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Michael Rov

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Indians May Sue for Breach of Federal Trust Relationship: *United States v. Mitchell*[1] — The legislative,[2] judicial,[3] and executive[4] branches of the federal government have long recognized the existence of a special relationship between Indians and the federal government.[5] The Supreme Court has characterized this relationship as resembling a guardianship,[6] as a guardianship,[7] as a fiduciary relationship,[8] and as a trust responsibility,[9] but the exact nature and scope of this "trust relationship" have eluded judicial definition.[10] Courts have invoked the trust relationship as a source of Congressional "plenary"

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[1] 463 U.S. 206 (1983).

[2] *See, e.g.*, General Allotment Act of 1887 § 5, 25 U.S.C. § 348 (1982); Indian Child Welfare Act of 1978 § 2, 25 U.S.C. § 1901 (1982).

[3] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 415 (1980); Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.).

[4] Statement of President Reagan on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983); President Nixon, Special Message to Congress on Indian Affairs, 213 PUB. PAPERS OF RICHARD NIXON 564, 566 (July 8, 1970); H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. 9-10 (1970); 116 CONG. REC. 23258 (1970). *See also* letter from Leo M. Krulitz, Solicitor, United States Department of Interior to James W. Moorman, Assistant United States Attorney General (Nov. 21, 1978), reprinted in Brief for Respondent, Appendix, United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter cited as Letter of Krulitz, Solicitor].

[5] The source of this special relationship, to which this casenote will generally refer as a "trust" relationship, is beyond the scope of this casenote. For a detailed treatment of the development of this relationship by the judiciary, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) [hereinafter cited as Chambers]. *See also* Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land Related Cases, 1887-1924*, 4 AM. IND. L. REV. 197 (1976); AMERICAN INDIAN POLICY REVIEW COMMISSION (TASK FORCE ONE), FINAL REPORT: REPORT ON TRUST RESPONSIBILITIES OF THE FEDERAL-INDIAN RELATIONSHIP (Committee Print 1976).

[6] *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.).

[7] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Kagama, 118 U.S. 375, 383-84 (1886). A guardianship is "the relation subsisting between guardian and ward." BLACK'S LAW DICTIONARY 636 (5th ed. 1979). A guardian is defined as:

> A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate, or both, of a child during its minority.

Id. at 635. A guardian resembles a trustee, but is not a trustee in the strict sense. 1 A. SCOTT, THE LAW OF TRUSTS § 7 (3d ed. 1965) [hereinafter cited as A. SCOTT].

[8] *See, e.g.*, United States v. Mason, 412 U.S. 391, 397 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

[9] *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). A trust is defined as: "A fiduciary relation with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person which arises as the result of a manifestation of an intention to create it." BLACK'S LAW DICTIONARY 1352 (5th ed. 1979).

[10] *See, e.g.*, Oneida Tribe v. United States, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964). The court stated:

> We do not discuss the question of whether, and to what extent, the United States had, in general, the technical status of guardian or fiduciary toward its Indian dependents . . . . It is unimportant, in this case, to characterize [the obligation owed the Indians by the federal government] precisely. Whether the responsibility be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the [government] would be the same.

Id. at 493-94 (citations omitted).

power over Indian affairs,[11] similar in scope to the police power exerted by state governments,[12] a power subject only " 'to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.' "[13]

Only recently, however, have the courts considered whether the trust relationship between Indians and the federal government creates legally enforceable fiduciary duties on the part of the United States. Prior to the United States Supreme Court decision in *United States v. Mitchell* (*Mitchell I*),[14] several lower court decisions had held the government liable in money damages for breach of its fiduciary duties to Indians or Indian tribes.[15] Construing statutes authorizing federal management of Indian property liberally in favor of the Indians because of the federal-Indian trust relationship, and borrowing from the common law of trusts, these courts imposed fiduciary duties on the federal government in excess of express statutory duties.[16] The courts assumed that breaches of these duties gave rise to a cause of action for money damages.[17] They based their jurisdiction to hear Indian breach of trust suits on federal statutes granting federal courts jurisdiction over certain classes of claims against the United States.[18] Further, the courts found the requisite waiver of federal sovereign immunity in these jurisdictional statutes.[19]

The Supreme Court's 1980 decision in *Mitchell I* placed the validity of these decisions in doubt. In *Mitchell I*, Indian owners of allotted forest land on the Quinault Reservation sued the government for mismanagement of their timber under the theory that such mismanagement was a breach of trust.[20] The government held the lands in trust for the Indians under an express trust created by the General Allotment Act of 1887,[21] and managed the land pursuant to various statutes.[22] In a decision limited to the question of whether the General Allotment Act authorized the award of money damages for mismanagement of allotted forest land,[23] the Court ruled against the plaintiffs, reversing the lower court decision.[24] Rejecting the plaintiffs' argument that the required waiver of

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[11] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 407-16 (1980) (power to dispose of Indian land as guardian); United States v. Kagama, 118 U.S. 375 (1886) (upholding Major Crimes Act as an exercise of Congressional guardianship power).

[12] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 219-20 (1982 ed.) [hereinafter cited as F. COHEN].

[13] United States v. Sioux Nation, 448 U.S. 371, 415 (1980) (quoting United States v. Creek Nation, 295 U.S. 102, 109-10 (1935)).

[14] 445 U.S. 535 (1980).

[15] *See* Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). *See also* Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483 (1966) (upholding court's jurisdiction to hear such claims under 28 U.S.C. §§ 1491, 1505). For a discussion of these cases, see *infra* text accompanying notes 110-53.

[16] *See infra* text accompanying notes 110-53.

[17] *See infra* text accompanying notes 110-53.

[18] *See* 28 U.S.C. §§ 1346(a)(2), 1491, 1505 (1982). These statutes grant federal courts jurisdiction to hear claims against the United States founded upon federal statutes. *See infra* text accompanying notes 61-81.

[19] *See infra* text accompanying notes 148-51.

[20] 445 U.S. 535, 537 (1980).

[21] Ch. 119, 24 Stat. 388, 389 (1887) (current version at 25 U.S.C. § 34 (1982)).

[22] *See* 25 U.S.C. § 162a (Supp. I 1983); 25 U.S.C. §§ 318a, 323-25, 349, 372, 406, 407, 413, 466 (1982).

[23] *Mitchell I*, 445 U.S. at 536.

[24] *Id.* at 546.

sovereign immunity was contained in one of the jurisdictional statutes involved,[25] the Court construed the Allotment Act strictly,[26] as required in cases in which a statute is alleged to waive sovereign immunity.[27] According to the Court, the Allotment Act created only a limited trust not extending to the management of allotted forest lands.[28] The Court held that the Act could not, therefore, give rise to a cause of action for mismanagement of such lands.[29] The Court remanded the case to the Court of Claims to determine whether the statutes authorizing the government to manage the land created such a cause of action.[30]

Fortunately for Indian plaintiffs, *Mitchell I* was not the last word on breach of trust litigation. In its second decision in the *United States v. Mitchell* litigation (*Mitchell II*),[31] the Court held the government liable in money damages for breaches of fiduciary duties.[32] The Court held that these duties were imposed by various statutes authorizing federal management of allotted timber.[33] The Court rejected its holding in *Mitchell I* that the jurisdictional statutes involved did not waive the government's immunity to suit.[34] It therefore construed the timber management statutes liberally in view of the existence of a general trust relationship between the federal government and Indians.[35] Furthermore, the Court announced that, as a general rule, the United States is presumed to be acting as a trustee in its management of Indian property.[36] The Court found that the statutes involved created a trust relationship, thereby imposing fiduciary duties on the federal government.[37] Borrowing from the private law of trusts, the Court held that this trust implicitly provided the injured Indian beneficiary with the right to sue the government for damages resulting from a breach of its fiduciary duties.[38]

Mitchell II is a landmark decision in Indian law. For the first time, the Supreme Court has held that the federal-Indian trust relationship, long recognized as a source of federal power to manage Indian property,[39] also imposes fiduciary duties on the federal trustee, breaches of which give rise to a cause of action for money damages.[40] The Court in *Mitchell II* conclusively rejected the strict analysis it had employed in *Mitchell I*,[41] and distinguished that case on the narrow grounds that the General Allotment Act did not authorize the management of allotted timber, while the statutes involved in *Mitchell II* did.[42] Given this reading of *Mitchell I*, that decision should prove no obstacle to Indian

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[25] *Id.* at 540.
[26] *Id.* at 542.
[27] *Id.* at 538.
[28] *Id.* at 542.
[29] *Id.* at 546.
[30] *Id.* at 546 & n.7.
[31] 463 U.S. 206 (1983).
[32] *Id.* at 226.
[33] *Id.* at 224-25.
[34] *Id.* at 216.
[35] *Id.* at 225.
[36] *Id.*
[37] *Id.* at 224-25.
[38] *Id.* at 226.
[39] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (declaring that in its role as guardian, Congress has "plenary" power to manage Indian property).
[40] 463 U.S. at 224-26.
[41] *Id.* at 216, 218-19.
[42] *Id.* at 224 (construing 25 U.S.C. §§ 406-407 (1982) (authorizing the sale of Indian timber by the Department of the Interior); 25 U.S.C. § 466 (1982) (authorizing regulations to implement the

plaintiffs suing the government for mismanagement of their property. Rather than basing their claim on statutes such as the Allotment Act, declaring their property to be held in trust by the government, plaintiffs should base their claim upon the specific statute authorizing the federal management of the resource involved. Following *Mitchell II*, the courts will generally find the government liable for proven breaches of fiduciary duties in managing Indian land and resources.[43]

This casenote will first discuss the sovereign immunity of the United States and the jurisdiction of the federal courts in suits brought by Indians and Indian tribes against the government,[44] before turning to several important breach of trust cases decided by the lower courts before *Mitchell I*.[45] Following a discussion of the decisions in *Mitchell I* and *Mitchell II*,[46] the casenote will analyze those decisions in more detail, concluding that the Court in *Mitchell II* was correct in holding that the United States is liable in money damages for mismanagement of Indian property.[47] Finally, the casenote will analyze the implications of *Mitchell II* on future breach of trust cases.[48]

I. Suing the United States

To sue the United States, plaintiffs must meet three requirements: they must file suit in a court with subject matter jurisdiction to hear the case; they must establish that the United States has consented to suit; and they must state a cause of action upon which the requested relief may be granted.[49] Although the Supreme Court has often distinguished between these requirements,[50] it has sometimes confused them,[51] as it did in *Mitchell I*.[52] To understand these requirements as they relate to the *Mitchell* litigation, this section of the casenote will discuss the government's sovereign immunity and the jurisdiction of the federal courts to hear claims against the government, culminating with a discussion of an important Supreme Court decision directly leading to the *Mitchell* litigation.

A. *The Tucker Act and the Indian Tucker Act*

It is a well established principle that the United States, as a sovereign, cannot be sued without its consent.[53] Before 1855, claimants against the government were forced to seek

harvesting of Indian timber on a sustained-yield basis); 25 U.S.C. § 318(a) (1982) (road building on Indian lands); 25 U.S.C. §§ 323-325 (1982) (grants of rights-of-way over Indian lands)).

[43] *Id.* at 225.

[44] *See infra* text accompanying notes 49-109.

[45] *See infra* text accompanying notes 110-55.

[46] *See infra* text accompanying notes 156-336.

[47] *See infra* text accompanying notes 337-400.

[48] *See infra* text accompanying notes 401-14.

[49] *Mitchell II*, 463 U.S. at 212, 216; *Mitchell I*, 445 U.S. at 538; Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 Cath. U.L. Rev. 635, 639 (1982) [hereinafter cited as Newton].

[50] *See, e.g., Mitchell II*, 463 U.S. at 216 (distinguishing between waiver of sovereign immunity and a cause of action); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) (distinguishing between subject matter jurisdiction and a cause of action).

[51] *See, e.g.*, Travis & Adams, *The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. Rev. 635 (1983); Orme, *Tucker Act Jurisdiction over Breach of Trust Claims*, 1979 B.Y.U. L. Rev. 855, 875-80 (confusion of all three requirements in United States v. Testan, 424 U.S. 392 (1976)) [hereinafter cited as Orme].

[52] *See infra* text accompanying notes 244-45 & 380-84.

[53] *Mitchell II*, 463 U.S. at 212; *Mitchell I*, 445 U.S. at 538; United States v. Sherwood, 312 U.S. 584, 586 (1941); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3654 (1976).

redress from Congress.[54] In that year, to relieve itself of the burden of deciding such claims, and to ensure their equitable adjudication, Congress established the Court of Claims.[55] The original Court of Claims Act empowered that court to hear claims against the United States based on any law of Congress, any regulation of an executive department, and any contract with the federal government.[56] Judgments of the court were not final; rather, the court transmitted to Congress its findings and the record of the testimony, along with an opinion and a draft bill to implement the opinion.[57] The draft bill was referred to the Committee on Claims, where decisions for the claimant often languished without review or were rejected outright.[58] Thus, the court as originally constituted was flawed in two ways. First, it did not alleviate Congress's burden in deciding such claims, as Congress itself had ultimate review of the court's decisions, and second, claimants had to convince both the court and Congress of the merits of their claims. These flaws were corrected by the Act of March 3, 1863,[59] which made the court's decisions final and appealable to the Supreme Court.[60]

In 1887, Congress revised the jurisdiction of the Court of Claims by passing the Tucker Act.[61] With two notable exceptions,[62] discussed later in the casenote,[63] the Supreme Court has consistently construed the Tucker Act as waiving the government's sovereign immunity to the classes of claims described in the Act.[64] The Act remains the basic jurisdictional grant of the Court of Claims,[65] and has been changed very little since its enactment. The Tucker Act vests the Court of Claims with jurisdiction to hear claims for money damages against the United States founded upon federal statutes or regula-

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[54] W. COWEN, P. NICHOLS, JR. & M. BENNET, THE UNITED STATES COURT OF CLAIMS — A HISTORY, Part II, 9-15 (1978) [hereinafter cited as W. COWEN].

