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Trust Responsibility of Federal Government for Indian Tribes: Recent Cases

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Abstract. Two pending Supreme Court cases, expected to be decided in 2003, may clarify how trust obligations are established and delineated. In one case, the Navajo Nation claims damages for the government's failure to maximize return from coal leases on tribal land; in the other, the White Mountain Apache Tribe seeks compensation for deteriorating structures on tribal trust property used by the United States.

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Trust Responsibility of Federal Government for Indian Tribes: Recent Cases

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Summary

The courts and Congress have long acknowledged a trust relationship between the federal government and the Indian tribes. Two Supreme Court cases, decided on March 4, 2003, further clarify how trust obligations are established and delineated. In one case, the Court rejected the Navajo Nation's claim for damages for the government's failure to maximize return from coal leases on tribal land. In the other, the Court ruled that a fiduciary obligation from which damages could flow was created by a 1960 statute declaring that the United States was to hold a former military post, Fort Apache, in trust for the White Mountain Apache Tribe subject to the right to use the land for school purposes. These cases supply a backdrop against which other Indian trust cases may be viewed. Prominent among the pending cases is *Cobell v. Norton*, Civil No. 96-1285 (D.D.C.), in which a federal district court is conducting a trial of a claim brought in the name of individual Indians for an accounting of funds held in trust for their benefit. (For further information, see CRS Report RS21738, *The Indian Trust Fund Litigation: An Overview of Cobell v. Norton*, by Nathan Brooks.) That suit has resulted in contempt orders against two Secretaries of the Interior and one Secretary of the Treasury and the removal from the Department of the Interior Internet site of all resources connected to trust documentation.

Background. Nations colonizing the New World declared their sovereignty over the land and invoked a jurisprudence that required them to assume certain duties toward the native peoples that has been expressed in terms of the metaphor of guardian and ward. This metaphor was invoked to express the nature of the authority and responsibilities of the federal government with respect to the Indian tribes as early as 1831 in Supreme Court cases involving the Cherokee Nation,¹ in which Court ruled that Indian tribal lands were jurisdictionally not subject to state law, but to the protection of federal law. In reaching the decision, the Court held that the Cherokee Nation was not a foreign nation (and, thus, able to invoke the original jurisdiction of the Supreme Court), but a "domestic dependent

¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

nation,”² analogous to a ward of the United States. The Cherokees, thus, could “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”³ Eventually, in the late nineteenth century, the trust relationship was viewed as a source of federal power.⁴ The Court virtually refused to find any federal legislation affecting Indian property to be unconstitutional and saw the power to abrogate Indian treaty rights as political and not subject to judicial control.⁵

Courts no longer invoke the plenary authority of Congress in Indian affairs and the trust relationship as a source of plenary federal power but have delineated limits on Congressional power to deal with Indian property. In *United States v. Sioux Nation*,⁶ for example, the Court focused on how Congress must act as a trustee of Indian property—it may change it from one form to another, e.g., from land to money, but it may not take it for a public purpose without meeting the Fifth Amendment’s just compensation requirement. Similarly, the Supreme Court has held unconstitutional as confiscatory, federal legislation that permits escheat (transferring title) to tribes of fractionated shares of Indian allotments that have passed through multiple intestate successions resulting in maximum fractionalization of interests.⁷

Although the Court seems to be moving away from viewing the trust relationship as a source of federal plenary power, it has not adopted the view that the trust relationship completely incorporates the common law of trusts. In 1983, in *Nevada v. United States*,⁸ the Supreme Court indicated that the trust obligations assumed by federal government agencies with respect to Indians or Indian property are unlike the obligations of a private fiduciary or trustee with respect to the issue of conflict of interest. The case involved a situation in which the United States represented both an Indian tribe and a reclamation project in water rights litigation. The Court noted that when Congress calls upon an agency to represent more than one beneficiary or imposes conflicting obligations on it, strict fiduciary duties are not required, saying “[t]he Government does not ‘compromise’ its obligations to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.”⁹

Under what is known as the Indian Tucker Act, 28 U.S.C. § 1505, the United States waives its sovereign immunity to permit Indian tribes to sue for damages in the Court of Federal Claims for claims “arising [after August 13, 1946] under the Constitution, laws

² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³ *Id.*, at 17.

