No. 01-1067

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WHITE MOUNTAIN APACHE TRIBE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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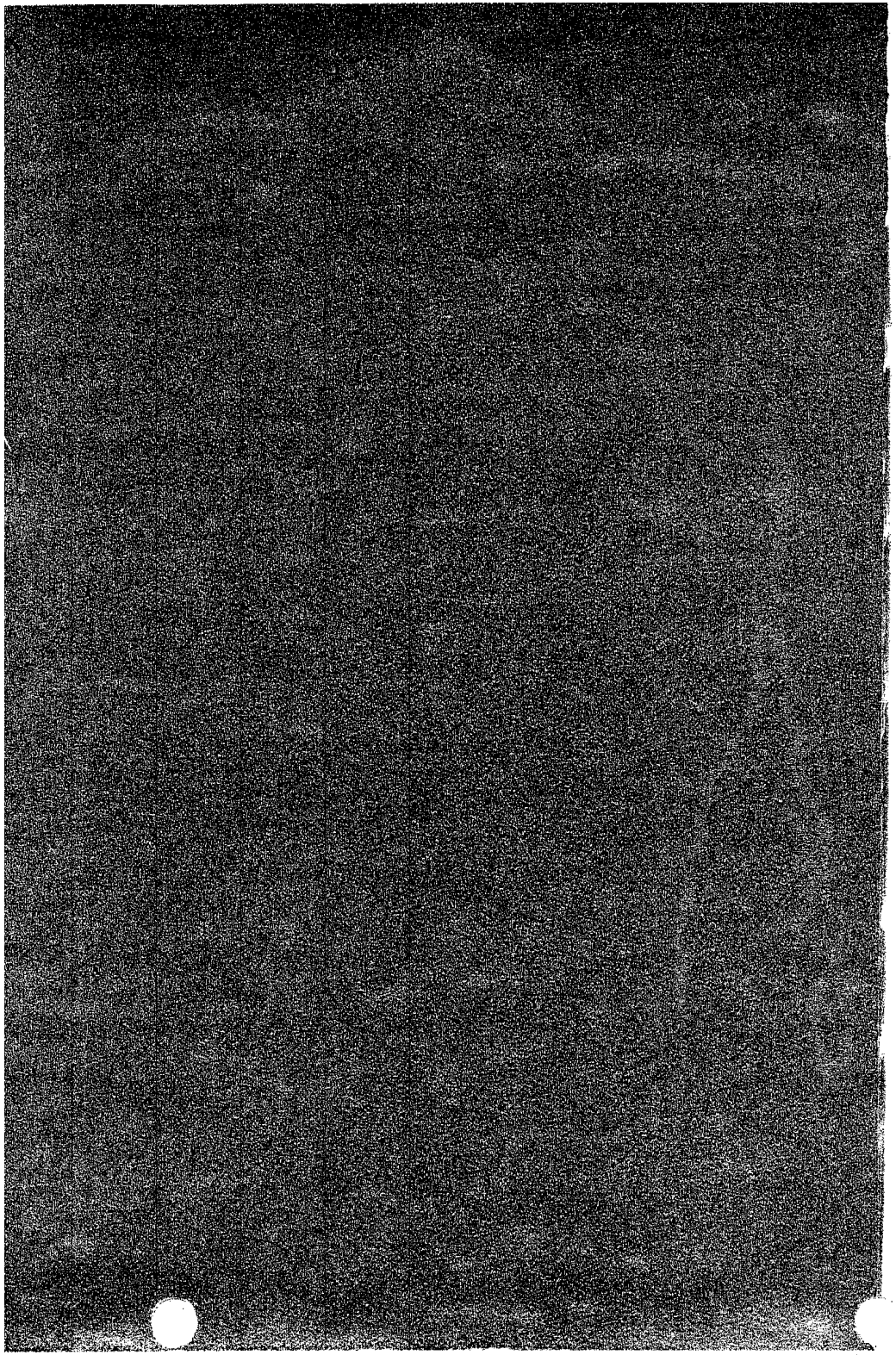

QUESTION PRESENTED

The Act of March 18, 1960, Pub. L. No. 86-392 (74 Stat. 8) ("1960 Act") states:

> [A]ll right, title and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive Order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

The Question Presented is whether the 1960 Act and subsequent use and exclusive control of the trust property by the Secretary of Interior, for school or administrative purposes, creates a fiduciary obligation on the part of the United States to maintain and preserve the subject trust property so used, the breach of which would state a claim for damages in the Court of Federal Claims.

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STATEMENT OF THE CASE

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960), (the "1960 Act"), which declared certain land and improvements (buildings) in trust for the White Mountain Apache Tribe ("Tribe") but which authorized the Secretary of Interior to use the land and improvements for school or administrative purposes, established a fiduciary relationship and an obligation upon the United States to maintain, preserve, and repair the property and buildings while being used and controlled by the Secretary of Interior for school or administrative purposes, so that the Tribe can maintain a suit for damages in the Court of Federal Claims for failure of the United States to maintain, repair and otherwise preserve the property and buildings.

Respondent White Mountain Apache Tribe ("Tribe") submits its own Question Presented as it objects to the form of the Government's "Question Presented," the first two lines of which state: "In 1960, Congress declared that a former military post in Arizona *would* be held by the United States in Trust for the White Mountain Apache Tribe." Use of the conditional tense "would" does not appear in the 1960 Act or the legislative history.[1] Respondent disagrees with the Government's

1. The term "would" reflects the Government's argument that beneficial title to that part of the former military post used by the Secretary for school or administrative purposes was not conveyed to the White Mountain Apache Tribe by Congress on March 18, 1960, that Congress only granted a contingent future interest to the Tribe, and that beneficial title to the subject land and improvements (buildings) is being "held in trust" by the Secretary of the Interior until such time as the Secretary no longer needs them for school or administrative purposes. The Government's Statement commits the same error. Petition, 3 (hereinafter "P.").

The Government's "Question Presented" also fails to include whether the Secretary's actual use and exclusive control of the Tribe's trust property for school or administrative purposes pursuant to the 1960 Act gives rise to the type of fiduciary relationship and obligation which would support a claim for damages against the United States in the Court of Federal Claims.

description of how the Court of Appeals reached its opinion below. The court did not, as the Government claims, initially look to the common law of trusts to find a "full fiduciary relationship," but, rather, conducted a careful analysis of the 1960 Act and control by the Secretary of the Interior of the subject trust property in accordance with this Court's opinions in *Mitchell I* and *Mitchell II*. P. App. 10a-18a. The Court of Appeals looked to the *Restatement (Second) of Trusts*, as this Court did in *Mitchell II*, only after it determined that a fiduciary relationship was established by the 1960 Act *and* the Government's control over the subject trust corpus. The Tribe, in the interest of insuring that this Court receive a clear statement of the material facts and proceedings below in the Court of Appeals, submits its own Statement of the Case.

1. The Tribe is a Federally recognized Indian Tribe, organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476. The Tribe's White Mountain Apache Indian Reservation, a/k/a Fort Apache Indian Reservation, was established by Executive Order on November 9, 1871.[2]

2. On January 26, 1877, the Fort Apache military site of some 7,597 acres was removed from the Reservation and restored to the public domain. On February 1, 1877, by Executive Order, the Fort Apache military site of 7,597 acres was removed from the public domain and made a military reserve.

3. The Army operated Fort Apache as a military post until 1922, when Congress transferred control of Fort Apache to the Secretary of the Interior, and authorized the Secretary to establish

2. The Government gratuitously lists some of the Tribe's enterprises (P., 3, n.1). Their only relevance to this case is that most of the Tribe's enterprises depend upon tourism, hence the Tribe's attempt to preserve for its tourism-based economy the last nonmechanized military post in the United States and one known worldwide by name alone — "Fort Apache." Government's Petition, Appendix, 4a, n.5, hereinafter "P. App. __."

and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out a treaty obligation,[3] to be known as the Theodore Roosevelt Indian School. Congress also provided, that the military post and land appurtenant thereto shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes, 25 U.S.C. § 277, 42 Stat. 1187, c.a. January 24, 1923. P. App., 59a.

4. On March 18, 1960, all right, title, and interest of the United States in and to the lands, together with the improvements [buildings] thereon, included in the former Fort Apache military reservation and subsequently set aside as a site for the Theodore Roosevelt School, were declared by Congress to be held by the United States in trust for the White Mountain Apache Tribe.[4] The Government incorrectly states that "Congress 'declared' that Fort Apache *would* be held by the United States in trust for the . . . Tribe," (P., 3). The term "would" does not appear

3. This treaty obligation to the Navajo Tribe was abolished in 1933.

4. **Title held in trust.** Act March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, provided:

> *All right, title, and interest of the United States in and to the lands, together with the improvements thereon*, included in the former Fort Apache Military Reservation, created by Executive order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187) [this section], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, *are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe*, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

(Emphasis added) Respondent's Lodging with the Court, L-3, hereinafter, "R. L. ___."

anywhere in the text of the 1960 Act, n.4, *supra*, or in the legislative history.[5] *See* Respondent's objection, *supra*, 1, n.1.

5. Since 1960, the Secretary has controlled, used, occupied, supervised, managed and administered certain portions of the Tribe's trust property, comprised of land, buildings and other improvements within the former Fort Apache military post and Theodore Roosevelt School for school or administrative purposes. Complaint, Para. 13.

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5. The Senate Report accompanying S.2268 states that the Purpose Of The Bill ". . . is to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, *for* the White Mountain Apache Tribe of Arizona." Continuing, the Report states "the lands to be *restored* to the Tribe were originally part of the White Mountain Indian Reservation that was set aside as the Fort Apache military post in 1877." (S. Rep. No. 671, 86th Congress, 1st Session) (1959), R. L. 8.

Report No. 1284 (February 22, 1960) accompanying H.R. 8796, the companion Bill to S.2268, states that

> [T]he purpose of H.R. 8796, . . . is to provide that the United States holds in trust . . . land, together with improvements thereon, for the White Mountain Apache Tribe of Arizona. The bill explicitly provides *that the Tribe's beneficial ownership of the property* is subject to the right of the Secretary to use any part of the land and improvements for administrative or school purposes for so long as they are needed for those purposes.

R. L. 25.

Hearings on H.R. 8796, [S.2268] before the Subcommittee on Indian Affairs - Committee on Interior and Insular Affairs, February 11, 1960, make it clear that title to the school would *not* remain in the Secretary of Interior, that title would be maintained in full trust status with beneficial ownership in the Tribe with a limited right accorded to the Secretary of Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose. Of the 7,500 acres restored in trust to the Tribe, only 410 acres were used for the school site. R. L.12-24.

6. On November 18, 1965, the White Mountain Apache Tribal Council adopted a Resolution requesting the Secretary "to designate Fort Apache, including the military cemetery, as a national historic site." P. App., 39a.

7. On October 14, 1976, the United States National Park Service designated approximately 288 acres of the former Fort Apache military post and Theodore Roosevelt School, which included all of the buildings, as a National Historic Site to be known as the Fort Apache Historic District and placed it on the National Register of Historic Places. P. App., 4a, n.5, 39a, Complaint, para. 15.

8. In 1993, the Tribe adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore the Historic District as a cultural and economic resource for the Tribe and declared its intent to intervene and save its imperiled trust property. P. App., 4a, n.4.

9. In November 1998[6], the Tribe commissioned a professional engineering survey and assessment report to evaluate the condition of the buildings and lands held in trust for the Tribe. Based on this assessment, it was determined that the Tribe would have to expend $13,973,732 to bring the buildings and other improvements into compliance with the Secretary of Interior's own building code standards for historic buildings. P., 5, P. App., 4a.

10. Fort Apache "has become an increasingly significant tourist attraction" and the Tribe "has constructed a cultural museum within its boundaries." P. at 5, para. 1, Tribe C.A. Reply Br. 3.[7]

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6. The Government mistakenly states "1999" as the year of the assessment/survey. P. at 5, *see* P. App. 4a.

7. The subject land and improvements also had substantial value in 1960. *See* 1960 Senate Report No. 671, 2, *supra*, n.5, which valued the "lands to be donated," exclusive of improvements, at $141,000. The improvements were valued at $680,352. R. L.9.

