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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE MOUNTAIN APACHE TRIBE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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, 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." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 249 F.3d 1364. The opinion of the Court of Federal Claims (App., *infra*, 37a-56a) is reported at 46 Fed. Cl. 20.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2001. A petition for rehearing was denied on August 22, 2001 (App., *infra*, 58a). On November 14, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 20, 2001. On December 11, 2001, the Chief

Justice further extended the time within which to file a petition for a writ of certiorari to and including January 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, 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 * * *, and subsequently set aside by [25 U.S.C. 277], 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.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), Indian Tucker Act, 28 U.S.C. 1505, and 25 U.S.C. 277—are set forth in the appendix. App., *infra*, 59a-60a.

STATEMENT

This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.

1. The property at issue in this case is a former military post, Fort Apache, located within the boundaries of the Fort Apache Indian Reservation in east

central Arizona, just south of Whiteriver along Highway 73.¹ Fort Apache was established by the United States Army in 1870 and, together with the surrounding 7579 acres, was set aside by President Grant in 1877 as a military reserve. In Arizona's territorial times, Fort Apache provided a strategic outpost from which federal soldiers—aided by White Mountain Apache scouts—engaged Apache bands, including the one led by Geronimo. The Army operated the fort until 1922, when an Executive Order placed it “under the control of the Secretary of the Interior” (Secretary) for use in accordance with federal law governing the disposal of abandoned military property (Act of July 5, 1884, ch. 214, 23 Stat. 103), or as otherwise provided by Congress. See S. Rep. No. 671, *supra*, at 3; App., *infra*, 2a.

In 1923, Congress authorized the Secretary to use Fort Apache to establish the Theodore Roosevelt Indian School, provided “[t]hat the Fort Apache 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. In the Act of March 18, 1960, Congress “declared” that Fort Apache would “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

¹ The reservation was initially established by an Executive Order in 1871. In 1897, Congress set aside a smaller portion of that reservation for exclusive use by the White Mountain Apache Tribe (Tribe). Act of June 7, 1897, ch. 3, 30 Stat. 64; see S. Rep. No. 671, 86th Cong., 1st Sess. 2-3 (1959). The Tribe is organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. It operates several commercial ventures, including the Hon-Dah Resort Casino, Sunrise Park Ski Resort, and various other outdoor recreational activities. See <<http://www.wmat.nsn.us>>.

improvements for administrative or school purposes for as long as they are needed for that purpose.” 74 Stat. 8.² Since 1960, the Secretary has continued to hold Fort Apache in trust, while operating the Theodore Roosevelt Indian School. App., *infra*, 3a.

There are more than 30 buildings and other structures on Fort Apache. They include the officers’ quarters, barracks, parade grounds, and stables and barns used by the cavalry that first occupied the fort; school facilities such as class rooms, dormitories, and a cafeteria; and administrative buildings such as storage and septic facilities. See App., *infra*, 3a; App. A to Compl. (listing buildings). Numerous buildings are more than a half a century old, and several date back to the fort’s frontier days. Over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures have been condemned or demolished. See App., *infra*, 3a.

In 1976, portions of Fort Apache, including the Theodore Roosevelt School, were designated as a national historic site known as the Fort Apache Historic District. App., *infra*, 39a. In 1993, the Tribe

² In 1960, about 410 acres of Fort Apache were used for school purposes. On the approximately 7169 acres that remained, Indians had built homes and other improvements, and had used the land for “tribal grazing.” S. Rep. No. 671, *supra*, at 3. In recommending passage of the 1960 Act, the Department of the Interior proposed the “subject to” clause that was subsequently enacted by Congress, explaining that that clause would reserve the right of the United States to continue to use “the property for the specified purposes.” *Id.* at 2, 3. The Department further stated that “[t]his reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use without seeking new legislation.” *Id.* at 4.

adopted a master plan for repairing and restoring property within the historic district. It then commissioned a 1999 survey, which concluded that re-landscaping the historic district and refurbishing its buildings and improvements in accordance with various environmental and historic preservation laws and building code provisions would cost approximately \$14 million. *Id.* at 3a-4a. In addition, the Tribe has asserted that Fort Apache “has become an increasingly significant tourist attraction,” and that it “has constructed a cultural museum within its boundaries.” Tribe C.A. Reply Br. 3.

