No. _____

In The
Supreme Court of the United States

EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, and NORTHERN ARAPAHO TRIBE OF THE WIND RIVER RESERVATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A series of Interior Department appropriations acts from 1990 to the present delay commencement of the statute of limitations on Indian claims for breach of trust against the Government "concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." The question presented is:

Whether these acts apply to claims for breach of trust based on mismanagement of Indian trust resources that resulted in losses to trust funds.

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PETITION FOR WRIT OF CERTIORARI

The Eastern Shoshone Tribe of the Wind River Reservation and Northern Arapaho Tribe of the Wind River Reservation respectfully petition 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 Federal Circuit (App. 1-32) is reported at 364 F.3d 1339. The opinion of the Court of Federal Claims (App. 33-54) is reported at 51 Fed. Cl. 60.

JURISDICTION

The Federal Circuit entered its judgment on April 7, 2004 (App. 55). It denied timely cross-petitions for rehearing on August 26, 2004 (App. 56-59). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This matter involves a series of appropriations acts for the Interior Department, the most recent of which is the Department of the Interior and Related Agencies Appropriations Act 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003), which provide in relevant portion as follows:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation

> pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.[1]

The only changes to the provision since it was first enacted in 1990 are: (1) beginning in 1991, the provision added the last clause "from which the beneficiary can determine whether there has been a loss." Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991); and (2) beginning in 1993, the provision added the phrase "including any claim in litigation pending on the date of this Act." Pub. L. No. 103-138, 107 Stat. 1379, 1391 (1993).

STATEMENT OF THE CASE

Petitioners Eastern Shoshone Tribe and Northern Arapaho Tribe (collectively, the "Tribes") share an undivided interest in the Wind River Reservation in Wyoming, including its mineral resources. On October 10, 1979, the

[1] This provision appears in the following appropriations acts: Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915, 1930; Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990, 1004; Act of Oct. 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374, 1389; Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379, 1391; Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499, 2511; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-175; Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-197; Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543, 1559; Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-153; Act of Oct. 11, 2000, Pub. L. No. 106-291, 114 Stat. 922, 939; Act of Nov. 5, 2001, Pub. L. No. 107-63, 115 Stat. 414, 435; Act of Feb. 20, 2003, Pub. L. No. 108-7, 117 Stat. 11, 236; Act of Nov. 10, 2003, Pub. L. No. 108-108, 117 Stat. 1241, 1263.

Tribes each filed a petition in the Court of Claims (now the Court of Federal Claims), making virtually identical claims against the Government for breach of trust by mismanagement of the Tribes' natural resources and mishandling of Tribal funds. The jurisdiction of the court was invoked under 28 U.S.C. §§ 1491 and 1505.

The Tribes' cases were consolidated and, in 2001, divided into four phases for adjudication. The first phase, largely complete except for this appeal, addressed claims that the Government mismanaged the Tribes' sand and gravel resources. The Tribes sought damages for breaches of trust dating back to August 14, 1946. In a pretrial motion, the Government asserted that the six-year statute of limitations established by 28 U.S.C. § 2501 limits the Tribes' recovery to claims arising on or after October 10, 1973.

The Tribes opposed the Government's motion, arguing that the statute of limitations had not commenced to run on their claims because the Government had not yet provided them with an accounting from which the Tribes could determine whether they had suffered a loss. The Tribes relied upon a provision in a series of appropriations acts for the Interior Department from 1990 through the present ("Acts"). The most recent version states:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Department of the Interior and Related Agencies Appropriations Act 2004, 117 Stat. at 1263.

1. The Court of Federal Claims' Decision

The Court of Federal Claims ruled in favor of the Tribes, holding that the Acts allow them to pursue claims for periods prior to October 10, 1973 because the Tribes have not yet received an accounting. *Shoshone Indian Tribe v. United States*, 51 Fed. Cl. 60, 67-69 (2001), App. 48-53. The court concluded that "the Acts cover claims both for monies received in trust by [the Government] and thereafter mismanaged and to 'losses to' the trust, including monies that should have been received by the trust but were not received because of mismanagement of the Tribes' mineral and other assets." 51 Fed. Cl. at 68, App. 52. Based on Congress' use of the disjunctive "or" between the two phrases "losses to" and "management of" tribal trust funds, the court reasoned that this language indicated two different types of fiduciary breaches as to which Congress intended to preserve claims. The court concluded that Congress intended "losses to" trust funds to include claims for monies not received because the Government breached its fiduciary duty to "make the trust property productive." *Id*.

Thereafter, the parties entered into a settlement agreement under which the Government paid the Tribes $2.75 million to resolve their sand and gravel claims, but preserved the limitations issue for appeal. An appeal to the Federal Circuit followed.

2. The Federal Circuit's Decision

The Federal Circuit affirmed in part and reversed in part. It agreed with the Court of Federal Claims that the Acts defer accrual of certain claims for limitations purposes until an accounting is provided. It held, however, that the lower court's interpretation of the scope of the Acts was "overly expansive." 364 F.3d at 1349, App. 18. It reasoned as follows:

> The Act covers claims concerning "losses to . . . trust *funds*" rather than losses to mineral trust *assets*. While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*. The Court of Federal Claims therefore erred in equating the mismanagement of trust *assets* with "losses to . . . trust *funds*."

364 F.3d at 1350, App. 20 (emphasis in original).

The circuit court interpreted "losses to . . . trust funds" to mean losses resulting from the Government's failure to timely collect amounts due and owing to the Tribes under their contracts. 364 F.3d at 1350, App. 21. The court held that such losses include "losses resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing accounts, or (3) assessing penalties for late payment." *Id.* In short, the court construed the Acts to cover claims based on "accounts receivable due and owing to the Tribes," 364 F.3d at 1351, App. 21, but held that claims for mismanagement of trust assets themselves were not covered.

REASONS FOR GRANTING THE WRIT

The Court of Appeals incorrectly decided an important question of federal law that has not been, and should be, settled by this Court. It is central to clarifying when Indian tribes and individuals can seek redress from the Government for breach of the Government's fiduciary duties in managing Indian trust resources.

After this Court's seminal decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), and *United States v. Mitchell*, 463 U.S. 206, 210 (1983) ("*Mitchell II*"), establishing that the Government can be liable for breach of its trust obligations to Indians, a number of damages actions were brought against the United States. Clarifying the circumstances under which the Government must answer in damages became sufficiently important that the Court recently revisited this issue in *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *White Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003). The specific issue addressed in those cases was determining when a statute or regulation imposes a duty on the Government that mandates compensation if it is breached.

An issue of comparable importance is whether or how the statute of limitations is to be applied to Indian breach of trust claims in situations where the Government has failed to provide an accounting. An accounting is the essential first step for an Indian beneficiary to determine what damages claims it might have against the Government. As the Federal Circuit noted below, "how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" 364 F.3d at 1347, App. 14. Yet the Government has been woefully delinquent in

providing accountings to the Indian beneficiaries whose trust assets it manages and, even today, the great majority have yet to receive an accounting. *See*, *e.g.*, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (action to compel proper accounting).

Recognizing the gross inequity that would result if a breach of trust claim expired before a tribe or individual Indian even received an accounting from which it could determine whether it had suffered a loss, Congress specifically provided that the statute of limitations would not run until the beneficiary received an accounting. Indeed, Congress deemed the limitations issue so important that it addressed the issue specifically and repeatedly in the Acts. Now, however, the Government is seeking to reduce its exposure to Indian lawsuits by narrowing the types of breach of trust claims covered by the Acts. The Federal Circuit's ruling for the Government on this point undermines the remedial intent of Congress and is squarely contrary to the plain meaning of the Acts. It is vital that the Acts be given their full effect so that Indian victims of Government breaches of trust are not deprived of the recourse that Congress intended for them.

The circuit court's construction would erroneously exclude from the ambit of the Acts the majority of Indian claims for breach of fiduciary duty, which involve claims of mismanagement of income-producing resources rather than failures to timely collect and deposit accounts receivable or mismanagement of trust funds after collection. A review of *Mitchell II* and its progeny demonstrates that most Indian damages claims for breach of trust have involved alleged mismanagement of revenue-producing resources. *Mitchell II* itself involved a claim of "pervasive waste and mismanagement of [Indian] timber lands." 463

U.S. at 210. *Navajo Nation* involved a claim of mismanagement of tribal coal resources. *White Mountain Apache Tribe* involved a claim that the Government had permitted the dissipation and waste of historic Fort Apache. The same pattern appears in the decisions of lower courts. *See, e.g., Confederated Tribes of the Warm Springs Reservation v. United States,* 248 F.3d 1365 (Fed. Cir. 2001) (mismanagement of tribes' timber resources); *Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996) (failure to properly manage commercial leases on allotted lands); *Pawnee v. United States,* 830 F.2d 187 (Fed. Cir. 1987) (mismanagement of oil and gas resources); *Apache Tribe of the Mescalero Reservation v. United States,* 43 Fed. Cl. 155 (1999) (failure to properly manage, cut and market tribe's timber resources); *Oglala Sioux Tribe v. United States,* 21 Cl. Ct. 176 (1990) (failure to properly manage tribal lands to generate an appropriate level of income). Indeed, the only notable decision in a damages action involving alleged mismanagement of trust revenues after collection is *Short v. United States,* 50 F.3d 994 (Fed. Cir. 1995).

Because all Indian damages claims exceeding $10,000 must be brought in the Court of Federal Claims, *see* 28 U.S.C. §§ 1346(a)(2), 1491, 1505, it is virtually certain that no split in authorities will develop on this issue. Thus, the Federal Circuit's decision, unless reversed, will effectively become the law of the land. The Court should resolve this important issue of the scope of the Acts to effectuate the will of Congress.

A. The Federal Circuit's Decision Conflicts with the Plain Language of the Acts.

The Federal Circuit's construction of the Acts is at odds with the plain language of the statutes. The statutory language is sweeping. It covers "*any* claim . . . concerning losses to or mismanagement of trust funds" (emphasis added).[2] Thus, as drafted by Congress, the Acts apply broadly to all claims that in any way relate to losses to or mismanagement of trust funds. *Cf. Kosak v. United States*, 465 U.S. 848 (1984) (any claim "arising in respect of" the detention of goods sweeps within its ambit all injuries "associated in any way with" the detention of goods).

The circuit court assumed that "trust funds" meant monies held in trust for the benefit of Indians as opposed to mineral trust assets. The court's assumption is inconsistent with the standard legal definition of "trust fund," which is very broad and encompasses any form of property, not just money: "property held in a trust by a trustee." Black's Law Dictionary (8th ed. 2004). This standard definition would include Indian mineral trust assets as part of the "trust funds" covered by the Acts.

Even if "trust funds" are construed as meaning only money, however, the Federal Circuit's ruling still conflicts with the plain language of Acts. In construing a statute, effect must be given, if possible, to every word so that no part is rendered superfluous. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The Acts cover "losses to" and "mismanagement of" trust funds, terms which have

[2] "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzalez*, 520 U.S. 1, 5 (1997).

different meanings and are separated by the disjunctive "or." Accordingly, they must be read to apply to different situations. The circuit court agreed that, to avoid redundancy, "losses to" trust funds must encompass something beyond mismanagement of trust funds after their collection, *i.e.* it must apply to certain breaches of trust occurring before funds are collected and deposited into trust accounts. 364 F.3d at 1349, App. 18. The court erred, however, by restricting the class of covered claims for "losses to" trust funds to allegations that the Government failed or delayed in (1) collecting payments due, (2) depositing the collected monies into interest-bearing trust accounts, or (3) assessing penalties for late payment. There is no basis in the statutory language for this artificial limitation.

The Government itself defines Indian trust funds as "money *derived from the sale or use of trust lands, restricted fee lands, or trust resources* or other money that the Secretary must accept into trust." 25 C.F.R. § 115.002 (emphasis added). Likewise, the very purpose of many statutes and regulations governing the management of Indian resources is to require the Government to manage them "*so as to generate proceeds for the Indians*." *Mitchell II*, 463 U.S. at 226-27 (emphasis added); *see, e.g.*, S. Rep. No. 985, at 1 (1937); H.R. Rep. No. 1872, at 1 (1938) (1938 Indian Mineral Leasing Act enacted because it was "not believed that the present law is adequate to give the Indians the greatest return from their property"). The Government's failure to prudently manage revenue-producing Indian trust assets will result in a loss to an Indian trust fund, a point which the circuit court acknowledged. 364 F.3d at 1350, App. 20. It follows that a tribal cause of action based on the Government's failure to obtain

adequate value for a mineral asset in violation of applicable statutes or regulations is a claim "concerning losses to trust funds" and comes within the ambit of the Acts, which cover "any" such claim.