⁴ See Reid Peyton Chambers, “Judicial Enforcement of the Federal Trust Responsibility to Indians,” 27 *Stanford Law Review* 1213, 1223 (1975).

⁵ See e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁶ See *United States v. Sioux Nation*, 448 U.S. 371 (1980).

⁷ *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997).

⁸ 463 U.S. 110 (1983).

⁹ 400 U.S. 110, 128.

or treaties of the United States, or Executive orders of the President, or ... which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group” For a tribe to recover damages against the United States under this statute, it is not enough to cite the federal trust relationship. To impose strict fiduciary duties¹⁰ upon a federal agency a statute must satisfy tests set forth by the Supreme Court in two cases involving timber management on reservation trust lands.

In *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), the Court held that assessment of money damages against the United States for breach of trust in connection with Indian property must be based on a statute that contemplates such a result (i.e., it must be “money-mandating”). The Supreme Court found nothing in the language, legislative history, or circumstances surrounding the legislation cited by the lower court,¹¹ the General Allotment Act, 25 U.S.C. §§ 332 *et seq.*, to create an express trust respecting timber management. On remand,¹² the lower court found that the Indian timber statutes¹³ established a trust relation allowing recovery for breach of trust because they created a corpus of Indian property, to be controlled by a trustee, the federal government, for the benefit of a beneficiary, Indian owners, and that Congress intended the benefit be financial. The Supreme Court agreed. In *United States v. Mitchell*, 463 U.S. 206, 219 (1983) (*Mitchell II*) the Court examined the statutes cited by the lower court to see “whether they can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.” It traced the history and scope of the timber management legislation and concluded that it, unlike the general Allotment Act, gives the federal government “full responsibility to manage Indian resources and land for the benefit of the Indians. ...[and] thereby establish a fiduciary relationship....”¹⁴

White Mountain Apache and Navajo Nation. On March 4, 2003, the Supreme Court decided two cases involving assertions by Indian tribes that the United States had breached its trust obligations. The decisions articulated the same standard as announced in *Mitchell II*, but found a trust obligation in only one of the cases, *United States v. White Mountain Apache* 537 U.S. 465 (2003). In it, the Court upheld an appellate ruling¹⁵ that a tribe could bring an action against the United States for compensation for failure to repair buildings at Fort Apache. The case involved a 1960 statute that declared the Fort Apache military post 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

¹⁰ Technically, this means that, provided the statutes imposing the trust meet certain standards indicating that they are intended to mandate monetary compensation for their breach, a tribe may sue the United States under the Indian Tucker Act.

¹¹ *Mitchell v. United States*, 391 (F2d 1300) (Ct. Cl. 1979).

¹² *Mitchell v. United States*, 664 F2d. 265 (Ct. Cl. 1981).

¹³ 25 U.S.C. §§ 406 - 407 and 466; the court also found trust responsibilities created by statutes dealing with road building and rights of way (25 U.S.C. §§ 318a and 323 - 325; and Indian trust funds and administrative fees (25 U.S.C. §§ 162a and 413).

¹⁴ 463 U.S. 206, 225.

¹⁵ *White Mountain Apache v. United States*, 249 F.3d 1364 (Fed. Cir.2001).

needed for that purpose.”¹⁶ The appeals court had noted that the Fort Apache legislation conveyed complete control and did not require, as in *Mitchell II*, that the property be administered for the benefit of the Indians. Nonetheless, it found that when the government chooses to use trust property exclusively for its own purposes, it becomes subject to the duties of a common law fiduciary and, therefore, must “act reasonably to preserve the trust property,”¹⁷ or to be liable to the tribe in money damages. This ruling was contrary to that of the trial court, which had held that mere control was insufficient for a trust obligation to attach.¹⁸

Writing for the Supreme Court, in an opinion in which Justices Stevens, O’Connor, Ginsburg, and Breyer concurred, Justice Souter rejected the argument that the United States had raised as to the high standard to be applied to any statute interpreted as imposing a fiduciary obligation on the United States, breach of which is to give rise to compensable damages.¹⁹ The Court found that the Indian Tucker Act²⁰ met the standard for a clear waiver of sovereign immunity and that a statute creating a substantive right within that waiver requires merely the standard identified in *Mitchell II*: “that...[it]...be reasonably amenable to the reading that it mandates a right of recovery in damages.”²¹ The Court recognized, in the language of *Mitchell II*, that this is not to be “‘lightly inferred,’” but said that “a fair inference will do.”²²