2. In 1999, the Tribe filed a “Complaint for Money Damages” against the United States in the Court of Federal Claims, alleging (at para. 1) that the government breached “fiduciary obligations” to the Tribe in the course of the government’s “use, occupation, control, supervision, management and administration” of Fort Apache property “for administrative and school purposes.” In particular, the Tribe alleged (*ibid.*) that the government “breach[ed] its fiduciary duty to maintain, protect, repair and preserve the Tribe’s trust corpus.” According to the complaint (at paras. 32-33), the government’s asserted fiduciary duty stems from the 1960 Act, as well as from other land-use statutes and regulations.³ The complaint (at 13) seeks \$14 million in damages to repair and refurbish Fort Apache property, as well as an unspecified amount of “[c]ompensation for the economic loss and value of annual lease/rental fees.”

3. The United States moved to dismiss the Tribe’s complaint, arguing, *inter alia*, that under the principles

³ The additional statutes relied upon by the Tribe include the Snyder Act, 25 U.S.C. 13; National Historic Preservation Act, 16 U.S.C. 470; Historic Sites, Buildings and Antiquities Act, 16 U.S.C. 462; and Non-Intercourse Act, 25 U.S.C. 177.

established by this Court's decisions in *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535 (1980), and *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), the United States is not subject to a suit for money damages with respect to the trust property at issue, because neither the 1960 Act nor any of the other statutes or regulations relied upon by the Tribe establishes an obligation on the part of the United States with respect to such property that could give rise to a claim for money damages. The Court of Federal Claims granted the government's motion, and dismissed the complaint for failure to state a claim. App., *infra*, 37a-56a.

After reviewing the *Mitchell* decisions and lower court precedent applying them, the Court of Federal Claims stated that the dispositive inquiry in this case is whether, under the statutes or regulations identified by the Tribe, the United States owes the Tribe "any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust." App., *infra*, 46a. The court answered that question in the negative. The court viewed "the 1960 Act as similar to the provisions of the General Allotment Act which [were] found insufficient to establish a money-mandating claim in *Mitchell I*." *Id.* at 47a. The court further reasoned that, unlike the statutes in *Mitchell II*, "the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 48a. Instead, "[a]s the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe." *Ibid.*

The Court of Federal Claims rejected the Tribe's argument "that, even if the statutes and regulations do not expressly create a [money-mandating] fiduciary relationship, [the United States'] day-to-day occupa-

tion, use, control, or supervision of Fort Apache under the 1960 Act" establishes such a relationship. App., *infra*, 50a. The court explained that the Tribe's argument "misconstrues * * * *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship." *Ibid.* In that regard, the court emphasized that, although the 1960 Act "may give the government complete control over the Fort Apache site, [the Act does not] require that the government manage the Fort Apache site for the purpose of protecting the Tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them." *Id.* at 52a.

The Court of Federal Claims also rejected the Tribe's argument that it was entitled to relief under the common law doctrine of permissive waste. App., *infra*, 55a. The court explained that the Tribe failed to show that "an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*." *Ibid.* In any event, even under the common law, the court concluded, "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 53a. Rather, "the appropriate remedy for permissive waste is generally an injunction," which the Tribe did not request in its self-styled "Complaint for Money Damages." *Id.* at 54a.⁴

⁴ The United States also argued that the Tribe's claim was barred by the six-year statute of limitations established by 28 U.S.C. 2501. Because of its conclusion that the Tribe had failed to state a claim, the court did not reach that "alternative basis for dismissal." App., *infra*, 56a.

4. The court of appeals reversed and remanded. App., *infra*, 1a-32a. The court agreed with the Court of Federal Claims that none of the general land-use statutes or regulations relied upon by the Tribe establishes a money-mandating obligation on the part of the United States, see *id.* at 8a-10a, but it reached the opposite conclusion with respect to the 1960 Act. The court acknowledged that the 1960 Act does not “direct[] the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans,” and that “the 1960 Act does not explicitly define the government’s obligations” with respect to the property. *Id.* at 14a, 19a. The court nevertheless “infer[red] that the government’s use of any part of the property requires the government to act in accordance with the duties of a common law trustee.” *Id.* at 18a.