The Federal Circuit resisted this conclusion, mistakenly reasoning that the statutory language "covers claims concerning 'losses to . . . trust *funds*' rather than losses to mineral trust *assets*." 364 F.3d at 1350, App. 20 (emphasis in the original). But when the Government wrongfully sells off Indian mineral assets for less than appropriate value, what results is a loss of *income*, which is a loss to *funds* rather than to assets. The sale presupposed severance and disposal of the mineral asset. A loss to trust *assets* would occur only in situations where the Government allows the waste or dissipation of assets that are not being sold (such as historic Fort Apache, at issue in *White Mountain Apache Tribe*). Thus, claims for "losses to trust funds" logically and properly include claims for mismanagement of Indian mineral assets because that breach of duty results in lost income to the trust, *i.e.* a loss to trust funds.

Significantly, the Acts employ two different definitional approaches in defining the sorts of claims for which it extends the statute of limitations. "Mismanagement of" trust funds defines one class of covered claims by describing the nature of the alleged misconduct. However, Congress defined the other class of covered claims by reference to the alleged damage – "losses to trust funds" – rather than by the nature of the alleged misconduct.[3] Because it

[3] It is not unusual for Congress to define a class of covered claims by reference to the alleged damage rather than the particular nature of the conduct in issue. The Federal Tort Claims Act, for example, covers

(Continued on following page)

used this definitional approach, there was no need or reason for Congress to further specify what the language already states – that the Acts include claims for damages arising from mismanagement of income-producing trust "assets."[4]

Finally, the Federal Circuit suggested that there are certain evidentiary advantages to its interpretation of "losses to trust funds" as including only accounts receivable due and owing to the Tribes. 364 F.3d at 1351, App. 21. It posited that "the comparison of pertinent mining contracts with the results of an accounting will reveal what income was required to be received by the Government but was either not received or was received late." *Id.* In contrast, the court noted that an accounting alone will not reveal the mismanagement of tribal assets and that a significant amount of additional evidence might have to be marshaled.

Evidentiary convenience is not a basis for circumscribing the plain language of the Acts. That language draws no distinction between an "account receivable" claim and other claims for mismanagement of income-producing assets. A trust accounting is essential to proving either sort of claim. It is impossible to establish *any* claim for loss to trust funds without having an accounting of what funds

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"any claim . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any [federal] employee." 28 U.S.C. § 2672.

[4] This difference in definitional approach cannot be ignored as mere happenstance. There is a strong presumption that Congress expresses its intent through the language it chooses and that its choice of words in a statute is deliberate and reflective. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987).

were "derived from the sale or use of trust land" (25 C.F.R. § 115.002) as a baseline for calculating damages. At the same time, an accounting of the funds received is not by itself sufficient to prove either sort of claim. Resort must be had to additional evidence to establish what greater amount should have been collected. Thus, there is no basis for drawing a distinction between "accounts receivable" and "resource mismanagement" claims based on the utility of an accounting.

In sum, the circuit court's limitation of the Acts to claims that the Government (in the role of bookkeeper) mismanaged billing, collection, or remittance procedures conflicts with the plain language of the Acts. The statutory language covers all Indian claims concerning losses to trust funds, including those arising from mismanagement of trust assets that produce such funds.

B. The Federal Circuit's Decision Conflicts with the Legislative History of the Acts.

The Federal Circuit's construction also conflicts with the legislative history of the Acts and Congress' treatment of Indian trust fund management in related legislation enacted at the same time. *See Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 736 (1973) (construing Shipping Act in light of its legislative history and congressional treatment of other industries in contemporaneous and related statutes). The Acts' history demonstrates that Congress was acutely concerned about the Government's continuing failure to properly account for the Indian trust resources under its control. Congress enacted the Acts as a remedial measure to preserve all damages claims by Indians who have been deprived of an accounting by their

trustee. In enacting this provision, Congress did not draw any distinction between the various sorts of fiduciary breaches that might result in "losses to trust funds." Nor did Congress suggest that losses caused by mismanagement of income-producing trust assets were beyond the scope of the Acts. To the contrary, Congress viewed *resource management* as a key element of *trust fund* management and one which directly affects Indian trust accounts.

During the 1980's it became apparent to Congress that the Government has been grossly derelict in fulfilling its obligation to provide trust accountings to Indian tribes and individuals. In 1982 the General Accounting Office reported that the Bureau of Indian Affairs ("BIA") appropriation and trust fund accounting systems needed major improvements and that trust accounts had not been reconciled with the agency's general ledger to ensure correct account balances. U.S. GAO, "Major Improvement Needed in the Bureau of Indian Affairs' Accounting System," Rep. No. GAO/AFMD-82-71, Sept. 8, 1982.

In 1986, the BIA launched an initiative to privatize certain Indian trust fund management functions. Concerned that this might result in the BIA merely passing off a set of unbalanced books to another party, Congress added a proviso to the fiscal year 1987 Supplemental Appropriations Act prohibiting the BIA from transferring funds to any private institution until Indian trust fund accounts were audited and reconciled. Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329, 1329-229. Thereafter, Congress inserted language in each appropriations act for the Interior Department that prohibited the BIA from contracting out trust fund services until the funds had

been audited and reconciled and an accounting had been provided to the tribe(s) or individual Indians involved.[5]

In the Spring of 1989, the House of Representatives Committee on Government Operations initiated an investigation of the problems associated with BIA's management of Indian trust funds. It held a series of public hearings between 1989 and 1991, and ultimately issued a seminal report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," which detailed multiple problems with the management of Indian trust funds. H.R. Rep. No. 102-499 (1992). These problems included not only an inability to audit and reconcile all Indian trust fund accounts, *id*. at 18, but also failure to obtain fair market rates and fees for tribal assets and failure to identify underpayments and nonpayments of royalties. *Id*. at 11, 45-46. The report noted that, if the BIA could not establish that the royalties received are correct, then it "cannot accurately maintain the accounts in the Indian trust fund, even if . . . all trust accounts are reconciled, audited, and certified." *Id*. at 50. Prompted in large part by the findings of this report, Congress in 1994 enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239. *See* H.R. Rep. No. 103-778 at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468-69. This act included a provision amending 25 U.S.C. § 162a, which deals with the deposit

[5] Act of Sept. 27, 1988, Pub. L. No. 100-446, 102 Stat. 1774, 1794; Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701, 714; Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915, 1929; Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990, 1004; Act of Oct. 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374, 1389; Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379, 1391; Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499, 2511.

and investment of tribal trust funds, by adding a section that defined the proper discharge of the Government's trust responsibilities to include "appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." Pub. L. No. 103-412, § 101.

During the investigation of the BIA's mismanagement of Indian trust funds, Congress learned that BIA's failure to provide accountings prejudiced Indians' ability to determine whether they have been shortchanged by a federal breach of trust and seek redress for their losses. Congress was advised that "BIA's practice was to not disclose [any] losses, but rather wait for the account holders to become aware of the losses, if they ever did, and to file a claim or sue the Government for recovery of the funds." *Review of the Bureau of Indian Affairs' Management of the $1.7 Billion Indian Trust Fund: Hearing Before the Subcomm. on Environment, Energy and Natural Resources of the House Comm. on Government Operations*, 101st Cong., 32 (1989) (statement of James R. Richards, Inspector General, Department of the Interior). In many cases, the statute of limitations could have run before tribes or individual Indians became aware that they had a cause of action against the Government.

Congress promptly remedied this inequity by adopting a procedure long utilized in the field of trusts: delaying the running of the statute of limitations until the Government provided an accounting to the Indian trust beneficiaries. As the Federal Circuit noted, because a trustee can often breach his fiduciary responsibilities without placing the beneficiary on notice that a breach has occurred, "[i]t is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final

accounting has occurred that establishes the deficit of the trust." 364 F.3d at 1348, App. 15. Starting in 1990, Congress inserted another provision in every Interior Department appropriations bill – immediately after the prohibition on contracting out trust services until an accounting is furnished to Indian beneficiaries – which provided that "the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds."[6]

In enacting this provision, Congress viewed *resource management* as a key element of *trust fund* management which directly affects Indian trust accounts. For example, the legislative history of the appropriations legislation that included the 1994 version of the Acts, Pub. L. No. 103-138, 107 Stat. 1379 (1994) states, in pertinent part:

> With regard to the systems development effort, the Committee is aware that the General Accounting Office and the Intertribal Monitoring Association are *analyzing trust fund management functions* with the purpose of identifying functions that could be handled by an outside entity and those that should be conducted in house by the Bureau. *This analysis is to include all Bureau and Departmental functions that affect the trust accounts including trust resource management*, billings and

[6] Congress eventually dropped the prohibition on "contracting out" after the passage of the American Indian Trust Fund Management Reform Act in 1994. However, it has maintained the provision regarding the statute of limitations until the present.

> collections, investments, and accounting and reporting.

H.R. Rep. No. 103-158, at 55 (1993)(emphasis added).

Likewise, when Congress enacted the American Indian Trust Fund Management Reform Act in 1994, it added a new subsection to 25 U.S.C. § 162a which provides "a list of guidelines for the Secretary's proper discharge of trust responsibilities regarding Indian *trust funds*" that includes "*managing the natural resources* located on Indian reservations and trust lands." H.R. Rep. No. 103-778 at 15-16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3474-75 (emphasis added). Further, Congress specifically mandated "*integration of* land records, *trust funds accounting, and asset management systems,*" 25 U.S.C. § 4043(c)(4) (emphasis added), and a comprehensive strategic plan to help the Secretary efficiently and effectively discharge her trust responsibilities, including the management of trust funds and natural resources. 25 U.S.C. § 4043(c)(5)(A). Finally, Congress *criticized* the "piecemeal" approach the Department of the Interior had thus far taken in addressing trust reform, which did not treat all phases of trust management in a coordinated and consistent way. H.R. Rep. No. 103-778 at 14-15.

When Congress expanded the time limit for Indians to file "any claim concerning losses to or mismanagement of trust funds," it deemed resource management to be an integral part of trust fund management. Congress was concerned not only about improper handling of trust funds, but also "losses to trust funds" due to the Government's mismanagement of trust assets. It plainly did not intend to exclude from the coverage of the Acts claims regarding improper asset management that resulted in losses to

Indian trust funds.[7] The Acts were passed as part of a comprehensive congressional effort to assure that Indian beneficiaries receive all amounts due them through proper management of their resources and monies by their federal trustee. The Acts should be interpreted consistently with this purpose.

C. Applicable Canons of Statutory Construction Require the Acts to Be Construed in the Tribes' Favor.

Finally, because the Acts are remedial legislation enacted for the protection of Indians, they are subject to a special canon of construction: "When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992), *quoting Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Even if the Federal Circuit's construction of the Acts were plausible (which it is not for the reasons discussed above), that construction cannot prevail. Rather, the Acts must be construed liberally to cover Indian claims for federal mismanagement of their resources that result in losses of trust income.

[7] Indeed, as Congress enacted and re-enacted this legislation over the past dozen years, it certainly knew that many claims being brought by Indians were based on the Government's alleged mismanagement of trust assets. It deliberately framed the Acts in broad language that encompasses such claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals, Federal Circuit.

The SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, Plaintiff-Cross Appellant,

and

The Arapaho Indian Tribe of the Wind River Reservation, Plaintiff-Cross Appellant,

v.

UNITED STATES, Defendant-Appellant.

Nos. 03-5036, 03-5037.

DECIDED: April 7, 2004.

Rehearing and Rehearing En Banc Denied Aug. 26, 2004.

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Before RADER, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

Opinion for the court filed by Circuit Judge GAJARSA. Opinion dissenting-in-part filed by Circuit Judge RADER.

GAJARSA, Circuit Judge.

