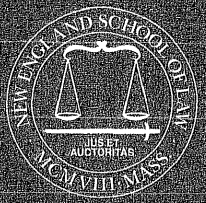
Volume 37 Number 3

NEW ENGLAND LAW REVIEW



We Stand United Before the Court: The Tribal Supreme Court Project

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2002 – 2003

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Tracy Labin*

INTRODUCTION: BIRTH OF THE TRIBAL SUPREME COURT PROJECT

In the 2001 term, the Supreme Court of the United States rendered two devastating Indian law opinions. In the first, *Atkinson Trading Co. v. Shirley*,[1] the Court ruled that tribes lack authority to tax within their own reservations.[2] In the second, *Nevada v. Hicks*,[3] the Court ruled that tribal courts lack jurisdiction to entertain suits by tribal members, even for wrongs allegedly done to those tribal members on their own trust land within reservation boundaries.[4] These decisions were devastating in that they struck crippling blows to tribal sovereignty and tribal jurisdiction—the most fundamental elements of continued tribal existence. Additionally, the opinions departed from what had been longstanding, established principles of Indian law, and constituted a wholesale re-writing of the very conceptions of tribal sovereignty and jurisdiction by the Court.[5]

While the losses in *Hicks* and *Atkinson* are some of the most severe to

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1. 532 U.S. 645 (2001).

2. *See id.* at 647. The specific question in *Atkinson* was whether the Navajo Nation could impose a hotel occupancy tax on a hotel located on privately owned fee land within the exterior boundaries of the Navajo Nation Reservation. *See id.* at 647–49.

3. 533 U.S. 353 (2001).

4. *See id.* at 361. The specific question in *Hicks* was whether the Fallon Paiute-Shoshone Tribal Court could entertain a civil suit brought by one of its members against state game wardens for alleged harm that occurred during the execution of a search warrant on the tribal member's property. *See id.* at 355–56. Although the case had originally been filed, inter alia, against the game wardens in their official capacities, the only remaining question at the time the case reached the Supreme Court was whether the tribal court had jurisdiction to hear suit against the state officials in their individual capacities. *See id.* at 355–57.

5. *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (providing an in-depth analysis of the Court's re-writing of Indian law).

have befallen Indian tribes, they are not the only losses. Unfortunately, over the past two decades Indian tribes have suffered consistent defeat before the Supreme Court. During this time period, Indian tribes lost approximately eighty percent of the cases they brought before the Court.[6] This percentage is significant in itself; however, it is even more significant when looked at comparatively. For instance, in the period covering the 1986-2000 terms, convicted criminals seeking reversals of their convictions were the only group of litigants to have fared nearly as badly as the tribes. Convicted criminals were successful thirty-six percent of the time compared to the tribes' success rate of twenty-three percent in the same period.[7]

Indians tribes are not falling apart in the face of the Supreme Court's virtual attack on tribal sovereignty and jurisdiction, however. Rather, they are uniting to face the Court. Following the *Hicks* and *Atkinson* rulings, the Native American Rights Fund (NARF)[8] and the National Congress of American Indians (NCAI)[9] joined forces to create the Tribal Supreme Court Project. They created this Project to coordinate and strengthen the advocacy of Indian issues before the Supreme Court, and ultimately to improve the win-loss record of tribes before that tribunal.

Tribes are not alone in developing an institutional structure such as the Supreme Court Project. In fact, the time for such a project is long overdue. The fifty states, acting through the National Association of Attorneys General (NAAG) created a similar project to improve the quality of their advocacy in 1990, and the effects have been notable.[10] No one would question that the 1990s were a successful decade for the states, due in no small part to their project. Today the NAAG Supreme Court Project is an integral part of the states' efforts to protect their sovereign interests before

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6. *See id.* at 280.

7. *See id.* at 281.

8. NARF, the nation's largest non-profit legal organization dedicated to defending and protecting tribal rights, was established 1971. The organization specializes in tribal law relating to the preservation of tribal existence; the protection of natural resources; the promotion of human rights; the accountability of governments to Native Americans; the development of Indian law; and the education of the public about Indian rights, laws, and issues. *See* Native American Rights Fund, *Our History*, *at* http://www.narf.org/intro/history/html (last visited Jan. 29, 2003).

9. The NCAI, the nation's largest organization of Indian tribes, represents more than 250 Indian tribes and has, since 1944, been dedicated to protecting the rights and improving the welfare of Native Americans. *See* National Congress of American Indians, *Welcome to NCAI*, *at* http://www.ncai.org/index.asp (last visited Jan. 29, 2003).