The court of appeals looked to “the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*,” to define the government’s obligations. App., *infra*, 19a. Under the common law, the court concluded, a private trustee in the government’s position “has an affirmative duty to act reasonably to preserve the trust property.” *Id.* at 20a. The court further determined that, under the permissive waste doctrine, the failure to perform that duty would give rise to a claim for money damages. *Id.* at 28a. In reaching that conclusion, the court found that the Tribe’s interest in the property was better characterized “as an indefeasibly vested future interest” than as a “contingent future interest” (for which, the court found, damages would not be available under common law). *Id.* at 27a-28a.

The court of appeals remanded for a parcel-by-parcel determination of what trust property is in fact “under United States control,” which under the court’s analy-

sis, triggers money-mandating fiduciary duties on the government’s part. App., *infra*, 31a; see *id.* at 18a. In doing so, the court noted that the “record in this case is unclear as to the extent of the government’s control and use of the many buildings and grounds comprising Fort Apache.” *Ibid.*

Chief Judge Mayer dissented. App., *infra*, 33a-36a. In his view, under the *Mitchell* framework the key question is whether “the statutes or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians.” *Id.* at 33a. He reasoned that—just like the statute in *Mitchell I*—the 1960 Act fails to meet that test. In particular, he noted that “[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government’s right to unrestricted use for the specified purposes out of the trust.” *Id.* at 33a-34a. Thus, Chief Judge Mayer concluded that the United States “has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages,” and would have affirmed the dismissal of the Tribe’s complaint on that basis. *Id.* at 34a.

Chief Judge Mayer saw no need to delve into the common law to decide the threshold immunity issue. Nonetheless, he disagreed with the court’s common law analysis, and would have affirmed on that “independent ground” as well. App., *infra*, 36a. He explained that under common law, “the owner of a contingent future interest has no right to sue for money damages for permissive waste,” and that the Tribe held only such a contingent future interest, because its interest was subject to the “condition precedent * * * that the government no longer needs to use the property for school or administrative purposes.” *Id.* at 34a, 35a.

REASONS FOR GRANTING THE PETITION

The sovereign immunity of the United States from claims for money damages is a matter of bedrock importance. The divided court of appeals' decision in this case directly contravenes this Court's precedents with respect to the statutory predicate necessary to find that the United States has agreed to subject itself to money damages for an alleged breach of trust.

The court of appeals held that the United States is accountable in money damages for an alleged breach of trust in connection with the property placed in trust by the 1960 Act, even though the court acknowledged (App., *infra*, 14a) that the 1960 Act does not obligate the United States to manage the property for the benefit of the Tribe and, in fact, the Act explicitly reserves to the government the right to use the property for government purposes "for as long as" (74 Stat. 8) it deems necessary. That ruling directly conflicts with this Court's *Mitchell* decisions, as well as with time-honored immunity principles. The Tribe itself recognized in the Court of Federal Claims "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*." App., *infra*, 52a. Given the "substantial importance" of issues concerning "the liability of the United States" for an alleged breach of trust, *Mitchell II*, 463 U.S. at 211, certiorari is warranted to consider whether such an "extension" is proper.

Furthermore, the court of appeals' decision directs the focus of the threshold determination whether the United States may be liable to an Indian Tribe for money damages for breach of trust away from the terms of the pertinent statute enacted by Congress to a

case-by-case inquiry into the existence of control by government officials over the particular parcels of property at issue. Whenever sufficient control is evident, the decision equates the money-mandating obligations of the United States with those of a private trustee as defined by the *Restatement of Trusts*. On several different levels, that analysis is neither warranted, nor wise. In particular, that approach subjects the important immunity determination to an indeterminate fact-bound inquiry, and it contravenes the longstanding rule established by this Court's decisions that an enforceable claim to money damages must stem directly from a statute, implementing regulation, or other substantive right established by positive law.

The broad reasoning of the court of appeals could subject the United States to large money-damages claims in Indian breach-of-trust litigation, without any evidence whatsoever that Congress intended to expose the treasury of the United States to such liability. Indeed, the decision in this case already has been relied upon by the Court of Federal Claims to expose the United States to significant potential liability for alleged breach of trust in other pending Indian litigation.

