

1983

The Re-Emergence of the Trust Relationship after United States v. Mitchell

Patricia McKeown Nagel

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Nagel, Patricia McKeown (1983) "The Re-Emergence of the Trust Relationship after United States v. Mitchell," *Land & Water Law Review*: Vol. 18 : Iss. 2 , pp. 491 - 512.

Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss2/2

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

COMMENTS

THE RE-EMERGENCE OF THE TRUST RELATIONSHIP AFTER UNITED STATES v. MITCHELL

In April, 1980 the Supreme Court reversed the Court of Claims' decision in *Mitchell v. United States*¹ and remanded the case to the Court of Claims for further consideration. The Supreme Court's decision in *United States v. Mitchell*² was viewed as a "discouraging episode in Indian law",³ since it left both the jurisdiction of the Court of Claims over Indian breach of trust suits and the Indian trust relationship with the United States in doubt. This comment will trace the re-establishment by the Court of Claims of its jurisdiction over Indian breach of trust suits, as well as the emerging definition of the trust relationship in that court. Finally, the comment suggests that the Court of Claims should stringently enforce all private trust principles in those suits involving Government mismanagement of Indian natural resources.

THE MITCHELL DECISION

The Quinault Indians⁴ brought suit against the United States Government in the Court of Claims under the General Allotment Act⁵ (GAA) for the mismanagement of the tribe's

Copyright © 1983 by the University of Wyoming.

1. *Mitchell v. United States*, 591 F.2d 1300 (Ct. Cl. 1979).

2. 445 U.S. 535, 546 (1980). The Court held that:

The General Allotment Act . . . cannot be read as establishing that the United States has a fiduciary responsibility for the management of allotted forest lands. Any right of the respondents to recover money damages for government mismanagement of timber resources must be found in some source other than that Act.

3. Hughes, *Can the Trustee Be Sued for its Breach? The Sad Saga of the United States v. Mitchell*, 26 S.D.L. Rev. 447, 493 (1981).

4. The respondents included 1,465 individual allottees of land contained within the Quinault Reservation, the Quinault Tribe, and the Quinault Allottees Association. The Quinault Reservation is located in northwestern Washington. It was established by executive order in 1873. The term "allottee" is used to describe the individual Indian who received a statutorily defined amount, or an allotment, of land under the General Allotment Act. *Mitchell v. United States*, 591 F.2d at 1300 (Ct. Cl. 1979). See *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391, 1393-95 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974), for a history of the formation of the Quinault Reservation and the allotment process on that Reservation.

5. 25 U.S.C. §§ 331-358 (1976). The General Allotment Act was enacted in 1887 in an attempt to assimilate the Indians into a white society. The main thrust of the Act was to break up communal ownership of tribal lands and allot each member of the tribe a certain amount of land. A general discussion of the intent and effects of the General Allotment Act can be found in COHEN, HANDBOOK OF FEDERAL INDIAN LAW 130-44 (1982).

timber resources.⁶ The Quinalts contended that a trust relationship was explicitly established by the language of the GAA.⁷ Consequently, the trust relationship created a substantive right upon which the Indians could base their claim, and upon which the court's jurisdiction could be properly invoked. The authority of the Court of Claims to entertain actions brought by individual Indians was invoked under 28 U.S.C. § 1491 (Tucker Act), which states

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.⁸

The jurisdiction of the Court of Claims on behalf of the tribe is set out in 28 U.S.C. § 1505:

The Court of Claims 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

6. *Mitchell v. United States*, 591 F.2d 1300, 1301 (Ct. Cl. 1979). The Indians alleged that the Government had: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on other funds; and (6) exacted excessive administrative charges from allottees. *Id.* at 1301 n.4. For an overview of the management of Quinalt timber resources, see Beaty, *A Study of B.I.A. Timber Management on the Quinalt Indian Reservation 1950-1970*, in II STUDIES IN AMERICAN INDIAN LAW (1971).

7. 25 U.S.C. § 348 (1976). The GAA provides in pertinent part:

Patents to be held in trust:

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, *in trust for the sole use and benefit of the Indian* . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, . . . in fee, discharged of said trust and free of all charge of incumbrance whatsoever; Provided, that the President of the U.S. may in any case, in his discretion extend the period.

(emphasis added).

8. 28 U.S.C. § 1491 (1976).

cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.⁹

The United States moved to dismiss the Indians' suit on the grounds that the Government had not waived its sovereign immunity with respect to the claims raised. The Court of Claims rejected the Government's jurisdictional challenge and held that the General Allotment Act sustained the Indians' claim for a breach of trust suit.¹⁰

The issue then before the Supreme Court in *Mitchell* was whether the General Allotment Act authorized the award of money damages against the United States for the alleged mismanagement of forests located on lands allotted to the Indians under the Act.¹¹ The Court began its analysis of *Mitchell* with a discussion of sovereign immunity, substantive rights, and jurisdiction.¹² The Court asserted, as an elementary proposition, that "[T]he United States as sovereign is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."¹³ The Court noted that the waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."¹⁴ The statutes upon which the Indians had based jurisdiction, the Tucker Act and 28 U.S.C. § 1505, were held to be jurisdictional only and neither created a substantive right nor contained an explicit waiver of sovereign immunity.¹⁵ The Court considered *U.S. v. Testan*¹⁶ as determinative of the jurisdictional issue.¹⁷ The Court concluded, therefore, that the Indians must look elsewhere for either a waiver of sovereign immunity or a substantive right upon which to base their claims.¹⁸

Since the Indians relied upon the General Allotment Act as establishing a trust relationship, with all its attendant duties and liabilities, the Court turned to an examination of the Act.¹⁹ Analyzing the language and legislative history of the Act, the

9. 28 U.S.C. § 1505 (1976).

10. 591 F.2d at 1304.