10. *See* National Association of Attorneys General, *NAAG Projects: Supreme Court*, *at* http://www.naag.org/issues/issue-supreme_court.php (last visited Jan. 26, 2003).

the nation's highest tribunal.[11] Other entities that have initiated Supreme Court projects include the Public Citizen Litigation Group[12] and the Defender Services Division Training Branch (formerly the Federal Defender Training Group) established by the Judicial Conference Committee on Defender Services.[13]

DESCRIPTION OF THE SUPREME COURT PROJECT

A. Structure of the Project

Currently housed at NARF's offices in Washington, D.C., the project is staffed by one NARF attorney plus support staff. An ever-growing Supreme Court Project Working Group is also dedicating time and energy to make the Project work. The Working Group is a group of more than 200 noted attorneys and academics from around the nation who specialize in Indian law and other areas of law impacting Indian cases—like property law, trust law, and Supreme Court litigation. These attorneys participate in the Project as their time and interest allows. Among the group there is a former Solicitor General of the United States, several attorneys who clerked for the Supreme Court, as well as attorneys who have many years of Supreme Court litigation experience. The Project, through NARF, is continuing to develop relationships with, and recruit new members to, the Working Group.[14] The group holds regular conference calls to discuss strategy, pending litigation, and related matters. The group also is connected through email and receives case updates, materials submitted to the Supreme Court (many of which are not obtainable in any other way except at the Court itself or from the individual attorneys involved in the litigation), and other relevant information from the Project staff. This open forum of communication provides an excellent network of expertise and resources to the Project and all those involved. Regular contact fosters discussions among tribes and tribal attorneys about the impact of litigation

11. *See id.* During the 2001 term, the NAAG Project conducted seventeen moot courts, edited more than thirty-five briefs, conducted a Supreme Court Advocacy Seminar, and published a bi-weekly newsletter to keep all state attorneys generals educated and current on litigation before the Supreme Court affecting state interests. *See id.*

12. *See* Public Citizen, *Supreme Court Assistance Project*, *at* http://www.citizen.org/litigation/court_assist (last visited Jan. 26, 2003).

13. *See* Defender Services Training Branch (DSTB) of the Administrative Office of the U.S. Courts, *DSTB Supreme Court Update: As of October 15, 2002*, *at* http://www.fd.org/Publications/GenRef/SCU/101502.html (last visited Jan. 26, 2003).

14. Attorneys interested in joining the Tribal Supreme Court Project Working Group should contact the author at the Native American Right's Fund, 1712 N St., NW, Washington, D.C. 20036; (202) 785-4166 (phone); (202) 822-0068 (fax); labin@narf.org (email).

and keeps this very important issue at the forefront.

An Advisory Board of Tribal leaders, comprised of NCAI Executive Committee members and other tribal leaders willing to volunteer their time, also assists the Project. The Board's role is to provide necessary political and tribal perspective to the legal and academic expertise. This input is critical, particularly in assisting tribes make the intensely difficult decisions they will be faced with, due to the Project's collective approach to Supreme Court advocacy. Given the reality that individual tribal interests do not always coincide with the collective interest of Indian country, success under the Supreme Court Project model will, occasionally, depend on tribes sacrificing their individual interests for the greater good. Sacrifice may come, for instance, by a tribe's deciding not to appeal a case to the Court, and thus not providing the Court with further opportunity to erode tribal rights.

B. Functions of the Project

As appeal to the Supreme Court is predominantly subject to the discretion of the Court,[15] the Project's role begins even before the Court has decided to take an Indian law case. The Project monitors Indian cases in the state and federal appellate courts that have the potential to reach the Supreme Court. Members of the Project reach out to counsel in those cases to offer assistance in determining whether to seek Supreme Court review of a particular case where the tribe has lost or to assist in opposing review in cases where the tribe has won.

The Tribal Supreme Court Project also assists tribes once a petition for a writ of certiorari has been granted. Through conference calls and other means (e.g., panel discussions, networking of papers, etc.), the Project fosters discussions among attorneys nation-wide about pending Indian law issues. By drawing together Supreme Court specialist counsel, experts in Indian law, as well as other particular areas of law, the Project makes available to all tribes and counsel with Indian issues the immense value of combined nationwide expertise.

The Project also coordinates a nation-wide Indian amicus brief writing network. An amicus brief, also known as a "friend of the Court brief,"[16] allows those not directly involved in litigation, but potentially impacted by its outcome, to raise points before the Court. Through amicus brief writing and coordination, the Project assists Indian country as a whole in most effectively supporting the tribes going before the Court. Project staff

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15. *See generally* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 219–71 (8th ed. 2002).

16. See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

members write amicus briefs drawing on the input of the working group, coordinate tribes to join together in submitting briefs, or even work with Supreme Court specialist firms to produce briefs. The rationale of the Project is to submit to the Court the fewest number and the highest quality briefs in support of the Indian argument. This coordinated approach is meant to ensure that the briefs and the Indian voice receive the Court's maximum attention.

