

Newton, Nell J., 1992, Indian Claims in the Courts of the Conqueror. *American University Law Review* 41:1:753-854.

INDIAN CLAIMS IN THE COURTS OF THE CONQUEROR†*

NELL JESSUP NEWTON**

TABLE OF CONTENTS

Introduction	754
I. True Stories	761
A. Confiscation of Land by Judicial Decree: Mary and Carrie Dann	761
B. Land, Not Money: The Sioux Nation and the Black Hills	763
C. Prove Your Case, and You Can Get Jurisdiction: The Cherokee Nation and the Arkansas River	765
II. Indian Claims	769
A. Special Jurisdictional Statutes	769
B. Indian Claims Commission	771
C. The Tucker Act: The Federal District Court, the Court of Claims, and the Claims Court	774
D. Review in the United States Court of Appeals for the Federal Circuit	775
III. Claims Law	776
A. The Trust Relationship: The Convenient Distinction Between Moral and Legal Claims	776
1. Breach of fair and honorable dealing	776
2. Breach of trust in the federal district courts	784
3. Breach of trust in the Court of Claims	786

† *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (Marshall, C.J.) ("We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. 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.").

*© 1992 Nell Jessup Newton.

** Professor of Law, Catholic University Law School. The author wishes to thank Milner Ball, Philip S. Deloria, Nancy Dunn, Joel Paul, and Judith Resnik for their helpful comments on earlier stages of this manuscript. Many thanks also to Diana Botluk, Brian Baker, and Mark Hammond of the CUA Law Library research staff.

4.	Breach of trust in the Claims Court and Federal Circuit	789
a.	Tolling the statute of limitations	792
b.	The trust relationship after <i>Mitchell II</i>	800
5.	Creation of the trust	803
6.	Applying the appropriate standard	810
B.	Property Claims in the Indian Claims Commission and the Court of Claims	818
1.	<i>United States v. Dann</i>	826
2.	The Sioux land claims	830
C.	Enforcement of Treaties: The Promise of <i>Tsosie v. United States</i>	835
IV.	Structure and Process	838
A.	Adoption of the Federal Rules by the Claims Court	840
B.	The Nonpublication Controversy	843
C.	Appeals	843
D.	The Judges	846
1.	Bias	846
2.	Background	847
E.	The Attorneys	849
1.	The Department of Justice	849
2.	The tribal advocate	850
	Conclusion	851

INTRODUCTION

Indian tribes have refused to disappear despite the genocide of the 18th and 19th centuries, the neglect of the first half of the 20th century, and the genocide-at-law that continued well into this century.¹ Indian tribal claims against the Government also continue to be initiated and litigated in spite of the creation of elaborate judicial devices to settle these claims for all time. When Congress enacted the Federal Courts Improvement Act (FCIA), it did so with a great deal of thought about the need for uniformity and predictability in the American patent system, but with no thought about the impact of the newly created system on Indian claims against the Government.²

1. See Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 718 (1986) (noting that as United States citizens killed Native Americans and destroyed their culture, state legislatures passed formal resolutions legalizing such actions by declaring Indians to be outlaws and beyond protection of law).

2. See Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.) (establishing United States Court of Appeals for the Federal Circuit and United States Claims Court); S. REP. NO. 275, 97th Cong.,

In fact, Indian claims against the Government occupy a marginal position in American law. Judith Resnik has demonstrated that Indian law is simply not within the received tradition of the domain of federal court jurisprudence.³ The same observation can be made about the narrower domain of claims against the Government for money damages. Indian claims are rarely mentioned in the scholarly literature on the subject matter areas and procedural issues within the ambit of United States Court of Appeals for the Federal Circuit and the United States Claims Court.⁴ Similarly, the annual

2d Sess. 17 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 14-15 (noting that creation of United States Court of Appeals for the Federal Circuit will produce "desirable uniformity" and, thus, reduce forum shopping that is common to patent litigation); Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6 (1989) (focusing on patent jurisdiction of Court of Appeals for Federal Circuit and benefits produced by court's patent jurisdiction); Charles W. Adams, *The Court of Appeals for the Federal Circuit: More Than a National Patent Court*, 49 Mo. L. REV. 43, 60 (1984) (indicating that Department of Justice had hoped for greater Federal Circuit control over tax and environmental cases in addition to patent issues, but jurisdiction over civil tax and environmental cases fell by wayside); Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 AM. U. L. REV. 385, 397 (1984) (noting patent law was "the real impetus").

3. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 686 (1989) ("Most of the books [treatises and materials for federal courts courses] refer hardly at all or only in notes to Indian tribe cases.").

4. The major treatise on claims against the United States has separate sections dealing with more frequently litigated claims, but no section dealing with Indian claims under the Tucker Act. See JOHN M. STEADMAN ET AL., *LITIGATION WITH THE FEDERAL GOVERNMENT* §§ 8.113-8.120, at 156-65 (2d ed. 1983) (discussing employee compensation); *id.* §§ 9.101-9.125, at 169-202 (covering government contracts); *id.* §§ 11.101-11.111, at 219-32, 13.101-13.120, at 245-78 (handling tort claims). Indian cases are cited when relevant to the point, usually procedural, such as jurisdiction or the statute of limitations. See URBAN A. LESTER ET AL., *LITIGATION WITH THE FEDERAL GOVERNMENT* § 3.107, at 52 (2d ed. Supp. 1989) (discussing attorney's fee case); *id.* § 6.101, at 95-98 (construing Court of Claims law to be law of old Claims Court); *id.* § 6.115, at 103-05 (limiting congressional reference jurisdiction); *id.* § 7.103, at 121-23 (applying statute of limitations); *id.* § 7.110(c), at 141 (assessing in rem jurisdiction); *id.* § 8.104, at 149-50 (discussing waiver of sovereign immunity). Only one reference is substantive. See *id.* § 7.106.2(c), at 127 (referring to breach of fiduciary duty cases); *infra* notes 183-287 and accompanying text (discussing breach of trust in federal district courts, Court of Claims, and Claims Court).