11. On March 18, 1999, the Tribe filed a Complaint for money damages against the United States in the Court of Federal Claims. P. at 5, para. 2.

12. The Government states in pertinent part, that according to paras. 32 and 33 of the Tribe's Complaint, "the Government's asserted fiduciary duty stems from the 1960 Act." The Government fails to state that para. 32 alleges that it was the 1960 Act *and* the Government's subsequent use, occupation, management, supervision and administration of the Tribe's trust corpus that created a fiduciary duty in the Federal Government to maintain the Tribe's buildings and other site improvements comprising the trust corpus.[8] P., 5, para. 2 (Complaint, para. 32).

13. On June 1, 1999, the Government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. The Government argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe, imposed an obligation on the United States to maintain or restore the buildings held in trust for the Tribe, and that the Tribe had not stated a cognizable claim for money damages for the Government's alleged mismanagement of that trust property. P. App., 5a. The Court of Federal Claims agreed with the government and dismissed the complaint for failure to state a claim. *Id.*[9]

8. The Complaint (at paras. 32-33) alleges that the government's fiduciary duty arises from the 1960 Act and other land-use statutes and regulations, but it is the 1960 Act *and* the Secretary's subsequent use and exclusive control of the Tribe's trust corpus for school or administrative purposes pursuant to the 1960 Act which the Tribe claims is the statutory source of the Government's fiduciary relationship and obligation to the Tribe.

9. The Judgment of November 19, 1999 was entered in the "United States Court of Federal Claims," not the "United States Court of Appeals for the Federal Circuit" as titled in P. App., 57a.

The court based its dismissal on its interpretation of *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). It concluded that the 1960 Act only created a limited or bare trust relationship between the Government and the Tribe; that the 1960 Act was for the "benefit" of the Government, not that of the Tribe (P. App. 47a-48a); and that control of the subject trust property alone was insufficient to create a fiduciary relationship, because the 1960 Act did not require the Government to manage or operate the subject trust property for the Tribe's benefit. P. App., 51a-52a.

14. The Court of Appeals reversed and remanded. P. App., 1a-32a. The court concluded that the 1960 Act clearly created a trust. P. App., 10a-11a. It rejected the Government's argument that *Mitchell I* and *II*, read together, only impose a fiduciary obligation when the statute creating the trust relationship *also* directs the United States to manage the trust corpus for the benefit of the Native Americans. P. App., 14a. It then reviewed the application of the principles established by this Court in *Mitchell I* and *II* and their application to other statutory contexts, and concluded that "the language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship." P. App., 14a-15a.[10] The court also noted that previously, in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), it had held that control alone was sufficient to

10. Citing *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980):

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

establish a fiduciary relationship under the facts of that case. P. App., 15a. The Court concluded that "to the extent that the government has actively used any part of the Tribe's trust property and where its "control over the buildings it occupies is essentially exclusive," those portions of the property so used "can no longer be classified as being held in merely a 'bare trust' under *Mitchell I*." (P. App., 17a, 31a). Thereafter, the Court of Appeals looked to the *Restatement (Second) of Trusts* to determine the nature of the Government's obligations. P. App., 18a.[11] The court rejected the Government's claim that the *Restatement (First) of the Law of Property* (1936) applied to the Tribe's claim. *Id.*, 27a, noting that the *Restatement of Property* states that it is not applicable to a trust situation; *Id.*, 27a. It also found that there was nothing contingent about the Tribe's future interest in the trust property, and that the Tribe's interest in the trust property, in any event, was better described as an indefeasibly vested future interest. The court found "the more nearly analogous provisions" to be Sections 134 and 187

11. As this Court did in *Mitchell II*, *supra*, 463 U.S. at 226, 103 S. Ct. 2961. This is still the view of this Court:

> The existence of a trust obligation is not, of course, in question, *see United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942). The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 221, and has been compared to one existing under a common law trust, with the United States as trustee, the Indian Tribe or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. *See, e.g., Mitchell, supra*, at 225, 103 S. Ct. 2961.

Department of Interior v. Klamath Water Users, 121 S. Ct. 1060 at 1067 (2001).

of the *Restatement (First) of Property* (1936). *Id.*, 28a, and that, "Under these sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings." *Id.*, 28a-30a.[12]

REASONS TO DENY THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

The Government's fiduciary obligation in this case is firmly anchored in the 1960 Act of Congress *and* the Government's subsequent use and control of the Tribe's trust property pursuant thereto.

The majority opinion below is consistent with controlling authority and this Court's jurisprudence with respect to the United States' fiduciary obligation to Indian Tribes. It does not constitute a deviation from *Mitchell I* or an *extension* of *Mitchell II*, nor does it represent "a significant doctrinal development in the Federal Circuit's own decisions" as claimed by the Government. P., 22, n.10.[13]

12. Chief Judge Mayer filed a dissent, *Id.*, 33a-36a, as he did in *Brown*, *supra*, at 1565-1566. In *Brown*, Chief Judge Mayer disagreed that the leasing statutes and regulations at issue in that case amounted to "elaborate control" and that the allottees were "essentially powerless." *Id.*, at 1565-1566. He found the opposite in respect to the Secretary's [of Interior] control over rights of way and concluded that their only recourse was to hold the Government answerable to compensation. He did not reject the control test. In his dissent in this case, Chief Judge Mayer never reached the control issue because he concluded that the 1960 Act could not impose a fiduciary obligation on the Government, because the 1960 Act carved "out of the trust," the Government's right to use the Tribe's property, and therefore a fiduciary obligation would never attach during the Government's use and control. In his view, the Tribe's interest in the trust property was a "contingent future interest" only and there was no certainty it would ever vest. P. App., 35a.

13. The Government leads off its argument for certiorari by stating: "The Tribe itself recognized in the Court of Federal Claims 'that to hold the Government liable for money damages where the Government has

(Cont'd)

A. *The 1960 Act Declared a Present Indefeasible Trust*

The language of the 1960 Act, which is the starting point for all statutory interpretation, *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979), explicitly created a "trust." The Court of Appeals below concluded that all of the necessary elements of a common law trust were present: a trustee (the United States), a beneficiary (the Tribe), and a trust corpus (the land and buildings held in trust). P. App., 11a. The court also noted that both the Tribe and the United States in their briefs agreed that the 1960 Act created a "trust." *Id.*, 10a[14]

(Cont'd)
the right to use the trust property for its own purposes calls for an *extension* of *Mitchell II*'." P., 10, P. App. 52a. The Government's reference is to the opinion of the U.S. Court of Federal Claims where that court states: "Plaintiff recognized at oral argument that to hold the Government liable for money damages where the Government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*."

The official reporter's transcript of the hearing on the Government's Motion to Dismiss, November 8, 1999, indicates no such statement by the Tribe. On page 29, line 22, Tribe's counsel did state: "Right. But this is a little bit different because this is a case of first impression. I admit that." (Tr., 11/8/99, p. 29). The Tribe's statement was in the context of generating income from the buildings and a damage claim for waste to *buildings held in trust* as opposed to the usual Indian trust property claims case for damages involving timber, minerals, gas, oil, or loss of Tribal water rights. The Tribe has consistently maintained in the Court of Federal Claims and in the Court of Appeals that the Tribe's claims fall squarely within the holding of *Mitchell I* and *II* and their progeny.

14. In note 7 of the Court of Appeals opinion, the court observed, "Inexplicably, at oral argument the Government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe, but for the reasons stated in the text, we find that the 1960 Act creates a 'trust.'" P. App. 10a, n.7.

The Government argues that the Tribe's interest in the subject land and buildings used by the Secretary is being held by the Secretary until such time as the Secretary transfers full beneficial title to the Tribe. This view is not supported by any authority and is contrary (1) to the plain meaning of the 1960 Act; (2) its legislative history which unequivocally declared, in the present tense, the lands and improvements in trust for the Tribe; (3) the canons of construction applicable to Congressional Acts regarding Indian Tribes and trust property; and (4) the understanding of the Tribe.[15]

The 1960 Act only reserved a limited use right to the Secretary. There was no "exception" in the 1960 Act declaring that the United States hold the land and improvements in trust for the Tribe. An "exception" operates upon the land description and withdraws the "excepted" property from the land description. A "reservation" of rights, on the other hand, is always of something taken back out of that which was clearly

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15. The Tribal Council was requested by the Department of the Interior, Bureau of Indian Affairs, "whether it would be willing to have the subject lands in a taxable status." Sept. 16, 1958, R. L. 4. The Tribal Council rejected this request on Sept. 24, 1958:

> The Tribe felt that inasmuch as the land was withdrawn from the reservation by Executive Order without compensation to the White Mountain Apache Tribe . . . that the land should be returned to the United States in trust for the White Mountain Apache Tribe in the same status as the entire balance of the reservation.

Sept. 24, 1958, Tribal Council Minutes. R. L. 5-7. The foregoing documents are part of the legislative history of the White Mountain Apache Tribal Council. They were not part of the record in the Court of Federal Claims or the Court of Appeals, but are relevant in determining the intent of the Grantor of the trust property, i.e., the United States, and the understanding of the Tribe as to the trust status of the land that was to be restored to the Tribe's reservation. *See* n.5, *supra*, and legislative history, R. L. 1-28.

granted, while an "exception" is of some part of the estate not granted at all.[16]

The 1960 Act reserved the limited use right of the Secretary "for as long as" the Secretary needed the Tribe's property for school or administrative purposes. By analogy to the law of property, words such as "so long as," "until," or "during" are appropriate to create a fee simple determinable. *Oldfield v. Stoew Homes, Inc.*, 26 N.J. 246, 139 A.2d 291, 296 (1958). The Secretary's need for the subject buildings is determinable and not perpetual as suggested by the Government. The Government has admitted that many of the subject buildings are no longer used or needed by the Secretary of Interior for school or administrative purposes.[17]

16. *See, e.g., Moore v. Davis*, 273 Ky. 838, 117 S.W.2d 1033, 1035; *Houghtaling v. Stoothoff*, 170 Misc. 773, 12 N.Y.S.2d 207, 210; *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514. (See other definitions and distinctions between "Exception" and "Reservation," *Black's Law Dictionary*, 4th Ed., 1951, at page 667-668.) The entire 7,579 acres and improvements thereon were restored to the Tribe and declared in full trust status to the White Mountain Apache Tribe on March 18, 1960, subject only to the reserved, but limited right of the Secretary to use any part of the included lands and improvements for administrative or school purposes. The 1960 Act did not "carve" out of the trust property the land and improvements to be used by the Secretary as that would not give the Secretary the desired "administrative flexibility" discussed in S. Report No. 671, R .L. 11.

17. "Between 1960 and March 18, 1999, the Government has used, controlled, supervised and managed these lands and the buildings located thereon for school or administrative purposes. Complaint, para. 13. *However, the Government no longer uses many of the buildings and improvements for school or administrative purposes.*" (Emphasis added.) Government's Mot. Dismiss at 5. Also noted by the Court of Appeals: "According to the parties, the Government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe." P. App. 3a.

B. *The 1960 Act Is for the Benefit of the Tribe–Not That Of the Government*

The Government argues that the 1960 Act was for the benefit of the government, not the Tribe. P., 15-16, citing P. App., 52a. This view is inconsistent with longstanding doctrines of Federal Indian law, and represents a dramatic departure from the *sui generis* trust relationship between the United States and Native American Tribes, and it is contrary to the legislative history of the 1960 Act.[18] Generally, the rules for construing federal statutes in Indian affairs provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *See* Cohen, *supra*, n.18 at 224-225.

18. *See* R. L. 1-28. It is also inconsistent with the three general canons of construction applicable in Indian law: *First*, that treaties and other Federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians, *See Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp 252, 256 (DDC 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974). *Second*, ambiguous expressions should be resolved in favor of Indians. *See, e.g., McClanhan v. State Tax Comm'n*, 411 U.S. 164, 175 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Ute Indian Tribe v. Utah*, 521 F. Supp 1072, 1110-32 (D. Utah 1981), *rev'd on other grounds*, 716 F.2d 1298 (10th Cir. 1983). *Third*, treaties should be construed as the Indians would have understood them. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). These rules of construction are not limited to treaties. The policy of the rules is rooted in the trust relationship between the United States and Indian tribes. *See* F. Cohen, *Federal Indian Law (2.ed)* note 4, at 221-225. Moreover, the term "trust" has a clear meaning in statutes or acts benefitting Indians. A court must give meaning to every word of a statute. 2A Sutherland, Statutory Construction 63 (C. Sans. 4 ed. 1972) cited in *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 643 (1987).

