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Indian Law - Sovereignty's Last Strand - Northern Arapahoe Tribe v. Hodel

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INDIAN LAW—Sovereignty's Last Stand. *Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741 (10th Cir. 1987).

In October 1984, the Bureau of Indian Affairs (BIA) published and put into effect the "Wind River Reservation Game Code."[1] The Arapahoe and Shoshone Indian tribes, which share the reservation in central Wyoming, had recognized a need for game management on the reservation as early as 1977,[2] but had failed to reach any hunting regulation agreement. The Shoshone enacted a game code to govern the tribe's own members in 1980, and when the Arapahoe rejected the code as too restrictive, the Shoshone asked the Secretary of the Interior (Secretary) to intervene. The Associate Solicitor of Indian Affairs instead encouraged the tribes to resolve the matter, but when they continued to fail to do so, and after the harsh winter of 1983-84 resulted in press reports of massive elk kills on the reservation,[3] the BIA finally issued the game code.[4]

Less than three weeks after the regulations were imposed, the Arapahoe filed an action against the Secretary for declaratory and injunctive relief and moved for a temporary restraining order[5] to prevent enforce-

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1. 25 C.F.R. pt. 244 (1986). The Game Code provided for the establishment of hunting seasons and hunting areas, and the issuance of permits and limits on all wildlife. Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 746 (10th Cir. 1987).

2. *Northern Arapahoe Tribe*, 808 F.2d at 744. In 1977, the Joint Business Council passed Resolution No. 3923, recognized the importance of wildlife management and the risk of unrestricted harvest, and requested a U.S. Fish and Wildlife Service study and recommendation of wildlife management practices for the reservation.

The Shoshone and Arapahoe Tribes govern the Wind River Indian Reservation jointly. Each Tribe makes its decisions by a vote of the Tribal membership at General Council meetings or by vote of the elected Business Councils of each Tribe. Decisions on the Tribal game code were submitted to the Tribal memberships. Brief for Appellant at 5, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987) [hereinafter Brief for Appellant].

3. *Northern Arapahoe Tribe,* 808 F.2d at 745.

4. *Id.* Congress' power over Indians is derived from the Constitution, where "Indians not taxed" are referred to in article I and in the fourteenth amendment. U.S. CONST. art. I, § 2, cl. 3; amend. XIV, § 2. The Commerce Clause includes the Indian Commerce Clause, which authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* at art. 1, § 8, cl. 3.

Congress has also relied on the Treaty Clause to exercise federal management of Indian affairs. *Id.* at art. II, § 2, cl. 2. *See* McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 172 n.7 (1973).

The Department of War was originally entrusted with Indian affairs by the Act of August 7, 1789. ch. 7, Stat. 49. In 1849, the Department of Interior (created by the Act of March 3, 1849, ch. 108, § 1, 9 Stat. 395 (repealed in part, 1953) (superseded in part 1966) (formerly codified at 19 U.S.C. § 42 (1952), scattered sections of 5 U.S.C. (1964)) (codified in scattered sections of 5, 31, 43 U.S.C.)) took over responsibility for the administration of Indian affairs. The BIA continues to represent the federal government in most of its relations with Indian tribes. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 108, 119 (1982 ed.).

5. The temporary restraining order (TRO) is an injunction granted for a ten-day period only when the moving party shows 1) there is no adequate legal remedy, 2) the party would otherwise suffer irreparable harm, and 3) a likelihood of success on the merits. A TRO is typically an *ex parte* injunction, one which is granted without notice to the defendant. The plaintiff's evidence is often in attenuated form because of hurried proceedings. D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES, 107-09 (1973 ed.).

At the hearing the Arapahoe relied entirely on 50 affidavits filed by Tribe members. These averred that the affiant had hunted regularly on the reservation, that he planned to hunt that fall for food, and that enforcement of the game code would leave him and his family without adequate food supply. *Northern Arapahoe Tribe,* 808 F.2d at 746.

ment of the game code. The Shoshone moved to intervene. The district court consolidated the hearing on preliminary injunctive relief with a trial on the merits, and denied all the Arapahoe's requests.[6]

The Arapahoe contended on appeal that the Secretary lacked authority to regulate on-reservation hunting by Indians, arguing that the rulemaking power of administrative agencies is the power to carry into effect the will of Congress, and not the power to make law.[7] The tenth circuit court disagreed, finding authority in 25 U.S.C. §§ 2 and 9[8] and the 1868 Treaty with the Shoshone.[9]