[55] Act of February 24, 1855, ch. 122, 10 Stat. 612.

[56] *Id.*

[57] *Id.* § 7, 10 Stat. at 613.

[58] W. COWEN, *supra* note 54, at 18.

[59] Ch. 92, 12 Stat. 765 (1863).

[60] Ch. 92, § 5, 12 Stat. at 766. Section 14 of the Act, however, provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." *Id.*, 12 Stat. at 768. In Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), the Supreme Court dismissed an appeal from the Court of Claims for lack of jurisdiction. The Court reasoned that its opinion would be advisory in nature rather than judicial and hence unconstitutional, since it depended upon the action of the Secretary of the Treasury under section 14 for enforcement. *See* W. COWEN, *supra* note 54, at 24 & n.77. Congress repealed section 14 of the Act by the Act of March 17, 1886, ch. 19, § 1, 14 Stat. 9.

[61] Act of March 3, 1887, ch. 359, 24 Stat. 505 (now codified at 28 U.S.C. § 1491 (1982)).

[62] *Mitchell I*, 445 U.S. at 535; United States v. Testan, 424 U.S. 392 (1976).

[63] *See infra* text accompanying notes 82-105 & 240-61.

[64] *See, e.g., Mitchell II*, 463 U.S. at 212; Soriano v. United States, 352 U.S. 270, 273 (1957); United States v. Sherwood, 312 U.S. 584, 590 (1940); Schillinger v. United States, 155 U.S. 163, 166-67 (1894).

[65] The Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25, merged the Court of Claims and the Court of Customs and Patent Appeals into a new federal court of appeals, the United States Court of Appeals for the Federal Circuit. The Act also created a new article I trial forum, the United States Claims Court, which inherited the trial jurisdiction of the Court of Claims. Because the *Mitchell* litigation arose in the Court of Claims prior to the enactment of P.L. 97-164, the casenote will continue to discuss the jurisdiction of the Court of Claims, although such claims would now be heard by the Claims Court with appeal to the Court of Appeals for the Federal Circuit.

tions, the Constitution, or a contract with the government.[66] Federal district courts have concurrent jurisdiction of Tucker Act claims not exceeding $10,000.[67]

Under an 1863 amendment to the original Court of Claims Act,[68] the court's jurisdiction did not extend to claims arising from treaties with Indian tribes.[69] Although the amendment expressly excluded only tribal claims based upon treaties, it was widely accepted as a bar to all tribal suits against the government.[70] Consequently, until the Act was amended in 1946, a tribe had to obtain passage of a special jurisdictional act from Congress in order to sue the United States in the Court of Claims.[71]

In 1946, Congress enacted the Indian Claims Commission Act to eliminate the need for tribes to obtain special jurisdictional acts to sue the government.[72] The Act established the Indian Claims Commission, and vested it with jurisdiction to hear tribal claims against the federal government accruing before August 13, 1946.[73] The Court of Claims was granted appellate jurisdiction over Indian Claims Commission cases.[74] Section 24 of the

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[66] The Tucker Act now reads, in pertinent part:

> The United States Claims Court 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.

28 U.S.C. § 1491(a)(1) (1982).

[67] 28 U.S.C. § 1346(a)(2) (1982). Before passage of the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25, Tucker Act claims brought in the district courts were reviewable by the court of appeals for the circuit in which the district court was located. P.L. 97-164, § 127, 96 Stat. 37-38 added 28 U.S.C. § 1295(a)(2), which vests the Court of Appeals for the Federal Circuit with exclusive jurisdiction of appeals of Tucker Act cases brought in the district courts pursuant to 28 U.S.C. § 1346(a)(2).

[68] Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612.

[69] Act of March 3, 1863, ch. 92, § 9, 12 Stat. 767. In Eastern Extension Tel. Co. v. United States, 231 U.S. 326 (1913), the Court held that the Tucker Act's repealer clause, ch. 359, § 16, 24 Stat. 508 (1887) had not repealed this section.

[70] *See, e.g.*, Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 511 n.1 (1966) ("no suit could be brought unless Congress passed special legislation giving the Court of Claims jurisdiction.") [hereinafter cited as Wilkinson]. For an argument that the individual Indians could have brought treaty claims before the court, and that Indian tribes could have brought any claims other than treaty claims, see Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of* United States v. Mitchell, 26 SAN DIEGO L. REV. 447, 461 n.108 (1981) [hereinafter cited as Hughes].

[71] *See, e.g.*, Act of June 3, 1920, ch. 222, 41 Stat. 738, granting the Court of Claims jurisdiction to decide any claims by the Sioux Nation against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof." See also Newton, *supra* note 49, which states: "Some of [the cases decided under special jurisdictional acts] are gold mines of favorable language regarding the government's trust responsibilities . . . . Nevertheless they are doubtful precedents, for the jurisdictional acts have been regarded as creating claims in and of themselves in recent years." *Id.* at 636 n.10. *See generally* Wilkinson, *supra* note 65. For this reason, these cases will not be considered further in this casenote.

[72] The Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049.

[73] Ch. 959, § 2, 60 Stat. at 1050. The sections of this act that governed the Indian Claims Commission were omitted in the 1982 United States Code. *See* 25 U.S.C. §§ 70-70v-3 (1982) (codification notes).

[74] Ch. 959, § 20, 60 Stat. at 1054. As in the case of decisions under special jurisdictional acts, *see supra* note 71, many Indian Claims Commission cases contain favorable language regarding the government's trust responsibilities. *See, e.g.*, Oneida Tribe v. United States, 165 Ct. Cl. 487, *cert. denied*, 379 U.S. 946 (1964); Sioux Tribe v. United States, 146 F. Supp. 229 (Ct. Cl. 1956). These cases are of questionable precedential value, however, as they have sometimes been regarded as exercises

Act, sometimes called the "Indian Tucker Act," applied to post-1946 tribal claims.[75] This section was intended to give Indian tribes "the same right to sue in [the Court of Claims] as is granted to others under the Tucker Act."[76] As the Supreme Court had consistently interpreted the Tucker Act as waiving the government's sovereign immunity,[77] Congress presumably intended the Indian Tucker Act to waive sovereign immunity as well.[78] Furthermore, the Court of Claims had construed the Indian Tucker Act as a waiver of sovereign immunity, prior to the Supreme Court's decision in *Mitchell I*.[79] The language and legislative history of section 24 indicate that Congress intended breach of trust claims to be within the scope of jurisdiction granted by that section. Section 24 provided that the section was not to be construed as altering the federal-Indian trust relationship.[80] Congressman Jackson, House sponsor of the bill, stated: "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability."[81]

It has been noted that the Supreme Court had consistently construed the Tucker Act as granting the government's consent to suit for those classes of claims described in the Act.[82] In *United States v. Testan*,[83] however, the Court expressly rejected the argument that the Tucker Act waived sovereign immunity regarding any claim described in the Act.[84]

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of the Commission's jurisdiction to hear "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." The Indian Claims Commission Act, ch. 959, § 2, 60 Stat. at 1050. *See* Chambers, *supra* note 5, at 1214 n.8; Newton, *supra* note 49, at 636-37 n.10. Pre-1946 cases over which the Indian Claims Commission had original jurisdiction will not be considered further in this casenote.

[75] 28 U.S.C. § 1505 (1982) states:

> The United States Claims Court shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Claims Court if the claimant were not an Indian tribe, band or group.

[76] *Id.* Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483, 489-90 (1966). *See also Mitchell II*, 463 U.S. at 212 n.8; *Mitchell I*, 445 U.S. at 538-40; H.R. REP. No. 1466, 79th Cong., 1st Sess. (1945).

[77] *See, e.g.*, United States v. Sherwood, 312 U.S. 584, 590 (1940); Schillinger v. United States, 155 U.S. 163, 166-67 (1894).

[78] Brief of Amici Curiae Shoshone Tribe, at 17, *Mitchell II*, 463 U.S. 206 (1983). *See* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (when Congress adopts a new law incorporating sections of a prior law, Congress is presumed to adopt prior judicial interpretations of the prior law in the new one).

[79] *See, e.g.*, Navajo Tribe v. United States, 586 F.2d 192, 200 (Ct. Cl. 1978) (en banc), *cert. denied*, 441 U.S. 944 (1979); *id.* at 208 (Nichols, J., concurring and dissenting).

[80] Ch. 959, § 24, 60 Stat. 1055-56 (1946). This provision was omitted from 28 U.S.C. § 1505 in the 1970 printing of the United States Code.

[81] 92 CONG. REC. 5312 (1946). In a similar fashion the House Committee Report stated: "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 76, at 5. As an example of the type of case for which tribes needed access to the courts, the House Report cited Menominee Tribe v. United States, 117 Ct. Cl. 442 (1950), a breach of trust case brought under a special jurisdictional act. In *Menominee Tribe*, the plaintiffs obtained an award for federal mismanagement of Indian timber. H.R. REP. No. 1466, *supra* note 76, at 4.

[82] *See supra* note 64 and accompanying text.

[83] 424 U.S. 392 (1976).

[84] *Id.* at 400.

The Supreme Court's interpretation of the Tucker Act in *Testan* led to the government's motion to dismiss the *Mitchell* litigation, and proved nearly fatal to the plaintiffs in *Mitchell I*. Because of the effect of the *Testan* decision on the *Mitchell* litigation, the casenote will discuss *Testan* before turning to a discussion of breach of trust suits decided before *Mitchell I*.

B. *The Decision in* United States v. Testan

In *United States v. Testan*, two government attorneys claimed that they should have been classified at a higher position with a higher salary.[85] After exhausting their administrative remedies, the attorneys brought suit in the Court of Claims under the Classification Act[86] for reclassification to the higher position and an award of back pay.[87] The Court of Claims remanded the case to the Civil Service Commission for a determination of whether the plaintiffs were entitled to the position.[88] The court held that if the Commission found that the plaintiffs were entitled to the position, that finding would create a legal right to money damages.[89]

Holding that the claims were not within the jurisdictional grant of the Tucker Act, the Supreme Court unanimously reversed the Court of Claims decision.[90] Noting that Tucker Act jurisdiction is limited to claims against the government for money damages,[91] the Court stated that the Tucker Act is only a jurisdictional statute which does not create any substantive right enforceable against the United States for money damages.[92] According to the Court, the Court of Claims had recognized that the Act merely conferred jurisdiction on that court whenever a substantive right exists.[93] Therefore, the issue in *Testan*, the Court stated, was whether the Classification Act conferred a substantive right to money damages for wrongful civil service classifications.[94]

The Court began its analysis of the Classification Act issue by observing that the United States is immune from suit unless it has consented to be sued,[95] and that such consent must be unequivocally expressed.[96] Applying these principles to the Classification Act, the Court found no provision in the Act that expressly made the United States liable for pay lost through allegedly improper classifications.[97] The Court rejected the plaintiff's argument that the Tucker Act waived the governments' sovereign immunity to suits based upon a federal statute because the Classification Act did not explicitly confer a substantive right.[98]

Restating the propositions that the Tucker Act is merely jurisdictional and that the grant of a cause of action must be made with specificity, the Court reasoned that "the asserted entitlement to money damages depends upon whether any federal statute 'can

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[85] *Id.* at 393-94.
[86] 5 U.S.C. §§ 5101-5115 (1982).
[87] 499 F.2d 690 (Ct. Cl. 1974) (en banc) (per curiam), *rev'd*, 424 U.S. 392 (1976).
[88] *Id.* at 692.
[89] *Id.* at 691.
[90] 424 U.S. at 392.
[91] *Id.* at 397-98. Justice Blackmun authored the Court's opinion. *Id.* at 392.
[92] *Id.* at 398.
[93] *Id.* (citing Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967)).
[94] *Id.* at 398.
[95] *Id.* at 392.
[96] *Id.* at 399.
[97] *Id.*
[98] *Id.* at 400.

fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' "[99] The Court held that the Classification Act could not be interpreted this way.[100] According to the Court, nothing in either the Classification Act or its legislative history suggested that Congress intended to change the "established rule" that one is not entitled to the benefit of a position until appointed to it.[101] Furthermore, the Court stated, the plaintiffs did not have a right without a remedy as the Classification Act provided an administrative avenue of prospective relief.[102] Because the Classification Act did not create a substantive right to back pay,[103] the Court concluded that the claim was not within the Tucker Act jurisdiction of the Court of Claims[104] and ordered the suit dismissed.[105]

When the Supreme Court decided *Testan* in 1976, the *Mitchell* litigation, which had been filed in 1971, was already well underway. The Court of Claims had decided three preliminary issues in the case,[106] and there had been extensive discovery.[107] The government had not contested the jurisdiction of the court to hear the case, which was brought by the individual plaintiffs under the Tucker Act and by the tribal plaintiff under the Indian Tucker Act. Following the Supreme Court's new interpretation of the Tucker Act (and possibly, by analogy, the Indian Tucker Act) in *Testan* as granting the Court of Claims jurisdiction to hear a case only when another statute waives the government's sovereign immunity, the government moved to dismiss *Mitchell I* and other breach of federal-Indian trust suits[108] on jurisdictional grounds.[109] Before turning to *Mitchell I*, however, the casenote will discuss the major breach of trust suits decided prior to the Court's interpretation of the Tucker Act in *Testan*.