Since Congress is exercising a trust responsibility in its enactment of Indian statutes [such as the 1960 Act], courts presume that Congress's intent toward the Indians is benevolent.[19] Accordingly, courts construe statutes affecting Indians as non-abrogation of prior Indian rights or, in case of ambiguity, in a manner favorable to the Indians. *See United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This Court has observed that where Congress is exercising its authority over Indians, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served; otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. F. Cohen, *supra*, n.18, 221. Further, although Congress can unilaterally act in a fashion adverse to Indian interests, such an intent must be "clear," "plain," or "manifest" in the language or legislative history of an enactment. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *United States v. Creek Nation*, 295 U.S. 103 (1935) (Held: Unless Congress has expressly directed otherwise, the Federal Executive is held to a strict standard of compliance for fiduciary duties.) *See* F. Cohen, *supra*, 225-228.

19. "[T]here is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust." *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); This obligation derives from "a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme] Court under which the Government has charged itself with moral obligations of the highest responsibility and trust" in carrying out its treaty obligations with the Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 1054-55, (1942) (footnote omitted).

Loudner v. United States, 108 F.3d 896, 900 (8th Cir. 1997); *Moose v. United States*, 674 F.2d 1277 at 1281 (9th Cir. 1982), citing *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980) n.10.

In this case, the United States held the Fort Apache lands and improvements from 1877 to 1960 in *fee simple absolute*. During that interim there was no obligation on the part of the United States to preserve the land and property for the benefit of the White Mountain Apache Tribe. However, after the 1960 Act restored the land and improvements to the Tribe, the United States was left with naked title, and full beneficial title to the entire 7,579 acres and improvements thereon, was declared held in trust by the United States for the Tribe, subject only to a limited use by the Secretary of the Interior for specific, determinable purposes.[20] Once the Government commenced to control and use the Tribe's trust corpus as authorized by the 1960 Act, it became an *in situs* trustee with distinct fiduciary obligations to the Tribe's trust corpus.

If the United States Congress intended to exempt the United States from any fiduciary obligation in respect to the Tribe property, it could have provided in the 1960 Act that during the Secretary's use of the Tribe's trust property for school and

20. The title to the Tribe created by the 1960 Act of Congress is "as sacred as the fee simple title of the whites." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), Ch. 9, Sec. A, 472, n.11, *Mitchel v. United States*, 34 U.S. (9 Peters), 711, 746 (1835). The United States' trust title is characterized as "naked fee", with the full beneficial interest vested in the Tribes. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); in that case the Court made clear that the Indian right of occupancy includes ownership of the timber and minerals upon the land, stating: "[T]he [Indians'] right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee." 304 U.S. at 116-18; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 n.12 (1980). *See also United States v. West*, 232 F.2d 694 (9th Cir.), *cert. denied*, 352 U.S. 834, 77 S. Ct. 51 (1956). (Held: "the White Mountain Apaches have the usual Indian right of occupancy with the fee in the United States [that is] as sacred as the fee-simple of the whites.") Likewise, and as *explicitly* stated in the 1960 Act, the White Mountain Apache Tribe has all right, title and interest to the land and improvements thereon, regardless of the Secretary's limited right to use them for specifically authorized, but limited, determinable purposes.

administrative purposes, the Secretary would not be obligated to maintain, repair and preserve the property it was using. Alternatively, the 1960 Act could have been drafted to exclude or except the buildings being used by the Secretary from the declaration of Trust and they would have remained titled as Federal government buildings. Congress did none of the foregoing. The Government offers no authority to support its benefit-for-government argument other than its subjective interpretation of the 1960 Act and the Court of Federal Claims' misapplication of the *Restatement of Property* to the 1960 Act.

C. *The 1960 Act Authorizes More than a "Bare" Trust; It Authorized Exclusive Control by the Secretary of Interior of the Tribe's Property*

The Government contends that the 1960 Act only created a "bare trust" like the trust created by the General Allotment Act discussed in *United States v. Mitchell*, 445 U.S. 535 (1980) at 542, 100 S. Ct. 1349 (*Mitchell I*). P., 15.[21] The Government ignores the complete control that the 1960 Act authorized, but did not require the Secretary to exercise, over the Tribe's trust property. The Government further argues that because the 1960 Act does not "clearly obligate" the Government to manage the Fort Apache site for the purpose of protecting the Tribe's financial interest, it does not meet the requirements of *Mitchell II*. P., 17, P. App. 50a. In the Government's view, the only proper

21. The 1960 Act declared the land, buildings and improvements held in trust for the White Mountain Apache Tribe. However, the 1960 Act went well beyond the General Allottment Act's limited or bare trust pronouncement, because it authorized a limited right in the Federal Government, if it chose to exercise that right, to control the Tribe's trust property for school or administrative purposes. When the Federal Government chose to undertake comprehensive control to use the Tribe's property after it was declared in trust, it moved itself into a fiduciary relationship in respect to the Tribe's property within the holding of *United States v. Mitchell* (II), 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 620, 649-650 (1987); and *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183; 624 F.2d 98, 987 (Ct. Cl. 1980).

Mitchell II inquiry is one that is directed to "the nature of control" and not the "extent" of the control and that "nature of control" means an obligation to generate revenue from the Tribe's trust property, not to protect it from loss or waste.

The Government is in error, and veers sharply from overwhelming authority to the contrary, when it argues for an overly restrictive interpretation of *Mitchell II* that narrowly defines "benefit" to mean that the 1960 Act would have to obligate the Government to generate revenue from the subject land and buildings for the Tribe's benefit, while the Government was controlling them for school or administrative purposes, to state a money mandating claim.[22] The Tribe has never argued that the Government had an obligation to generate revenue for the Tribe during the Secretary's control and use of the Tribe's trust property. It claims, however, that the Secretary has a fiduciary obligation to maintain, repair and preserve the Tribe's trust property it is using and controlling.

The Government's "nature of control" argument mistakenly merges "management for the benefit of Indians" with the dispositive "control" criteria approved in *Mitchell II*, *supra*, *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987), and *Navajo Tribe of Indians v. United States*, 224 Cl. Ct. 171, 183, 624 F.2d 981, 987 (1980), cited

22. In *Mitchell II*, this Court's acknowledgment of a general trust responsibility and of rules of construction applicable to Indian law indicates that detailed delineation of management duties are not required. This Court recognized elaborate control by the Government over Indian property as an independent basis for its finding of a fiduciary duty. *Mitchell II*, at 224, 103 S. Ct. at 2972. *See also Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1980), *cert. denied*, 103 S. Ct. 3569 (1983) (Federal trust need not spell out all duties of the Government due to the history of the Governmental fiduciary obligation in management of Indian property —broad scale Congressional establishment of trust is enough). The *Duncan* Court aptly noted '[It] is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust.' *Duncan*, at 43 n. 10.

with approval by this Court in *Mitchell II* at 224, S. Ct. at 2972.[23] It is emphasized that this Court [in *Mitchell II*] found that it was not significant that the statutes and regulations did not mention that the United States could be held financially responsible for damages to the Indians resulting from the United States' management decisions and that it was enough that the statutes and regulations created a fiduciary responsibility. *Mitchell II* at 226, 103 S. Ct. at 2972. *See Brown v. United States*, 86 F.3d 1554, 1539 n.6 (1996). (Trial court appeared to have misapplied *Mitchell II* transforming "the descriptive into the prescriptive.")

The Government refuses to move itself outside of the first prong of the *Mitchell II* "management test" which looks to the existence of a "comprehensive" scheme of regulation and statutory responsibility to discern the existence of a trust relationship sufficient for the Claims Court to have jurisdiction.

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23. Other Federal Claims Court and Federal Circuit decisions have recognized a breach of fiduciary duty based on the Government's action once it has undertaken action within the exercise of only general powers over Indian affairs to control or supervise Indian property for the benefit of a Tribe even though no statutory or regulatory scheme required the Government to generate income for the Tribe from the particular Tribal resource or property at issue. *See White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987) citing *Navajo Tribe of Indians v. United States, id.*; *Gila River Pima Maricopa Indian Community v. United States*, 231 Cl. Ct. 193, 208, 684 F.2d 852, 861 (1982) (Per curiam) (held: although the Government had no statutory or regulatory duty to develop irrigation facilities on the Reservation, failure to protect water resources can be actionable). The reasoning of the Court in *Mitchell II*, and by the Court of Appeals in this case, recognizing elaborate control by the Government over Indian property as an independent basis for finding of a fiduciary duty, makes complete sense; as most statutory schemes in Indian affairs are not as detailed as the timber management statutes and regulations in *Mitchell II*, and most statutes that regulate Indian affairs do not delineate specific management duties or provide for money damages for mismanagement.

The second prong of the *Mitchell* case, the control test, in contrast, has no such qualifiers.[24] *Brown v. United States*, *supra*, at 1561. The Court of Appeals in *Brown* found error when the Claims Court in that case imposed a more restrictive test than was established in *Mitchell II*, noting: "The Supreme Court did not qualify 'control or supervision' with modifiers such as 'significant,' 'comprehensive,' 'pervasive,' or 'elaborate.' Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty." *Brown*, *supra*, 1561.

In *Brown*, the Government argued that regardless of the Secretary's *control* over commercial leasing, *Mitchell I* and *Mitchell II*, required that the Government pursue an *active role* in the management of trust property to be liable for damages. *Id.* at 1561, n.9.

The Court of Appeals disagreed and found that the formulations presented by the Government shared two fundamental flaws: "First, they improperly transform the disjunctive 'control *or* supervision' test into a conjunctive 'control *and* supervision' test. Second, they qualify the 'supervision' aspect of the test by heaping on modifiers such as 'rather intense' and 'extensive' . . . ." *Id.* at 1561 n.9.

Oblivious to the control prong of the *Mitchell II* criteria, the Government argues in this case that the Court of Appeals has bolted from the *Mitchell II* "money mandating duty" inquiry, which, in its view, must "spring" from the statutes and regulations which "define the contours of the United States'

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24. A review of the "comprehensive scheme of regulation" cases and "control" cases indicates that they ultimately merge at the same point — a determination of sufficient Government control to establish a fiduciary obligation on the part of the United States to conduct itself as a reasonable trustee in respect to the trust corpus it controls. The Government errs, however, by taking the "description" of a comprehensive regulatory scheme as an end in itself, a "prescription," *sine qua non*, for a damage claim, thereby losing sight of the central inquiry under *Mitchell I* and *II*.

fiduciary responsibilities."[25] P., 22 n.10. The Government further charges the Court of Appeals with divorcing the immunity inquiry from the terms of the pertinent statutes and regulations and embracing instead, judge-made law and notions of Federal control over trust property.[26] P. at 23, n.10.

In the case at bar, the Government, as it argued in *Brown, supra*, would have the Supreme Court raise the jurisdictional threshold above the level where this Court has already squarely placed it. *Brown, supra*, at 1561.[27] Likewise, the Court of

25. Cf. This Court quoted with approval from the Court of Claims opinion in *Navajo Tribe v. United States*, as follows:

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

Mitchell II, at 225, 1035 S. Ct. at 2972 (emphasis added) (quoting *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (1980)). In this case, the Court of Appeals determined that the Government's fiduciary obligation "springs" from the 1960 Act which authorized the Secretary's subsequent control and use of the Tribe's trust property.

26. The Court of Appeals looked to the applicable source of the substantive law which may grant the right to recovery either "*expressly or by implication*." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967). It is clear that the 1960 Act *and subsequent control* by the Government of the Tribe's trust corpus is a source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." See *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961 quoting *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967); *see Brown v. United States, supra*, 86 F.3d 1554, discussing "the Mitchell Decisions" at 1559.

27. In *Brown*, the Court of Appeals observed that this Court's "alternative test of 'control or supervision' makes eminent good sense (Cont'd)

Appeals in this case correctly found that if the Tribe controlled the land and buildings at issue in this case, the duty of the United States would be lessened appropriately. *White Mountain Apache*, P. App. 18a; in accord, *Navajo Nation*, 263 F.3d 1325 at 1329 (Fed. Cir. 2001); *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 573-574 (1990).[28]

The Court of Appeals in this case concluded that the record was unclear as to the extent of the Government's control and use of the many buildings and grounds comprising Fort Apache, that there might be related issues involving application of the

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as well." That "if the Secretary controls leasing, that he or she does not also supervise or manage it should not matter." Thus, the Court concluded at 1560, "Under *Mitchell II*, then, as properly (and literally) construed, the assumption by Congress and/or the Secretary, its delegatee, of control of allottee money or property beyond the limited trust embodied in the General Allotment Act imposes on the government a fiduciary duty to the allottees." *See also White Mountain Apache*, P. App., 17a.

28. The control exercised by the Government in the case at bar pursuant to the 1960 Act far exceeds the Government's control which gave rise to a fiduciary obligation on the part of the Government in *Brown, supra*. However, the Government steadfastly maintains that control is irrelevant unless the Government is also obligated to generate revenue from the Tribe's property. But see Tribe's discussion, Part D, *infra*, on waste or loss of value to Tribal trust property as a breach of the United States' fiduciary obligation. In *Mitchell II*, this Court looked beyond the particular source of law, which was silent regarding damages and found an *implicit* or inherent requirement of compensation for breach of fiduciary duty by looking to the common law of trusts. *Mitchell II* at 226, 103 S. Ct. at 2973. *See also e.g., American Indians Residing on the Maricopa Ak-Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) (trustee liability for breach of fiduciary duty *inherent* in trust relationship; damages are appropriate remedy for breach), *cert. denied*, 456 U.S. 989 (1982); *Whiskers v. United States*, 600 F.2d 1331, 1335 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Coast Indian Community v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1979); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1392-94 (Ct. Cl. 1975).

statute of limitations, exclusivity of control, and duration of use, all of which the Court of Federal Claims would have to resolve upon remand. P. App. 31a-32a.

The Government, however, criticizes the Court of Appeals' remand instruction to the Court of Federal Claims to determine, *inter alia*: (1) the extent of the Government's active use and control over the subject trust property; (2) whether the Government's control was essentially exclusive; and (3) the extent to which the Government, not the Tribe, had control over the Tribe's trust corpus. P., 21, para. 4.

The Government describes such an inquiry as "highly amorphous," *Id.* at 22, and that there is no evidence on the face of the 1960 Act that Congress intended to "expose the United States to mandatory liability in that haphazard manner." *Id.* at 22. However, the same type inquiry was condoned by this Court in *Mitchell I* which remanded that case to the Claims Court for a determination of whether the plaintiffs' right to recover money damages for Government mismanagement of timber resources could be found in some source other than the General Allotment Act. Moreover, such an inquiry is unavoidable if a court is to properly and diligently determine if a fiduciary relationship and obligation exists, the breach of which is remediable in damages. Virtually every Indian Tucker Act claim since *Mitchell II* has undergone the same type of judicial inquiry.

D. *The Federal Government's Action to Undertake Control, Use and Occupation of the Tribe's Property After the 1960 Act created a Fiduciary Obligation in the Government to Protect the Tribe's Financial Interests in the Subject Property from Waste or Loss*

The proscription against the Federal Government committing waste, destruction, or loss to the value of Indian property under its control is a well-established principle in

Federal Indian law and policy and may be the basis for a money-mandating claim as expressed by the Supreme Court in *Mitchell II*,

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *Navajo Tribe of Indians v. United States*, 224 Ct. Cl., 171, 183, 624 F.2d 981,987 (1980).

Id. at 225, 103 S. Ct. at 2972.[29]

29. *See also Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (finding duty to protect fishery in reservation lake); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-26 (1991) (finding duty to protect reservation water rights); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 672 (1987) (finding duty to protect Indian forest lands), *aff'd*, 5 F.3d 1506 (Fed. Cir.), *cert. denied*, 114 S. Ct. 1538 (1993); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987) (finding trust responsibility to protect wildlife resources); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C.) (1973) (finding duty to protect water resources), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), rev'd in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1980) (Held: Bureau of Indian Affairs has continuing duty to replant harvested areas.)

Restatement (Second) of Trusts § 176 (1959) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"); 2A Austin W. Scott & William F. Fratcher, the Law of Trusts § 176 (Trustees liable for failure to avert or mitigate damages); American Indian and the Federal–Indian Relationship; Including Treaty Review 179 (Comm. Print 1976) [hereinafter Trust Report] (applying

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Federal courts have also consistently emphasized that Federal agencies must deal with Tribes according to the "most exacting fiduciary standards"[30] and that the Bureau of Indian Affairs (BIA), in particular, has a special trust responsibility beyond those of other Federal agencies, because it is responsible for managing Tribal lands and resources as the principal agent of the Trustee, United States.[31]

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trust principles to Government's role in protecting Indian land; *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991).

> Where a trust relationship exists, [t]he trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust *res* which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.

Citing G. Bogert, *The Law of Trusts & Trustees* § 582 (2d ed. Revised 1980); and *Restatement (Second) of Trusts*, § 176 (1959) *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 681, *aff'd*, 5 F.3d 1506 (Fed. Cir. 1987), *cert. denied*, 114 S. Ct. 1538 (1993) (government breached fiduciary duty by overcutting tribal forest lands and overgrazing tribal grazing lands).

30. *Seminole Nation v. United States*, 316 U.S. 286 at 297 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 at 256 (D.D.C. 1973); Decisions of the Court of Claims have uniformly held that the standards of a private fiduciary must be adhered to by executive officials administering Indian property. *E.g.*, *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 10, 18-19 (1944); *Navajo Tribe v. United States*, 364 F.2d 320, 322-324 (Ct. Cl. 1966).

31. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *See also* BRUCE BABBITT, U.S. DEPARTMENT OF INTERIOR, ORDER NO. 3175, INCORPORATED INTO DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST RESOURCES (November 8, 1993), hereinafter (Cont'd)

In Tribal resource cases involving the Government's liability for breach of fiduciary obligation with respect to oil, gas, or commercial leases, *i.e.*, *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Brown v. United States*, 86 F.3d 1554, 1558-1562 (Fed. Cir. 1996); *Jicarrilla Apache Tribe v. Supron Energy Corporation*, 782 F.2d 855, 857 (10th Cir. 1985), *cert. denied*, 479 U.S. 970 (1986), the Federal courts have made inquiry of the Government's control over the trust assets or resources involved to determine whether there was *sufficient control* by the Government to give rise to a fiduciary obligation under this Court's decision in *Mitchell II*, *supra*.

In other cases, following *Mitchell II*, the Federal Circuit Court of Appeals has found "elaborate control" over a timber resource as an alternative, if *not* the primary, reason for imposing a fiduciary obligation. *Short v. United States*, 719 F. 2d 1133, 1135-36, Fed. Cir. (1983), *cert. denied*, 467 U.S. 1256 (1984), and in the government's role in regulating mineral leasing, *Jicarrilla Apache Tribe v. Supron Energy Corporation*, 782 F. 2d 855, 857, 10th Cir., *cert. denied*, 479 U.S. 970 (1986); *Pawnee v. United States*, 830 F. 2d 187, 189-90 F. Cir. (1987), *cert. denied*, 486 U.S. 1032 (1988) (finding federal government owes fiduciary obligation to Indians for administration, collection and payment of royalties under oil and gas leases). *See Fort Mohave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-426 (1991) (federal government, once it took control of

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INTERIOR ORDER; *Navajo Tribe v. United States*, 364 F.2d 320, Ct. Cl. (1966); *See generally United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (Ruiz may impose more extensive procedural requirements on the Bureau of Indian Affairs than are customary for federal agencies. *See* Davis, Administrative Law Surprises in the Ruiz Case, 75 COLUM. L. REV. 823 (1975) cited with approval in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) at 1100. *See also* F. Cohen, *Handbook of Federal Indian Law*, *supra*, pp. 225-228.

litigation for protection of Tribe's water resources, was obligated to do so in a fiduciary capacity).[32]

E. *The Court of Appeals Decision Does Not Increase the Government's Liability Beyond This Court's Holding in Mitchell II*

The Government attempts to grab the attention of this Court with alarmist predictions that the Court of Appeals decision will encourage the filing of additional damage claims against the United States for breach of trust with respect to Indian trust property or buildings on such property, and ties its dire prediction to the fact that the United States holds more than 56 million acres of land in trust, for individual Indians or Indian Tribes. P., 23. The Government argues that because a significant portion of that land, including allotments, is held in a limited or bare trust, the Court of Appeals decision "could prompt money damages claims for breach of trust with respect to such property, even though such claims would otherwise be barred under a proper understanding of this Court's *Mitchell* decisions." *Id.*, 23-24. The Government evokes a cellulose metaphor as it portrays the Court of Appeals opinion as "taking root" and

32. In *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614 (1987), Judge Netteshiem found that the transfer of the Tribe's forest to the adjacent national forests between 1909 - 1912 by the federal government to protect the watershed to the Salt River Federal Reclamation Project represented an instance of mismanagement by the federal government. The court further found that the reigning conservationist theory — protection of the forest to protect watershed in the arid southwest did not excuse annexation of the Tribe's forest as the reservation's forest was the Tribe's resource, not the Nation's. *Id.* at 670. Likewise, in the case at bar, no purported "benefit" to the federal government or to the Tribe stemming from the Government's use of the subject trust property excuses the waste and destruction committed by the Government to the Tribe's property while under its daily control and use.

laments "the rapid speed with which it already has spread." P. App. 25.[33]

In that vein, the Government points to *Navajo Nation v. United States*, 263 F.3d 1325, 1329-1330, 1335 and *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 51 Fed. Cl. 60, 68 (2001), as proof that the "broad reasoning" of the Court of Appeals decision "already has spilled over into other types of Indian breach-of-trust litigation." Petition 24-25.

In *Navajo*, *supra*, 1329, the Court of Appeals' reference to *White Mountain Apache*, 249 F.3d at 1377, merely noted that a statute [the 1960 Act] established an "enforceable fiduciary relationship between the United States and the Tribe," *id.* at 1383, and that although the statute was silent on *how* the United States was to administer the property, the Court applied the common law of trusts to find a duty on the part of the United States to preserve the Tribe's trust corpus, *Navajo* at 1330. This is hardly a new concept and comports with this Court's application of the law of trusts in *Mitchell II* once a full fiduciary relationship was determined to exist in that case. The Court of Appeals opinion in *Navajo*, *supra*, did *not* assume, as the Government seems to imply, that the Court of Appeals in *White Mountain Apache* applied the law of trusts *in the absence of any statutory source* to establish the required fiduciary relationship, and clearly understood that the majority in *White Mountain Apache* looked to the 1960 Act as the statutory source to which it applied the *Mitchell I* and *II* criteria, *supra*, at 1329-1330.[34]

33. The Government also contends that the Court of Appeals decision below conflicts with this Court's sovereign immunity jurisprudence (P., 21), citing *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), a case involving the State of Missouri's mandatory retirement requirement for judges, the Age Discrimination in Employment Act (ADEA) and the application of the Tenth Amendment. *Gregory* has no apparent application to this case.

34. The Court of Federal Claims in *Shoshone*, *supra*, at 68, obviously understood the *White Mountain Apache* opinion to mean that there was a *fiduciary obligation* on the part of the Government to preserve

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When the Secretary chose to exercise its statutory, but limited, right to use and control the Tribe's trust property to the exclusion of the Tribe for school or administrative purposes, that use and control gave rise to a fiduciary obligation on the part of the Government to maintain and repair the Tribe's trust property. There is no doctrine in American Indian law which allows the United States, short of a condemnation action, to take and use Indian trust property and then transfer the property back to the Tribe in a totally wasted state. Yet, that is what the Government would have this Court approve.[35] As this Court aptly observed in *Mitchell II*, *supra* at 207: "it would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed," 463 U.S. 206, 207.

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the trust corpus under its control, even though no statute or regulation specifically required the Government to preserve it. The 1960 Act and subsequent control by the Government created the *fiduciary relationship* which gave rise to the *fiduciary obligation*.

35. During oral argument below in the Court of Appeals, December 7, 2000, the court inquired what the Government's position would be if "the United States tomorrow dynamited to the ground all 36 buildings," to which the Government replied,

> I do believe that the United States has no special obligation to the Tribe with regard to any building needed for the operation of the school and therefore subject to the reservation in the 1960 statute. So, therefore, if it were deemed appropriate to dynamite those buildings to the ground by the Secretary of the Interior, it would be within the Secretary's discretion to do so.

In response to the court's inquiry whether the Tribe had any property right that was impaired by that destruction, the Government replied: "I don't believe so, Your Honor. I believe that beneficial title has not even passed as to any of those portions of the site that are retained for exclusive use by the United States." (Tr., December 7, 2000, p. 23).

Authorization in the 1960 Act for the Secretary to use and control the Tribe's trust property for limited school or administrative purposes does not include the right of the Government to appropriate the Tribe's buildings and destroy them without rendering or assuming an obligation to render just compensation.[36] As this Court observed in *United States v. Sioux Nation*, 448 U.S. 371, 406, 100 S. Ct. 2716, 2736 (1980), "In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristic pithy phrase: 'Spoiliation is not management'"[37]

In bright contrast to the Government's extreme view of the Government's trust obligation, n.35, *supra*, the Court of Appeals' opinion comes squarely within the criteria established by this Court in *Mitchell I* and *II* for finding a fiduciary relationship and obligation, the breach of which by the Federal Government could reasonably be interpreted as mandating compensation by the Government for damages sustained as a result of the breach.

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36. *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S. Ct. 244 (1937). In *Shoshone*, the Court conceded Congress' paramount property over Indian property, but held, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation.'" *Id.* at 497, 57 S. Ct. at 252 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 684 (1935). *See also White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 670 (1987; discussion of, *supra*, n.32.

37. Quoting Justice Cardozo, in *Shoshone*, 299 U.S. at 498, 57 S. Ct. at 253 (1937).

CONCLUSION

This case does not merit further review by this Court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BRIEF IN OPPOSITION
(NAVAJO NATION CASE)

No. 01-1375

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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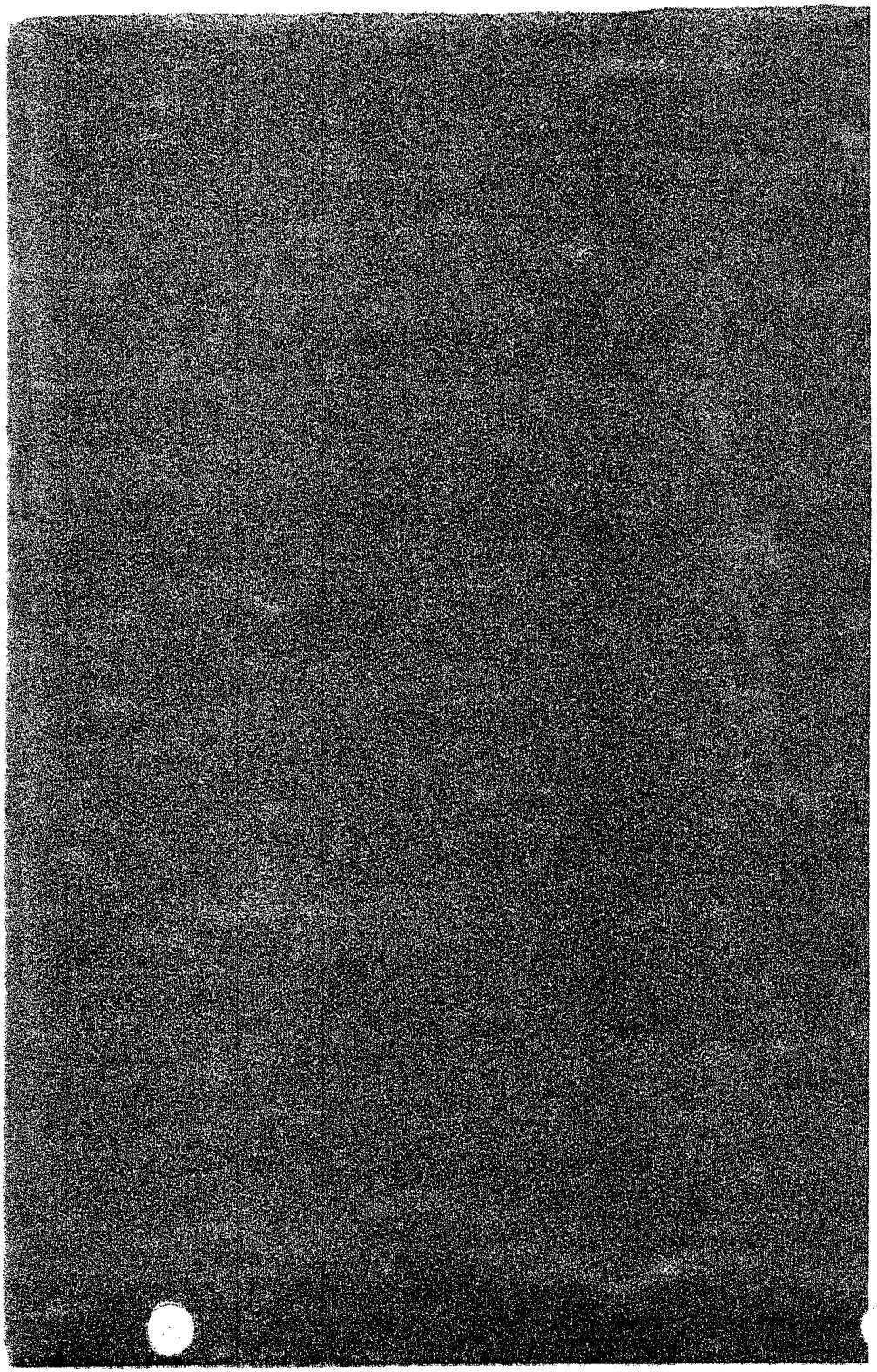

QUESTION PRESENTED

Federal statutes and regulations control virtually every aspect of surface coal mining on tribal lands, from the creation of leases, approval of mine plans, setting and administration of rentals and royalties, and supervision of reclamation activities, to final bond release. The basic purpose of the statutory scheme is to maximize tribal revenues from reservation lands. The question presented is:

Whether the Court of Appeals properly held that the United States may be liable in damages to the Navajo Nation when the Department of the Interior, in exercising its control over the leasing process, violated several specific trust duties imposed by the Indian Mineral Leasing Act and its implementing regulations and deliberately abused its comprehensive management authority to minimize Navajo revenues in favor of a politically powerful coal company with ties to the Secretary.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Navajo Nation respectfully urges that the Government's Petition be denied. The judgment below is entirely consistent with this Court's precedents, the lower courts are in harmony on the legal issues, and a decision on these facts would have no general applicability.

TREATY, STATUTES, AND REGULATIONS INVOLVED

The following treaty, statutes, and regulations reveal the comprehensive nature of federal control over the leasing of Navajo coal and provide the contours of the Government's trust duties: the Treaty between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849); the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, and implementing regulations, 25 C.F.R. Parts 211 and 216, Subpart A and 43 C.F.R. Part 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. Part 169; the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA requirements to Indian coal, 30 C.F.R. § 206.450 *et seq.* and 25 C.F.R. § 211.40 (applying 30 C.F.R. Parts 201-243, 290); section 710 of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. Part 216, Subpart B, and 30 C.F.R. Parts 750 and 955; and federal mine safety laws applicable to coal mining on tribal lands, 30 U.S.C. § 551 *et seq.* and 30 U.S.C. § 802 *et seq.*; *see* 30 C.F.R. Parts 50, 56, 71-72, 74, 77, 90, 100, 880. These provisions are set forth in the Addendum lodged

with the Court, except for the voluminous, generally applicable, mine safety laws and regulations.

STATEMENT OF THE CASE

This case involves a unique set of unrebutted facts. In 1964 the Department of the Interior negotiated, drafted, and approved a coal lease between the Navajo Tribe and a subsidiary of the Peabody Coal Company. The lease called for royalties of 20¢ to 37.5¢ per ton. C.A. App. A281. After Congress mandated in 1976 that royalties for federal coal equal or exceed 12½% of value, *see* 30 U.S.C. § 207(a), the Department recognized that the lease was inequitable and that it had a duty to rectify the inequity. *E.g.*, C.A. App. A364, A379. The lease itself offered that opportunity, granting the Secretary unilateral authority to adjust the royalty rate to a reasonable level in 1984. *Id.* at A284.

The Tribe engaged in fruitless negotiations with Peabody from 1979 to 1984. In early 1984, Tribal Chairman Peterson Zah requested the Secretary to adjust the royalty rate. *Id.* at A375. The Secretary delegated that responsibility to the Navajo Area Office of the Bureau of Indian Affairs ("BIA"). *Id.* at A379. The Navajo Area Director obtained analyses from the Bureau of Mines ("BOM") and the BIA Energy & Minerals Office ("E&M"). BOM recommended a royalty rate adjustment to 20%; E&M to 24%. *See id.* at A437. Relying on the lower BOM recommendation, the Area Director notified Peabody in June 1984 that he was adjusting the royalty rate to 20% and that Peabody had a right to appeal under the Department's formal appeal procedures. *Id.* at A438.

Peabody appealed to the Commissioner of Indian Affairs, then John Fritz, who also held the positions of Deputy Assistant Secretary and Acting Assistant Secretary for Indian Affairs. Fritz indefinitely stayed the royalty adjustment during the appeal, *id.* at A453, causing the Navajo to lose an estimated $50,000 per day while the appeal languished, *id.* at A397. Peabody and its utility customers instructed counsel to "proceed[ ] on maximum delay mode in the appeal." *Id.* at A452. The parties completed briefing in early 1985, and Fritz then obtained new, more detailed, studies from BOM and the BIA's own experts. *See id.* at A649-714. All federal studies determined that the 20% rate was proper, *see id.* at A714; no study found otherwise, *id.* at A1864.

Fritz sought to make his decision a model of procedural fairness and technical competence. *Id.* at A1230-32. Fritz, his staff, and his solicitor prepared a final decision for the Department, going over it line-by-line. *Id.* at A1245-46. The decision document was finalized, typed on BIA letterhead, copied, and checkmarked for distribution to counsel of record in the administrative appeal. *Id.* at A717-722. It was, in Fritz' words, "teed up" for his signature after he returned from military reserve duty. *Id.* at A1245.

The Department leaked the pending decision to Peabody, but not the Navajo. *E.g.*, *id.* at A1089-90; *see* Pet. App. 41a-42a. Peabody immediately hired Stanley Hulett, a "close personal friend" of Secretary Hodel, to seek *ex parte* the suppression of the decision. Pet. App. 40a. Then, "[o]n or shortly after the date of the *ex parte* meeting, Secretary Hodel signed a memorandum prepared by Peabody . . . instruct[ing] Mr. Fritz not to issue the appeal

decision affirming the twenty percent rate."[1] Pet. App. 40a-41a; C.A. App. A746-49, A764.

The Department immediately notified Peabody of the success of its *ex parte* campaign–both Hodel and Fritz met with Hulett at least twice–but concealed it from the Navajo. *Id.* at A746; Pet. App. 41a, 46a. An Associate Solicitor discovered what Secretary Hodel had done and warned of various consequences if the Navajo learned the truth. C.A. App. A771-72. The Department then "misinformed" the Navajo. Pet. App. 41a. Because of the Department's dishonesty, "the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." Pet. App. 51a-52a.

Peabody reiterated its longstanding offer to raise the royalty rates for its coal leases to 12½% shortly thereafter. The Tribe rejected Peabody's offer in July 1986. *See* C.A. App. A929, A1041. However, during the two and one-half years of negotiations after Secretary Hodel secretly scuttled Fritz' decision, the Navajo continued to receive negligible royalties. The Department knew the Navajo would get "beat up" in the negotiations, *id.* at A1644, A1263-64; continued to conceal from the Navajo

[1] The Government's claim that Hodel signed the memo prepared by Peabody's lawyers to "request" Fritz not to issue the decision, Pet. at 13, is euphemistic at best. As the former Director of the Office of Trust Responsibilities testified, "you would have to be brain dead not to understand what this is telling you." C.A. App. A1648. Similarly, notwithstanding the Government's attempt to find a regulation that might justify Hodel's actions, *see* Pet. at 7 n.4, 24, Hodel did not direct Fritz to "reconsider" his decision; rather, he secretly "assume[d] personal jurisdiction" over the case, and told Fritz to "stop action." C.A. App. at A1253.

both the *ex parte* deal and the new federal studies supporting the 20% royalty rate, *see id.* at A784, A1026-27, A1283-84; and violated its own regulation designed to prevent overreaching by companies negotiating with Indians. *See* 25 C.F.R. § 211.2 (1985) (prohibiting mineral lease negotiations unless desired by the Indians and generally restricting any negotiations to thirty days); C.A. App. A839. Instead, the Department actively assisted *Peabody* in *its* negotiation strategy. *See id.* at A778.

Predictably, facing "severe economic pressures," Pet. App. 3a, the Navajo eventually agreed to Peabody's proposal reducing the effective royalty rate to even less than the federal minimum.[2] Moreover, contrary to the Government's assertion, Pet. at 7-8, other provisions of the "negotiated" lease amendments substantially harmed Navajo interests. For example, the amendments eliminated the "extremely valuable" provision for future Secretarial adjustment, *see id.* at A800-01 (abrogating Article VI of the original lease), A988; required the Navajo to forfeit $89 million in back royalties and taxes,[3] Pet. App. 44a; capped future taxes, confirmed old tax waivers[4] and

[2] Contrary to the Government's representations, accepted by the Court of Federal Claims, *see* Pet. at 11, the Navajo Nation alleged and proved on unrebutted facts that the effective royalty rate of the "negotiated" lease amendments was less than the federal minimum of 12½%. C.A. App. A107, A120, A124, A1973, A2058, A2796.

[3] The Department knew that the Navajo "gave up something for nothing" here. C.A. App. A2865.

[4] Because of a pre-existing tax waiver on coal destined for the Navajo Generating Station, which consumes over half of the Peabody coal, the *total* of Navajo taxes and royalties for that coal cannot exceed 12½% under the lease amendments, much less

granted new tax waivers, C.A. App. A805-10; and leased an additional 90 million tons of Navajo coal for insubstantial bonuses and at the facial 12½% royalty rate, not the 20% rate that all federal studies had found reasonable, *id.* at A795, A1550-52, A1857. The Government notes that the royalty rate of a second inequitable lease of coal jointly owned by the Navajo and Hopi was also adjusted to 12½%, Pet. at 8, but the amendments to that lease only damaged the Navajo further. As Peabody and its customers recognized, if the 20% rate were affirmed for the Navajo lease, the royalty rate of the other lease would inevitably rise to that figure. *See id.* at A740; A1072-73. Ironically, at the same time the Department was working with Peabody to minimize Navajo royalties below the 12½% federal minimum, it required Peabody to pay a 17.08% royalty for inferior federal coal. *Peabody Coal Co.*, 93 IBLA 317 (1986).

Federal law requires that any tribal mineral lease be approved by the United States, to protect Indians from unfair transactions. The process required by IMLA for Secretarial approval therefore requires an economic analysis to determine if it were in the Tribe's best interest. However, Secretary Hodel had committed privately to Peabody to approve the deal without any economic analysis. C.A. App. A847. The approval process was thus described by the Director of the Office of Trust Responsibilities as follows: "And my shop, what are we doing? We can't help, because we are not supposed to help. . . . [I]f you tell me I can't respond as a Trustee, then what is my review? And that's why we have no review . . . [T]he

approach the 20% figure found by the Department to be proper compensation for the coal alone. C.A. App. A1972-76.

way this happened was, we were rubber stamping a review of a bunch of [lease] amendments that we weren't supposed to review." *Id.* at A1659-61. The Director "refused to sign his approval because he felt he 'would be participating in a breach of trust.' " Pet. App. 45a (quoting deposition testimony).

Thus, Peabody submitted the lease amendments directly to Secretary Hodel's office, and their approval became a "rush job" within the Department. C.A. App. A1876. Hodel approved the lease amendments via a document partially drafted by Peabody, based on the recommendation of Assistant Secretary Ross Swimmer *also* drafted in part by Peabody. *Id.* at A1877-82. No economic analysis or study of any kind was included in the package sent to Hodel by Swimmer.[5] *Id.* at A2061, 2725.

From the exhaustive studies performed by the Bureau of Mines and others, the Department was well aware that the Navajo's extraordinarily valuable coal should have commanded a royalty rate of at least 20% and it had the opportunity to impose that rate at all times from 1984 to 1987. This case involves no Navajo "second-guess[ing]" and requires no "benefit of hindsight," as the Government suggests. Pet. at 18, 27. It concerns the intentional subversion of Navajo interests by its faithless trustee, which knew at the time it approved the sub-12½% deal that the proper royalty was at least 20%.

This suit was filed in 1993. Until the Government's first trial attorney was removed from this case after being found to have intentionally obstructed justice in another

[5] A rushed "technical review" prepared by the BIA was shelved, its author having been given insufficient information to form a reasoned opinion. *See, e.g.*, C.A. App. A959, A963. Had the reviewer been informed of the facts, he would have recommended disapproval. *Id.* at A999-A1006.

case involving Navajo coal, *see Mescal v. United States*, 161 F.R.D. 450 (D.N.M. 1995), the Government continued to conceal the facts even during discovery in the trial court in this case. The full extent of its misconduct was discovered only in 1997, when Peabody was forced to produce a document that *it* had concealed in violation of court orders and agreements of counsel. *See Navajo Nation v. United States*, 46 Fed. Cl. 353, 354 (2000), *aff'd*, 2001 WL 312117 (Fed. Cir. May 29, 2001).

DECISIONS BELOW

The Court of Federal Claims was outraged by the Department's conduct, but, focusing only on the Department's collusion with Peabody, held that it lacked jurisdiction to provide a remedy. "Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic duties [of loyalty, care, and candor]. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." Pet. App. 49a. The "formal outcome" was premised on the court's *sua sponte* determination that federal supervision over Indian coal was not comprehensive, contrary to the Government's repeated concession in that court. *See* C.A. App. A2108, A2986.

The Court of Appeals shared the trial court's outrage, *see* Pet. App. 11a-12a, but reversed on the "formal outcome." It found it "quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Pet. App. 10a. The Court of Appeals determined that such comprehensive supervision over all aspects of Indian coal leasing gives rise to a correlative federal duty to "manage the mineral resources for the benefit of the Indians." Pet. App. 11a.

The Court of Appeals further determined that the principal statutory purpose to be served by federal management of tribal minerals was to "maximize their benefit to the Indians," Pet. App. 10a, and that the familiar "best interest of the Indians" standard applies to the Departmental actions at issue here. *See* Pet. App. 12a. Having determined that the United States controls and supervises virtually every aspect of Indian coal development and that the Government has a statutory duty to exercise its pervasive control to manage tribal minerals in a way that maximizes revenues and advances Indian interests, the Court of Appeals concluded that "[IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*," *United States v. Mitchell*, 463 U.S. 206 (1983). Pet. App. 8a.

The Court of Appeals therefore applied the *Mitchell II* framework. It found that all of the Department's revenue-minimizing activities, from its secret collaboration with Peabody in scuttling a well-supported administrative appeal decision to its rubber-stamp approval of the damaging lease amendments two and one-half years later violated both "common law . . . [and] statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo." Pet. App. 12a.

In a separate opinion, Judge Schall agreed that the Government violated compensable fiduciary duties, but focused on the Secretary's approval of the "negotiated"

lease amendments.[6] In Judge Schall's opinion, the Department's "failure to perform an economic analysis on the Agreement between Peabody and the [Navajo] Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 . . . amounted to a breach of a fiduciary obligation owed to the Nation." Pet. App. 30a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH *MITCHELL II*.

a. *Mitchell*'s "Control or Supervision" Test

Mitchell II approved the general test stated in *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980), for determining if money-mandating trust duties may exist: " 'where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' " 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987). The Government would apparently substitute an undefined "management" test derived from dictum in *Mitchell I* for the "control or supervision" test actually approved by this Court in *Mitchell II*. *See* Pet. at 17-19.

The Indian plaintiffs in *Mitchell II* sought to recover damages from the United States based on allegations of waste and mismanagement of their timber resources.

[6] The Government's repeated references to a "divided" court of appeals are misleading. All judges on the panel agreed that jurisdiction was present and that the Department had breached compensable trust duties.

They asserted that the alleged misconduct constituted a breach of fiduciary duty owed them by the United States under various statutes. 463 U.S. at 210. To prevail, the plaintiffs were required to show that the source of substantive law on which they relied–the statutes and regulations under which the United States controlled or supervised the timber resource–could fairly be interpreted as mandating compensation by the Federal Government for damages sustained as a result of a breach of the duties they impose. *Id.* at 219.

The Court examined the timber management statutes, 25 U.S.C. §§ 406, 407, 466, the Indian right-of-way statutes, and implementing regulations–the sources of substantive law on which the plaintiffs relied. *Mitchell II*, 463 U.S. at 219-23. It found that they conferred federal control over "[v]irtually every stage of the process," *id.* at 222, and established a correlative federal "responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary obligations." *Id.* at 224. The Court concluded that, because those "statutes and regulations . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation for damages sustained." *Id.* at 226.

In its Petition, the Government urges both that the governing statutes and regulations must expressly impose "fiduciary *management* duties" in order to create potential liability under *Mitchell II*. Pet. at 21 (emphasis in original). The Government's contention ignores the disjunctive "control or supervision" test adopted in *Mitchell II*, 463 U.S. at 225, and improperly transforms "the

descriptive into the prescriptive." *Brown v. United States*, 86 F.3d 1554, 1559-60 n.6 (Fed. Cir. 1996). As *Brown* explained, "[a]ccording to [*Mitchell II*'s] disjunctive 'control or supervision' test, nearly complete government management (*i.e.*, 'supervision') or control, while more than sufficient to create an enforceable duty, is not necessary." *Id.* at 1560 (citations omitted). The Government's seeming insistence on violations of statutes and regulations that provide a money damage remedy *in haec verba* overlooks the careful wording of *Mitchell II*: the applicable statutes and regulations provide the "contours" of the trust duty. 463 U.S. at 224. While the general contours of the government's obligations may be defined by statute, the interstices are filled in through general trust law.

b. Federal Control or Supervision of Indian Coal Leasing

The Navajo Nation alleged, *e.g.*, C.A. App. A38-39, A117-18, and the Government conceded comprehensive federal control and supervision over Indian minerals in both of its briefs in the Court of Federal Claims.[7]

[7] C.A. App. A2108 ("the Department of the Interior has promulgated comprehensive regulations governing the operation of approved leases–including regulations governing rights-of-way over Indian lands, 25 C.F.R. Part 169 (1985); surface exploration, mining operations and reclamation, 25 C.F.R. Parts 216 (1985) and 200 (1993); and the payment of rents and royalties, 25 C.F.R. Part 211 (1985)"); C.A. App. A2986 ("the Secretary's duties in the administration of mineral leases are admittedly quite comprehensive . . . ").

Inexplicably, that court, *sua sponte*, found that comprehensive federal control of Indian coal was lacking. This *sua sponte* utterance is the only support the Government can muster for its position here that the United States controls or supervises Indian minerals less comprehensively than it does Indian timber. *See* Pet. at 20. The Court of Appeals corrected the Court of Federal Claims on this point. The Government's concession of jurisdictional facts in the Court of Federal Claims, *see supra* n.7, and its express concession in the Court of Appeals that "there is no question that the CFC had subject matter jurisdiction" over this case, Gov. Br. at 2, belie its new position here, that this case "presents a threshold immunity question." Pet. at 14.

Congress has delegated to several federal agencies the power to regulate all aspects of Indian coal leasing and development. These agencies exercise literally daily supervision of all such mining activities.

• *Bureau of Indian Affairs ("BIA")* Congress expressly delegated rulemaking authority to the Secretary in IMLA. 25 U.S.C. § 396d. The Secretary's regulations comprehensively govern coal exploration permits, lease negotiations, bonding, the size and shape of leases, specific terms of mineral leases, approval or disapproval of leases and mining plans, rental and royalty payments, permission to commence mining operations, promulgation and enforcement of "operating regulations" by the Secretary, penalties for noncompliance with provisions of leases and regulations, and lease cancellation. 25 C.F.R. Parts 211 and 216, Subpart A. Pet. App. 9a-10a; C.A. App. A3393.

The IMLA regulations were expressly promulgated to ensure that Indian mineral resources "will be developed in a manner that maximizes their best economic interests" and to be "consistent with the *Federal Government's role as trustee* for these mineral resources and with the modern Federal policy of self-determination." 61 Fed. Reg. 35,634 (1996) (emphasis added). The BIA exercises further control over coal mining operations through authority over rights-of-way. 25 U.S.C. §§ 323-328; 25 C.F.R. Part 169; *see Mitchell II*, 463 U.S. at 223.

• *Bureau of Land Management ("BLM")* IMLA regulations delegate to BLM comprehensive authority over resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification for Indian coal, and incorporate by reference BLM regulations governing coal exploration and mining operations. 25 C.F.R. § 211.4, incorporating 43 C.F.R. Part 3480. In performing these functions, BLM exercises "the *trust responsibility of the United States*." *See* 61 Fed. Reg. 35,634, 35,641 (1996) (emphasis added).

• *Minerals Management Service ("MMS")* In the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757 ("FOGRMA"), Congress required the Secretary to address "the adequacy of royalty management for coal . . . on . . . Indian lands." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes. The Secretary satisfied the congressional mandate by establishing the Auditing and Financial System in 30 C.F.R. Parts 212 and 218, *see* 49 Fed. Reg. 37,336 (1984), and applying it to solid minerals retroactive to June 1985, *see* 51 Fed. Reg. 15,763, 15,765 (1986); and by adopting the Production Auditing and Accounting System in 30 C.F.R. Part 216, *see* 51 Fed. Reg.

8,168 (1986), under which MMS controls or supervises all aspects of coal valuation and the collection and audit of royalties, *see* C.A. App. A3393. The royalty management regulations were *also* expressly promulgated "to ensure that the *trust responsibilities of the United States* are discharged in accordance with the requirements of the governing leasing laws, treaties, and lease terms." 30 C.F.R. § 206.450(d) (emphasis added).[8]

• *Office of Surface Mining Reclamation and Enforcement ("OSM")* In the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), Congress reaffirmed federal control over Indian coal mining and lease amendments. 30 U.S.C. § 1300. Under regulations promulgated under SMCRA in 1977, OSM issues or denies mining permits on Indian land and oversees compliance by coal operators with requirements concerning post-mining land use, backfilling and grading, spoil disposal, topsoil handling, protection of hydrologic systems, dams and impoundments, revegetation and steep-slope mining. C.A. App. A3393; 25 C.F.R. Part 216, Subpart B (1985). Under additional Indian lands regulations promulgated under SMCRA in 1984, OSM comprehensively regulates permit applications and permitting decisions, exploration, performance standards, bonding, inspections, and enforcement of permit conditions, performance standards, and

[8] The Government's suggestion, Pet. at 21, that it might have leased Navajo coal for the 10¢ per ton minimum set by a 1957 regulation even if it were aware (as here) that the proper royalty was closer to $4.00 per ton is preposterous. The United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate," to strive for the "ceiling" and not settle for the "floor." *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).

reclamation requirements. 30 C.F.R. Part 750; C.A. App. A3393. The regulations governing surface coal mining on tribal lands were *also* promulgated to satisfy "the *Department's legal role as trustee* of the natural resources of the Indian tribes." 42 Fed. Reg. 18,083 (1977) (emphasis added). Since 1994, OSM has also administered on Indian lands the provisions of the Coal-Mine Fire Control Act of 1954, 30 U.S.C. §§ 551-558, applicable only to "lands owned or controlled by the United States or any of its agencies." 30 U.S.C. § 554(a). *See* 30 C.F.R. Part 880.

Other federal agencies, such as the Office of Mine Safety and Health Administration and the Environmental Protection Agency, comprehensively regulate coal surface mining operations on Indian lands under more generally applicable laws. *See* C.A. App. A3394.

Even without the special overlay of rules governing Indian coal royalty management and Indian surface coal mining, this Court has observed that IMLA confers comprehensive federal authority over Indian minerals. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) (under IMLA, "the United States has exercised its supervisory authority over oil and gas leases[9] in considerable detail"). In invalidating certain state taxes on mineral production in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court likewise observed that IMLA was "comprehensive legislation" which "detailed uniform leasing procedures designed to protect the Indians." *Id.* at

[9] The unrebutted record here shows that the Government's supervisory control over Indian coal is *more* comprehensive than that over oil and gas. C.A. App. A3392-95.

763. The lower courts are in accord, including one that has scrutinized the mining operation at issue here. *See Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (federal "statutes and regulations govern[ ] virtually every aspect of [Peabody's] coal mining activities, from the creation of its leases to the reclamation of land"). Similarly, in holding that the Department breached trust duties under IMLA by rubber-stamp approvals of well spacing orders, the court in *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv.*, 792 F.2d 782 (9th Cir. 1986), relied on the fact that IMLA "is a detailed and comprehensive act that imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of Indians." *Id.* at 794. It relied on the *en banc* decision of the Tenth Circuit in *Jicarilla Apache Tribe v. Supron Energy Corp.*,[10] which held that the Department had violated trust duties under IMLA by failing to invoke a lease provision that would have resulted in greater royalties to the tribe than an alternative set of regulations. In so deciding, the *Supron* court found that, under IMLA, "the federal government's role in mineral leasing is pervasive and its responsibilities comprehensive," 728 F.2d at 1564, and that IMLA "regulations detail in exhausting thoroughness the government's management and regulatory responsibilities," *id.* at 1565.

As in *Mitchell II*, both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians. *See* 25 U.S.C. § 396b, 25

[10] 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring and dissenting), *on reh'g*, 782 F.2d 855 (*en banc*) (adopting concurring and dissenting opinion as modified), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986).

C.F.R. §§ 211.1(a), 211.3 (2001); *see Blackfeet Tribe*, 471 U.S. at 764 (IMLA's "leasing procedures [are] designed to protect the Indians."); *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982);[11] *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The Department's Indian coal leasing policy, adopted in 1975, also expressly requires it to act in the best interest of the Indians. C.A. App. A332.

Even if the Court were to adopt the novel "full management" test proposed by Petitioner, the IMLA regime would plainly satisfy it. The courts uniformly agree with the court below, Pet. App. 10a, that IMLA *does* impose management duties on the Federal Government, in addition to other duties expressly set forth in particular provisions of IMLA and its implementing regulations. For example, the court in *Kenai* invalidated a Departmental approval decision not in the interest of the Indians, reasoning that, as trustee under IMLA, the Secretary "must *manage* Indian lands so as to make them profitable for the Indians." 671 F.2d at 386 (emphasis added). Similarly, *Assiniboine* "conclude[d] that a fiduciary duty exists in the *management* of tribal mineral resources." 792 F.2d at 794 (emphasis added).[12] The lower courts are also in

[11] *Kenai* held that the Department must "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands." 671 F.2d at 387. The *Kenai* standard was expressly adopted in the IMLA regulations, 61 Fed. Reg. 35,634, 35,640 (1996), and it applies to lease approval decisions, 25 C.F.R. § 211.3.

[12] *Accord Woods Petrol. Corp. v. Dep't of Interior*, 47 F.3d 1032, 1038 (10th Cir.) (*en banc*), *cert. denied*, 506 U.S. 808 (1995); *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 238 (1985).

agreement with the court below, Pet. App. 8a, that the IMLA scheme is the legal analog in the mineral context to the timber management regime in *Mitchell II*. *Supron*, 728 F.2d at 1564 ("the statutory and regulatory scheme in *Mitchell II* parallels that involved here"); *Pawnee*, 830 F.2d at 190 (analyzing Indian mineral leasing statutes and regulations, and concluding that "[t]his case is very much like . . . *Mitchell II*."); *Assiniboine*, 792 F.2d at 794; *Youngbull v. United States*, No. 31-88L, 17 Indian L. Rptr. 4001, 4005 (Cl. Ct. 1990) ("In many respects, the case at bar [concerning federal liability for improper IMLA approval decision] parallels the *Mitchell* cases. Both deal with the government's management of Indian resources. Both feature elaborate federal statutory and regulatory schemes governing disposition of Indian resources.") (Rader, J.).

The Government suggests that its management duties are not money-mandating because IMLA's primary goal, to maximize tribal lease revenues, cannot be given "talismanic effect." Pet. at 18 (quoting *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 179 (1989)). However, *Cotton* concerned a state's taxing authority, and "[i]mportant considerations of federalism took precedence over the Secretary's general duty to act on behalf of the tribe." *Burlington Resources Oil and Gas v. Dep't of the Interior*, 21 F. Supp. 2d 1, 4 (D.D.C. 1998). No such principles of federalism are present here, and, absent that circumstance, all authorities (including the Department's own Board of Land Appeals) agree that IMLA's "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).[13] In any event, the Navajo Nation's

[13] *Accord Supron*, 728 F.2d at 1570; *Kenai* 671 F.2d at 386; *Dawn Mining Co. v. Watt*, 543 F. Supp. 841, 843 n.8 (D.D.C. 1982);

claim does not depend on giving the goal of maximizing lease revenues "talismanic effect"; the Government's conduct subverted IMLA's basic purpose in a most extraordinary and substantial way.

c. The "Causal Link"

The Government's contention that the Navajo Nation here did not allege or prove "the breach of any specific duties imposed by the statutes or regulations giving rise to [the trust] relationship," referred to by the Government as the "requisite causal link," Pet. at 23, simply misstates the record. The Navajo Nation alleged the violation of specific trust duties in the approval of the lease amendments and the events leading to that approval, C.A. App. A35-41, and demonstrated with an unrebutted factual record that the Department violated the following "specific" trust duties imposed by IMLA and its implementing regulations. The Department:

- exercised its approval power under 25 U.S.C. § 396a with no examination of the merits of the transaction or the Navajo's best interests, *see* Pet. App. 26a-27a;
- violated 25 C.F.R. § 211.2 (1985) by compelling the Navajo to negotiate, and by failing to limit and supervise the negotiations;[14]

Burlington Resources Oil and Gas Co., 151 IBLA 144, 156 (1999); *General Crude Oil*, 18 IBLA 326, 329 (1975).

[14] That regulation allowed mineral lease negotiations only if the Indian, not the developer, sought them and required that negotiations generally be concluded in thirty days. C.A. App. A195. The regulation "is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources." Pet. App. 57a. Here, Peabody sought to prolong the multi-year "negotiations"; the Navajo *opposed* them. *See, e.g.*, C.A. App. A462-A464, A468,

- violated Congress' central purpose in establishing the IMLA trust by deliberately *minimizing* tribal revenues from the Navajo's most valuable, nonrenewable, resource;
- obtained for the trust beneficiary less consideration for its coal than the trustee itself requires for federal coal in violation of federal law, policy, and black letter trust standards;
- knowingly exercised its complete control over royalty adjustments under the lease to undermine Navajo interests, in violation of its IMLA duties[15] and in collusion with the adversary of the trust beneficiary, *see* C.A. App. A746;
- violated specific trust duties of care, loyalty,[16] and candor when operating within the "contours" of the IMLA statutory and regulatory scheme, *see* Pet. App. 11a-12a, 49a.

A728-A729, A746, A750-A751, A766-A767. This regulatory violation was flagged by the Solicitor's Office and ignored in late 1987, prior to Secretary Hodel's rubber-stamp approval of the lease amendments. *See* C.A. App. A839.

[15] The Government seeks to excuse the obvious breach of trust in the Secretary's collusion with Peabody to suppress and conceal a favorable decision on Peabody's administrative appeal of the royalty rate adjustment by observing that that misconduct occurred in a formal administrative appeal governed by the Administrative Procedure Act, not by IMLA. Pet. at 23-24 & n.11. However, the Secretary, as trustee managing tribal minerals, "cannot escape his role as trustee by donning the mantle of administrator." *Supron*, 728 F.2d at 1567. Stated more generally, a "fiduciary cannot turn his responsibilities on and off like a faucet." *In re Diasonics Sec. Lit.*, 110 F.R.D. 570, 574 (D. Colo. 1986) (citations omitted).

[16] The Department's adherence to its duty of loyalty is especially important in its dealings with Indian tribes. *Felix S. Cohen's Handbook of Federal Indian Law* 227-28 (1982); *see generally N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981).

The Court of Appeals had no trouble finding a "causal link," *see* Pet. at 23, between the Department's intentional mismanagement of Navajo coal resources and the damages sustained by the Navajo. *See* Pet. App. 3a, 11a-12a. The Department foresaw the damage to Navajo interests at the time Secretary Hodel suppressed and concealed the well-reasoned Fritz decision, misled the Navajo, and forced the Navajo to negotiate while under severe economic pressures. Asked about a statement in the instruction memorandum drafted by Peabody's lawyers and signed by Hodel that "there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate," Acting Assistant Secretary Fritz testified: "[t]o everybody other than the Navajo Nation there would be significant advantages, candidly." C.A. App. A1263-64. As the Director of the Office of Trust Responsibilities testified, Hodel instructed Fritz to "don't act, and put these people at arm's length; but I didn't think that that was appropriate . . . I thought that the proper standard for a Trustee is to put your arm around your beneficiary, and together you try to work out a good result. Not to throw them out there and let them get beat up, and then if they are still alive, resuscitate them." C.A. App. A1643-44.

Judge Schall's narrower rationale, that the Secretary's approval of the lease amendments with no economic evaluation violated his trust duties under IMLA, also provides a direct "causal link" between the breach of an enforceable trust duty under IMLA and the damages sustained by the Navajo. Judge Schall's reasoning conforms with all the authorities.[17] It is hornbook law that

[17] *See, e.g., Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992) ("the Secretary's discretion to approve or disapprove leases . . . must be governed by fiduciary standards and limited by fiduciary duties"); *Cheyenne-Arapaho Tribes v. United States*, 33 Fed. Cl. 464, 468 (1995) ("when DOI leased mineral rights on plaintiffs' lands, it was obliged to use reasonable skill and care in an effort to maximize the benefits, financial and otherwise, that the Tribes would receive from those mineral leases"); *Youngbull*, 17 Indian L. Rptr. at 4005 ("In accord with trust responsibilities, the Secretary has a statutory and regulatory obligation to approve or reject leases according to the best interests of the Indians.").

the federal trust duty under IMLA requires the Department "to review all leases and amendments to leases to assure that the rent and royalty received by the Indian tribes or individual represents the best return that the market will bear." 3 *Am. L. of Mining* § 67.04 [4][d] (1999). The Government's notion that IMLA's approval requirement does not oblige the Secretary to reject improvident lease transactions, Pet. at 19, is pure fancy. The Secretary had done just that when the Navajo had negotiated another sub-12½% coal deal, albeit with a less well-connected coal company. C.A. App. A334; 3 *Am. L. of Mining* § 67.04 [4][d] at 67-17 (1999); *Felix S. Cohen's Handbook of Federal Indian Law* 537 & n.71 (1982). The duty to reject improvident transactions affecting Indian land is one of the cornerstones of federal Indian law, with a history going back to the earliest days of the Republic. *See* 25 U.S.C. § 177; *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960). Notably, Congress has allowed for the Navajo Nation to take steps to eliminate the requirement of federal approval for Navajo business site leases, but rejected any reduction of federal control over approval of Navajo mineral leases. *See* Navajo Nation Trust Land Leasing Act of 2000, Pub. L. No.

106-568, Tit. XII, 114 Stat. 2933 (*codified at* 25 U.S.C. § 415(e)(1)).

Similarly, the Department's acknowledged violation of 25 C.F.R. § 211.2 (1985) by forcing the Navajo into multi-year "negotiations," *see* C.A. App. A839, directly caused the damage to the Navajo, as the Department knew it would. *See, e.g.*, Pet. App. 51a-52a; C.A. App. A1263-64, A1667-71.

d. Application of Common Law Standards

The Court of Appeals did not "put[ ] the United States in the shoes of a private, common law trustee for determining *whether* the government has assumed money-mandating obligations to an Indian tribe," as argued by the Government. *See* Pet. at 26 (emphasis added). Rather, the court below first determined, consistent with *Mitchell II*, that the United States assumed money-mandating trust obligations to manage tribal minerals by taking on control of those resources through a comprehensive statutory and regulatory scheme. The Court of Appeals only then measured the Government's *conduct* as trustee with reference to common law trust standards.

The application of common law trust standards to judge the Government's *conduct* as trustee is consistent with both *Mitchell II* and other venerable authorities. This Court has ruled consistently that the Government's "conduct, as disclosed in the acts of those who represent it in its dealings with the Indians, should . . . be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.*, at 297 n.12. "There is no doubt that the United States serves in a fiduciary

capacity with respect to [the] Indians and that, as such, it is duty bound to exercise great care in administering its trust." *United States v. Mason*, 412 U.S. 391, 398 (1973). As the Chief Justice stated for a unanimous Court, "[i]t is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity. *See Seminole Nation v. United States*, 316 U.S. 296-97 . . . " *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). *Mitchell II* itself both relied on the common law of trusts, *see* 463 U.S. at 225-26, and also cited with approval numerous decisions expressly applying the *Seminole* standard in imposing monetary liability on the United States for breaches of trust.[18]

Application of the *Seminole* standard specifically in the Indian mineral leasing context is also well established. The Government's duties in this regard are certainly fiduciary in nature. *See Poafpybitty*, 390 U.S. at 373-74 (referring to the "trust obligations" of the Government under IMLA); *Supron*, 728 F.2d at 1563 (applying *Seminole* standard to IMLA decisions); *Assiniboine*, 792 F.2d at 794 (applying *Seminole* and *Mason* standards to IMLA decisions). The application of these standards, with their long established meanings, *see N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981), and a federal Indian law pedigree dating to the earliest years of the Republic, *see Seminole*, 316 U.S. at 296 (relying on, *e.g.*, *Cherokee Nation*

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[18] *See Mitchell II*, 463 U.S. at 226 n. 31, citing, *inter alia*, *Coast Indian Community v. United States*, 550 F.2d 639, 652-53 (Ct. Cl. 1977); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975); *Mason v. United States*, 461 F.2d 1364, 1373 n.10 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); *Smith v. United States*, 515 F. Supp. 56, 60 (N. D. Cal. 1978); *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1243 (N. D. Cal. 1973).

v. State of Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831)), is supported by the decisions of this Court and every other court that has addressed the issue.

e. Interplay with Tribal Self-Determination

The Government urges that respect for tribal self-determination dilutes trust duties under IMLA. Specifically, the Petition urges that the Indians' ability to enter into a mineral lease with Secretarial consent lessens the Government's management role. Pet. at 17-18. This is the same argument that the Government made, unsuccessfully, in *Mitchell II*. *See* Brief for the United States, No. 81-1748 (Sept. 3, 1982) at 35 ("the congressional objective [in the timber leasing statute, 25 U.S.C. § 406(a)] was to encourage Indian self-government and Indian control over exploitation of Indian natural resources"). This argument has no more validity in the mineral leasing context than it had in *Mitchell II*. The federal Government's commitment to tribal self-determination in no way compromises its fiduciary obligations under IMLA.

IMLA's only nod to tribal self-determination was to prevent the Secretary from leasing tribal minerals over the Indian's objections. Stated another way, IMLA allows the Indians to make the initial leasing decision if the Government agrees with it. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L. J. 541, 558-61 (1994). IMLA and its implementing regulations "leave no significant authority in the hand of the Indian tribes." Pet. App. 10a; Royster, at 565 (IMLA "kept tribes largely in the position of passive lessors"). But even if IMLA allowed tribes to exercise significant management authority, the Government presents a false dichotomy.

President Nixon, who forged the Indian self-determination policy, found vigorous enforcement of the trust duty and respect for tribal self-determination to be complementary. President Nixon sought to ensure Federal support for tribal self-determination by emphasizing, not limiting, the trust duty. Focusing on the Indians' "natural resource rights," President Nixon emphasized that "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 573.

President Reagan continued the policy of government-to-government respect. President's Statement on Indian Policy, 1983 Pub. Papers 96, 97. But that respect was not to come at the expense of the trust relationship:

> In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Id. at 96. President Bush continued this course. President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662. President Bush affirmed that the federal trust duty in the natural resources context was "an obligation of the highest responsibility and trust," to be judged "by the most exacting fiduciary standards." Statement on Signing the Department of the Interior and Related Appropriations Act, 1991, 26 Weekly Comp. Pres. Doc. 1768, 1769 (1990).

Nor does *Congress* view fulfillment of the trust duty as incompatible with respect for tribal governments. The Indian Self-Determination statute fulfilling President

Nixon's vision makes that clear. *See* 25 U.S.C. § 450n(2). Congress also emphasized this principle in the Indian-Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. §§ 2101-2108. IMDA was enacted "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources." S. Rep. No. 97-472, 97th Cong., 2d Sess. 2 (1982). The House report explained that 25 U.S.C. § 2103(e), which recognized "continuing" trust duties in the case of mineral leasing,

> simply restates the law as it exists today. If the Secretary, acting as trustee, approves a lease . . . or otherwise acts in relation to the trust resources of an Indian tribe and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability.

H.R. Rep. No. 97-746, 97th Cong., 2d Sess. 7-8 (1982); *accord* S. Rep. No. 97-472, 97th Cong., 2d Sess. 4-5 (1982).

The Department was not advancing the policy respecting tribal self-government when it secretly conspired with Peabody to cheat the Navajo Nation.[19] Honest consultation with, not deception of, Indian tribes is the cornerstone of the modern federal-tribal relationship. *See, e.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (2000). Indeed, as the Department recognizes, "maximiz[ing] the economic return on Indian mineral development [helps] to achieve

[19] Had the Department truly respected tribal decision-making in this case, it would have decided the royalty appeal, not rewarded Peabody's *ex parte* strategy. *See, e.g.*, Pet. App. 40a; C.A. App. A468, A766-67, A2792-93.

greater Indian self-determination." 42 Fed. Reg. 18,083 (1977). Minimizing that return surely undermines tribal self-determination.

f. Inadequacy of Equitable Relief

The Petition urges that the Navajo Nation's sole recourse is an action for equitable relief under the Administrative Procedure Act. *See* Pet. at 24-25. *Mitchell II* rejected this argument, because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227. That is especially true here, where, unlike timber, the coal resource is non-renewable and the Government concealed its intentional mismanagement of that resource for a decade.

II. THIS CASE PRESENTS NO ISSUE OF GENERAL IMPORTANCE, AND REVIEW WOULD BE PREMATURE.

a. The Petition urges that this case be paired with *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3475 (U.S. April 22, 2002) (No. 01-1067). However, the procedural posture of *White Mountain* is quite different. The Court of Appeals noted there that the Apache had not proved a breach of any federal duty, 249 F.3d at 1381, and it "express[ed] no view as to the existence or nature" of any federal duty, *id.* at 1380. Some of the claims may be premature; others (or all) may be barred by limitations. *Id.* at 1383. Moreover, *White Mountain* involves a *sui generis* act of Congress, and the decision in that case turned on arcane property law concepts unrelated to the body of federal/Indian trust law. *See id.* at 1381-82, and *compare id.* at 1384-85 (Mayer, C.J., dissenting).

By contrast, the Court of Appeals' decision below in *Navajo Nation* is a straightforward application of *Mitchell II*. Therefore, pairing the two cases might have some academic appeal, *see* Pet. at 27, but would add little, if anything, to the comprehensive framework established by the two *Mitchell* decisions.

b. As the Government stresses, the Navajo Nation alleges that the Department's violations of its trust duties resulted in significant damages. If the Court of Federal Claims awards damages on remand and the Government disagrees, this Court will have the opportunity to review the final judgment upon a complete record, and address jurisdiction, liability, and damages. *See Missouri v. Jenkins*, 515 U.S. 70, 83-84 (1995). At this stage, however, review is unnecessary and premature. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (per Scalia, J., on denial of certiorari).

CONCLUSION

The court of appeals' interlocutory decision faithfully applies the *Mitchell* framework. The lower courts are in harmony on all the legal issues. The Petition should therefore be denied, or the judgment below summarily affirmed under Rule 16.1.

Respectfully submitted,

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