The Federal Bar Association has published a practitioner's handbook for practice before the Claims Court and the Court of Appeals for the Federal Circuit. See ARTHUR L. BURNETT, *FEDERAL BAR ASS'N HANDBOOK ON PRACTICE BEFORE THE U.S. CLAIMS COURT AND THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT* (1986). This useful handbook contains rules of the two courts, articles on jurisdiction of the courts, and practice pointers. In addition, the handbook features articles on practice within specified areas, including analysis of developing case law relating to jurisdiction and other procedural issues. The handbook deals with only one issue with regard to Indian claims, however, and that is in an article written by the Deputy Chief of the General Litigation Section, Land and Natural Resources Division, U.S. Department of Justice. See James E. Brookshire, *Emerging Indian Damages Litigation Against the United States: Mitchell, The "Government Trust," and Other Considerations*, reprinted in BURNETT, *supra*, at 135-59. While thoughtful, the article takes the narrowest possible view of the court's jurisdiction in this area. Indian property claims are not covered at all.

It is not surprising that most articles stress the areas most often litigated, such as intellectual property, international trade, government contracts, and tax decisions. See generally Janet Spragens, *The Tax Cases of the Federal Circuit: 1986 and 1987*, 37 AM. U. L. REV. 1141 (1988) (providing overview and general discussion of Federal Circuit tax cases); Robert G. Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U. L. REV. 825 (1987) (giving area

reports of the Judicial Conference for the Federal Circuit contain few references to Indian claims.⁵ A two-part symposium on the old Court of Claims included a short descriptive article by a prominent attorney who was active in tribal claims work.⁶ Indian law was marginalized even within that symposium, being confined, as always, to its own category. For example, an article on eminent domain in the same symposium contained no reference to Indian property claims, which involve the largest sum of money of any takings claims.⁷

In a recent symposium on the new Claims Court, an article on the takings clause referred to a claim of major importance in Indian law as "an obscure Indian property law case."⁸ Ironically, while one of

summary of Federal Circuit employment cases). Articles by authors assessing more broadly the role or performance of the Federal Circuit and the Claims Court have not analyzed the impact of the new court system on Indian claims, except for isolated references to the fact that Indian claims are included within the court's jurisdiction. See Joan Baker, *Is the United States Claims Court Constitutional?*, 32 CLEV. ST. L. REV. 55, 95 (1983) (finding Indian claims among variety of claims adjudicated by Claims Court); Philip R. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7, 9, 12 (1983) (noting Claims Court jurisdiction over Indian claims); Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1009 (1988) (noting that enabling legislation gave Federal Circuit appellate jurisdiction over Indian claims).

5. The Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit has been published for the past nine years in the *Federal Rules Decisions*. Indian claims have been listed in the statistics on other claims. See Claims Court Breakout Session, Fifth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 119 F.R.D. 45, 226 (1987) (listing five major categories of Federal Circuit cases as tax, contract, service pay, civilian pay, and other claims). Other than their inclusion in statistics or in passing mention that Indian claims are included within the jurisdiction of the Federal Circuit, I have found only one reference to Indian claims in the annual conference proceedings. See Loren A. Smith, Claims Court Breakout Session, State of the Court Address, Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 112 F.R.D. 439, 500 (1986) (praising partial summary judgment as method of narrowing issues, "particularly in Indian cases"). Even presentations focusing specifically on the Federal Circuit review of Claims Court decisions omitted references to Indian claims. See Claims Court Breakout Session, The First Three Years of the Federal Circuit: A Critique, Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 112 F.R.D. 439, 450 (1986) (focusing on international trade, employment, government contracts, and patent cases). One exception is a short presentation by James Brookshire, taking up approximately four pages in print, regarding breach of trust cases in the Claims Court. See James Brookshire, Claims Court Breakout Session, Fifth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 119 F.R.D. 45, 255-59 (1987).

6. See Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 528 (1966) (scanning history of Indian tribal litigation in Court of Claims by surveying cases litigated in court before and after establishment of Indian Claims Commission).

7. See generally Herbert Pittle, *Suits Against the United States for Taking Property Without Just Compensation*, 55 GEO. L.J. 631, 631-46 (1966) (concentrating on problems which are brought to Court of Claims when United States takes property without formal condemnation proceedings).

8. See Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought To Be Borne by Society As a Whole*, 40 CATH. U. L. REV. 549, 553 (1991) (referring to holding in *Hodel v. Irving*, 481 U.S. 704 (1987)). The court in *Hodel* declared "one of the most essential sticks in the bundle of rights that are commonly characterized as property—[is] the right to exclude others." *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

the authors is the president of an organization named "Defenders of Property Rights," the major reference to Indian tribes in the work is a sympathetic treatment of a multimillion dollar takings claim against the U.S. Government by the United Nuclear Corporation, a corporation that lost valuable mining leases when the Navajo Tribe refused to approve its uranium mining plan.⁹ The authors' discussion of this case reveals a lack of knowledge of basic principles of tribal sovereignty and the federal trusteeship.¹⁰ The discussion also ignores the painful history of the failure of the law to provide any remedy to the Navajo people who continue to suffer the disastrous effects of uranium mining and the resulting contamination of many areas of the Navajo Reservation.¹¹ Miners as well as Navajo people living near the uranium tailings have died of cancer, dust poisoning, and pulmonary fibrosis. In addition to causing ground water and river contamination, uranium mining was responsible for a disastrous flood caused by a broken dam at a United Nuclear Corporation tailings pond that released ninety-five million gallons of radioactive water. It has been called the "worst contamination in the history of the nuclear industry. . . ."¹² Although these events undoubtedly influenced the Navajo tribal government when it canceled the leases, none of these facts were reported in the opinion or in the article lauding it. Nor has federal law permitted the injured Navajos to recover from either the uranium mining companies or

9. See *United Nuclear Corp. v. Watt*, 912 F.2d 1432, 1438 (Fed. Cir. 1990) (holding that failure of Secretary of Interior to approve mining plan was taking of mining company's property without just compensation and remanding case to Claims Court in order to determine just compensation to which United Nuclear was entitled).

10. *United Nuclear Corp.* was premised on the Government's failure to require the tribe to approve the mining plan. *United Nuclear Corp.*, 912 F.2d at 1434-35. Although the Secretary of the Interior has the power to approve tribal leases, that authority does not include the power to force the tribe to enter leases. *Id.* at 1438; see AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 338-47 (1977) (noting difficulty of renegotiating long-term mineral leases approved by Secretary); Reid P. Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Land*, 26 STAN. L. REV. 1061, 1064 (1974) (discussing leasing of Indian lands as well as duties of Secretary of Interior as trustee of Indian lands).

11. See PETER MATTHIESSEN, INDIAN COUNTRY 293, 296-97, 301-02 (1979) (discussing uranium contamination in Four Corners area of Navajo Reservation); ANITA PARLOW, CRY BELOVED GROUND: BIG MOUNTAIN, USA 23, 29 (1988) (discussing excavation of Indian natural resources including uranium, oil, and gas).

12. MATTHIESSEN, *supra* note 11, at 302 (reporting that Nuclear Regulatory Commission made statement quoted in text). Matthiessen contrasts this actual disaster with the much more widely reported Three-Mile Island near-disaster, intimating that identity of victims as Indians contributed to the lack of publicity about the flood. Cf. GERALD M. STERN, THE BUFFALO CREEK DISASTER (1976) (recounting successful litigation strategy of pro bono attorney on behalf of West Virginia communities destroyed by flood caused when dam containing coal waste and water burst, spilling 130 million gallons of water).

the United States for any of these injuries.¹³ Kerr-McGee, the uranium mining company, continues to deny liability except for workers compensation claims, and the Navajo peoples' attempts to hold the U.S. Government accountable in court have been unsuccessful.

The Federal Circuit reviews Indian claims because Congress combined the former Court of Claims, which had jurisdiction over Indian claims,¹⁴ with the Court of Patent and Customs Appeals to create the new Claims Court. The jurisdiction of the Court of Claims also included some patent cases as well as tax, contract, pay suits, takings cases, and congressional reference cases.¹⁵ Congress added the Court of Claims to this mix in part to counter the argument that the two new courts, the Claims Court and the Federal Circuit, would become overly specialized.¹⁶ Congress also gave the Federal Circuit appellate jurisdiction over other subjects, the most frequently litigated of which are international trade, Merit Systems Protection Board, and government contracts cases.¹⁷

The debate over the utility and wisdom of the creation of specialized courts to deal with developing areas, such as science and technology, is a rich one.¹⁸ While specialized courts undoubtedly promote efficiency, commentators have expressed concern that such courts may attract less than first-rate judges who then can develop tunnel vision, write pedestrian, conclusory opinions, and be subject to capture by the bar.¹⁹ Some have argued that the United States

13. For a series of lawsuits designed to gain compensation for the miners and others injured by uranium exposure that were spectacularly unsuccessful, see *infra* notes 549-56 and accompanying text.

14. 25 U.S.C. § 1505 (1988) (providing that Indian tribal claims arising after 1946 may be brought in Court of Claims).

15. Loren A. Smith, Claims Court Breakout Session, Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 128 F.R.D. 409, 457 (1989).

16. See Adams, *supra* note 2, at 82 (explaining that specialization might result in increased influence of special interest groups, lower quality of judges, and judges not maintaining generalist perspective); see also Sward & Page, *supra* note 2, at 396 (emphasizing that overspecialization was chief concern of Congress).

17. See 28 U.S.C. § 1295 (1988) (detailing jurisdiction of United States Court of Appeals for the Federal Circuit).

18. See Dreyfuss, *supra* note 2, at 6-7 (summarizing debate and evaluating treatment of patent cases under new court system). For an argument based on the importance of uniformity of the law throughout the nation, see Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 607 (1989) (suggesting that uniformity may be accomplished by modifying regional organization of federal intermediate appellate tier by increasing categories of appeals routed to nonregional appellate fora).

19. RICHARD POSNER, *THE FEDERAL COURTS* 147-60 (1985). Judges in specialized courts are exposed to a few narrow subjects in great depth. Such a narrow focus can prevent judges from being open to new ideas or seeing the greater implications of their decisions. *Id.*; see Rader, *supra* note 4, at 1003-06 (noting criticisms of specialization of Federal Circuit's jurisdiction arising in legislative history of Federal Courts Improvement Act); Sward & Page, *supra*

Court of Appeals for the Federal Circuit should not be termed a specialized court, although it does deal to a great extent with specialized subject matters.²⁰ Even accepting this distinction, however, one would be hard-pressed to call the Federal Circuit a generalist court.²¹

Indian claims comprise only a tiny portion of the jurisdiction of the Federal Circuit in terms of numbers of cases.²² Nevertheless, money judgments in Indian claims often involve millions of dollars. That a small number of cases involving tricky points of law expose the Government to enormous liability should be enough to make anyone pause to consider how well Indian claims are treated by this system. Yet, the fact that Indian claims formed no part of the considerations that impelled the creation of the new courts does not necessarily mean that the new courts serve them ill. In fact, very little has changed about the way Indian cases are litigated in these courts.²³ The thesis of this Article is not that the new system is worse than the old system, but that the system as a whole suffers from structural problems creating a perception among some Indian people and advocates for Indian tribal rights that the Indian claims court system is rigged. That is, it is rigged to favor the Government and to reward financially the small group of attorneys who specialize in these matters without enriching, in any real way, the day-to-day existence of tribal people.²⁴ Conversely, others paint a somewhat

note 2, at 395-96 (discussing Congress' hesitancy and concerns about granting additional specialized jurisdiction to Federal Circuit).

20. See Meador, *supra* note 18, at 613 (positing that Federal Circuit is not specialized court in any meaningful sense because 28 U.S.C. § 1295 brings that court wide array of case types and legal issues).

21. See Sward & Page, *supra* note 2, at 397 ("[T]he Federal Circuit is 'generalist' only if one means by 'generalist' that it specializes in several areas.").

22. See Claims Court Breakout Session, *supra* note 5, at 226 (noting that Indian claims compose only 3.5% of all cases heard by Federal Circuit). Similarly, Indian claims represent only a minor portion of the jurisdiction of the Claims Court in terms of number of cases. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table G-3a, at 245 (1990) (indicating Indian claims represent 47 out of 1933, or 2.4% of pending complaints in 1990).

23. See *United States v. Mitchell*, 445 U.S. 535, 538-40 (1980) (adopting Government position to limit jurisdiction of Tucker Act, such that Indian tribe seeking to initiate breach of trust action must base claim on statute expressly creating trust for activity at issue and imposing specific statutory remedy in money damages); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 407-16 (1988) (assuming restrictive test devised by Indian Claims Commission that limited liability of government).

24. VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES 226 (1974) [hereinafter DELORIA, BEHIND THE TRAIL]. Vine Deloria, Jr., has been a leading exponent of this point of view. Deloria contends, for example, that the "high moral purpose of settling the Indian claims boiled down in the end to a lucrative bonanza for a select group of attorneys possessing the special skills to practice Indian law and the career employees of the United States who saw the complicated Indian cases as a lifetime career in a specialized field." See VINE DELORIA, JR. & CLIFFORD LYTTLE, AMERICAN INDIANS, AMERICAN JUSTICE 142-43 (1983) (criticizing role

more positive and pragmatic picture of the Indian claims court system as proof that the United States continues to try its best to foster and support Indian tribes.²⁵ As always, the truth lies somewhere in between. While rejecting the rosy view and recognizing that there are solid grounds for distrust of the system, I argue that a greater understanding of the structural deficits will result in better process decisions by tribal advocates and Indian tribes. I define structural issues as those that the tribal advocate cannot change, such as the fact the claims courts can only award damages. Process issues are those that the advocate and the tribe can affect, including the selection of legal theories, the selection of the appropriate forum, and decisions regarding the appropriate roles of litigation, negotiations, and congressional intervention to resolve disputes between tribes and the Federal Government.

Stories serve many different functions in legal scholarship. Richard Delgado stresses the use of stories to critique the ideology of the dominant group with its powerful message that current social arrangements are fair and neutral.²⁶ In particular, Delgado focuses on the use of constructed stories to illuminate the complexity of racial issues.²⁷ Unlike Delgado, I am not a member of the group about whom I write; thus, I do not attempt to offer my own story²⁸ or construct stories²⁹ about the Native American experience. The Indian claims cases themselves, however, are rich sources of true stories. The claims stories, when broken from the dry legal recitation of the facts in the cases and placed in context, reveal powerfully the inadequacies of the dominant group's stories. The Euro-myths of the

of claims attorneys); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, in *RETHINKING INDIAN LAW* 103, 107 (1982) ("The United States has never established, nor even sought to establish, an honorable and fair means for permanently resolving Indian claims."); PETRA T. SHATTUCK & JILL NORNGREN, *PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM* 155 (1991) (noting that under U.S. law, "land rights must yield to power and . . . legal forms will not change that outcome").

25. See EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION V. THE UNITED STATES 1775 TO THE PRESENT* 413 (1991) ("American legal culture, almost uniquely, at least recognized some legal limits on its conduct toward aboriginal people."); Wilkinson, *supra* note 6, at 528 ("Progress has been made but considerable work remains.").

26. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2411-12 (1989) (giving examples of scholarship using narrative, including true stories and urging scholars to employ narrative techniques in writing about outgroups).

27. *Id.* at 2413.

28. Patricia Williams is the most powerful exemplar of this technique, and the most courageous. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991) (relating personal experiences as black woman who descended from slaves to teach about and analyze law).

29. See generally DERRICK BELL, *AND WE ARE NOT SAVED* (1987) (illustrating stories told by fictional character describing complexities, contradictions, absurdities, and racism reflected in law relating to race relations in general and African-Americans in particular).

dominant group,³⁰ in contrast, justify and rationalize the dispossession of Native Americans from their lands and blame them for continuing to refuse the full benefits of membership in the dominant culture.³¹

What follows, then, are the stories of three claims cases to illuminate the context of Indian claims. Two involve property claims that have been finally adjudicated but are not really over by any sense of the word. The third is a claim for breach of trust, presently before the Claims Court, although hanging by a thread after several successful motions to dismiss. These stories illustrate better than any dry legal exegesis that Indian tribes' grievances against the Government, whether based on ancient happenings or present-day affairs, are very real. The stories also illustrate some of the pitfalls of the claims system that will be explored analytically in the sections that follow.

I. TRUE STORIES

A. *Confiscation of Land by Judicial Decree: Mary and Carrie Dann*

Mary and Carrie Dann are sisters and members of the Dann Band of Western Shoshones. They raise cattle on 5120 acres in Nevada within the aboriginal territory of the Shoshone people. Although much aboriginal Western Shoshone land is now occupied by non-Indians, the Dann Band has grazed its animals on this acreage since time immemorial. There has been neither a formal act by the Federal Government confiscating their land, nor any event that could be labeled a regulatory taking. The Western Shoshone have never fought a war against the United States, nor have they ceded the land claimed by the Dann sisters by treaty.³²

In 1974, the United States ordered the Dann sisters to stop grazing on federal land. When they refused, the Federal Government brought suit against them for trespass.³³ The Government based its title to the land on an Indian Claims Commission decision, *Western Shoshone Identifiable Group v. United States*,³⁴ in which the Commission

30. Robert A. Williams, Jr. has described Federal Indian Law as "a brute reflection of the interests of a conquering nation groping for its own unique colonizing syntax and grammar." Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 167 (1987).

31. For examples of contemporary documents and statements reflecting these views, see Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 258-78 (1989), which analyzes case law, commission reports, and congressional bills.

32. *United States v. Dann*, 470 U.S. 39, 43 (1985).

