treaty or statute, some Indian claimants have sought to base a claim on the general trust relationship between the United States and the Indians. The most famous of these cases is *Naganab v. Hitchcock*,[68] where a Chippewa Indian sought a general accounting and an injunction prohibiting the Secretary of the Interior from certain acts regarding sale of Indian trust lands. The suit was held to be one in effect against

---

claim that government payments to the Seminoles, which by treaty were to be used for specified purposes, had been misapplied or wrongfully distributed. A special jurisdictional act, Act of August 16, 1937, ch. 651, 50 Stat. 650 (1937), allowed trial on the merits in the court of claims, and judgment for the Indians was given as to some of the claimed amounts. 316 U.S. at 396.

61. Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (in suit for payment of interest on government-held trust funds, court inferred from relevant case law a trust obligation and liability of the government, measured by the same standards applicable to private trustees).

62. 316 U.S. at 297.

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

64. *Id.* at 110.

65. Delaware Tribal Business Council v. Weeks, 430 U.S. 73, 85 (1976) (Court had power to review Congress' exclusion of nontribal Indians from distribution of a judgment fund to redress a breach of an 1854 treaty).

66. *Id.* at 83-84.

67. *See, e.g.*, Coleman v. United States, 100 F.2d 903 (6th Cir. 1939). "The rule that the United States may not be sued without its consent is all-embracing . . . . The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced." *Id.* at 905.

68. 202 U.S. 473 (1906).

the United States, and since the government had "not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action . . . we hold that there is no jurisdiction to maintain the present suit."[69] "The moral obligations of the government toward the Indians, whatever they may be, are for the Congress alone to recognize and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them."[70]

Once a statute is invoked in support of a claim, courts are divided concerning appropriate statutory construction when searching for waivers of immunity. Some courts have strictly construed statutory and treaty language. In *Skokomish Indian Tribe v. France*,[71] the plaintiff Indians attempted to add the United States as a party plaintiff against the State of Washington in a suit for trespass and to quiet title to treaty lands. They argued that government consent to suit could be inferred from the terms of an 1855 treaty, read in light of the government's historical guardian/ward relationship with the Indian tribes. However, the court stated that "in the absence of some specific language . . . in the treaty, the legal obligations of a true guardianship do not prevail," and concluded that neither the guardian/ward concept nor the terms of the 1855 treaty, constituted an implied consent of the government to be sued.[72]

According to the strict view, " '[t]he principle that the United States, as sovereign, is immune from suit save as it consents to be sued' . . . is not affected by the fact that the government has voluntarily undertaken a trustee relationship with respect to the Indians."[73] In *Tlingit & Haida Indians of Alaska v. United States*,[74] suit was brought to recover for land and property rights allegedly appropriated by the government. Although the claim was brought under a special jurisdictional statute,[75] the court of claims held that it did not contain a clear statutory directive creating a right to compensation in the Indians, and that liability may not be imposed on the government to which

69. *Id.* at 476.

70. Donahue v. Butz, 363 F. Supp. 1316, 1321 (N.D. Cal. 1973) (suit alleging that government failure to allot lands to Karuk Indians violated general trust relationship held within federal law in absence of particular supporting statute).

71. 269 F.2d 555 (9th Cir. 1959).

72. *Id.* at 559-60.

73. Motah v. United States, 402 F.2d 1, 2 (10th Cir. 1968) (citations omitted) (suit contesting results of a tribal election held not to present a federal question).

74. 389 F.2d 778 (Ct. Cl. 1968).

75. Act of June 19, 1935, ch. 275, 49 Stat. 388 (amended 1965) (this act gave the Court of Claims exclusive jurisdiction over all claims the Tlingit and Haida Indians had against the United States).

it has not consented nor which it has explicitly assumed.[76]

Other courts have *inferred* a waiver of immunity for suits falling within the purview of a particular act, and have given great weight to the legislative history of the applicable act and the government's general "moral obligations of the highest responsibility and trust"[77] toward the Indians. The court of claims discussed the Acts of 1906 and 1908 requiring payment of interest on Indian funds in United States Treasury accounts in *Menominee Tribe of Indians v. United States*,[78] but relied on a presumed fiduciary relationship to hold that the government had an obligation to use such funds in the way most beneficial to the Indians rather than for its own benefit.[79] *Cheyenne-Arapaho Tribes of Oklahoma v. United States*[80] held that case law and actions by Congress and the executive branch made clear that funds appropriated to Indians to satisfy judgments of the Indian Claims Commission or of the courts, as well as funds produced by tribal activities, were held in trust for the Indians when kept in the Treasury; that the United States as trustee has undertaken an obligation toward the Indians of the highest responsibility and trust; and that the court of claims' jurisdiction was broad enough to cover a claim by the Indians of breach of trust by the government in failing to make the funds productive.[81]

The variations in judicial decisions are in large part explained by different approaches to statutory construction. The general rule is that, even when consent to suit is given by Congress, "it is no broader than the limitations which condition it, and these must be construed in

---

76. 389 F.2d at 787. *See also* Morrison v. Work, 266 U.S. 481 (1924). In *Morrison*, plaintiffs requested both an injunction restraining government officials from mismanaging Chippewa Indian property and an accounting. The Court held that it had no jurisdiction because the United States was an indispensable party to the suit but could not be joined as a defendant since Congress had not consented to be sued. *Id.* at 486.

77. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). *See* notes 60 & 62 and accompanying text *supra*.

78. 59 F. Supp. 137 (Ct. Cl. 1945).

79. *Id.* at 140-41.

80. 512 F.2d 1390 (Ct. Cl. 1975).

81. *Id.* at 1392. *See also* Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977). Plaintiffs in *Coast Indian Community* alleged that the action of the Bureau of Indian Affairs in selling a right of way through a reservation for a nominal sum constituted an inverse taking compensable under the fifth amendment. The court found an alternative cause of action in the government's breach of its fiduciary obligation as trustee for the Indians, on the basis of statutes and judicial decisions establishing the government's fiduciary role regarding Indian property. The court stated that the government's actions should be judged according to standards applicable to a trustee engaged in management of trust property and that the government should be "held to the most exacting fiduciary standards," including accountability for acts of its agents, even where wrongful and unauthorized. *Id.* at 652-53.

favor of the sovereign."[82] In direct contrast to the strict rule is a tradition dating back to Chief Justice Marshall's opinion in *Worcester v. State of Georgia*[83] that ambiguous terms in an Indian treaty should be interpreted as the Indians most likely understood them.[84] This liberal construction has also been followed in the interpretation of statutes relative to the Indians, giving them the benefit of the doubt as to questions of fact, rather than insisting on strict adherence to technical meanings.[85] Therefore, "[u]ndertakings with the Indians are to be liberally construed to the benefit of the Indians . . . ."[86] Nevertheless,

---

82. Coleman v. United States, 100 F.2d 903, 905 (6th Cir. 1939).

83. 31 U.S. (6 Pet.) 515 (1832).

84. *Id.* at 551-54. *See also* Choate v. Trapp, 224 U.S. 665 (1912). In *Choate*, an injunction was granted to Choctaw and Chickasaw Indians against state assessment and collection of taxes on allotted lands before expiration of the trust period. The Court stated:

> [I]n the Government's dealings with the Indians . . . [t]he construction [of a treaty] instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . .

Id. at 675.

85. 34 Op. Att'y Gen. 439-44 (1924). In this opinion, the Attorney General concluded that "[t]he income from the restricted lands of the Quapaw Indians is not subject to the Federal income tax laws." *Id.* at 439. In reaching this conclusion, he examined two treaties between the Quapaw and the federal government, the Treaty of Nov. 15, 1824, 7 Stat. 232; and Articles of Agreement, May 13, 1833, 7 Stat. 424 (a supplemental treaty). He then looked at the surrounding circumstances at the time the treaties were made and concluded that no taxation had been contemplated, as taxation at the time the treaty was made would have meant destruction for the Indians because of their poverty-stricken condition. 34 Op. Att'y Gen. at 439. He stated that from the beginning of its negotiations with the Indians, the government had given them the benefit of the doubt in factual matters or those matters relating to their welfare. *Id.* at 444.

86. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972). In *Pyramid Lake*, the court enjoined certain diversions of water by a federal dam and reclamation project which reduced the water level of Pyramid Lake on a downstream Indian reservation, diminishing the value of the lake as a trust asset and impairing fishing on the lake. Although the diversions violated no specific treaty or statute, the court held that operation of the project violated the government's trust responsibility to the tribe. *See also* Navajo Tribe v. United States, 586 F.2d 192 (Ct. Cl. 1978), a suit based on a course of governmental conduct which began before August, 1946 (and which thus came under the Indian Claims Commission Act), but alleging injuries suffered from that conduct after that date. In determining whether such a "continuing claim" was nevertheless barred by the more restrictive language of 28 U.S.C. § 1505 (1976), *see* text accompanying note 7 *supra* the court stated:

> The principles which underlie the strict construction of statutory waivers of sovereign immunity simply do not have full strength in the precise situation before us. But even if we were to apply the principle of strict construction at full face value, we would not adopt the Government's thesis.

many decisions have expressed a strict standard of interpretation when a statute is alleged to waive the immunity of the United States from suit.[87] "Sovereign immunity is always considered present, unless expressly waived. Waivers by implication will not be endorsed. Courts are not empowered to legislate so as to dictate jurisdiction . . . [and will] not 'fashion' or create private rights of action when, as here, Congress has revealed no intention to do so."[88]

In *Mitchell*, the Supreme Court granted certiorari to determine whether the General Allotment Act of 1887 could be read to authorize the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to the Quinaults under the Act.[89] The court of claims' jurisdiction over the suit was first addressed. The Court stated that, since "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit,"[90] Congress must clearly express its intent to waive sovereign immunity before a particular claim can be allowed.[91] In *Testan*,[92] the Court decided that the Tucker Act was only a jurisdictional statute and did not confer a substantive right against the United States for recovery of money damages.[93] The *Mitchell* Court reiterated this holding and concluded that the Tucker Act merely gives the court of claims jurisdiction to hear claims against the United States when-

---

> It has never been the rule that consents-to-suit must be given the narrowest possible scope or that legislation granting jurisdiction of actions against the sovereign must be read apart from history, legislative purpose, or dictates of common sense.