A. This Case Concerns A Threshold Immunity Question Of Fundamental Importance To The United States

"It is elementary that [t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Mitchell I*, 445 U.S. at 538 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); see *Mitchell II*, 463 U.S. at 212. In determining whether the United States has granted such consent, this Court has repeatedly stated that "[a] waiver of sovereign

immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)); accord, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). That settled rule of construction applies with equal force with respect to "Indian plaintiffs." *United States v. Mottaz*, 476 U.S. 834, 851 (1986).

Congress has consented to be sued on certain claims for money damages under the Tucker Act and the Indian Tucker Act. 28 U.S.C. 1491(a) and 1505. But as this Court has recognized, those statutes are merely jurisdictional. See *Mitchell II*, 463 U.S. at 212-217; see also App., *infra*, 7a-8a, 41a. They do "not create any substantive right enforceable against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *United States v. Testan*, 424 U.S. 392, 398 (1976). As a result, in order to state a claim for money damages against the United States that is cognizable under the Tucker Acts, a plaintiff must point to a "substantive right" stemming from some other provision of law—such as a statute or implementing regulation—that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. The requisite waiver of sovereign immunity exists only "[i]f a claim falls within this category." *Id.* at 218; see also *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990).

This Court's *Mitchell* decisions rest on that foundation. In the underlying *Mitchell* litigation, the Quinault Tribe and numerous individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to

individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—which provides for the United States to hold allotted lands "in trust for the sole use and benefit of [Indian allottees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not support a money-damages action against the United States for alleged mismanagement of timber resources on allotted lands. As the Court explained, the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]." *Id.* at 542. "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.*

In *Mitchell II*, the Court considered a different set of statutes and implementing regulations and held that they could "fairly be interpreted as mandating compensation by the Federal Government" for mismanagement of such resources. 463 U.S. at 228. In so holding, the Court emphasized that those provisions established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"). Distinguishing the situation in *Mitchell I*, the Court stated: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224 (emphasis added); see *id.* at 226.⁵

⁵ Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the type of comprehensive statutory and regulatory scheme involved in that case—requiring the government to

Together, the *Mitchell* decisions establish important limitations on the potential liability of the United States for breach of trust with respect to property held in trust for an Indian Tribe or individual Indians.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedents

The court of appeals' decision in this case directly conflicts with the *Mitchell* decisions, and fundamentally misapplies the basic principles of sovereign immunity on which those decisions rest.

1. The 1960 Act does not expressly "create any substantive right enforceable against the United States for money damages," and nothing in that Act "can fairly be interpreted as mandating compensation by the Federal Government" to the Tribe based on the government's exercise of its reserved right to use the property. *Mitchell II*, 463 U.S. at 216, 217. The Act does not give "the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. To the contrary, as the court of appeals acknowledged, "[i]t is undisputed that the 1960 Act contains no * * * requirement" that the United States "manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." App., *infra*, 14a. And as the court of appeals further acknowledged, "neither the 1960 Act nor any pertinent regulation sets

manage trust property for the benefit of the Indians—failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testar*, 424 U.S. at 399, 400).

forth clear guidelines" as to how the government is to manage the property at all. *Id.* at 18a.

At most, the 1960 Act establishes only the type of "limited trust relationship" that did not give rise to a money-mandating obligation in *Mitchell I*. 445 U.S. at 542. The Act simply "declare[s]" that "all right, title, and interest of the United States in and to [Fort Apache] are "held by the United States in trust for the [Tribe]." 74 Stat. 8. In fact, however, the 1960 Act is an even *less* likely source of a money-mandating obligation than the statute considered by the Court in *Mitchell I*. The General Allotment Act explicitly obligates the United States to hold allotted lands "in trust for the *sole* use and benefit of the Indian [allottees]." 445 U.S. at 541 (quoting 25 U.S.C. 348) (emphasis added). The 1960 Act not only does not require the government to hold the trust property for the "sole use and benefit" of the Indian beneficiaries; it specifically reserves to the United States the right to use the property for government purposes "for as long as" it deems such use necessary. 74 Stat. 8.

As Chief Judge Mayer explained in his dissent:

Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school.

App., *infra*, 34a; see also *id.* at 52a (“[T]he 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them.”) (Court of Federal Claims’ decision).