33. *Id.*

34. 40 Indian Cl. Comm'n 318 (1977).

entered judgment in the amount of \$26 million for the taking by the United States of the aboriginal title of the Western Shoshone Indians located in California, Colorado, Idaho, Nevada, Utah, and Wyoming.³⁵ Although no single act of taking occurred, the Commission found that the United States had treated the land as public land.³⁶ Later in *Temoak Band of Western Shoshone Indians v. United States*,³⁷ the tribal attorney stipulated that all of the groups' Nevada land was taken by the Government on July 1, 1872,³⁸ in order to simplify the case so that the court could assess the damages owed. Those involved in the claims case, including the tribe's attorney,³⁹ apparently believed that the claim had no effect on present possessory rights, but only involved land actually held by others at the stipulation date.⁴⁰

The Danns were not members of the Temoak Band of Western Shoshones or the entity known as the Western Shoshone Identifiable Group, a group created to be a representative plaintiff in the claims case. In fact the Danns had supported unsuccessful efforts to intervene in the claims case for purposes of excluding present possessory rights.⁴¹ One of the original claimants, the Temoak Band, attempted to stay the proceeding in 1977 and even discharged its attorney in order to stop the claim from proceeding.⁴² Nevertheless, the Government argued that the Dann sisters were barred by the Indian Claims Commission case.⁴³

35. *Western Shoshone Identifiable Group v. United States*, 40 Indian Cl. Comm'n 318, 318 (1977) (noting exact figure as \$26,154,000).

36. See *Shoshone Tribe v. United States*, 11 Indian Cl. Comm'n, 387, 416 (1962) (stating that gradual encroachment by whites, settlers, and others resulted in taking of Indian lands by United States for its own use).

37. 29 Indian Cl. Comm'n 5 (1972).

38. *Temoak Band of W. Shoshone Indians v. United States*, 29 Indian Cl. Comm'n 5, 6 (1972).

39. The attorney is reported to have stated to the Temoak Band council that "[t]his lawsuit is for compensation. It doesn't change your title one bit." Oral Argument at 21, 25-27, *Temoak Band of W. Shoshone Indians v. United States*, 29 Indian Cl. Comm'n 5 (1972) (No. 326-K), quoted in Caroline L. Orlando, *Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and Its Due Process Implications*, 13 B.C. ENVTL. AFF. L. REV. 241, 266 n.224 (1986).

40. See *United States v. Dann*, 572 F.2d 222, 224 (9th Cir. 1978) (stating that most Western Shoshone people still live within boundaries of land described in Treaty of Ruby Valley); *Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495, 496 (Ct. Cl.) (noting that estimates of acreage claimed vary widely, ranging from 3 to 12 million acres), cert. denied, 429 U.S. 885 (1976).

41. See *Western Shoshone*, 531 F.2d at 497 (noting that Western Shoshone Legal Defense Association and Frank Tomohe, as part of Western Shoshone Identifiable Group, were parties involved in intervening action).

42. *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994, 997 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979).

43. See *Dann*, 572 F.2d at 225 (noting Government claimed that Indian Claims Commission decision estopped Danns from asserting that Indians retained beneficial ownership of Western Shoshone's Nevada lands).

The Ninth Circuit Court of Appeals vindicated the sisters' claim by applying ordinary principles of collateral estoppel.⁴⁴ The Government appealed, however, and the sisters lost in a dry-as-dust Supreme Court decision, which focused solely on a statutory issue.⁴⁵ Although the Danns eventually won the right to retain the land on which their homestead was constructed, they lost the grazing land.⁴⁶

B. Land, Not Money: The Sioux Nation and the Black Hills

The dispossession of the Sioux Tribe's sacred Black Hills is an often-told story, involving the discovery of gold in the hills by General George Armstrong Custer and leading to the beginning of the end: the Indian wars of the Great Plains, including the Battle of Little Big Horn and the massacre at Wounded Knee.⁴⁷ When the Lakota people made their last voluntary concession of land in the Treaty of Fort Laramie in 1868, they insisted on retaining a large, unbroken tract, including the Black Hills, as the Great Sioux Reservation.⁴⁸ Each constituent tribe of the Sioux Nation signed the treaty separately.⁴⁹ In return, the Government promised that the land would belong to the Sioux Nation forever, that a supermajority would be required for any future concessions, and that the Government would remove any non-Indian intruders from the reservation.⁵⁰ After breaking these and many other treaty promises, the Government confiscated⁵¹ the Black Hills in an 1877 statute, taking

44. *Id.* at 226. The court held that res judicata did not attach because the decision would not be final until Congress actually paid the compensation owed to the tribe. The Danns were not precluded from litigating the title issue because it had not been litigated or decided in the Indian Claims Commission decision. *Id.*

45. *See* *United States v. Dann*, 470 U.S. 39, 45-50 (1985) (interpreting Indian Claims Commission Act, section 22(a) concerning payment of claims by U.S. Government and holding that payment by U.S. Government to the Western Shoshone of \$26 million under section 22(a) does not bar Danns from raising individual aboriginal title as defense in their action).

46. *See* *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir.) (holding that individual land title of Mary and Carrie Dann was restricted to land that they or their lineal descendants actually occupied prior to 1934, and restricted number and type of animals that could graze), *cert. denied*, 493 U.S. 890 (1989).

47. *See generally* DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970) (providing Indian history of American West including battle at Wounded Knee); EVAN CONNELL, *SON OF THE MORNING STAR* (1984) (providing biography of General Custer and detailing Bighorn campaign).

48. *See generally* Treaty of Ft. Laramie, Apr. 28, 1868, 15 Stat. 635, 635 (stating that signing of Treaty occurred at Fort Laramie in territory of Dakota); *see id.* art. 2, 15 Stat. 635, 635 (defining parameters of Great Sioux Reservation).

49. *Id.* at intro., 15 Stat. 635, 635. *See generally* LAZARUS, *supra* note 25, at 45-53 (describing Sioux Tribes and process leading to Treaty with Sioux Indians).

50. *See* Treaty of Ft. Laramie, *supra* note 48, arts. 3, 12, 15 Stat. 635, 639 (providing absolute and undisturbed use of nation and requiring 75% of adult males to approve further land concessions).

51. I realize this is a term of art, but the legal story of the Sioux is told later in this Article. A treaty was signed, but it was illegal because only 10% of the adult males signed it, instead of the requisite 75%. Treaty of Ft. Laramie, art. 12, 15 Stat. 635, 639. The tribe was

most of the Great Sioux Reservation and giving the Sioux people rations in return for the land.

The Sioux people never recognized the validity of this action. More importantly they continuously made demands for the return of this land, or at least the portion of the Great Sioux Reservation containing the Black Hills. In 1920, the tribe obtained a special jurisdictional statute permitting suit against the Government.⁵² In 1942, the Court of Claims dismissed the claim in an opinion remarkable for its lack of clarity on the basis of the dismissal.⁵³ In 1950, the Sioux again filed a claim for their land invoking the more liberal bases in the Indian Claims Commission Act. The Commission held there had not been a taking, in part because their attorney working with very limited resources had not made proper offers of proof that the Sioux land had, in fact, been confiscated.⁵⁴ New attorneys for the Sioux convinced the Court of Claims to reopen the case, on the grounds that the tribe's former attorney had developed a serious drinking problem and was incompetent.⁵⁵ Finally in 1975, the court again dismissed the Sioux Nation's case for failure to state a claim.⁵⁶ After an intense lobbying effort by the new tribal attorneys in 1978, Congress revived the claim.⁵⁷

By the time of the claim's revival, many members of the Sioux Tribe decided that the claim was misguided. In 1977, the Oglala Sioux Tribe, one of the signatories of the Treaty of Fort Laramie, refused to renew its attorney's contract and passed a tribal resolution advising Congress of their desire to seek return of the Black Hills.⁵⁸ Because taking money for the land created the impression that the tribe had no right to the land, the Oglala Sioux Tribe decided it did not want the money.⁵⁹

given rations in return for the concession. It was not until 1981 that the Supreme Court gave the correct label to these actions.

52. Act of June 3, 1920, Pub. L. No. 237, ch. 222, 41 Stat. 738.

53. See *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613, 689 (1942) (stating that according to principles governing rights and privileges of Indians and power of Government in its dealings with Indian tribes, Sioux Tribe is not entitled to recover from United States for takings or misappropriations of any kind), *cert. denied*, 318 U.S. 789 (1943).

54. See LAZARUS, *supra* note 25, at 191 (discussing petition); *id.* at 194-98 (discussing litigation before Indian Claims Commission).

55. See LAZARUS, *supra* note 25, at 217-35 (discussing appointment of new counsel to Sioux Tribe case).

56. *United States v. Sioux Nation of Indians*, 518 F.2d 1298, 1308 (Ct. Cl.) (holding claim barred by res judicata), *cert. denied*, 423 U.S. 1016 (1975).

57. LAZARUS, *supra* note 25, at 345-66 (explaining process that revived Sioux claim).

58. Russell L. Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. Rev. 7, 21 (1982).

59. See *id.* at 20 (discussing effect of payment and noting that payment could extinguish all land rights).

Although this decision may have been ill-considered in light of the chances of getting any land back, courts usually do not interfere when litigants dismiss their attorneys. The Court of Claims would not let the attorneys withdraw from the case, however, and judgment was eventually entered in favor of the tribe.⁶⁰ The Supreme Court affirmed in a case briefed and argued by the attorneys who had been dismissed by the Oglala Sioux Tribe.⁶¹ Although the Court affirmed an award of \$122 million to the Sioux Nation, each of the tribes refused to accept it. The account has now grown to over \$300 million.⁶²

C. *Prove Your Case, and You Can Get Jurisdiction: The Cherokee Nation and the Arkansas River*

The Cherokee Nation is one of the "Five Civilized Tribes." Civilized, in this sense, refers to the fact that the Cherokee tried to accommodate their new neighbors by selling land and changing their lifestyle from nomadic to agrarian traditions. The Cherokee developed a written language, published newspapers, and developed a legislative system that "was superior to the wisdom of Lycurgus or Solon."⁶³ When the State of Georgia tried to destroy the Cherokee Nation with the implicit and explicit approval of President Andrew Jackson, the tribe appealed to the Supreme Court and won technical, if not real, victories in 1831 and 1832.⁶⁴ The Supreme Court victories only added urgency to the task of removing the Cherokee people from Georgia.⁶⁵

60. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1172 (Ct. Cl. 1979) (affirming that Act of Feb. 28, 1877 constituted taking of Sioux land in Black Hills and rights of way acquired thereunder, but reversing holding of Indian Claims Commission declaring that removal of gold from Great Sioux Reservation constituted taking).

61. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1981) (holding that Treaty of Ft. Laramie provided for exclusive occupation and that 1877 Act constituted taking which requires award of interest).

62. *Black Hills Account More Than \$300 Million*, LAKOTA TIMES, Feb. 4, 1992, at 1 (reporting that Sioux trust account balance was \$315,398,364.87 as of December 31, 1991).

63. RENNARD STRICKLAND, *FIRE AND THE SPIRITS—CHEROKEE LAW FROM CLAN TO COURT* 65 (1975) (quoting 1827 editorial from NEW YORK OBSERVER, reprinted in CHEROKEE PHOENIX, Jan. 14, 1829).

64. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 80 (1831) (placing responsibility for resolution of dispute between State of Georgia and Cherokee in control of Georgia legislature). Although the Supreme Court held the tribe could not invoke original jurisdiction as either a state of the union or a foreign nation, the opinion contemplated access by tribes to the federal courts in other circumstances. *Id.* In a habeas corpus case brought by an imprisoned white missionary, the Court courageously declared Georgia confiscatory laws unconstitutional, but the opinion was never enforced. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595-96 (1832).

65. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 511 (1969) (noting that *Cherokee Nation* and *Worcester* cases created urgency on part of states to remove Indians because myth of voluntary cessation dissipated).

In 1835, the Government secured the Treaty of New Echota, signed by only one faction of the Cherokee Tribe.⁶⁶ The Government promised that if the tribe would relocate from Georgia to fourteen million acres in the newly created Indian Country in present-day Oklahoma, the Government would deed the new land to the tribe in fee simple absolute.⁶⁷ As in the treaty with the Sioux Nation, the Government also promised to protect the Cherokee from intrusion by citizens of the United States into their new land.⁶⁸ The Cherokee people paid for this treaty not only with their Georgia land, but also with their blood.⁶⁹ When most of the tribe refused to leave, the Army forcibly marched them from Georgia at the beginning of the winter in 1838. A doctor accompanying the marchers estimated that one-fifth of the Cherokee died.⁷⁰ This "Trail of Tears" remains a defining moment for Cherokee people.⁷¹

The Cherokee people rebuilt their community and again accommodated the ways of their dispossessors. Pressure to open up the Indian territory mounted over the years and culminated in the allotment of most of the Cherokee Reservation.⁷² By 1906, tribal landholdings had been reduced from fourteen million to less than fifty thousand acres.⁷³ Still, Congress declared these remaining tribal holdings to be held in trust for the Cherokee Nation's use and benefit.⁷⁴ The property included valuable land comprising the riverbeds

66. Treaty of New Echota, Dec. 29, 1835, preamble, 1, 7 Stat. 478, 478.

67. *Id.* art. 2, 7 Stat. at 479.

68. *Id.* art. 6, 7 Stat. at 481. This promise and other parts of the Treaty were reaffirmed in a later treaty. See Treaty of July 19, 1866, art. 27, 14 Stat. 799, 806 ("It is the duty of the United States Indian agent for the Cherokees to have . . . [intruders] removed . . .").

69. For a discussion of the Cherokee removal from Georgia, see generally JOHN EHLE, TRAIL OF TEARS: THE RISE & FALL OF THE CHEROKEE NATION 361 (1988); GRANT FOREMAN, THE FIVE CIVILIZED TRIBES 281-82 (1934).

70. FOREMAN, *supra* note 69, at 281-82.

71. See FRANCIS P. PRUCHA, THE GREAT FATHER 85-87 (abridged ed. 1986) (noting that "Trail of Tears" episode furnished most controversial episode in removal policy and its tragic results created continuous reminder of treatment Indians received at hands of U.S. Government).

72. See Act of July 1, 1902, Pub. L. No. 241, ch. 1375, 32 Stat. 716, 717-19 (providing for allotment of lands of Cherokee Nation for disposition of town sites and other purposes). Two books, ROBERT BERKHOFER, JR., THE WHITE MAN'S INDIAN 166-75 (1978) and S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 95-124 (1973), provide a description of the allotment policy and its devastating effects on Indian landholdings.

73. The figure is the present estimate of the lands possessed by the Cherokee Tribe and represents tribal interests in the Arkansas riverbed. Plaintiff's Verified Second Amended Complaint at 8, Cherokee Nation v. United States (Cl. Ct.) (No. 218-89L) (1991). In 1940, Angie Debo, the leading historian of the Five Civilized Tribes, reported that the Cherokee owned 365.87 acres of tribal property. See ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 387 (1940).

74. Act of Apr. 26, 1906, Pub. L. No. 130, ch. 1877, 34 Stat. 148, 148-49. The Act of June 16, 1906 conditioned Oklahoma's entering the Union on the insertion of a proviso in the Oklahoma Constitution promising not to impair Indian property rights. Act of June 16, 1906, Pub. L. No. 234, ch. 3335, 34 Stat. 267, 267.

of four rivers, including the Arkansas river, and land adjacent to those rivers.⁷⁵

When Oklahoma entered the Union in 1907, the Secretary of the Interior issued an opinion advising the Governor of Oklahoma and the Cherokee Nation that the State acquired title to the beds of the rivers flowing through the remaining Cherokee property. Although the Cherokee Nation insisted that title remained with the tribe, the tribe did not take action until two significant events occurred. First, from 1940 to 1970, the U.S. Corps of Engineers constructed the massive Kerr-McLellan Irrigation Project on the Arkansas River, which straightened the river and also narrowed the channel. As a result, some 22,000 acres of riverbed land stretching along 96 miles of the Arkansas River became dry and usable. Second, oil and gas were discovered in the late 1940s and 1950s, and numerous oil and gas wells were constructed. In 1970, the Supreme court held the Cherokee Nation did indeed hold title to the riverbed land.⁷⁶

During the intervening sixty-two years, the land has been treated as nontribal land. The land covers rich oil and gas deposits valued at \$40 million in the 1970s before additional large deposits were identified. Today the land is used for grazing and oil and gas production, and could be used for economic development and sand and gravel production. Very little of this income goes to the Cherokee Nation, however, because most of the land is illegally occupied by non-Indian trespassers.⁷⁷ In order to determine who is a trespasser, the tribe needs to know which land is tribal land and identify the persons occupying it. Such a task is practically impossible for the tribe. The trespassers purport to be owners, and the U.S. Army Corps of Engineers has contributed to the confusion by paying trespassers for flood easements and in other ways recognizing them as legitimate owners of the land.

75. SPECIAL COMM. ON INVESTIGATIONS, SENATE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 60, 101st Cong., 1st Sess. 130 (1989) [hereinafter SPECIAL COMM. REPORT NO. 60].

76. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (explaining that tribe, not State, has legal title to Arkansas riverbed). The tribe was unsuccessful in seeking damages for the confiscation of the portions of their riverbed land by the Government in constructing the navigation projects. *United States v. Cherokee Nation*, 480 U.S. 700, 707-08 (1987). The Supreme Court held that the projects were merely exercises of the Government's navigational servitude, a sovereign right of the United States to which all property owners are subject, and therefore the land had not been taken at all. *Id.* at 706.

77. SPECIAL COMM. ON INVESTIGATIONS, SENATE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 216, 101st Cong., 1st Sess. 129-32 (1989) [hereinafter SPECIAL COMM. REPORT NO. 216]. The tribe is losing at least \$1 million per year income on the 15,000 acres of fertile soil and revenues from sand and gravel deposits worth \$32 million.