Judge Seymour stated the issue for the tenth circuit court when he wrote that one tribe cannot claim the right to hunt to the point of endangering game to the derogation of the other tribe's right to hunt.[10] The court clearly sought an equitable solution based on this perception, yet the result it reached is not supported in the opinion's legal argument. Federal Indian policy has often been a balancing act between the concept of tribal sovereignty and the trust relationship.[11] The caselaw has not been consistent.[12] This casenote will outline the development of the law and attempt to chart the direction courts are currently taking. The note will show that "sovereignty" is used in its most limited sense when applied to Indian tribes. The trust relationship between the United States and the tribes, both as a source of authority and as a source of duty, is the dominant doctrine. The United States Supreme Court, however, has required an express creation of the trust relationship, and does not recognize the trust duty as an independent legal doctrine. Absent the express creation of a trust relationship or the clear expression of Congress to act, there is no authority to interfere in Indian sovereignty.

BACKGROUND

The "special relationship" between the United States and Indian tribes is defined by two often conflicting doctrines. Courts have historically balanced the concept of Indian sovereignty against the government's trust relationship with Indian tribes.

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6. *Northern Arapahoe Tribe*, 808 F.2d at 746-47. The Tenth Circuit Court of Appeals remanded the case for a trial on the merits, reversing the lower court's judgment "to the extent that it denied a permanent injunction without holding a proper hearing on the factual issues." *Id.* at 754.

Federal district courts are vested with original jurisdiction of civil actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." 28 U.S.C. § 1362 (1982).

7. Brief for Appellant, *supra* note 2, at 16. The brief cited Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)).

8. 25 U.S.C. §§ 2 and 9 (1982).

9. Treaty with the Eastern Band Shoshone and Bannock, July 3, 1868, United States—Eastern Band Shoshone—Bannock, 15 Stat. 673, 674. [hereinafter Treaty of 1868]. *Northern Arapahoe Tribe*, 808 F.2d at 749.

10. *Id.* at 750.

11. Note, *Sovereignty Under Reservation: American Indian Tribal Sovereignty in Law and Practice*, 14 N.Y.L. SCH. J. INT'L AND COMP. L., 589, 603-05 (1983).

12. *Id.* at 599.

Northern Arapahoe presents an unusual problem in that two tribes share not only the reservation hunting rights, but also the exercise of power, or sovereignty, over the reservation. To further complicate the situation, the Arapahoe and Shoshone are ancestral foes[13] whose coexistence was forced upon them by the government, against the will of the Shoshone, the original Treaty signatories.[14]

However, the Arapahoe's right to one-half the Wind River Reservation was legitimized by a bill enacted in 1927,[15] and the Shoshone were compensated for "one-half the undivided interest of the Shoshone or Wind River Reservation."[16] The government recognized the Arapahoe's claim to half the Reservation's rights even before that, since as early as 1897.[17] For 90 years the Arapahoe and Shoshone have exercised joint tribal self-government, in accordance with the United States' policy of encouraging Indian tribal sovereignty.[18]

Indian Sovereignty

Since the landmark 1832 case of *Worcester v. Georgia*,[19] the courts have recognized Indian tribes as "distinct, independent political communities, retaining their original natural rights."[20] In *Worcester*, Chief Justice Marshall wrote that the State of Georgia could not exercise jurisdiction over the Cherokee reservation because the power to regulate Indians lies exclusively with Congress. Applying principles of international law, he found that "a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[21]

The concept of Indian sovereignty has developed since *Worcester*. In 1959, the Supreme Court recognized that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal

13. Shoshone Tribe v. United States, 299 U.S. 476, 486 (1937).

14. Brief for Appellee at 24, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987) [hereinafter Brief for Appellee].

15. A band of Northern Arapahoe was brought to the Wind River Reservation under military escort in 1878. The Shoshone leader, Chief Washakie, agreed to let them stay long enough to let them rest their horses and themselves, but the Arapahoe did not leave. They continued to arrive until within a month nearly the whole tribe had arrived. Washakie's protests were met with silence, and the government treated the Arapahoe's presence on the Reservation as permanent and rightful in spite of the fact that it was in clear violation of the Treaty of 1868. In 1927 Congress passed a bill permitting the Shoshone to submit claims for appropriation of their lands. The bill became Chapter 302 of the Laws of 1927. *Shoshone Tribe*, 299 U.S. at 486-91.