Under the teaching of the *Mitchell* decisions, the provision allowing the Secretary to use the property for *government* purposes should alone have foreclosed the conclusion that the 1960 Act creates a money-mandating obligation on the part of the United States to the Tribe. Indeed, as noted above, the Tribe itself has acknowledged “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*.” App., *infra*, 52a. In addition, of course, such a holding requires an evisceration of *Mitchell I*.

2. The court of appeals believed that “control alone is sufficient to create a fiduciary relationship” that is enforceable against the United States in an action for money damages. App., *infra*, 15a. That understanding also is contradicted by the *Mitchell* decisions, especially the second one. In finding that the statutes and regulations at issue in *Mitchell II* established a money-mandating obligation on the part of the United States, the Court did point to the fact that the government had assumed “elaborate control over forests and property belonging to Indians,” *i.e.*, the trust property. 463 U.S. at 225. But the Court did not state, much less hold, that such control “alone” (App., *infra*, 15a) gave rise to the money-mandating obligation. To the contrary, the Court pointed to such control only after finding that “the statutes and regulations [at issue] clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” *Id.* at 224 (emphasis added).

In other words, as the Court of Federal Claims explained, the *Mitchell* inquiry is directed to “the nature of control”—*i.e.*, control stemming from statutes or implementing regulations that clearly obligate the United States to manage the trust property for the benefit of the Tribe—and not simply the “extent” of control *vel non*. App., *infra*, 50a (emphasis added). That understanding conforms to the Court’s general immunity jurisprudence. Confining the analysis to whether the United States exercises “control” over trust property would contravene the well-established principle that to recover monetary relief from the United States, a plaintiff must identify a statute, regulation, or other source in positive law of a substantive right that “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” *Mitchell II*, 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400).

3. The court of appeals compounded its error by holding that, since “the 1960 Act does not explicitly define the government’s obligations” with respect to the trust property at issue, it was proper “to infer that the government’s use of any part of the property requires the government to act in accordance with the duties of a common law trustee” and, further, to *infer* that such use subjects the government to the money-mandating obligations of a common law trustee. App., *infra*, 18a (emphasis added); see *id.* at 19a (because the 1960 Act “does not explicitly define the government’s obligations,” we “look to the common law” to define those obligations); *id.* at 31a (under common law, “the Tribe’s claim gives rise to a cognizable claim for money damages”). That analysis essentially turns the settled rule on its head. The rule established by this Court’s precedents is that there is *no* substantive right against

the United States for money damages unless the statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402. Under the decision below, by contrast, the government's money-mandating obligations "must be determined by the general law of trusts as modified by the 1960 Act." App., *infra*, 26a (emphasis added); see *id.* at 24a.

The court of appeals believed that its approach was supported by several decisions in Indian cases in which this Court has looked to the common law of trusts. See App., *infra*, 19a (citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1068 (2001)). In those cases, however, the Court considered the common law in evaluating the scope of the United States' duties in circumstances in which it was understood that the United States had assumed trust duties under a provision of positive law with respect to the particular matter at issue, and not—as the court of appeals did here—to impose a money-mandating obligation on the part of the United States that had no grounding in a statute, implementing regulation, or treaty.⁶ It is one thing to say that the United States,

⁶ The money claims in *Seminole Nation* were predicated on alleged violations of express promises by the United States in treaties or statutes to pay sums certain to the Tribe. 316 U.S. at 293-294. In *Mason*, the Court found no breach of any fiduciary obligation on the part of the United States, and thus had no occasion to consider the circumstances in which the United States may be held to have waived its immunity from suit for money damages for breach of trust. 412 U.S. at 400. And *Klamath Water Users* did not even involve a claim for money damages for breach of trust, but instead a claim for *documents* under the Freedom of

when acting as trustee for an Indian Tribe, may assume certain duties that are analogous to those recognized at common law between private trustee and beneficiaries. See *Nevada v. United States*, 463 U.S. 110, 127 (1983). It is quite another to say that simply by entering a generalized trust relationship with an Indian Tribe, or by passing a statute providing that certain property will be held in trust, Congress has created a cause of action against the United States for money damages for all obligations that would apply to a private trustee.