586 F.2d at 201.

87. *See* notes 71-76 and accompanying text *supra*.

88. Vicenti v. United States, 470 F.2d 845, 848 (10th Cir. 1972) (statute conferring federal jurisdiction in actions by Indians against the United States for land allotments, 25 U.S.C. § 345 (1976), does not give rise to a cause of action for money damages). *Accord*, United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1316 (Ct. Cl. 1975) (claim for payment of interest on a government-held trust fund denied in the absence of a contract or statute which expressed in plain terms that payment of interest be made on the particular fund).

89. United States v. Mitchell, 445 U.S. 535 (1980). Justice Marshall delivered the opinion of the Court, in which Justices Stewart, Blackmun, Powell and Rehnquist joined.

90. United States v. Sherwood, 312 U.S. 584, 586-87 (1941). Although *Sherwood* involved a suit by a government contractor for breach of a contract to build a post office building, its language is applicable and has been widely quoted in Indian cases. *See, e.g.*, United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975); Vicenti v. United States, 470 F.2d 845 (10th Cir. 1972); Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Harkins v. United States, 375 F.2d 239 (10th Cir. 1967).

91. 445 U.S. at 538.

92. United States v. Testan, 424 U.S. 392 (1976). *See* notes 32 & 33 and accompanying text *supra*.

93. 424 U.S. at 398. For the pertinent provision of the Tucker Act, *see* note 29 *supra*.

ever an independent substantive right exists founded on other legislation.[94] Section 1505 was held to be limited in the same way as the Tucker Act with respect to tribal claimants.[95]

---

94. 445 U.S. at 538. The standard expressed in *Eastport Steamship Corp. v. United States* is somewhat more flexible than the strict view taken by the *Vincenti* and *Mescalero Apache* courts. 372 F.2d 1002 (Ct. Cl. 1967), *cited in* United States v. Testan, 424 U.S. 392, 398 (1976). *See* note 88 and accompanying text *supra*. *Eastport* states that a claimant with an arguable claim that a statute or regulation grants him a right to money damages from the United States "in terms or by implication" can properly come to the court of claims. *Id.* at 1008. In contrast, *Vicenti* and *Mescalero Apache* required an express intention by Congress to confer jurisdiction in actions against the federal government.

A recent decision in the Tenth Circuit applied the *Testan-Eastport* standard in adjudicating breach of trust claims. In Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979), a breach of fiduciary duty by the government in distributing shares of a settlement under the Southern Paiute Judgment Distribution Act, Pub. L. No. 90-584, 82 Stat. 1147 (1968), was alleged and money damages were claimed. In dismissing the action, the court stated:

> At the outset we express our full agreement with plaintiffs' contention that a legislative declaration of trust status for a particular fund is itself a congressional mandate, fully consistent with the *Testan-Eastport* standard discussed above, that the United States assume financial responsibility for its failure adequately to perform its fiduciary obligations . . . . Unless it appeared affirmatively that Congress meant to create something less than a trust relationship when it used the term "trust" in referring to a particular fund, we would necessarily assume that Congress intended to establish nothing less than a valid trust — complete with fiduciary duties and concomitant financial liability for their breach . . . [b]ut we cannot agree that Congress in any way indicated that the judgment fund in question was to be held in trust . . . .

600 F.2d at 1335.

95. 445 U.S. at 538-40. The Court arrived at this conclusion by examining the legislative history of the Indian Claims Commission Act. The purpose of the bill was to ensure that an "Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, on any controversy with the Federal Government that may rise in the future." H.R. REP. No. 1466, *supra* note 1, at 3, *reprinted in* CONG. SERV., *supra* note 1, at 1349. Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946), which covered claims arising after August 13, 1946, and which as amended became § 1505 of title 28, contained the following proviso: "[N]othing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups." 28 U.S.C. § 150 (1976). Although this language lends a certain ambiguity to the jurisdictional limits under the present § 1505, the limits were clarified by the court of claims in Menominee Tribe of Indians v. United States, 607 F.2d 1335 (Ct. Cl. 1979):

> [N]either section 1491 nor section 1505 contains any provisions comparable to the "fair and honorable dealings" clause or the clause countenancing revision of treaties, etc. for fraud, unconscionable consideration, etc. [of the Indian Claims Commission Act]. The predecessor of section 1505 was originally a part of the Indian Claims Commission Act of 1946 and Congress obviously knew that the new jurisdictional provision for future

The Court then examined the General Allotment Act[96] to determine whether, by its language or legislative history, it expressed an explicit trust relationship between the United States and the Indians which constitutes a waiver of sovereign immunity from suits based on breach of that trust. The Court held that only a limited trust responsibility had been assumed by the United States under the General Allotment Act which imposed no duty upon the government to manage timber resources.[97]

The limitations on the trust relationship were based on the Court's reading of sections 1 and 2 of the General Allotment Act.[98] The Court read these sections as indicating that the Indian allottee, and not a government representative, was to be responsible for using the land for agricultural or grazing purposes. Since it was the responsibility of the allottee, not the United States, to manage the land, the Court concluded that the United States had not assumed a trustee's obligations with respect to such management.[99]

> litigation directly in this court was different from and narrower than the very broad jurisdictional provision for the claims to be heard initially by the Commission.