The United States government appeals from the decision by the Court of Federal Claims permitting the Shoshone and Arapaho Indian Tribes of the Wind River Reservation (the "Tribes") to bring allegedly untimely claims relating to the Government's management of sand and gravel resources on the reservation. *The Shoshone Indian Tribe of the Wind River Reservation v. United States,* No. 458a-79L, 459a-79L (Fed.Cl. Oct. 10, 2002) (order providing for final judgment on the issues of the statute of limitations and applicable interest) (the "*Shoshone Final Judgment Order*"); *see also The Shoshone Indian Tribe of the Wind River Reservation v. United States,* 51 Fed.Cl. 60 (2001). In addition, the Tribes submit a cross-appeal, arguing that the Court of Federal Claims erred in denying the Tribes interest on money that the Government should have, but did not, collect from the sale and leasing of sand and gravel deposits. *Shoshone Final Judgment Order,* at 1; *see also The Shoshone Indian Tribe of the Wind River Reservation v. United States,* No. 458a-79L, 459a-79L (Fed. Cl. June 21, 2002) (order denying interest to Tribes) (the "*Shoshone Interest Order*").

Because the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7, permits the Tribes to bring their trust management claims after they receive an accounting – regardless of when such claims accrued – this court affirms the Court of Federal Claims' decision on direct appeal. We limit, however, the claims that may be brought to those relating to (1) the Government's mismanagement of tribal trust funds after their collection and (2) losses to the trust resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

With respect to the Tribes' cross-appeal, we reverse the Court of Federal Claims' denial of interest and hold that the Tribes are entitled to interest on monies that the Government was contractually obligated to collect, but did not collect or delayed in collecting, on behalf of the Tribes.

We thus affirm-in-part, reverse-in-part, and remand the case for further proceedings.

I. BACKGROUND

A. *The Wind River Reservation*

The Eastern Shoshone Tribe (the "Shoshone") and the Northern Arapaho Tribe (the "Arapaho") share an undivided interest in the Wind River Indian Reservation (the "Wind River Reservation" or the "reservation") in Wyoming. *Shoshone Indian Tribe,* 51 Fed.Cl. at 61. The Shoshone originally occupied approximately 44,672,000 acres across Wyoming, Colorado, Idaho, and Utah. In 1868, the Shoshone signed a treaty with the United States (the "Treaty of 1868") and agreed to relinquish their aboriginal lands and relocate onto a reservation established for their

benefit. In this treaty, the Government agreed that the reservation would be:

> set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, . . . and henceforth *they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States,* except such as is embraced within the limits aforesaid.

Treaty between the United States and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, art. II, 15 Stat. 673 (emphasis added). By signing the Treaty of 1868, the Shoshone relinquished to the Government title to their aboriginal lands and reserved a right of occupancy and use to the Wind River Reservation. *Shoshone Tribe of Indians v. United States,* 299 U.S. 476, 496, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *cf. United States v. Creek Nation,* 295 U.S. 103, 109, 55 S.Ct. 681, 79 L.Ed. 1331 (1935) (discussing the right of occupancy as compared to a fee simple).

In 1878, the United States military escorted the Arapaho onto the Wind River Reservation, where the Arapaho were settled by the Government on the Wind River Reservation despite protests by the Shoshone. *Shoshone,* 299 U.S. at 494, 57 S.Ct. 244. Against their respective wishes, the Shoshone and Arapaho Tribes were made owners in common of the Wind River Reservation, with undivided rights to the land and its accompanying mineral resources, by Congressional act. Act of Mar. 3, 1927, §§ 1, 3, 44 Stat. 1349, 1350; *Shoshone,* 299 U.S. at 494, 57 S.Ct. 244. Both Tribes continue to occupy the Wind River Reservation, which consists primarily of the reservation

lands created by the Treaty of 1868, minus certain lands sold to the United States in 1872 and 1896.

In addition to establishing co-ownership of the Wind River Reservation, the Act of March 3, 1927 also permitted the Shoshone to bring claims against the Government in the Court of Claims arising from the settlement of the Arapaho. Until the passage of the Indian Claims Commission Act in 1946 (the "ICC Act"), tribes could not litigate claims against the United States without specific Congressional permission. Act of Mar. 3, 1927, §§ 1, 3, 44 Stat. 1349, 1350; *Shoshone,* 299 U.S. at 494, 57 S.Ct. 244; *see also Navajo Tribe of Indians v. State of New Mexico,* 809 F.2d 1455, 1460 (10th Cir.1987) (discussing the history of the ICC Act). After receiving access to the Court of Claims, the Shoshone filed suit and were eventually awarded damages for the taking of the Shoshone's right of occupancy under the Treaty of 1868. *Shoshone,* 299 U.S. at 497-98, 57 S.Ct. 244.

On October 10, 1979, the Tribes brought suit in the United States Court of Claims, alleging that the Government breached fiduciary and statutory duties owed to the Tribes from August 14, 1946 onward by mismanaging the reservation's natural resources and the income derived from such resources. The date of August 14, 1946 chosen by the Tribes coincides with the passage of the ICC Act. The ICC Act provided a five-year window of time during which tribes could submit to the Indian Claims Commission all of their claims against the Government that accrued before August 13, 1946. Courts have therefore held that claims "accruing before August 13, 1946" that were not filed with the Commission by August 13, 1951 cannot be submitted to any court, administrative agency, or the Congress. 60 Stat. 1052 (formerly 25 U.S.C. § 70k);

Navajo Tribe, 809 F.2d at 1461; *Catawba Indian Tribe of S.C. v. United States,* 24 Cl.Ct. 24, 29 (1991).

The Court of Federal Claims severed the Tribes' present action into four segments: (1) claims relating to mineral rights, including sand and gravel resources; (2) claims relating to royalties associated with oil and gas deposits; (3) all other claims relating to oil and gas extraction; and (4) claims relating to trust fund mismanagement. *Shoshone Indian Tribe,* 51 Fed.Cl. at 62.

B. *Sand and Gravel Litigation*

The current appeal stems from the first segment of litigation and involves the alleged mismanagement of sand and gravel resources by the Government. The sand and gravel claims of the Tribes were severed from the rest of the claims by order of the Court of Federal Claims. *The Shoshone Indian Tribe of the Wind River Reservation v. United States,* No. 458a-79-459a-79L (Fed. Cl. June 13, 2001) (order severing claims).[1]

In its pre-trial motions related to the sand and gravel claims, the Government moved the Court of Federal Claims to bar any claim by the Tribes that accrued prior to October 10, 1973, the date that corresponds to six years before the Tribes' complaint was filed. *Shoshone Indian Tribe,* 51 Fed.Cl. at 61. The Government argued that 28 U.S.C. § 2501, which imposes a six-year statute of limitations on

[1] The litigation regarding the management of oil and gas reserves on the Wind River Reservation is still pending in the Court of Federal Claims. *See The Shoshone Indian Tribe of the Wind River Reservation v. United States,* 58 Fed. Cl. 542 (2003) (interim order on motions in limine).

claims brought against the United States, should apply to limit the Tribes' ability to recover for alleged injuries occurring between 1946 and 1973. *Id.* at 61-62.

In response, the Tribes cited the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7 (the "Act"), which provides in pertinent part:

> *[N]otwithstanding any other provision of law,* the statute of limitations *shall not commence to run* on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning *losses to or mismanagement of trust funds,* until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub.L. No. 108-7 (2003) (emphasis added). An earlier version of the Act was first adopted in 1990 and has been adopted each year thereafter, with minor changes in 1991 and 1993.[2]

The Court of Federal Claims denied the Government's motion on November 30, 2001. *Shoshone Indian Tribe,* 51

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[2] Pub.L. No. 101-512 (1990) originally provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds.

In 1991, the clause "from which the beneficiary can determine whether there has been a loss" was added to the end of the provision. Pub.L. No. 102-154 (1991). In 1993, Congress added "including any claim in litigation pending on the date of this Act." Pub.L. No. 103-138 (1993).

Fed.Cl. at 61. The gravamen of the Government's motion was that the six year statute of limitations on claims against the Government provided by 28 U.S.C. § 2501 had already run on many of the Tribes' claims and that the Act therefore did not reach such claims. Relying on the plain language of the Act, the court determined that claims falling within the scope of the Act do not *accrue* until an accounting "concerning losses to or mismanagement of trust funds" is provided. Because the Tribes had not received an accounting, the Court of Federal Claims thus permitted the Tribes to present evidence of economic losses resulting from the Government's mismanagement of tribal trust funds and sand and gravel resources from 1946 onward.

The Tribes' cross-appeal concerns the Court of Federal Claims' decision denying the Tribes interest on monies that the Government failed to collect with respect to the sand and gravel mining leases on the reservation. The Tribes argued before the Court of Federal Claims that 25 U.S.C. § 612, which establishes a trust for the Shoshone and Arapaho Tribes, requires the Government to pay interest on funds that the Government should have, but did not, collect and deposit in the tribal trust. In pertinent part, 25 U.S.C. § 612 provides:

> The Secretary of the Treasury, upon request of the Secretary of the Interior, is authorized and directed to establish a trust fund account for each tribe and shall make such transfer of funds on the books of his department as may be necessary . . . : Provided, *That interest shall accrue on the principal fund only, at the rate of 4 per centum per annum,* and shall be credited to the interest trust fund accounts established by this section: Provided further, That *all future revenues*

> *and receipts derived from the Wind River Reservation under any and all laws,* and the proceeds from any judgment for money against the United States hereafter paid jointly to the Shoshone and Arapahoe Tribes of the Wind River Reservation, shall be divided [between the Tribes] and *credited to the principal trust fund accounts* established herein; and the proceeds from any judgment for money against the United States hereafter paid to either of the tribes singly shall be credited to the appropriate principal trust fund account.

25 U.S.C. § 612 (2000) (emphasis added). The Tribes further argued that the general statutes governing Indian trust fund management, 25 U.S.C. §§ 155, 161a, 161b, and 162a, mandate the payment of interest. Under 25 U.S.C. § 155, miscellaneous revenues derived from tribal resources are to be deposited with the Treasury, and under 25 U.S.C. §§ 161a, 161b, and 162a, simple interest must be collected on such accounts. *See* 25 U.S.C. §§ 155, 161a, 161b, 162a.

On June 21, 2002, the Court of Federal Claims determined that the Government would not be responsible for interest on any damages awarded to the Tribe for trust fund mismanagement. *Shoshone Interest Order,* at 2. In its order, the court reasoned that 25 U.S.C. § 612 did not provide the "necessary 'hook'" to award interest damages against the United States under the Supreme Court's decision in *United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1982) ("*Mitchell II*"). *Shoshone Interest Order,* at 2. The court did not address the availability of 25 U.S.C. §§ 155, 161a, 161b, and 162a to require the payment of interest.

On the basis of its orders of November 30, 2001 and June 21, 2002, the Court of Federal Claims (1) granted judgment in favor of the Tribes on the issue of the statute of limitations and (2) granted judgment in favor of the Government on the issue of interest. *Shoshone Final Judgment Order,* at 1. Except for these two issues, the parties have settled the claims concerning the sand and gravel resource management. *The Shoshone Indian Tribe of the Wind River Reservation v. United States,* No. 458a-79L, 459a-79L (Fed.Cl. Oct. 4, 2002) (order approving partial settlement).

This Court has jurisdiction of the appeal and cross-appeal pursuant to 28 U.S.C. § 1295(a)(3).

II. DECISION

A. *Standard of Review*

The issue before us is one of statutory construction. This court reviews the construction and interpretation of governing statutes *de novo. Massie v. United States,* 166 F.3d 1184, 1187 (Fed.Cir.1999); *Dock v. United States,* 46 F.3d 1083, 1086 (Fed.Cir.1995). The plain language of a statute is controlling. *Int'l Bus. Machs. Corp. v. United States,* 201 F.3d 1367, 1373 (Fed.Cir.2000).

B. *The Act*

1. Statute of Limitations

In challenging the Court of Federal Claims' decision concerning the statute of limitations for the Tribes' claims, the Government relies on the ambiguous language of the House and Senate Reports associated with the Act, rather than on the language of the statute itself. The language of

the statute is the best indication of Congress's intent. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 118, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). When the language of a statute is plain on its face, it is inappropriate to turn to the legislative history.[3] *Dep't of Hous. & Urban Dev. v. Rucker,* 535 U.S. 125, 132, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002).

The statute of limitations provision of 28 U.S.C. § 2501 places an express limit on the Government's waiver of sovereign immunity for every claim within the jurisdiction of the Court of Federal Claims. *Soriano v. United States,* 352 U.S. 270, 273, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957); *Hart v. United States,* 910 F.2d 815, 817 (Fed.Cir.1990). Statutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government also are considered a waiver of sovereign immunity. *See Martinez v. United States,* 333 F.3d 1295, 1316 (Fed.Cir.2003) (noting that exceptions to statutes of limitations on suits against the Government

[3] Only two courts have interpreted the Act prior to this appeal. In the unpublished decision of *Assinboine & Sioux Tribes of the Fort Peck Indian Reservation,* No. 773-87L (Fed.Cl.1995), the Court of Federal Claims found that the Act deferred the accrual of the statute of limitations until an accounting was provided. That court cited the legislative history surrounding the Act's renewal in 1993, specifically a House Report that provided that the purpose of the Act was to "protect the rights of tribes and individuals until reconciliation and audit of their accounts has been completed." H.R.Rep. No. 103-158, at 57 (1993).