16. United States v. Shoshone, 304 U.S. 111, 114 (1938).

17. *Shoshone Tribe*, 299 U.S. at 489.

18. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

19. 31 U.S. (6 Pet.) 515 (1832).

20. *Id.* at 559.

21. *Id.* at 561. *Cf.* Right of Nationals of the United States in Morocco (France v. U.S.A.), 19 INT'L L. REP. 255 (1959 ed.). The case involved a dispute between the United States and France over allegedly discriminatory Moroccan trade regulation. The International Court of Justice recognized that "Morocco, even under the Protectorate [of France], has retained its personality as a State in international law." *Id.* at 260.

government existed."[22] In the 1974 case of *Morton v. Mancari*,[23] a class action by non-Indians contending that the BIA's Indian hiring preference was in violation of the Equal Employment Opportunity Act,[24] the Supreme Court cited congressional intent dating back 150 years in support of furthering the goal of Indian self-government.[25] The Court found the Indian hiring preference to be valid in that historical context, and added: "Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."[26]

> There are, of course, limits to the sovereignty of Indian tribes.
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> Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.[27]

The Court listed some of the powers yielded up, including the right to free alienation of tribal lands to non-Indians,[28] the ability to enter into direct commercial or governmental relations with foreign nations,[29] and jurisdiction to try nonmembers in tribal courts.[30]

As the Supreme Court stated in *United States v. Wheeler*, "[U]ntil Congress acts the tribes retain their existing sovereign powers."[31] In *Wheeler*, a Navajo Indian being tried in both tribal and federal courts for crimes arising out of the same incident appealed to the Supreme Court on grounds of double jeopardy. Justice Stewart, writing for a unanimous[32] Court, said the power to punish offenses against tribal law is derived from primeval sovereignty. Indian tribes exercise power retained by them, not one delegated to them by Congress.[33] The sources of authority for tribal and federal courts are entirely independent, the Court held, and therefore it found no double jeopardy. Implied in the Court's reasoning is the understanding that the fifth amendment is not applicable to tribal courts.

Although Congress may exercise its plenary powers to withdraw the sovereign rights of Indian tribes, the Supreme Court has insisted on "clear

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22. Williams v. Lee, 358 U.S. 217, 221-22 (1959). The Court said the understanding was implicit in treaty terms establishing the Navajo Reservation. Note that *Williams* was a case of state preemption of Indian sovereignty.
23. 417 U.S. 535 (1974).
24. *Id.* at 538.
25. *Id.* at 541-45.
26. *Id.* at 553.
27. United States v. Wheeler, 435 U.S. 313, 323 (1978).
28. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).
29. *Worcester*, 31 U.S at 559; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).
30. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
31. *Wheeler*, 435 U.S. at 323.
32. Justice Brennan took no part in the consideration or decision of the case. *Id.* at 332.
33. *Wheeler*, 435 U.S. at 328. *See also* Talton v. Mayes, 163 U.S. 376 (1896).

indications of legislative intent"[34] before abrogating any such rights. As far back as 1883, the Supreme Court in *Ex parte Crow Dog*[35] denied the district court jurisdiction over an Indian murder trial, absent a specific treaty provision or the "clear expression of the intention of Congress" to include such crimes in federal jurisdiction.[36] The Supreme Court in *Crow Dog* did not deny the power of Congress to limit the extent of tribal self-government; it merely refused to imply such an intent without a clear expression by Congress. Two years later, Congress passed the Indian Major Crimes Act, making it a federal crime for one Indian to murder another.[37] When the Supreme Court, in *United States v. Kagama*,[38] was faced with an Indian murder case whose facts resembled those in *Crow Dog* in 1886, it applied the Indian Major Crimes Act and found that federal courts had jurisdiction.[39]