Id. at 1341 (citation omitted). The *Mitchell* Court then concluded that, just as 28 U.S.C. § 1491 conferred no substantive rights on individual claimants, 28 U.S.C. § 1505 conferred no substantive rights on tribal claimants. 445 U.S. at 540.

96. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-58 (1976 & Supp. III 1979)).

97. 445 U.S. at 541-42.

98. *Id.* at 542-43. Section 1 of the General Allotment Act authorized the President to allot to individual Indians any part of a reservation which

> may be advantageously utilized for agricultural or grazing purposes . . . and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (current version at 25 U.S.C. § 331 (1976)).

Section 2 of the Act provides for the case in which two or more Indians have made improvements on the same subdivision of land.

> Where the improvement of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections.

Id. § 2, 24 Stat. 388 (current version at 25 U.S.C. § 332 (1976)).

99. 445 U.S. at 542-43. The Act provisions, which have never been amended, reflect the policy that the trust relationship between Indians and the United States was intended to be of limited duration pending assimilation of Indians as individual citizens into the mainstream of society.

> The bill provides for the breaking up, as rapidly as possible, of all the tribal organizations and for the allotment of lands to Indians in severalty, in order that they may possess them individually and proceed to qualify

The Court then cited the legislative history of the General Allotment Act, without discussing it in depth, to support its interpretation of the Act's purposes.[100] The trust language in the Act was an amend-

---

> themselves for the duties and responsibilities of citizenship . . . and to support themselves by industry and toil.

18 CONG. REC. 191 (1886) (statement of Representative Perkins). This policy is discussed in Mattz v. Arnett, 412 U.S. 481 (1972), where the Court held that confiscation of Indian fishing nets by a California game warden on land within reservation boundaries was unjustified, because the area had not lost its identity as Indian country:

> [The General Allotment] Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and encouraging Indians to adopt white ways.

Id. at 496.In establishing the Indian Claims Commission, Congress expressed as one of its motives that

> [a]nother serious result of the present situation is the fact that many persons of Indian blood, who are fully capable of taking their place in non-reservation life on the same basis as any other citizen, are impelled to cling to tribal associations because of the Indian's "fear that separation from the tribe might deprive him of his share of a settlement which he believes the Government may some day make." . . . Only a procedure which provides for prompt hearing and final disposition of these grievances will make it possible for the tribes and the Federal Government to settle their accounts finally with those Indian citizens who no longer need special Federal services.

H.R. REP. NO. 1466, *supra* note 1, at 5-6, *reprinted in* CONG. SERV., *supra* note 1, at 1351 (citation omitted).

According to the respondents in *Mitchell*, independence and assimilation of Indians into society is far from being a reality.

> Most allottees have substandard education and . . . are totally reliant upon the Government to manage their timber . . .. Thus, the trust responsibilities of the Government here are not passive; the [Bureau of Indian Affairs] has exercised active and total control over the management of the Indians' land and timber, and the allottees have always relied upon the BIA to do so.

Brief for Respondents at 5-7, United States v. Mitchell, 445 U.S. 535 (1980).

100. 445 U.S. at 543-44. A bill similar to the General Allotment Act was debated in the Senate in 1881. *See* S. 1773, 46th Cong., 3d Sess. (1880); 11 CONG. REC. 778-88, 873-82, 904-13, 933-43, 994-1003, 1028-36, 1060-70 (1881). Bills essentially identical to the Act as enacted in 1887 were passed by the Senate in 1882 and 1884, but were not acted upon by the House of Representatives. *See* S. 1434, 47th Cong., 1st Sess. (1882) (providing that, for the Umatillo reservation, the allottee was to hold fee simple title subject to a restraint on alienation which was to last at least ten years and thereafter until the President ended the restraint); S. 1455, 47th Cong., 1st Sess. (1881) (containing a similar provision for Indian reservations generally); 13 CONG. REC. 3211 (1882) (statement of Senator Dawes that the allottee under S. 1434 was to be the occupant of the land and

ment from earlier drafts which would have vested fee simple title in the Indian allottees, subject only to a restraint on alienation for twenty-five years.[101] Because of concern that the states in which allot-

---

enjoy all its use); *id.* at 3211-12 (Senator Dawes' motion to amend S. 1434 language to provide that the United States would hold the allotted lands "in trust" for 25 years); *id.* at 3212 (Senator Dawes' motion to amend S. 1455 similarly); S. 48, 48th Cong., 1st Sess. (1883) (reflecting the amended language); 15 CONG. REC. 2242 (1884); *id.* at 2277-80; 16 CONG. REC. 218 (1884); 16 CONG. REC. 580 (1885); H.R REP. No. 2247, 48th Cong., 2d Sess. (1885). Representative Skinner, sponsor in the House for the bill which became the Act, stated the purpose of the legislation in the following terms:

> [I]t should be impressed upon the Indians "that they must abandon their tribal relation and take lands in severalty as the corner-stone of their complete success in agriculture . . . [A]s soon as the allotment is made the allottee becomes a citizen of the United States . . . and, in addition thereto, his land is made inalienable and non-taxable for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and to prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property . . . .

18 CONG. REC. 190 (1886).

This theory has been rejected, as indicated by President Nixon's message to Congress in 1970, containing recommendations for Indian policy:

> This policy of forced termination of the trust relationship is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

H.R. DOC. No. 91-363, 91st Cong., 2d Sess. 2 (1970), *reprinted in* PUB. PAPERS 564-66 (1970).

101. 445 U.S. at 543. *See* 13 CONG. REC. 3212 (1882) (statement of Senator Dawes). *See also* 34 Op. Att'y Gen. 275, 281 (1924). "Congress, recognizing that the Indian was by nature improvident and unable to withstand the superior commercial instincts of his white neighbors, found it advisable to stipulate in treaty and statute and in the conveyances to the allottees restructions against alienation of the allotted lands." *Id.*

ments were located might attempt to impose taxes on the Indians holding allotted lands, insertion of the trust language was proposed by Senator Dawes to clearly defeat any such attempt.[102] Based on this record, the Court felt it was clear that Congress intended the trust language only in terms of preventing alienation of the land by Indian allottees during the trust period, and to ensure that they would be immune from taxation.[103]

The Court noted that no authorization of government management of the allottees' timber resources could be found in the General Allotment Act or in the events surrounding and following its passage.[104] In 1874, prior to passage of the Act, the Court had determined in *United States v. Cook*[105] that Indians held only a right of occupancy, while the government held the fee title to their lands, and therefore the cutting of timber from the land for sale constituted waste by the Indian occupants. Two years after the passage of the General Allotment Act, the Attorney General of the United States concluded that this rule applied to both allotted and unallotted lands.[106] Sale of dead and down timber on Indian lands was then authorized by Congress.[107] Occasional legislation was passed authorizing timber sales on particular reservations.[108] Not until 1910 did Congress empower the Secretary of the Interior to sell timber on allotted and unallotted lands for the benefit of the Indian "owners."[109] Subsequent legislation was directed to the management of tribal timber resources and investment of the proceeds therefrom.[110] Presumably, the Court felt that since broad powers for management and sale of timber on Indian lands were not delegated by Congress to the Secretary until so much later, the General Allotment Act could not be read to support a fiduciary duty arising from those powers.[111]

---

102. 445 U.S. at 543-44 (citing 13 CONG. REC. 3211 (1882)). Nontaxability of allotted lands during the trust period has been uniformly upheld. *See, e.g.*, United States v. Mason, 412 U.S. 391 (1972); Choate v. Trapp, 224 U.S. 665 (1921). The principle has been extended to nontaxability of the income from sale of standing timber on allotted land. Squire v. Capoeman, 351 U.S. 1 (1955).

103. 445 U.S. at 544.

104. *Id.* at 545.

105. 86 U.S. (19 Wall.) 591 (1874).

106. 19 Op. Att'y Gen. 232 (1889).

107. Act of Feb. 16, 1889, ch. 172, 25 Stat. 673.

108. *See, e.g.*, Act of Mar. 28, 1906, ch. 1350, 34 Stat. 91 (authorizing sale of timber on the Jicarilla Apache Indian Reservation).

109. Act of June 25, 1910, ch. 431, 36 Stat. 857 (current version at 25 U.S.C. §§ 406-407 (1976)). *See* note 19 *supra*.

110. *See* note 24 *supra*.

111. 445 U.S. at 545-46. The Court rightly notes that the General Allotment Act itself contains no mention of management of timber resources, and on that basis it may well be insufficient alone to establish the government's fiduciary duty to manage allotted for-

The conclusion of the Court was that any right of the Indian plaintiffs to recover money damages for government mismanagement of timber resources on allotted lands would have to be based on some source other than the General Allotment Act, and that the judgment of the court of claims must be reversed and the case remanded for further proceedings.[112]

---

est lands. However, the effect of the cases cited by the Court to support its holding argues against its thesis that management of the land was to be by the Indian allottees. In United States v. Cook, 86 U.S. (19 Wall.) 591 (1874), the government brought an action of replevin against the defendant, who had purchased saw-logs made from timber cut by tribal members. The act of cutting the timber, except for use upon the premises, was held to be waste; "[t]he timber while standing is a part of the realty, and it can only be sold as the land could be." *Id.* at 593. In Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902), also cited by the Court in *Mitchell*, a contract between the government and defendant provided for cutting of timber on Indian land. The amount actually cut by the Indians for defendant was of different quality and far in excess of the contractual amount. Defendant argued that the actual conduct of defendant and the Indians in disregarding the contract specifications was sufficient to give a different construction to the contract, but the Court disagreed:

> The argument overlooks the fact that the Indians had no right to timber upon the land other than to provide themselves with the necessary wood for their individual use, or to improve their land, . . . except so far as Congress chose to extend such right; . . . that the Indians in fact were not treated as *sui juris*, but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the rights given by the statute.

Id. at 290.

An analogous case, United States v. Eastman, 118 F.2d 421 (9th Cir. 1941), held that restraints upon alienation extended to timber as well as to lands, where trust patents for allotments were issued in conformity with the usual provision that the United States would hold the lands for twenty-five years for the sole use and benefit of the Indians. *Id.* at 424. "Since the lands are chiefly valuable for their timber it is settled law that the restraint upon alienation, effected by the terms of the trust patents, extends to the timber as well as to the land." *Id.*

The gist of the cases cited by the Court in *Mitchell*, 445 U.S. at 545, taken together with cases like *Eastman* and Squire v. Capoeman, 351 U.S. 1 (1956), is to reinforce the concept of the government's plenary control over Indian affairs. In *Squire*, the Court held that income from sale of standing timber on allotted land, as well as the land itself, was to be non-taxable, since "it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian," and "[t]o tax respondent under these circumstances would . . . be 'at the least, a sorry breach of faith with these Indians.' *Id.* at 8, 10 (citations omitted).

112. 445 U.S. at 546 & n.7. Respondents had asserted that other statutes, *see* note 24 *supra*, rendered the United States liable in money damages for the mismanagement alleged in *Mitchell*. Respondents had also contended that the alleged mismanagement was cognizable under the Tucker Act because it involved money improperly exacted or restrained. The Tucker Act, 28 U.S.C. § 1491 (1976), provides in relevant portion: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States . . . ." *Id. See also* Brief for Respondents at 32-38 & 41, United States v. Mitchell, 445 U.S. 535 (1980); Mitchell v. United States, 591 F.2d 1300, 1304 & n.18,

The dissent, relying on *Testan*,[113] stated that a statute creates a substantive right enforceable against the United States in money damages only if it can fairly be interpreted as mandating compensation by the Federal government for the damage sustained.[114] Unlike the majority, however, Justice White felt that the General Allotment Act *could* fairly be interpreted as mandating compensation, and noted that "[t]he Act could hardly be more explicit as to the status of allotted lands."[115]

Discussing the trust language in the Act, Justice White turned to general trust law[116] to support his conclusion that, giving the words of the General Allotment Act their ordinary meaning, "as we commonly do when the law does not define a statutory phrase precisely," there is sufficient manifestation of intent by Congress to create a trust.[117] Justice White discussed the legislative history of the General Allotment Act "against the backdrop of a relationship between the United States and the Indian tribes that had long been considered to 'resembl[e] that of a ward to his guardian.' [118] Justice Ward considered that the majority's evaluation of the government's fiduciary obligations under the Act was too narrow when viewed against this "backdrop."[119] Admittedly,

---

1305 & n.19 (Ct. Cl. 1979). The court of claims did not consider either of these contentions.

113. United States v. Testan, 424 U.S. 392 (1976). For a discussion of *Testan*, see notes 32 & 33 and accompanying text *supra*.

114. 445 U.S. at 546-47 (White, J., dissenting). Justice White wrote the dissenting opinion, in which Justices Brennan and Stevens joined. *Id.* at 546 (White, J., dissenting); Chief Justice Burger took no part in the decision in *Mitchell*. *Id.*

115. *Id.* at 547 (White, J., dissenting).

116. *Id.* at 547-48 (White, J., dissenting). Justice White concluded that the structure of the General Allotment Act has all the elements of a common law trust, and as such imposes fiduciary obligations on the United States as trustee. At common law, the necessary elements of a trust are a trustee, a beneficiary, and a trust corpus. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959). A trust entails a fiduciary relationship with respect to property, subjecting the person by whom the legal title was held to equitable duties to administer the trust solely in the interest of the beneficiary. *Id.* The United States has the capacity to take and to hold property in trust. *Id.* § 95. *See* A. SCOTT, THE LAW OF TRUSTS (3d ed. 1967). *See also* Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390 (Ct. Cl. 1975).

117. 445 U.S. at 548 (White, J., dissenting). *See* Group Health and Life Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979). This approach to statutory construction is particularly true in dealing with Indians, as noted by Chief Justice Marshall in Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832): "If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.* at 582.

118. 445 U.S. at 548 (White, J., dissenting) (quoting Cherokee Nation v. Georgia Nation, 30 U.S. (5 Pet.) 1, 17 (1831)).

