No. 04-929

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPAHO TRIBE OF THE WIND RIVER RESERVATION

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether provisions contained in appropriations Acts for the Department of Interior since 1990: (a) preserve claims relating to losses to or mismanagement of Indian trust funds which might otherwise have expired prior to passage of the Acts; or (b) cover claims that the Government failed to collect revenues due under tribal mineral agreements and deposit them into the relevant tribal trust accounts.

2. Whether the respondent Tribes can recover, as an element of damages, interest on funds that the United States ought to have collected on their behalf but that were not deposited into tribal trust accounts.

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INTRODUCTION

Respondents Shoshone Tribe and Arapaho Tribe (collectively, the "Tribes") respectfully request that this Court deny the Government's petition for writ of certiorari seeking review of certain aspects of the Federal Circuit's opinion in this case.[1]

STATEMENT OF THE CASE

Although the Government's statement of the case and the decisions below is generally accurate, its summary of the Federal Circuit's decision is incorrect in one important respect. The Government wrongly asserts that the court held that the Tribes were entitled to prejudgment interest. To the contrary, the court carefully explained that "[t]his decision . . . does not award pre-judgment interest, but rather awards interest as a part of the damages sustained by the Government's breach [of fiduciary duty]." Pet. App. at 23a n.7.

[1] The Tribes have filed their own petition for a writ of certiorari seeking review of the Federal Circuit's decision insofar as it limits the appropriations Acts to claims alleging failures to collect payments due under Tribal contracts, deposit collected monies into interest-bearing accounts, or assess penalties against lessees for late payments. *See Eastern Shoshone Tribe of the Wind River Reservation, et al. v. United States*, petition for cert. pending, No. 04-731 (filed Nov. 24, 2004).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Ruled that a Series of Interior Appropriations Acts Preserve Indian Claims Until an Accounting is Provided, and that the Acts Are Not Limited to Claims Alleging Government Mishandling of Monies After Deposit into a Trust Account.

The court of appeals correctly ruled that a series of appropriations acts for the Department of the Interior ("Acts"), the most recent of which is the Department of the Interior and Related Agencies Appropriations Act of 2004, Pub. L. No. 108-108, 117 Stat. 1241, defer the commencement of the statute of limitations on Indian claims concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with an adequate accounting. Consequently, where no such accounting has yet been provided, the Acts preserve all breach of trust claims within their purview, including those as to which the six-year limitations period established by 28 U.S.C. § 2501 otherwise might have expired. Further, the court correctly ruled that the Acts were not limited to claims for mishandling of monies contained in Tribal trust accounts, but also cover claims based on the Government's wrongful failure to collect and deposit money owed to the Tribes under mineral leases.

A. The Acts Defer Commencement of the Statute of Limitations on Indian Breach of Trust Claims and Do Not Simply Toll the Statute of Limitations.

The Government takes the untenable position that the Acts should be interpreted as mere "tolling" provisions for limitations purposes. Both the Court of Federal Claims

("CFC") and the Federal Circuit rejected this contention, and concluded that the Acts are instead "accrual" provisions that defer commencement of the limitations period for Indian breach of trust claims. This conclusion is compelled by the plain language of the Acts:

> [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.[2]

The court of appeals, like the CFC, saw "no ambiguity in the language used by Congress," and held that the "clear intent of the Act is that the statute will not begin to run on a tribe's claims until an accounting is completed." Pet. App. 13a.[3] In a straightforward analysis, the court of appeals held, first, that "notwithstanding any other provision of law," connotes a legislative intent to displace any other provision of law that is contrary to the Acts, including the otherwise applicable statute of limitations. Pet. App. 12a. Second, "shall not commence to run" unambiguously indicates that Congress wants commencement of the statute of limitations deferred until an accounting is provided. Pet. App. 13a. This analysis is unimpeachable.

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[2] *See* Pet. at 2 & n.1.

[3] The Government acknowledges, as it must, that Congress can expand limitations periods for claims against the Government, make such changes retroactive, and revive lapsed claims. Pet. 13-14, n.6. Thus, the only issue here is whether Congress intended to do so.

Nonetheless, the Government continues to argue that the Acts are mere tolling provisions which do not revive "stale" claims for which the limitations period may have already expired when the first of the Acts was passed. But this argument assumes that the statute of limitations trumps the Acts in derogation of the explicit congressional mandate that the Acts shall govern "notwithstanding any other provision of law."

The Acts cannot reasonably be construed as tolling provisions. "Toll" means "to stop the running of" a statute of limitations, Black's Law Dictionary (8th ed. 2004), and relates to limitations periods that have already commenced. In the Acts, Congress eschewed the language of interruption by providing that the statute of limitations "shall not *commence* to run." Congress announced, clearly and repeatedly, that until the Government as trustee furnishes a proper accounting to its Indian wards, it will have no statute of limitations defense to claims within the Acts' purview. The court of appeals correctly reasoned that Congress's decision to use "shall not commence to run" instead of "tolls" was determinative. Pet. App. 12a-13a, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12, 436 (1987).

The Government argues that the phrase "shall not commence to run" indicates that Congress did not intend the Acts to apply retroactively. Pet. at 16 n.7. This argument fails for multiple reasons. Even were "shall" to be construed as a future tense verb, as the Government suggests, it would refer not to future *claims* but to the future *furnishing of an accounting* which will commence the running of the statute of limitations. In the context of the Acts, however, "shall" is not used as a future tense verb, but instead denotes a duty or a requirement. *See* Black's Law Dictionary (8th ed. 2004). "Shall not," as used in the Acts, is a statutory command.

More fundamentally, the Government's argument founders upon the language of the Acts, which covers "any claim" without limitation and specifically includes "*any claim in litigation pending on the date of the enactment of this Act.*" The Acts' application to pending litigation, such as the Tribes' claims here, necessarily is retroactive. The Government contends that this language merely extends the Acts' "tolling effect" to filed claims that were not time-barred when filed, but this construction is nonsensical and would render the phrase superfluous. The six-year statute of limitations applicable to claims against the United States is measured as of the date the complaint or petition is filed. 28 U.S.C. § 2501. There is no need to further "toll" a claim that was timely when it was filed. Rather, the purpose of this language is to make clear that the Acts apply to all pending claims regardless of whether they would otherwise be considered timely.[4]

The court of appeals also noted that the Acts' approach to limitations is consistent with general trust principles, under which "it is . . . 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." Pet. App. 15a, citing 76 *Am.Jur.2d*

[4] The Government contends that there would have been no need to add the proviso for pending claims in 1993 if the original statutory language covering "all claims" had been intended to be retroactive. Absent this clarification, however, there might have been some question as to whether the Acts applied to pending actions. *See United States v. St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 4 (1926) (refusing to assume that Congress intended an amendment to a statute of limitations to apply to claims on which suits were then pending).

Trusts § 440 (2000); *McDonald v. First Nat'l Bank of Boston*, 968 F.Supp. 9, 14 (D.Mass.1997).[5] In addition, this approach comports with "simple logic – how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" Pet. App. 13a-14a. The Government argues that the provision of an accounting is not "an invariable prerequisite" to the commencement of the limitations period in breach of trust actions and that sometimes the beneficiary knew or should have known of the breach before an accounting was rendered. Pet. 18-19. The short answer to this argument is that Congress explicitly adopted a categorical approach in the Acts. It made clear that, for any claim concerning losses to or mismanagement of Indian trust funds, an accounting from which the beneficiary can determine whether there has been a loss *is* required before the limitations period will commence.[6]

[5] Thus, even apart from the Acts, the statute of limitations may not have commenced running on the Tribes' claims under the common law of trusts.

[6] The Government complains that this limitations rule may revive many old claims and substantially increase the potential liability and litigation burdens of the United States. Pet. 9-11. This, however, is a policy choice that Congress has made to honor its legal and moral obligations to Native Americans. If the Government wishes to avoid continuing liability for historic trust fund mismanagement, it can trigger commencement of the limitations period on Indian claims at any time by furnishing an accounting to the affected tribes or individuals. At this juncture, some 14 years after passage of the first of the Acts, the Government's continued susceptibility to old claims is attributable to its ongoing dereliction of trust responsibility by failing to provide accountings.

B. The Acts Are Not Limited to Claims for Government Mishandling of Monies After Deposit Into a Trust Account.

The Government also presses the argument, unanimously rejected below, that the Acts apply only to claims for mishandling of monies actually contained in Indian trust accounts. The difficulty with this position is that the Acts cover not only claims for "mismanagement of trust funds" but also any claims concerning "losses to" trust funds. Both lower courts rejected the Government's construction because it effectively reads the provision for "losses to" trust funds out of the Acts, making it entirely redundant. This interpretation conflicts with accepted rules of statutory construction requiring that meaning be attributed to all words in the Acts, if possible. Pet. App. 17a, 51a-53a.

Based on Congress' use of the disjunctive "or" between the two phrases "losses to" and "management of" trust funds, both lower courts reasoned that the Acts are intended to preserve claims for two different types of fiduciary breaches. 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. The CFC 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." Pet. App. 52a. The court of appeals took a narrower view, construing "losses to" trust funds to cover losses resulting from the Government failure to timely collect amounts due and owing to the Tribes under

their mineral leases, which it characterizes as accounts receivable. Pet. App. 18a-21a.[7]

The central flaw in the Government's argument that the Acts should be limited to claims for mishandling of collected funds is that it does not and cannot explain why the provision for "losses to" trust funds was included in the Acts. The Government contends, in essence, that Congress repeatedly wasted its breath by covering claims for "losses to" trust funds in addition to claims for "mismanagement of" trust funds.

There are other flaws in the Government's argument, such as contending that its failure to collect and deposit monies owed under the Tribes' mineral leases is not properly regarded as a "loss" to the tribal trust accounts. The Government regularly takes the opposite position when it suffers this sort of "loss," for example when there is a failure to pay federal self-employment or withholding taxes. *See United States v. Twieg*, 238 F.3d 930, 932 (7th Cir. 2001) (failure to pay taxes results in loss to Government); *Winter v. United States*, 196 F.3d 339, 344 (2d Cir. 1999) (same). Further, 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). Accordingly, the conclusion is inescapable that the Government's failure to collect or deposit monies owed to the Tribes results in a "loss" to the tribal trust funds.

[7] The Tribes believe that the CFC's broader construction is correct. This is the subject of the Tribes' pending petition for certiorari. *See* n.1, *supra*.

Moreover, the ultimate question is what Congress intended when it drafted the Acts to cover claims for "losses to" trust funds. Significantly, the legislative history of the appropriations legislation containing the 1994 version of the Acts demonstrates that Congress viewed "trust resource management" and "billings and collections" as "trust fund management functions" that directly affect Indian trust accounts:

> 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 collections, investments, and accounting and reporting.*

H.R. Rep. No. 103-158, at 55 (1993) (emphasis added). Thus, when Congress passed the Acts, it directly linked resource management and billings and collections to the resulting funds in Indian trust accounts. In light of this linkage, the Government's argument that the Acts do not cover claims for wrongful failure to collect or deposit monies owed the Tribes is entirely unpersuasive.

Finally, the Government argues that its failure to timely collect and deposit amounts due the Tribes is outside the ambit of the Acts because it is not the sort of loss that would be uncovered by an accounting. According to the Government, the only loss that an accounting would reveal is a dissipation of funds that at one time were in a

tribal trust account. In making this argument, the Government takes a myopic view of an accounting and how it is used by a beneficiary to determine whether or not there has been a loss. As the court of appeals explained, a clear and accurate accounting by a trustee will show what he has received, what he has expended, what gains have accrued, and what losses have resulted. The beneficiary then can compare the results of this accounting with pertinent mineral leases to ascertain what income was required to be received by the Government but was either not received or was received late. Pet. App. at 21a.[8]

The Government's suggestion that its narrow definition of an accounting is reinforced by the American Indian Trust Fund Management Reform Act of 1994 is incorrect. To the contrary, that Act requires the Secretary of the Interior to provide comprehensive, meaningful accountings to Indian tribes and individuals that will enable them to determine whether there has been either mismanagement of, or losses to, their trust accounts. It mandates quarterly

[8] Even if one adopts the Government's narrow definition of an accounting, there is no basis for limiting the sorts of claims covered by the Acts based on the utility of an accounting in proving such claims. In fact, it is impossible for a beneficiary to establish *any* claim for mismanagement of, or loss to, trust funds without having an accounting of money held in the trust account as a baseline for calculating damages. At the same time, an accounting of money held in the tribal accounts will seldom be sufficient by itself to prove either sort of claim – resort must be had to other evidence to establish whether there has been a breach of duty and, if so, what the amount of damages are. For example, an accounting of money held in the account will not reveal whether trust funds have been mismanaged after receipt by making expenditures for improper purposes or failing to properly invest the funds and obtain an appropriate return. Additional information is needed to complete the picture, just as in the case of claims for losses to trust funds based on failures to collect accounts receivable.

statements for Indian trust accounts that identify (1) the *source, type, and status* of the funds; (2) the beginning balance; (3) the gains and losses; (4) receipts and disbursements; and (5) the ending balance. 25 U.S.C. § 4011(b) (emphasis added). Moreover, it mandates "integration of . . . trust funds accounting, and asset management systems," 25 U.S.C. § 4043(c)(4), so that Indian landholders are provided with "accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources." *Id. at* § 4043(c)(4)(B)(ii). In enacting this legislation, Congress *criticized* the Government for undertaking trust fund reform piecemeal, stating that what was necessary was a "comprehensive strategic plan for all phases of the trust management business cycle, including . . . collecting, accounting for, and investing trust fund revenues." H.R. Rep. 103-778, at 14-15 (1994). Contrary to the Government's contention, Congress's concerns in mandating trust fund accountings – and deferring Indian claims for breach of trust until receipt of such accountings – were *not* limited to care of collected funds.

II. The Court of Appeals Correctly Ruled that the Tribes Are Entitled to Recover as Damages the Interest that Should Have Been Earned on Monies the Government Failed to Collect for the Tribes' Resources.

The court of appeals correctly ruled that the Tribes are entitled to recover as damages the interest that should have been earned on payments the Government failed to collect for the Tribes' minerals in breach of its trust responsibilities. This issue is controlled by the Court's

decision in *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (1968), which is directly on point.

A. The Government Has a Statutory Obligation to Invest and Earn Interest On All Revenues Derived From the Tribes' Natural Resources.

The Tribes' damages claim for lost interest is predicated upon the Government's statutory obligation to invest and earn interest on all revenues derived from the Tribes' natural resources. In 1947, Congress enacted special legislation mandating the establishment of trust funds for the benefit of the two Tribes. 25 U.S.C. §§ 611-13. Congress directed that, henceforth, "all future revenues and receipts derived from the Wind River Reservation under any and all laws" were to be divided between the two Tribes and placed in their respective trust accounts where interest was to accrue on the principal at an annual rate of 4%. 25 U.S.C. § 612. This provision explicitly obligates the Government to invest the proceeds received for the Tribes' mineral assets in interest-bearing trust accounts.[9]

Furthermore, the same obligation to invest and earn interest on all revenues derived from the Tribes' natural resources arises under several statutes that apply generally to Indian revenues held by the Government. 25 U.S.C. § 155 requires that "[a]ll miscellaneous revenues derived from Indian reservations . . . which are not required by

[9] The legislative history of Section 612 shows that Congress was well aware that the majority of funds to be placed in these interest-bearing trust accounts would be derived from sales of the Tribes' mineral resources. H.R. Rep. No. 80-172, at 2 (1947); S. Rep. No. 80-117, at 2 (1947).

existing law to be otherwise disposed of, shall be covered into the Treasury of the United States[.]" Several other statutes, 25 U.S.C. §§ 161a, 161b, and 162a, require the Government to earn a return on such trust funds.[10]

B. The Tribes Are Entitled to Recover Lost Interest As an Element of Damages.

Because the Government has an obligation to invest and earn interest on all revenues derived from the Tribes' natural resources, the full measure of the Tribes' damages for the Government's wrongful failure to collect funds for those resources includes the additional amount that should have been earned as interest on those funds. The Government's liability for such lost interest is firmly established by the decisions of this Court. *Peoria Tribe*, 390 U.S. at 471-73; *United States v. Blackfeather*, 155 U.S. 180, 192-93 (1894).

[10] 25 U.S.C. § 161a provides that "[a]ll funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities, . . . bearing interest at rates determined by the Secretary of the Treasury[.]"

Section 161b provides that all tribal funds included in the "Indian Money, proceeds of Labor" fund "shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930."

Section 162a authorizes the Secretary of the Interior to withdraw Indian trust funds from the United States Treasury and to deposit them in banks where the United States "is not obligated by law to pay interest at higher rates than can be procured from the banks."

The issue presented here is not, as the Government contends, whether the Tribes are entitled to "prejudgment interest" on their claims. The Tribes do not seek an award of prejudgment interest *in addition to* damages; rather, they seek their lost investment return *as part of* their damages. "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). It is compensation for the money that the *plaintiff*, not the defendant, might have earned on his lost funds had the wrongful conduct not occurred. In contrast, this case involves a breach of fiduciary duty where the *defendant* had an obligation to invest the funds in issue and obtain a return on them for the benefit of the plaintiffs. The lost investment return is part and parcel of the defendant's breach of duty and of the plaintiffs' consequent damages.

The Court recognized this distinction in *Peoria Tribe*. In that case, a treaty required certain tribal lands to be sold at public auction by the Government and the proceeds either disbursed to the tribe or invested in bonds until the proceeds were paid over. The Government breached its obligations by selling tribal lands in private sales at depressed prices. The Court ruled that the tribe was entitled to recover not only the shortfall in the prices obtained for its lands, but also the lost investment earnings on those monies. The Court rejected the Government's contention that an award of interest to the tribe was precluded by the general rule that the United States is not liable for prejudgment interest. It explained that "[t]he issue, rather, concerns the measure of damages for the

treaty's violation in the light of the Government's obligations under that treaty." 390 U.S. at 471.

More specifically, the Court framed the issue as "whether the obligation of the United States to invest unpaid proceeds [*i.e.* proceeds from land sales not yet paid over to the plaintiff tribe] applies to proceeds which, by virtue of the United States' violation of the treaty, were never in fact received." *Id.* Answering this question in the affirmative, the Court held the Government liable for its failure to invest the proceeds that would have been received had it not violated the treaty. *Id.* at 473. The same result obtains here. Because the Government has a duty to invest all revenues received for the Tribes' assets, it is liable not only for the lost revenues it failed to collect for the Tribes' minerals, but also for the interest that should have been earned on those revenues.

Since the Tribes seek lost interest as damages for the Government's breach of duties imposed by statutes and regulations, the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, provide the United States' consent to suit if the statutes or regulations at issue "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) ("*Mitchell II*") (*quoting United States v. Testan*, 424 U.S. 392, 400 (1976)).[11] A source of substantive law is

[11] In contrast, the sovereign immunity cases cited by the Government addressed the issue of "prejudgment interest" rather than interest as a component of damages. Moreover, those cases did not involve any specific requirement that the Government pay interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the issue was whether language in Title VII of the Civil Rights Act of 1964 providing that "the United States shall be liable for costs the same as a private person" was

(Continued on following page)

money-mandating if, either expressly or by implication, it entrusts the Government with sufficient "control" or "supervision" over Indian property to justify a conclusion that Congress intended to impose an enforceable fiduciary obligation on the part of the Government in managing that property. *Id.* at 225. This "fair inference" rule requires simply that the relevant statute or regulation "be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

In this case, the applicable tribal investment statutes impose an explicit duty on the Government to invest all revenues and receipts from the Reservation and to pay interest on those funds. 25 U.S.C. § 612;[12] *see also* 25

sufficient to waive the Government's sovereign immunity against paying interest on an attorneys' fee award. In *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), the issue was whether a statute and lease providing for "just compensation" in the event the Government took over a hotel was sufficient to waive the Government's sovereign immunity against paying interest.

[12] The CFC erroneously read 25 U.S.C. § 612 to contemplate post-judgment interest but not prejudgment interest because the statute specifically mentions the former but not the latter. The provision covering the "proceeds from any judgment" was not part of the original 1947 statute but was added some eleven years later in 1958. Pub. L. No. 85-610, 72 Stat. 541, 626 (1958). The 1958 amendment provided a mechanism for management and distribution of judgment funds, obviating the need for specific legislation each time a judgment was received. From the outset, the statute has obliged the Government to invest all revenues and receipts derived from the Reservation for the Tribes' benefit, thereby making the loss of interest an element of damages for any tribal claim accruing thereafter and so obviating any need for prejudgment interest on such claims. The 1958 amendment ensured that the Tribes also would receive post-judgment interest on all judgments they obtained.