The tenth circuit court itself emphasized the importance of preserving tribal sovereignty in 1980 in *Joe v. Marcum*,[40] when it overruled a lower court order garnishing the wages of a Navajo Indian who lived and worked on the Navajo Reservation. The circuit court recognized the validity of the policy argument that Joe should not be able to use the reservation as sanctuary to insulate himself from the consequences of failing to pay off-reservation debts. It said that argument "overlooks the central and dominant factor here involved, namely, that to allow the present garnishment proceeding to stand would impinge upon tribal sovereignty."[41] The court went on to note that the Civil Rights Act of 1968 provides a method whereby a state may assume jurisdiction over actions such as the one before it.[42] The court showed little sympathy for the state's action, considering the state had made no attempt to exert its jurisdiction by legitimate channels. Finally, the court noted that the absence of a specific tribal mechanism for garnishment proceedings did not justify state intervention. "The basic tenet of the Navajo Treaty of 1868 [which is identical to the 1868 Treaty with the Shoshone in its essential provisions] is that the Navajo Tribe is a sovereign entity and that, upon the reservation, the tribe possesses the right to self-government."[43]

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34. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (Indian Civil Rights Act doesn't provide federal jurisdiction except for specific actions, because congressional intent is to leave Indian sovereignty untouched); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (Supreme Court declined to construe the termination of federal supervision of the tribe as the termination of hunting and fishing rights); *Talton*, 163 U.S. 384-85 (Supreme Court refused to apply constitutional grand jury requirements to Indian murder or to rule on which of two conflicting Cherokee laws applies, saying that determination is solely within the jurisdiction of Cherokee courts).

35. 109 U.S. 556 (1883).

36. *Id.* at 572.

37. Indian Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (1982)).

38. United States v. Kagama, 118 U.S. 375 (1886).

39. *Id.* at 385. The Court referred to the Act of March, 1885 in its decision. *Id.*

40. 621 F.2d 358 (10th Cir. 1980).

41. *Id.* at 361.

42. 25 U.S.C. § 1322 (1982) provides for state assumption of jurisdiction over civil causes of action in Indian country, with the consent of the tribe.

43. *Marcum*, 621 F.2d at 361. *See* Treaty with the Navajo, June 1, 1868, United States—Navajo, 15 Stat. 667.

It must be noted that *Joe* is a case of state preemption of tribal sovereignty. Ever since *Worcester,* the courts have guarded Indian sovereignty against state preemption far more assiduously than they have against federal preemption. As the "domestic dependent nations" described by Chief Justice John Marshall in *Cherokee Nation v. Georgia,*[44] Indian tribes' right to self-government often prevails against the exercise of authority by states.[45] Confronted with the plenary powers of Congress, however, Indian "sovereignty" has proven to be a misnomer.

The theory that congressional action can override even the express treaty rights of Indians was manifested in the 1903 Supreme Court decision of *Lone Wolf v. Hitchcock.*[46] That case involved an 1867 Treaty (Treaty of Medicine Lodge) with the Kiowa and Comanche Tribes, which required the signature of three-fourths of adult male Indians for cession of reservation land.[47] A subsequent treaty providing for the cession of reservation lands was not signed by the requisite number of Indians, and Lone Wolf sued to enjoin enforcement of the statute enacted by Congress to put that treaty into effect.[48] The court rejected his claim, saying that "Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied even though opposed to the strict letter of the treaty with the Indians."[49]

The limits to Indian sovereignty when faced with federal authority were expressed in *United States v. Blackfeet Tribe.*[50] The Blackfeet Tribe permitted slot machines in violation of a federal statute.[51] The court ruled that the Tribe could not cite an FBI agent for contempt for removing the slot machines from the reservation. It dismissed the Tribe's claim of sovereignty, saying that "[t]he blunt fact . . . is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less."[52]

25 U.S.C. Sections 2 and 9

Consistent with the requirement of clear legislative intent, the Supreme Court has interpreted the scope of the authority in 25 U.S.C. §§ 2 and 9 very narrowly. The two statutes provide:

§ 2 Duties of the Commissioner

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

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44. *Cherokee Nation,* 30 U.S. (5 Pet.) at 17.
45. *Id.* at 76. *Williams,* 358 U.S. at 220.
46. 187 U.S. 553 (1903).
47. *Id.* at 554.
48. *Id.* at 560.
49. *Id.* at 565 (interpreting Beecher v. Wetherby, 95 U.S. 517 (1877)).
50. 364 F. Supp. 192 (D. Mont. 1973), *aff'd on rehearing,* 369 F. Supp. 562.
51. *Id.* at 194.
52. *Id.*

§ 9 Regulations by President

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.[53]

In *Organized Village of Kake v. Egan*,[54] the Supreme Court held that the Secretary did not have the authority to permit Indians to trap salmon in violation of state law. The Court found that sections 2 and 9 did not support the fish trap regulations, noting that the Interior Department had conceded that "In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed . . . the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct."[55]

The Trust Relationship

Chief Justice Marshall's 1831 opinion in *Cherokee Nation v. Georgia*[56] laid the foundation for the concept of a federal trust responsibility to Indians. In *Cherokee Nation* the Tribe invoked the Supreme Court's original jurisdiction[57] to enjoin enforcement of state laws on the Cherokee reservation. Although the Court held that the Tribe could not bring the suit initially in the Supreme Court because it was neither a U.S. state nor a foreign state,[58] Justice Marshall did define the status of Indian tribes. They "may, more correctly," he said, "be denominated domestic dependent nations . . . in a state of pupilage . . . . Their relationship to the United States resembles that of a ward to his guardian."[59]

The Supreme Court justified the exercise of federal authority based on the government's trust relationship in 1886 with *United States v. Kagama*. In that case, the Supreme Court found that a congressional act extending federal jurisdiction over certain crimes committed by Indians was valid. The Court found that the federal government was under a duty to exercise its authority over Indian tribes because it was largely responsible for their state of "weakness and helplessness."[60] The exercise of federal authority, the Court reasoned, was necessary for the Indian's protection.[61] Thus *Kagama* stands for the proposition that the duty inherent in the trust relationship is also a source of authority — a proposition that leads to significant inroads into the concept of Indian sovereignty.

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53. 25 U.S.C. §§ 2, 9 (1982).
54. 369 U.S. 60 (1962).
55. *Id.* at 63 (*Kake* dealt with off-reservation fishing rights).
56. 30 U.S. (5 Pet.) 1.
57. *Id.* at 17. The tribe attempted to invoke original jurisdiction based on U.S. CONST. art. III, § 2, cl. 1. *Id.* at 15.
58. *Cherokee Nation*, 30 U.S. at 16, 19-20. The Court based its conclusion on U.S. CONST. art. 8, cl. 3's distinction between foreign relations and Indian tribes. *Id.* at 18.
59. *Cherokee Nation*, 30 U.S. at 17.
60. *Kagama*, 118 U.S. at 384.
61. *Id.*

The trust relationship remains as "one of the primary cornerstones of Indian law."[62] The Supreme Court relied on it to find a federal duty to the Shoshone in 1937 in *Shoshone Tribe of Indians v. United States.*[63] In that case, the Shoshone Tribe sought compensation for the taking of half the Wind River Reservation, which had been ceded to it in its entirety by the Treaty of 1868.[64] In determining compensation, the Court found that the time of the taking was March, 1878, when the Arapahoe were brought to the reservation under military escort. In his opinion, Justice Cardozo noted that:

> The treaty of 1868 charged the Government with a duty to see to it that strangers should never be permitted without consent of the Shoshones to settle upon or reside in the Wind River Reservation. That duty was not fulfilled. Instead, the Arapahoes were brought upon the Reservation with a show of military power, and kept there in defiance of the duty to expel them.[65]

The duty inherent in a trust relationship has been used in the twentieth century to protect the rights of Indian tribes against federal and state encroachment and establish a standard of conduct for federal officials and Congress.[66] In *Seminole Nation v. United States,*[67] the Supreme Court held that the federal trust duty extends to protecting Indians even from their own improvidence. The case dealt with a treaty providing for the establishment of a trust fund, with the interest to be paid annually, per capita, to members of the Seminole Nation. Pursuant to requests of the Seminole General Council, the government made payments to the tribal treasurer and to designated creditors.[68] When members of the Tribe sued for breach of fiduciary duty based on misappropriation of the funds by tribal officials, the government argued that the payments made according to requests of the Tribal Council fulfilled its treaty obligation. But the Court said that argument "fails to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards."[69] The Court applied strict standards of fiduciary responsibility, saying the government "has charged itself with moral obligations of the highest responsibility and trust."[70]

The Court in *Seminole Nation* relied on the express provisions of the treaty, which imposed on the government a duty to pay the annuities to individual members of the Seminole Tribe.[71] The requirement that a trust duty be clearly established before the trust responsibility can be invoked

62. F. COHEN, *supra* note 4, at 220-21.
63. 299 U.S. at 476.
64. Treaty of 1868, *supra* note 9, at 674.
65. *Shoshone Tribe,* 299 U.S. at 494.
66. F. COHEN, *supra* note 4, at 220.
67. 316 U.S. 286 (1942).
68. *Id.* at 294-95.
69. *Id.* at 295.
70. *Id.* at 297.
71. *Id.* at 294.

as a basis of liability is even more explicit in *United States v. Mitchell*[72] (*Mitchell I*) and *United States v. Mitchell*[73] (*Mitchell II*).

In *Mitchell I*, members of the Quinault Tribe sued the government for mismanagement of reservation timber resources. The Indians based their claim for damages on the government's breach of its fiduciary duty, based on the General Allotment Act.[74] Section 5 of that Act provided that the Secretary of Interior would 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 to whom such allotment shall have been made." (emphasis added).[75] But in spite of the clear language creating a trust, the Court refused to find government liability. Instead, it said, "the Act created only a limited trust relationship . . . . The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."[76] After concluding that the General Allotment Act does not establish a fiduciary duty in the United States, the Court went on to say that any right of plaintiffs to recover damages for government mismanagement of timber resources might be found in sources other than the Act, and remanded the case.[77]

On remand, the Court of Claims found the government liable for breach of fiduciary duty in its management of the Tribe's timber resources.[78] The Supreme Court, in *Mitchell II*, affirmed.[79] The Court based its conclusion on various Acts of Congress and executive department regulations.[80] It found that, "[i]n contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."[81]

Although the trust relationship remains as a basis for invoking both the federal responsibility and federal authority, it does not exist as an independent legal doctrine. Rather, the trust relationship exists only as a consequence of specific federal treaties or statutes.

THE PRINCIPAL CASE

The tenth circuit court, in its opinion, did not dispute that the "primary authority to regulate hunting lies with the tribes, consistent with their sovereignty over the reservation land and resources."[82] But it considered the narrower question of whether the Secretary has authority to

72. 445 U.S. 535 (1980).
73. 463 U.S. 206 (1983).
74. *Mitchell I*, 445 U.S. at 537.
75. *Id.* at 541 (citing 25 U.S.C. § 348 (1982)).
76. *Id.* at 542.
77. *Id.* at 546.
78. *Mitchell II*, 463 U.S. at 211.
79. *Id.* at 228.
80. *Id.* at 219.
81. *Id.* at 224.
82. *Northern Arapahoe Tribe*, 808 F.2d at 749.

adopt interim hunting regulations as a necessary conservation measure at the request of one of the tribes. It concluded that the authority could be found in 25 U.S.C. §§ 2 and 9, together with the 1868 Treaty with the Shoshone, and "construed in accordance with the special relationship between the United States and Indian tribes."[83]

Citing *Organized Village of Kake v. Egan,* the court noted that sections 2 and 9 "do not vest the Secretary with general regulatory authority," and said it was "reluctant to hold that sections 2 and 9 by themselves could support the regulations."[84] However, the court did consider the authority delegated to the Secretary by Congress in sections 2 and 9 to be one of three sources combining to justify the Secretary's enaction of the game regulations.[85]

The court went on to note the "unique relationship" between the United States and Indian tribes, citing Chief Justice Marshall's description of Indian tribes in *Cherokee Nation v. Georgia* as "domestic dependent nations" which "look to our government for protection."[86] The court also relied on *Mitchell II,* in which the general trust relationship between the United States and Indians was recognized as a principle governing the government's dealings with the Indians.[87]

The court relied most heavily in its opinion on the Treaty of 1868, by which "the Government undertook the responsibility to protect the persons and property of the Shoshone from wrongdoers among the whites, or among other people subject to the authority of the United States."[88] The court noted that the right to hunt is shared by both tribes, and said "one tribe cannot claim that right to a point of endangering the resource in derogation of the other tribe's rights. Under the Treaty, the Government has the right upon request of the Shoshone to protect the resources guaranteed the Shoshone by treaty from misappropriation by third parties."[89]

Finally, the court concluded that the Secretary does have authority to implement a game code.[90] It found that authority, when there exists a threat of extinction or endangerment of wildlife,[91] in the Treaty along with 25 U.S.C. §§ 2 and 9, viewed in light of the trust responsibility and the Shoshone's request for regulation.