The Supreme Court Project also provides numerous services to tribes and attorneys with cases before the Court. Project staff and Working Group members provide counsel with any other type of brief writing assistance they may require, whether it be drafting, editing, reviewing principal briefs, or providing research assistance. In addition, the Project helps educate attorneys as to the specialized nature of Supreme Court advocacy and provides advice on Supreme Court procedure and strategy. The Project also coordinates and creates moot court and roundtable discussion opportunities to assist attorneys in preparing their oral arguments.[17] All of these services are aimed at making better tools available to enhance the overall quality of tribal advocacy before the Supreme Court.

ONE RECENT PROJECT: AMICUS CURIAE BRIEF IN *UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE*[18]

In the year following the creation of the Tribal Supreme Court Project, the Court granted petitions for writ of certiorari in three Indian law cases: *United States v. White Mountain Apache Tribe*,[19] *United States v. Navajo Nation*,[20] *and Inyo County v. Bishop Paiute Tribe*.[21] The Project assisted, and is continuing to assist, the attorneys for the tribes in all three cases and has filed, or will file, amicus curiae, or "friend of the court," briefs in support of the tribes in all three cases. The NARF, as counsel for the NCAI, filed an amicus curiae brief in support of the Tribe in *White Mountain Apache*, which is attached.[22]

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17. For moot courts, the Tribal Supreme Court Project relies primarily on the services of the Georgetown University Law Center Supreme Court Institute's Moot Court Program. *See* Georgetown University Law Center, *Supreme Court Institute Moot Court Program*, *at* http://www.law.georgetown.edu/SCI/moot.html (last visited Jan. 28, 2003).

18. Brief of Amicus Curiae National Congress of American Indians, United States v. White Mountain Apache Tribe, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002) (No. 01-1067).

19. 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002) (No. 01-1067).

20. 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002) (No. 01-1375).

21. 291 F.3d 549 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 618 (2002) (No. 02-281).

22. John E. Echohawk, Tracy Labin* of the Native American Rights Fund for Amicus

The question to be decided in *White Mountain Apache* is whether the Tribe can sue the United States for damages in a breach of trust action for the United States' alleged mishandling of the Tribe's trust property. The United States argues that it cannot. It argues that the Tribe has no right to money damages against the United States for the breaches of trust alleged by the Tribe. Rather, the United States essentially argues that it is immune from such a suit.

The property at issue in *White Mountain Apache* was taken into trust [23] by the United States for the Tribe by the Act of March 18, 1960 (1960 Act).[24] In addition to taking the land in trust for the Tribe, the 1960 Act also provided the Secretary of the Interior rights to use the land, or make improvements thereon, for purposes of operating an Indian school.[25] The Tribe alleges that the United States did use the property, as the Act allowed but, while using the property, failed to care for the property and hence, breached its trust responsibilities to the Tribe. After the United States refused to make any reparations for the damaged property, the Tribe sued. The Tribe prevailed in the Court of Appeals, which recognized that the Tribe did have a right to sue the United States for such breaches of trust.[26] The United States appealed.

The amicus curiae brief submitted by the Supreme Court Project supported the Tribe and its right to sue the United States in damages for breaches of trust.

Curiae, the National Congress of American Indians (*Counsel of Record).

23. Indian property is typically held in trust, which means the underlying fee title to the property is owned by the United States in trust for the Indian tribe, who owns the beneficial title to the property.

24. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (codified as amended at 25 U.S.C. § 277 (2000)).

25. *See id.*

26. *See White Mountain Apache*, 249 F.3d at 1364.

No. 01-1067

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WHITE MOUNTAIN APACHE TRIBE,

Respondent.

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

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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September 2002

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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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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the National Congress of American Indians (NCAI), is the oldest and largest national organization of tribal governments in the United States. Like the White Mountain Apache Tribe, NCAI's tribal members all have trust resources, resources over which they do not have sole ownership. As is the case here, their ownership is a beneficial ownership, which means that fee title is held by the United States in trust for the benefit of the tribes. Also, as is the case here, the United States often exercises extensive control over these trust resources.

While the narrow question presented in this case involves the interpretation of a unique statute passed for the benefit of the White Mountain Apache Tribe, several underlying issues in this case are of broad importance to NCAI members. The statute at issue here, the 1960 Act is being interpreted for the purpose of determining whether the White Mountain Apache Tribe may sue the United States for damages on a breach of trust claim. In this context, broader principles concerning the fundamental federal/tribal trust relationship and questions regarding when the United States may be held liable in damages for breaches of trust in the context of that relationship are

[1] Counsel for Petitioner and Counsel for Respondent have consented to the filing of the brief of amicus. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

raised. NCAI's members all have substantial interest in these underlying issues and hence, have a substantial interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1960 Congress passed a unique act for the benefit of the White Mountain Apache Tribe ("Tribe"): the Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. ("1960 Act"), which provides:

> 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, 1887, 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.

Act of Mar. 18, 1960, P.L. 86-392, 74 Stat. 8.