11. *United States v. Mitchell*, 445 U.S. 535, 536 (1980).

12. *Id.* at 538.

13. *Id.*

14. *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

15. *Id.*

16. 424 U.S. 392 (1976).

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

18. *Id.*

19. *Id.* at 540-44.

Court held that the General Allotment Act created only "a limited trust."²⁰ The Act could not be read to impose a fiduciary duty on the Government in its management of Indian timber resources.²¹

The dissent in *Mitchell* also used *Testan* as a basis for its analysis.²² The holding in *Testan*, according to the dissent, was that a "statute creates a substantive right enforceable against the United States in money damages only if it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" ²³ The dissent reasoned that the General Allotment Act could be so interpreted. This interpretation could be derived from the language of the Act as well as from its legislative history.

The language of the General Allotment Act, contended the dissent, explicitly established a trust.²⁴ The trust created by the Act contained all the necessary elements of a common law trust: a trustee (the United States), a beneficiary (the Indian allottees), and the corpus (the designated allotment lands).²⁵

The dissent also noted that the General Allotment Act was enacted against the backdrop of a long established trust relationship between the United States and the Indians. It would not be reasonable, the dissent argued, to assume that Congress intended "to depart from these well-known fiduciary principles" when it enacted the General Allotment Act.²⁶ Therefore, the General Allotment Act created a trust which "imposes fiduciary obligations on the United States as trustee in the management of allotted timber lands, and provides a damage remedy against the United States for breach of those obligations."²⁷

20. *Id.* at 542-44. The Court noted that even though a trust had been created the language had not unambiguously provided that the United States assume full fiduciary duties over allotted lands. The Court reasoned that the trust created by the GAA was limited in that the Government simply wished to prevent alienation of the land and to protect the allottees from state taxation. *Id.*

21. *Id.* at 546.

22. *Id.* at 546 (White, J., dissenting).

23. *Id.* at 546-47 (White, J., dissenting) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1003, 1009 (Ct. Cl. 1967)).

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

25. *Id.* at 548 (White, J., dissenting).

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

27. *Id.* at 550 (White, J., dissenting).

If read narrowly, the Supreme Court's decision in *Mitchell* could be interpreted as foreclosing breach of trust suits in the Court of Claims for two reasons. First, the narrow *Testan* interpretation of 28 U.S.C. § 1491 controls, and therefore, the Tucker Act is merely a jurisdictional statute that contains no grant of sovereign immunity.²⁸ Second, since the majority in *Mitchell* completely ignored the trust relationship which had traditionally existed between the United States and the Indians, the Indians could no longer rely upon those trust principles as a basis for breach of trust suits against the Government.²⁹

JURISDICTION OF BREACH OF TRUST CLAIMS

The majority in *Mitchell* relied upon the Court's earlier decision in *United States v. Testan* as the definitive case interpreting the Tucker Act.³⁰ The Plaintiffs in *Testan* were two government attorneys who were suing for reclassification of their jobs and seeking corresponding back pay. The attorneys brought the case under the Tucker Act in the Court of Claims.

The Court of Claims remanded the case to the Civil Service Commission with directions to reclassify the claimants.³¹ The Supreme Court granted certiorari³² because of the importance of establishing the "measure of the Court of Claims statutory jurisdiction. . . ."³³ The respondents in *Testan* contended that the Tucker Act waived sovereign immunity "with respect to any claim invoking a constitutional provision or a federal statute."³⁴ Consequently, where there has been a violation of a substantive right, as found in either the Constitution or a statute, the Tucker Act waives sovereign immunity "as to all measures necessary to redress that violation."³⁵

The Court held that the Tucker Act was only a jurisdictional statute and did not create any substantive right enforceable against the United States for money damages.³⁶ Fur-

28. *Id.* at 538.

29. *Id.* at 535-46.

30. *Id.* at 538.

31. *United States v. Testan*, 424 U.S. at 395 (1976).

32. *United States v. Testan*, 420 U.S. 923 (1975).

33. 424 U.S. at 397.

34. *Id.* at 400.

35. *Id.*

36. *Id.* at 398.

thermore, in a suit against the United States there “cannot be a right to money damages without a waiver of sovereign immunity. . . .”³⁷ The Court concluded that entitlement to money damages depended upon whether the federal statute involved could “fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”³⁸ Consequently, if *Testan* controls and the Tucker Act does not waive sovereign immunity, the statute relied upon by the Indians in breach of trust suits must not only grant a substantive right but must be able to be interpreted as mandating compensation for the violation of that right.

The suggestion by the respondents in *Testan* that the Government had confused two very different issues, namely, whether there had been a waiver of sovereign immunity and whether a substantive right had been created, surfaces again in *Mitchell*.³⁹ The Court in *Mitchell* merely stated conclusions concerning these issues and did not clearly support those conclusions. The respondents in *Testan* and *Mitchell* based their claims on substantive rights found in federal statutes. Since these rights were statutory, the Tucker Act provided jurisdiction over violations of those rights in the Court of Claims. The grant of jurisdiction over those claims implied a waiver of sovereign immunity. The Court in *Mitchell* summarily dismissed that analysis by stating that the waiver of sovereign immunity must be explicit and that the Tucker Act granted no substantive rights. Admittedly, no substantive rights are granted by the Tucker Act, but the issue of whether or not the Tucker Act contains a waiver of sovereign immunity should not be so easily dismissed. It is arguable that the Tucker Act and 28 U.S.C. § 1505 established jurisdiction over actions based on the Constitution or a federal statute and concomitantly waived sovereign immunity. A brief look at the history of the Court of Claims supports this argument.

The Court of Claims was created to entertain suits against the United States and thereby relieve Congress of the onerous duty of hearing private claims.⁴⁰ The Tucker Act was intro-

37. *Id.* at 400.