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83. *Id.*
84. *Id.* In note 5, the court said that it did not decide whether sections 2 and 9 alone could support the regulations, because the Secretary also relied on the treaty with the Shoshone for his authority. *Id.* at n.5.
85. *Id.* at 749.
86. *Id.* at 750.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* Because the lower court consolidated the hearing on the TRO with a trial on the merits without adequately notifying the parties, the question of a threat of endangerment of extinction was not resolved. The tenth circuit found that the consolidation was reversible error and remanded. *Id.* at 753.

ANALYSIS

The tenth circuit court in its opinion neglected the issue of Indian sovereignty, whose existence is at least as undisputed as that of the general trust relationship, and is cited in the brief of the Secretary as well as in the Appellant's briefs.[92]

The court was careful to specify in its opinion that it based its finding of the Secretary's authority to enact the game code in part on the fact that the Shoshone had requested the Secretary's intervention.[93] While it is clear that it would be inequitable to recognize the Arapahoe's right to hunt to the extent that it would be detrimental to the Shoshone's equal right, the court goes against a century and a half of Indian law when it allows the federal government to intervene without clear statutory authority. If the concept of Indian sovereignty is to mean anything, it must be upheld when its exercise appears misguided just as it is upheld when its exercise conforms to judicial notions of equity.

The court resorts to some convoluted reasoning to find its authority. The court's opinion takes the Treaty provision, in which it finds a government duty to protect the Shoshone from wrongdoers, out of context. The full Treaty provision says:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished . . . .[94]

A thorough reading of this provision reveals two flaws in the court's interpretation. First, the clause does not create a general duty of the government to protect the Shoshone against wrongdoers, but rather a commitment to prosecute proven wrongdoers for specific acts. This is not the case in *Northern Arapahoe*. Nowhere does the Treaty say that regulations will be enacted to prevent wrong. Second, the provision relates to people "subject to the authority of the United States."[95] The Arapahoe in this case are not people subject to the authority of the United States (without a specific expression of congressional intent), for in hunting game they are merely exercising their sovereign rights as Indians,[96] and are sub-

92. Brief for Appellant, *supra* note 2, at 23; Reply Brief for Appellant at 13-15, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987). The Secretary conceded that "[i]t is the stated objective and preference of the federal government that issues concerning the protection and management of wildlife resources on the Wind River Reservation be addressed and resolved by joint agreement between the Shoshone and Arapahoe Tribes." Brief for Appellee, *supra* note 9, at 4.

93. *Northern Arapahoe Tribe*, 808 F.2d at 750.

94. Treaty of 1868, *supra* note 9, at 673.

95. *Id.*

96. The court in *Northern Arapahoe* rejected the Shoshone claim that the Arapahoe have no rights to hunt and fish on the Reservation, saying those rights are part of both tribes' larger rights of possession. It said the Arapahoe's rights on the Reservation are derived from the Tribe's status as occupants of the land confirmed by congressional and executive acts. *Northern Arapahoe Tribe*, 808 F.2d at 748.

ject to the authority of tribal government. The Supreme Court in *Crow Dog* suggests that the "bad men clauses" indicate an intent by the parties to a treaty similar to the Treaty of 1868 that the United States will have jurisdiction over offenders among white men, while Indian tribes will have jurisdiction over their own members.[97]

The court goes on to say that, "Under the Treaty, the Government has the right upon request of the Shoshone to protect the resources guaranteed the Shoshone by treaty from misappropriation by third parties."[98] The Arapahoe are not third parties; they are joint occupants of the Wind River Reservation. By 90 years of practice, and by the Law of 1927, if not by treaty, Congress has specifically recognized the Tribe as having equal rights and equal sovereignty with the Shoshone on the Reservation.

The court recognized that sections 2 and 9 do not, in and of themselves, provide sufficient authority for the Secretary to enact the game regulations in question. Having conceded that these statutes cannot support the regulations, the court, without explanation, concluded that sections 2 and 9 are factors in providing the Secretary with the necessary authority to enact the regulations.

Finally, the court fell back on the trust relationship as a source of authority. The court cites *Cherokee Nation* to support its finding that Indian tribes are dependent upon the United States for their protection.[99] It ignores Justice Marshall's opinion of the following year in *Worcester v. Georgia*, in which he laid the foundation for the recognition of Indian tribes as "distinct, independent political communities" which retain their right to self-government.[100]

Although the *Northern Arapahoe* court did not cite *Seminole Nation* in finding the trust relationship is a source of authority, that decision would have been strong support for its argument. *Seminole Nation* held that the Government had a duty to fulfill its trust responsibilities even to the extent of protecting Indians from their own improvidence,[101] an interpretation which might be applied to find a similar duty in enactment of the Wind River Game Code. The trust relationship that is the source of duty is, correspondingly, the source of authority.