The Tribe claimed that pursuant to this Act the United States used portions of the Tribe's trust property for the authorized purposes and in so doing exercised complete and exclusive control over that property. Recently, the United States completed its need for portions of the land and buildings and proposed to release its use

interest. The Tribe refused to accept the release without indemnification however, because the Tribe alleged, that while under its exclusive use and control, the United States, "destroyed, materially altered, caused to deteriorate, ... unreasonably and improperly used, abused, neglected, mismanaged, and failed to act to protect" that property. Complaint at 6-7, para. 27. It further alleged that the United States, "committed waste by deliberately pulling down buildings, and removing things affixed to and constituting a material part of the trust corpus, and has failed to exercise even the ordinary care of a prudent person for the preservation and protection of the Tribe's trust corpus. . . . " *Id.* at 7, para. 28. Claiming that the United States breached its fiduciary duty to the Tribe by allowing or causing waste of the tribal trust property over which it had exclusive control, the Tribe sued in the United States Court of Federal Claims for money damages against the United States.

The Tribe invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.[2] As the Court has held, the Tucker Act waives the United States' sovereign immunity from suit whenever the "source of substantive law" upon which the claim is based, "can fairly be interpreted as mandating compensation by the Federal Government. . . . "

[2] The Indian Tucker Act, 28 U.S.C. § 1505, provides tribal claimants the same access to the Court of Claims that the Tucker Act provides to individual claimants. As any analysis regarding Tucker Act jurisdiction applies to Indian Tucker Act jurisdiction, *see United States v. Mitchell*, 445 U.S. 535, 539-40 (1980), any reference herein to Tucker Act jurisdiction is meant also to include and apply to Indian Tucker Act jurisdiction.

United States v. Mitchell, 463 U.S. 206, 216-217 (1983) (*Mitchell II*). No additional waiver of sovereign immunity need be found. *Id.* at 218-219.

Hence, if the positive law relied on here, the 1960 Act, can fairly be interpreted as mandating compensation by the Federal Government, it authorizes the Court of Claims to award damages for any proven breach of trust. As the Court held in *Mitchell II,* statutes and regulations are so fairly interpreted when:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [Referencing Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959).] '[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.' (quoting *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

Mitchell II, 463 U.S. at 225. Here, the language of the 1960 Act creates a trust, vests the Tribe with beneficial title in the trust property, makes the United States the trustee of that property, and authorizes the United States, the trustee, to exercise exclusive control over portions of the property (a right which it did in fact, exercise). Hence, here, like in *Mitchell II,* a fiduciary relationship arises under the 1960 Act.

Contrary to the United States' suggestion, the purpose of the United States' control here does not negate the fiduciary relationship and the duties that "naturally" arise therefrom. *Id.* at 226. Although the United States was authorized to use the Tribe's trust property to run an Indian school, and not to generate profit for the Tribe, the fact that the property was trust property and that the United States was the trustee of that property, did not change. The fiduciary duties naturally implied in the 1960 Act remained, as did the liability in damages for breach of those duties.

As part of its fiduciary responsibilities, the United States here is also liable to the Tribe for waste of the Tribe's property in its capacity as tenant – which, Amicus argues, describes the United States' use status here. *See, e.g., United States v. Bostwick*, 94 U.S. 53 (1876) (which held the United States impliedly liable for waste under a lease).

As in *Mitchell II*, the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here is reinforced by the well-established, long-standing general trust relationship between the United States and Indian tribes. And, as in *Mitchell II*, the substantive source of law at issue here can easily be distinguished from the source of law which was at issue in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") – a source of law which could not be fairly interpreted as mandating compensation because it gave the United States no active role in managing or taking care of the property.

Amicus comes before this Court in support of the White Mountain Apache Tribe. It respectfully urges this

Court to affirm the Court of Appeals' holding that the 1960 Act is an act that can "fairly be interpreted as mandating compensation by the federal government" for the particular breaches of trust allegedly committed here, and to affirm the jurisdiction of the Court of Federal Claims to hear the Tribe's suit under the Tucker Act.

ARGUMENT

I. THE TUCKER ACT WAIVES THE UNITED STATES' IMMUNITY FROM SUIT FOR DAMAGES WHERE THE SUBSTANTIVE LAW UPON WHICH CLAIMANTS RELY "CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT"

The question here is whether the Court of Federal Claims has authority to award damages in a suit brought by the White Mountain Apache Tribe ("Tribe") under the Tucker Act. The Tucker Act provides in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . . " 25 U.S.C. § 1491(a)(1). For jurisdiction to lie, there must be a waiver of sovereign immunity. As the Court explicitly held in *United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) (*Mitchell II*), if a claim falls within its terms, the Tucker Act provides a waiver of sovereign immunity.

> [T]here is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a

> claim falls within this category, the existence of a waiver of sovereign immunity is clear.