119. *Id.* (White, J., dissenting).

the General Allotment Act itself provided only for allotment of "agricultural or grazing" lands, which the Indian was expected to reside on and manage himself, and not until 1923 was it established that forested areas were also subject to allotment.[120] Nevertheless, Justice White urged that "subsequent statutory and administrative developments which clarified and fleshed out" the government's fiduciary duty should also be considered.[121] In addition, since as a practical matter the management of the timber lands cannot be undertaken by the Indians, but must necessarily be performed by the government,[122] Justice White felt it was consistent with the purpose of the General Allotment Act that the United States assume fiduciary obligations in performance of its management functions.[123]

Finally, with respect to government consent to liability in damages for breach of trust, Justice White concluded that such liability flows naturally from the existence of a trust and of fiduciary duties.[124] This conclusion was based on two grounds: first, the "hornbook law" of

---

120. United States v. Payne, 264 U.S. 446, 448 (1924) (in suit by a Quileute Indian to determine his right to an allotment in the Quinault Reservation, the Court held that timbered lands were not meant to be excluded from allotment under the General Allotment Act).

121. 445 U.S. at 549 (White, J., dissenting). Subsequent statutes enacted by Congress include: 25 U.S.C. § 162(a) (1976) (authorizing the Secretary of the Interior to manage tribal funds held in trust); *Id.* §§ 323-325 (authorizing the Secretary of the Interior to grant rights of way over Indian trust lands upon payment of just compensation); *id.* § 466 (instructing the Secretary of the Interior to manage Indian forests on a sustained-yield basis).

122. The management process is described in the Brief for Respondents at 5, United States v. Mitchell, 445 U.S. 535 (1980):

> The Government, through the Secretary of the Interior and the Bureau of Indian Affairs (BIA), has continuously exercised total control over the management and disposition of the Indians' lands and timber on the Quinault Reservation. The BIA determines which blocks (units) of timber are to be put up for sale. It then obtains a power of attorney from each allottee owning land within the unit . . . after which the BIA handles every detailed aspect of a sale — advertisement for bids, letting contracts, and supervision of the loggers who build roads, cut the timber, and remove it. After the contract commences, the BIA oversees the scaling and grading of logs, collects the sale proceeds monthly, deducts its fees, and credits the balance to the Tribe's or allottees' BIA accounts. The Indians have nothing to do with the entire operation, except: (1) signing the initial power of attorney, and (2) opening the envelope five or ten years later (or more) with their check.

Id.

123. 445 U.S. at 549 (White, J., dissenting). Justice White stated that the government's responsibility need not conform "to the exact terms of these statutes and regulations." *Id.* (White, J., dissenting). Perhaps he would agree with the court of claims that those statutes and regulations could at least furnish "congressional gauges of proper trustee conduct . . .." Mitchell v. United States, 591 F.2d at 1305.

124. 445 U.S. at 550 (White, J., dissenting).

trusts, which presumes answerability in money damages by a trustee for breach of trust;[125] and second, the purpose of the General Allotment Act, and its frustration in the absence of a retrospective damage remedy to discourage federal officials from neglecting their duties or abusing their powers.[126]

The dissent also noted that the Department of the Interior, which is charged with administration of the General Allotment Act, disagreed with the government's position in this litigation. The Solicitor for the Department informed the Attorney General of the United States that "[t]he government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property."[127] Justice White felt that, "as the agency charged with administering the Act, [the Department] is entitled to considerable deference in its interpretation of the statute."[128]

---

125. *Id.* (White, J., dissenting) (citing RESTATEMENT (SECOND) OF TRUSTS, §§ 205-212; A. SCOTT, THE LAW OF TRUSTS § 205 (3d ed. 1967)).

126. *Id.* at 550 (White, J., dissenting). Concern for alternative remedies was also expressed by the court of claims in Mitchell v. United States, 591 F.2d at 1302-03. Judge Nichols disagreed on this point in his concurring opinion, stating that the doctrine of strict construction of the government's consent to be sued should not be relaxed by the fact that a claimant has no other remedy. He felt that no claimant is without a remedy while Congress sits, and that Congress has always reserved adjudication of many claims for itself, especially Indian claims. *Id.* at 1307-08 (Nichols, J., concurring). It is noteworthy, however, that Congress itself has expressed concern for the effect that lack of a judicial forum would have on Indian claims:

> [F]or most violations of their rights our Indian citizens have never been able to obtain a day in court. This . . . encourages bureaucratic disregard of the rights of Indian citizens by a small minority of government officials who are comforted by the thought that there is no judicial redress available to the victims of their maladministration . . . .

H.R. REP. No. 1466, *supra* note 1, at 5, *reprinted in* CONG. SERV., *supra* note 1, at 1351.

127. Letter from Interior Department Solicitor Krulitz to Assistant Attorney General Moorman, November 21, 1978, *reprinted in* Brief for Respondent at 1a-2a, United States v. Mitchell, 445 U.S. 535 (1980). The letter stated:

> [S]et forth below is the Department's view of the legal obligations of the United States, as defined by the courts, with respect to Indian property interests. That the United States stands in a fiduciary relationship to American Indian tribes, isestablished beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy . . . . There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

Id., *reprinted in* Brief for Respondent at 1a-2a.

128. 445 U.S. at 550 (White, J., dissenting).