In *Cobell v. Babbitt,* a district court determined that the Act merely tolls the statute of limitations. 30 F.Supp.2d 24 (D.D.C.1998). Citing the same sentence from the House Report relied on in *Assinboine,* the District Court came to the opposite conclusion from the legislative history. *Id.* at 44.

are not to be implied); *see also Soriano,* 352 U.S. at 276, 77 S.Ct. 269. Such statutes must be construed strictly and must clearly express the intent of Congress to permit a suit against the Government. *Dep't of the Army v. Blue Fox, Inc.,* 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999) ("We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign. . . . Such a waiver must also be 'unequivocally expressed' in the statutory text." (citations omitted)); *United States v. Mottaz,* 476 U.S. 834, 841, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986); *Bath Iron Works Corp. v. United States,* 20 F.3d 1567, 1572 (Fed.Cir.1994). By the plain language of the Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided.

The operative language of the Act is the combination of the phrases "[n]otwithstanding any other provision of law" and the directive that the statute of limitations "shall not commence to run" on any claim until an accounting is provided from which the Tribes can discern whether any losses occurred which would give rise to a cause of action against the trustee. The introductory phrase "[n]otwithstanding any other provision of law" connotes a legislative intent to displace any other provision of law that is contrary to the Act, including 28 U.S.C. § 2501. *See, e.g., Marcello v. Bonds,* 349 U.S. 302, 310-11, 75 S.Ct. 757, 99 L.Ed. 1107 (1955) (finding the inclusion of the phrase "Notwithstanding any other provision of law" in earlier drafts of a bill enough to show the intent of Congress to supersede § 5(c) of the Administrative Procedure Act even though the final bill deleted the language); *Watt v. Alaska,* 451 U.S. 259, 280, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981)

(Stewart, J., dissenting) (stating that Congress "ideally" would have used the phrase "notwithstanding any other provision of law" to express its intent to have the Wildlife Refuge Revenue Sharing Act of 1964 supersede the Mineral Leasing Act of 1920).

The next important phrase of the Act, "shall not commence to run," unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered. As the Tribes point out, most statutes use the word "toll" when the purpose of the statute is to interrupt the statute of limitations. *See, e.g.,* 12 U.S.C. § 3419 (2000); 15 U.S.C. § 6606(e)(4) (2000); 21 U.S.C. § 1604(b)(3)(C) (2000); 29 U.S.C. § 1854(f) (2000). Congress's choice of the phrase "shall not commence to run" instead of "tolls" should be given effect. There exists a strong presumption that "Congress expresses its intent through the language it chooses" and that the choice of words in a statute is therefore deliberate and reflective. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 433 n. 12, 436, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *see also Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 223, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) ("Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ. . . ."); *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (refusing to give a restrictive meaning to the word "person" because Congress could have, but did not, use more particular language).

Unlike the Government, we see no ambiguity in the language used by Congress. The clear intent of the Act is that the statute of limitations will not begin to run on a tribe's claims until an accounting is completed. We therefore

hold that the Act provides that claims falling within its ambit shall not accrue, i.e., "shall not commence to run," until the claimant is provided with a meaningful accounting.[4] This is simple logic – how can a beneficiary be aware of any claims unless and until an accounting has been rendered?

The interpretation of the Act provided by this court also comports with fundamental trust law principles. Beneficiaries of a trust are permitted to rely on the good

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[4] Our interpretation of the Act also comports with an examination of other statutes that affect the accrual of a cause of action. For example, the Court of Federal Claims is permitted to hear claims by the Pueblo of Isleta tribe regardless of the time incurred. The applicable statute provides:

> Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946 (60 Stat. 1052), or any other law which would interpose or support a defense of untimeliness, jurisdiction is hereby conferred upon the United States Court of Federal Claims to hear, determine, and render judgment on any claim by Pueblo of Isleta Indian Tribe of New Mexico against the United States with respect to any lands or interests therein the State of New Mexico or any adjoining State held by aboriginal title or otherwise which were acquired from the tribe without payment of adequate compensation by the United States.

Pub.L. No. 104-198 (1996).

The Act's introductory phrase "notwithstanding any other provision of law" parallels the above recitation listing a number of statute of limitations provisions and declaring that they are inapplicable. Moreover, like the passage quoted, the Act specifically outlines the types of claims that are exempted from the standard statute of limitations. In the case of the Pueblo of Isleta tribe, the claims involve the Government's payment of inadequate compensation for tribal lands. In the case before this court, the claims are limited to those "concerning losses to or mismanagement of trust funds." We address the interpretation of that phrase *infra* at Part II.B.2 of this opinion.

faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets. *Loudner v. United States,* 108 F.3d 896, 901 (8th Cir.1997); *Cobell v. Norton,* 260 F.Supp.2d. 98, 104 (D.D.C.2003); *Manchester Band of Pomo Indians v. United States,* 363 F.Supp. 1238 (N.D.Cal.1973). As the Supreme Court explained in *Mitchell II,* "[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." 463 U.S. at 227, 103 S.Ct. 2961.

A cause of action for breach of trust traditionally accrues when the trustee "repudiates" the trust and the beneficiary has knowledge of that repudiation. *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573 (Fed.Cir.1988); *Restatement (Second) of Trusts* § 219 (1992); *Cobell,* 260 F.Supp.2d at 105; *Manchester Band of Pomo Indians,* 363 F.Supp. at 1249. A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee. *Jones v. United States,* 801 F.2d 1334, 1336 (Fed.Cir.1986); *Philippi v. Philippe,* 115 U.S. 151, 5 S.Ct. 1181, 29 L.Ed. 336 (1885). The beneficiary, of course, may bring his action as soon as he learns that the trustee has failed to fulfill his responsibilities. 3 *Scott on Trusts* §§ 199.3, 205 (2001). It is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust. 76 *Am.Jur.2d Trusts* § 440 (2000);

McDonald v. First Nat'l Bank of Boston, 968 F.Supp. 9, 14 (D.Mass.1997).

In this case, the United States is the trustee for the Tribes, having assumed the relationship of trustee-beneficiary pursuant to treaties and statutes. That a general trustee relationship exists between the Government and tribal nations has long been recognized by the Supreme Court. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8, 8 L.Ed. 25 (1831) (describing the relationship of tribes with the United States as that of a "ward to his guardian"); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832) (elaborating on a duty of protection undertaken by the United States with respect to the native tribes); *Mitchell II,* 463 U.S. at 225, 103 S.Ct. 2961 (noting the "undisputed existence of a general trust relationship between the United States and the Indian people").

Because of its treaty and statutory obligations to tribal nations, the United States must be held to the "most exacting fiduciary standards" in its relationship with the Indian beneficiaries. *Coast Indian Cmty. v. United States,* 213 Ct.Cl. 129, 550 F.2d 639, 652 (1977). The Indian Tribes, as domestic dependent nations, were subjected to the imposition of the trustee-beneficiary relationship and have become reliant upon their trustee to carry out trustee responsibilities. *Mitchell II,* 463 U.S. at 225, 103 S.Ct. 2961.

2. *The Scope of the Act*

In addition to interpreting the Act's effect on the statute of limitations, this Court must determine which claims are within the scope of the Act. The Act postpones

the commencement of the statute of limitations for "any claim . . . concerning *losses to or mismanagement of trust funds*." (emphasis added). In its interpretation of the Act, the Court of Federal Claims focused on the disjunctive term "or" between the two phrases "losses to" and "mismanagement of" tribal trust funds. *Shoshone Indian Tribe,* 51 Fed.Cl. at 68. The court determined that "mismanagement of trust funds" plainly covers a breach of fiduciary duty in the management of money already received in the trust. *Id.* The court then interpreted "losses to . . . trust funds" as corresponding to the Government's mismanagement of trust assets and the "breach of its trust duty to 'make the trust property productive'. . . ." *Id.* The interpretation by the court below thus permitted the Tribes to bring claims from 1946 onward relating to the Government's management of the sand and gravel leasing, including claims that the Government did not receive the best possible price for the leases negotiated. *Id.*

As part of its appeal, the Government argues that the Act applies only to claims for the mismanagement or loss of tribal funds that were actually collected and deposited into the tribal trusts by the Government. Under the Government's proposed interpretation of "losses to or mismanagement of trust funds," the phrase "mismanagement of trust funds" would connote active misconduct relating to the tribal funds and "losses to . . . trust funds" would apply to "purely passive behavior" resulting in a decrease in the trust funds. Under the Government's theory of liability, the Act would not apply to losses that the Tribes alleged occurred because of the Government's failure to collect rents or to collect rents in a timely manner or to timely deposit such rents into the tribal trust accounts.

We reject the Government's narrow reading of the Act. If the Government's interpretation were adopted, the term "losses to" would be redundant – the mismanagement of trust funds after their collection necessarily results in a loss to such funds. *Shoshone Indian Tribe,* 51 Fed.Cl. at 68. Accepted rules of statutory construction suggest that we should attribute meaning to all of the words in the Act if possible. *Montclair v. Ramsdell,* 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1882) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute. . . ."); *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); Norman J. Singer, *Sutherland on Statutory Construction* § 46.06, at 181-96 (6th ed.2000).

At the same time, the Court of Federal Claims' interpretation of the Act's language is overly expansive. We first must note that the Supreme Court's recent decision in *United States v. Navajo Nation* may moot the Tribes' claims relating to a breach of trust for *asset* mismanagement pursuant to the Indian Mineral Leasing Act ("IMLA") of 1938, i.e., claims that the Government failed to obtain the best possible market rates for the sand and gravel contracts. *See United States v. Navajo Nation,* 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). In *Navajo Nation,* the Supreme Court held that the IMLA does not impose a fiduciary obligation on the Government to manage the negotiation of tribal coal leases and maximize the lease revenues received. *Id.* at 507, 123 S.Ct. 1079. Reviewing the responsibilities owed by the Government to the Navajo under the IMLA, the Court determined that the Government was charged with approving mineral leases and regulating mining operations, but was not otherwise responsible for obtaining the highest and best

price for the leases of tribal coal deposits. *Id.* at 507-08, 123 S.Ct. 1079; *see also* 25 U.S.C. § 396a (requiring that the Secretary of the Interior approve mineral leases); 25 U.S.C. § 396d (providing that the Secretary promulgate regulations relating to mining operations). While the Court in *Navajo Nation* specifically limited its holding to coal leasing, 537 U.S. at 508 n. 11, 123 S.Ct. 1079, the IMLA alone does not impose any additional responsibilities on the Government relating to the management of sand and gravel leases.[5] *See* 25 U.S.C. § 396a *et seq.; see also* 25 C.F.R. § 211.3 (defining mineral to include sand and gravel resources, thus establishing that such resources are subject to the IMLA). Like the coal leases at issue in *Navajo Nation,* the Government's responsibilities relating to the management of mineral assets such as sand and gravel is limited to the general obligation to approve leases and regulate removal operations under 25 U.S.C. § 396a and § 396d respectively. In light of *Navajo Nation,* we are compelled to find that the Tribes' argument that the Government mismanaged its sand and gravel assets is not a valid claim for relief given that the Government did not have a fiduciary or statutory duty to maximize the prices obtained under the leases entered into between the tribes and third parties. As such, the language in the Act "losses to or mismanagement of trust funds" cannot be used to delay the accrual of a cause of action for failure to obtain a maximum price of the mineral assets since such

[5] We do not, in this opinion, reach the question of whether a claim for asset mismanagement under statutes other than the IMLA is viable. *See Navajo Nation v. United States,* 347 F.3d 1327, 1332 (Fed.Cir.2003). The issue of whether "a network of other statutes and regulations" may create a trust obligation for tribal asset management on the part of the Government is currently on remand to the Court of Federal Claims. *Id.*

an action is not within the contemplated scope of the IMLA.

Even if a claim for a breach of the fiduciary duty to obtain a maximum return from the mineral assets had been available, however, the plain language of the Act excludes such a claim. The Act covers claims concerning "losses to . . . trust *funds*" rather than losses to mineral trust *assets*. While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*. The Court of Federal Claims therefore erred in equating the mismanagement of trust *assets* with "losses to . . . trust *funds*."