The Court found that the language of the 1960 Act in *White Mountain Apache* created more than a bare trust even though it did not impose specific management and control duties similar to those of the timber management statutes at issue in *Mitchell II*. It held the statutory authorization for the United States to use the trust property carried with it a duty to maintain the property and not to permit it to deteriorate, a duty imposed upon a common law trustee. The Court remanded the case to the Court of Federal Claims for a trial on the issue of damages. Assessment of damages may involve knotty issues, such as whether damages will be assessed only for those improvements on the trust property used by the United States or for all the deterioration of this historic site and what interplay there will be with the trust law principle that the trustee use trust assets for expenses incurred in administering and maintaining the trust.

In *United States v. Navajo Nation* 537 U.S.488 (2003), in an opinion written by Justice Ginsburg, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Breyer, the Court reversed the U.S. Court of Appeals for the Federal Circuit.

¹⁶ Pub. L. 86-392, 74 Stat. 8 (1960).

¹⁷ *White Mountain Apache v. United States*, 249 F. 3d 1364, 1378.

¹⁸ *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20 (1999).

¹⁹ Brief for Petitioner, at 14 ff., *United States v. White Mountain Apache Tribe* (No. 01-1067).

²⁰ 28 U.S.C. § 1505, which authorizes the Court of Claims to hear claims against the United States by Indian tribes based on an Act of Congress.

²¹ *United States v. White Mountain Apache*, slip op., at 6.

²² *Id.*, 6, quoting *United States v. Mitchell*, 463 U.S. 206, 218 (1963)

It ruled against the Navajo Nation (Nation), which had sought \$600 million damages²³ in the context of the Department of the Interior's role in the negotiation and approval of reservation coal leases. The fact situation includes *ex parte* communication between the Secretary of the Interior and the lessee that was not disclosed to the Nation and that resulted in withdrawing an administrative decision that would have imposed higher royalties than were ultimately obtained by the Navajo Nation. The issue was whether the mineral leasing statutes²⁴ are such that they can be fairly interpreted as mandating monetary damages for breach of trust if actions by the Department of the Interior could be shown, in a future trial, to have resulted in an economic disadvantage to the tribe.

At the trial court level, the Court of Federal Claims had ruled that although the United States, "acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation...the trust relationship necessary for ...jurisdiction does not exist, and these violations do not mandate monetary relief."²⁵ That court found the dual purposes of the Indian mineral leasing statutes, maximizing economic returns for the Indian beneficiaries and fostering Indian self-determination, as undermining the necessary intent to permit money damages. This decision was reversed at the appellate level.²⁶ The arguments that the United States raised in the Supreme Court drew a contrast between the mineral leasing statutes that give the tribes the authority for mineral leasing, subject to the approval of the Secretary of the Interior, with the timber statutes in *Mitchell II*, which the Court found conveyed total control to the Secretary of the Interior. It also raised various factual matters that indicate the possibility that the final lease, which the Navajo Nation submitted for approval, may have been on the whole equal to that which would have been mandated had the Secretary not intervened. Finally, the U.S. characterized the Navajo Nation's case as calling for the imposition of common law trust duties, thereby, expanding potential liability beyond the *Mitchell II* standard and beyond what would be inferred by a fair reading of the statutes at issue.

The Supreme Court, in *Navajo Nation*, found no language creating a trust in the Indian mineral leasing statutes; nor did it find that the statutes or implementing regulations conferred the kind of control from which fiduciary obligations were held to flow in *Mitchell II*. The Secretary had only the authority to approve leases negotiated by tribes subject to the sole standard that royalties not fall below a minimum level established in the regulation. A dissent, which was written by Justice Souter, the author of the opinion of the Court in *White Mountain Apache*, drew a different implication from the requirement of Secretarial approval of coal leases on tribal lands. Relying on legislative history relevant to the purpose of the Secretarial approval requirement—to maximize tribal returns from mineral estates—and cases in the early part of the 20th century²⁷ the dissent viewed Secretarial approval as a protective measure. Two justices, Justices Ginsburg and Breyer, cast the deciding votes. They joined in a concurring

²³ Petition for Writ of *Certiorari*, at 13, *United States v. Navajo Nation* (No. 01-1137).

