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TRUSTS: TOWARD AN EFFECTIVE INDIAN REMEDY FOR BREACH OF TRUST

Daniel McNeill

No other ethnic minority in the country feels the close, constant presence of the federal government as does the American Indian. Agencies within HUD, Health and Human Services, Education, Justice, and other departments play often crucial roles with regard to Indian housing, medical care, instruction, legal representation, and other needs. The Bureau of Indian Affairs (BIA) alone has been called the reservation

realtor, banker, teacher, social worker; it runs the employment service, vocational and job training program, contract office, chamber of commerce, highway authority, housing agency, police department, conservation service, water works, power company, telephone company, planning office; it is land developer, patron of the arts, ambassador to and from the outside world, and also guardian, protector, and spokesman.¹

It is not going too far to say that the United States exercises "nearly total control over many aspects of Indian life."²

Although ultimately the government obtained this power because of demographic, economic, technological, and military factors, its legal sources lie in the United States Constitution,³ various Indian treaties and agreements, executive orders, and congressional statutes.⁴ From all of these, the courts have inferred—and it is now well-settled—that a trust relationship exists between Indians and the government.⁵ As trustee, the government is obliged to manage tribal affairs solely in the interest of Indian beneficiaries.⁶ The Supreme Court has held the government to "the most exacting fiduciary standards"⁷ in this task.

1. OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 157 (Cohn & Hearne ed. 1970). The Indian Self-Determination Act of 1975, 25 U.S.C. §§ 450a to 450u, now allows tribes to contract with the government for delivery of these services. The pervasive influence of the government remains, however.

2. C. Scott, *Administrative Law: Self-Determination and the Consent Power: The Role of the Government in Indian Decisions*, 5 AM. INDIAN L. REV. 195 (1977).

3. U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2.

4. Generally collected in Title 25 of the United States Code.

5. For 24 case citations to this effect, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

6. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959); A. SCOTT, TRUSTS § 2.3 (1939); G. BOGERT, TRUSTS AND TRUSTEES § 541 (rev. ed. 1978). The Scott and Bogert treatises will hereinafter be cited only as SCOTT, BOGERT.

7. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

Thus Indians would seem to enjoy a charmed relationship with the United States, one whose only danger would be the *dolce far niente* of the gilded cage. In fact, though, among American minority groups today, Indians have the highest rates of poverty,⁸ ignorance,⁹ infant mortality,¹⁰ and hunger and malnutrition.¹¹ One observer has noted that "on every scale of measurement—employment, income, education, health—the condition of Indian people ranks at the bottom."¹²

Moreover, the government has systematically doled out Indian natural resources to its own favorites. "Indian history is full of instances of 'sweetheart' contracts for mining and mineral exploration approved by the government, contrary to the Indians' best interests and for a fraction of their true value."¹³ Such largesse has also extended to agencies within the government itself, such as the Bureaus of Mines and Reclamation.¹⁴

These deprivations raise urgent questions about the enforceability of the government's trusteeship obligations. The Supreme Court has never recognized an Indian cause of action under general jurisdiction for breach of trust.¹⁵ Moreover, the Court has never articulated more than the shadow of a specific legal structure for the trust relationship, and few, if any, commentators have attempted to supply one. Lacking such a structure, the trust has tended to become a vaporous entity, whose shifting, uncertain contours have lent themselves to diverse and contradictory interpretations by different courts.

This note examines the current possibilities for establishing an effective Indian remedy for breach of trust. The first part deals with the elements of a trust in general and forms the foundation for the discussion. The second part treats potential obstacles to the cause of action, with particular emphasis on *United States v. Mitchell*¹⁶ and the difficulties it suggests may inhere in sovereign

8. S. LEVITAN & W. JOHNSON, *INDIAN GIVING: FEDERAL PROGRAMS FOR NATIVE AMERICANS* 11 (1975).

9. NAACP LEGAL DEFENSE AND EDUCATION FUND, *AN EVEN CHANCE* 2 (1971).

10. OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 157 (Cohn & Hearne ed. 1970).

11. *Id.*

12. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. 1 (1970).

13. C. Scott, *supra* note 2, at 198.

14. *Id.*

15. *Seminole Nation v. United States* and similar cases were all brought under special jurisdictional statutes.

16. 445 U.S. 535 (1980).

immunity and statutory interpretation. The third part suggests specific theoretical models for the Indian-government trust relationship, with the aim of at least beginning to construct a framework appropriate for this special field.

Elements of a Trust

A trust is a legal device by which one person conveys property to a second, to be managed in the interests of a third. It commonly exhibits five main parts: the trust corpus, the settlor, the manifestation of intent, the beneficiary, and the trustee.

The trust corpus is the property that forms the subject matter of the relationship. It is the central feature, against which the rights of the beneficiary and the duties of the trustee are understood.¹⁷

The settlor creates the trust by passing title to the corpus to the trustee on behalf of the beneficiary. As original owner of the property, he has considerable latitude in determining the scope of the trust. He may, for instance, appoint himself trustee.¹⁸ He may retain the power to modify or revoke the relationship at will.¹⁹ However, no trust is created unless the settlor manifests an intention to impose enforceable duties.²⁰ Moreover, though the settlor may limit some of the trustee's obligations,

[a] provision in the trust instrument is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust.²¹

The beneficiary thus has certain equitable rights which no settlor may deny. Because a trust may be created by statute, there need be no individual settlor.²²

The manifestation of intent provides evidence of the creation of a trust and, generally, defines the corpus and the terms of the trust. A settlor may manifest his intent by written words, spoken words, or behavior, or all three,²³ and the courts may look to all

17. SCOTT, § 3.1.

18. RESTATEMENT (SECOND) OF TRUSTS § 17(a)(1959).

19. *Id.* § 37.

20. *Id.* § 23.

21. *Id.* § 222(2). See SCOTT, § 222; BOGERT, § 542.

22. RESTATEMENT (SECOND) OF TRUSTS § 23, comment c (1959).

23. *Id.* § 24(1).

relevant circumstances to discern the terms of the trust.²⁴ However, the presumption is that the common law of trusts will define the terms unless "the settlor manifests a different intention in a manner which admits of proof in a judicial proceeding"²⁵ The burden of such proof thus rests with the settlor.

The beneficiary is the individual for whom the trust is set up. Broadly speaking, his rights are the obverse of the trustee's duties. The beneficiary possesses five equitable remedies against the trustee: "1) [T]he specific enforcement of the duties of the trustee under the trust; 2) an injunction against a threatened breach of trust; 3) redress for breach of trust; 4) the appointment of a receiver; 5) the removal of the trustee."²⁶ The third is easily the most common cause of action.

The trustee administers the trust on behalf of the beneficiary. "One of the most fundamental duties of the trustee is that he must display throughout administration of the trust complete loyalty to the interests of the beneficiary, and must exclude all selfish interests and all considerations of the interests of third persons."²⁷ As a general rule, he must not merely refrain from harming the beneficiary's interests but must actively promote them. He has the duty "to use reasonable care and skill to make the trust property productive,"²⁸ "to defend actions which may result in a loss to the trust estate,"²⁹ "to keep the trust property separate from his individual property"³⁰ (thus "a trustee cannot properly lend trust property to himself"³¹), and "to use reasonable care and skill to preserve the trust property."³² The fiduciary may breach his obligation "even if he does the best he can, if his best is not good enough."³³ An errant trustee may be held liable for any loss resulting from, profit made because of, or profit which would have been made in the absence of the breach.³⁴

24. SCOTT, § 4.

25. *Id.*

26. *Id.* § 199. See RESTATEMENT (SECOND) OF TRUSTS § 199 (1959); BOGERT, §§ 519-28, 543(v), 861, 945-46.

27. BOGERT, § 543.

28. RESTATEMENT (SECOND) OF TRUSTS § 181 (1959). See SCOTT, § 181; BOGERT, § 541.

29. RESTATEMENT (SECOND) OF TRUSTS § 178. See SCOTT, § 178; BOGERT, § 581.

30. RESTATEMENT (SECOND) OF TRUSTS § 179. See SCOTT, § 179; BOGERT, § 541.

31. SCOTT, § 170.17. See RESTATEMENT (SECOND) OF TRUSTS § 191; BOGERT, § 543(j).

32. RESTATEMENT (SECOND) OF TRUSTS § 176. See SCOTT, § 174; BOGERT, § 541; *Costello v. Costello*, 209 N.Y. 252, 261, 103 N.E. 148, 152 (1913).

33. SCOTT, § 201. See BOGERT, § 541.

34. SCOTT, § 205. See RESTATEMENT (SECOND) OF TRUSTS § 205; BOGERT, § 543(v).

The courts have consistently found that, without this high standard of conduct on the part of the trustee, the institution of the trust would be jeopardized. As Bogert says:

By reason of the intimate knowledge which the fiduciary has with respect to the financial affairs of the principal, the superiority of his position, his usual influence with the principal, and the latter's trust and confidence in the fiduciary, there is great opportunity for the exercise of fraud and undue influence.³⁵

Or, as Chief Judge (later Justice) Cardozo observed, in a famous passage:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.³⁶

If the courts did not require the trustee to balance his great power over the affairs of the beneficiary with "an honor the most sensitive," he might show little honor at all.

Congress as Trustee

The history of the congressional relationship with Indians aptly illustrates the Bogert and Cardozo warnings.

Though Congress derives its power over Indians from the commerce and treaty clauses of the Constitution,³⁷ nothing in their language suggests that the legislative branch would ever become trustee of Indian property. It took a pair of Supreme Court decisions vesting title to Indian land in the United States to send Congress on the road to trusteeship. In *Johnson v. M'Intosh*, Chief Justice Marshall baldly stated the rationale for the transfer of ownership: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."³⁸ Eight years later,

35. BOGERT, § 544.

36. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

37. U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2.

38. 21 U.S. (8 Wheat.) 543, 588 (1823).

in *Cherokee Nation v. Georgia*, he restated the principle more broadly: "[The Indians] occupy a territory to which we assert a title independent of their will."³⁹ As one cannot be a trustee without title to a corpus, these decisions made the trusteeship possible.

However, since the government obtained this title from the Indians "independent of their will," the relationship began as one of exploitation rather than protection. Subsequent events amplified its larcenous nature. For instance, in the late nineteenth century, open, arable land began to grow scarce in the United States, and pressure mounted to hand Indian territory over to white settlers. Congress thus enacted numerous statutes which, like the General Allotment Act of 1887, effectively mulcted Indians of their land. Rapid white occupation often followed such legislation. The intransigence of these pioneers, and their political clout, placed the Supreme Court in a delicate situation regarding these acts. If it applied the private law of trusts to them, it would have to order the removal of thousands of whites. Such a decision risked a defiance similar to that which occurred after *Worcester v. Georgia*,⁴⁰ a case which threatened white interests to a much lesser extent than such a "dispossession" ruling would have. The power of judicial review was still not firmly established in the late 1800s, and the Court may have felt that, in Indian cases, to use it was to lose it. On the other hand, if the Court ignored fiduciary law entirely, it both flouted the germinal principle announced by Marshall in *Cherokee Nation*⁴¹ and appeared to

39. 30 U.S. (5 Pet.) 1, 17 (1831).

40. 31 U.S. (6 Pet.) 515 (1832).

41. "[The Indians'] relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) at 16. The clarity of the government-Indian relationship has not been helped at all by the terminology used by the courts to describe it. Outstanding among the semantic offenders have been the words "ward" and "guardian," which have specific legal meanings and which have been continually used where they can only mean "beneficiary" and "trustee." For instance, the Supreme Court recently quoted with approval the following formulation of a lower court: "On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward." *United States v. Sioux Nation*, 488 U.S. 371 (1980). Moreover, "ward" has been employed so loosely as to have become meaningless even as a word of art. Felix Cohen identified at least ten different senses in which the term "wardship" had been used: (1) as suggestive of the "domestic dependent nation" concept of *Cherokee Nation*; (2) as indicative of special tribal subjection to congressional power; (3) as indicative of individual Indian subjection to congressional power; (4) as synonymous with "subject to the jurisdiction of the federal courts"; (5) as indicative of Indian subjection to administrative power; (6) as suggestive of beneficiary status; (7) as

grant approval to wanton treaty breaking and racial theft. The middle way out of this dilemma contained strong internal contradictions, but the Court took it anyway. Its decisions stressed the fiduciary role of the government again and again but generally refrained from granting relief for abuse of that role. Congress gained the power of a trustee without the duties. Indians found themselves "beneficiaries" of an essentially unenforceable trust.

Confusion between congressional exploitation and protection of Indians reached its highest pitch in the early years of this century. In *Lone Wolf v. Hitchcock*⁴² the Court declared that Congress possessed "plenary," i.e., absolute, power over Indians, and that as trustee it could pass any statutes or break any treaties it wished, and as long as its actions were constitutional the judiciary would not inquire further into them. As Felix Cohen pointed out in 1941, this doctrine stood the trusteeship on its head: "In private law, a guardian is subject to rigid court control in the administration of the ward's affairs and property. In [Indian] law the guardianship relation has generally been invoked as a reason for *relaxing* court control over the action of the 'guardian'."⁴³ Moreover, not only could the Court find that the trusteeship justified exploitation, but that such exploitation in turn justified the trusteeship: "From [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power."⁴⁴

For years after *Lone Wolf*, Congress was the paramount source of Indian law. The first assertion of ultimate judicial supremacy came in 1937, with *Shoshone Tribe v. United States*.⁴⁵ There, the Court held that Congress could not unilaterally abrogate Indian treaty rights without providing just compensation. The decision did not explicitly refer to congressional trusteeship duties, but Justice Cardozo, tersely concluding that "spoliation is not management,"⁴⁶ clearly implied that such duties exist.

equivalent to "noncitizenship"; (8) as indicative of the presence of a restraint upon the alienation of Indian land; (9) as explanatory of the rule that doubtful clauses in treaties, statutes, and agreements are to be resolved in favor of the Indians; and (10) as suggestive of an Indian right to particular boons from the government. F. COHEN, *FEDERAL INDIAN LAW* 170-73 (1941).

42. 187 U.S. 553 (1903).

43. COHEN, *supra* note 41, at 171 (emphasis in original).

44. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

45. 299 U.S. 476 (1937).

46. *Id.* at 498.

In 1974, with *Morton v. Mancari*,⁴⁷ the Court indicated congressional responsibility directly. In upholding special promotional preferences for Indians working in the Bureau of Indian Affairs, it stated that "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."⁴⁸ Of course, the Court here invoked the "unique obligation" to countenance, rather than restrain, congressional power. The "obligation" thus seemed optional rather than mandatory. Moreover, the decision left some question as to whether the rational-tie test merely limited the amount of special treatment Indians could receive vis-à-vis whites, or whether it had wider scope.

The Court clarified the latter issue in *Delaware Tribal Business Committee v. Weeks*.⁴⁹ It referred to the *Morton* test as "the standard of review most recently expressed,"⁵⁰ and applied it to a case involving not special treatment but distribution of funds among competing groups of Delaware Indians. The sweep of the test has thus been increased significantly.

That the trust responsibility limits congressional action is now clear. But problems remain. The extent of the congressional obligation is uncertain, as are the criteria for a rational tie. Moreover, despite the recent ruling that *Morton* and *Weeks* "establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment,"⁵¹ it is still true that the Court has never struck down a piece of congressional legislation bearing on Indians. The power of Congress is no longer plenary, but it remains substantial.

Executive Branch as Trustee

Traditionally, the courts have viewed the executive branch as something of an agent of Congress in regard to Indian affairs. Thus, while they have been willing to play the Pollyanna with respect to Congress, they have been much more vigilant over the executive branch. This concern stems not only from the greater potential of the executive to commit concrete injustice but also from the greater confidence the Court has felt in overturning executive actions. The main line of cases in this century strongly

47. 417 U.S. 535 (1977).

48. *Id.* at 555.

49. 430 U.S. 73 (1977).

50. *Id.* at 85.

51. *United States v. Sioux Nation*, 488 U.S. 371, 414 (1980).

suggests that the principles of private trust law apply directly to the executive branch.

In 1919, with *Lane v. Pueblo of Santa Rosa*,⁵² the Court made it clear that the *Lone Wolf* teaching did not extend to the executive branch. It forbade the government from dispensing Indian territory as if it were public land, stating that such action "would not be an exercise of the guardianship, but an act of confiscation."⁵³

The Court went farther four years later in *Cramer v. United States*,⁵⁴ where it held that the general trust responsibility of the government protected Indians not otherwise covered by treaty, statute, or executive order from arbitrary alienation of their land. It stated, "The fact that [an Indian] right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."⁵⁵ In effect, the Court found that the written words, spoken words, and behavior of the government combined to form a manifestation of intent to create a trust, and that henceforth Indian rights under that trust need not be limited to those in the written documents.

In *United States v. Creek Nation*⁵⁶ the Court awarded money damages to Indians whose land had been sold because of an incorrect federal survey of the reservation boundary. It ruled that the executive branch was "subject to limitations inhering in . . . a guardianship,"⁵⁷ though it did not specify what those limitations might be.

Two subsequent cases were more explicit, but because they were brought under special jurisdictional statutes, their precedential value today is uncertain. In *Seminole Nation v. United States*,⁵⁸ the Court held the government to "the most exacting fiduciary standards."⁵⁹ And in *Menominee Tribe v. United States*,⁶⁰ the Court of Claims declared that "the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary."⁶¹

Since *Seminole*, the Court has not elaborated on the extent of

52. 249 U.S. 110 (1919).

53. *Id.* at 113.

54. 261 U.S. 219 (1923).

55. *Id.* at 229.

56. 295 U.S. 103 (1935), *reh. denied*, 295 U.S. 769 (1935).

57. *Id.* at 110.

58. 316 U.S. 286 (1942).

59. *Id.* at 297.

60. 101 Ct. Cl. 10 (1944).

61. *Id.* at 18.

the executive fiduciary liability. However, recently a few district courts have handed down decisions which expand and clarify the responsibility considerably. In *Manchester Band of Pomo Indians v. United States*,⁶² the court found that the government "is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."⁶³ Noting that the government in this instance had not done so, it entered a judgment of breach of trust against it. *Manchester* is the first case in which the government has been held liable for failure to take action to implement its trust obligation.

In *Pyramid Lake Paiute Tribe v. Morton*,⁶⁴ Indians contested a harmful government diversion of water away from Pyramid Lake, a shallow inland sea wholly within the reservation. Applying a rational basis standard and the *Seminole* private law test, the court found that the government failed on both and enjoined the diversion. Thus, the trust responsibility was extended beyond direct management of the Indian trust corpus to embrace actions that might only secondarily affect Indian welfare.⁶⁵

The private law of trusts is a coherent, rational structure, with powers balanced against protections, duties against rights. Its purpose is to advance the interests of the beneficiary, according to the wishes of the settlor, and it is well-suited to that end.

But the government-Indian trust has, historically, been less a structure than a series of catchwords. Trustee powers have far outrun beneficiary protections. Trustee duties have been largely voluntary and beneficiary rights hence unenforceable. The legal contradictions have been an embarrassment to the profession. The trust relationship has resembled a state of vassalage. The government has fallen to Cardozo's level "trodden by the crowd," and the "fraud and undue influence" Bogert cautioned against have proliferated. As those eminent authorities noted, such is the *inevitable* result of failure to impose a clear protective framework on a trust relationship.

Current Obstacles to Effective Remedy

The historical, political, and institutional conditions that gave the government-Indian trust its unilateral aspect today no longer

62. 363 F. Supp. 1238 (N.D. Cal. 1973).

63. *Id.* at 1245.

64. 354 F. Supp. 252 (D.D.C. 1973).

65. A holding with many potential ramifications, given the serious conflicts of interest within the Department of Interior.

exist. Yet certain technical barriers to an effective Indian remedy for breach of trust may still obtain. These include a case, salient because of its possible precedential value, and two recently announced principles.

United States v. Mitchell

The Quinault Indian Tribe has long lived on the western flank of the Olympic Peninsula in Washington State. The land there is heavily forested, and was, for their purposes, fit mainly for hunting and fishing. By the Treaty of Olympia⁶⁶ in 1859, the government granted them 200,000 acres of it for their own use.

However, in 1887, Congress passed the General Allotment Act,⁶⁷ which fragmented reservations, and which stated in Section 5⁶⁸ that the United States would "hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such an allotment shall have been made" Legislators clearly saw this act as a device to induce Indians to abandon tribalism for individualism and nomadism for farming and ranching. On the wooded Quinault Reservation, though, such pursuits were highly impractical, and perhaps for this reason allotment did not commence there until 1905, nor finish until 1933.

By the Act of June 25, 1910,⁶⁹ Congress authorized the Department of Interior to market timber on Indian land. In 1920 the department began harvesting and selling lumber from the Quinault Reservation. Since then, the BIA has handled all aspects of the operation—receipt of bids, award of contracts, supervision of cutting and processing, and collection and distribution of proceeds.⁷⁰ The 1934 Indian Reorganization Act⁷¹ mandated that all Indian forests be run on a sustained-yield basis, and in 1949 the Department of Interior issued its own guidelines ordering that all Indian timberlands be kept in a perpetually productive state.

Before 1946 sovereign immunity prevented tribes from suing the United States in federal court without congressional passage of a special jurisdictional statute to that end. The process of obtaining such a statute was, of course, arduous and often seemingly endless. In that year, Congress passed the Indian Claims Com-

66. 12 Stat. 971 (1859).

67. 24 Stat. 388, ch. 119, 25 U.S.C. §§ 331 *et seq.* (1970).

68. 25 U.S.C. § 348.

69. 36 Stat. 857, ch. 431, 25 U.S.C. §§ 406, 407 (1970).

70. Even today, the Quinaults are not allowed to cut timber on their land without posting bond to the BIA and gaining its permission. 25 C.F.R. 141.19 (1979).

71. 48 Stat. 986, ch. 576, 25 U.S.C. § 466 (1970).

mission Act,⁷² which gave Indians essentially the same right of access to the Court of Claims as the Tucker Act⁷³ conferred on other citizens. In passing the Indian Claims Commission Act, Congress noted that, unless Indians had effective recourse to sue for governmental mismanagement of trust property, there would continue to be "encourage[ment of] bureaucratic disregard of the rights of Indian citizens by a small minority of governmental officials who are comforted by the thought that there is no judicial redress available to the victims of their maladministration."⁷⁴

In 1971 allottees of the Quinault Reservation brought suit in the Court of Claims under the Indian Claims Commission and Tucker acts, to recover money damages for government mismanagement of their timberlands. They alleged that the government

(1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations, and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees.⁷⁵

The evidence for malfeasance was strong.

The Court of Claims ordered money damages for the plaintiffs in 1979.⁷⁶ It found that the General Allotment Act imposed a fiduciary obligation upon the United States and that the government had breached it. Since the Act was sufficient to decide the case, the court did not need to reach the Quinaults' contention that subsequent statutes had also made the government liable.

The Supreme Court reversed and remanded. In essence, it held that the General Allotment Act "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands."⁷⁷ Rather, "the Act created only a limited trust relationship"⁷⁸ between the United States and the tribe, one which did not include reservation timber in the corpus.

72. 60 Stat. 1055, ch. 959, 25 U.S.C. §§ 70 *et seq.* (1970).

73. 28 U.S.C. § 1491 (1970).

74. H.R. REP. No. 1466, 79th Cong., 1st Sess. 4 (1945).

75. *United States v. Mitchell*, 445 U.S. 535, 537 (1980).

76. *Mitchell v. United States*, 591 F.2d 1300 (1979).

77. 445 U.S. 535, 546 (1980).

78. *Id.* at 542.

The Court adduced three reasons for this interpretation of the statute: the other provisions of the Act, its legislative history, and the restrictive Indian laws of the time.

First, the Court observes that sections 1 and 2 of the Act provide that the Indian allottees, not the government, are to control and manage the allotments. The implication is that such Indian control cannot coexist with full fiduciary responsibility on the part of the government. However, the Court fails to demonstrate that this conclusion necessarily follows because Indian management does not preclude federal assistance to make the lands profitable. Moreover, sections 1 and 2 explicitly contemplate "agricultural and grazing"⁷⁹ uses, not logging. Timber management on reservations almost demands such federal assistance because it requires a high degree of organization, substantial capitalization, significant expertise, and a broad expanse of territory. As the Act itself had shivered the reservation into parcels, the government was perhaps the only agency capable of harvesting the wood.

Second, the Court examines the intent of legislators, and finds that "the legislative history of the Act plainly indicates that the trust Congress placed on the allotted lands is of limited scope."⁸⁰ The Court states that the preliminary versions of the Act provided only that Indians were to hold title subject to a restraint on alienation. Senator Dawes altered this language when it occurred to him that the statute would afford allottees no protection from state taxation. By placing title in the United States,⁸¹ Dawes believed Indians could avoid the encroachments of state government. Thus, the Court concludes, Congress included trust language in the Act, "not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to insure that allottees would be immune from state taxation."⁸² However, it neither follows that the reasons for creating a trust limit its scope, nor that they limit more expansive language in a written manifestation. For instance, if a settlor creates a trust because he never wants to see his son go on welfare, it does not follow that the duty of the trustee is limited to preventing that contingency, especially if the written manifestation states only that the trustee must "hold the [trust

79. 25 U.S.C. § 331 (1970).

80. 445 U.S. 535, 543 (1980).

81. The United States was to issue patents in the name of individual Indians, who would in turn take title at some later (and as yet unreached) date. 25 U.S.C. § 331 (1970).

82. 445 U.S. 535, 544 (1980).

property] . . . in trust for the sole use and benefit of" the son. Thus, it is possible that while the danger of state taxation may have inspired the trust clause, Senator Dawes intended it to extend broader protection to Indians. This interpretation gains some force when one realizes that if the senator had wished merely to prevent alienation and taxation, he could have omitted the clause entirely. The government already held title to Indian land. It would have continued to hold title if the trust language had never been used. Thus, the presence of such language suggests Congress intended a larger purpose.

Third, the Court presents other evidence from the period, most of it demonstrating that Indians at this time had no legal right to harvest reservation lumber. For instance, according to *United States v. Cook*, "If the timber should be severed [by an Indian] for the purposes of sale alone . . . then the cutting would be wrongful, and the timber, when cut, become the absolute property of the United States."⁸³ The Court notes that Congress did not give the Department of Interior the authority to sell timber for "the benefit of the Indians"⁸⁴ until the Act of June 25, 1910.⁸⁵ Hence, the General Allotment Act, alone, cannot "impose any duty upon the Government to manage timber resources."⁸⁶ But the Court refused to consider whether the Act of June 25 or any other statute might "render the United States liable in money damages for the mismanagement alleged in this case."⁸⁷ It justified this refusal on the grounds that the Court of Claims had not considered the argument. However, the Court of Claims had no reason to consider it because it had already ruled that the General Allotment Act rendered the government liable. Moreover, the Supreme Court is not bound by the arguments the lower courts address. It is free to consider any line of reasoning presented to it. The Court's procedure here was so extraordinary as to merit serious explanation. In effect, it reduced the issue to one far narrower than that contemplated by either of the parties, then offered a decision that consequently had only tangential relation to the reality of the case. The dissent, of course, found no difficulty in taking these statutes into account.⁸⁸

83. 86 U.S. (19 Wall.) 591, 593-94 (1874).

84. 445 U.S. 535, 545 (1980).

85. 36 Stat. 857, ch. 431, § 7, 25 U.S.C. § 407 (1970).

86. 445 U.S. 535, 542 (1980).

87. *Id.* at 546.

88. *Id.* at 549-50.

It is important to discuss other factors the Court did *not* decide in *Mitchell*, and why. First, it did not reach the issue of whether a full, uncontested fiduciary obligation on the part of the government would create an enforceable Indian right. It felt there was no need to treat this matter because the General Allotment Act created only a limited trust.

Second, the Court did not consider the tribe's assertion that the overall government-Indian trust relationship disposed of this case. It avoided this claim on the ground that the tribe had not presented it before the Court of Claims. Again, this shortcoming did not prevent the dissent from taking the matter into consideration.⁸⁹

Third, the Court did not consider whether the Tucker Act comprehends the alleged misproprieties because they involved money wrongfully obtained or withheld. It stated, again, that because the Court of Claims had not reached this issue, it would not.

Fourth, the Court did not consider whether the General Allotment Act and the Treaty of Olympia,⁹⁰ combined, create an implied contract within the purview of the Tucker Act. Again, it stated that the Quinaults had not argued this point before the Court of Claims, so it would not rule on the issue.

Finally, it is worth noting that this case was appealed, not by the government *in toto* but by the Justice Department. The Department of Interior had earlier submitted a memo asserting: "There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians, and is reflected in the treaties, agreements and statutes pertaining to Indians."⁹¹ Interior thus took no part in the appeal. The *Mitchell* Court ignored the memo.

The majority opinion in *Mitchell* exhibits at least three fundamental flaws, each of them essential to the outcome of the case:

(1) *It characterizes a straightforward passage as unclear.* There is nothing obscure about a provision that the United States shall "hold the land thus allotted . . . in trust for the sole use and benefit of the Indian"⁹² allottee. As the dissent notes, "The act

89. *Id.* at 547.

90. 12 Stat. 971 (1859).

91. Memo of Nov. 21, 1978. See Brief for Appellee at app. 2a.

92. 25 U.S.C. § 348.

could hardly be more explicit as to the status of the allotted lands."⁹³

(2) *It then goes at once to legislative intent and relies solely upon this test to interpret the clause.* Both the haste and the emphasis are unwarranted, for this procedure ignores Indian vulnerability to Congress, tends to perpetuate the outmoded policies of the nineteenth and early twentieth centuries, and does not adequately take into account the general ambiguity of legislative intent itself.

(3) *It fails to consider statutes not merely relevant to the controversy but central to it.* This baffling approach will probably do little more than consume the additional time and money of both the Quinalts and the government. The Court did not even attempt to justify it.

As an obstacle to an effective Indian remedy for breach of trust, the status of *Mitchell* is uncertain. The decision itself—that the trust corpus created by the General Allotment Act did not include reservation timber—cannot bar many Indian actions for forestry mismanagement because most of these, like the Quinalts' claim itself, will rest on statutes like the Act of June 25, 1910.

However, *Mitchell* may have laid down language from which more obstructive decisions can be cantilevered. Its statements on statutory interpretation and sovereign immunity may affect how future trust questions are understood, or whether they are reached at all. The greatest precedential barrier in *Mitchell* may lie not in its conclusion but in its serpentine reasoning.

Statutory Interpretation

Two issues of statutory interpretation surface in *Mitchell*: (1) When is a statute unclear? (2) If it is unclear, what principles of interpretation should the Court resort to?⁹⁴

With regard to the first question, the dissent observes that the plain sense of statutory language is the starting-point for all interpretation.⁹⁵ In order to defeat the standard of common under-

93. 445 U.S. 535, 547 (1980).

94. There is, of course, a third: When should the Court consider other statutes *in pari materia* with the one before it? But the answer to this question, *i.e.*, when they are relevant, is so obvious, and the logically subsequent question, *i.e.*, when are they relevant?, is so poorly focused in the opinion, that the matter will not be dealt with in detail here. But see note 110, *infra*.

95. 445 U.S. 535, 547-48 (1980). See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

standing, substantial ambiguity is required, for even "when the law does not define a statutory phrase precisely,"⁹⁶ the Court will "give the words of the statute their ordinary meaning."⁹⁷ It is when the words reasonably lend themselves to more than one ordinary meaning that a statute becomes unclear.

In *Mitchell*, the plain meaning standard is ignored. The starting point becomes pellucidity. The Court states: "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."⁹⁸ Because the statute is not unambiguous, the Court may apply other canons of interpretation to it. It is important to note that "not unambiguous" does not mean the same thing as "ambiguous," any more than "not poor" means the same thing as "wealthy." A phrase that has a 95 percent chance of meaning one specific thing is "not unambiguous," but it is not "ambiguous" either. The *Mitchell* standard would allow the most frail possibility of alternate meaning to justify interpretation beyond the obvious sense of the words.

Such an approach is unwise for several reasons. First, it imposes a heavy burden of clarity upon legislators. Lawmakers do not have the time to define all their terms beyond cavil. As long as their words are sufficiently clear to the ordinary understanding, there is no point in demanding the extra effort of them. Second, the public relies on the plain meaning of legislation. Excessive judicial interpretation introduces an uncertainty to statutes that is not in the general interest. Third, the ordinary meaning of statutory language is the best evidence of collective legislative intent, both because draftsmen believe their words will be construed in their plain sense, and because a statute represents the consensus of the legislative body as a whole, rather than merely the beliefs of its sponsors.

Once a statute is deemed unclear, the question arises as to which tenets of interpretation should be used to clarify it. That these tenets should have some relation to the subject matter of the legislation seems obvious. For instance, statutory vagueness provokes very different judicial reactions in contract, criminal, and freedom of expression cases. Thus, inquiry into the nature of Indian legislation is essential.

Congress has passed laws bearing on Indians since its incep-

96. 445 U.S. 535 (1980).

97. *Id.*

98. *Id.* at 542.

tion.⁹⁹ However, before 1871 treaties defined most important legal relations between the government and the Indians. Chief Justice Marshall stated the guiding principle for interpretation of these documents in 1832: "The language used in treaties with Indians should never be construed to their prejudice."¹⁰⁰ This canon has never been seriously contested.

In the Indian Appropriations Act of 1871,¹⁰¹ Congress forbade further Indian treaties and assumed the power of legislating on matters that would previously have been negotiated by treaty. Nonetheless, it recognized the basic bilateral nature of Indian statutes—stemming from ethnic difference and centuries of hostility—when it implemented at once an agreement procedure. Representatives of the government and of the Indians would discuss and conclude a pact, which would then be sent to Congress. If passed, the agreement possessed the form and force of a statute. In a case involving such a statute, but applying to other instruments as well, the Court stated:

Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . . .¹⁰²

99. For example, the Northwest Ordinance of 1787, ratified by the First Congress in 1789, declared, "The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. Art. III, 1 Stat. 50, 52."

100. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). *Accord*, *Tulee v. Washington*, 315 U.S. 681, 684 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198 (1918); *United States v. Nice*, 241 U.S. 591, 599 (1910); *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886); *Wan-Zop-E-Ah v. Miami County Comm'rs*, 72 U.S. (5 Wall.) 759, 760 (1866); *Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866).

101. 25 U.S.C.A. § 71 (1971).

102. *Choate v. Trapp*, 224 U.S. 665, 675 (1912). *Accord*, *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656 (1976); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *DeCoteau v. District County Ct.*, 420 U.S. 425, 444 (1975); *Antoine v. Washington*, 420 U.S. 194, 200 (1975); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

The *Choate* standard thus derives from three explicit concerns: fiduciary obligation, Indian vulnerability, and precedent.¹⁰³

These considerations apply equally to statutes which do not develop from agreements,¹⁰⁴ as the Court has noted.¹⁰⁵ As recently as 1976, the Court affirmed that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor."¹⁰⁶

At the same time, however, another line of cases has begun eroding the canon. In *Mattz v. Arnett*, the Court laid down the requirement that "congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."¹⁰⁷ The Court may consider the words of the statute and the legislature's intent, but it must apply the *Choate* standard to both. Or, to put it more specifically in *Choate* terms: If both expression *and* intent are doubtful, a statute must be resolved in favor of the Indians.

Four years later, Justice Rehnquist changed the standard once again, in an attempt to prevent Indians from receiving the benefit of any doubt: "In all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was. *Mattz v. Arnett*, *supra*, at 505."¹⁰⁸ The reliance on *Mattz* is misplaced, to say the least, since this approach voids the *Mattz* rule. If rephrased to align with *Choate*, it holds: Whether expression is doubtful or clear, a statute must be resolved according to legislative intent. Or, in terms of the plain meaning doctrine: The ordinary sense of statutes is *never* enough for proper interpretation; one must always consider legislative intent.

103. Implicit considerations include, among others, lack of Indian fluency in English and lack of Indian acquaintance with American legal terms.

104. One observer, an attorney for the Justice Department, has recently suggested that *Choate* ought to apply only to treaties and agreement/statutes, and not to ordinary statutes, because the former are arrived at bilaterally and the latter unilaterally. This confuses procedure with essence. The fact that Congress can pass legislation without Indian consent does not vaporize the factors of trusteeship, vulnerability, and precedent which led to *Choate* in the first place. Decker, *The Construction of Indian Treaties, Agreements and Statutes*, 5 AM. INDIAN L. REV. 299-311 (1977).

105. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *United States v. S.F. Pac. R.R.*, 314 U.S. 339, 354 (1941); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87 (1918).

106. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

107. 415 U.S. 481, 505 (1973).

108. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977).

Justice Rehnquist elaborated on this standard, novel with him, in *Oliphant v. Suquamish Indian Tribe*:

"Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.¹⁰⁹

This remarkable passage (1) attacks judicial precedent in Indian law; (2) attacks the validity of the "actual text" of treaties and statutes; and, hence, (3) reposes the ultimate source of Indian law in the "assumptions" of draftsmen and the "common notions of the day." It thus asserts that, in Indian law, the Court plays an essentially passive role. It does almost nothing but treaty and statute interpretation. Moreover, it does not interpret mere documents but rather the "assumptions" of individuals who may have been in their graves for more than a century. Finally, because Justice Rehnquist seems to be referring to the "common notions" of white Americans and their elected officials, rather than of the Indians, his method of construction would turn the 149-year-old principle inside out. In effect, statutory ambiguities would be resolved in favor of the government.¹¹⁰

Legislative intent is not, of course, irrelevant to statutory interpretation. But, we enforce statutes, not the often elusive intent behind them. The very difficulty in divining collective legislative intent makes it a useful interpretive guide only after more important considerations have been dealt with. In Indian law the *Choate* tenet of construction is appropriate, for at least five reasons:

109. 435 U.S. 191, 206 (1978).

110. The Rehnquist canons offend a second primary tenet of statutory interpretation in Indian law. Ever since *Worcester*, the Court has shown a willingness to consider the broad historical picture in passing judgment on Indian cases. Often, for instance, an opinion will begin with a detailed analysis of the circumstances leading up to the controversy and deal with both the special situation of Indians in the matter and other statutes and treaties relevant to the matter. This approach is still very much alive. Less than two months after *Mitchell*, the Court stated, "We . . . require courts, in considering whether a particular congressional action was taken in pursuance of congress' power to manage and control tribal lands for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record." *United States v. Sioux Nation*, 448 U.S. 371, 415-16 (1980). Justice Rehnquist, it seems, would restrict that examination to white America.

(1) It derives from a long history of judicial contemplation of Indian matters, rather than the recent ruminations of, essentially, one man.

(2) Government-Indian issues are inherently bilateral, and have been historically recognized as such, because they involve relations between two different and distinct peoples.

(3) Indians are even more vulnerable to maladroitness in unilaterally enacted statutes, where they may not have been consulted, than in agreement/statutes, where they have been and *Choate* applies.

(4) The congressional trust responsibility, as announced in *Morton* and *Weeks*, mandates statutory beneficence toward Indians.

(5) It only makes sense that inadequate statutes be resolved against their drafters.

At present, the canon of statutory interpretation in Indian law seems to depend on who is handing down the opinion. Obviously, however, if the Rehnquist approach gains ascendancy, it could pose a serious problem for development of an effective Indian remedy for breach of trust. If the Court can declare that treaties, statutes, and its own prior decisions do not mean what they say they do, then it can successfully claim that allusions to a government trust obligation do not really refer to an *enforceable* trust obligation. The existence of the trust is firmly established, but such an interpretive end-run around plain meaning to "intent" could conceivably transform it into a trust in name only.

Sovereign Immunity: The Unequivocal Expression Test

The *Mitchell* Court spent a large portion of its time discussing sovereign immunity. However, as far as the outcome of the case went, it was all sound and fury. Statutory interpretation explains the result completely, and the Court never develops the link between sovereign immunity and the facts of the case.¹¹¹ But the

111. Justice White, writing in dissent, disagrees: "the Court today holds that *Testan* bars a damages suit against the Government. . . ." 445 U.S. 535, 547 (1980). His opinion is entitled to considerable deference, since, among other things, it is the clearest statement of the reason for the result in the entire case. But, with all due respect, this writer believes him to be wrong.

The heart of the holding was that the General Allotment Act created a trust corpus which did not include reservation timber. Hence, the Act would not sustain a breach of trust suit to recover for damages to the timber. There was no substantive right of any kind, and this fact alone sufficed for reversal.

It is also true that where there is no substantive right to money damages, the Court of

dicta cannot be ignored, for the Court at one point states: "We need not consider whether, had Congress actually intended the General Allotment Act to impose upon Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity."¹¹² That is, even if the private law of trusts applied directly to the government, sovereign immunity *might* bar an Indian cause of action for breach.

Mitchell reiterates three main points from previous cases. First, the United States possesses sovereign immunity, and, hence, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."¹¹³ Second, the Tucker Act only "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists."¹¹⁴ Consent to suit thus appears simultaneous with substantive right. Third, such consent "cannot be implied but must be unequivocally expressed."¹¹⁵ Hence, it would seem, no party can bring suit against the government in the Court of Claims except upon an unequivocally expressed substantive right. The standard appears quite literal.

Its strictness is largely illusory, though, as examination of the prior cases shows. In *United States v. King*,¹¹⁶ the question arose as to whether the Court of Claims had authority to render declaratory judgments. In deciding it did not, the court stated that a grant of such broad jurisdiction "cannot be implied but must be unequivocally expressed."¹¹⁷ Thus, in context, the requirement of unequivocal expression refers not to substantive rights but to extraordinary grants of jurisdictional power.

Context also illuminates *United States v. Testan*.¹¹⁸ *Testan* not only cites the unequivocal expression test with approval but states that the "grant of a right of action must be made with specificity."¹¹⁹ However, this remark follows an assertion that the *Testan* plaintiffs "argue that the Tucker Act fundamentally waives sovereign immunity with respect to *any* claim invoking a constitutional provision or a federal statute or regulation, and makes available *any and all* generally accepted and important

Claims has no jurisdiction. Thus, the *Mitchell* Court also found lack of jurisdiction. But this fact is inessential to the result.

112. 445 U.S. 535, 542 (1980).

113. *Id.* at 538, quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

114. *Id.*, quoting *United States v. Testan*, 424 U.S. 392, 398 (1976).

115. *Id.*, quoting *United States v. King*, 395 U.S. 1, 4 (1969).

116. 395 U.S. 1 (1969).

117. *Id.* at 4.

118. 424 U.S. 392 (1976).

119. *Id.* at 400.

forms of redress, including money damages.”¹²⁰ “Specificity” thus contemplates, not an explicit and detailed written guarantee of remedy, but rather a reasonable right to money damages, the only kind the Court of Claims can award.

Proof of this interpretation emerges in the standard the *Testan* Court used to decide the case before it: “It follows that the 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.’ *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 607, 372 F.2d at 1009 (1967) . . . We are not ready to tamper with these established principles. . . .”¹²¹ By way of emphasis, the Court repeated the fair interpretation standard later.¹²² The test of “unequivocal expression” must therefore be understood as a device that is relative. The Court may admonish a plaintiff with a tenuous claim to “unequivocal expression,” but when it states the principle generally, it uses the language of fair inference.¹²³

One must thus consider whether statutes establishing a “trust” for Indians “can fairly be interpreted as mandating compensation by the Federal Government” for breach. There are at least two strong reasons for concluding that they can: (1) *The Court has granted such money damages in the past.* The *Creek*¹²⁴ and *Seminole*¹²⁵ cases, it is true, reached the Court under special jurisdictional statutes and thus had cleared the barrier of sovereign immunity before the Court heard them. However, in both the Court ruled that government’s fiduciary obligation created a substantive right to compensation. Under *Testan*, such a right also constitutes waiver of immunity. It is worth noting that no precedent at all existed in either *King* or *Testan*. (2) *Trust terminology becomes meaningless without a cause of action for breach.* Where statutory language loses all sense without an enforceable remedy, it is a fair inference that a substantive right to sue has been conferred. Again, the statutes that plaintiffs relied upon in *King* and *Testan* retained their meaning even after the adverse decisions.

120. *Id.* (emphasis added).

121. *Id.*

122. *Id.* at 402.

123. Such a standard harmonizes with both traditional practice and public policy. For instance, a requirement of unequivocal expression of right to damages could prevent parties contracting with the government from suing for breach.

124. 295 U.S. 103 (1935).

125. 316 U.S. 286 (1942).

The unequivocal expression test would appear to be a chimera. Yet the ease with which it can be lifted out of context and made to appear a comprehensive precept, as in *Mitchell*, suggests the possibility of abuse. Indeed, it is hard to see why the *Mitchell* Court even broached the idea that a complete government fiduciary obligation might not waive sovereign immunity, unless it had such application in mind. At the same time, the reluctance of the Court to decide this case on waiver grounds implies it is aware of the difficulties involved in doing so. For the moment, then, statutory interpretation seems a more serious obstacle to remedy than sovereign immunity.

Outlook

The literal law is easily the greatest Indian asset in the attempt to establish an effective remedy for breach of trust. So many cases, statutes, and treaties refer to a trust responsibility that the Court can hardly deny a cause of action without appearing arbitrary and contentious. The legislative intent and unequivocal expression tests may make inroads here nonetheless, but their use will demand some sinuous logic.

Mitchell does indicate, however, that the current Court may be trying to limit Indian breach of trust actions. If so, its most vulnerable target may be the government's umbrella trust obligation to tribes, arising out of its course of dealing with them and independent of specific legal instruments.¹²⁶ This judicially created duty might fall to the Rehnquist emphasis on statutes and treaties, or suffer reduction through narrow usage of the fair interpretation test. As it offers hope of the broadest and most thorough protection for all Indians, its existence and growth warrant the most vigorous promotion.

It is also possible that the Court will tend to construe government breaches of trust as fifth amendment takings. Indeed, the government's brief in *Mitchell* strongly urged this approach upon the Court. Such a course, if broadly pursued, could reduce or eliminate any government duty to make trust property productive, as in *Manchester Band*,¹²⁷ or to avoid indirect damage to Indian interests, as in *Pyramid Lake*.¹²⁸ This kind of diversion would clearly curtail the efficacy of a breach remedy

126. *Cramer v. United States*, 261 U.S. 219 (1923).

127. 363 F. Supp. 1238 (N.D. Cal. 1973).

128. 354 F. Supp. 252 (D.D.C. 1973).

A further obstacle may lie in the absence of a coherent model of the government-Indian relation. As things stand, recognition of a breach of trust action might be seen as a venture into dark, uncharted territory, with but the feeble lantern of 150 years' talk of a fiduciary responsibility. In any case, the need for such a model is plain, since without it the trust relation must remain amorphous and confused and decisions thus unpredictable.

Toward a Model of the Government-Indian Relation

In 1886 the Supreme Court observed, "The relation of Indian tribes . . . to the people of the United States has always been an anomalous one and of complex character."¹²⁹ The description is still apt. But it is not inevitable. The relation can be cast into trust terms that not only impose a reliable structure on the field but also take the uniqueness of the relation into account. The following brief sketches are meant to give some idea of the possibilities.

The Model of Plenary Power

According to the Model of Plenary Power, Congress created the Indian trust, since it held title to the land, and nominated the executive branch as trustee. Moreover, Congress retained the right to alter the provisions of the trust whenever it wished, and thus it could redefine its powers and obligations annually. It could even eliminate certain beneficiaries from the trust relationship, as it did when it unilaterally abrogated treaties.

This model accords with history fairly well. It explains why Indians reaped so few benefits under federal "guardianship," for, since they never owned the trust corpus, they had no legitimate reason for control over its disposition. It indicates why Congress was for so long immune from trust obligations, for these do not apply to a settlor. It partly explains why the executive branch has been more open to breach of trust suits, for a trustee does have certain duties. It even goes some way toward supporting the Rehnquist legislative intent test, for, since congressional statutes constitute the manifestation of intent in this model, inquiry into purpose is appropriate.

However, the construct has serious flaws. First, and most important, the presumption that Congress held original title is factually incorrect. The United States obtained title by conquest and

129. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

arrogation. The Indians held title to North America long before the whites arrived, and this model can only stand if one refuses to admit it.¹³⁰

Second, it was one thing for the government to assert title to Indian land, and another to occupy it. To do the latter, the government entered into hundred of treaties in which it pledged itself to specific concessions. This model ignores the essentially contractual nature of these agreements and treats the government obligations laid out in them as gratuitous services which can be withdrawn at will.¹³¹

Third, the model has certain internal contradictions. For instance, although the executive branch acts as trustee, Congress appears to retain title to the corpus. Such an arrangement is not properly a trust at all but an agency.¹³² Moreover, there is a tendency toward fusion of function between settlor and trustee here that is quite extraordinary, and which creates a conflict of interest so acute as to lead, perhaps, to an effective beneficial interest in the government. Such an arrangement is also not a trust.

Fourth, of course, case law has rendered the model out of date. Decisions like *Morton* and *Weeks*, in imposing fiduciary obligations on the Congress, have recognized that: (1) it is not really a settlor; (2) its function does partly merge with the executive's; and (3) the resulting conflict of interest may be undesirable.

Ultimately, the Model of Plenary Power does not describe a trust at all. In addition to the problems above, it lacks the first element of a lawful trust: enforceability.¹³³

The Model of Partial Responsibility

According to the Model of Partial Responsibility, Congress for awhile acted as settlor, with a right to modify the terms of the trust, then became a trustee with limited duties. The Indians were also settlers, but their impact was far less, and this survives mainly in treaties and the rule construing ambiguous statutes in their favor. They have now become beneficiaries. Moreover, to the ex-

130. But it is not hard to imagine a proper application of this model. If, for instance, the government offered *unconditionally* to hold the Siskiyou National Forest in California in trust for the Modoc Indians, the model could apply. Congress as settlor could continually determine terms for the trust, and as long as the Modocs retained some beneficial interest, as pure gainers they could not cavil.

131. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902).

132. RESTATEMENT (SECOND) OF TRUSTS § 8(a); SCOTT, § 8; BOGERT, § 15.

133. RESTATEMENT (SECOND) OF TRUSTS § 23.

tent that executive orders have affected the trusteeship, the executive branch can also be called a settlor, but it more like a trustee with greater duties than Congress.

Except for the absence of an umbrella trust obligation, this model roughly describes the current situation. A main feature of interest is that the manifestation of intent—derived basically from documents—commonly leaves the terms of the trust ambiguous. Yet the courts do not often resort to the private law of trusts to clear them up, as they would do at once in any similar situation. Moreover, the judiciary tends to act, if at all, mainly to right instances of arrant injustice, rather than to impose affirmative obligations on the trustees. The beneficiaries thus profit minimally from the relation.

The Model of General Responsibility

This model dispenses with the concept of the settlor. Congress and the executive branch are cotrustees. The manifestation of intent arises from the course of dealing of the government and Indians. Since its terms are ambiguous, the private law of trusts applies in all cases, except where prior documents grant the Indian beneficiaries greater rights than would private law, or where the trusteeship obligation conflicts in a serious way with government obligations to the public good.

The Model of General Responsibility represents the triumph of the overall, independent trust responsibility. Its virtues include simplicity, coherence, comprehensiveness, fairness, and predictability. It fulfills the promise of decades of judicial precedent. Its main disadvantage, partly illumined by *Pyramid Lake*, lies in the clashes that could ensue between government obligations to different parts of the citizenry.

The Model of Restitution

If ethics were law, the government-Indian relationship might properly be deemed a constructive trust. "A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."¹³⁴ Such "unjust enrichment may arise out of the wrongful acquisition of title to property. This is the case where the title is acquired by fraud or duress or undue influence."¹³⁵ It need scarcely be

134. SCOTT, § 462. See BOGERT, § 471.

135. SCOTT, § 462.2. See BOGERT, § 471.

said that the government gained title to Indian land through duress (conquest), or that it induced most tribes to sign treaties through fraud or undue influence.

The constructive trust is a remedy, rather than a trust per se. It subjects the constructive trustee to the duty of returning the property to the "beneficiary" so as to restore the status quo. The Court rejected this option with regard to Indian land quite deliberately in *Johnson v. M'Intosh*,¹³⁶ and for a number of reasons it cannot realistically be applied today. However, the underlying rationale and goal of the constructive trust could be joined to the Model of General Responsibility. The new model, like the old, would have no settlor and would rely on private trust law. However, the goal would be not merely profit to the beneficiaries but restoration of as much as possible of the appropriated trust corpus.

The Model of Indian Expectations

This model begins with a leap of the imagination. It assumes that the Indians, as settlors, voluntarily vested title to their land in the government as a trustee for themselves. It then asks what terms the Indians would have provided in such a trust.

The model could be especially helpful with regard to treaties that either confer particular advantages on tribes, or ought to. In asking, "Would this tribe have willfully vested the rights it did in the government on these terms?," one necessarily considers both the stronger bargaining points of the tribe, and the dividends it might reasonably expect for them. Such a test could be used both to resolve ambiguities in language and remedy clear injustices.

But it does have certain drawbacks. First, it is somewhat speculative. Like the legislative intent test, it involves divination of the will, and might thus lead to disputable holdings. Second, there seems an inescapable element of Monday morning quarterbacking in assessing reasonable commercial practice of a century ago or more. Third, it risks sovereignty confrontations with the United States. Thus, as an integral structure, this model is not as firm or clear as some of the others, and it might best function as an adjunct to the Model of General Responsibility.

Conclusion

As these constructs indicate, one cannot give framework to trust law without imputing some goal to the trust itself. For in-

136. 21 U.S. (8 Wheat.) 543 (1823).

stance, the purpose of the Model of Plenary Power was to subjugate Indians. The purpose of the Model of Partial Responsibility seems to be to maintain them at subsistence level. At the same time, the minimum legitimate purpose of a trust is promotion of the beneficiary's interest. Logic, fairness, and the plain meaning of words mandate enforcement of the latter goal. This Court probably will, if pressed, find an Indian remedy for breach of trust. But it will also likely limit it, through devices like the legislative intent test. Justice will receive a nod, and the problems of the reservation will persist.