While *Navajo Nation* forecloses holding the United States responsible for allegedly failing to maximize the return from the Tribes' sand and gravel mining leases, it does not foreclose liability for failing to manage or collect the *proceeds* from the approved mining contracts in violation of the trust responsibilities owed under the implementing regulations of the IMLA. Pursuant to 25 C.F.R. § 211.40 and related regulations in 30 C.F.R., Subchapters A and D, the Government collects and manages all payments relating to the mineral leases unless such leases specify otherwise. The Government then must deposit and accrue interest on such proceeds pursuant to the general trust provisions of 25 U.S.C. §§ 161a, 161b, and 162a, and, in the case of the Tribes, pursuant to 25 U.S.C. § 612. It therefore is clear that the Tribes have a possible claim against the United States for the alleged breach of the Government's fiduciary duty to manage and collect revenues derived from the mining leases.

A review of the language of the Act confirms that the Act defers the accrual of a cause of action relating to the Government's fiduciary duties to collect revenue for the Tribes' leases. In the context of the Act, "losses to . . . trust funds" may be understood to cover losses resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts. We therefore interpret the phrase "losses to . . . trust funds" to mean losses resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing trust accounts, or (3) assessing penalties for late payment. Fiduciary breaches such as these result in losses to trust funds that are separate and distinct from the mismanagement of trust funds once collected.

We finally note that the interpretation of "losses to . . . trust funds" as accounts receivable due and owing to the Tribes has certain evidentiary advantages. As part of its duties, a trustee must keep clear and accurate accounts, showing what he has received, what he has expended, what gains have accrued, and what losses have resulted. 2A *Scott on Trusts* § 172 (2001). An accounting alone will not reveal the mismanagement of tribal assets; a comparison with historical market prices is required, creating a large burden on the parties and the courts. In contrast, the comparison of pertinent mining contracts with the results of an accounting will reveal what income was required to be received by the Government but was either not received or was received late.

Based on the language of the Act and statutory rules of construction, we conclude that the Act covers any claims that allege the Government mismanaged funds after they

were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

C. *Interest*

On cross-appeal, the Tribes argue that the Government should pay interest on amounts that it should have received, but did not receive, as a result of sales of the reservation's sand and gravel interests. We hold that the Tribes are permitted to receive interest on monies that the Government was obligated to collect on behalf of the Tribes under the leases, but did not collect or delayed in collecting.

Pursuant to 28 U.S.C. § 2516, a court is prohibited from awarding prejudgment interest against the United States unless such interest is specifically authorized by a contract or act of Congress. 28 U.S.C. § 2516 (2000). In addition, the Supreme Court held in *Mitchell II* that a claimant may recover against the United States only if he or she demonstrates that a source of substantive law can "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 463 U.S. at 216-17, 103 S.Ct. 2961.

In denying interest to the Tribes, the Court of Federal Claims determined that 25 U.S.C. § 612, which specifically requires interest to accrue on proceeds deposited in trust accounts for the Shoshone and Arapaho Tribes, is not money-mandating under *Mitchell II*. *Shoshone Interest Order,* at 2. To support its decision, the court stated that because 25 U.S.C. § 612 requires the payment of interest on post-judgment awards but is silent as to pre-judgment

interest awards, pre-judgment interest is not contemplated under the statute. *Id.*

The Court of Federal Claims erred in its analysis of the language of 25 U.S.C. § 612. Although the court was correct that the statute does not use the express term "pre-judgment interest," we interpret the statute as providing a substantive basis for the award of interest as part of the Tribes' damages. *See Short v. United States,* 50 F.3d 994, 998 (Fed.Cir.1995). Under 25 U.S.C. § 612, the Government is obligated to pay interest on *all* revenues derived from the Wind River Reservation, not just the revenues that the Government collected. Specifically, 25 U.S.C. § 612 requires the Secretary of the Treasury to credit to a principal trust fund for the Tribes "*all* future revenues and receipts derived from the Wind River Reservation under any and all laws." (emphasis added). In addition, 25 U.S.C. § 612 provides that "interest shall accrue on the principal fund only, at the rate of 4 per centum per annum." To the extent that the Government did not deposit "*all* future revenues and receipts derived from the Wind River Reservation," which in the present case would include revenues and receipts derived from the sand and gravel contracts, it has breached the provisions of 25 U.S.C. § 612.[6] The direct consequence of this breach is that the Tribes were denied interest on the full amount that should have been, but was not, collected under their sand and gravel contracts.

Because the Government was obligated under 25 U.S.C. § 612 to both credit the principal account with *all*

[6] The legislative history of 25 U.S.C. § 612 also reveals that Congress anticipated that most of the funds to be deposited in the trust would come from the mineral resources on the reservation. *See* H.R.Rep. No. 80-172, at 2 (1947); S.Rep. No. 80-117, at 2 (1947).

future revenues and receipts and to accrue interest at the stated rate, the provisions of 25 U.S.C. § 612 are therefore clear and unambiguous and are interpreted to permit recovery for interest on revenues and receipts that the Government failed to collect or delayed in collecting under the Tribes' sand and gravel contracts.[7] Adding even further support for this interpretation is the long-standing canon of statutory construction that "statutes are to be construed liberally in favor of the Indians. . . ." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); *Winters v. United States,* 207 U.S. 564, 576, 28 S.Ct. 207, 52 L.Ed. 340 (1908) (stating that ambiguities should be resolved "from the standpoint of the Indians"); *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912) (stating that pro-Indian statutory construction has been a canon of construction used since the early 1800s); *see Chickasaw Nation v. United States,*

[7] The dissent erroneously considers the interest that the Government is required to pay on the Tribes' trust principal under 25 U.S.C. § 612 to be a form of pre-judgment interest. Unlike the situation in *Mitchell II,* however, the Government had an obligation to collect the payments from the Tribes' sand and gravel leases and deposit such payments in interest-bearing trust accounts. By failing to reasonably manage the collection of lease payments, the Government deprived the Tribes of not only trust principal, but also the interest that would have been generated on that principal had the Government not breached its fiduciary responsibilities. This decision therefore does not award pre-judgment interest, but rather awards interest as a part of the damages sustained by the Government's breach. *See Short v. United States,* 50 F.3d 994, 999-1000 (Fed.Cir.1995). Under the analysis set forth by the dissent, if the Government failed to collect any payments despite being under an obligation to do so, the Government would experience no liability whatsoever for lost interest. If the Government mismanaged principal, however, it would be liable for interest. Such a distinction is untenable; it would perversely (and proportionally) reward the Government for inaction that violates the Government's fiduciary duties to collect funds and accrue interest.

534 U.S. 84, 93-95, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (recognizing the pro-Indian canon of construction, which "assumes Congress intends its statutes to benefit the tribes"); *see also Thompson v. Cherokee Nation of Okla.,* 334 F.3d 1075, 1090 (Fed.Cir.2003) (finding it unnecessary to utilize the Indian canon of construction because the statute at issue was not ambiguous). We therefore hold that 25 U.S.C. § 612 mandates the payment of interest on monies that the Government was contractually obligated to collect, but failed to collect or delayed in collecting.

The Supreme Court's decision in *Peoria Tribe of Indians of Oklahoma v. United States* further supports this court's reversal of the Court of Federal Claims' decision. In *Peoria Tribe,* the Government entered into a treaty that required it to sell tribal lands at public auctions and accrue interest on the proceeds for the benefit of the tribe. 390 U.S. 468, 469, 88 S.Ct. 1137, 20 L.Ed.2d 39 (1968). The Government sold tribal lands at private sales instead, resulting in lower prices received for the property. *Id.* The Court of Claims and the Indian Claims Commission denied the tribe damages for the failure to invest the proceeds that "would have been received had the United States not violated the treaty." *Id.* at 473, 88 S.Ct. 1137. The Supreme Court reversed, holding that the Government had an obligation to invest the money that should have, but was not, collected from the sale of land. *Id.* at 472-73, 88 S.Ct. 1137. Accordingly, the Supreme Court held that the Government was required to pay interest on the potential, rather than actual, proceeds of the sales as part of the damages for breach of the treaty. *Id.* at 470, 88 S.Ct. 1137; *see also United States v. Blackfeather,* 155 U.S. 180, 193, 15 S.Ct. 64, 39 L.Ed. 114 (1894) (permitting

interest to be paid on amounts that should have been, but were not, collected upon the sale of the tribes' lands).

Peoria Tribe is directly on point. The Government has a binding obligation to collect revenues from the sand and gravel contracts and earn interest on the revenues derived. *See* 25 U.S.C. § 612.[8] On the basis of *Peoria Tribe,* damages are therefore due to the Tribes for the failure to invest proceeds that "would have been received had the United States not violated" its fiduciary obligation to collect amounts due under the sand and gravel leases. *Peoria Tribe,* 390 U.S. at 473, 88 S.Ct. 1137.

We also find merit in the Tribes' argument that the general provisions for tribal trust management and interest accrual found in 25 U.S.C. §§ 161a, 161b, and 162a mandate the payment of interest. When considered in conjunction with the Government's fiduciary duty to collect revenue from mineral leases under regulations implementing the IMLA, these trust fund statutes create an obligation for the Government to pay interest on amounts that the Government failed to collect. IMLA, 52 Stat. 347, 25 U.S.C. § 396 *et seq*. (2000); 25 C.F.R. § 211.40.

This court has previously held that 25 U.S.C. §§ 161a, 161b, and 162a mandate the payment of interest under certain circumstances. In *Short v. United States,* the Government held in trust profits generated from the sale of certain natural resources on the Hoopa Valley Reservation

[8] As discussed in Part II.B.2, the Government did not have a trust responsibility to obtain the best possible market rates for the sand and gravel contracts. It therefore is obvious that the Tribes cannot recover interest on the amounts that the Tribes did not receive because of the Government's alleged failure to obtain the maximum price for the sand and gravel assets.

and therefore had an obligation to accrue interest on those amounts according to 25 U.S.C. §§ 161a, 161b, and 162a. 50 F.3d at 999-1000. The Government wrongfully disbursed certain funds to one tribe on the reservation to the detriment of the other tribe coexisting on the reservation. Relying on *Peoria Tribe,* the Court granted interest based on 25 U.S.C. §§ 161a, 161b, and 162a, not as an award on damages, but "as part of the damages award itself." *Id.*

Under *Short* and *Peoria Tribe,* when the Government has a clear statutory fiduciary duty to collect or manage funds and further undertakes the duty to earn interest on those funds, the failure of the Government to collect or manage such funds in accordance with its obligations will result in an award of damages for that failure and an award of interest on the amount mismanaged or not collected. As was the case in *Short* and *Peoria Tribe,* the Government here has a separate and distinct statutory fiduciary obligation to pay the interest on the funds it failed to collect or otherwise mismanaged.

The Government argues that reliance on *Short* would conflict with the Court of Claims decision in *Mitchell v. United States,* 229 Ct.Cl. 1, 664 F.2d 265 (1981). That decision, which led to the Supreme Court decision in *Mitchell II,* is also binding on this court. In *Mitchell,* the Court of Claims held that the mismanagement of timberlands by the United States would give rise to a damages award, but not to an award of interest on monies that plaintiffs might recover for the mismanagement of trust assets. In its decision, however, the court did not discuss or reconcile its decision with the binding Supreme Court precedent of *Peoria Tribe.* In affirming the Court of Claims' decision, the Supreme Court in *Mitchell II* also did not address the denial of interest.

In any event, the present case is distinguishable from *Mitchell.* The Tribes point to a definitive requirement[9] that the Government credit its trust accounts with its sand and gravel proceeds and earn interest on those trust funds. *See* 25 U.S.C. § 612; *see also* 25 C.F.R. § 211.40; 25 U.S.C. §§ 161a, 161b, and 162a. In *Mitchell,* however, the Government's duties arose from a network of statutes relating to timber management, none of which required the Government to deposit the proceeds into an interest-bearing tribal trust account. *See* 25 U.S.C. § 406 (providing that payment for timber sales should be made to the owner of the land or disposed of for their benefit); 25 U.S.C. § 407 (providing that timber sale proceeds from unallotted lands should be dispersed "as determined by the governing bodies of the tribes concerned and approved by the Secretary"); 25 U.S.C. §§ 323-325 (providing that compensation received for rights of way should be disposed of in accordance with enacted regulations of the Secretary, which in turn provide that the consideration be paid to the landowner under 25 C.F.R. § 169.14 (2003)).[10] Unlike *Short* or *Peoria Tribe,* the Government in *Mitchell* never placed the proceeds into a trust to earn interest (*Short*) or even had the obligation to do so (*Peoria Tribe*).