Mitchell II, 463 U.S. at 218; *see also Id.* at 215-217. *See also Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982) (recognizing that waiver of the United States' sovereign immunity to suit must be unequivocally expressed and holding that "the Tucker Act effects . . . such explicit waiver. . . . "). Because the Tucker Act waives the United States' sovereign immunity, determination of the lower court's jurisdiction here turns on the analytically distinct question: "whether the statutes or regulations at issue can be interpreted as requiring compensation." *Id.* Because this question is distinct from that of waiver of sovereign immunity, the rule requiring that waivers of sovereign immunity be strictly construed does not apply. The Court also made this clear:

> Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'

Id. at 218-219. This holding in *Mitchell II* is crucial. However, its importance is ignored and even contradicted by the United States in its brief as it repeatedly tries to extend the notion of strict construction into this case. *See* U.S. Br. at 14, 17, 18 (*citing* numerous pre-*Mitchell II*, and non-Tucker Act cases). Amicus respectfully urges this Court to adhere to the precedent it established in *Mitchell II* and

reject the United States' invitations "to add to the rigor" of construction here "where consent has been announced."

II. THE 1960 ACT CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT FOR THE DAMAGES SUSTAINED IN THIS CASE

A. The Language Of The 1960 Act Creates A Specific Trust And Establishes The United States' Exclusive Use And Control Of Portions Of The Tribe's Trust Property

As with all cases of statutory interpretation, the Court's task begins with the language of the Act. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). Here, the language is examined to determine whether the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." As the Court has made clear, the language may do so either explicitly or implicitly. *Mitchell II*, 463 U.S. at 217, n.16 and 218. And, any ambiguity as to whether the language may be so fairly interpreted should be resolved in favor of the Tribe. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The language, "held . . . in trust," places land in trust for the Tribe and creates a trust relationship between the United States and the Tribe. Indeed, the language of the 1960 Act creates a very specific trust: it clearly identifies a trustee ("the United States"), a beneficiary ("the White Mountain Apache Tribe") and a trust corpus ("the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation. . . . ").

In addition to creating a specific trust, Congress, through the language "subject to the right of the Secretary of the Interior to use," authorized the United States to use and control portions of the trust property that it had just conveyed to the Tribe.[3] Although Congress granted the United States the right to use portions of the trust property, it did not eliminate the trust responsibility, remove or reserve any part of the property from trust status, nor did it relieve the United States of its status as trustee over that property.

The federal government suggests otherwise. In arguing that the language "carves out of the trust" the right of the federal government to use the property, the United States seems to suggest that either the property at issue is not trust property, or that it is no longer a trustee. *See* U.S. Br. at 11, 24-25. Nothing in the language supports such a reading. Indeed, the language compels the opposite conclusion. The language "*[a]ll* right, title, and interest" (emphasis added) indicates that Congress' intended to vest the Tribe with beneficial title to the *entirety* of the trust property.[4] Also, any suggestion that the United States is

[3] Although Congress authorized use, this use interest was limited. First, the statute specifically uses the words of limitation "so long as" which temporally limits the United States' use, and second, the statute specifies that the property may be used only for two purposes– administrative or school purposes.

[4] That intent is supported by language in the legislative history of the 1960 Act. For instance, the Senate Report explicitly stated that the purpose of the bill which was to become the 1960 Act was, "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." S. Rep. No. 86-671 at 1 (1959) (7,579 acres of land and the improvements being the entirety of the conveyance). And, in

(Continued on following page)

not currently the trustee of the property is rebutted by Congress' explicit use of the present tense in the 1960 Act, "are hereby declared to be held." This language indicates that Congress intended to create the trust immediately, make the United States the trustee of all the land immediately, and vest the Tribe with beneficial title immediately. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). If there is any ambiguity as to any of these points, however, that ambiguity should be resolved in favor of the Tribe. *Montana v. Blackfeet*, 471 U.S. 759 (1985).

As the Court held in *Mitchell II*, federal control of tribal trust property is crucial in determining whether a source of law may be fairly interpreted as mandating compensation such that it gives rise to a cognizable claim for breach of trust. On this point, the Court held:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists

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describing the value of the lands and improvements placed in trust for the Tribe, the record explicitly described the value of *all* the land and improvements. The record stated that the "lands to be donated, exclusive of improvements, are valued at $141,000. The improvements are located in the Theodore Roosevelt School area and consist of school building and plant valued at $495,980, roads and streets valued at $160,000 and irrigation laterals and ditches valued at $24,372. *Id.* at 2. The understanding was the same in the House of Representatives. In discussing the conveyance, Congressman Stewart L. Udall, "acknowledged that the department has agreed *the whole thing* would go back to trust status. . . . " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).

> 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, 463 U.S. at 225. As in *Mitchell II*, the Tribe here alleges that the United States did exert control, indeed, exclusive control over portions of the Tribe's trust property pursuant to the terms of the 1960 Act. While the purpose of the United States' control of the trust property here differs from that in *Mitchell II*, the import of the exclusive control is no less important to the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here.