The flaw in this reasoning, however, is revealed by the requirement, expressed in *Mitchell I and II*, of clear establishment of the trust relationship by statute or treaty.[102] In *Seminole Nation*, the government's duty to pay the individual members of the Tribe was clearly established by treaty.[103] In *Mitchell I*, even the trust language of section 5 of the General Allotment Act was found insufficient to create an enforceable fiduciary

97. *Crow Dog*, 109 U.S. at 567-68.
98. *Northern Arapahoe Tribe*, 808 F.2d at 750.
99. *Id.*
100. *Worcester*, 31 U.S. (6 Pet.) at 559.
101. *Seminole Nation*, 316 U.S. at 300.
102. *Mitchell I*, 445 U.S. at 545-46, *Mitchell II*, 463 U.S. at 226.
103. *Seminole Nation*, 316 U.S. at 294.

duty in the government.[104] Only the express language of several acts and regulations was sufficient to find that duty in *Mitchell II*.[105]

Nowhere in the Treaty of 1868 is there any language creating a trust relationship that fulfills the strict requirements of *Mitchell I* to establish a specific fiduciary relationship in respect to preservation of game animals.

Without a fiduciary responsibility, there can be no fiduciary authority. The court cannot invoke an amorphous "trust relationship" in order to achieve the result it seeks.

An alternative theory supporting the court's result might be Congress' plenary power. The opinions in *Lone Wolf* and *Blackfeet Tribe* would support such an argument. But the results in those cases depended on express congressional action. Congress was silent as to the establishment of the Wind River Game Code.

Indian sovereignty exists only at the pleasure of the United States Government. When Chief Justice Marshall refused original Supreme Court jurisdiction to the Cherokee Tribe on the grounds that Indian tribes are "domestic dependent nations," he laid the foundation for recognition of tribal status as something less than sovereign.[106] Even that sovereignty recognized in *Cherokee Nation* has been significantly eroded since 1831.[107] However, the courts do continue to respect Indian sovereignty at least to the extent of requiring a clear expression of congressional intent to encroach upon it.

No such expression exists in *Northern Arapahoe Tribe*. To fall back on a free-floating concept of the trust relationship is to contravene precedent. Where the trust responsibility is not sufficient as a source of duty, it cannot be sufficient as a source of authority.

CONCLUSION

The court in *Northern Arapahoe* bases its approval of the Secretary's enactment of the Wind River Reservation Game Code on the government's trust relationship with Indian tribes. It attempts to bolster this conclusion with two very broad statutes (25 U.S.C. §§ 2 and 9) and the Treaty of 1868. The court does not point to any specific provision in the Treaty which might furnish duty or authority for the Secretary's action.

This undefined "trust relationship" is arguably insufficient under *Seminole Nation* to find duty or authority; it is certainly insufficient under *Mitchell I* and *II*. If the Supreme Court found the explicit trust language of section 5 of the General Allotment Act insufficient to create a trust duty in *Mitchell II*, it would certainly reject the vague reference in *Northern Arapahoe* to sections 2 and 9 and the Treaty.

104. *Mitchell I*, 445 U.S. at 546.
105. *Mitchell II*, 463 U.S. at 224.
106. *Cherokee Nation*, 30 U.S. 1 (5 Pet.) at 17.
107. *Wheeler*, 435 U.S. at 323; *Blackfeet Tribe*, 364 F. Supp. at 194.

The court in *Northern Arapahoe* furthermore approves the Secretary's encroachment on Indian sovereignty without giving any recognition to that ancient doctrine. Although Indian sovereignty has been significantly eroded, any further erosion still requires a clear expression of congressional intent.

Because there are no specific treaty or statutory provisions sufficient to establish a trust duty to preserve game on the Wind River Indian Reservation, the court did not have grounds to find authority for the Secretary's actions based on the trust relationship. And because Congress had not expressed the intent to give the Secretary such authority, the court should not have permitted this encroachment on Indian sovereignty.

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