38. *Id.* (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d at 1009 (Ct. Cl. 1967)).

39. Brief of Amici Curiae at 9, *United States v. Mitchell*, 445 U.S. 535 (1980). See Hughes, *supra* note 3, at 458.

40. Naylor, *The United States Court of Claims*, 29 GEO. L.J. 719 (1940-1941).

duced in 1886 to expand the jurisdiction of the court.⁴¹ An exchange between Representative Tucker, the sponsor of the Act, and Representative Reed emphasizes that the United States' consent to be sued was implicit in the Act.⁴² This consent was recognized one hundred years later in a speech by Newall Ellison commemorating the court's anniversary when Ellison noted that the very idea of sovereign immunity is an anathema to an independent people.⁴³ That the consent to be sued is implied in the jurisdictional grant is also noted in Wright & Miller's civil procedure treatise: "Probably the . . . best known [example] . . . of [a] legislative [exception] to the sovereign immunity doctrine [is] the Tucker Act. . . ."⁴⁴

The Court in *Mitchell* extended its *Testan* interpretation of the Tucker Act to 28 U.S.C. § 1505 which was the statute relied upon by the Quinaults in asserting their tribal claim.⁴⁵ Again, an examination of the legislative history of 28 U.S.C. § 1505 compels a different interpretation. Before 1946, Indian claims were heard by the Court of Claims only under special jurisdictional statutes.⁴⁶ In 1946 Congress passed the Indian Claims Commission Act.⁴⁷ The purpose of the bill was twofold: 1) to give tribes their day in court on old claims previously barred, and 2) to remove the bar as to future claims.⁴⁸

The authorization for the Court of Claims to hear new claims is now codified at 28 U.S.C. § 1505.⁴⁹ The legislative history of this section supports the contention that it, too, contains an implicit waiver of sovereign immunity. The principle sponsor of the bill in the House, Representative Henry Jackson, stated "[L]et us see that the Indians have their fair

41. H.R. 6974, 49th Cong., 1st Sess. (1886). Prior to 1886, the Court of Claims had jurisdiction over any claim based on an act of Congress, an executive regulation or on an express or implied contract with the Government. The Tucker Act extended that jurisdiction to include damages for any claim, other than tort claims, to which a party would be entitled to redress against the United States.

42. "Mr. Reed: '[T]he effect of the bill is that the U.S. can be made a party in any suit where an individual could be made a party?' Mr. Tucker: 'Yes, Sir.'" 18 CONG. REC. 622 (1887).

43. Ellison, *The United States Court of Claims: Keeper of the Nation's Conscience for One Hundred Years*, 24 GEO. WASH. L. REV. 251, 252 (1956).

44. WRIGHT, MILLER AND COOPER, 14 FEDERAL PRACTICE AND PROCEDURE § 3656 (1976).

45. 445 U.S. at 540.

46. Wilkinson, *Indian Tribal Claims Before The Court of Claims*, 55 GEO. L.J. 511 (1966-1967).

47. 25 U.S.C. § 70 (1976). This chapter relates only to claims accruing before August 13, 1946. Jurisdiction of Indian claims after that date comes under 28 U.S.C. § 1505 (1976), as noted in the text.

48. Brief for Respondents at 23, *United States v. Mitchell*, 445 U.S. 535 (1980).

49. *Id.*

day in court so that they *can call the various Government Agencies to account on the obligations the Federal Government assumed.*"⁵⁰

The House Report, in its summary of the Indian Claims Commission Act, also indicated that the Act contained a waiver of sovereign immunity. The report noted that the Court of Claims may hear "*any* controversy with the Federal Government that may arise in the future."⁵¹ It seems clear, then, that 28 U.S.C. § 1505 can also be interpreted as containing a waiver of sovereign immunity for Indian claims.

The Supreme Court, however, chose to apply the stringent *Testan* view, which repudiates the argument that an implicit waiver of sovereign immunity can be found in both the Tucker Act and 28 U.S.C. § 1505. It has been suggested that *Testan* was decided incorrectly and should be repudiated in breach of trust claims.⁵² If that were done, the Court of Claims could assert its jurisdiction over Indian breach of trust claims without having to resort to a case-by-case policy analysis in order to find a substantive claim and thereby a waiver of sovereign immunity.

THE TRUST RELATIONSHIP

The second notable aspect of the *Mitchell* decision was the Court's interpretation of the trust relationship between the United States and the Indians, and its reluctance to find any substantive rights in that trust relationship. A brief historical summary is helpful in understanding the development of the trust relationship.⁵³

50. 92 CONG. REC. 5312 (1946) (emphasis added).

51. H.R. Rep. No. 1466, 79th Cong., 1st Sess. (1946).

52. Orme, *Tucker Act Jurisdiction Over Breach of Trust Claims*, 1979 B.Y.U. L. REV. 855, 882.

53. Property is one of the major elements in any trust relationship. In order to understand more fully the trust relationship that developed between the United States and the Indians, it will be helpful to include here a brief summary of the development of property titles. Property titles in the United States were of dual origin. The settlers claimed title to land by discovery and the Indians claimed title by aboriginal right of occupancy. Justice Marshall assigned priorities to the titles by stating that "[d]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). During the westward expansion, the United States began trading large, unoccupied tracts of land in the west for tracts occupied by Indians in the east. It was hoped that this would give the Indians more time to assimilate themselves into white society. This became the genesis of the reservation system. MAXFIELD, DIETERICH AND TRELEASE, *NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS* 17, 18, 24, 25 (1977).

The trust relationship between the United States and the Indians had its inception in *Cherokee Nation v. Georgia*.⁵⁴ The Cherokees sought injunctive relief as a sovereign nation against the State of Georgia for executing laws that infringed upon the Cherokee's political society. The tribe also sought to prevent Georgia from taking Indian property. Chief Justice Marshall, writing for the Court, stated in dicta:

[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. . . . They acknowledge themselves, in their treaties to be under the protection of the United States. . . . [T]heir relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and power; appeal to it for relief of their wants. . . .⁵⁵

In another landmark case, *Worcester v. Georgia*,⁵⁶ Justice Marshall referred to the weaker Cherokee nation as accepting the protection of the stronger United States.⁵⁷

When no challenge was issued to test this "guardian-ward" relationship during the removal of the Indians to the West, the courts "recast the Marshall guardianship principle" into a source of federal power.⁵⁸ This power and its attendant liability were clearly expressed in *Seminole Nation v. United States*.⁵⁹ There, the Court held the government liable for mishandling Indian trust funds, stating

Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court it [the Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the

54. 30 U.S. (5 Pet.) 1 (1831).

55. *Id.* at 17. The Cherokees sought an injunction against the State of Georgia to restrain the state from taxing Cherokee property. The Court held that it had no original jurisdiction in this dispute. *Id.* at 20.

56. 31 U.S. (6 Pet.) 515 (1832). A missionary challenged his arrest within the limits of the Cherokee nation. The Court held that since the Cherokees were a sovereign nation, Georgia law did not extend to Cherokee territory and therefore the arrest was invalid. *Id.* at 563.

57. *Id.* at 561.

58. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1223 (1975). See also Comment, *Indian Battle for Self-Determination*, 58 CAL. L. REV. 445, 449 (1970).

59. 316 U.S. 286 (1942).

acts of those who represent it in the dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.⁶⁰

The standard imposed by the *Seminole* case became a guideline for the breach of trust cases that followed. The principle that emerges from these cases is that “[C]ongress intends specific adherence to the trust responsibility by executive officials unless it has *expressly provided otherwise*.”⁶¹ A breach of this “specific adherence to the trust-responsibility” would therefore impose liability. The imposition of liability would imply a waiver of sovereign immunity.

This is the backdrop against which the Supreme Court decision in *Mitchell* and the subsequent breach of trust cases in the Court of Claims should be viewed. Given this background, it is not difficult to see why the *Mitchell* Court’s refusal to recognize the trust responsibility, with its full panoply of duties and liabilities, created alarm.⁶² In spite of the gloomy predictions of some commentators, however,⁶³ a survey of the Indian breach of trust cases since *Mitchell* leaves some optimism for those concerned with Indian affairs. A careful analysis of each case provides an insight into the methods employed by the Court of Claims in overcoming the strictures imposed by *Mitchell*.

BREACH OF TRUST CASES IN THE COURT OF CLAIMS AFTER *Mitchell*

The first breach of trust case to reach the Court of Claims after the Supreme Court decision in *Mitchell* was *Navajo Tribe of Indians v. United States*.⁶⁴ This case, like *Mitchell*, had a long litigation history and arose originally under the Indian Claims Commission Act.⁶⁵ The Navajo Indians demanded an accounting from the Government for mismanagement of Navajo funds and property.⁶⁶ The Government, in its opposition to the accounting claims, contended that no fiduciary

60. *Id.* at 296-97.

61. Chambers, *supra* note 58, at 1248 (emphasis added).

62. See Hughes, *supra* note 3, at 448.

63. *Id.* See Also Barsh, *U.S. v. Mitchell Decision Narrows Trust Responsibility*, 6 AM. IND. J. 2 (Aug. 1980).

64. 624 F.2d 981 (Ct. Cl. 1980).

65. *Id.* at 983.

66. *Id.* at 988.

obligation could exist without an express provision in a treaty or statute creating a trust relationship between the United States and the Indians.⁶⁷ The court viewed the existence of a trust relationship as the “seminal question” in this case as well as in other Claims Commission Act accountings.⁶⁸ In determining the existence of a trust relationship, the court rejected the Government’s contention that the trust relationship must be explicitly created in a statute.⁶⁹ Instead, the court found that the existence of the relationship could be “inferred from the nature of the transaction or activity.”⁷⁰

The key to the court’s reasoning seems to be the *control* the Government assumes over tribal monies or properties.⁷¹ If the Government “takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute about a trust fund, or a trust or fiduciary connection.”⁷² In direct opposition to the Government position, the court implies that when Government *control* is exercised over Indian property, the trust relationship exists *unless* Congress has expressly provided otherwise.⁷³ The court found that the trust relationship that existed in *Navajo* created a duty on the part of the Government.⁷⁴ Therefore, a breach of that duty would constitute a breach of trust for which the Government would be held accountable.⁷⁵

The *Navajo* court declined, however, to apply all the rules that governed private fiduciaries to an accounting claim by an Indian tribe against the United States.⁷⁶ The court stated that the precise scope of the obligation, and therefore the precise scope of the liability, must be determined on a case-by-case

67. *Id.* at 987.

68. *Id.* at 987 n.11. “Though this issue [the fiduciary relationship between the United States and the Indians] does not arise in the context of a dispositive ruling (in Part I of the trial judge’s opinion) we consider it now because we view it as a seminal question for all of the further proceedings in this accounting and in other Claims Commission Act accountings.”

Id.

69. *Id.* at 987.

70. *Id.*

71. *Id.*

72. *Id.* The court cites an impressive amount of authority to support its reasoning here.

73. *Id.*

74. *Id.* at 989.

75. *Id.*

76. *Id.* at 988.

basis.⁷⁷ In this case, the court found that the Government was obligated to account for the management of the tribe's timber and the proceeds for fire-damaged timber.⁷⁸ The tribe could also recover any funds, minus offsets, that were improperly expended and were not used for the benefit of the Indians.⁷⁹ However, the Navajos could not recover on the claim that tribal funds should have been deposited, when earned, in interest bearing accounts.⁸⁰ The Indian claim that the Government had a separate obligation to invest tribal funds productively was remanded to the trial court for further consideration.⁸¹

The next breach of trust case to come before the Court of Claims was *American Indians Residing in the Maricopa-Ak Chin Reservation v. United States*.⁸² The reservation, which was created by executive order, was semi-arid.⁸³ In 1946, the Superintendent of the Pima Indian Agency executed two long-term leases for the development of irrigated agriculture on the reservation.⁸⁴ Subsequently, additional ten-year leases were granted pursuant to a reservation development policy adopted by the Indians.⁸⁵

The Indians claimed that all of the leases were a "product of a continuing wrongful course of conduct"⁸⁶ in that the long-term leases ignored local agricultural practices.⁸⁷ The Indians further asserted that the Government breached its fiduciary duty by failing to obtain fair rental values for the properties.⁸⁸ Finally, the Indians sought damages for the Government's failure as a trustee to administer reservation property in accordance with a proper fiduciary standard.⁸⁹

77. *Id.* The court declined to apply the rule that if a beneficiary claims breach of trust, he is entitled to recover on the claim unless the fiduciary affirmatively establishes that it properly discharged its trust. The second trust principle the court declined to apply was that failure to render the precise form of accounting required was sufficient, in and of itself, to establish liability. *Id.*

78. *Id.* at 989.

79. *Id.* at 991.

80. *Id.* at 995.

81. *Id.*

82. 667 F.2d 980 (Ct. Cl. 1981).

83. *Id.* at 985.

84. *Id.*

85. *Id.* at 986.

86. *Id.* at 989.

87. *Id.*

88. *Id.*

89. *Id.*

The court examined the trust relationship and again found its genesis in the *control* the Government asserted over Indian affairs.⁹⁰ Denying that the trust must be expressly created by treaty, agreement or statute, the court stated that “[T]he trust or fiduciary relationship [the Indians] ha[ve] with the Government arises not from the specific terms of a document; it exists because [the Government] has assumed control and supervision over [Indian] money and property.”⁹¹ The court concluded, therefore, that the Government was a trustee with reference to its dealings with Indian reservation property.⁹²

Since the Government was a trustee, it would be held to the “highest fiduciary standards,”⁹³ even though the court again declined to apply all the rules that govern private fiduciary relationships.⁹⁴ Damages were allowed because the losses incurred were the result of a breach of trust in the Government’s management of tangible trust property.⁹⁵ Damages were determined by adjustments between the actual amount received by the Indians and the fair market value of the lease.⁹⁶ The records in this case were inadequately kept by the Government, so the court granted all the claims clearly established by the Indians, noting that the Government must suffer the consequences of its poor record-keeping.⁹⁷

The third breach of trust case, *Duncan v. United States*,⁹⁸ was heard in the Court of Claims on remand. The facts in that case involved the Pomo Indians in California. The Pomos lived on the Robinson Rancheria, which was terminated⁹⁹ according to the terms of the Rancheria Act.¹⁰⁰ In order to facilitate and

90. *Id.* at 990.

91. *Id.* The court also cited *Cramer v. United States*, 261 U.S. 219 (1923), and *Coast Indian Community v. United States*, 550 F.2d 639 (Ct. Cl. 1977), stating: “Plaintiff’s rights and defendant’s obligations arise from the creation of the reservation, and defendant, as regards its dealings with Indian reservation property, is a trustee.” 667 F.2d at 990.

92. 667 F.2d at 990.

93. *Id.*

94. *Id.* Specifically, the court noted that the Government’s failure to render an accounting in the form required by a fiduciary was not in and of itself sufficient to establish liability. *Id.*

95. *Id.*

96. *Id.* at 996-97.

97. *Id.* at 1005.

98. 667 F.2d 36 (Ct. Cl. 1981).

99. Termination was a federal Indian policy pursued by the United States from 1945 to 1961. The object of the policy was to reduce Government involvement in Indian affairs. See Wilkinson and Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977).

100. *Duncan v. United States*, 597 F.2d 1337, 1340 (Ct. Cl. 1979). The Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958). “This law provided for termination of the special status

encourage termination, the Act provided that the Government would build sanitation and irrigation systems on the Rancheria before the land would be conveyed to private owners under the distribution plan.¹⁰¹ The Government failed to complete the sanitation and irrigation projects. Nevertheless, the Rancheria was terminated.¹⁰² The Indians brought suit for breach of trust and the Court of Claims held that damages were recoverable for the breach.¹⁰³ The judgment was vacated and remanded by the Supreme Court in light of *Mitchell*.¹⁰⁴

On remand,¹⁰⁵ The Court of Claims found that *Mitchell* was not applicable because the Supreme Court in *Mitchell* limited its investigation of the trust obligation to the terms of the General Allotment Act.¹⁰⁶ The Court of Claims noted that the Supreme Court had left open the issue of "whether a statute imposing on the Government general fiduciary duties toward the Indians would constitute a waiver of sovereign immunity."¹⁰⁷ The Court of Claims believed that such a statute could waive sovereign immunity and that the Rancheria Act fit that criterion.¹⁰⁸ The Court of Claims found that a trust relationship existed for two reasons: the language in the Rancheria Act,¹⁰⁹ and the Government's subsequent recognition of the trust relationship by its *assumption of control* over the Rancheria.¹¹⁰ The court reasoned that the governing statute need not spell out specifically all the duties of the Government as

(as Indian lands) of various California Rancherias upon approval by a majority of the affected Indians of a final distribution plan." 597 F.2d at 1340. In 1964 the Act was amended to expand the scope of the Secretary's responsibility to include sanitation facilities. Pub. L. No. 88-419, 78 Stat. 390 (1964). The Reservation was terminated in 1965. See Table Bluff Band of Indians v. Andrus, 532 F. Supp. 255 (D.C.N. Cal. 1981). That case involved a similar fact situation and was brought by the Indians under the Rancheria Act in the District Court of Northern California. The Court held *inter-alia* that (1) where the trust relationship between the United States and Indians residing on trust land was wrongfully terminated the lands could be returned to the United States to be held in trust (532 F. Supp. at 260), but (2) Indians were not entitled to recover money damages against the United States for breach of fiduciary duties, breach of statutory duties, or breach of contract created by the distribution plan or for a fifth amendment taking of vested rights. 532 F. Supp. at 264.

101. Duncan v. United States, 597 F.2d at 1340 (Ct. Cl. 1979).

102. *Id.*

103. *Id.* at 1339.

104. United States v. Duncan, 446 U.S. 903 (1980).

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

106. *Id.* at 40.

107. *Id.*

108. *Id.*

109. Even though the court used the language of the Rancheria Act to establish the trust relationship, it is important that the court noted that the language of the Act did not expressly state that the United States held the land as trustee. *Id.*

110. *Id.* at 41-42.

trustee. The long established history of governmental fiduciary obligation in the management of Indian property was enough to support a broad scale Congressional establishment of a trust.¹¹¹

The control analysis used in *Navajo* was again applied to establish the fiduciary relationship.¹¹² The court concluded that the Rancheria Act "mandated compensation for federal breaches of trust . . ." and that under 28 U.S.C. § 1491, the Court of Claims was the proper forum in which to seek damages.¹¹³ In its consideration of damages, the court reviewed the claims for damages in previous Indian cases.¹¹⁴ The court concluded that the test should always be that of "proximate causation by a proven breach of trust."¹¹⁵ Consequently, only actual damages were allowed.¹¹⁶

The reconsideration of *Mitchell* by the Court of Claims in this review of breach of trust claims is most illuminating.¹¹⁷ On remand, the Indians did not base their claim on the General Allotment Act. The Indians' claims were based instead on timber management statutes.¹¹⁸ The Government again moved to have the case dismissed on jurisdictional grounds, claiming that Congress had not waived sovereign immunity either through the Tucker Act or 28 U.S.C. § 1505 or through any other statute invoked by the Indians.¹¹⁹

The court answered this argument with a two-pronged analysis. First, the court reasoned that if a statute could fairly be interpreted as mandating compensation by the Govern-

111. *Id.* at 42. The court specifically distinguished the trust created by the General Allotment Act, which was limited, from the trust created by the Rancheria Act, which was general. The court rationalized this by saying that nothing in the legislative history of the Rancheria Act or in the course of its administration suggested that the trust was to have a restricted purpose. *Id.*

112. *Id.* The court noted that the ruling in *Navajo* "squarely applies to [*Duncan*] as well." *Id.*

113. *Id.* at 44.

114. *Id.* at 46-47. The court gave an excellent review of the cases involving compensation for breach of trust claims.

115. *Id.* at 49.

116. *Id.*

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

118. *Id.* at 269. The Indian's claims were based on the following statutes: 25 U.S.C. §§ 406-407 (1976) (timber sales); 25 U.S.C. § 466 (1976) (regulations and sustained-yield); 25 U.S.C. §§ 318a, 323-325 (1976) (rights-of-way). For a review of the Government's pervasive control and harvesting of Indian timber, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

119. 664 F.2d at 267.

ment, then it would have been superfluous¹²⁰ “for Congress to add expressly in that statute that suit may be maintained in [the Court of Claims].”¹²¹ The court noted that Congressional consent to Court of Claims jurisdiction over pecuniary claims was given in the Tucker Act and 28 U.S.C. § 1505.¹²²

Second, the court did not believe that the only statutes mandating compensation were those that expressly authorized it.¹²³ The court noted that “neither *Testan* nor *Mitchell exclude[d]* all non-express indications of the right to compensation,” but merely demanded a close and careful reading of the relevant statute to determine whether the statute could “fairly be read as mandating compensation.”¹²⁴ The relevant statutes must be read “‘with that conservatism which is appropriate in the case of a waiver of sovereign immunity.’”¹²⁵ The court acknowledged that a statute may contain an implicit waiver of sovereign immunity. The court concluded that “The only inescapable principle is that Congress’s waiver of sovereign immunity with respect to money compensation must be clear or strong before the court can say that the statute mandates compensation.”¹²⁶ The court further noted that the strict requirement for an express statutory waiver of sovereign immunity, if it applied at all, wouldn’t be “extended to a *substantive* claim within the Tucker Act. . . .”¹²⁷

The court then applied the above analysis to the relevant timber management statutes in *Mitchell*.¹²⁸ The court noted that the Supreme Court in *White Mountain Apache v. Bracker* had interpreted the same statutes as giving the Government comprehensive control and management of timber resources

120. *Id.* at 268.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (emphasis added).

125. *Id.* (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

126. *Id.* at 268-69.

127. *Id.* at 269 n.4 (emphasis in original). The court stated:

In refusing to accord us jurisdiction beyond that historically recognized in this court, the Supreme Court may be said sometimes to have rested almost exclusively on the absence of an express Congressional statute waiving sovereign immunity. But this extremely strict requirement of an express statute, if it be a true *sine qua non* at all, has not, we think, been extended to a *substantive* claim within the Tucker Act—e.g. a monetary claim founded on an Act of Congress.

128. *Id.* at 269. Those statutes included: 25 U.S.C. §§ 406-407 (1976) (timber sales); 25 U.S.C. § 406 (1976) (regulations and sustained-yield); 25 U.S.C. §§ 318a, 323-325 (1976) (rights-of-way).

on Indian lands.¹²⁹ This comprehensive control then created a fiduciary relationship between the Government and the Indians.¹³⁰ Even though the word trust was never used in the relevant statutes,¹³¹ the court reasoned that they were “infused” with the long-continuing doctrine of governmental fiduciary obligation. These later statutes thus broadened the limited trust imposed by the General Allotment Act into one which imposed a special fiduciary obligation on the government for managing Indian lands.¹³² The court noted that nothing in the relevant legislation “suggests that Congress wished, contrary to historical principle, to depart from the norm of fiduciary duty.”¹³³

Given this finding of a fiduciary responsibility in the relevant acts, the court concluded, a breach of that responsibility mandated compensation.¹³⁴ Damages were limited, however, to direct damages. No consequential or indirect damages were allowed. As it had done in *Navajo, Duncan, and Maricopa-Ak Chin*, the court again stated the principle that the full panoply of damages applicable in a private trust suit was not applicable in an Indian breach of trust suit.¹³⁵

The only breach of trust action after *Mitchell* in which the Court of Claims denied damages was *Hydaburg v. United States*.¹³⁶ The Indian Reorganization Act (IRA)¹³⁷ was used as the basis for establishing a trust relationship in *Hydaburg*.¹³⁸ The Hydaburg Cooperative Association (the Association) was a chartered Indian corporation within § 17 of the Indian Reorganization Act.¹³⁹ Accordingly, the Association was eligible for loans to finance business ventures. These loans were

129. 664 F.2d at 269 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 145-48 (1980)).

130. *Id.* at 270.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 271.

135. *Id.* See also *The American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (Ct. Cl. 1981); *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981); *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980).

136. 667 F.2d 64 (Ct. Cl. 1981).

137. 25 U.S.C. §§ 461-479 (1976). The goal of the Act was to encourage Indian self-government. See Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

138. 667 F.2d at 67.

139. *Id.* at 65.

administered by the Bureau of Indian Affairs (BIA).¹⁴⁰ The Association purchased salmon fleets and canneries, which proved initially to be a successful business venture.¹⁴¹ For various reasons, however, the venture floundered and the BIA, in an effort to minimize losses, terminated the employment contract of the cannery manager.¹⁴² The Association had negotiated the contract.¹⁴³ The Association claimed that this interference by the Government was breach of trust under the IRA,¹⁴⁴ since the Government had a fiduciary duty to "promote, manage and maintain all assets and enterprises acquired by Indians pursuant to the Act."¹⁴⁵

The court noted that the relevant inquiry was to determine the scope of the fiduciary relationship that Congress had intended when the Indian Reorganization Act was passed. After making this inquiry, the court applied both the trust and the jurisdictional limitations imposed by *Mitchell*.¹⁴⁶ Examining the Indian Reorganization Act, the *Hydaburg* court concluded that the trust relationship in it, like the General Allotment Act in *Mitchell*, was limited to preventing alienation of Indian lands.¹⁴⁷ The Indians argued that the loan fund statutes¹⁴⁸ should be analogized to the timber statutes,¹⁴⁹ and therefore should support jurisdiction in the Court of Claims. The court disagreed, noting that the IRA loan provisions imposed no management standards on the Government, and concluded that Congress never intended to be liable "as a *fiduciary* for

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 67. The Indian Reorganization Act, provided that the title to lands taken pursuant to the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired. . . ." 25 U.S.C. § 465 (1976).

145. 667 F.2d at 67.

146. *Id.* at 67-68.

147. *Id.* at 68.

148. 25 U.S.C. § 470 (1976) (loan fund). This section provides in pertinent part:

There is hereby authorized to be appropriated out of any funds in the Treasury not otherwise appropriated, the sum of \$10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members. . . .

149. 667 F.2d at 68. 26 U.S.C. § 466 (1976) (timber management). This section provides in pertinent part:

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units. . . . and to promulgate such other rules and regulations as may be necessary.

the promotion, maintenance and management of assets and enterprises acquired by the Indians pursuant to the Act."¹⁵⁰ Accordingly, all the breach of trust claims in *Hydaburg* were dismissed.¹⁵¹

The court did not explicitly address the control element, but the facts indicate that the enterprise was generally run by the Indians themselves. The Bureau of Indian Affairs made management decisions only when the cannery was facing bankruptcy.¹⁵² Therefore, the *Hydaburg* court's decision was consistent with its other decisions¹⁵³ in not finding the existence of a trust relationship. The Government's pervasive control over Indian operations could not be established.

DEFINING THE TRUST RELATIONSHIP AFTER *United States v. Mitchell*

An examination of the breach of trust suits brought in the Court of Claims subsequent to *Mitchell* reveals that the impact of *Mitchell* has been minimal in the resolution of these suits. The Court of Claims has declined to read *Mitchell* rigidly and considers the "limited trust"¹⁵⁴ definition applicable to the General Allotment Act only.¹⁵⁵ The court has based the trust relationship on a variety of statutes, but a pattern begins to emerge in the court's analysis of them. This pattern might be termed a "control analysis." In each case, the court examined the relevant statute to determine the amount of control that the government assumes over the management of Indian property and affairs. The degree of control seems to vary from case to case, ranging from limited in *Hydaburg* to comprehensive in *Mitchell*. When the government assumes comprehensive control over Indian money and property, a fiduciary relationship is created.¹⁵⁶ This fiduciary relationship, in turn, imposes liabilities on the Government for its breach.

150. 667 F.2d at 69 (emphasis in original).

151. *Id.*

152. *Id.* at 65.

153. See *The American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (Ct. Cl. 1981); *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981); *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981); *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980).

154. See *supra* note 20.

155. *Duncan v. United States*, 667 F.2d 36, 40 (Ct. Cl. 1981).

156. See *supra* note 153.

In using this "control analysis" the court has adhered to a fundamental legal concept as defined by the legal philosopher, Wesley Hohfeld.¹⁵⁷ According to Hohfeld, there can be no right without a duty; no power without the correlative liability.¹⁵⁸ This application to breach of trust suits is not only legally logical, but can be considered politically logical as well. If the Government is not held responsible for its actions, a political vacuum is created. When a vacuum is created, the more powerful entity moves to fill it. In other words, if the Government is not held responsible for its actions, it may, in effect, operate without rules. If the Government operates without rules it may do so to the detriment of the weaker entity, namely, the Indians. In fact, this sequence is one which has occurred in our history many times.¹⁵⁹ This should serve as a warning to those who see the trust relationship as an impediment to Indian sovereignty.¹⁶⁰ Sovereignty must be founded upon a strong economic base, and the Indians themselves¹⁶¹ as well as many commentators¹⁶² and legislators,¹⁶³ recognize that fact. In many cases the Indians are unable or unwilling to manage their own resources.¹⁶⁴ If the Government, as manager of those resources, is not held accountable, then the Indians' economic base is in danger of disappearing altogether. The continuation of the trusteeship with its attendant duties and liabilities is therefore essential to the preservation of Indian sovereignty. The Court of Claims implicitly recognizes this in its "control analysis."

In using the "control analysis" to establish a trust relationship, the court declines to place a strong emphasis on the

157. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (rev. ed. 1978).

158. *Id.* at 38.

159. This premise is clearly illustrated by a review of the United States' policies toward the Indian. For an overview of the United States' policies concerning Indian affairs, see COHEN, *supra* note 5, at 47-180.

160. Barsh, *supra* note 63, at 14.

161. Two organizations founded by the Indians to help promote tribal economic development are the Council of Energy Resources Tribes (CERT) and the United Indian Development Association (UIDA). Both of these organizations operate on federal funds. For a discussion of these organizations and other efforts to promote tribal independence, see Winslow, *The Last Stand?* 6 AM. IND. J. 2, 8 (Sept. 1980).

162. See, e.g., Ickes, *Tribal Economic Independence—The Means to Achieve True Tribal Self-Determination*, 26 S.D.L. REV. 494 (1981); Ruffing, *Agenda for Action*, 6 AM. IND. J. 14 (July 1980); Comment, *Indian Tribes: Self-Determination Through Effective Management of Natural Resources*, 17 TULSA L.J. 507 (1982).

163. Senator John Melchor (D-Mont.) introduced Senate Bill No. 1894. This bill would give tribes and individual Indian owners an opportunity to negotiate their own oil and gas leases. See Comment, *supra* note 162, at 510.

164. Cleaves, *A Betrayal of Trust: The Main Settlement Act and the Houttan Band of Maliseets*, 6 AM. IND. J. 2 (Nov. 1980). Winslow, *supra* note 161, at 6.

precise language of the statute. The court's contention that a trust may exist even though the word "trust" is never used in the statute upon which claims are based is consistent with the law of trusts:

The trust is the whole judicial device, the *legal relationship* between the parties with respect to the property which is its subject matter, and includes not merely the duties which the trustee owes to the beneficiary . . . but also the rights, privileges [and] powers which the beneficiary has against the trustee. . . .¹⁶⁵

The application of these principles to the trust relationship which exists between the Government and the Indians satisfies the symmetry required by the law.

REMEDIES FOR INDIAN BREACH OF TRUST CLAIMS

The remedy in Indian breach of trust suits has always been limited to actual damages.¹⁶⁶ This seems inadequate in view of the fact that most of these cases have a long litigation history.¹⁶⁷ The tribe's natural resources may be completely depleted by the time the complex litigation is completed. The Indian community must maintain a strong economic base if it is to preserve its sovereignty.¹⁶⁸ If that base is depleted, Indians may be forced to abandon their communities and thus, Native American culture may face complete extinction. In view of this, perhaps the Indians' claims in *Duncan* for damages for injury to Indian culture and subsequent emotional and psychological injuries were not unreasonable.¹⁶⁹

165. SCOTT, 1 THE LAW OF TRUSTS § 2.4 (1967) (emphasis added).

166. See *supra* text accompanying note 135.

167. It should be noted that the litigation in *Mitchell* took eight years.

168. See *supra* text accompanying notes 161-163.

169. 667 F.2d at 46. Two other remedies might also be considered. One writer suggests that "if there is a sovereign immunity problem with the Tucker Act, the issue could be avoided if suit is brought seeking equitable relief under the Administrative Procedure Act, 26 U.S.C. §§ 450 (a)-(n) (1976)." Comment, *Whom Can the Indian Trust After Mitchell?* 53 U. COLO. L. REV. 179 (1981). This would not allow damages but would at least insure that mismanagement would cease. Another option may be to bring an action under 28 U.S.C. § 1983 (1976). In a recent case, *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court held that section 1983 applied to rights secured by the Constitution and by all federal laws, thereby rejecting assertions that it is limited to color-of-state law and civil rights statutory violations. This case could be viewed as *carte blanche* for claims against the United States. See Note *Section 1983: Carte Blanche Remedy for Federal Statutory Violations?* 10 STETSON L. REV. 506 (1981). This decision also allowed attorney's fees under 28 U.S.C. § 1988 (1976), which could be a major expense in complex Indian litigation. 448 U.S. at 9.

The Court of Claims contends that other kinds of damages would require Congressional authority because no precedent exists for recovery of consequential damages of this nature.¹⁷⁰ It can be assumed that the court created a fiduciary relationship using the "control analysis" in order to reach equitable results. Even more equitable results would have been achieved if the court were also willing to enlarge the remedy available for the breach of that trust. The court should consider applying the full panoply of remedies available in private breach of trust suits. Perhaps the spectre of greater damages will motivate the Government to fulfill its role as trustee to the Indians more prudently.

PATRICIA MCKEOWN NAGEL

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