In its brief, the United States argues that for federal control to play a part in determining whether the United States is subject to liability, such control must be specifically, "for the benefit of the Indians." See U.S. Br. at 31. In this way, the United States suggests that the purpose of control, rather than the extent of control is what governs. *Id.* at 7. From this premise, it tries to impress upon the Court that its use of the Tribe's trust property was not for the Tribe's benefit but for its "own benefit" or its "*own* purposes." U.S. Brief at 7, 22 (emphasis in original), 25. In addition to being disingenuous,[5] this assertion is irrelevant.

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[5] The United States has the right to use this property to operate an Indian school, for the benefit of Indians. As Stewart Udall recognized during hearings on the 1960 Act, "[t]he department approves the legislation and proposes merely that a proviso be put in that the

(Continued on following page)

It is true that the United States did not manage and control the property in question for "the purpose of protecting the Tribe's financial interest," U.S. brief at 7, or to manage the property solely for the benefit of the Tribe to generate proceeds and ensure profit for the Tribe. *Id.* at 27. However, the Tribe here is not suing to recover damages for mismanagement of this nature.[6] Rather, the Tribe here is suing to recover for the United States' outright neglect, waste and destruction of tribal trust property. *See* Complaint at para. 17. Hence, language requiring the United States to "manage the property for the benefit of the Indians" is neither necessary nor appropriate to create the duty to not waste the property.

B. Duties Giving Rise To Damages Are Implied In The 1960 Act

As explained above, the 1960 Act creates a trust for the Tribe and grants the trustee, the United States,

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government right to continue to operate the school, *which of course, is for the benefit of the Indians. . . .* " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).

[6] In both *Mitchell I* and *Mitchell II*, the question presented to the Court was whether the United States was liable for the mismanagement of timber resources. The allegations in both *Mitchell I* and *Mitchell II* were that "the Government: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees." 445 U.S. at 537, 463 U.S. at 210.

limited rights to use the trust property. Under even the most rudimentary principles of the obligations of a trustee in using and controlling trust property, it can fairly be implied that the Secretary has a duty not to waste that property. For, that "would not be an exercise of guardianship, but an act of confiscation." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937). As stated in the Restatement (Second) of Trusts § 176 (1959), "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." This duty includes protecting the property from loss, damage, or destruction. *See Id.* Comment (b); Bogert, Trusts and Trustees, § 582, at 346 (rev. 2d ed. 1980). And, under the law, breach of this trust duty gives rise to a claim for monetary damages. Scott, The Law of Trusts, § 176, at 482-489 (4th ed. 1987). *Mitchell II* plainly confirmed this when it held:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. . . . This Court and several other federal courts have consistently recognized 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 trust.

Mitchell II, 463 U.S. at 226. Given this clear precedent, the government's repeated suggestions that for a statute to be fairly interpreted as mandating compensation, it must be of a money character, is ill-founded. See U.S. Br. at 11, 16-17, 21.

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Also ill-founded are the United States' assertions that the general law of trusts plays no role in informing the interpretation of the 1960 Act – an Act which clearly creates a trust and designates the United States the trustee. See U.S. Br. at 12. This Court has explicitly stated that "[i]t may be that where only a relationship between the government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Nevada v. United States*, 463 U.S. 110, 127 (1983). *See also Mitchell II*, 463 U.S. at 226 & n.30; *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the federal government has "charged itself with moral obligations of the highest responsibility and trust . . . [and] should therefore be judged by the most exacting fiduciary standard"); *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (recognizing that the Federal-Indian trust relationship "has been compared to one existing under a common law trust"). Also, in other contexts, when in interpreting the statutory phrase, "held in trust," the Court has held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *National Labor Relations Board v. Amex Coal Co.*, 453 U.S. 322, 330 (1981).

Similar duties, obligations, and liabilities not to permit or commit waste[6] can also be implied under the most basic tenets of American property law, tenets which are so basic that they must surely be implied to be part of the United States' duties as trustee of tribal trust property. Even if the United States is regarded here just in its capacity as tenant, there is an implied duty not to waste the Tribe's property.[7]

The "concept of waste . . . is an old one: '[F]or he that suffereth a house to decay, which he ought to repaire, doth the waste. . . . " Gregory M. Stein, The Scope of the Borrower's Liability in a Non-Recourse Real Estate Loan, 55 Wash. & Lee L. Rev 1207, 1284 n.146 (1988) (quoting Edward Coke, The Second Part of the Institutes of the Laws of England Chap. 24, 145 (Professional Books Ltd. 1986) (1817)). English common law defined waste as: "[a]ny act or omission which diminished the value of the estate or its income, or increased the burdens upon it or impaired the evidence of title thereto." *Hausmann v. Hausmann*, 596 N.E.2d 216, 219 (Ill.App. 1992). "More recently, '[w]aste occurs when someone who lawfully has possession of real estate destroys it, misuses it, alters it or neglects it so that

[6] The new Restatement abandons the distinction between voluntary (intentional) and permissive (negligent) waste. See Restatement (Third) of Property: Mortgages § 4.6 & cmt. b (1997). *See City of New York v. United States*, 97 F. Supp. 808 (Ct. Cl. 1951) (U.S. responsible for damages caused by neglect of leased property).