The *Mitchell* decisions prove the point. In *Mitchell I*, this Court rejected the argument that the plaintiffs were entitled to money damages to compensate for the alleged breach of trust simply "because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages [plaintiffs] would have no effective redress for breaches of trust." 445 U.S. at 541-542. In *Mitchell II*, the Court stated that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.⁷ But the Court explicitly

Information Act. See 121 S. Ct. at 1064. Cf. *United States v. Creek Nation*, 295 U.S. 103, 109 (1935) (money claims involving alleged misappropriation of property that the United States gave to Tribe by treaty in "fee simple").

⁷ For support, the Court referred in a footnote to its decisions in *Seminole Nation* and *Creek Nation* (as well as certain lower court decisions). See 463 U.S. at 226 n.31. The Tribe's claim for money damages in each of those cases, however, was specifically based on the violation of a *substantive right* granted by the United States in a treaty or statute, and not on violation of mere common law duties. See note 6, *supra*.

grounded its finding of a money-mandating obligation for breach of the particular trust duties spelled out in the statutes and implementing regulations relied upon by the Tribe. See *id.* at 228 (“We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property.”); see *id.* at 226.⁸

The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of “guardianship” or “trust.” See *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however—such as the operation of a school for Indian children—give rise to legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for money damages. In determining when an alleged breach of those duties may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *Mottaz*, 476 U.S. at 851; *Klamath & Moadoc Tribes of Indians v. United States*,

⁸ In a similar vein, this Court in *Nordic Village*, 503 U.S. at 39, refused to “[r]esort to the principles of trust law” to find that the United States had waived its immunity from a bankruptcy trustee’s claims for money damages, and specifically indicated that “trust decisions” involving private entities “are irrelevant” when it comes to determining the liability of the *government*.

296 U.S. 244, 250, 255 (1935); *Blackfeather v. United States*, 190 U.S. 368, 376 (1903). To the extent that the court of appeals’ decision puts the United States in the shoes of a private, common law trustee for purposes of determining whether it has assumed money-mandating obligations to an Indian Tribe, that decision departs significantly from this Court’s precedents.

4. The decision below conflicts with this Court’s sovereign immunity jurisprudence in another crucial respect. This Court has recognized the need for clear and predictable rules in the area of sovereign immunity. See *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”). The analysis adopted by the court of appeals below could scarcely be more at odds with that objective. Under the court’s decision, the potential liability of the United States for millions of dollars in damages for alleged breach of trust ultimately turns *not* on the terms of the pertinent statutes or regulations, but instead on whether the Tribe’s interest in the Fort Apache property is better characterized as a “contingent future interest” or an “indefeasibly vested future interest,” an arcane issue on which the panel itself split. App., *infra*, 27a-28a; see *id.* at 35a-36a (dissent).⁹

⁹ Chief Judge Mayer correctly resolved this issue. See App., *infra*, 34a-36a. But to be clear, in deciding whether the United States is immune from the Tribe’s money-damages claims, there should be no need for this Court to plumb that issue because—consistent with the *Mitchell* decisions and other precedents discussed above—the key issue is whether the statutes or regulations on which the Tribe’s claims are based “can fairly be interpreted as

Furthermore, under the court's "control" rule, the United States faces (common law) money-mandating obligations "only as to the specific parcels of trust property that the federal government has used and controlled" and—the court cryptically added—"possibly the grounds immediately surrounding such parcels." App., *infra*, 18a. As a result, the determination whether (or to what extent) the government is liable for breach of trust hinges on a fact-intensive, parcel-by-parcel inquiry into "the extent that the federal government has * * * used buildings to the exclusion of the Tribe." *Ibid.* That is a highly amorphous inquiry on which to base the liability of a sovereign for money damages. More to the point, there is no evidence on the face of the 1960 Act (or any other statute or regulation cited by the Tribe) that Congress intended to expose the United States to mandatory liability in that haphazard manner. The proper approach—and the one that this Court's own precedents establish—grounds the determination whether the United States is immune from money damages on the terms of the statutes or regulations on which the damages claim is based.¹⁰

mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226.