In light of *Peoria Tribe* and the statutory language of 25 U.S.C. § 612, we hold that the Tribes are entitled to interest on monies that the Government was contractually

[9] A general requirement to deposit miscellaneous funds in trusts, such as 25 U.S.C. § 155, would be unlikely to fulfill the standards required in *Mitchell II.*

[10] Other statutes listed in *Mitchell* do not involve the sale or leasing of tribal assets. 25 U.S.C. § 466 (requiring sustainable yield harvesting); 25 U.S.C. § 318a (authorizing the appropriation of money for reservation roads).

obligated to collect, but did not collect or delayed in collecting, on behalf of the Tribes. We further hold that the same interest obligation arose under the Government's duty to collect mineral royalties pursuant to 25 C.F.R. § 211.40 and to pay interest on such royalties pursuant to the general trust management statutes of 25 U.S.C. §§ 161a, 161b, and 162a.

III. CONCLUSION

We hold that the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7, suspends the statute of limitations for certain trust claims until an accounting of the trust is received. The claims covered by the Act include claims relating to the Government's mismanagement of tribal trust funds after funds are deposited in trust and claims relating to the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

We further hold that the Tribes are entitled to interest on amounts that the Government was contractually obligated to collect, but did not collect or delayed in collecting on behalf of the Tribes under both 25 U.S.C. § 612 and the combination of 25 C.F.R. § 211.40 and 25 U.S.C. §§ 161a, 161b, and 162a. We remand for further proceedings consistent with this opinion. Based on the foregoing, we

AFFIRM-IN-PART, REVERSE-IN-PART, AND REMAND.

IV. COSTS

No costs.

RADER, Circuit Judge, dissenting-in-part.

Although I agree with the court on the statute of limitations and the liability for mismanagement of trust funds but not assets, I respectfully disagree with its construction of 25 U.S.C. § 612. As a general proposition, 28 U.S.C. § 2516 relieves the United States of any liability for prejudgment interest, except where Congress has expressly authorized that payment. *See Library of Congress v. Shaw,* 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) ("The consent necessary to waive the traditional immunity [against liability for prejudgment interest] must be express, and it must be strictly construed.") (quoting *United States v. N.Y. Rayon Importing Co.,* 329 U.S. 654, 659, 67 S.Ct. 601, 91 L.Ed. 577 (1947)). Section 612, to my eyes, does not expressly authorize awarding prejudgment interest as a part of the damages.

That section places "all revenues and receipts derived from the Wind River Reservation under any and all laws" in a trust account where interest would accrue on the principal at four percent per year. *See* 25 U.S.C. § 612. Section 612 thus makes the United States responsible only for interest on funds actually collected and deposited in the trust account. This language does not obligate interest on funds that the United States should have collected or should have deposited. Accordingly, I do not read § 612 to overcome the general proscription against prejudgment interest.

For the same reason, the Court of Claims' en banc decision in *Mitchell v. United States,* 229 Ct.Cl. 1, 664 F.2d

265 (1981), *aff'd,* 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), governs this case. In *Mitchell II,* the court read Indian trust fund statutes of general applicability – 25 U.S.C. §§ 161a, 161b, and 162 (similar in many respects to § 612) – to deny the Indian tribes interest on claims stemming from mismanagement of trust assets. The court stated unequivocally that the tribes "are not entitled, however, to such interest on any unpaid amounts they may now recover in the present suit. . . . Those [unpaid] sums or their equivalent were never held by the Government for plaintiffs, were not subject to the specific interest provisions . . . and there is no statute awarding back-interest on such unpaid compensation now awarded by the court in this suit." *Mitchell II,* 664 F.2d at 275. Accordingly, the *Mitchell II* court denied those tribes, very similarly situated to the tribes in this case, interest on uncollected funds.

The court today distinguishes *Mitchell II* because it reads § 612 to create a definitive requirement that the United States deposit proceeds in an interest-bearing trust. The court observes that *Mitchell II* evinces no requirement to deposit proceeds into an interest-bearing account. To the contrary, *Mitchell II* makes clear that "tribal trust funds and proceeds of the sale of Indian lands must be held in the Treasury at interest under 25 U.S.C. §§ 161a and 161b (1976), but an alternative under § 162a is deposit in banks" and that the United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate, the statutory 4% being but a floor, not a ceiling." *Mitchell II,* 664 F.2d at 274. Thus, the statutes in *Mitchell II,* like section 612 in this case, required deposit and interest on the trust proceeds. On such compellingly similar facts, *Mitchell II* governs this case.

Moreover, *Peoria Tribe of Indians of Oklahoma v. United States,* 390 U.S. 468, 88 S.Ct. 1137, 20 L.Ed.2d 39 (1968), does not change the holding in *Mitchell II*. The Supreme Court in *Peoria Tribe* awarded interest on damages for malfeasance because the United States violated a treaty by selling some of the land ceded by the Indians to the United States "not by public auction, but by private sales at appraised prices lower than would have prevailed at public auction." *Peoria Tribe,* 390 U.S. at 469-70, 88 S.Ct. 1137. *Peoria Tribe* thus remedies the breach of a very specific duty, not negligence in general administration of a trust. In this case, on the other hand, the United States' liability stems from nonfeasance or negligence.

Similarly, *Short v. United States,* 50 F.3d 994 (Fed.Cir.1995), does not (and could not) override the holding of *Mitchell II*. In *Short,* this court held the government liable for interest on funds actually held but wrongfully disbursed. That, like *Peoria,* is malfeasance. In this case, the United States never collected the monies and, thus, never placed them in any account to bear interest. Accordingly, *Short* does not apply. Indeed, the proper reconciliation of the binding precedent of *Short* and *Mitchell II* yields the following: If funds are wrongfully disbursed after deposit, the United States is liable for interest on the missing funds. But if funds have not been collected and deposited in a trust account even due to negligence, the United States is *not* liable for interest on the missing funds. Accordingly, the United States should not be liable for prejudgment interest in the present case.

51 Fed.Cl. 60

United States Court of Federal Claims.

The SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, Plaintiff,

v.

The UNITED STATES, Defendant.

The Arapaho Indian Tribe Of The Wind River Reservation, Wyoming, Plaintiff,

v.

The United States, Defendant.

Nos. 79-458a L, 79-459a L.[1]

Nov. 30, 2001.

John C. Schumacher, Fort Washakie, WY, for plaintiff, The Shoshone Tribe of the Wind River Reservation, Wyoming a/k/a Eastern Shoshone Tribe. Dennis Eamick, Fort Washakie, WY, of counsel.

Timothy Judson, Denver, CO, for plaintiff, The Arapaho Indian Tribe of the Wind River Reservation, Wyoming a/k/a Northern Arapaho Tribe.

Stuart B. Schoenburg, Attorney, Environmental and Natural Resources Division, United States Department of Justice, Washington, DC, for defendant. Stephen Simpson, Attorney, Office of the Solicitor, Division of Indian Affairs,

[1] There are presently two separate dockets for these consolidated cases. Sand and gravel claims are docketed at 79-458a L & 79-459a L (referred to as the subdocket). All other claims are docketed as 79-458 L & 79-459 L (referred to as the main docket). The pending motion was filed in both dockets. The court is entering an order in the main docket providing that proceedings in the main docket shall also be subject to this order.

United States Department of the Interior, Washington, DC, of counsel.

OPINION AND ORDER

HEWITT, Judge.

This is an action by the Eastern Shoshone Tribe (the Shoshone) and the Northern Arapaho Tribe (the Arapaho) (collectively, the Shoshone and Arapaho are referred to as the Tribes) for damages based on the United States' alleged breach of trust for mismanagement of the Tribes' natural resources up to the point of collection and with respect to defendant's handling of Tribal funds post-collection. *See* Eastern Shoshone and Northern Arapaho Tribes' Legal Bases for the Tribes' Theories of Recovery for Breach of Trust (Tribes' Bases) at 1. The Tribes in this consolidated action share an undivided interest in the Wind River Indian Reservation (the Reservation) in Wyoming including, but not limited to, the mineral and other resources on and under the Reservation. *Id.*

Before the court is Defendant's Motion and Supporting Memorandum Re: Statute of Limitations Issues (Def.'s Mot.) and the responsive briefing. Defendant asserts that the applicable statute of limitations, 28 U.S.C. § 2501, limits plaintiffs' recovery to a period of time beginning no earlier than October 10, 1973, that is, six years prior to the filing of the complaint in this action. The Tribes oppose defendant's motion on the basis that the statute of limitations is tolled as to their claims until defendant provides an accounting of their trust property as required by a

series of appropriations enactments (the Acts).[2] *See* Response of the Eastern Shoshone and Northern Arapaho Tribes to United States' Motion RE Statute of Limitations Issues (Pls.' Resp.) at 10-11. For the following reasons, defendant's motion is DENIED.

I. Background

The litigation in this case is currently divided into four phases for adjudication. The first phase, as to which trial will be held beginning June 17, 2002, involves the Tribes' mineral trespass claims, as well as other claims, relating to specific sand and gravel pits on the Reservation. Pls.' Resp. at 2. The second phase involves extraction issues relating mostly to royalty accounting as to specific oil and gas deposits. *Id.* The third phase involves residual issues relating to oil and gas extraction, such as the failure to monitor leases. *Id.* at 2-3. The fourth phase involves the Tribes' trust money mismanagement claims. *Id.* at 3. The litigation is in various stages of discovery as to each of the phases; however, the legal questions raised in defendant's motion are ripe for judicial resolution at this juncture. Defendants Reply to Plaintiffs' Response to Defendant's Motion and Supporting Memorandum Re: Statute of Limitations Issues (Def.'s Reply) at 2.

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[2] The following is a complete list of the Acts since 1990: Act of November 5, 1990, Pub.L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub.L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub.L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub.L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub.L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub.L. No. 104-134, 110 Stat. 1321; Act of September 30, 1996, Pub.L. No. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub.L. No. 105-83, 11 Stat. 1543; Act of October 11, 2000, Pub.L. No. 106-291, 114 Stat. 922.

Defendant's motion seeks to limit damages to a period of time beginning no earlier than October 10, 1973, that is, six years prior to the filing of the complaint in this action as provided by this court's statute of limitations. Def.'s Mot. at 2; 28 U.S.C. § 2501. Plaintiffs seek recovery for breaches of trust beginning in 1946 and continuing to the present date. *See* Petition filed October 10, 1979 at ¶¶ 10-11; Tribes' Bases at 29-30. Plaintiffs argue that the Acts, a series of Department of the Interior appropriations enactments listed above in note 2, toll the statute of limitations as to the entirety of the Tribes' claims, and particularly as to those claims arising out of events prior to October 10, 1973, until the Tribes receive an accounting of their trust monies and property. *See* Tribes' Bases at 30. Resolution of the legal questions raised in defendant's motion, namely, the interaction between the Acts and the court's statute of limitations, will define both the scope of testimony to be received in the sand and gravel trial and the scope of discovery and testimony in the remaining phases of the litigation.

II. Discussion

A. Jurisdiction

The United States Court of Federal Claims has jurisdiction over the Tribes' claims pursuant to 28 U.S.C. § 1491 (1976) (the Tucker Act), and 28 U.S.C. § 1505 (1976) (the Indian Tucker Act). The Tucker Act and Indian Tucker Act waive the United States' sovereign immunity as to claims within their scope. *United States v. Mitchell,* 463 U.S. 206, 211-216, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*). It is established law that the United States is vested with a general trust responsibility with respect to tribal monies or properties "where the federal government

takes on or has control or supervision over" such "monies or property." *Id.* at 225, 103 S.Ct. 2961 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981 (1980)).[3] The statutes and regulations in the area of mineral resources, the subject matter of this litigation, provide sufficient control to vest the defendant with a fiduciary duty with respect to the Tribes' monies and properties. It is undisputed that this court has jurisdiction over the Tribes' claims that accrued after October 10, 1973; however, jurisdiction is disputed as to the Tribes' claims that might have accrued prior to October 10, 1973. *See* Defendant's Answer (Def.'s Ans.) at 1; *see also* Def.'s Mot. at 7-10.

B. The Impact of the Acts on the Statute of Limitations

1. The Issues

The principal legal issue to be resolved by the court is the precise impact of the Acts on the statute of limitations. The general statute of limitations, 28 U.S.C. § 2501, provides that "[e]very claim of which the United States

[3] *See also, e.g.,* 25 U.S.C. § 162a(d), which provides in part:

> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
>
> . . . .
>
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting. . . .
>
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a (d)(6), (8).

Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The most recent of the Acts states:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss. . . .

Department of the Interior and Related Agencies Appropriations Act, 2001, Pub.L. No. 106-291, 114 Stat. 922, 939 (2000).

It is undisputed that plaintiffs' claims involve trust funds and that the Tribes have yet to receive an accounting of their trust monies or property. The parties, however, disagree as to the precise impact of the Acts on the statute of limitations: whether the Acts preserve claims time-barred before the passage of the first of Acts and, if so, whether the Acts preserve only claims related to money already received by defendant or also preserve claims for monies that should have been received by the trust but were not received because of mismanagement of the Tribes' resources. Therefore, the legal arguments in defendant's motion and the responsive briefing can be divided into two main categories. First, the parties have made arguments as to whether the Acts preserve claims that, in absence of the Acts, might otherwise be time barred-that is, arguments with respect to time. Second,

the parties have made arguments with respect to the types of claims that Congress intended the Acts to cover.

The canons of statutory interpretation require the court to consider first the text of the Acts and any binding authority interpreting the text. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.01, at 113-129 (6th ed. 2000) (Singer); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). The second step of statutory construction, which is to be employed only in the case of ambiguity in the text of the statute and in the absence of binding interpretive authority, is to consider whether guidance is afforded by relevant legislative history. *See* 2A Singer, *supra,* § 48.01 at 411-415. The parties also argue various authorities and policies which may affect the court's reliance on one or another canon of construction or aspect of the legislative history. *See* Def.'s Reply at 7-10; Pls.' Resp. at 11.

The court notes at the outset that only two courts have ruled on the impact of the Acts on a general statute of limitations. In *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, et al.*,[4] No. 773-87L (Ct.Cl.1995),

[4] The parties contest the legal authority of *Assiniboine,* which is an unpublished order. *See* Def.'s Reply at 7 (arguing that Rule 52.1 of RCFC prohibits citing unpublished orders as authority). Rule 52.1 does, however, permit a party to cite an unpublished opinion as "persuasive authority." *Bennett v. United States,* 30 Fed.Cl. 396, 400 n. 7 (1994), *rev'd on other grounds,* 60 F.3d 843 (Fed.Cir.1995). Given the lack of prior judicial interpretation of the Acts as they affect the statute of limitations, the court finds that *Assiniboine* offers useful guidance in considering the legal issues raised by defendant's motion. The court also notes that this court's proposed revised rules (available at the court's website: http://www.uscfc.uscourts.gov) do not propose to carry

(Continued on following page)

Order of April 11, 1995, to which plaintiffs refer, this court held in an unpublished order that the Acts toll the statute of limitations, even as to claims otherwise time-barred under 28 U.S.C. § 2501, until the plaintiff receives an accounting. *Id.* at 6-7. *Assiniboine,* however, is silent as to the types of claims that are tolled by the Acts. Defendant relies on *Cobell v. Babbitt,* 30 F.Supp.2d 24 (D.D.C.1998),[5] which disagreed with the decision in *Assiniboine* and held that the Acts do not revive claims already barred by the statute of limitations, but only "toll" the statute of limitations as to existing claims: claims arising no earlier than October 1, 1984, that is, six years prior to the passage of the first of the Acts. *Id.* at 43-44. The United States, in this case as well as in *Cobell,* concedes implicitly that the Acts may toll claims that have accrued within the period of time six years prior to the passage of the first of the Acts (1990). *See* Def.'s Reply at 4; *Cobell, supra,* 30 F.Supp.2d at 44 n. 25.

2. Defendant's Arguments

The central theme of defendant's argument is that this court has no jurisdiction to consider the Tribes' claims that involve alleged breaches of trust accruing prior to the court's six year statute of limitations. Def.'s Mot. at 7. The statute of limitations is a threshold jurisdictional question

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forward the prohibition on citation of unpublished opinions and orders that is contained in Rule 52.1 of the court's current rules.

[5] The applicable statute of limitations in *Cobell* was 28 U.S.C. § 2401. An appeal in *Cobell* did not address the impact of the Acts on the statute of limitations; defendant's motion to dismiss in that case was denied on other grounds. *See generally Cobell v. Norton,* 240 F.3d 1081 (2001).

that cannot be waived. *See Hart v. United States,* 910 F.2d 815, 817 (Fed.Cir.1990); *Camacho v. United States,* 204 Ct.Cl. 248, 494 F.2d 1363, 1368 (1974). Defendant argues that preserving claims that accrued prior to the six year statute of limitations is tantamount to a waiver of sovereign immunity and that, as waivers of sovereign immunity, the Acts must be strictly construed. *See* Def.'s Reply at 5-6.

The court agrees that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Defendant asserts that the burden of proof is on the Tribes' to justify "tolling" of the statute of limitations. Def.'s Mot. at 9 (citing *Cochran v. United States,* 19 Cl.Ct. 455, 458 (1990)). *Cochran,* however, discusses the burden a plaintiff must meet in order to show that its claim has not yet accrued, but provides no guidance as to the interpretation of the text of any particular law, such as the Acts invoked by plaintiffs in this case, in relation to the statute of limitations. *See Id.*

With regard to the text of the statute, defendant argues that "'[a]bsent some clear, contrary expression of congressional intent that would lead to the conclusion that Congress meant to revive stale claims'", plaintiffs' interpretation of the Acts is overbroad. Def.'s Reply at 7, (quoting *Cobell,* 30 F.Supp.2d at 44 (holding that "[n]either the plain language nor the legislative history of the tolling provision can support the plaintiffs' sweeping interpretation")). However, defendant provides no examples of cases where Congress did intend to revive "stale" claims as a means of comparison. Defendant simply states, "Had Congress had [sic] intended to revive old, time-barred

claims it had more obvious ways of making that intent express. . . ." Def.'s Reply at 7.

Defendant in several places, does quote the language of the statute, but then stops short of addressing the meaning of the words contained in its quotation. For example, defendant characterizes the Acts as "tolling statutes" by quoting the following language from the Acts: "'shall not commence to run on any claim concerning loss to or management of trust funds.'"[6] Def.'s Mot. at 14. This bare characterization, absent an explanation of the meaning of the words (or citation to authority explaining the meaning of the words), provides the court with little assistance in its main task: determining congressional intent from, in the first instance, the language of the statute.

Defendant argues that not only the "plain language" of the Acts but also their legislative history bars the revival of "stale" claims. Def.'s Reply at 8-9. According to defendant, Sen. Rep. No. 101-534, 101st Cong., 2d Sess. (relating to the initial enactment in 1990) expresses clear congressional intent to that effect. Senate Report No. 101-534 provides:

> Since the audit and reconciliation of such funds, as directed by the Committee, will require at least 5 years to complete, it is possible that the statute of limitations for any significant discrepancies uncovered during this process may have expired by the time such audits are completed.

[6] Defendant does not cite to a specific bill in which this language appears; but, the court notes that this language is common to all of the Acts.

Id. at 65. Defendant argues that this language, and especially the short number of years ("5"), shows the limited reach of the Acts: to toll the statute of limitations as to existing claims but not to revive already time-barred claims. *Id.* at 18.

With regard to the types of claims preserved by the Acts, defendant argues that the Tribes' interpretation of the tolling provision in the Acts is also overbroad in the sense that the tolling provisions only apply to accounting claims and not to resource management claims. Def.'s Reply at 11. Defendant quotes the words "any claim, including any claim in litigation pending on the date of the enactment of the Act, concerning loss to or mismanagement of trust funds" and the words "until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *Id.* Defendant then states that "mismanagement" and "accounting" are the "key terms," but provides neither rationale nor authority for identifying those words as the "key terms" in the quoted text. *Id.* Nor does defendant explain how the words "losses to or" or the words "whether there has been a loss" function in the text of the statute. *Id.* at 10.

Defendant argues generally that the legislative history of the Acts supports its argument that the language should be strictly interpreted to exclude resource management claims from its coverage. Without analyzing particular examples, defendant states that "plaintiffs' recitation of the legislative history of relatively contemporaneous enactments . . . demonstrates that when Congress wishes to treat the trust management issue broadly, it knows how to do so." Def.'s Reply at 11.

Defendant largely relies on a policy argument for interpreting the Acts to exclude trust funds from resource mismanagement: that such a broad reading of the statute will result in "untoward consequences." *See* Def.'s Reply at 12. According to defendant, if the United States is put in a position of having to furnish an accounting for all of the Tribes' claims, "these accountings could never be completed in a reasonable time frame." *Id.* In response to defendant's policy concerns, the court notes that the United States has been under an obligation to provide such an accounting for more than a decade and the Tribes have yet to receive an accounting even limited to money actually collected by the defendant as trustee. The court is not in a position, on the basis of this briefing, to decide what is, or is not, a "reasonable time frame" for the furnishing of an accounting in these circumstances, except to note that ten years is already a fairly long time, and the Tribes can hardly be faulted as unreasonable for seeking what they view as their entire entitlement even if that might now take a bit longer.

3. Plaintiffs' Arguments

Plaintiffs counter defendant's central theme that this court lacks jurisdiction by arguing that the Acts are not waivers of sovereign immunity, but are merely "tolling statutes," thus permitting other than strict interpretation. Pls.' Resp. at 11. Further to this point, plaintiffs argue that where language in a statute contains "doubtful expressions" (which plaintiffs suggest is the case here), any ambiguity is to be resolved in favor of the Indians. *See id.* (citing *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)) (stating that

"standard principles of statutory construction do not have their usual force in cases involving Indian law").

As to the plain language of the statute, plaintiffs argue that the phrase "notwithstanding any other provision of law" appearing in Pub.L. No. 101-512, 104 Stat. 1915, 1929-1930 (1990) is a conclusive indication of congressional intent to remove sovereign immunity until the Tribes receive an accounting. *See* Tribes' Bases at 31-32, (citing *Ridgway v. Ridgway,* 454 U.S. 46, 73 n. 5, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981)). Plaintiffs then argue that statutory language appearing just before the contested language in Pub.L. No. 101-512 (addressing the preservation of claims) expresses clear congressional intent that "the accounting is to extend to the earliest possible date." *See* Tribes' Bases at 33 (quoting Pub.L. No. 101-512 104 Stat. at 1929 ("until the funds held in trust for all such tribes or individuals have been audited and reconciled to the earliest possible date")). Under the canons of statutory construction, this language, while not dispositive, is intrinsic evidence that may assist the court in interpreting the overall context of the legislation. *See* 2A Singer, *supra,* § 47.02 at 211-12.[7]

With respect to the types of claims covered by the Acts, plaintiffs argue that the language "any claim" in the Acts "could not be broader." Pls.' Resp. at 12. Plaintiffs also argue that the plain meaning of the term "accounting" is not limited to bookkeeping claims; rather, the term is a

[7] Plaintiffs cite no legislative history that applies exclusively to their argument that the Acts preserve previously time-barred claims. Plaintiffs' arguments based on legislative history are discussed below in relation to the types of claims that Congress intended to be within the purview of the Acts.

condition precedent to accrual of any of its claims, including trust management claims. *Id.* at 12. Arguing for a broad interpretation of the term accounting, plaintiffs highlight a Black's Law Dictionary definition of "accounting" as a "report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, and the probate court." *Id.* (quoting Black's Law Dictionary 19 (7th ed.1999)). Plaintiffs contend that Congress' use of the phrases "loss to or mismanagement of trust funds" and "such funds from which the beneficiary can determine whether there has been a loss" in the statute indicates that the United States is under a trust obligation to provide the Tribes with, "in essence, a determination of accounts receivable." Pls.' Resp. at 12.

Plaintiffs also suggest that legislative history of the Acts relating to the improvement in trust accounting supports the Tribes' argument that the Acts pertain also to resource management claims. Plaintiffs argue that a reading that excludes resource management claims from the Acts' coverage is inconsistent with the remedial purpose of the legislation demonstrated by the Acts' legislative history. Pls. Resp. at 13. In support of this argument, plaintiffs cite H.R.Rep. No. 103-158, 103rd Cong., 1st Sess. (1993), a House report leading up to the passage of Pub.L. No. 103-138, 107 Stat. 1379 (1994), providing:

> With regard to the systems development effort, the Committee is aware that the General Accounting Office and the Intertribal Monitoring Association are analyzing *trust fund management functions* with the purpose of identifying functions that could be handled by an outside entity and those that should be conducted in house by the Bureau. This analysis is to include all Bureau and

> Departmental functions that affect trust accounts *including trust resource management, billing and collections,* investments, and accounting and reporting.

See Pls.' Resp. at 14 (quoting H.R.Rep. No. 103-158, at 55 (1993)).

Plaintiffs suggest also that (H.R.Rep. No. 102-499, 102nd Cong., 2d. Sess.1992) demonstrates congressional awareness of and overall discontent with "the United States' failure to lease lands, to reissue leases, to obtain fair market value, to collect delinquent rents, and to collect interest on late rental payment as part of the financial management problems." Pls.' Resp. at 14 (citing H.R.Rep. No. 102-499, at 9 (1992)); *see also* Tribes' Bases at 36.

The court notes that H.R.Rep. No. 102-499 is a general report that was compiled as part of the broader package of legislation aimed at reforming the government's discharge of its Indian trust responsibilities. *See* H.R.Rep. No. 102-499, at 1-5 (1992). This general report does not specifically deal with the adoption of any of the language in the Acts. Plaintiffs' citations to H.R.Rep. No. 102-499, therefore, do not assist the court in determining the meaning of the language contained in the Acts. However, H.R.Rep. No. 102-499 does provide general contextual support for plaintiffs' argument that the Acts are part of a broader remedial effort designed to alleviate long-standing problems associated with Indian trust management.

4. Effect of the Acts

Defendant urges that the Acts be viewed as waivers of sovereign immunity and their scope interpreted in a strictly limited manner. Def.'s Mot. at 7. Plaintiffs urge that the Acts be viewed as part of a remedial effort by Congress on behalf of tribes and interpreted broadly to support a wider congressional program to redress breaches of trust. Pl.'s Reply at 13-14. The court believes that the parties' general approaches, while relevant, are (particularly in the case of defendant's briefing) insufficiently focused on the most basic principle of statutory interpretation, the plain meaning of the statute. *See* 2A Singer, *supra,* § 46.01, at 113-129; *Consumer Prod. Safety Comm'n,* 447 U.S. at 108, 100 S.Ct. 2051 ("[T]he starting point for interpreting a statute is the language of the statute itself.").

With respect to the reach of the Acts back in time to preserve claims, the court finds that the words "the statute of limitations shall not commence to run on any claim . . . until the affected tribe . . . has been furnished with the accounting of such funds from which the beneficiary can determine whether there has been a loss . . ." operate to defer the accrual of "any claim . . . until . . . the accounting [is provided]." The court finds absolutely no ambiguity in the words of the statute. While both parties refer to the Acts as "tolling" enactments, the plain meaning of the text is that a claim within the scope of the Acts does not accrue until the accounting described in the Acts

– that is, the accounting "concerning losses to or mismanagement of trust funds" – is provided.[8]

The statutory phrase "notwithstanding any other provision of law" appears to the court, as it does to plaintiffs, fully adequate to signal congressional awareness of the statutory framework, specifically 28 U.S.C. § 2501, and a corresponding determination on the part of Congress to preserve claims "notwithstanding" that framework. *See, e.g., Ridgway,* 454 U.S. at 73 n. 5, 102 S.Ct. 49.

This approach is consistent with judicial interpretation of a similarly lengthy period of claim preservation afforded by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401 (1994),[9] notwithstanding the generally applicable statute of limitations contained in 28 U.S.C. § 2401 and the context of sovereign immunity. Under the FTCA, a tort claim against the United States is barred "unless action is begun within six months . . . of notice of a final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). However, the "failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant *any time thereafter,* be deemed a final denial of the claim." 28 U.S.C. § 2675(a) (emphasis added). Most courts construing this

[8] The distinction between "tolling" and "accrual" is evident in the definition of the words. "Accrue" is "[t]o come into existence as an enforceable claim or right." Black's Law Dictionary 21 (7th ed.1999). "The term accrue in the context of a cause of action means to arrive to commence," *id.,* whereas, a "tolling statute" is defined as a "law that interrupts the running of a statute of limitations in certain situations. . . ." *Id.* at 1495. *See generally,* 1 Calvin W. Corman, *Limitations on Actions* § 6.1, at 370-71 (1991) (Corman) *and* 2 Corman § 8.2, at 2-3.

[9] The court notes that this language was added to the statute in 1966 by Pub.L. No. 86-238, § 1(3), 73 Stat. 472 (July 18, 1966).

statute have found that if no final determination is rendered by the agency within six months after a claim is filed, the option to bring suit remains with the claimant and there is no time limitation on when that claimant can bring suit. *See Conn v. United States,* 867 F.2d 916, 918-19 (6th Cir.1989), *Parker v. United States,* 935 F.2d 176, 178 (9th Cir.1991) ("[Claimant] may institute his FTCA claim 'at any time.' ").

In arriving at that interpretation, the courts looked first at the plain meaning of the statute. In *Conn v. United States,* for example, the court found that "section 2675(a) *expressly provides* that if the agency fails to finally dispose of the claim within six months after filing . . . [the claimant may exercise the option to bring suit] *at any time* after the six months has expired and there has been no [final] denial." 867 F.2d 916, 920-21 (6th Cir.1989) (emphasis added). The *Conn* court found that its interpretation did not place an unreasonable burden on administrative agencies. *Id.* at 921. "To avoid problems, an agency can simply deny the claim in such a manner as comports with [the applicable law] and thereby cause the six-month period to begin to run." *Id.* The power to begin the running of the FTCA limitation statute rests directly in the hands of the agency, similarly, defendant here has the sole power to begin the running of the statute by furnishing an accounting in accordance with the Acts.[10]

[10] In FTCA litigation in the Eighth Circuit, the government conceded that, in accordance with the plain meaning of the statute, there is no time limit for filing an FTCA action when an administrative claim is deemed to be denied under 28 U.S.C. § 2675(a) (1988) by virtue of an agency's failure to finally dispose of the claims within six months. *Taumby v. United States,* 919 F.2d 69, 70 (8th Cir.1990) (on rehearing).

The Court of Appeals for the Third Circuit has observed that, given the remedial nature of the FTCA, it is "'illogical, if not inequitable' to construe to the detriment of plaintiffs a provision designed to benefit them." *Pascale v. United States,* 998 F.2d 186, 190 (3rd Cir.1993) (quoting *Hannon v. United States Postal Service,* 701 F.Supp. 386, 389 (E.D.N.Y.1988)). "It would be ironic if a provision designed to permit a claimant to pursue [its] remedy where the appropriate federal agency is dilatory . . . would, instead, defeat [its] claim where the government delays. . . ." *Id.* at 192. Given the remedial nature of the Acts, that observation appears applicable to this case as well.

This approach is also consistent with Indian trust doctrine. When the government exercises some control over the management of Indian resources, a trust relationship is created. *See generally United States v. Mitchell,* 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (*Mitchell I*) and 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*); *Navajo Nation v. United States,* 263 F.3d 1325, 1329 (Fed.Cir.2001); *White Mountain Apache Tribe v. United States,* 249 F.3d 1364, 1377 (Fed.Cir.2001). "[W]hen the United States is assigned control of the management of Indian resources and the duty to manage those resources, there is created a full fiduciary relationship with respect to that management, including all appurtenant trustee duties, obligations, and liabilities." *Navajo Nation,* 263 F.3d at 1329. This fiduciary duty exists "even when the government has less than total control of management of the resources. . . ." *Id.* 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. 249 F.3d at 1378.

With respect to the types of claims preserved by the Acts, the court finds that the Acts cover claims both for monies received in trust by defendant and thereafter mismanaged and to "losses to" the trust, including monies that should have been received by the trust but were not received because of mismanagement of the Tribes' mineral and other assets. The court's conclusion is based on the language of the Acts. The Acts preserve claims "concerning losses to or mismanagement of trust funds. . . ." Pub.L. No. 106-291, 114 Stat. 922, 939 (2000).

The use by Congress of the disjunctive "or" between the phrase "losses to" and the phrase "management of" the Tribes' trust funds indicates two different types of fiduciary breaches as to which Congress intended to preserve claims. It is obvious that "mismanagement of trust funds" is a particular type of fiduciary breach which would result in losses from the money already received in trust. In order to give meaning to the disjunctive phrase "losses to . . . trust funds," the court concludes that Congress thereby indicated its intent to include within the scope of the Acts claims for monies that should have been received by the trust but were not received because of defendant's breach of its trust duty to "make the trust property productive" with respect to the Tribes' mineral and other assets. *See Restatement (Second) of Trusts* § 181 (1992) ("[T]rustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality."); *see also id.* § 176 (1959) (duty to use reasonable care and skill to preserve the trust property); *Id.* § 174 (1959) (duty to exercise

reasonable care and skill); *Id.* § 172 (1959) ("[T]rustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust"). If Congress had wished to limit the claims in the manner defendant suggests, it surely would have said "losses from mismanagement of trust funds" or some similar language more apt to that limited purpose.

Defendant's contrary view requires that the court focus exclusively on the words "mismanagement of trust funds." That approach appears to the court to be in conflict with the rule of statutory constructions that all words in a statute are to be given meaning. *See* 2A Singer, *supra,* § 46.06, at 181-196 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.").

Although the court believes that the types of claims covered by the Acts can be discerned from the Acts' text itself, the court addresses briefly the policy arguments advanced by the parties.

In response to defendant's argument that the Acts should not be read to revive "stale" claims, the court notes that the apparent purpose of the Acts is to preserve claims otherwise stale. The court also notes that Congress has not shown itself at all unwilling to address and provide remedies for tribes even when the grievances to be redressed arose in the earliest days of this country, implicating problems of proof reaching back to the use and occupancy of aboriginal lands in centuries before Western explorations – matters potentially more complex and greatly more remote in time than the evidence in this case. *See, e.g.,* Pub.L. No. 104-198, 110 Stat. 2418 at 418 (September 18, 1996).

The court's interpretation does not mean, of course, that the phrase "losses to . . . trust funds" in the Acts encompasses every possible fiduciary breach that could be complained of. The phrase points to the amounts of money that should have been received in trust if the trustee had performed its duties. The plaintiffs continue to carry the burden of proof as to the existence of losses within the scope of the Acts.

III. Conclusion

For the foregoing reasons, defendant's motion is DENIED. Evidence of "losses to or mismanagement of trust funds" may be discovered and offered at trial with respect to the period 1946-1973.

IT IS SO ORDERED.

United States Court of Appeals
for the Federal Circuit

03-5036, -5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff-Cross Appellant,

and

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 79-CV-4581 and 79-CV-4591

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED-IN-PART, REVERSED and REMANDED.

ENTERED BY ORDER OF THE COURT

DATED APR -7 2004 /s/ Jan Horbaly/BS
Jan Horbaly, Clerk

ISSUED AS A MANDATE: SEP 2 2004

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5036, -5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff/Cross-Appellant,

and

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff/Cross-Appellant,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

(Filed Aug. 26, 2004)

Before RADER, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the CROSS-APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 2, 2004.

FOR THE COURT,

/s/ Jan Horbaly/AV
Jan Horbaly
Clerk

Dated: August 26, 2004

cc: Robert H. Oakley
Steven D. Gordon, Richard M. Berley
Jeanne S. Whiteing, Melody L. McCoy

SHOSHONE INDIAN TRIBE V US, 03-5036, -5037
(CFC – 79-CV-4581)

* *
* Note: Pursuant to Fed. Cir. R. 47.6, this order is not *
* citable as precedent. It is a public record. *
* *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5036, -5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff/Cross-Appellant,

and

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION,

Plaintiff/Cross-Appellant,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

(Filed Aug. 26, 2004)

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the CROSS-APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 2, 2004.

FOR THE COURT,

/s/ Jan Horbaly/AV
Jan Horbaly
Clerk

Dated: August 26, 2004

cc: Robert H. Oakley
Steven D. Gordon, Richard M. Berley
Jeanne S. Whiteing, Melody L. McCoy

SHOSHONE INDIAN TRIBE V US, 03-5036, -5037
(CFC – 79-CV-4581)

* *
* Note: Pursuant to Fed. Cir. R. 47.6, this order is not *
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* *