[7] Amicus argues that the United States' use right is comparable to the use right of a tenant. A leaseholder or tenant is one who has a possessory estate, or a right to possession in the property, as the United States has here. Powell on Real Property §§ 16.02, 34.02 (1981). *See also* Restatement (Second) of Property § 1.2 (1977); Restatement of Property § 9 (1936).

the interest of persons having a subsequent right to possession is prejudiced in some way or there is a diminution in the value of the land being wasted.' " *Id. See also* Restatement (Second) of Property § 12.2 (1977).

Under these basic principles, the 1960 Act can be "fairly interpreted" as including the implied duty "to surrender the premises at the expiration of his term in as good a condition as when they were taken, ordinary wear and tear and damages from the elements excepted." *Dehn v. S. Brand Coal & Oil Co.*, 63 N.W.2d 6, 11 (Minn. 1954). Breach of this duty also gives rise to a claim for money damages. *See United States v. Bostwick*, 94 U.S. 53 (1876); Restatement (Second) of Property § 12.2.

This Court has confirmed that the doctrine of waste applies when the United States is a tenant and that when the United States does commit waste, it is implicitly liable in damages. *United States v. Bostwick*, 94 U.S. 53 (1876). In *Bostwick* a suit was brought against the United States for damages to property over which the United States had possession and control.[8] The United States had possession and control pursuant to a lease which provided only the term of the lease and the rent, "without restriction as to the use to which the property might be put." 94 U.S. at 65. Nothing in the lease explicitly imposed a duty on the

[8] The damages held to be waste in *Bostwick* are comparable to those alleged by the Tribe here. As correspondence from the property owner's trustee stated, "While the United States occupied the premises . . . the main house was burned; the flower-garden and shrubbery were destroyed; three and one-half miles of fence torn down . . . some sheds were torn down. . . . The part of the house not burned . . . was greatly damaged. . . . The premises were left in a dilapidated condition, and the house unfit for occupancy." *Bostwick*, 94 U.S. at 56.

United States not to commit waste during the tenancy. The Court found this language was implicit in the lease. The Court held that the United States was bound by certain implied duties, such as the obligation "to use the property as not unnecessarily to injure it . . . that the estate may revert to the lessor undeteriorated. . . . " *Id.* at 65-66. The Court held that this implied duty applied to the United States just as if it had been obligated by express language. *Id.* at 66. The Court continued, "[a]ll obligations which would be implied against citizens under the same circumstances will be implied against [the United States]." *Id.* The Court held that the United States was liable in damages for harm occurring while the United States was in possession, not "to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use," hence binding the United States "not to commit waste." *Id.* at 68.

Here, the same duty not to commit waste and to return the property to the Tribe in the same condition as when taken, normal wear and tear excepted, is implied in the 1960 Act as much as if it had been expressly stated. Likewise, the implication that where the United States does commit waste, it is liable to the Tribe in damages, is as plain as if specific language stating that "the United States is liable in damages for waste committed" had been used. That is the teaching of *Bostwick*.

C. The General Trust Relationship Reinforces The Conclusion That The 1960 Act Is Fairly Interpreted As Mandating Compensation For The Damages Here

The Court has explained that the existence of the general trust relationship is relevant in cases addressing

whether a statute can fairly be interpreted as mandating compensation for breach of trust in the Indian law context. As the Court indicated in *Mitchell II*, "[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. Likewise here, the trust relationship reinforces the interpretation of the 1960 Act as mandating compensation for the United States' destruction of property put in trust by that Act.

Where property is held in trust by the federal government for a tribe, the United States holds legal title and the Tribe holds equitable or beneficial title. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939). This relationship traces back to the first contact between the Indian and European nations when it was recognized that even though fee title vested in the "discovering" nations and eventually, in the United States, Indians had the right of use and occupancy. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). This right of use and occupancy was as "sacred as that of the United States to the fee." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *see also Mitchel v. United States*, 34 U.S. 711, 746 (1835). *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831).

Only last term, this Court recognized:

> The existence of a trust obligation is not, of course, in question. . . . The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law,' . . . and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001) (citations omitted). Also, the Court "has long recognized 'the distinctive obligation of trust incumbent by the government' in its dealings with Indian tribes, *see e.g., Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)." *Nevada v. United States*, 463 U.S. 110, 127 (1983).

Inherent in the trust relationship are concomitant trust duties – duties which trace to the first treaties and mutual promises made between the federal and tribal governments, when in exchange for vast relinquishments of land and promises of peace, the United States guaranteed that it would protect the ability of Indian tribes to continue their traditional way of life on remaining tribal homelands or reservations. *See* American Indian Policy Review Comm'n, 94th Cong., Final Report 126 (Comm. Print 1977) (finding that the federal trust responsibility emanates from "the unique relationship between the United States and Indians in which the federal government undertook the obligation to ensure the survival of Indian tribes"). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) ("the federal Government took early steps to deal with the Indians through treaty, the principle purpose often being to recognize and guarantee the rights of Indians to specified areas of land").