Since the General Allotment Act could be interpreted as creating a valid trust, and by implication as providing a damage remedy for breach of that trust, Justice White concluded that the court of claims did have jurisdiction over the action.[129]

The holding in *Mitchell* appears to place Indians once again in the position of requiring special jurisictional acts by Congress authorizing suit in particular instances.[130] The Court's narrow interpretation of the statutory language of the General Allotment Act bodes ill for many future Indian claimants. Congress recognized in 1946, when it established the Indian Claims Commission, that many Indian claims have merit though they are not strictly legal in nature.[131] If Indian claimants are to receive judgment on the merits of their suits, rather than summary dismissal on jurisdictional grounds, it may be necessary in light of *Mitchell* for Congress to make explicit the continuing nature of the government's trust relationship with the Indians and the extent of the fiduciary obligations assumed. This might also help resolve another problem foreseen by Congress in 1946: that inability to obtain a day in court may make grievances assume larger proportions in the minds of the Indians in cases in which a full and fair adjudication would resolve the grievance effectively.[132]

The government argued in its petition for certiorari that the court of claims' conclusion that sovereign immunity had been waived as to claims for money damages brought by the allottees was "unprecedented," and that "[t]he ramifications of such a broad holding . . . are serious," since "[d]amages claimed in this suit alone may aggregate $100 million, and many similar claims may be anticipated."[133] However, such claims were recognized by Congress in 1946.[134] If it were to

---

129. *Id.* at 550-51 (White, J., dissenting).

130. The situation prior to passage of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (codified at 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. III 1979), was that Indian claims against the United States were barred unless a special act of Congress conferred jurisdiction on the court of claims to hear a suit.

131. H.R. REP. No. 1466, *supra* note 1, stated that in the guardian/ward relationship existing between the United States and the Indian tribes, "many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts" such as the Tlingit and Haida Claims Act of 1935, ch. 275, 49 Stat. 388 (1935). H.R. REP. No. 1466, *supra* note 1, at 12, *reprinted in* CONG. SERV. , *supra* note 1, at 1358.

132. H.R. REP. No. 1466, *supra* note 1, at 5, *reprinted in* CONG. SERV., *supra* note 1, at 1351.

133. Petitioner's Brief for Certiorari at 12, United States v. Mitchell, 445 U.S. 535 (1980).

134. Claims relating to events occurring before 1946 and based on "fair and honorable dealings that are not recognized by any existing rule of law or equity," such as those seeking enforcement of a trust relationship but not grounded in specific statutory language, were included in the Indian Claims Commission Act, ch. 959, § 1, 60 Stat. 1049 (1946) (codified at 25 U.S.C. § 70 (1976)).

do so again, the government would not be defenseless: it is "hornbook law," as urged by Justice White, that a trustee is under a duty in administering a trust merely to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.[135] Therefore, an explicit recognition of at least some fiduciary duty by Congress, or a more liberal statutory interpretation by the Court,[136] would not expose the government wholesale to unreasonable or "wholly imaginary" claims. But for meritorious claims, such recognition might go a long way toward "dispos[ing] of the Indian claims problem with finality".[137]

Gail F. D'Italia

---

135. 445 U.S. at 550 (White, J., dissenting). *See* A. SCOTT, THE LAW OF TRUSTS § 2 (3d ed. 1967). In United States v. Mason, 412 U.S. 391 (1972), the Court stated: "it has long been recognized that a trustee is not an insurer of trust property . . . . It follows that if the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill." *Id.* at 398. In Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968), a suit alleging a taking of Indian lands without just compensation under the fifth amendment, the court of claims stated:

> [I]f there has been no Fifth Amendment taking, appellant can recover, pursuant to the Indian Claims Commission Act, only if it shows that moneys received from the sale of the lands were so far below the then fair market value thereof as to amount to fraudulent conduct, gross negligence, or some other breach of its fiduciary obligations on the part of the Government. A mere disparity is not sufficient.

Id. at 690.

136. The courts, of course, are limited in this respect by considerations of separation of powers, since the use of broad interpretations by the courts may infringe on the legislative prerogative. Note Judge Nichols' concurring opinion in the court of claims decision in *Mitchell*:

> I add this concurrence largely because in Navajo Tribe v. United States, I expressed the view that *the court was again taking entirely too lightly the doctrine of strict construction of the consent to be sued*, that the dropping out of Indian moral claims from our jurisdiction if they accrued after August 13, 1946, was no small matter and could be decisive in our adjudication of many Indian suits, and referred to the instant *Mitchell* case, which I expected to be hearing soon, as an example where the change might make a difference. After full acquaintance with the briefs and listening to oral argument, I am convinced that the present claims are legal as distinguished from moral, in the sense of our jurisdictional constraints.

Mitchell v. United States, 591 F.2d 1300, 1306 (1979) (emphasis added) (citation omitted) (citing Navajo Tribe v. United States, 586 F.2d 192 (Ct. Cl. 1978)).

137. H.R. REP. No. 1466, *supra* note 1, at 10, *reprinted in* CONG. SERV., *supra* note 1, at 1356. The House Committee on Indian Affairs stated that the chief purpose of the bill that became the Indian Claims Commission Act was to solve the Indian claims problem, and it was for this reason that broad jurisdiction was vested in the Commission to hear "all possible claims." *Id.*, *reprinted in* CONG. SERV., *supra* note 1, at 1355.