II. Enforcing the Trust Relationship before *Mitchell I*

In several cases decided prior to *Mitchell I*, lower courts exercising Tucker Act and Indian Tucker Act jurisdiction awarded money damages to Indian plaintiffs for federal

[99] *Id.* (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

[100] *Id.* at 402.

[101] *Id.*

[102] *Id.* at 403. The Court also noted that plaintiffs had a second possible avenue of prospective relief by way of mandamus, under 28 U.S.C. § 1361 (1982). *Id.* The *Testan* plaintiffs had initiated such an action. *Id.* at 401 n.5.

[103] The Court also rejected the argument that the Back Pay Act, 5 U.S.C. § 5596 (1982), created such a right. That act was held to apply only to wrongful reductions in pay. *Testan*, 424 U.S. at 405-07.

[104] 424 U.S. at 404.

[105] *Id.* at 407-08.

[106] In Capoeman v. United States, 440 F.2d 1002, 1008 (Ct. Cl. 1971) (en banc), the court held that the statute of limitations barred a claim of one of the individual plaintiffs. In Quinault Allottees Ass'n v. United States, 453 F.2d 1272, 1276 (Ct. Cl. 1972) (en banc), the court held that the allottees met the requirements to maintain a class action under its rules. Finally, in Quinault Allottees Ass'n v. United States, 485 F.2d 1391, 1401 (Ct. Cl. 1973) (en banc), *cert. denied*, 416 U.S. 961 (1974), the court held that the United States was entitled to deduct a reasonable management fee from the sale of the allotted timber.

[107] Brief for Respondents at 8, *Mitchell I*, 445 U.S. 535 (1980).

[108] Moose v. United States, 674 F.2d 1277 (9th Cir. 1982); Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[109] The motion to dismiss for lack of subject matter jurisdiction was timely although brought late in the proceedings, because such a motion may be raised any time prior to a decision on the merits. *Mitchell I*, 591 F.2d 1300, 1301 n.6 (Ct. Cl. 1979) (construing Ct. Cl. R. 38(h)). *See also* J. Moore & J. Lucas, 2 Moore's Federal Practice ¶ 4.02[3] (2d ed. 1985) ("[T]he notion that lack of federal subject-matter jurisdiction may be raised so long as the case is pending . . . is firmly established.").

government breaches of fiduciary duties.[110] These courts readily accepted the general existence of a federal-Indian trust relationship.[111] Construing federal statutes[112] liberally in favor of the Indians in view of this relationship and borrowing from the common law of private trusts, these courts imposed common-law fiduciary duties on the federal government in excess of express statutory duties.[113] Furthermore, until the Supreme Court decision in *United States v. Testan*,[114] the government failed to mount a successful challenge to the courts' jurisdiction to hear such cases.[115]

In *Manchester Band of Pomo Indians v. United States*, employing an analysis that became a model for later decisions, a federal district court held the government liable for mismanagement of tribal trust funds.[116] The statutes governing trust funds authorized the government to invest those funds in treasury accounts bearing four percent interest,[117] or in other investments.[118] Construing these statutes liberally to the benefit of the Indians in view of the "solemn trust obligation" of the United States to the Indian tribes,[119] the court determined that they required a minimum rate of return of four percent on tribal trust funds, and authorized higher-yielding investments.[120] Next, reasoning that the conduct of the government as a trustee was measured by the same standards applicable to private trustees,[121] the court held the government liable for breach of its duty to use reasonable care and skill to make the trust property productive.[122] The court held that the government breached this duty when it deposited funds in the four percent treasury account when other higher-yielding investments were available.[123] The Court of Claims followed *Manchester Band* two years later in an opinion directing the trial judge to apply the common law of private trusts in measuring the government's liability.[124]

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[110] *See* Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). Indians were also successful in obtaining declaratory and injunctive relief for breach of the federal trust. *See, e.g.*, Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973). Equitable enforcement of the trust relationship is beyond the scope of this casenote. For a detailed discussion, see generally Chambers, *supra* note 5.

[111] *See Coast Indian Community*, 550 F.2d at 652; *Cheyenne-Arapaho*, 512 F.2d at 1392; *Mason*, 461 F.2d at 1372-73; *Manchester Band*, 363 F. Supp. at 1243.

[112] 25 U.S.C. §§ 161a, 162a, 323, 465 (1982), Osage Allotment Act of 1906, ch. 3572, 34 Stat. 539 (often amended).

[113] *See Coast Indian Community*, 550 F.2d at 653; *Cheyenne-Arapaho*, 512 F.2d at 1394; *Mason*, 461 F.2d at 1372; *Manchester Band*, 363 F. Supp. at 1245.

[114] 424 U.S. 392 (1976). *See supra* text accompanying notes 82-109.

[115] *See infra* text accompanying notes 142-51.

[116] 363 F. Supp. 1238, 1247 (N.D. Cal. 1973).

[117] 25 U.S.C. § 161a (Supp. I 1983).

[118] 25 U.S.C. § 162a (1982) (federally insured bank accounts, federal bonds and federally insured bonds).

[119] *Manchester Band*, 363 F. Supp. at 1245. As a general rule, statutes enacted to benefit Indians are liberally construed in favor of the Indians and doubtful expressions are resolved in the Indians' favor. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

[120] *Manchester Band*, 363 F. Supp. at 1244.

[121] *Id.* at 1245 (citing United States v. Mason, 412 U.S. 391, 398 (1973)).

[122] *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 181 (1959)).

[123] *Id.* at 1247.

[124] Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975). The Court of

The Court of Claims again employed the *Manchester Band* analysis in *Coast Indian Community v. United States*, in which it held the government liable for breach of trust in granting a right-of-way worth $57,000 over Indian land for only $2,500.[125] The court premised the government's fiduciary duties on the trust status of the land[126] and a statute authorizing the Secretary of the Interior to convey rights-of-way over Indian lands.[127] Construing these statutes "in light of . . . the government's role as a fiduciary regarding Indian property,"[128] and applying common-law standards applicable to private trustees,[129] the court held the government liable for gross negligence in under-appraising the value of the right-of-way.[130]

One breach of trust suit decided prior to *Mitchell I* reached the Supreme Court. In *Mason v. United States*, administrators of an Osage Indian's estate held in trust under the Osage Allotment Act[131] sued the United States for breach of its fiduciary duty in paying a state tax on the estate.[132] The government had paid the tax based on *West v. Oklahoma Tax Commission*, a 1948 Supreme Court opinion upholding the tax as applied to Osage trust property.[133] The Court of Claims agreed with the plaintiffs that the *West* decision had been seriously eroded by subsequent Supreme Court opinions[134] and was no longer controlling.[135] Applying the common law of private trusts in measuring the government's fiduciary duties,[136] the court held the government liable for breach of its fiduciary duties in failing to seek a reconsideration of *West*.[137] The Supreme Court reversed.[138] Declaring that *West* had not been "substantially weakened" by subsequent opinions,[139] the Court held that "the United States reliance on *West* was reasonable in this situation."[140] Significantly, while the plaintiffs in *Mason* lost on the merits, the Supreme Court applied

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Claims has held, however, that interest cannot be awarded on an accounting claim brought by an Indian tribe against the government absent a contract, treaty or statute authorizing the payment of interest. United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1316 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976). *See* Navajo Tribe v. United States, 624 F.2d 981, 994-95 (Ct. Cl. 1980) (discussing *Mescalero Apache* and *Cheyenne-Arapaho*). The Court of Claims has also held that the United States cannot be held liable for failure to reinvest the interest accrued on tribal trust funds in interest bearing accounts. *Navajo Tribe*, 624 F.2d at 995; *Mescalero Apache*, 518 F.2d at 1331.

[125] 550 F.2d 639, 654 (Ct. Cl. 1977).

[126] The land was held in trust under 25 U.S.C. § 465 (1982). *Coast Indian Community*, 550 F.2d at 652.

[127] 25 U.S.C. § 323 (1982).

[128] *Coast Indian Community*, 550 F.2d at 652.

[129] *Id.* at 653 & n.43 (citing 2 A. SCOTT, TRUSTS §§ 174, 176 (3d ed. 1967)).

[130] *Coast Indian Community*, 550 F.2d at 653-54. Curiously, the court never referred to a provision in Title 25 providing: "No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just." 25 U.S.C. § 325 (1982).

[131] Ch. 3572, 34 Stat. 539 (1906) (often amended).

[132] Mason v. United States, 461 F.2d 1364, 1366 (Ct. Cl. 1972), *rev'd*, 412 U.S. 391 (1973).

[133] 334 U.S. 717 (1948).

[134] *Mason*, 461 F.2d at 1369-72.

[135] *Id.* at 1374-78.

[136] *Id.* at 1372-73 & n.9 (citing various sections of G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES (2d ed. 1959) [hereinafter cited as G. BOGERT & G. BOGERT] and 4 A. SCOTT, *supra* note 7).

[137] *Mason*, 461 F.2d at 1372-74.

[138] Mason v. United States, 412 U.S. 391, 392 (1973).

[139] *Id.* at 395-96.

[140] *Id.* at 400.

common-law fiduciary principles in determining the government's fiduciary duties to Indians.[141]

Although many pre-*Mitchell I* decisions failed to address the jurisdiction of the court to hear breach of trust claims against the government,[142] the Court of Claims stated that it had jurisdiction to hear such claims in two cases.[143] In *Klamath and Modoc Tribes v. United States*, the plaintiffs brought a claim for money damages and a claim for a general accounting.[144] The court granted a motion by the government to dismiss the accounting claim, holding that it lacked jurisdiction under the Indian Tucker Act to compel an accounting, which is an equitable action.[145] Noting that its jurisdiction under the Tucker Act did not include equitable actions,[146] the Court reasoned that the Indian Tucker Act merely gives Indian tribes the same rights to sue in the Court of Claims as are granted to individuals under the Tucker Act.[147] The court went on to state, however, that it did have jurisdiction under the Tucker Act and the Indian Tucker Act to award money damages for government mismanagement of Indian funds and property.[148]

The government contested both the jurisdiction of the court and the consent of the government to be sued in the Court of Claims decision in *Mason*.[149] The court rejected both arguments, reasoning that the claim was within its jurisdiction under the Tucker Act, as it was a claim for money damages founded upon a federal statute.[150] The government did not raise the jurisdiction or sovereign immunity issues before the Supreme Court, and the Court merely stated in a footnote that jurisdiction was based on the Tucker Act.[151]

The *Klamath-Manchester Band-Mason* line of cases evinced a judicial inclination to view the federal-Indian trust relationship as a legally enforceable private trust.[152] In the few instances in which the government asserted lack of jurisdiction or sovereign immunity as a defense to Indian breach of fiduciary duty actions, the courts easily found the requisite

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[141] *Id.* at 398.

[142] *See, e.g.*, Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). In *Manchester Band*, the court considered the limited question of whether the district court's concurrent Tucker Act jurisdiction under 28 U.S.C. § 1346(a)(2) included tribal claims under 28 U.S.C. § 1505. The court held that it did. *Manchester Band*, 363 F. Supp. at 1242.

[143] Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483 (1966).

[144] 174 Ct. Cl. at 485.

[145] *Id.* at 490.

[146] *Id.* at 487-88.

[147] *Id.* at 489-90.

[148] *Id.* at 491.

[149] 461 F.2d at 1374; Brief for the United States, Joint Appendix at 8, United States v. Mason, 412 U.S. 391 (1973) (reprinting United States' Answer to Petition, Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972)).

[150] *Mason*, 461 F.2d at 1374.

[151] 412 U.S. at 394 n.5.

[152] A 1975 study of equitable endorsement of the trust relationship concludes: "It is premature . . . to announce the existence of a cause of action for breach of trust . . . . The trend, however, seems to be a sound one . . . ." Chambers, *supra* note 5, at 1247. (The author, then Assistant Solicitor of the Department of the Interior, was writing in his private capacity.) In 1978, the Solicitor of the Department of the Interior concluded: "There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes." Letter of Krulitz, Solicitor, *supra* note 4, at 2a. The Solicitor further concluded that the government's fiduciary duties toward Indians were to be measured by the common law of private trusts. *Id.* at 14a.

jurisdictional grant and waiver of sovereign immunity in the Tucker Act or the Indian Tucker Act.[153] The Supreme Court's analysis of the Tucker Act in a non-Indian setting in *United States v. Testan*,[154] and the Court's subsequent application of *Testan* to an Indian breach of trust suit in *Mitchell I*, however, cast doubt on the validity of these decisions. *Testan* set up jurisdictional and sovereign immunity roadblocks to Tucker Act suits[155] which proved nearly fatal to the plaintiffs' case in *Mitchell I*. In the following section, the case note will discuss the decision in *Mitchell I* and its implications for Indian trust cases.

III. *MITCHELL I*

In *Mitchell I*, individual allottees of the Quinault Indian Reservation and the Quinault Tribe sued the United States for mismanagement of allotted forest land the government expressly held "in trust" under the General Allotment Act.[156] The Court of Claims denied the government's motion to dismiss for lack of jurisdiction,[157] concluding that "the congressional declaration of trust in the General Allotment Act 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' because of a proven breach of trust."[158] The Supreme Court reversed, holding that the General Allotment Act created only a limited trust relationship between the United States and the allottee that did not impose any duty upon the government to manage timber resources.[159] The Court remanded the case to the Court of Claims for a consideration of other grounds of liability argued by the plaintiffs but not reached by the Court of Claims.[160]

A. *Historical Background of the* Mitchell *Litigation*

In the 1850's, the United States sought to remove Indian tribes from large areas of the Pacific Northwest to facilitate the settlement of non-Indians.[161] Under this policy, the United States entered into the Treaty of Olympia with the Quinault and Quileute tribes.[162] The United States Senate ratified the treaty in 1859.[163] Under the treaty, the tribes surrendered a vast tract of land in exchange for the government's promise to set aside a reservation for the Indians.[164] In fulfillment of this promise, President Grant set

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[153] *See supra* text accompanying notes 142-51.

[154] 424 U.S. 392 (1976).

[155] *See supra* notes 82-109 and accompanying text.

[156] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, codified at 25 U.S.C. §§ 331-34, 339, 342, 348, 349, 354, 381 (1982).

[157] *Mitchell I*, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980).

[158] *Id.* at 1302 (quoting *Testan*, 424 U.S. at 400, 402 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

[159] 445 U.S. at 543.

[160] *Id.* at 546 & n.7. The other grounds of liability presented by plaintiffs included the assertions that other statutes render the United States liable in money damages for timber mismanagement, that the claim was one for money improperly exacted or retained, that the special federal-Indian relationship makes the government liable for such mismanagement, and that the claims were cognizable under the Tucker Act as contract claims. *Id.* at 546 n.7.

[161] *Mitchell II*, 463 U.S. at 207.

[162] Treaty of Olympia, Jan. 25, 1856, 12 Stat. 971.

[163] *Id.*

[164] *Id.*

aside approximately 220,000 acres of forest land to be held for the use of Quinault, Quileute, and other northwestern tribes.[165] The land set aside, known as the Quinault Reservation, was heavily forested.[166] Only two percent of the land was suitable for agriculture or for homesites.[167]

In 1905, Congress began to allot land on the Quinault Reservation to individual Indians pursuant to the General Allotment Act of 1887.[168] The purpose of the Act was to break up tribal landholdings and to give each individual Indian his own plot of land.[169] The "friends of the Indian" believed that private ownership of land would serve to "substitute white civilization for [Indian] culture."[170] They also believed that private ownership secured by a federal patent would be more secure than tribal possession.[171] In addition, the allotment of Indian land, it was thought, would end the dependency of Indians on the government, saving the government a great expense.[172] Finally, allotment was aimed at opening up "surplus" Indian lands to white settlement.[173]

The General Allotment Act provided for the allotment of tribal land to individual Indians[174] and authorized the President to grant such allotments whenever reservation land was found suitable for agricultural or grazing purposes.[175] Allotments were not to exceed eighty acres of agricultural land or 160 acres of grazing land.[176] The Act did not refer to forest land.[177] Section 5 of the Act directed the Secretary of the Interior to issue patents declaring that the United States would hold the allotted land "in trust for the sole use and benefit of the Indian" allottee for a period of twenty-five years.[178] At the end of the trust period, the allottee was to receive full fee simple title to the allotment.[179] Congress has since extended the trust period indefinitely.[180]

By 1911, the government had issued over 750 allotments on the Quinault Reservation, most of them to Indians who were not members of the signatory tribes to the Treaty of Olympia.[181] In that year, Congress passed legislation to clarify the President's authority

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[165] Executive Order of Nov. 4, 1873, 1 C. KAPPLER, INDIAN AFFAIRS 923 (2d ed. 1904).

[166] *Mitchell II*, 463 U.S. at 208.

[167] Quinault Allottees Ass'n v. United States, 485 F.2d 1391, 1394 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974).

[168] *Mitchell II*, 463 U.S. at 208; Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, codified at 25 U.S.C. §§ 331-34, 339, 342, 348, 349, 354, 381 (1982).

[169] *History of the Allotment Policy, hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, 428-89 (1934) (statement of D. Otis), *reprinted in* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 69 (1979).

[170] *Id.*

[171] *Id.* at 70.

[172] *Id.*

[173] *Id.* at 71.

[174] 25 U.S.C. § 331 (1982).

[175] *Id.*

[176] *Id.*

[177] *Quinault Allottees Ass'n*, 485 F.2d at 1394.

[178] 24 Stat. 389, 25 U.S.C. § 348 (1982).

[179] *Id.*

[180] Act of June 21, 1906, ch. 3504, 34 Stat. 316, 325, authorized the President to extend the trust period indefinitely. The President has exercised this authority several times. 25 U.S.C. § 348 (1982) (Extension of Trust Periods). Congress indefinitely extended and continued the trust period through the Indian Reorganization Act, Act of June 18, 1934, ch. 576, § 2, 48 Stat. 984, 25 U.S.C. § 462 (1982).

[181] *Quinault Allottees Ass'n*, 485 F.2d at 1394.

to issue allotments on the Quinault Reservation to those Indians.[182] In 1912, the Department of the Interior discontinued allotting Quinault Reservation land because the land was more valuable for its timber than for agricultural or grazing purposes.[183] The Department maintained that only agricultural or grazing land could be allotted.[184] Subsequent to the Supreme Court's 1924 decision in *United States v. Payne*,[185] in which the Court held that although the Allotment Act referred only to grazing and agricultural land, it did not preclude the allotment of forest land on the Quinault Reservation, the Department resumed allotment of Quinault Reservation land.[186] By 1935, the entire reservation had been divided into 2,340 trust allotments, most of which were eighty acres of dense forest.[187] About two-thirds of this land is still in trust status, the remainder having passed to non-Indians by inheritance or sale.[188] A small portion of land on the reservation is currently held in trust for the Quinault Tribe.[189]

The heavily-forested lands of the Quinault Reservation did not fit well into the General Allotment Act scheme, which contemplated that the allottee would use the land for agriculture or grazing.[190] Although such lands could be allotted,[191] the allottee could not cut the timber for sale because it was a part of the realty subject to the trust.[192] The only federal statute authorizing the sale of Indian timber expressly forbade the sale of live timber.[193] Consequently, allotments of forest land were of little value to the allottees. To remedy this situation, the Department of the Interior requested Congress to enact legislation authorizing the sale of allotted timber.[194] In response to the request, Congress

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[182] Quinault Allotment Act, ch. 246, 36 Stat. 1345 (1911). This act was construed in Halbert v. United States, 283 U.S. 753 (1931), in which the Court held that personal residence on the reservation was not a prerequisite to the issuance of an allotment. *Id.* at 762.

[183] *Quinault Allottees Ass'n*, 485 F.2d at 1395.

[184] *Id.* The Act referred to agricultural or grazing land, but not to forest land. *See supra* notes 176-77 and accompanying text.

[185] 264 U.S. 446 (1924).

[186] *Id.* at 449.

[187] *Mitchell II*, 463 U.S. at 209.

[188] Brief for Respondents at 4, *Mitchell II*, 463 U.S. 206 (1983).

[189] *Id.* at 4 n.5.

[190] *See supra* text accompanying notes 176-77.

[191] United States v. Payne, 264 U.S. 446 (1924). *See supra* text accompanying notes 185-86.

[192] Starr v. Campbell, 208 U.S. 527, 534 (1908) (allotments on Chippewa Reservation). *Cf.* Squire v. Capoeman, 351 U.S. 1 (1956) (holding income from the sale of allotted timber on the Quinault Reservation exempt from federal income tax due to the trust status of the timber under the General Allotment Act); United States v. Eastman, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941) (upholding federal regulation of timber on Quinault allotments). The *Eastman* court stated: "Since the [Quinault allotments] are chiefly valuable for their timber it is settled law that the restraint upon alienation, effected by the trust of the trust patents, extends to the timber as well as to the land." *Id.* at 424 (citing *Starr*, 208 U.S. 527). In *Starr*, the Court distinguished its decision in United States v. Paine Lumber Co., 206 U.S. 467 (1907), in which the Court had held that allottees could sell timber on their land. *Id.* at 472-74. The *Starr* Court limited the holding of *Paine Lumber* to allowing the sale of timber cleared for the purpose of cultivation, 208 U.S. at 534, although *Paine Lumber* had held explicitly that the allottee could sell timber cleared for any purpose, including sale. 206 U.S. at 473-74.

[193] Act of Feb. 16, 1889, ch. 172, 25 Stat. 673; H.R. REP. No. 1135, 61st Cong., 2d Sess. 3 (1910) (reprinting letter of the Secretary of the Interior citing this statute as the only general law authorizing the sale of Indian timber). *See also* 45 CONG. REC. 6086 (1910).

[194] H.R. REP. No. 1135, 61st Cong., 2d Sess. 3 (1910) (letter of the Secretary of the Interior). The Secretary's letter stated:

passed the Act of June 25, 1910.[195] The 1910 Act authorized the commercial sale of standing timber on allotted lands, subject to the consent of the Secretary of the Interior, with proceeds paid to the allottees or used for their benefit by the Interior Department.[196] The Act also provided for the sale of unallotted timber by the Interior Department, with proceeds to be used for the benefit of the tribe.[197]

Although the 1910 Act speaks only in terms of the *sale* of allotted timber, the Interior Department interpreted the Act as imposing broad management responsibilities "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."[198] In 1934, Congress expressly directed that the Interior Department manage Indian timber resources including, presumably, allotted timber "on the principle of sustained-yield management."[199] Congress amended the 1910 Act in 1964 to direct the Interior Department, in dealing with allotted timber, to consider "the needs and best interests of the Indian owner and his heirs."[200] The regulations of the Interior Department regarding Indian timber are designed to assure that the Indians receive "the benefit of whatever . . . profit [the forest] is capable of yielding."[201]

Under the 1910 Act and regulations implementing the Act, the responsibilities of the federal government in managing Indian timber are "comprehensive."[202] The Interior Department " 'exercises literally daily supervision over the harvesting and management of tribal timber.' "[203] Conversely, the allottees exercise almost no control over timber management; the Indians have nothing to do with the entire operation, except signing the initial power of attorney, and opening the envelope containing a check five or ten years later.[204] The Interior Department also exercises comprehensive control over grants of rights-of-way and road construction on Indian lands held in trust.[205] The Department may grant rights-of-way across trust land for any purpose,[206] provided that it obtains the consent of the tribal or individual owner[207] and that the Indian owners receive just

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> It is believed by this department that there should be a general law applicable to all Indian lands, because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.

Id.

[195] Act of June 25, 1910, ch. 431, 36 Stat. 855 [hereinafter cited as the 1910 Act].

[196] Ch. 431, § 8, 36 Stat. 857, codified as amended at 25 U.S.C. § 406 (1982).

[197] Ch. 431, § 7, 36 Stat. 857, codified as amended at 25 U.S.C. § 407 (1982).

[198] *Mitchell II*, 463 U.S. at 220 (quoting OFFICE OF INDIAN AFFAIRS, REGULATIONS AND INSTRUCTIONS FOR OFFICERS IN CHARGE OF FORESTS ON INDIAN RESERVATION 4 (1911) [hereinafter cited as 1911 REGULATIONS]).

[199] Indian Reorganization Act of 1934, ch. 576, § 6, 48 Stat. 984, 986, 25 U.S.C. 466 (1982).

[200] Act of April 30, 1964, 78 Stat. 186, 25 U.S.C. § 406(a) (1982).

[201] 25 C.F.R. § 163.3(d) (1985).

[202] *Mitchell II*, 463 U.S. at 209 (quoting White Mountain Apache v. Bracker, 448 U.S. 136, 145 (1980)).

[203] *Id.* (quoting *White Mountain Apache*, 448 U.S. at 147).

[204] Brief for Respondents at 5, *Mitchell I*, 445 U.S. 535 (1980).

[205] Act of Feb. 5, 1948, 62 Stat. 17, ch. 45, 25 U.S.C. §§ 323-325 (1982) (rights-of-way); Act of May 26, 1928, 45 Stat. 750, ch. 756, 25 U.S.C. § 318 (1982) (road building). The Interior Department has adopted detailed regulations concerning rights-of-way over Indian lands. *See* C.F.R. Part 169 (1985).

[206] 25 U.S.C. § 323 (1982).

[207] Under certain circumstances the consent of the individual land-owner is not needed. 25 U.S.C. § 324 (1982).

compensation.[208] In 1920, the government began managing sales of allotted and tribal timber on the Quinault Reservation.[209] The government has entered into fourteen long-term, large-volume contracts covering many allotments.[210] Since that date one of these contracts was ongoing, and one was completed, during the *Mitchell* litigation.[211]

In short, allotted and tribal lands on the Quinault Reservation are expressly held in trust for the allottees and for the tribe by the federal government.[212] The government exercises comprehensive management of the land through statutes authorizing federal management of Indian timber and rights-of-way and road building over Indian lands.[213] The benefited Indians themselves have little to do with the management of the land.[214]

B. *Origins of the* Mitchell *Litigation*

The *Mitchell* litigation began in 1971 when Quinault Reservation allottees, the Quinault Tribe,[215] and the Quinault Allottees Association[216] filed suit against the United States in the Court of Claims seeking money damages for federal mismanagement of allotted lands.[217] The plaintiffs claimed that the government breached fiduciary duties imposed by the General Allotment Act and other statutes in mismanaging allotted forest land.[218] Specifically, the plaintiffs raised five major claims. First, they claimed that the government failed to obtain fair market value for the timber.[219] Second, the plaintiffs claimed that the government failed to manage timber on a sustained-yield basis.[220] Third, they claimed that the government failed to build roads necessary for proper timber management.[221] Further, they asserted that the government paid no interest or insufficient interest on Indian funds held by the government.[222] Finally, they asserted that the government exacted excessive timber management fees and improper road management fees from the allottees.[223]

The plaintiffs based jurisdiction on the Tucker Act and the Indian Tucker Act. From the filing of the suit in 1971 to 1977, the Court of Claims decided three preliminary issues[224] and conducted the first phase of trial on the merits[225] without any challenge by

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[208] 25 U.S.C. § 325 (1982).

[209] Brief for Respondents at 4, *Mitchell I*, 445 U.S. 535 (1980).

[210] *Id.* at 4-5.

[211] *Id.* at 5.

[212] *See supra* text accompanying notes 178-80, 189.

[213] *See supra* text accompanying notes 194-210.

[214] *See supra* text accompanying note 204.

[215] The Quinault Tribe now holds some portion of the allotted lands. Brief for Respondents at 2 n.2, *Mitchell I*, 445 U.S. 535 (1980).

[216] The Quinault Allottees Association is an unincorporated association dedicated to protecting and promoting the interests of Quinault Reservation allottees. *Mitchell I*, 591 F.2d 1300, 1300 n.2 (Ct. Cl. 1979).

[217] *Id.* at 1300.

[218] *Mitchell II*, 463 U.S. at 210-11. The principal statutes were: 25 U.S.C. §§ 406-407 (1982) (timber sales); 25 U.S.C. § 466 (promulgation of regulations requiring sustained-yield management); 25 U.S.C. § 318a (1982) (road building); and 25 U.S.C. §§ 323-325 (1982) (rights-of-way). For a discussion of these statutes, see *supra* text accompanying notes 194-208.

[219] *Mitchell II*, 463 U.S. at 210.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *See supra* note 106.

[225] Brief for Respondents at 8, *Mitchell I*, 445 U.S. 535 (1980).

the government to the Court's jurisdiction to decide the case. In 1977, however, shortly after the Supreme Court's new interpretation of the Tucker Act in *Testan*, the government moved to dismiss the case for lack of subject-matter jurisdiction.[226]

C. *The Court of Claims Decision*

The Court of Claims, sitting en banc, unanimously denied the government's motion to dismiss[227] holding that it had jurisdiction of the plaintiff's breach of trust claims under the Tucker Act and the Indian Tucker Act.[228] First, the court noted that the General Allotment Act expressly declares that the United States holds allotted land "in trust for the sole use and benefit" of the allottee.[229] Reading the words of the Allotment Act plainly and in light of the administration of the Act by the Interior Department, the court viewed the Act as imposing duties upon the government to manage and conserve the trust property.[230] Next, the court held that the General Allotment Act gives rise to a cause of action for money damages since it " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' "[231] as required by *Testan*.[232] The court reasoned that the trust language in the statute implied the right to sue for damages for breach of trust,[233] especially in view of the inadequacy of prospective equitable relief.[234] The court noted that it had consistently upheld its jurisdiction in breach of trust suits[235] and that Congress, in enacting the Indian Tucker Act, believed that Indian trust legislation such as the General Allotment Act gave rise to a cause of action for money damages for breach of trust.[236]

Having found a right to sue for money damages in the General Allotment Act, the court found it unnecessary to decide whether other federal statutes invoked by the

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[226] *Mitchell I*, 591 F.2d 1300, 1301 (Ct. Cl. 1979), *rev'd*, 445 U.S. 535 (1980). The motion was timely although brought after a partial trial on the merits because lack of subject matter jurisdiction may be raised any time prior to a decision on the merits. *Id.* at 1301 n.6.

[227] *Id.* at 1301. Judge Nichols wrote a concurring opinion, but joined in the court's opinion except as noted. 591 F.2d at 1306 (Nichols, J., concurring). See *infra* note 234 for a discussion of Judge Nichols' opinion.

[228] *Id.* at 1303. The Tucker Act, 28 U.S.C. § 1491(a)(1) (1982) grants the court jurisdiction to hear claims against the United States "founded . . . upon . . . any Act of Congress . . . ." The Indian Tucker Act, 28 U.S.C. § 1505 (1982), grants the court jurisdiction to hear tribal claims against the United States "arising under the . . . laws . . . of the United States . . . ."

[229] 591 F.2d at 1302 (quoting 25 U.S.C. § 348 (1982)).

[230] *Id.* at 1302 n.11. The court expressly rejected the government's argument that the sole function of the General Allotment Act trust is to prevent improvident alienation of the allotment by the allottee. *Id.*

[231] *Id.* at 1302 (quoting *Testan*, 424 U.S. at 400, 402 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

[232] 424 U.S. 392 (1976).

[233] *Mitchell I*, 591 F.2d at 1302-03.

[234] *Id.* at 1302-03 & n.13. In a separate opinion, Judge Nichols stated that the lack of another remedy should not be a factor in deciding whether the United States has consented to be sued. *Id.* at 1307-08 (Nichols, J., concurring).

[235] *Id.* at 1303 (citing *Mason*, 461 F.2d at 1374; *Klamath*, 174 Ct. Cl. at 491-92). *See supra* text accompanying notes 142-51. The opinion also noted that it had referred to its jurisdiction to hear such claims in other breach of trust suits. *See* 591 F.2d at 1303.

[236] 591 F.2d at 1304. The court noted that the views of the 1946 Congress which enacted the Indian Tucker Act are not definitive as to the scope of the General Allotment Act of 1887, but found it "helpful to have the explicit and authoritative understanding of the 1946 Congress which went deeply into the problem of redressing wrongs against Indians and provided judicial and quasi-judicial remedies." *Id.* at 1304 n.17.

plaintiffs created a similar right.[237] The court stated, however, that it would take account of those statutes in determining the liability of the government for breach of trust created by the General Allotment Act.[238] The government petitioned for writ of certiorari, which the Supreme Court granted.[239]

D. *The Supreme Court Decision*

Reviewing the decision that the United States was liable in money damages for mismanagement of allotted timber under the General Allotment Act, the Supreme Court reversed the Court of Claims by a vote of 5-3, in an opinion written by Justice Marshall.[240] The Court held that the General Allotment Act created only a limited trust relationship between the United States and the allottee not extending to the management of timber resources.[241] According to the Court, the Act could not, therefore, give rise to a cause of action for federal mismanagement of allotted timber.[242] The Court remanded the case to the Court of Claims to consider whether the timber statutes give rise to such a cause of action, an issue that court had not reached.[243]

The Court's opinion began by restating the principles announced in *Testan*:

> The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." . . . The Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." . . . The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.[244]

The Court rejected the Indians's argument that the Indian Tucker Act contained the consent to suit lacking in the Tucker Act, reasoning that Congress intended the Indian Tucker Act to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act.[245]

Turning to an analysis of the General Allotment Act, the Court construed the Act strictly as a waiver of sovereign immunity and found that "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."[246] The Court therefore concluded that the General

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[237] *Id.* at 1304-05.

[238] *Id.* at 1305. In Part III of its opinion, the court distinguished a number of cases cited by the government for the proposition that the court had no jurisdiction to hear a breach of trust suit. In some of those cases, the court reasoned, plaintiffs had failed to cite a statute, treaty, agreement, regulation or executive order which could be read as establishing a trust relationship. In the remaining cases, plaintiffs had failed to cite a statute empowering the court to grant the relief requested. *Id.* at 1305-06.

[239] 445 U.S. 535 (1980).

[240] *Id.* Justices Brennan and Stevens joined a dissenting opinion of Justice White. *Id.* at 546 (White, J., dissenting). Chief Justice Burger took no part in the decision of the Court. *Id.* at 546.

[241] *Id.* at 542.

[242] *Id.* at 546.

[243] *Id.* at 546 & n.7. *See supra* text accompanying note 237.

[244] *Id.* at 538 (quoting *Testan*, 424 U.S. at 398).

[245] *Id.* at 542.

[246] *Id.*

Allotment Act trust was of a limited nature not encompassing federal management of timber resources and not conferring any substantive rights.[247]

The Court gave three reasons for reaching this result. First, the Court read the General Allotment Act as indicating that Congress intended the allottee to use the land for agricultural or grazing purposes; the allottee, and not the government, was to manage the land.[248] Second, the Court reasoned that Congress had inserted the trust language in the Act solely to prevent alienation and state taxation of the land.[249] Finally, the Court interpreted the Act as neither requiring nor authorizing federal management of timber allotments.[250] The Court stated that the Secretary of the Interior lacked general authority to manage Indian timber until passage of the 1910 Act.[251]

Justices Brennan and Stevens concurred in Justice White's dissenting opinion.[252] Justice White wrote that the trust language in the General Allotment Act imposed fiduciary duties on the United States.[253] He reasoned that the Act explicitly created a trust, and that a common-law trust imposes fiduciary duties on the trustee.[254] Because the Act failed to define the word "trust," it should be given its "ordinary meaning."[255] This reading of the Act was strengthened by the well-established existence of the federal guardianship of Indians and their lands at the time of its enactment, according to Justice White.[256] Furthermore, he reasoned that subsequent federal statutes and administrative regulations "implicitly acknowledged" the fiduciary duties established by the Act and "clarified and fleshed out" those duties.[257]

Justice White concluded that the government was liable in money damages for the breach of fiduciary duties created by the Act, because the trustee's accountability in money damages "is hornbook law."[258] Moreover, he reasoned, prospective equitable relief would be inadequate.[259] He also noted that the Department of the Interior, in disagreement with the Solicitor General, who was representing the government in the case, maintained that a damages remedy should be available under the Act.[260] For these reasons, the dissenters maintained that the Act " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' "[261]

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[247] *Id.*

[248] *Id.* at 542-43.

[249] *Id.* at 543-44.

[250] *Id.* at 545 (citing United States v. Cook, 86 U.S. (19 Wall.) 591 (1872) (holding that Indians could not harvest timber on their land); Act of Feb. 16, 1889, ch. 172, 25 Stat. 673, 25 U.S.C. § 196 (1982) (authorizing cutting of dead, but not live, timber on reservation or allotted land)).

[251] *Id.*

[252] *Id.* at 546 (White, J., dissenting).

[253] *Id.* at 547 (White, J., dissenting).

[254] *Id.* at 547-48 (White, J., dissenting).

[255] *Id.* at 548 (White, J., dissenting).

[256] *Id.*

[257] *Id.* at 549 (White, J., dissenting).

[258] *Id.* at 550 (White, J., dissenting) (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205-12 (1959); G. BOGERT & G. BOGERT, 3 A. SCOTT, *supra* note 7, § 205).

[259] *Id.*

[260] *Id.* (citing Letter of Krulitz, Solicitor, *supra* note 4).

[261] *Id.* (quoting *Testan*, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

E. *Implications of* Mitchell I *for Breach of Trust Suits*

Mitchell I required that statutes alleged to impose fiduciary duties on the government be construed strictly.[262] *Mitchell I*, therefore, rejected the liberal statutory interpretation espoused by the courts in *Manchester Band*[263] and *Coast Indian Community*.[264] Those courts had liberally construed statutes benefiting Indians in favor of the Indians, and had imposed common-law fiduciary duties on the government exceeding the express statutory duties.[265] *Mitchell I*, however, required that such duties be expressed unambiguously in a statute, regulation, or treaty.[266] In contrast to *Mitchell I*'s requirement that statutes alleged to impose duties on the government be construed strictly, *Testan* had only required strict construction in determining whether a statutory duty created a cause of action for money damages but not in determining whether a statute imposed any duties on the government.[267]

Because it held that the General Allotment Act did not impose the duties alleged to have been breached, the *Mitchell I* Court did not consider whether statutes imposing fiduciary duties on the government created a cause of action for money damages for breach.[268] By requiring unambiguous language establishing substantive duties, however, the Court indicated that it would require equally unambiguous language to establish a cause of action and waive the government's sovereign immunity.[269] Whether the mere recitation of the word "trust" in a statute would be sufficiently unambiguous to meet the *Mitchell I* standard is questionable.

Fortunately for Indian plaintiffs, *Mitchell I* was not the last word on breach of trust litigation. In *Mitchell II*, the Supreme Court held the government liable in money damages for mismanagement of allotted timber based on various federal statutes. Although the *Mitchell II* opinion purports to be consistent with *Mitchell I*, *Mitchell II* repudiates the Court's analysis in *Mitchell I*.

IV. *MITCHELL II*

On remand from the Supreme Court's decision in *Mitchell I*, the Court of Claims considered whether various federal statutes[270] authorizing the Department of the Interior

[262] *See supra* text accompanying note 246. Arguably, *Mitchell I* required strict construction of such statutes only when urged as the basis of a claim for money damages, since there is otherwise no sovereign immunity problem. The Ninth Circuit adopted this approach in Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 575 n.8 (1980). The District of Columbia Circuit applied *Mitchell I*, however, in suits seeking equitable relief from breaches of statutory duties. North Slope Borough v. Andrus, 642 F.2d 589, 611-12 (D.C. Cir. 1980); Hopi Indian Tribe v. Block, 8 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3073, 3076-77 (D.D.C. 1981), *aff'd sub. nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983). *See* Hughes, *supra* note 70, at 488 (advocating position later taken in *Rincon Band*); Newton, *supra* note 49, at 673-78 (approving *Rincon Band* and criticizing *Hopi Tribe* and *North Slope Borough*).