¹⁰ Because damages actions against the United States are confined by the Tucker Act and Indian Tucker Act to the Court of Federal Claims, the basic sovereign immunity issue presented is unlikely to arise in other circuits. The court of appeals' decision in this case represents a significant doctrinal development in the Federal Circuit's own decisions in this important area. In prior cases, the Federal Circuit has recognized that, in order to give rise to a claim for money damages, a money-mandating duty must "spring[] from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" *Pawnee v. United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); see *id.* at 190 (grounding money-mandating

C. The Court Of Appeals' Decision Can Be Expected To Have Serious Adverse Consequences For The Government

The potential fiscal and programmatic implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals \$14 million, plus unspecified damages for economic loss. The decision below will encourage the filing of additional damages claims against the United States for breach of trust with respect to Indian trust property, or buildings on such property. The United States holds more than 56 million acres of land in trust for individual Indians or Indian Tribes. A significant portion of that land, including allotments, is held in a limited or bare trust. The decision in this case could prompt money-damages claims for breach of trust with respect to such

obligation in "statutes and regulations [that] (a) give elaborate powers to Interior with respect to [oil and gas] leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands"; see also *Brown v. United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996) (grounding money-mandating duty in statutes and regulations that "make it clear beyond any doubt that the Secretary exercises his or her control over commercial leasing on allotted lands not only for traditional general welfare purposes * * * but also for the purpose of protecting [Indian] allottees' financial interests"). Chief Judge Mayer dissented in *Brown*, and argued that the statutes and regulations relied upon by the court in that case were insufficient—compared against those in *Mitchell II*—to give rise to a money-mandating obligation on the part of the United States. See *id.* at 1564-1565. In this case, the court of appeals essentially divorced the immunity inquiry from the terms of the pertinent statutes and regulations and, instead, tied it to judge-made principles of common law and notions of federal control over trust property.

property, even though such claims would otherwise be barred under a proper understanding of this Court's *Mitchell* decisions.

Furthermore, the broad reasoning of the court of appeals' decision in this case already has spilled over into other types of Indian breach-of-trust litigation. For example, in *Navajo Nation v. United States*, 263 F.3d 1325 (2001), the Federal Circuit held that the United States is subject to money damages for an alleged breach of trust in approving an Indian mineral lease. In so holding, the court of appeals specifically stated that, in *White Mountain Apache*, "we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages" even though, as the court recognized, the statute here does not impose any fiduciary obligations on the United States to manage the land on behalf of the Tribe. *Id.* at 1335; see *id.* at 1329-1330 ("Although the statute [in *White Mountain Apache*] was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations."); *id.* at 1335 (In *White Mountain Apache*, "we determined the government's obligations * * * [by] looking to the common law of trusts.")¹¹

¹¹ Judge Schall dissented in part in *Navajo Nation*. He agreed with the court that the statutes and regulations governing Indian mineral leasing gave rise to a "general fiduciary relationship between the [Navajo] Nation and the government regarding coal leases." 263 F.3d at 1339. But he took the position that to state a claim for money damages for breach of such relationship, the Tribe was required to "show the breach of a *specific* fiduciary obligation that falls within the contours of the statutes and regulations that

The Court of Federal Claims already has applied the decision in this case as well. See *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 51 Fed. Cl. 60, 68 (2001) ("In *White Mountain Apache Tribe*, the Federal Circuit applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, *despite absence of specific statutory or regulatory language regarding a fiduciary relationship.*") (emphasis added).

In short, the decision below—which departs sharply from this Court's *Mitchell* decisions—is taking root, and the rapid speed with which it already has spread underscores that the basic question presented is of an important and recurring nature. As the court of appeals recognized in this case, "[t]he Supreme Court has not provided further guidance in this area since the 1983 decision in *Mitchell II*." App., *infra*, 13a. Such guidance is now needed.

create the general fiduciary relationship." *Id.* at 1341 (emphasis added). The Tribe here could not possibly make such a showing; it is undisputed that "neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property." App., *infra*, 18a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

No. 00-5044

WHITE MOUNTAIN APACHE TRIBE,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: May 16, 2001
 Rehearing and Rehearing En Banc
 Denied Aug. 22, 2001

Before: MAYER, Chief Judge, MICHEL and DYK,
Circuit Judges.

Opinion for the court filed by Circuit Judge DYK.
Dissenting Opinion filed by Chief Judge MAYER.

DECISION

DYK, Circuit Judge.

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain