No. 01-1067

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WHITE MOUNTAIN APACHE TRIBE,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In 1960, Congress conveyed to the White Mountain Apache Tribe, in trust, "all right, title and interest of the United States" in the lands and improvements included in the former Fort Apache military post, later set aside as a site for the Theodore Roosevelt School, "subject to" the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose. Act of Mar. 18, 1960, Pub.L. No. 86-392, 74 Stat. 8.

The question presented is whether the United States has a fiduciary obligation to protect and maintain the Tribe's trust property during the Secretary of Interior's exclusive use and control thereof, the breach of which would give rise to a claim for money damages in the Court of Federal Claims.

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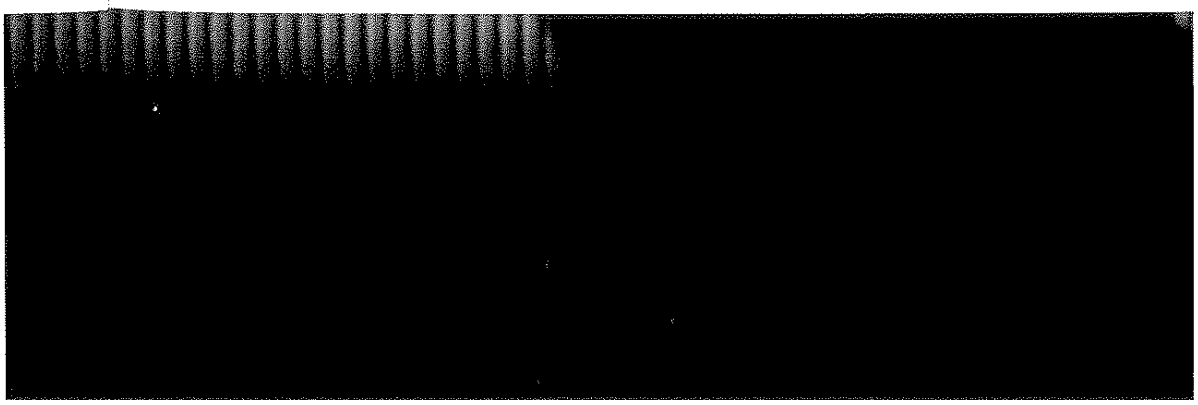

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STATUTORY PROVISIONS INVOLVED

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

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

2. Other pertinent statutory provisions — The Tucker Act, 28 U.S.C. § 1491(a), the Indian Tucker Act, 28 U.S.C. § 1505, and the Act of January 24, 1923 (42 Stat. 1187), codified at 25 U.S.C. § 277, are reproduced at Pet. App. 59a-60a.

STATEMENT OF THE CASE

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), which declared certain lands and improvements (the "property[1]") in trust for the White Mountain Apache Tribe (the "Tribe"),[2] obligates the United States to protect and maintain the property while under the Government's exclusive use and control.

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1. The 1960 Act conveyed and declared in trust for the Tribe, equitable (beneficial) title to 7,597 acres together with the improvements thereon.

2. The Tribe is a federally recognized Indian Tribe organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476.

I. Historical Background

1. The Tribe has occupied the White Mountains of east central Arizona since time immemorial. It originally occupied the much larger White Mountain Indian Reservation established for the Tribe in 1871, but now occupies the Fort Apache Indian Reservation,[3] set aside for the Tribe by Executive Order on June 7, 1897 (30 Stat. 64). (R.L. 9).

In 1877, President Grant removed 7,597 acres of land by Executive Order from the Tribe's Reservation and set it aside as a military reserve [Fort Apache]. The property remained a military reserve until 1922, when it was abandoned by the Army and transferred by Act of Congress to the Secretary of Interior with authorization to establish and maintain the abandoned post as an Indian boarding school, to be known as the Theodore Roosevelt Indian School.[4] The United States held fee simple title to the property from 1877 to March 17, 1960.

On March 18, 1960, Congress declared all right, title and interest of the United States in and to the property to be held in trust by the United States for the Tribe. The 1960 Act itself was a conveyance of equitable (beneficial) title to the Tribe "subject to" the right of the Secretary of Interior to use any part of the Tribe's trust property for administrative or school purposes for

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3. The Tribe has equitable (beneficial) title to the Fort Apache Indian Reservation comprised of some 1.63 million acres of trust land within the Tribe's former aboriginal territory.

4. 25 U.S.C. § 277, (42 Stat. 1187, c.a. January 24, 1923) provides:

> [T]he Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: *Provided*, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes. Pet. App. 59a.

The treaty obligation referred to in the 1923 Act was to the Navajo Tribe, but that obligation was terminated in 1933 and is not a factor in this case.

as long as needed for that purpose. R.L. 3, 11. The Senate Committee on Interior and Insular Affairs valued the property conveyed in trust to the Tribe at $141,000, the improvements at $495,980, roads and streets at $160,000, and irrigation laterals and ditches at $24,372, for a total property value of $821,352. R.L. 9.[5]

On November 18, 1965, the White Mountain Apache Tribal Council adopted a Resolution requesting the Secretary "to designate Fort Apache, including the military cemetery, as a national historic site." Pet. App. 39a. Eleven years later, on October 14, 1976, the United States National Park Service designated 288 acres of the former Fort Apache military post and Theodore Roosevelt School, including the buildings and other improvements, as a National Historic Site to be known as the Fort Apache Historic District and placed it on the National Register of Historic Places. Pet. App. 4a, n.5. In 1993, the Tribe adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore the Fort Apache Historic District. Pet. App. 4a, n.4. The trust property is a valuable economic asset for the Tribe. Pet. App. 4a. n.4, 25a. The Tribe has plans to use the property for commercial, governmental, cultural and housing purposes, and for tourism development, as Fort Apache has become an increasingly significant tourist attraction, and the Tribe has constructed a cultural museum within its boundaries.[6] Pet. App. 4a, n.4. In September 1997, Fort Apache was placed on the "1998 List of 100 Most Endangered Monuments" by the World Monuments Watch. Pet. App. 4a, n.5, 39a. Complaint, para. 15.[7]

5. The improvements include thirty-six buildings, a military cemetery, corrals, parade ground, streets, water tanks and utility infrastructure.

6. *See* Complaint, para. 34, Br. in Opp. 2, n.2, C.A. Reply Br. 3, and Tribe's Response to Motion to Dismiss, p. 13.

7. The Government's Brief, p. 4 [hereinafter "Br."], states, citing Pet. App. 3a, that "over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures (Cont'd)

In November 1998, the Tribe commissioned a professional engineering survey and assessment report (Schuman Report) to evaluate the condition of the subject buildings. The Schuman Report determined that it would cost the Tribe $13,973,732 to bring the buildings and other improvements into "compliance"[8] with the Secretary's own building code standards for historic buildings, the Uniform Conservation Building Code [UCBC], Pet. App. 4a (*See* Appendix A to Tribe's Complaint).

II. History of the Litigation

1. On March 18, 1999, the Tribe filed a Complaint for money damages against the United States in the Court of Federal Claims, alleging, *inter alia*, that the 1960 Act created a fiduciary obligation on the part of the United States to maintain, protect, repair and preserve the Tribe's property [trust corpus] during the Secretary of Interior's management, supervision, use and control of the property for administrative and school purposes, so that when the United States no longer needed the property for those purposes the Tribe would receive a protected and maintained trust corpus. (Compl. paras. 1, 32-33).

On June 1, 1999, the United States moved to dismiss the Tribe's Complaint for failure to state a claim and for lack of subject matter jurisdiction. It argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe,

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(Cont'd)
have been condemned or demolished." Procedurally, this case comes to the Court from the trial court's grant of a motion to dismiss. There is nothing in the record below to suggest that the environment is the cause of the buildings' current state of disrepair.

8. The Tribe does not allege that the Government must "refurbish" (Br. 5) or alter the property for any particular Tribal use. Nor does it seek to have the Government restore the buildings to their "Old West shape" or *pre*-1960 condition. Br. 26. *See* Complaint paras. 19-20. The Government also uses the term "rebuild" in reference to the Tribe's 1993 Master Plan. Br. 5, citing Pet. App. 4a, n.4. The word "rebuild" does not appear in Pet. App. 4a, n.4. The Tribe is seeking money damages to repair, not "rebuild" Fort Apache.

could fairly be interpreted as mandating the payment of compensation by the Government for its alleged mismanagement of the Tribe's trust property. Br. 6, Pet. App. 5a. The Court of Federal Claims agreed with the Government and dismissed the Tribe's complaint for failure to state a claim. Pet. App. 5a, 38a, 56a.

The court based its dismissal on its interpretation of *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). The court concluded that regardless of the Government's exclusive control over the property, the 1960 Act only created a limited or "bare" trust relationship between the Government and the Tribe similar to the bare trust created by the General Allotment Act of 1887, (24 Stat. 388, 25 U.S.C. § 331 *et seq.*) that was discussed by this Court in *Mitchell I*, 445 U.S. at 535, 546, 100 S. Ct. 1349, 1354.[9] Pet. App. 48a. The court concluded that the 1960 Act was for the Government's "benefit" and not that of the Tribe, and therefore the Government's control of the Tribe's trust property was insufficient to create a fiduciary relationship. Pet. App. 47a-48a. The court also agreed [with the United States] that because the 1960 Act did not *expressly* mandate the Government to generate income from the Tribe's trust property, the Government's control alone was insufficient to create a fiduciary duty to maintain or restore the buildings and improvements, the breach of which would give rise to a money claim. Pet. App. 47a. The court also concluded, citing the *Restatement of Property*, that the Tribe's interest in the property was analogous to that of a "contingent remainderman" and therefore the Tribe's remedy, if any, was injunctive relief, not money damages. Pet. App. 53a-54a.

2.a. The Court of Appeals for the Federal Circuit reversed and remanded. Pet. App. 1a-32a. The court found that the 1960

9. None of the Tribe's reservation trust lands have ever been subjected to the General Allotment Act, 25 U.S.C. § 331, *et seq.*

Act clearly created a trust.[10] It also concluded that the United States had a fiduciary obligation to the Tribe to protect and preserve the Tribe's trust property from "loss, damage or diminution in value" while under the Government's exclusive use and control and not only where a statute expressly or impliedly required the Government to generate income from Tribal trust resources, monies or property. *Id.* 14a-15a, 18a-25a. The court found that "[t]he language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship" and that

> to the extent that the government has actively used any part of the Tribe's trust property, and has done so in a manner where its control over the buildings it occupies is *essentially exclusive*, the portions of the property that have been so used can no longer be classified as being held in merely a '*bare trust*' under *Mitchell I*.

Id. 15a-17a, 31a. (emphasis added.) The court concluded that the Government had a fiduciary obligation to act reasonably to maintain and repair the trust property under its exclusive use and control. The court was also particularly aware of conflicts of interest, observing that it must be "particularly careful in scrutinizing the Government's actions" as the Government's statutory right to use the Tribe's trust property creates a "conflict of interest as to the fulfillment of that fiduciary obligation." *Id.* 23a. The court found that notwithstanding the Government's right to use the Tribe's property, the United States as trustee is required "to act with due regard" to the interests of the Tribe in the trust property, citing the *Restatement (Second) of Trusts*

10. "[A]ll of the necessary elements of a common law trust are present: a trustee (the United States), a beneficiary (the Tribe) and a trust corpus (the land and improvements held in trust)." Pet. App. 10a-11a. The court noted that "[b]oth the Tribe and the United States in their briefs agree that the 1960 Act creates a 'trust,'" but that "Inexplicably, at oral argument the Government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe." Pet. App. 10a-11a. n.7.

§ 232 (1959). *Id.* 23a-24a.[11] The court observed that it was well-established that once a fiduciary obligation exists by virtue of a governing statute, in this case the 1960 Act, courts may look to the common law of trusts [*Restatement (Second) of Trusts*] to help define the *nature* of that obligation, citing *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961 (use of *Restatement (Second) of Trust* and secondary authorities). *Id.* 19a.

The court held that the court of federal claims must assume that the purpose of the 1960 Act was entirely economic and thus the "reasonableness" of the Government's actions are to be "measured by the potential loss of economic value" to the Tribe. *Id.* 24a-25a. The court concluded that given the existence of a trust relationship and fiduciary obligations, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties, as it is well-established that a trustee is accountable in damages for breaches of trust, citing *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961 and the *Restatement of Trusts*. *Id.* 26a. Thus, if a breach of trust is proven by the Tribe, the United States, as trustee, could be chargeable with a loss or depreciation in value of the trust estate resulting from the breach of trust. *Id.* 26a.

The court of appeals rejected the court of federal claims' application of the *Restatement (First) of the Law of Property* (1936) to the Tribe's claim, observing that 'comments' to the *Restatement of Property* itself make it clear that the Restatement of Property is *not* applicable to a trust situation. *Id.* 27a. The court also concluded that even if the *Restatement of Property* was applicable there is nothing contingent about the Tribe's future interest in the trust property and that the Tribe's interest is "better described as an indefeasibly vested future interest."

11. Also citing, *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942) (citing *Restatement (First) of Trust*); *United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202 (1973) (relying on secondary authority); *Department of Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 6, 121 S. Ct. 1060, 1068, 149 L. Ed. 2d 87 (U.S. 2001) (citing *Restatement (Second) of Trusts*). Pet. App. 19a.

Id. 28a. Therefore, "the more nearly analogous provisions" were Sections 134 and 187 of the *Restatement (First) of Property* (1936) and "[u]nder those sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings." *Id.* 28a-30a.

2.b. Chief Judge Mayer dissented because in his view, "the 1960 Act did not impose a fiduciary duty on the Government and because the Tribe does not hold an indefeasibly vested future interest in the Fort Apache land and buildings." Pet. App. 33a. He observed that "[w]e held in *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996), that the fiduciary duty need *not* be explicit in the statute or regulation, but the government *must take on or have control or supervision of Tribal monies or property*." (Emphasis added). *Id.* 33a.[12] Chief Judge Mayer concluded that the 1960 Act could not impose a fiduciary obligation on the United States because the 1960 Act "carves" out of the trust the Government's right to use the Tribe's property. *Id.* 33a-34a. Therefore, the fiduciary obligation would never attach during the Government's "condition precedent" use of the property. *Id.* 35a. He further found that the Tribe's interest in the trust property was a "contingent future interest" only and there was no certainty it would ever vest in the Tribe. *Id.* 34a-35a. *Cf.* the panel majority's comments, *Id.* 30a, n.15.

SUMMARY OF ARGUMENT

A. The Government's fiduciary obligation to protect and maintain the Tribe's trust property while under the Secretary of Interior's exclusive control and use arises from and is firmly anchored in the 1960 Act. The Government's breach of its fiduciary obligation to the Tribe gives rise to a claim for money

12. Chief Judge Mayer also dissented in *Brown v. United States*, 86 F.3d 1554, 1565-66 (1996) because he disagreed that the Indian leasing statutes and regulations at issue amounted to "elaborate control" and that the allottees were "essentially powerless." *Id.* He found the opposite with respect to the Secretary's [of Interior] control over rights of way [25 U.S.C. §§ 323-325 (1982) and 25 C.F.R. Part 169], *Id.* at 1565, and concluded that their [allottees] only recourse was to hold the Government answerable to compensation. *Id.* at 1565-66.

damages in the Court of Federal Claims. The Tucker Act, 28 U.S.C. § 1491(a), and the Indian Tucker Act, 28 U.S.C. § 1505, waive the sovereign immunity of the United States and grant jurisdiction in the U.S. Court of Federal Claims for money damage claims against the United States. The Government's argument, that breach of trust claims are not within the purview of the Tucker Act, is contrary to Congress' purpose and intent in enacting § 1505 and represents a *sub rosa* attack on the scope of the fiduciary relationship and trust obligations of the United States to Indian people. Br. 40, n.16. In effect, the Government is asking that this Court ignore its longstanding recognition of "the distinctive obligation of trust incumbent upon the Government" in its dealings with Indian Tribes. *Nevada v. United States*, 463 U.S. 110, 127 (1983), citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

This Court's decisions in *Mitchell I* and in *Mitchell II* struck an appropriate balance between trust accountability and judicial intrusion into executive affairs. Since then, other federal courts have applied the principles enunciated in the *Mitchell* decisions to determine the Federal government's enforceable fiduciary obligations. These court decisions are characterized in each case by an essentially *ad hoc* textual and contextual inquiry and a careful examination and weighing of all the relevant circumstances to determine if the applicable statutory or other source of the claimed substantive right grants a right to recovery of money damages against the United States either "expressly or by implication." *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). Thus, the existence *vel non* of an enforceable trust–fiduciary relationship is inferred by courts from the nature of the transaction or activity involved, that is, whether the Government in the case at hand has taken on, supervised managed *or* controlled Indian monies or properties. *See Navajo Tribe of Indians*, 624 F.2d 981, 987 (1980), cited with approval in *Mitchell II*, 463 U.S. at 225, 103 S. Ct. at 2972.

This Court in *Mitchell II* clarified that the Tucker Act provides the necessary waiver of sovereign immunity and consent to suit by the United States, holding that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages." *Mitchell II*, 463 U.S. 206, at 218, *see also* 212, 215-216, 219. The 1960 Act which expressly created a "trust," need not explicitly authorize a suit for damages for breach of trust any more than a contract between the United States and a private entity must explicitly authorize a suit for damages for breach of contract. The Tribe is entitled to receive the benefit of the valuable property right that Congress expressly conveyed in trust to the Tribe. The Tribe's right to the property is not an implied right — it is an express right conferred by Congress in the exercise of its plenary power over Indian affairs and property. The express trust created by Congress for the benefit of the Tribe necessarily includes an implied remedy for breach of trust duties incumbent upon the Government as soon as it managed, supervised, controlled and took on physical occupation of the Tribe's trust property for the limited uses allowed it by the 1960 Act.

B. The plain text of the 1960 Act, as confirmed by its legislative history, unequivocally conveys all right, title, and interest of the United States in and to the property in trust for the Tribe, save bare legal title. Congress' purposive intent in the 1960 Act was to convey and recognize a protected, compensable and presently vested property interest in the Tribe and only to reserve a limited right, akin to a defeasible easement in the Government. The United States, as trustee and guardian of the Tribe's trust property, has a fiduciary obligation to protect the Tribe's property while under its exclusive control. As an active, *in situs* trustee, the Government is also inherently restrained from treating the Tribe's property as its own. This Court has held that where the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)

even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961.

Contrary to the plain text and legislative history of the 1960 Act, as well as overwhelming case authority, the Government asserted during oral argument in the court of appeals below that it had the discretionary right to dynamite the Tribe's buildings to the ground without recourse by the Tribe. Opp. Br. 28. n.35. The Government's asserted right to do so is based on a specious argument that "beneficial title[13] has not even passed as to any of those portions of the site that are retained for exclusive use by the United States," because the 1960 Act "subject[s]," and thus subordinates Congress' conveyance of beneficial title in trust to the Tribe to the Government's "open-ended" use right. See Pet. App. 10a. n.7, Br. 24-25. Without citation to any controlling authority, the Government argues it thus has no enforceable fiduciary obligation to protect, much less preserve or maintain, the Tribe's trust property during the Government's physical occupation, control and use thereof. In sum, the Government's view is that the 1960 Act represents "a favor conferred, rather than a right acknowledged." *Worcester v. Georgia*, 6 Pet. 515, 582 (1832).

The Government's interpretation of the 1960 Act leads to an irreconcilable inconsistency within the 1960 Act and, if adopted, results in a patently absurd and unjust consequence contrary to Congress' purposive and beneficent intent in the 1960 Act. Absent clear and plain language to the contrary in the 1960 Act, it must be presumed that Congress did not intend, *sub silentio*, to undo its intent to convey a protected property right in trust to the Tribe by authorizing a back-handed right in the Secretary to demolish the Tribe's trust property by design or neglect. Even if the 1960 Act's silence about commonly understood maintenance and protection duties of an active, *in situs* trustee could be construed as an ambiguity, statutes for

13. Opp. Br. 28, n.35 (Tr. December 7, 2000, p. 23).

the benefit of Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Doyon Limited v. United States*, 214 F.3d 1309, 1314 (Fed. Cir. 2000) quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

C. The Government's defeasible right to use the Tribe's trust property does not relieve it from its fiduciary obligation to protect and maintain the Tribe's property while under its exclusive, physical control. Thus, the court of appeals' application of the common law of trusts, within the context of the 1960 Act, to determine the *nature* of the Government's trust relationship and its fiduciary obligations (duty to protect and maintain) was both practical and principled and in conformity with this Court's trust obligation analysis in *Mitchell I* and *Mitchell II*.

The 1960 Act's silence about money damages is no bar to the Tribe's claim. The property Congress conveyed in trust for the Tribe has a monetary value. In 1960 Congress valued the property at $821,352. R. L. 9, n.5, *supra*. The replacement cost of the buildings alone would cost the Tribe millions of dollars. There is no doubt about the "monetary character" of the property that Congress conveyed in trust to the Tribe. As the designated beneficiary of a trust established by Congress, the Tribe has the right as an injured beneficiary to sue its trustee for damages resulting from breach of its trustee's fiduciary obligations. *Mitchell II*, 463 U.S. at 226, n.31 (citations omitted). A money damage remedy is also consistent with this Court's "well settled" rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Barnes v. Gorman*, 536 U.S. __ (2002) at 7, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). A money damage remedy also furthers Congress' purposive intent in the 1960 Act, which was to convey a protected, compensable and valuable property right to the Tribe. The court of appeals properly interpreted the 1960 Act. Its decision does not represent a

deviation of, or an extension of *Mitchell II*, or "a significant doctrinal development in the Federal Circuit's own decisions" as claimed by the Government. Pet. 22, n.10.

ARGUMENT

A. The Indian Tucker Act waives the sovereign immunity of the United States from suit for Tribal claims based on breach of trust or fiduciary obligations that arise under the laws of the United States.

In 1946, Congress enacted the Indian Claims Commission Act (ICCA), the purpose of which was to adjudicate all Indian claims arising on or before August 13, 1946, the date of its enactment.[14] For Tribal claims arising *after that date*, consent was given to suit in the Court of Claims by Section 24 of the ICCA, now partially codified as 28 U.S.C § 1505, and referred to as the Indian Tucker Act. Pet. App. 59a-60a. The purpose of Section 24 was to provide Tribal claimants the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491. *Mitchell II*, 463 U.S. 206, 212 n.8, 214.

When Congress enacted the 1946 Indian Claims Commission Act, it expressly presumed and intended that future claims filed by Tribes under Section 24 would or could be based on the Government's trust mismanagement or breach of its fiduciary obligations to Indian Tribes. Congressman Henry M. Jackson, House sponsor of the bill that became § 1505,

14. The Indian Claims Commission Act was triggered by Congress' concern about the "vast and growing burden" placed upon Congress by the volume of claims filed by Tribes seeking special jurisdictional acts. It concluded that the "pernicious effect of long delay and the denial of justice" in the special jurisdictional act system had to be stopped. *See* H.R. Rep. No. 1466, 79th Cong., 1st Sess. pg. 6.

Between 1886 and 1946, Congress enacted well over 100 special jurisdictional statutes allowing Tribes to sue the United States for damages. A compilation of most of these acts may be found in Felix S. Cohen's *Handbook of Federal Indian Law*, pp. 374-376 (Government Printing Office, 1942). For a more detailed history of the Tucker Acts, 28 U.S.C. §§ 1491 and 1505, *see Mitchell II*, 463 U.S. 206, 212-215 (1983).

stated the following about the bill's intent regarding trust mismanagement:

> The Interior Department itself suggested that it ought not be in a position where its employees can *mishandle funds and lands of a national trusteeship* without complete accountability . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the *obligations that the Federal Government assumed.*

92 Cong. Rec. 5312 (1946). (Emphasis added.)[15] A proviso was inserted in Section 24 of the ICCA bill, which stated that "[n]othing contained in this section shall be construed as *altering the fiduciary or other relations* between the United States and the several Indian Tribes, bands or groups."[16] The 1949

15. Congressman Jackson urged passage of the bill, "so it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any *misappropriations of Indian funds or of any other Indian property by federal officials that might occur in the future.*" 92 Cong. Rec. 5313 (1946).

The House Report expressed this same Congressional purpose in even stronger terms: "If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties* have been violated, we compromise the national honor of the United States." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 4 (1945), reprinted in 1946 U.S. Code Cong. & Ad. News 1347, 1351. (Emphasis added.)

16. See House Reports, 79th Cong. 2d Sess. (January 14 – August 2, 1946) misc. vol. 5 at p. 6, Conference Report to accompany H.R. 4497, creating the Indian Claims Commission. An Amendment [No. 6] to the bill passed by the House provided that in the determination of any claim by the Commission, the Court *should apply to the United States the same principles of law as would be applied to an ordinary fiduciary*. The Senate struck this provision as part of its Amendment No. 6 as unnecessary:

> [T]he conferees agreed to the elimination of this provision because it is now well settled that *without express*

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recodification of section 24 [§ 1505] omitted this proviso as unnecessary surplusage.[17] *See also Klamath & Modoc Tribes & Yahoo Skin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 491 (1966), where the court observed:

> [T]he purpose of the omitted language was to make it clear that the new legislation did not discharge or cancel any *fiduciary obligations* of the United States and to vouchsafe the right of the Indians to sue in this court . . . . to recover money damages that result from the Government's breach of any such *obligations* that arise under "the Constitution, laws, treaties of the United States, or Executive Orders of the President."

(emphasis added.)

The Government's Brief ignores the legislative history of § 1505, and argues that because the Tucker Acts do not list a provision for "claims based on a trust relationship," such claims do not come within the purview of either § 1491 or § 1505. Br. 40. n.16. Ironically, the part of Section 24 omitted in the 1949 recodification as "unnecessary surplusage" had originally

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> *language the United States owes a very high degree of fiduciary duty to Indian Tribes*, and the bill, by Section 24 provides — "*that nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian Tribes, bands, or groups.*"

Cong. Rep. July 27, 1946. H.R. No. 2693. (Emphasis added.) Felix S. Cohen, Assistant Solicitor, representing the Department of Interior, explained: "By way of precaution against misconstruction a proviso has been inserted at the end of the section [24] for the purpose of indicating that the *substantive* relations between the United States and the several Tribes are not intended to be altered." Hearings Comm. Ind. Affairs, 79th Cong. 1st Sess. on H.R. 1198 and H.R. 1341, 127, 130-131 (1945). (emphasis added).

17. *See* 28 U.S.C. § 1505, U.S. Code Service History; and Ancillary Laws and Directives, notes, prior law and revision. 2 U.S. Cong. Serv. 1269 (1949).

been inserted with the support of the Department of the Interior to guard against such misconstruction. In support of its astonishing argument, the Government invokes the statutory canon that expressing one item of a commonly associated group or series excludes another left unmentioned (*exclusius unius est exclusio alterius*) and cites *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002), a criminal procedure case, as authority. Br. 40, n.16. More apropos is this Court's statement in the same case that, "at best, the canon . . . . is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives," and that "[a]n inference drawn from Congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of Congressional intent." *Id.* at 1049-1050, citing *Burns v. United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991). Even more on point is this Court's past admonishment that a "canon of construction is not a license to disregard clear expressions of . . . . Congressional intent." *Rice v. Rehner*, 463 U.S. 713, 733 (1983).

The Government deduces that because non-Indians cannot base a substantive right to money damages on the "mere existence of a trust relationship," "*A fortiori*, the same is true with respect to a suit . . . . by an Indian Tribe under the Indian Tucker Act." Br. 40. The Government confuses equal *access* under the Tucker Acts for Indians and non-Indians with the substantive rights that may arise under the Constitution, laws or treaties of the United States or Executive Orders of the President. Placed side by side, § 1491 and § 1505 are different. Non-Indian claimants obviously do not have claims arising from "treaties of the United States." Although Congress' intent and purpose in the Indian Tucker Act was to provide Indian Tribes the same access to the Federal Claims Court as non-Indian claimants have under § 1491, neither the claims nor the Federal statutes or regulations which give rise to the claimed enforceable substantive rights have to be identical. Thus, most Indian claims to recover money damages are based upon an alleged breach of

a fiduciary obligation that arises under the Constitution, laws, treaties of the United States or Executive Orders of the President, while most, if not all, non-Indian claims, arise from contracts, regulations or Acts of Congress not based on breach of trust. The Government's interpretation of the Indian Tucker Act would have this Court ignore the *sui generis* fiduciary relationship between the United States and Indian Tribes and fiduciary obligations that arise under the laws of the United States, and make Indian Tucker Act claims "the same" as non-Indian Tucker Act claims. The Government's attempt to restrict what kind of a claim an Indian Tribe can file against the United States is contrary to Congress' purposive intent in § 1505,[18] this Court's decision in *Mitchell II*, and the Federal Indian law jurisprudence of this Court as recently confirmed in *Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060 (2001).

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

18. The canons of statutory interpretation require the Court to consider first the text of the Act and then any binding authority interpreting the text. *See* 2.A. Norman J. Singer, Sutherland Statutory Construction, § 46.01, at 113-129 (6th ed. 2000) (Singer); *Consumer Product 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 interpretative authority, is to consider whether guidance is afforded by relevant legislative history. *See* 2A Singer, *supra*, § 48.01 at 411-415.

> common law trust, with the United States as trustee, the Indian Tribe or individuals as beneficiaries, and the *property and natural resources managed by the United States as the trust corpus*. *See, e.g.*, *Mitchell*, *supra*, at 225, 103 S. Ct. 2961.

Id. at 1067 (emphasis added).

B. The 1960 Act conveyed in trust for the Tribe a presently vested and protected property right with full equitable title in the subject property.

The objective of statutory analysis is to determine the intent of Congress. *In Re Portola Packaging, Inc.*, 110 F.3d 786, 788 (Fed. Cir. 1997). This analysis begins with the language of the statute at issue, *Toib v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991),[19] and "[t]he design of the statute as a whole and [to] its object and policy," *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990). It is a fundamental rule of statutory construction 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.")[20]

The 1960 Act is written in unmistakable present tense terms. It states that "[A]ll right, title and interest of the United States" [in the lands and improvements] "are hereby declared to be held in trust," for the White Mountain Apache Tribe. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a

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19. *See also Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (The language of the Act is the starting point for all statutory interpretation); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979); *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

20. *See also Chisom v. Roemer*, 501 U.S. 380; 111 S. Ct. 2354; 115 L. Ed. 2d 348 (1991): ". . . . In the political process, the statute does not create two . . . distinct rights. . . . It would distort the plain meaning of the sentence to substitute the word 'or' . . . .", and *Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (In construing a statute a court must give effect and meaning to all of its terms, if possible.)

verb tense is significant in construing statutes.") (emphasis added). *See also Otte v. United States*, 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64, n.4 (1987). The Government's paraphrase of the 1960 Act in its Question Presented reads, "Congress declared that a former military post in Arizona *would* be held by the United States in trust for the [Tribe]," suggesting a future interest in the property rather than a presently vested trust with full equitable title. Br. (I). (emphasis added.) The Tribe objected to the Government's verb tense change in its Opposition to Petition for Certiorari and continues that objection here. Opp. Br. 1. n.1.

In error, the court of federal claims ignored the present-tense language of the 1960 Act and characterized the Tribe's property right as a "contingent remainderman," a view now rallied behind by the United States. The court of appeals reversed and found there was nothing "future" or "contingent" about Congress' declaration of trust and conveyance to the Tribe of equitable title to the property. It concluded that the Tribe's interest in the property was better described as an "indefeasibly vested future interest" and the Government's interest "as one akin to a present life estate in the trust property."[21] Pet. App. 28a. The court did not find as the law of the case that the *Restatement (First) of Property* was the correct source of law for trust questions. Pet. App. 30a. n.15. It observed, in fact, that the *Restatement (First) of the Law of Property* (1936) had no application because the *Restatement* itself was clear that it did *not* apply to trust situations, citing the *Restatement (First) of the Law of Property* (1936), note to ch. 13, at 753 ("when the person seeking protection has a future beneficial interest under a trust, the protections available to him . . . are a part of the law of trust and outside the scope of this Restatement.").

21. Note: the Government's Br. 37, inadvertently, but incorrectly states that the majority panel believed the Tribe's interest in the property was a "contingent future interest" and that the dissent argued it was an "indefeasibly vested future interest." It is the reverse. *See* Pet. App. 27a-28a, and 33a (dissent).

Pet. App. 27a. Thus, although the court correctly described the Tribe's title to the property as "indefeasibly vested," its "future interest" analogy is more applicable to the postponement of a beneficiary's enjoyment under a trust than to the Tribe's property right. Pet. App. 28a-29a. The text of the 1960 Act itself, as discussed below, defines the appropriate application of property and trust law in this case.

1. ***The Secretary's defeasible reserved use right in the 1960 Act is not a "carving out" or an "exception" to the property that Congress conveyed in trust to the Tribe.***

The property conveyance words used in the 1960 Act are well defined legal terms. The "carved out" metaphor used throughout the Government's brief to describe the Government's reserved right has no such lineage. The Government argues that because the Secretary's reserved right was "carved out" of the property, beneficial title to the property has not yet been transferred to the Tribe. The Government's "carving out" metaphor is tantamount to an "exception" in real property conveyance terms. An interest in real property is defined by the metes and bounds that describes its geographic dimensions and by the term of years that describe the temporal aspect of the owner's interest. *Restatement of Property* §§ 7-9 (1936). An "exception" is the withholding of title to a portion of the legal description of property conveyed by the grantor, in this case, the United States, which would otherwise pass to the grantee, in this case, the Tribe.[22] The 1960 Act did not "carve out," withdraw, or "except" from the conveyed property's legal description any land and improvements for Secretarial use. Rather, Congress reserved for the Secretary a limited defeasible right to use the Tribe's property *after* it had conveyed "all right,

22. *See* Black's Law Dictionary 4th Ed. (1951) at 667-668 "exception in deeds or conveyances"; *see also Moore v. Davis*, 273 Ky. 838, 117 SW.2d 1033, 1035 (1938); *Houghtaling v. Stoothoff*, 170 Misc. 773, 12 N.Y.S.2d 207, 210 (1939); *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514 (1937). Tiffany, Law of Real Property (3rd ed.) §§ 972-973.

title and interest of the United States, in and to the lands, together with the improvements[23] thereon, in trust for the Tribe. This is confirmed by the 1960 Act's legislative history which is replete with references to "proviso," and the "reserved right" of the Secretary.[24] R.L.-9, 11, 15, 16. Rather, the "subject to" proviso created a new interest in the Tribe's trust property similar to that of a defeasible use easement or servitude. A reserved right can only be created by a "reservation" of rights, not by an "exception." Moreover, the word "except" cannot create a servitude as one cannot hold an easement in one's own land.[25]

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23. Equitable title to the "improvements" was of course conveyed to the Tribe by the 1960 Act, and would have been even if the Act had been silent in that regard. *See Banner v. United States*, 238 F.3d 1348 at 1356 (Fed. Cir. 2001) (Held: "Under the general law of improvements, it is well settled that improvements to realty are considered part of the real property and ownership of the improvements follows title to the land,") *citing in support, inter alia, In Re Chicago, Rock Island & Pac. RR Co.*, 753 F.2d 56, 58 (7th Cir. 1985) and Tiffany, Real Property § 231, pp. 535-36 (1912) (other citations omitted).

24. Black's Law Dictionary, *Id.* at 668:

> A reservation does not affect the description of the property conveyed, but retains to the grantor some right upon the property, as an easement, whereas an exception operates upon the description and withdraws from the description the excepted property. *Moore v. Davis*, 273 Ky. 838, 117 S.W.2d 1033, 1035. A "reservation" is always of something taken back out of that which is clearly granted, while an "exception" is of some part of the estate not granted at all.

Houghtaling v. Stoothoff, 170 Misc. 773, 12 N.Y.S.2d 207, 210 (1939); *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514 (1937).

25. *See* Powell on Real Property § 34.02[1] at 34-10; and generally "The Law of Easements and Licenses and Land," John W. Bruce & James W. Ely, Jr. (Warren, Gorham and LaMonte) § 3.05 [1], a grantor who wishes to retain an easement should use the word "reserve" not "exception," because "reservation" implies the creation of a new interest in the grantor. n.1 citing *Bigelow & Madden*, "Exception and Reservation of easements," 38 Harv. L. Rev. 180 (1924); *Creation of*

(Cont'd)

Accordingly, the Secretary's reserved use right in the Tribe's property is *not* and cannot be an "estate in land" such as a fee simple determinable estate or life estate in the property. *See Powell on Real Property*, § 13.05, 13-34, 13-35, n.4 and § 34.02 [1], 34-10; Restatement of Property § 44.[26]

2. *"Subject To"*

The 1960 Act provides that the Tribe's property be "subject to" use by the Secretary of Interior, but only for administrative or school purposes. The term "subject to" as used in the 1960 Act has been defined to mean "subordinate or subservient to," or "governed" or "affected by" or "provided that" and has been held sufficient to reserve an easement, although the term "reserved" is preferred.[27] Although the 1960 Act's reserved use right proviso could, if exercised by the Secretary of Interior, *postpone* the Tribe's enjoyment of its trust property, the Tribe's beneficial interest in the property was nevertheless created by Congress *at the time* of its declaration "in trust" [March 18, 1960]. It is well established that a promise to create or convey a trust in the future is distinguishable from the present creation

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Easements by Exception, 32 W. Va. L. Q. 33 (1925) (reviewing decisions in Massachusetts). *See also* definition of "reservation," Black's Law Dictionary, *supra* at 1472 (reservation is a clause in a conveyance by which the grantor creates, and then reserves to himself, some right or interest in the estate granted).

26. The 1960 Act divested the United States of "all right, title and interest" in the property. The Government accordingly has no ownership or "estate in land" in the Tribe's trust property, save bare legal title and a reserved, defeasible use easement. Where a Tribe has full beneficial title, the United States only has naked fee and transfers no beneficial interest by conveyance thereof, *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee).

27. Black's Law Dictionary, *supra,* at 1594; *see* Bruce & Ely, *supra* § 3.05 [3], 3-13, n.15, citing *City of Phoenix v. Kennedy*, 138 Ariz. 406, 408, 675 P.2d 293, 295 (Az. Ct. App. 1983) (Held: reservation of right-of-way easement found where 1955 federal land grant contained "subject to" language.)

of a trust with a *postponement* of enjoyment by the beneficiary. Thus, it is immaterial that no one but the settlor [in this instance, the United States] has an interest presently enjoyable and that the interests of the Tribe as trust beneficiary is postponed in enjoyment. The interests are nevertheless created at the time of the declaration of trust. *Scott on Trusts*, by William H. Fratcher, § 26 at 288.

The "subject to" proviso in the 1960 Act was inserted at the request of the Department of the Interior as an amendment to the bill [S.2268],

> "[T]his change is a technical one. The bill itself is a *conveyance of the equitable title*, and in conveyancing terms *the grant of title* should be made *subject to the right of the United States* to use the property for school and administrative purposes. This reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use *without seeking new legislation*.

(Emphasis added.)[28] Indian Reservations in Arizona and New Mexico cannot be added to without an Act of Congress.[29] An "exception" or "carving out" of property Congress conveyed to the Tribe for Secretarial use would require future Congressional legislation to transfer each parcel of property (with its own legal description) to the Tribe after the Secretary no longer needed each such parcel of property for its administrative or school purposes. The "subject to" amendment made such legislation unnecessary as the 1960 Act conveyed equitable title to the entire property to the Tribe. In summary,

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28. *See* Senate Report No. 671 [S.2268], 86th Cong., 1st Session, Calendar No. 677, Report of Roger Ernst, Assistant Secretary of the Interior, R.L. 11.

29. *See* Act of May 25, 1918, ch. 86, § 2, 40 Stat. 570 (1918), codified at 25 U.S.C. § 211 (1958).

the 1960 Act's "subject to" proviso only reserved in the Secretary a "right of use" in the Tribe's trust property, *not* retention of ownership of the property held in trust. *See, e.g., Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1340-41, 1342 (2000) (Held: "subject to" provision in Congress' land conveyance to Tribe did not convey ownership of mineral rights to United States, only a use or access easement). Discussed *infra.*, pp. 25-26.

3. ***"For As Long As"***

Pursuant to the 1960 Act, the Secretary has a limited use right in the Tribe's trust property "for as long as" the Secretary needs the property for administrative or school purposes.[30] Thus, the Secretary's use easement was made defeasible. A defeasible easement or interest in land created for a particular purpose expires when the particular purpose ends or when the underlying need no longer exists. *See B*ruce & Ely, *Law of Easements and Licenses in Land*, § 10:8 and 10:9, use of term "so long as" found to be determinable easement, *Id.* § 10.3, 10-7, n.8. *See* an analogous application in the law of property where words such as "so long as," "until," or "during" are appropriate to create a fee simple determinable "estate" in land. *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 139 A.2d 291, 296 (1958).

30. Few of the thirty-six buildings are currently needed by the Secretary for administrative or school purposes. *See e.g.*, Government's Mot. to Dismiss at 5: "[T]he Government no longer uses many of the buildings and improvements for school or administrative purposes." *See also* Federal Circuit opinion, "According to the parties, the government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe." Pet. App. 3a. "[T]he future of the school as a viable institution is apparently under review." Pet. App. 3a, citing *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22, n.2.

4. ***The Government's interpretation of the "subject to" proviso in the 1960 Act would lead to a patently absurd and unjust consequence***

The Government's claim of an "open-ended right"[31] to destroy[32] the Tribe's valuable, vested trust property cannot be imputed from the "subject to" proviso in the 1960 Act which only reserved and authorized in the Government a defeasible use of the Tribe's trust property and one limited to administrative or school purposes. A recent case decided by the Federal Circuit Court of Appeals involving similar statutory language is instructive. In *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1340-41, 1342 (2000), a 1978 Act of Congress declared certain lands, *including minerals thereon*, to be held in trust by the United States for the benefit and use of the Pueblo of Santa Ana. Another section of the 1978 Act provided that these same lands would continue to be "*subject to*" a previous Public Land Order, meaning that the mineral rights in the Pueblo's land would be subject to use by the United States for the Jemez Canyon Dam and Reservoir Project until such lands, or any portion thereof, were determined by the Secretary of the Army to be *no longer needed* for those purposes. *Id.* 1340.

The Federal Circuit found that the Pueblo's ownership of the mineral rights was *not* "carved out" of the Pueblo's ownership rights to the land and given to the Army:

> If Congress had intended to effect such a statutory inconsistency — by expressly conveying all mineral rights to the Pueblo and then excluding mineral rights to the PLO 873 land — it would have included far more than the notation that some of the land was "*subject to*" PLO 873, the terms of which do *not convey mineral rights to the United States.*

Id. at 1341[33] (emphasis added). Under such circumstances, the

31. Br. 24.

32. Opp. Br. 28, n.35.

33. Citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 432, 107 S. Ct. 1207 (1987) ("'Where Congress includes particular language in one (Cont'd)

court concluded that it could not find clear congressional intent to keep ownership of the mineral rights in the United States,[34] but found that the United States retained a "right" in the nature of an "easement of access for the purposes of operating and maintaining the [Jemez Dam]." *Id.* at 1342. Thus, the Army Corps of Engineers had the right to use minerals from the Pueblo's land, but had to pay for them. The court also noted than any lingering doubts as to statutory construction of the 1978 Act must be resolved to the benefit of the Pueblo, citing in support *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) (ambiguous or uncertain statutory provisions in laws intended to benefit Native Americans construed in their favor). *Id.* 1342.

Another basic rule of statutory construction is to avoid construing statutes in a manner which would lead to unjust or absurd consequences. *Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 427 (8th Cir. 1979). This Court has applied legislative history to avoid a literal meaning which would have resulted in "patently absurd consequences" that "Congress could not possibly have intended." *Public Citizen v. Department of Justice*, 491 U.S. 440 at 455-465 (1989). If the Government's flawed interpretation of the 1960 Act is adopted by the Court, it would lead to a patently absurd and unjust consequence. The 1960 Act which plainly conveyed "all right, title and interest of the United States" in the property in trust for the Tribe cannot simultaneously grant the Secretary

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section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (Quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)).

34. Citing *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (courts avoid reading portions of statutes inconsistently); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) (same); *Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1384-85 (Fed. Cir. 1998) (same).

of the Interior an "open-ended" right to destroy the same property by dynamite or neglect as claimed by the Government.[35]

In defiance of the clear text of the 1960 Act and its legislative history,[36] the Government refuses to let go of its fixed idea that

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

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

In response to the court's inquiry whether the Tribe had any property right that was impaired by that destruction, the Government replied: "I don't believe so, Your Honor. I believe that beneficial title has not even passed as to any of those portions of the site that are retained for exclusive use by the United States." (Tr., December 7, 2000, p. 23), Opp. Br. 28, n.35.

36. Senate Report No. 671, [S.2268], 86th Cong., 1st Session (1959), R.L.11; "[T]he *purpose* of S.2268 is to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, *for* the White Mountain Apache Tribe of Arizona. The lands to be *restored* to the Tribe. . . ." *Id.*, R. L. 8. (Emphasis added.)

Report No. 1284 (February 22, 1960) accompanying H.R. 8796, the companion Bill to S.2268, states in applicable part "[T]he bill explicitly provides *that the Tribe's beneficial ownership of the property*. . . ." (Emphasis added.) R. L. 25.

See generally, Transcript of Hearings, H.R. 8796 [S.2268] House Subcommittee on Indian Affairs — Committee on Interior and Insular Affairs, February 11, 1960 (title to the school buildings would *not* remain in the Secretary of Interior, but would be maintained in full trust status with beneficial ownership in the Tribe). R. L.12-24.

The Tribal Council was equally clear on the status of the lands to be restored to the Tribe. The Department of the Interior, Bureau of Indian (Cont'd)

the 1960 Act was actually a "land grant" for its benefit and not the Tribe, citing in support, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983). Br. at 29. *Western Nuclear* is not applicable as it basically involved a dispute over the definition of "minerals" in a land grant. There is no definitional ambiguity in the 1960 Act and no "land grant" to the Government, only a defeasible use right or easement in favor of the Secretary of Interior. There is no conflict of canons in this case either, but even if there was a conflict between the Indian canon and the presumption of a liberal interpretation of a land grant to the Government, the Indian canon must predominate. *Choate v. Trapp*, 224 U.S. 665 at 674-675 (1912). This Court has also held that the general presumption supporting the legality of Executive action must yield to the Indian canon, a counter-presumption specific to Indians. *Minnesota v. Millelacs Band of Chippewa Indians*, 526 U.S. 172, 194, n.5 (1999).

C. The Government has a fiduciary obligation to protect the Tribe's trust property during its authorized control and use

The 1960 Act expressly conveyed property in trust for the Tribe and was enacted against the backdrop of a general trust relationship between the United States and the Indian tribes that had long been considered to "resembl[e] that of a ward to his guardian." *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831).[37]

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Affairs, inquired if the Tribe "would be willing to have the subject lands in a taxable status." R. L. 4. In reply,

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

Tribal Council Legislative Minutes, Sept. 24, 1958. R. L. 5-7,

37. *See also Morton v. Mancari*, 417 U.S. 535, 541-42 (1974); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Squire v. Capoeman*, 351 U.S. 1, 2 (1956); *United States v. Payne*, 264 U.S. 446, 448 (1924); *United States v. Kagama*, 118 U.S. 375, 382 (1886).

It does not make sense to assume that when Congress in the 1960 Act established an express "trust" for the Tribe it intended to depart from these well-known fiduciary principles. Thus, when the Federal Government chose to undertake comprehensive and exclusive control over the Tribe's property after Congress declared the property in trust, it moved into a full fiduciary relationship with respect to the Tribe's trust property within the holding of *United States v. Mitchell* (II), 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983).[38]

Although Congress can unilaterally act in a fashion adverse to Indian interests, such an intent must be "clear," "plain," or "manifest" in the language or legislative history of an enactment. The 1960 Act discloses no Congressional intent to grant the Secretary of Interior *a right* to depreciate the value of the Tribe's trust property that Congress conveyed to the Tribe. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *United States v. Creek Nation*, 295 U.S. 103 (1935) (Held: Unless Congress has expressly directed otherwise, the Federal Executive is held to a strict standard of compliance for fiduciary duties.); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), 225-228. There is also no manifestation of Congressional intent in the 1960 Act *to relieve* the United States of its fiduciary obligation to protect and maintain the Tribe's trust property during the Government's exclusive use and control. Silence as to that obligation cannot overcome the "presumption that absent explicit language to the contrary, all funds and property held by the United States for Indian Tribes are held in trust."[39]

38. *See also White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 620, 649-650 (1987); *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183; 624 F.2d 98, 987 (Ct. Cl. 1980) and *Brown v. United States*, 86 F.3d 1554, 1561 (Fed. Cir. 1996). *See also Restatement (Second) of Trusts* (1959) § 2 and 1 Scott § 2.5 (1. A. Scott, *The Law of Trusts* (3d ed. 1967).

39. *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97, (Cont'd)

1. *Detailed management duties not required if control present*

In *Mitchell II*, this Court's acknowledgment of a general trust responsibility and of rules of construction applicable to Indian law indicates that detailed delineation of management duties is not required.[40] The Court recognized elaborate control by the Government over Indian property as an independent basis for its finding of a fiduciary duty in *Mitchell II*, at 224, 103 S. Ct. at 2972. *See also Brown v. United States*, 86 F.3d 1554, 1561 (Fed. Cir. 1996); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1980) *cert. den.*, 103 S. Ct. 3569 (1983) (Federal trust need not spell out all duties of the Government due to the history of the Governmental fiduciary obligation in management of Indian property — broad scale Congressional establishment

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62 S. Ct. 1049, 1054-55 (1942) (footnote omitted). *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997); *Moose v. United States*, 674 F.2d 1277 at 1281 (9th Cir. 1982), citing *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980) n.10. *See also Short v. United States*, 719 F.2d 1133, 1137 (Fed. Cir. 1983) (finding accounts containing proceeds of individual Indian labor, and interest thereon, to be designated as trust funds), *cert. denied*, 467 U.S. 1256 (1984); *Rogers v. United States*, 877 F.2d 1550, 1553 (Fed. Cir. 1989) (interpreting *damages award* for taking of aboriginal homelands *as trust funds* subject to statutory duty to invest), *Brown v. United States*, 86 F.3d 1554, 1559-1561 (Fed. Cir. 1996).

40. In the context of Congressional Acts in Indian affairs, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). *See also Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941 (1912) (holding that while tax exemptions are generally construed narrowly, in "the Government's dealings with the Indians the rule is exactly contrary, the construction, instead of being strict, is liberal."); *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) (ambiguous or uncertain statutory provisions in laws intended to benefit Native Americans construed in their favor).

of trust is enough). The *Duncan* court further observed, "[i]t is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust." *Duncan*, at 43 n.10.[41]

The reasoning of the Court in *Mitchell II*, and by the court of appeals below, recognizing elaborate control by the Government over Indian property as an independent basis for finding of a fiduciary duty, makes complete sense as most statutory schemes in Indian affairs are not as detailed as the timber management statutes and regulations in *Mitchell II*, and most statutes that regulate Indian affairs do not delineate specific management duties or provide for money damages for mismanagement. Other federal court decisions have recognized a breach of fiduciary duty based on the Government's action once it has undertaken action, even though no statutory or regulatory scheme required the Government to generate income for the Tribe from the particular Tribal resource or property at issue.[42]

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41. *See also* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, American University Law Review 41:753 (1991/92) at 804:

> [*A*]*ssuming a statutory basis at least permitting the action*, actual control may be a sufficient factor on which to base a claim for breach of fiduciary duty by mismanagement of the trust. . . . *As long as the Government, and not the Indian or the tribe, has actual control* over the management of a resource, the exercise of this control can create a trust claim.

(Emphasis added.)

42. *See White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987) citing *Navajo Tribe of Indians v. United States*, *id.*; *Gila River Pima Maricopa Indian Community v. United States*, 231 Cl. Ct. 193, 208, 684 F.2d 852, 861 (1982) (per curiam) (held: although the Government had no statutory or regulatory duty to develop irrigation facilities on the Reservation, failure to protect water resources can be actionable). *See also Fort Mohave Indian Tribe v. United States*, 23 Cl.Ct. 417, 426 (1991) ("[T]he trustee has a duty to protect the trust property [reserved water rights] against damage or destruction and is (Cont'd)

The Government tries to avoid this reality by arguing that this Court's *description* of the clarity with which the Government's duties were established in *Mitchell II* is the *prescription* for determining whether a fiduciary duty exists in other domains; even in this case, where there is no need to resort to an extended disquisition of statutes and regulations to find the requisite governmental control that would give rise to a full fiduciary relationship and enforceable trust duty. This view was rejected by the Federal Circuit Court of Appeals in *Brown v. United States*, which held that the "transformation of the descriptive into the prescriptive is improper." 86 F.3d 1554, 1559, n.6 (1996). Emphasizing this Court's disjunctive "control or supervision" test (*Mitchell II*, *id.* at 225, 103 S. Ct. at 2972), the court found that "nearly complete government management (i.e., 'supervision') or control, while more than sufficient to create an enforceable fiduciary duty, is not necessary." *Brown*, at 1560, and *Id.*, n.7.[43]

2. *The Tribe has a Congressionally recognized and protected property right*

In the absence of the 1960 Act's "subject to" authorization, the Secretary could not physically occupy and control the Tribe's

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obligated to the beneficiary to do all acts necessary for the preservation of the trust *res*. . . ."). *See also Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113, 39 S. Ct. 185, 63 L. Ed. 504 (1919) (Holding that United States has fiduciary obligation to not alienate trust lands currently occupied by Indians even where the Government had neither control nor supervision of the trust property), cited by the Court of Appeals below, Pet. App. 17a, n.11.

43. Citing *Navajo Tribe of Indians v. United States* decided soon after *Mitchell I*, where the Court of Claims rejected the government's contention that "no fiduciary obligation can arise unless there is an *express* provision of a treaty, agreement, executive order or statute creating such a trust relationship." 224 Ct.Cl. 171, 624 F.2d 981, 987 (1980) (emphasis in original).

trust property, except by leasing it from the Tribe,[44] or unless Congress, in the exercise of its plenary power over Indian affairs and property, took the property from the Tribe under the "Takings Clause" of the Constitution. Thus, once a Tribe has a vested property right (equitable title) recognized by treaty or Act of Congress, including vested property rights created by Executive Order, abrogation of those property rights are not lightly inferred from Congress' Acts and any such abrogation is subject to Constitutional limitation. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115, 58 S. Ct. 794, 82 L. Ed. 1213 (1938) ("Held: United States does not have the power *to appropriate to its own use any part of the* [Tribe's] *land* without rendering, or assuming obligation to pay just compensation to the Tribe, for that would be, not the exercise of guardianship or management, but an act of confiscation."). *See also Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375, 57 S. Ct. 826, 81 L. Ed. 1156 (1937) (Government power to control and manage the property and affairs of Indians is subject to

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44. The Government has leased some of the property to third parties in accordance with 25 C.F.R. § 162, *et seq.*, which regulates leases and permits of Indian land. *See, e.g.*, Fort Apache Post Office lease, Joint Appendix JA75-80, Tribe's Br. CAFC. The Secretary of Interior is responsible for administering and enforcing this lease "through appropriate inspections and enforcement actions as needed *to protect the interests of the Indian landowners*," including the taking of "other emergency action as needed to *preserve the value of the land.*" 25 C.F.R. 162.108(b) (emphasis added).

The Government could also be held liable by invitees to the Fort Apache site under the Federal Tort Claims Act for injuries proximately caused by its failure to maintain the Tribe's trust property under its control. *See, e.g., O'Toole v. United States*, No. 01-15310 (9th Cir. 2002) (Held: BIA liable for negligent maintenance of irrigation system on Indian Tribe's ranch which flooded neighboring non-Indian ranch) citing in support, *Berkovitz v. United States*, 486 U.S. 531, 537 (1981) and *Indian Towing Company v. United States*, 350 U.S. 61 (1955).

constitutional limitations and "does not enable the Government . . . . *to deal with them as its own*.") (emphasis added).[45]

3. ***No conflict in canons***

The Government cites *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535-536 (2001), in support of its argument that the Indian canons cannot overcome the 1960 Act's silence as to the Government's fiduciary obligation to protect the Tribe's trust property while under its control and use. Br. at 28-29. *Chickasaw* does not apply as this is not a tax exemption case, nor is there a conflict in the 1960 Act. The Government's reserved right to use the Tribe's trust property for administrative or school purposes is not challenged by the Tribe and can easily coexist with the Government's fiduciary obligation to maintain the property. Unlike the canons found inapplicable or in conflict in *Chickasaw*, there is no offsetting or conflicting canon in this case that would overcome the Indian canon that assumes Congress intends enactments affecting Indians to be for their benefit.[46]

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45. *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 79 L. Ed. 1331 (1935) (no taking without just compensation); *Spalding v. Chandler*, 160 U.S. 394, 404, 16 S. Ct. 360, 40 L. Ed. 469 (1986); *Gibson v. Anderson*, 131 F. 39, 41-42 (9th Cir. 1904).

46. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). *See also Chickasaw Nation v. United States*, 122 S. Ct. 528 at 538 (2001) (dissent of Justice O'Connor)

> The Indian canon presumes Congressional intent to assist its wards to overcome the disadvantages our country has placed upon them, ...
>
> Consistent with this purpose, the Indian canon applies to statutes as well as treaties: the form of the enactment does not change the *presumption* that Congress generally intends to benefit the Nations, *Montana et al. v. Blackfeet Tribe of Indians*, 471 U.S. 759 at 766 (1985); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992).

4. *The 1960 Act's silence as to money damages does not bar the Tribe's claim.*

This Court in *Mitchell II* found that it was not significant that the statutes and regulations in that case did not explicitly state that the United States could be held financially responsible for damages to the Indians resulting from the United States' management decisions. It was enough that the statutes and regulations in that case created a fiduciary responsibility. *Mitchell II* at 226, 103 S. Ct. at 2972. The Court looked beyond the particular source of law, which was silent regarding damages and found an *implicit* or inherent requirement of compensation for breach of fiduciary duty by looking to the common law of trusts. *Mitchell II* at 226, 103 S. Ct. at 2973.[47] *See Brown v. United States*, 86 F.3d 1554, 1559 n.6 (Fed. Cir. 1996).

The court of appeals below looked to the applicable source of the substantive law which may grant the right to recovery either "*expressly or by implication*," *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967), and concluded that the Government's control and use of the Tribe's property pursuant to the 1960 Act was a source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," citing *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961, quoting *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 [quoting *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967)]. Pet. App. 8a, 15a-18a. *See Brown v. United States*, *supra*, 86 F.3d 1554, discussing "the Mitchell Decisions" at 1559.

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47. *See also e.g.*, *American Indians Residing on the Maricopa Ak-Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) (trustee liability for breach of fiduciary duty *inherent* in trust relationship; damages are appropriate remedy for breach), *cert. denied*, 456 U.S. 989 (1982); *Whiskers v. United States*, 600 F.2d 1331, 1335 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Coast Indian Community v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1979); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1392-94 (Ct. Cl. 1975).

If this Court is to give the words of the 1960 Act their ordinary meaning ["trust"], as it has in cases when the law does not define a statutory phrase precisely, *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, at 211 (1979), the Court should find that the 1960 Act imposes fiduciary obligations on the United States as a trustee under the statutory and factual circumstances before it. By expressly conveying and declaring the property in "trust" for the Tribe, it may necessarily be inferred Congress knew the significance of the term "trust" as well as the other property conveyance terms used in the 1960 Act. Thus, "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 576, at 583 (1977) quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911). *See also Gilbert v. United States*, 370 U.S. 650, 655 (1962) and *Montclair v. Ratisdell*, 107 U.S. 147, 152 (1883). It is not clear whether Congress envisioned that Federal officials would fail to protect and maintain the property it conveyed in trust to the Tribe. It is enough that Congress intended that the language it enacted would be applied as the court of appeals applied it, including a trust remedy to protect Congress' purposive intent in the 1960 Act. This Court did similarly in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982), when it turned to legislative history to show that Congress, even though it may not have had a particular result in mind, intended for the statute to be applied as the Court applied it.

The customary practice of this Court and other lesser federal courts to look to the common law of trusts, as modified by the statutory or other source of the substantive right giving rise to a Tribe's breach of trust claim, has its analogue in the area of implied and express contracts between the United States and private parties, an area viewed as perhaps "[t]he widest and most unequivocal waiver of federal immunity from suit." *Mitchell II* at 215, citing *Developments in the Law – Remedies Against the United States and Its Officials*, 70 Harv. L. Rev.

827, 876 (1957) and 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3656, p. 202 (1976). The Tucker Act, 28 U.S.C. § 1491, is the source of the United States' consent to be sued for breach of contract.[48] The Government apparently has no qualms about courts looking to the *Restatement of Contracts* for principles of contract law applicable to cases before them,[49] but flinches when the court of appeals below looked to the *Restatement (Second) of Trusts* to assist in its determination of the nature of the Government's fiduciary obligations as an *in situs* trustee in total control of its beneficiary's trust property. Br. 17. The Tucker Acts, however, make no distinction between claims founded upon contracts, and claims founded upon other specified sources of law. *Mitchell II* at 215.

It follows that the necessary corollary to application of private contract law when the Government enters into contracts is to apply the law of trusts when the United States functions as an *in situs* Trustee. Congress' purposive intent in the 1960 Act was to convey equitable title to valuable property "in trust" for the Tribe. This intent necessarily includes or implies a remedy under applicable concepts of trust law to protect the trust

48. When the United States breaches a contract it has entered — whether that contract is expressed or implied in fact — it is liable in money damages under the Tucker Act. *See United States v. Milliken Imprinting Co.*, 202 U.S. 168 (1906). The contract need not state that the United States intends to be held liable in money damages for any breach. All that is required is a breach of the contract, as consent to suit is provided in "the waiver of sovereign immunity in the Tucker Act." *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980).

49. "[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," and "[t]he Restatement of Contracts reflects many of the principles of contract law that are applicable to this action." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States,* 530 U.S. 604, 607-608 (2000). *See also Franconia Associates v. United States*, 536 U.S. __, 122 S. Ct. 1993 (2002) and *Clearfield Trust Company v. United States*, 318 U.S. 363, 369 (1943), "[t]he United States does business on business terms."

property from damage resulting from breach of trust while under the trustee Government's exclusive physical control and use. As there is no need for a Federal Government contract to spell out expressly that the Government may be sued in damages for breach of contract, *a fortiori*, it is not necessary that an express trust established by Congress for an Indian Tribe specifically state that the Government may be sued for damages for failure to protect that property while under its exclusive physical control, use and management. Thus, "[g]iven the existence of a [full] trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties," as "[i]t is well established that a trustee is accountable in damages for breaches of trust," *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961. See discussion (same) by court of appeals below. Pet. App. 26a.

5. *The 1960 Act does not create a right in the Government to destroy the Tribe's trust property.*

While the Secretary unquestionably has a reserved right in the 1960 Act to use the Tribe's trust property for administrative or school purposes, that right is not unlimited. *See Navajo Tribe v. United States*, 364 F.2d 320, 324 (1966). *See also Cheyenne-Arapaho Tribe of Oklahoma v. United States*, 966 F.2d 583, 588 (10th Cir. 1992) (Although *control* was relegated to the Secretary by statute over gas and oil leases on Indian lands, the United States' function as a trustee over Indian lands *necessarily limited the Secretary's discretion* when approving the agreements).

The Government's novel view of its fiduciary obligation to the Tribe in this case, that it can treat the Tribe's trust property as if it were its own and even destroy it, defies a long line of decisions by this Court. *Cramer v. United States*, 261 U.S. 291 (1923) (Held: trust responsibility and national policy protecting Indian land occupancy *limited* the general statutory authority of federal officials). In accord, *United States v. Creek Nation*, 295 U.S. 103 (1935) ("power to control and manage was not

absolute . . . . it was subject to *limitations inherent in such a guardianship* and to pertinent Constitutional restrictions."). *Id.* at 109-10 (emphasis added).

The principle that the trust responsibility applies to the Executive Branch is applicable to this case, where the Secretary of Interior, as the Tribe's guardian and trustee, controls and uses the Tribe's trust property.[50] The Secretary's reserved right to use the Tribe's property cannot trump Congress' plenary authority over Indian property manifested in the 1960 Act by its purposive intent to convey a protected and compensable property right in trust for the Tribe. It is also of no moment that courts have found a fiduciary obligation in cases involving special jurisdictional acts as the Government has previously inferred. Pet. Reply Br. 9. *Cf. Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980).[51] The fiduciary obligation of the United States to protect and not cause or allow waste, destruction, or loss of value to Indian trust monies or property under its supervision, management or control is a well-established principle in Federal Indian law and policy and may be the basis for a money-mandating claim as expressed by this

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50. The relationship between the United States and an Indian Tribe has often been characterized as one of a guardian and ward. A guardian of the property of a person who is under an incapacity is a Trustee in the broad sense of that term. *Scott on Trusts, supra.*, § 7 at p. 85. A guardian usually does not take title to the property, but like a trustee, a guardian is a fiduciary. *Id.* p. 85, n.1, citing *Smith v. Smith*, 210 F. 947 (D. MT. 1914), *affirmed*, 224 F. 1 (9th Cir. 1915).

51. "In *Menominee Tribe, supra*, we held explicitly that a special jurisdictional statute making ordinary fiduciary standards applicable to the United States, 'add[s] little to the settled doctrine that the United States, *as regards its dealings with the property of the Indians*, is a trustee.' (Emphasis added). 101 Ct.Cl. at 19." "Likewise, *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322, observed that '[n]umerous cases have expressed the notion that, *when dealing with Indian property*, the Government may be acting as a 'trustee.' (Emphasis added)." *Id.* 987.

Court in *Mitchell II*, 463 U.S. 206, 225, 103 S. Ct. 2972, and in other federal court decisions.[52]

Federal courts have also consistently emphasized that Federal agencies must deal with Tribes according to the "most exacting fiduciary standards"[53] and have observed that the Bureau of Indian Affairs (BIA), in particular, has a special trust responsibility beyond those of other Federal agencies, because it is responsible for managing Tribal lands and resources as the

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

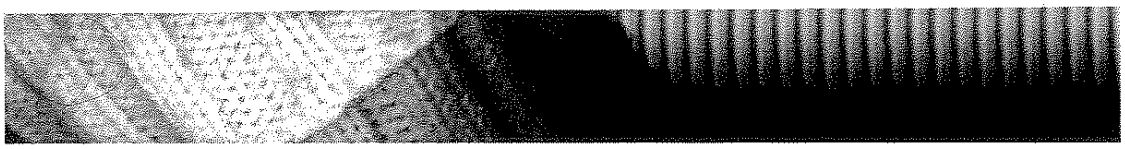
See American Indian and the Federal–Indian Relationship; Including Treaty Review 179 (Comm. Print 1976) [hereinafter Trust Report] (applying trust principles to Government's role in protecting Indian land); *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 681, *aff'd*, 5 F.3d 1506 (Fed. Cir. 1987), *cert. denied*, 114 S. Ct. 1538 (1993) (government breached fiduciary duty by overcutting tribal forest lands and overgrazing tribal grazing lands).

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

principal agent of the Trustee, United States.[54] In *Nevada v. United States*, 463 U.S. 110 (1983) at 127, this Court observed that it "has long recognized 'the distinctive obligation of trust incumbent upon the Government' in its dealings with Indian Tribes," citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and that these concerns have been traditionally focused on the Bureau of Indian Affairs within the Department of the Interior." Citing *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968).

It is clear that the court of claims has jurisdiction to award damages for waste. An implied covenant against waste has been found to exist by the Claims Court in a lease between a private corporation and the United States, *even* in the absence of a trust relationship. In *Italian National Rifle Shooting Society of the United States v. United States*, 66 Ct. Cl. 418 (1928), citing *United States v. Bostwick*, 94 U.S. 53, 68, 69 (1876), the court of claims held that even though there was *no express* agreement to leave the premises in as good condition as when received (ordinary wear and tear accepted), and there was *no express* agreement in the lease not to commit waste, the United States was nevertheless liable for any loss resulting from want of reasonable care and use of the property and was bound not to commit waste or suffer it to be committed. These cases and

54. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) at 217 (the Department of Interior "has the primary responsibility for carrying out the Federal Government's trust obligations to Indian Tribes."); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *Navajo Tribe v. United States*, 364 F.2d 320, Ct.Cl. (1966). *See generally United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (Ruiz may impose more extensive procedural requirements on the Bureau of Indian Affairs than are customary for federal agencies. *See* Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM.L.REV. 823 (1975) cited with approval in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) at 1100. *See also* F. Cohen, *Handbook of Federal Indian Law*, pp. 225-228 (1982 ed.).



others cited, *supra*, leave little room for the Government's argument that it has no fiduciary obligation to protect the Tribe's trust property during its exclusive control and use from waste and depreciation or that the court of claims cannot award money damages for waste, to use a property law analogy.

6. ***The decision of the Court of Appeals does not depart from this Court's decisions in Mitchell I and Mitchell II***

The court of appeals' decision below is consistent with this Court's decisions in *Mitchell I* and *Mitchell II*. The court agreed that if the Government had never exercised exclusive control and use of the Tribe's trust property for administrative or school purposes, only a 'bare trust' relationship (*Mitchell I*) would have been created by the 1960 Act and the United States would have had no fiduciary obligation to protect, maintain or manage the Tribe's trust property. However, the court found that the Government's decision to use and control the Tribe's valuable trust property categorically took the Tribe's claim outside the "bare trust" circumstances of *Mitchell I* and moved it into a full fiduciary relationship within the Court's decision in *Mitchell II*. While it was Congress' intent in the General Allotment Act that the Government not *control use of the allottees' land*, *United States v. Mitchell*, 535, at 544, 100 S. Ct. at 1354 (1980), the opposite applies here where the 1960 Act clearly authorizes the Government to control and use the Tribe's property.

In *Mitchell II*, this Court analyzed the timber statutes and regulations involved in that case to find the requisite Governmental *control* which would give rise to a full fiduciary relationship and enforceable obligation in the United States to manage the allottees' timber resources. No such analysis by the Court is necessary in this case to find the requisite Governmental control which would give rise to an enforceable fiduciary obligation. This Court's decision in *United States v. Testan*, 424 U.S. 392 (1976), upon which the Government frequently draws comparisons to the 1960 Act, also supports the Tribe's claim.

In *Testan*, this Court reviewed the Classification Act, 5 U.S.C. § 5101 *et seq.* and the Back Pay Act, 5 U.S.C. § 5596, to determine whether those statutes conferred a substantive right to recover money damages from the United States for back pay from a job the plaintiffs *never* occupied. The Back Pay Act's coverage provided monetary payments, but only to those who were wrongfully reduced in grade, suspended or terminated. It did not apply to persons who alleged they were entitled to the benefits of a higher grade. *Id.* at 405-406. The Classification Act provided administrative procedures for reclassification, but lacked a provision for back pay.[55] Thus, neither Act conferred upon the claimants a substantive right to the payment of money.

The Tribe's claim here has no such obstacle. The 1960 Act provides the statutory basis for the Tribe's substantive right to the payment of money damages. The Tribe's claim is also analogous to the Back Pay Act's coverage in *Testan* which provides monetary payments for those who are wrongfully reduced in grade, suspended or terminated. The Tribe's valuable vested property right has been wrongfully depreciated and reduced in value as a direct result of its trustee's breach of fiduciary duty. *Testan* also tells us that, "[T]he asserted entitlement to money damages depends upon whether any Federal statute" can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," citing *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 607, 372 F.2d 1002 at 1009, and that the substantive statute upon which a Tucker Act claim is based need not *expressly* state that the United States can be held accountable in money damages, *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 605, only that the statute must "grant the claimant, expressly or by implication" a right to

55. Both statutes were construed in light of the "established rule" that "the Federal employee is entitled to receive only the salary of the position to which he was appointed." A rule which the court held was not changed or overruled by Congress in the Classification or Back Pay Acts. *Id.* at 402, 406.

money damages. Certainly, the 1960 Act which expressly conveyed valuable land and improvements in "trust" to the Tribe, includes by implication, a remedy for breach of trust.

The Government apparently perceives it will find a safe harbor from liability for Indian claims based on breach of trust if it can persuade the Court to hold that Tribal claims under the Indian Tucker Act cannot be based on breach of trust. It argues that the Court should instead apply its criteria for determining private rights of action which has no Tucker Act counterpart and which resides in an arena far removed from the *sui generis* jurisprudence of Federal Indian law. In pursuit of this goal, the Government tries to inveigle this Court's attention by invoking the specter of "separation of powers concerns" which in its view is engendered by "unanchored, judge-made principles of common law" by the court of appeals below. Br. 13, 34, 42-43. The only separation of powers concerns that arise in this case stem from the Government's refusal to recognize that Congress did not grant the Secretary of Interior an unlimited right in the 1960 Act to destroy property which Congress, in the exercise of its plenary power over Indian affairs and property, specifically conveyed in trust for the benefit of the Tribe. The Government's insistence of the Secretary's unbridled right to do with the Tribe's property as it pleases, impermissibly invades the province of Congress over Indian affairs and property and defeats Congress' purposive intent in the 1960 Act. The Tribe, as an injured beneficiary of an express Congressional trust, has a right of action against its trustee when that trustee, without any semblance of authority from Congress, destroys by neglect or design, the value of its trust property.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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