[263] *See supra* text accompanying notes 116-23.

[264] *See supra* text accompanying notes 125-30.

[265] *See supra* text accompanying notes 105-06 and 128.

[266] *See supra* text accompanying note 246.

[267] *See supra* text accompanying notes 91-105.

[268] *See* 445 U.S. at 542.

[269] In dictum, the Court stated: "A waiver of sovereign immunity 'cannot be implied but must be unequivocably expressed.' " 445 U.S. at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)).

[270] The principle statutes were: 25 U.S.C. §§ 406-407 (1982) (timber sales); 25 U.S.C. § 466 (1982) (promulgation of regulations requiring sustained yield management); 25 U.S.C. §§ 318a, 323-325 (1982) (road building and rights-of-way). For a discussion of these statutes, see *supra* text accompanying notes 194-208.

to manage Indian timber created fiduciary duties and a substantive right to money damages for breaches of those duties.[271] Once again, the court decided in favor of the Indians.[272] This time the Supreme Court affirmed.[273] The Supreme Court held that the Tucker Act and the Indian Tucker Act waive the sovereign immunity of the United States regarding claims to which the statutes grant the Court of Claims jurisdiction, expressly rejecting language in *Testan* and *Mitchell I* to the contrary.[274] Having found a waiver of sovereign immunity in the jurisdictional statutes, the Court then construed the substantive legislation more liberally than it had construed the General Allotment Act in *Mitchell I*.[275] The Court held that the timber statutes establish a trust relationship,[276] and that the government was liable in money damages for breach of its fiduciary duties as trustee of Indian timber.[277] The Court distinguished *Mitchell I* on the narrow grounds that the General Allotment Act did not authorize the federal management of allotted timber, although the statutes involved in *Mitchell II* did.[278] *Mitchell II* repudiated the analysis employed in *Mitchell I*, however, and established the presumptions that the United States is acting as a trustee in its management of Indian property and that the government will be liable in money damages for breach of trust when it mismanages that property.[279]

A. *The Court of Claims Decision*

On remand from *Mitchell I*, the Court of Claims first considered which standard to apply in determining whether a statute contains a waiver of sovereign immunity.[280] The court interpreted *Testan* and *Mitchell I* as requiring only that a waiver be "clear or strong," not that it be express.[281] The court then analyzed the statutes directly related to federal management of the plaintiffs' forests and lands.[282] The court held that these statutes created a fiduciary relationship between the United States and the Indians even though the statutes do not specifically mention a "trust" or "fiduciary" relationship.[283] Such a relationship normally exists, the court reasoned, when the government assumes control of Indian property.[284] Further, the court viewed the timber legislation as having "broadened" the limited trust created by the General Allotment Act to impose fiduciary duties on the government in its management of Indian forest lands.[285]

Next, the court considered whether these statutes waived the government's immunity to suit for money damages for breaches of the fiduciary duties created by the statutes.[286] The court held that the statutes mandated compensation for breach of fiduciary duties,[287]

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[271] *Mitchell II*, 664 F.2d 265 (1981) (en banc), *aff'd*, 463 U.S. 206 (1983).
[272] *Id.*
[273] *Mitchell II*, 463 U.S. at 211.
[274] *Id.* at 212 & n.8.
[275] *Id.* at 224-26.
[276] *Id.* at 224.
[277] *Id.* at 226.
[278] *Id.* at 224.
[279] *Id.* at 225-26.
[280] 664 F.2d at 267-68.
[281] *Id.* at 268-69.
[282] *Id.* at 269.
[283] *Id.* at 269-70.
[284] *Id.* at 270.
[285] *Id.*
[286] *Id.* at 273.
[287] *Id.*

reasoning that Congress intended the Indians to receive not only whatever income the land produced, but also, in the event of mismanagement, the income which they would have received if the government had managed the land properly.[288] Additionally, the court noted that "[a] trust normally entails the right to compensation for the trustee's breach,"[289] and that prospective equitable relief would be inadequate.[290] The court concluded that the plaintiffs could therefore sue for the difference between the income they actually received from their land and what they would have received had the land been properly managed in compliance with the statutes and related regulations. In addition, the court held that the plaintiffs were entitled to sue to recover for any diminution of property value due to government mismanagement.[291]

B. *The Supreme Court Opinion*

The Supreme Court affirmed the Court of Claims decision in an opinion written by Justice Marshall, author of the *Mitchell I* opinion.[292] Although the Court had held in *Testan* and *Mitchell I* that neither the Tucker Act nor the Indian Tucker Act waive the government's sovereign immunity, the *Mitchell II* opinion began by reconsidering these holdings.[293] The Court held that the Tucker Act and the Indian Tucker Act waive the

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[288] *Id.*

[289] *Id.* at 271 (citing G. BOGERT & G. BOGERT, *supra* note 136, § 862; 3 A. SCOTT, *supra* note 7, § 205.

[290] *Id.* at 272.

[291] *Id.* at 271. In Part IV of the opinion, the court dealt with certain other claims of lesser importance. The court held the government liable for administrative fee deductions in excess of reasonable amounts authorized by 25 U.S.C. §§ 406-407 (1982). *Mitchell II*, 664 F.2d at 274. The court also held that the plaintiffs could sue for the government's failure to invest the actual proceeds from the sale of Indian timber to earn the best rate of interest available (citing *Cheyenne-Arapaho*, 512 F.2d 1390 (Ct. Cl. 1975), discussed *supra* note 124 and accompanying text), but that plaintiffs could not recover interest on the amounts they may recover for violations of fiduciary duties, since federal law prohibits interest on a noncontractual claim against the United States unless expressly provided for by federal statute. *Id.* at 274-75 (citing 28 U.S.C. § 2516(a) (1982)).

The court rejected the Indians' argument that their claims regarding timber mismanagement could be brought as claims based on implied contract. *Id.* at 275. Finally, the court denied the right to claim damages for issuing fee patents to incompetent Indians or for failure to issue patents to competent Indians under 25 U.S.C. § 349 and Act of Jan. 24, 1923, ch. 42, 42 Stat. 1185, *amended by* Act of May 29, 1928, ch. 901, § 1(84), 45 Stat. 992 (formerly codified at 25 U.S.C. § 377; repealed 1980), since these statutes are like licensing statutes and do not themselves mandate compensation for violations.

Judge Nichols wrote a separate opinion, concurring with the court regarding those claims discussed in Part IV, but dissenting with respect to the majority of the claims. *Mitchell II*, 664 F.2d at 276 (Nichols, J., concurring and dissenting). While agreeing that the statutes in question created fiduciary duties on the part of the government, Judge Nichols disagreed that these duties created a right to money damages. *Id.* at 282-83 (Nichols, J., concurring and dissenting). He argued that the court had erred in not applying to the statutes the doctrine of strict construction of consent to be sued, as required by *Mitchell I*. *Id.* at 277 (Nichols, J., concurring and dissenting). Moreover, Judge Nichols reasoned: "The federal power over Indian lands is so different from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS (sic) to impose liability on claims where assent is not unequivocally expressed." *Id.* at 283 (Nichols, J., concurring and dissenting).

[292] 463 U.S. 206 (1983). Justices O'Connor and Rehnquist joined the dissenting opinion of Justice Powell. *Id.* at 228 (Powell, J., dissenting).

[293] *Id.* at 211-16. Reconsideration was merited because both the Indians and the government argued that the Tucker Act waived the government's immunity to suit. Brief for Respondents at 114,

government's immunity to the classes of claims falling within their terms.[294] Tracing the legislative history of both Acts, the Court determined that Congress intended the statutes to waive the government's immunity to suit.[295] The Court acknowledged that it had consistently interpreted the Tucker Act as providing the consent of the United States to be sued for the classes of claims within the Tucker Act.[296] Because no executive official can waive the government's immunity,[297] the Court reasoned that the Tucker Act must provide consent to claims founded upon contracts and executive regulations.[298] The Act does not distinguish between contractual claims and the other classes of claims within the Act, the Court noted.[299]

Having found that the Tucker Act and the Indian Tucker Act waive the government's immunity to certain classes of suits, the Court distinguished between a waiver of sovereign immunity and a grant of a substantive right to money damages.[300] While the Tucker Act contains the former, the Court stated, the substantive right must be found under the Constitution, or in a treaty, statute, or regulation which " 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' "[301] The Court indicated that the statutes alleged to grant the substantive right need not be construed in the strict manner appropriate to waivers of sovereign immunity since immunity has been waived by the Tucker Act.[302] The Court then examined the substantive statutes and regulations upon which the plaintiffs based their claim.[303] Distinguishing them from the bare trust created by the General Allotment Act, the Court held

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Mitchell II, 463 U.S. 206 (1983); Brief for United States at 19 n.12, *Mitchell II*, 463 U.S. 206 (1983). *See also* Brief for Amici Curiae Shoshone Tribe at 17-29, *Mitchell II*, 463 U.S. 206 (1983). In *Mitchell I* the Indians had accepted *Testan*'s holding that the Tucker Act does not waive sovereign immunity. Brief for Respondents at 12, 28, 29, 31, *Mitchell I*, 445 U.S. 535 (1980). Moreover, the Court had expressly stated that the Tucker Act provided the government's consent to suit in two post-*Testan* breach of contract cases. Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982); Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (per curiam). The real issues in a Tucker Act case, the parties agreed, is whether the statutes imposing duties on the federal government create a substantive right to money damages. Brief for Respondents at 14, *Mitchell II*, 463 U.S. 206 (1983); Brief for United States at 19 n.12, *Mitchell II*, 463 U.S. 206 (1983). The government continued to argue, however, that in deciding whether a substantive statute gives rise to a cause of action for money damages against the United States, the statute "should be construed in the conservative manner appropriate to a waiver of sovereign immunity." *Id.*

[294] 463 U.S. at 212 & n.8.

[295] *Id.* at 212-15.

[296] *Id.* at 215.

[297] *Id.* at 215-16 & n.14.

[298] The Court noted that in two post-*Testan* contract cases the Court had "explicitly stated that the Tucker Act effects a waiver of sovereign immunity." *Id.* at 215 (citing Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982); Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (per curiam)).

[299] *Id.*

[300] *Id.* at 216.

[301] *Id.* at 217 (quoting *Testan*, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

[302] *Id.* at 218-19. The Court stated: " 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' " *Id.* (quoting United States v. Aetna Surety Co., 338 U.S. 366, 383 (1949) (quoting Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardoza, J.))).

[303] *Id.* at 219-28. See also *supra* text accompanying notes 194-208 for a discussion of these statutes.

that the statutes and regulations invoked in *Mitchell II* give the government full responsibility to manage Indian resources for the benefit of the Indians.[304] The Court therefore concluded that these statutes "establish a fiduciary relationship and define the contours of the United States' fiduciary duties."[305]

The Court gave three reasons for reaching this conclusion. First, according to the Court, the statutes and regulations establish comprehensive federal management of Indian timber and a concurrent federal government duty to manage that timber in the best interests of the Indian owner.[306] The Court noted that the Department of Interior's earliest regulations implementing the 1910 Act "addressed virtually every aspect of forest management,"[307] and recognized the Department's obligation to " 'manag[e] the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests.' "[308] The Court found that Congress imposed even stricter duties upon the Interior Department in later statutes.[309] These statutes and the regulations implementing them,[310] the Court stated, "establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber."[311] Second, the Court announced a general rule that a trust relationship arises whenever the federal government assumes comprehensive control over Indian property unless Congress provides otherwise.[312] Finally, the Court cited "the undisputed existence of a general trust relationship between the United States and the Indian people" to support its construction of the Indian statutes.[313] The Court stated that the government has long acted as a fiduciary in its dealings with the Indians.[314]

The Court next considered whether these statutory fiduciary duties created a substantive right to monetary damages under the *Testan* "fairly interpreted as mandating

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[304] 463 U.S. at 224.

[305] *Id.*

[306] *Id.* at 224.

[307] *Id.* at 220.

[308] *Id.* (quoting 1911 REGULATIONS, *supra* note 198, at 4).

[309] *Id.* at 220-21. The Indian Reorganization Act of 1934, ch. 576, § 6, 48 Stat. 984, 25 U.S.C. § 466 (1982), directs the Secretary of the Interior to manage Indian forests "on the principle of sustained-yield management." The Act of April 30, 1964, 78 Stat. 186, 25 U.S.C. § 406(a) (1982), directs the Secretary to consider "the needs and best interests of the Indian owner and his heirs" in managing allotted timber.

[310] 25 C.F.R. Part 163 (1985). The Court noted that "[t]he regulatory scheme was designed to assure that the Indians receive 'the benefit of whatever profit [the forest] is capable of yielding.' " 463 U.S. at 222 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980) (quoting 25 C.F.R. § 141.3(a)(3) (1979) (current version at 25 C.F.R. § 163.3(d) (1985))))). The Court discussed federal management of Indian timber at great length in *White Mountain Apache*, 448 U.S. at 145-48. This case presented the question of whether a state could enforce its motor carrier license tax and its fuel tax against a non-Indian corporation conducting logging operations entirely within an Indian reservation under contracts entered into with a tribal corporation (which had contracted with the United States to harvest Indian timber). The Court held that the application of the tax was pre-empted by federal law due to the comprehensive federal management of Indian timber. *Id.* at 148.

[311] 463 U.S. at 222 (quoting *White Mountain Apache*, 448 U.S. at 145). The Court further stated: "The pattern of pervasive federal control evident in the area of timber sales and timber management applies equally to grants of rights-of-way and to management of Indian funds." *Id.* at 225 n.29.

[312] *Id.* at 225. The Court noted that "[a]ll of the elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees) and a trust corpus (Indian timber, lands, and funds)." *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 2, comment h (1959)).

[313] *Id.*

[314] *Id.*

compensation" standard.[315] The Court held that the statutes did create such a right, reasoning that a trust implicitly includes the right of the injured beneficiary to sue the trustee in money damages for breach of fiduciary duties.[316] "Given the existence of a trust relationship," the Court stated, "it naturally follows that the Government should be liable in damages for breach of its fiduciary duties."[317] The Court stated that, along with other federal courts, it previously recognized the right of Indians to sue the government in money damages for breach of trust.[318]

To buttress its conclusion, the Court also maintained that a damages remedy would further the purposes of the statutes and regulations.[319] Absent such a remedy, the court reasoned, there would be little to prevent federal officials from mismanaging Indian property.[320] The Court rejected the government's argument that federal mismanagement of Indian lands could be adequately remedied by equitable relief.[321] Most Indian allottees would be unable to monitor federal management of their lands, according to the Court.[322] The Court also reasoned that the Indian beneficiary should not be charged with supervising the actions taken on his behalf by the federal trustee,[323] and that equitable relief "may be next to worthless" in restoring a forest damaged through mismanagement.[324]

Justice Powell wrote a dissenting opinion, in which Justices Rehnquist and O'Connor joined.[325] Justice Powell accepted the government's argument that the right to sue the United States for damages must be expressly stated in the substantive legislation on which the claim is brought.[326] The dissent stated that the Court adopted this rule of strict construction in *Mitchell I*, and that in rejecting it here the Court in effect was overruling *Mitchell I* sub silentio.[327] The majority opinion, the dissent argued, was based on two dubious assumptions. First, the dissent asserted, the Court decided that the statutes create or recognize fiduciary duties.[328] The federal-Indian trust relationship, according to Justice Powell, is not like an ordinary private trust.[329] Rather, he reasoned, the main effect of this trust is to grant the federal government pervasive control over Indian affairs to immunize Indians from state control.[330]

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[315] *Id.* at 226.

[316] *Id.*

[317] *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205-212 (1959); G. BOGERT & G. BOGERT, *supra* note 136, § 862; 3 A. SCOTT, *supra* note 7, § 205).

[318] *Id.* (citing, e.g., Seminole Nation v. United States, 316 U.S. 286, 295-300 (1942); United States v. Creek Nation, 295 U.S. 1003, 1009-10 (1935); Mason v. United States, 461 F.2d 1364, 1372-73 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973)).

[319] *Id.*

[320] *Id.* at 227.

[321] *Id.*

[322] *Id.* The Court noted that many allottees are poorly educated, most do not live on their allotments and many do not even know where their allotments are located. *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.* at 228 (Powell, J., dissenting).

[326] *Id.* at 228-30 (Powell, J., dissenting).

[327] *Id.* at 233 (Powell, J., dissenting).

[328] *Id.* at 234 (Powell, J., dissenting).

[329] *Id.* (quoting *Mitchell II*, 664 F.2d 265, 283 (Nichols, J., concurring and dissenting)). See *supra* note 291 for a discussion of Judge Nichols' opinion.

[330] *Id.* at 234-35 (Powell, J., dissenting). Furthermore, the dissent questioned why the Court characterized the federal-Indian relationship as a trusteeship rather than as a guardianship although the Court often has described the relationship as a guardianship. *Id.* at 234-35 n.8 (Powell, J., dissenting).

According to Justice Powell, the second "dubious assumption" the Court made was that because a trust normally includes the right of the injured beneficiary to sue for breach, and because injunctive relief would be inadequate, Congress must have authorized recovery for breach of trust.[331] The dissent found " '[n]othing on the face' "[332] of any of the timber statutes to establish that Congress had "consented" to a breach of trust action,[333] and found no support for the majority's conclusion that a damages remedy " 'naturally follows' "[334] from the existence of a trust relationship.[335] Finally, the dissent argued that the possible inadequacy of injunctive relief should have no bearing in deciding whether a damages remedy is available.[336]

V. Analysis of the Decisions in *Mitchell I* and *Mitchell II*

In *Mitchell I*, the Court held that the General Allotment Act did not impose fiduciary duties on the government to manage Indian timber.[337] In *Mitchell II*, however, the Court held that other statutes did impose such duties on the government.[338] The Court also held that breach of such duties gave rise to a cause of action for money damages.[339] This section of the casenote will analyze these decisions,[340] and their implications in future breach of trust litigation.[341]

A. *Establishing the Trust*

In *Mitchell I*, the Court held, incorrectly, that the General Allotment Act did not impose fiduciary duties on the government to manage allotted timber.[342] The incorrect decision was due to the Court's improper use of strict construction,[343] its restrictive reading of the General Allotment Act contrary to Supreme Court precedent,[344] and to the undue significance it attached to the Act's legislative history[345] and to the Act's failure to authorize federal management of allotted timber.[346]

In *Mitchell I*, the Court incorrectly construed the General Allotment Act conserva-

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[331] *Id.* at 234 (Powell, J., dissenting).

[332] *Id.* at 236 (Powell, J., dissenting) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978)).

[333] *Id.*

[334] *Id.* (quoting *id.* at 226).

[335] The dissent disagreed with the Court's reading of Seminole Nation v. United States, 316 U.S. 286 (1942), and United States v. Creek Nation, 295 U.S. 103 (1935), which the Court cited for the proposition that it had previously recognized the right of Indians to sue the government for money damages for breach of trust. *See supra* note 318 and accompanying text. The dissent read *Seminole Nation* as involving "a claim to compel payments expressly prescribed by treaty." 463 U.S. at 237 n.10 (Powell, J., dissenting) (citing 316 U.S. at 296-97). The dissent read *Creek Nation* as holding the government liable for an uncompensated fifth amendment taking. *Id.*

[336] 463 U.S. at 237 (Powell, J., dissenting).

[337] *See supra* text accompanying notes 240-51.

[338] *See supra* text accompanying note 304.

[339] *See supra* text accompanying note 317.

[340] *See infra* text accompanying notes 342-400.

[341] *See infra* text accompanying notes 401-14.

[342] *See supra* text accompanying notes 240-41.

[343] *See infra* text accompanying notes 347-53.

[344] *See infra* text accompanying notes 354-60.

[345] *See infra* text accompanying notes 361-65.

[346] *See infra* text accompanying notes 366-70.

tively in the manner of a waiver of sovereign immunity[347] in determining whether the Act created fiduciary duties. The Court did so due to its incorrect[348] and now-discarded[349] belief, founded in equally incorrect language in *Testan*, that neither the Tucker Act nor the Indian Tucker Act provide the government's consent to be sued.[350] Furthermore, even if the doctrine of sovereign immunity required that statutes be construed strictly in determining whether they create a statutory duty,[351] the Court should have construed the General Allotment Act liberally to the benefit of the Indians in view of the existence of a general federal-Indian trust relationship[352] — the standard of construction which it apparently used in *Mitchell II*.[353]

The reasoning of the Court in *Mitchell I* that the allottee and not the government was to manage the land, and that the land was to be used for farming or grazing,[354] is inconsistent with earlier Supreme Court decisions. In *United States v. Payne*, for example, the Court ordered the government to allot timber lands on the Quinault Reservation.[355] Similarly, in *Halbert v. United States*, the Court approved the Department of the Interior's practice of allotting Quinault lands to nonresidents.[356] The practical result of *Payne* and *Halbert* was that the Quinault Reservation was fully divided into allotments of dense forest,[357] the value of which was almost entirely in timber,[358] and that most of the allottees did not live on their allotments let alone use them for farming or grazing.[359] Furthermore, after the Interior Department had undertaken management of tribal timber pursuant to the 1910 Act, many Quinault allottees took their allotments subject to long-term timber harvesting contracts, thereby precluding them from managing or farming the land.[360] The *Mitchell I* decision is therefore inconsistent with *Payne* and *Halbert* and with the Department of Interior's practice of allotting lands subject to timber harvesting contracts.

The Court placed too much emphasis in *Mitchell I* on the legislative history of the Act in holding that Congress intended the "trust" language solely to prevent alienation and state taxation of the allotment.[361] In offering the amendment adding the trust language to a predecessor bill, Senator Dawes, the bill's sponsor, explained that the change was intended to "make it impossible to raise the question of [state] taxation."[362] The bill,

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[347] *See supra* text accompanying note 246.

[348] *See infra* text accompanying notes 380-84.

[349] *See supra* text accompanying note 294.

[350] *See supra* text accompanying notes 244-45.

[351] *See supra* text accompanying notes 262 and 267.

[352] *See supra* text accompanying note 119. In Squire v. Capoeman, 351 U.S. 1 (1956), a case involving allotted forest land on the Quinault Reservation, the Court construed the General Allotment Act according to the rule that " '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, subject to its protection and good faith.' " *Id.* at 6-7 (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

[353] *See supra* text accompanying note 313.

[354] *See supra* text accompanying note 248.

[355] 264 U.S. 446, 449 (1924). *See supra* text accompanying notes 185-86.

[356] 283 U.S. 753, 760-62 (1931). *See supra* text accompanying note 182.

[357] *See supra* text accompanying note 187.

[358] *Mitchell II*, 463 U.S. at 228 (quoting Squire v. Capoeman, 351 U.S. 1, 10 (1956)).

[359] *Id.* at 227.

[360] United States v. Eastman, 118 F.2d 421, 422 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941).

[361] *See supra* text accompanying note 248.

[362] 13 CONG. REC. 3211 (1882). The bill under consideration at the time was a bill to allot the Umatilla Reservation. Senator Dawes offered, and the Senate approved, an identical amendment to S. 1455, the predecessor bill to the General Allotment Act, the same day. *Id.* at 3212.

however, already expressly provided that the land would not be subject to taxation.[363] As one commentator has noted, according to the Court's interpretation, "Senator Dawes' amendment did [no] more than merely replace the clear and specific language [of the original bill] with more abstract language meaning the very same thing."[364] Especially in view of the context of the federal-Indian trust relationship, the trust language in the Act should have been interpreted more broadly to give it its ordinary meaning.[365]

The fundamental flaw in *Mitchell I* was the Court's reasoning that because the General Allotment Act did not authorize the federal management of allotted timber, breach of trust suits for mismanagement of allotted timber could not be premised on that Act.[366] It is true, of course, that the government was not authorized to manage allotted timber prior to the 1910 Act.[367] The Court should have followed the reasoning of Justice White's dissenting opinion, however, that the 1910 Act and subsequent legislation were properly viewed as having "fleshed out" the trust created by the Allotment Act.[368] Thus, in undertaking the management of allotted "trust" timber under the 1910 Act and subsequent legislation, the government was acting in its capacity as trustee under the General Allotment Act, and was bound by fiduciary duties. Implicit in the Court's rationale is the incorrect assumption that the timber on allotted lands is not subject to the General Allotment Act trust. This assumption is inconsistent with earlier Supreme Court decisions ordering the allotment of timber land on the Quinault Reservation,[369] and considering timber on allotted lands as subject to the trust.[370] Reading these cases together, the principle that emerges is that the General Allotment Act placed allotted timber in trust, which trust the government has administered through subsequent legislation.

In *Mitchell II*, the Court of Claims drew on this principle in holding that the 1910 Act and subsequent timber management statutes imposed fiduciary duties on the federal government.[371] The court reasoned, in part, that these statutes broadened the General

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[363] The language replaced by the amendment read as follows:

> Provided, That the title to lands acquired by Indians under the provisions of this act shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or the order of any court, but shall be and remain inalienable and not subject to taxation, lien, or incumbrance for any purpose . . . .

13 CONG. REC. 3211 (1882).

[364] Hughes, *supra* note 70, at 481.

[365] *See supra* note 119.

[366] *See supra* text accompanying notes 250-51.

[367] *See supra* text accompanying notes 193-95.

[368] *Mitchell I*, 445 U.S. at 549 (White, J., dissenting). *See supra* text accompanying notes 224 and 250. This argument is essentially the argument made by the Indians in their petition for rehearing. Respondents' Petition for Rehearing, *Mitchell I*, 446 U.S. 992 (1980) (rehearing denied). Respondents argued that United States v. Payne, 264 U.S. 446 (1924), Halbert v. United States, 283 U.S. 753 (1931), and Squire v. Capoeman, 351 U.S. 1 (1956), require reading the 1910 Act and the General Allotment Act as one statutory plan. Respondents' Petition for Rehearing, *Mitchell I*, 446 U.S. 992 (1980) (rehearing denied). *See also* F. COHEN, *supra* note 12, at 134 (calling the 1910 Act "a major revision of the General Allotment Act").

[369] United States v. Payne, 264 U.S. 446, 449 (1924). *Cf.* Halbert v. United States, 283 U.S. 753, 760-62 (1931) (ordering the allotment of Quinault forest land to nonresidents). *See supra* notes 182, 185-86, and 355-60 and accompanying text.

[370] Starr v. Campbell, 208 U.S. 527, 534 (1908). *See supra* note 185 and accompanying text. *See also* United States v. Eastman, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941). *Cf.* Squire v. Capoeman, 351 U.S. 1 (1956).

[371] 664 F.2d at 270.

Allotment Act trust to include the federal management of Indian timber.[372] The Supreme Court affirmed the Court of Claims decision in *Mitchell II*, holding that the timber management statutes created a federal trusteeship of Indian timber.[373] As the Court noted, the statutes establish the "comprehensive" responsibilities of the federal government in managing Indian timber.[374] Congress has directed the Department of the Interior to consider the best interests of the allottee in managing the timber.[375] The Interior Department recognized long ago its obligation to " 'manag[e] the Indian forest so as to obtain the greatest revenue for the Indians . . . .' "[376] In its management of Indian lands and resources, the Interior Department considers itself to be subject to fiduciary duties.[377] Reading the statutes in light of the undisputed existence of a general trust relationship between the United States and the Indian people, it is reasonable to conclude that the statutes impose fiduciary duties on the government.[378] Moreover, the timber statutes could properly be viewed as having broadened the limited trust created by the General Allotment Act to impose general fiduciary obligations on the Government in the management and operation of the forest lands with which Interior Department was entrusted.[379]

In conclusion, *Mitchell I* was wrongly decided. The *Mitchell I* Court should have held that the General Allotment Act, which expressly placed allotted timber land in trust, imposed fiduciary duties on the United States in its management of those lands under subsequent statutes. *Mitchell I*, however, has little meaning in light of *Mitchell II* which correctly held that statutes authorizing the federal management of Indian lands impose fiduciary duties on the government. *Mitchell II* establishes the presumption that the federal government, in managing Indian property, is bound by fiduciary duties.

B. *Liability of the United States for Breach of Trust*

In *Mitchell II*, the Supreme Court correctly held that the Tucker Act and the Indian Tucker Act waive the sovereign immunity of the United States regarding claims founded upon federal statutes and regulations.[380] Prior to the *Testan* decision, the Court had consistently construed the Tucker Act as containing a waiver of sovereign immunity.[381] The legislative histories of both statutes indicate that their purpose was to provide the consent of the United States to be sued for those classes of claims falling within their terms.[382] It is evident that these statutes provide the government's consent to suit for contract claims, for executive officials cannot waive the government's immunity to suit.[383]

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[372] *Id.*

[373] 463 U.S. at 224.

[374] *Id.* at 222.

[375] 25 U.S.C. § 406(a) (1982).

[376] *Mitchell II*, 463 U.S. at 220 (quoting 1911 REGULATIONS, *supra* note 198, at 4).

[377] *See* Letter of Krulitz, Solicitor, *supra* note 4, at 2a.

[378] *Mitchell II*, 463 U.S. at 225.

[379] *Mitchell II*, 664 F.2d at 270. *See also* Justice White's dissent in *Mitchell I*: "This argument [that the General Allotment Act trust does not extend to the management of forest lands] takes too narrow a view of the subsequent statutory and administrative developments which clarified and fleshed out that duty." 445 U.S. at 549 (White, J., dissenting).

[380] *See supra* text accompanying notes 292-95.

[381] *See supra* text accompanying notes 62-64 and 296. Furthermore, prior to *Mitchell I*, the Court of Claims had construed the Indian Tucker Act as containing a waiver of sovereign immunity. *See* Navajo Tribe v. United States, 586 F.2d 192, 200 (Ct. Cl. 1978).

[382] *See supra* text accompanying notes 53-81 and 295.

[383] *See supra* text accompanying notes 296-98.

This consent to suit logically applies to other classes of claims within the terms of the statutes as well, since these statutes make no distinction between those claims and contractual claims.[384]

The issue, then, in a damages action against the United States founded upon federal statutes or regulations is not whether the statutes provide the government's consent to suit, but whether they create a substantive right to money damages. Both the majority and the dissenting opinions in *Mitchell II* agree that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act."[385] Something more is needed. The dissent agreed with the government that the substantive right must be expressly stated in the statute or regulation.[386] In effect, the dissent would require a second waiver of sovereign immunity, the first being found in the Tucker Act, thus rendering the Tucker Act waiver superfluous. The majority properly rejected this argument.[387]

The majority stated that the substantive right exists if the statutes or regulations " 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' "[388] Although this standard of construction is arguably correct, it is too vague to be very helpful.[389] A better standard might be for the court to "consider the decisional law on the compensability of claims of the same general type."[390] This standard finds support in the congressional debate on the original Court of Claims Act, and in an early Court of Claims case.[391] Congress anticipated that the court would decide cases according to established rules of justice, and follow those rules as precedent.[392] In its first case,[393] the Court of Claims considered the principles that should govern the court in their adjudications upon the cases within their jurisdiction.[394] The court stated:

> If a claim be alleged to be "founded upon any law of Congress," in the words of the [Court of Claims Act,] we must construe such law, and ascertain its meaning by applying it to those rules of construction which a wide and long-continued experience has determined to be the best adapted to that purpose; and the same course must be pursued where a claim is founded "upon any regulation of an executive department."[395]

Applying this standard to actions against the United States by Indians or Indian tribes for violations of statutory duties, two rules emerge: first, the statutes should be interpreted liberally in favor of the Indians, according to well-established principles; and second, if the statutes create a trust, ordinary principles of trust law should apply insofar as they are not contrary to the express or clearly implied intent of Congress.

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[384] *See supra* text accompanying note 299.

[385] 463 U.S. at 216. *See also id.* at 228-29 (Powell, J., dissenting).

[386] *See supra* text accompanying notes 326-27.

[387] *See supra* text accompanying note 302.

[388] 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

[389] The dissent in *Mitchell II*, for example, read this standard as requiring an express grant of a cause of action for money damages in the statute. 463 U.S. at 229 (Powell, J., dissenting).

[390] Orme, *supra* note 51, at 881.

[391] Todd v. United States, 1 Ct. Cl. No. 1 (1856).

[392] CONG. GLOBE, 33d Cong., 2d Sess. 111 (1854) (remarks of Senator Clayton).

[393] Todd v. United States, 1 Ct. Cl. No. 1 (1856).

[394] *Id.* at 5 (quoting Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612).

[395] *Id.* In another portion of the opinion, the Court applied "the rules which regulate the liability of parties in ordinary suits." *Id.* at 9.

Application of these rules of construction to the timber and land management statutes leads to the conclusion that the United States should be liable for violating fiduciary duties imposed by these statutes. The statutes may be viewed either as establishing a trust,[396] or as extending the limited trust imposed by the General Allotment Act to the management of forest lands.[397] The United States should therefore be liable for breach of its fiduciary duties, for "[i]t is well-established that a trustee is accountable in damages for breaches of trust."[398] The Court was therefore correct in *Mitchell II* when it held that the statutes could fairly be interpreted as mandating compensation by the federal government for timber mismanagement.[399]

This result is consistent with the *Testan* decision. The Court in *Testan* found that the Classification Act did not create a substantive right to money damages in light of the rule that an individual is not entitled to the benefit of a position until he has been duly appointed to it.[400] In a breach of trust case, on the other hand, the established rule that a beneficiary is entitled to money damages applies.

Mitchell II was correct in deciding that the United States is liable in money damages for mismanagement of Indian timber. Because the government is acting as a trustee in managing Indian property, it should be liable for breach of fiduciary duties just as are other trustees. *Mitchell II*, therefore, correctly establishes a presumption that the United States will be liable for mismanagement of Indian property.

C. *Litigating Breach of Trust Cases after* Mitchell II

Mitchell II established two important principles in breach of trust cases. First, *Mitchell II* announced a presumption that the United States is acting as a trustee when managing Indian property.[401] Second, under the rule espoused in *Mitchell II*, the United States will be liable for breaches of statutory duties and the ordinary duties of a private trustee.[402]

As to the first principle, the *Mitchell II* Court stated:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.[403]

Mitchell II therefore stands for the proposition that whenever the United States manages Indian resources under congressional authority it is acting in its capacity as trustee unless the statute empowering it to manage the resources expressly states otherwise. This principle is not new; as one commentator wrote two years before the government moved to dismiss *Mitchell I*: "Reading all the [breach of trust] cases together, the principle that emerges is that Congress intends specific adherence to the trust responsibility by execu-

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[396] *Mitchell II*, 463 U.S. at 224.

[397] *Mitchell II*, 664 F.2d at 270.

[398] *Mitchell II*, 463 U.S. at 226 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205-12 (1959); G. BOGERT & G. BOGERT, *supra* note 136, § 205; 3 A. SCOTT, *supra* note 7, § 205).

[399] 463 U.S. at 226.

[400] 424 U.S. at 402.

[401] *See supra* text accompanying notes 308.

[402] *See infra* text accompanying notes 406-14.

[403] 463 U.S. at 225 (quoting Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980)).

tive officials unless it has expressly provided otherwise."[404] *Mitchell II* is the most forceful and authoritative statement of this principle.

Mitchell II reverses the presumption against the establishment of a trust employed in *Mitchell I*.[405] Although the Court did not expressly overrule the earlier decision, the limited holding of that case should not be an obstacle to Indians suing the government for mismanagement of their property. Plaintiffs need only base their claim on the statutes, treaties, or regulations specifically authorizing the federal government to manage the property involved.

Mitchell II establishes that the government is liable not only for violations of express statutory duties, but also for breaches of common-law fiduciary duties not expressly mandated by statute. Although this principle is not clearly articulated in the opinion, it is evident from the Court's reliance on the common law of trusts to establish the government's liability for breach that the Court would borrow other common-law principles in determining the scope of that liability.[406] Moreover, the dissent in *Mitchell II* reads the majority's decision as holding the United States liable in money damages "for statutory violations *and other departures from the rules that govern private fiduciaries*."[407] Because the Court did not discuss the scope of the government's liability in detail, it appears that the Court implicitly approved of the approach taken by the Court of Claims. It is therefore necessary to look to that court's opinion to determine the law on this issue. The Court of Claims held the government liable for breaches of fiduciary duties not specifically prescribed by statute.[408] For example, construing the forest management statutes[409] together with statutes authorizing the Interior Department to grant rights-of-way[410] and build roads[411] across Indian lands, the court held the government liable for loss of income or property value occasioned by the Interior Department's unjustified failure or refusal to build or maintain the roads called for by proper harvesting and forest care.[412]

Reading the Court of Claims and the Supreme Court decisions together, the principle that emerges is that the federal government, in its management of Indian property, is liable for violations of express statutory duties and for breaches of common-law fiduciary duties. The government's liability for breaches of common-law fiduciary duties is limited only by its authority to manage Indian property. Where it does not have the authority to act as a common-law trustee, of course, it cannot be held liable for failing to do so.[413]

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[404] Chambers, *supra* note 5, at 1248.

[405] *See supra* text accompanying notes 262-69.

[406] *See supra* text accompanying notes 316-17.

[407] 463 U.S. at 230 (Powell, J., dissenting) (emphasis added).

[408] *Mitchell II*, 664 F.2d at 270-73.

[409] 25 U.S.C. §§ 406-407, 466 (1982).

[410] 25 U.S.C. §§ 323-325 (1982).

[411] 25 U.S.C. § 318a (1982).

[412] 664 F.2d at 273. The court did state, however, that it would not allow recovery for "consequential, indirect damages which a private cestui might possibly recover because of his trustee's derelictions." *Id.* at 271. Consequential damages for which plaintiffs could not collect included "indirect or consequential business, economic, or personal damages due to the loss (total or partial) of their property, or personal, psychological, or social harm experienced by the Indian owners or the tribe as a consequence of federal mismanagement of their property." *Id.* at 274. Such indirect damages probably would not be allowed in an ordinary breach of trust suit either. *See generally* G. BOGERT & G. BOGERT, *supra* note 136, § 862.

[413] For example, while a private trustee can invest trust funds in any number of ways, the government's choice of investment of Indian trust funds is limited by statute. 25 U.S.C §§ 151-165 (1982).

Insofar as it has authority to manage Indian property, however, it must act consistently with the principles applicable to common-law fiduciaries. When it does not, the government will be liable for any diminution of the value of the trust property, and the difference between the income yielded by the property and the income it would have yielded had it been managed properly.[414]

Conclusion

Two important principles emerge from *Mitchell II*: first, where the federal government manages Indian property under congressional authority, a trust relationship presumptively exists unless Congress expressly provides otherwise; and second, the United States is liable in money damages for violations of its fiduciary obligations imposed by the trust unless Congress provides otherwise. *Mitchell II* will likely result in better federal management of Indian lands, by providing that the Indian beneficiaries be made whole for breaches of the government's fiduciary obligations. While it may be better for tribes to manage their own land and the lands of their members rather than relying on the federal trusteeship,[415] *Mitchell II* provides that as long as Indians have to rely on the federal trusteeship, the United States will be accountable for its actions judged by common-law fiduciary standards in an action for money damages in the newly constituted United States Claims Court, formerly known as the Court of Claims.[416]

Michael Roy

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[414] *See supra* text accompanying note 291.

[415] *See, e.g.*, G. Hall, The Federal-Indian Trust Relationship, 53-54 (2d ed. 1981).

[416] *See supra* note 65.