U.S.C. §§ 155, 161a, 161b, 162a. The statutory language is mandatory: money "shall be" deposited and interest "shall accrue." There can be no dispute as to Congressional intent to impose an enforceable fiduciary duty on the Government with respect to the management of revenues derived from the Tribes' natural resources. Thus, when the Government breaches that duty, it is liable to the Tribes for the resulting damages.

The Government struggles in vain to distinguish this case from *Peoria Tribe*. First, it makes the red herring argument that the court of appeals erred in concluding that the United States has a legal duty to collect funds owed the Tribes from the sale of their natural resources. The circuit court made no such ruling. It simply noted that the Government often has a duty, by contract or pursuant to 25 C.F.R. § 211.40, to collect lease proceeds. Whether, in this case, the Government had a duty to collect funds for the Tribes' sand and gravel resources was not an issue on appeal because the parties had settled that claim for $2.75 million and preserved only the issue whether the Tribes were entitled to additional damages for lost interest on the uncollected funds. Thus, the premise for this appeal – which the Government is not free to dispute – is that the Government failed to collect monies for the Tribes' mineral assets in breach of its fiduciary duties. The issue presented is whether the Government is also liable for the lost interest on those funds. The court of appeals correctly concluded that 25 U.S.C. § 612 and the general trust fund provisions impose liability in these circumstances.

Second, the Government argues that, in *Peoria Tribe*, the Government's obligation to sell land and its duty to pay interest on the sale proceeds both arose from the same source of law, *i.e.* the treaty, whereas here the

Government's duty to manage the Tribes' mineral resources and its duty to invest and pay interest on the proceeds from those resources involve different statutes and what the Government contends are two "legally distinct trusts:" (1) tribal land and other natural resources, and (2) tribal funds held in Treasury accounts.[13] This distinction is spurious. *Peoria Tribe* does not require that the Government's obligation to invest tribal funds arise from the same source of law as its duty to collect those funds in the first instance. To the contrary, it is fundamental "that all acts in pari materia are to be taken together, as if they were one law." *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845). Furthermore, 25 U.S.C. § 612 explicitly mandates the investment of "all revenues and receipts derived . . . *under any and all laws*." (emphasis added).

The issue here is the extent of the Government's liability to the Tribes for breach of fiduciary duty. To

[13] The Government cites no authority for its dubious contention that its stewardship of tribal lands and natural resources is a legally distinct trust from its stewardship of tribal funds. In fact, Congress regards the United States' various fiduciary obligations to Indians as being parts of an integrated whole. *See* 25 U.S.C. § 162a(d)(8), (defining the proper discharge of the Government's trust responsibilities for Indian trust funds to include "appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands"). Even if they are separate trusts, they are closely interrelated. 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).

resolve that issue, all sources of law establishing the Government's various duties to the Tribes must be considered together. Congress, in delineating the Government's fiduciary responsibilities towards an Indian tribe, is free to impose an obligation to invest tribal funds in separate legislation from other provisions obliging the Government to manage tribal lands and resources so as to generate income for the tribe.

Finally, the Government argues that *Peoria Tribe* is inapposite because it involved a treaty that must be construed in favor of the Indians rather than, as here, a statutory obligation. This is a distinction without a difference in deciding the Government's liability. An obligation is no less money-mandating on the Government because it is self-imposed through statute or regulation rather than being bargained for as part of a treaty.[14] Indeed, *Mitchell II* and virtually all of its progeny have involved duties imposed by statute or regulation rather than by treaty. Nor is there a difference in the interpretation of treaties and statutes where Indians are concerned – both are construed liberally in their favor. *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O'Connor, J., dissenting). Moreover, the statutory language at issue here is even stronger and more specific than the treaty language in *Peoria Tribe* in terms of spelling out the Government's duty to invest proceeds received for tribal resources. 25 U.S.C. § 612 provides that all future revenues and receipts derived from the

[14] The Government has long taken the position, based on the sixth article of the Constitution, that "treaties as well as statutes are the law of the land" and "stand upon the same level, and [are] of equal validity." 13 Op. Atty. Gen. 354 (1870).

Wind River Reservation shall be deposited in trust accounts that "shall accrue" interest at a rate of 4% per annum. There is no need for resort to a canon of construction in order to determine the meaning of this statutory command.

CONCLUSION

The Tribes respectfully request that the Government's petition for certiorari in this case be denied.

Respectfully submitted,

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