In addition to its treaty foundations, the United States' trust duty also traces to judicial opinions of this Court and statutes of Congress. The Court first acknowledged the trust duty over 170 years ago in the Cherokee cases: *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). *Worcester* recognized "Indian nations as distinct political communities, having territorial boundaries, within

which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

In addition to the judicial recognition, there is also a long history of congressional recognition of the United States' trust duty. The most specific examples of early congressional recognition of the trust duty are found in the Trade and Intercourse Acts, see 25 U.S.C. § 177, which prohibited non-Indians from encroaching on Indian lands, regulated trade with the tribes, and prevented the alienation of Indian land – all purposes aimed at fulfilling its duty to protect the tribal land base. The Northwest Ordinance of 1787, also demonstrated Congress' early recognition of the federal duty of protection as part of the trust relationship:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance of 1787, art. III, reprinted in 32 Journals of the Continental Congress 340-41 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50). *See generally* Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109 (1995) and Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: the

Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994) (providing a thorough discussion of the federal-Indian trust relationship and responsibility).

Trust duties "are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 58-59 (1831) (Thompson J., dissenting). As reiterated by President Nixon, the federal government has *not* "taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people" and it can*not* "discontinue this responsibility on a unilateral basis whenever it sees fit." President's Message to the Congress of the United States on the American Indians, July 8, 1970, at 2. As President Nixon recognized:

> [T]he unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has [made agreements]. . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Id.

D. The 1960 Act Is Distinguishable From The General Allotment Act

The United States argues that the 1960 Act cannot be fairly interpreted as mandating compensation for the waste and destruction alleged here; that the substantive basis for suit here is even more limited than the basis relied upon in *United States v. Mitchell,* 445 U.S. 535 (1980) ("*Mitchell I*"). See U.S. Br. at 23-25.

In *Mitchell I* the Tribe claimed that the General Allotment Act, 25 U.S.C. § 331 et seq. ("GAA"), provided a substantive basis for suit for the alleged mismanagement of tribal trust timber resources. The Court disagreed, holding that, "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." 445 U.S. at 542. Rather, the Court concluded that "the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* In multiple important ways, the situation here is distinguishable from that in *Mitchell I.*

First, the trust created by the 1960 Act is a specific trust pertaining to a particular tribe about a particular and well defined piece of property. Unlike the GAA, the 1960 Act is not a general statute of general applicability.

Second, as noted above, supra, the Tribe here is not claiming that the United States mismanaged its trust property in the way that it was alleged to have mismanaged the property in *Mitchell I.* The question here is not whether the 1960 Act imposed on the Federal Government the duty to manage the property for the economic benefit of the Tribe. Rather, the question here is whether the Act

imposed on the Federal Government the duty not to waste the Tribe's property.

Third, unlike in *Mitchell I*, the 1960 Act created a trust that specifically authorized the United States' use of the Tribe's trust property. That crucial element of control was missing in the GAA. The Court in *Mitchell I* explicitly noted that the GAA did not "provide that the United States has undertaken full fiduciary responsibilities as to the management" of the trust property. *Mitchell I*, 445 U.S. at 542. The opposite was true. Under the GAA, "the Indian allottee and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. . . . Under this scheme, then, the allottee and not the United States, was to manage the land." *Mitchell I*, 445 U.S. at 542-543.

Finally, both the purposes and federal policies toward Indians underlying the 1960 Act and the GAA completely differed. As the Court emphasized in *Mitchell I*, the entire purpose of the GAA was to limit, even extinguish, the United States' management role with respect to the allotted properties. Congress "intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Id.* at 544.

These goals reflected the larger goals and policies in existence when the GAA was passed. The GAA was passed

during one of the two periods in United States' relations with Indian tribes in which the federal government's recognition of its trust responsibility ebbed.[9] *See* Felix S. Cohen, Handbook of Federal Indian Law, 127-143 (1982 ed.) ("Cohen"). The GAA was rightfully interpreted by the Court to incorporate congressional intent at that time.

United States policy toward Indians and the trust responsibility had shifted by the time the 1960 Act was passed, however. In 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA") – an Act which was meant specifically to reverse the policy of allotment and the devastating effects of the GAA and reaffirm its trust duties toward tribes. *See* Cohen at 144-152. Indeed, as the provisions of the IRA itself demonstrate, see 25 U.S.C. §§ 461-465, when the 1960 Act was passed, Congress clearly intended to encourage and protect tribal trust property – an intent which should be read into the 1960 Act.

[9] The other period was the period known as the termination era, *see* Cohen at 152-180, which is not applicable here.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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