²⁴ The Indian Mineral Leasing Act of 1938, 38 *Stat.* 347, 25 U.S.C. §§ 396a *et seq.*

²⁵ *Navajo Nation v. United States*, 46 Fed. Cl. 217,219 (2000).

²⁶ *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001).

²⁷ *Tiger v. Western Investment Co.* 221 U.S. (1911); *Choteau v. Burnet*, 283 U.S. 691 (1931); *Sunderland v. United States*, 266 U.S. 226 (1924); and *Anicker v. Gunsburg*, 246 U.S. 120 (1918)

opinion, written by Justice Ginsburg, in *White Mountain Apache*, reconciling the different outcomes on the basis of application of the *Mitchell II* standard. They saw the statute in *White Mountain Apache* as requiring the Secretary to hold the land in trust and as conveying full authority to use it. On the other hand, they viewed Indian mineral leasing legislation as involving no Secretarial management or control or duties, breach of which, required compensation.

Cobell²⁸ and Other Trust Fund Cases. The Court's decision to uphold the *Mitchell II* rationale may have an impact on other litigation.²⁹ For example, Judge Royce Lamberth of the U.S. District Court for the District of Columbia has been overseeing *Cobell v. Norton* (Civil No. 96-1285), a suit seeking a declaratory judgment as to the extent of the Interior Department's duties with respect to trust funds held for individual Indians and an injunction to assure performance. Related cases involving similar claims involving trust funds held for certain tribes have also been referred to Judge Lamberth.³⁰ At least two federal statutes are central to the *Cobell* case: (1) section 702 of the Administrative Procedure Act waives sovereign immunity of federal officials for actions "seeking relief other than money damages" involving a federal official's action or failure to act,³¹ and (2) the Indian Trust Fund Management Reform Act of 1994³² specifies, *inter alia*, that the Secretary of the Interior must provide: adequate systems for accounting for trust fund receipts and balances, periodic reconciliations of trust fund accounts, adequate controls over receipts and balances; and periodic statements to account holders. The trial court, during the course of protracted litigation that has included contempt orders against two Secretaries of the Interior and one Secretary of the Treasury³³ and the removal from the Department of the Interior website of all resources connected to trust documentation,³⁴ has found that these duties have been breached. The appellate court, in an opinion that has not been appealed, generally upheld the trial court, finding that the government had breached its trust obligations to the beneficiaries and upheld the district court's orders compelling the government officials "to do little more than develop plans to ensure proper discharge of their duties within a reasonable time."³⁵

²⁸ *Cobell v. Norton* (Civil No. 96-1285) (D.D.C.). Updated information is available on the plaintiffs' website: [<http://www.indiantrust.com>]. The Department of Justice Civil Division's website provides case documents. [<http://www.usdoj.gov/civil/cases/cobell/index.htm>.]

²⁹ Interior Department estimates it holds 300,000 trust accounts; the plaintiffs in *Cobell* assert that 500,000 is the appropriate figure. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, at 10 (D.D.C. 1999).

³⁰ See, e.g., *Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation v. Norton* (Civil Action No. 01-35 (RCL) D.D.C.). The *Cobell* plaintiffs' web site, [<http://www.indiantrust.com>], contains many of the pertinent documents and news articles, and a chronology of the case.

³¹ 5 U.S.C. § 702.

³² 25 U.S.C. § 162a(d).

³³ *Cobell v. Babbitt*, 37 F. Supp. 2d (1999); *Cobell v. Norton*, 2002 U.S. Dist. Lexis 17353 (D.D.C. 2002).

³⁴ *Cobell v. Norton*, 226 F. Supp. 2d 1, 305-307, n. 130 - 131 (D.D.C. 2002).

³⁵ *Cobell v. Norton*, 240 F.3d 1081, 1098. (D.C. Cir. 2001).