The tribe alleges it cannot sue the trespassers to establish title to the land and recover damages without a survey, and the only survey that is acceptable in land claims involving Indian land is one prepared by the Bureau of Land Management of the Department of the Interior. Despite appropriations, the Bureau has made little progress on the survey.⁷⁸ In addition, the Government exercises considerable control over management of many tribal mineral resources, including gas and oil. Although the Government has entered into some natural gas and mineral leases on tribal lands on behalf of the tribe, the Government has done nothing else to manage the tribal resources on behalf of the tribe.⁷⁹ In 1990, the Cherokee Tribe sued the Government in the Claims Court for breach of fiduciary duty by mismanagement and nonfeasance.⁸⁰ The Claims Court dismissed most of the claim on jurisdictional grounds, except for the claim for damages based on the Government's failure to remove trespassers from oil and gas land. The court, however, has stated it also will dismiss this claim unless the tribe can name the trespassers and establish which ones moved onto the land within the six-year period before filing the suit.⁸¹ Without the surveys, it is impossible for the tribe to name the trespassers.

The result in each of the three cases was influenced by the structure of the claims process. As this Article will demonstrate, some of these structural provisions are no longer present. Although today tribes can sue the Government, it is no longer possible for a fictional tribe to be created as it was under the Indian Claims Commission Act. On the other hand, some of the structural limitations remain, such as the limitation to a remedy of money damages. Finally, strategic decisions regarding whether and how to use the present claims process still exist.

Part II of this Article provides the necessary background to begin to parse the arcane world of Indian claims. This section focuses initially on claims before 1946, claims after 1946 in the Indian Claims Commission, and claims after 1951 based on the Tucker Act and special jurisdictional acts. Finally, a description of the Federal

78. SPECIAL COMM. REPORT NO. 60, *supra* note 75, at 129. In 1989, the Special Investigative Committee of the Senate reported that in the 19 years since the decision, the Bureau of Indian Affairs (BIA) had "obtained surveys of only 789 of the 22,000 river-bed acres." *Id.*

79. See SPECIAL COMM. REPORT NO. 216, *supra* note 77, at 130-31 (noting that Government has failed in its basic managerial responsibilities and as result, tribes have lost income from oil, gas, sand, and gravel reserves).

80. See *Cherokee Nation v. United States*, No. 218-89L, 1992 WL 41510 (Cl. Ct. Mar. 5, 1992) (denying in part Government's motions to strike third amended complaint and denying motion to dismiss with prejudice).

81. *Cherokee Nation v. United States*, 23 Cl. Ct. 117 (1991). See *infra* notes 370-73 and accompanying text (updating status of Cherokee claim).

Courts Improvement Act (FCIA) will focus on how the FCIA affects jurisdiction over these classes of claims.

Part III of the Article synthesizes Indian claims law as it is interpreted and applied in the Federal Circuit, focusing on two established areas, property and breach of trust claims, and one new development, the enforcement of treaty rights not pertaining to property. Because the relevant procedural issues are entwined with the substantive areas, they will be discussed simultaneously rather than separately. Where appropriate, cases brought in federal courts for equitable relief will also be assessed to provide useful analogies and criticisms.

Part IV of the Article assesses the structure of the claims system and reflects on the extent to which the structure and procedures can influence the outcome of Indian claims. The goal of the entire Article is to provide the context and depth necessary to permit real reflection on the utility of the system and to encourage those interested in advocacy for Indian tribes to work on solutions that involve land and real power instead of money.

II. INDIAN CLAIMS

Before the Federal Courts Improvement Act (FCIA), three statutory methods existed for bringing an Indian claim for money damages: (1) special jurisdictional acts;⁸² (2) the Indian Claims Commission Act;⁸³ and (3) the Tucker Act.⁸⁴ In each case, the claims were usually tried in an Article I court, either the Indian Claims Commission or the trial court of the old Court of Claims.⁸⁵ A brief description of these courts and their jurisdiction is thus necessary.

A. Special Jurisdictional Statutes

Early Marshall Court opinions created doubts about the capacity of Indian tribes to sue even private defendants without the United States suing on their behalf as their guardian.⁸⁶ This notion was not

82. See *infra* notes 86-93 and accompanying text (discussing special jurisdictional statutes and noting that these statutes are devices granting Court of Claims jurisdiction and waiving sovereign immunity).

83. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, 60 Stat. 1049 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

84. Tucker Act, Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended in scattered sections of 28 U.S.C.).

85. The exception is cases within the concurrent Tucker Act jurisdiction of the district courts with claims for less than \$10,000. 28 U.S.C. § 1346(a)(2) (1988).

86. See *United States v. Kagama*, 118 U.S. 375, 382 (1886) (noting that courts speak of Indians as "wards of the nation," "pupils," and as "local dependent communities"); *Cherokee*

fully dispelled until 1965, when Congress explicitly stated that Indian tribes could bring suit in federal courts without the aid of the Government.⁸⁷ This basis of jurisdiction increased activism by Indians and the legal services and public interest movement of the 1960s. It also sparked a revolution in Indian law, as the number of cases brought by Indian tribes to federal courts increased dramatically, often with favorable results.⁸⁸

Indian tribes were also disabled from suing the Government without first obtaining a private bill from Congress permitting suit. In this respect the law treated them the same as it treated other citizens, for the doctrine of sovereign immunity barred suit against the Government by all. The primary purpose for the creation of the Court of Claims in 1855 was to open the doors to citizens' suits.⁸⁹ The hope of ready access to a court of law in which to air their grievances was dashed in 1863, however, when Congress amended the law to except claims "dependent on treaty stipulations entered into with foreign nations or with the Indian tribes."⁹⁰ Remarkably, neither the bench nor the bar attempted to read this provision narrowly to permit claims by tribes not based on treaties to proceed in the Court of Claims. Instead, all assumed that the clause excepted any claim brought by an Indian tribe against the Government.⁹¹

Nation v. Georgia, 30 U.S. (5 Pet.) 1, 7 (1831) (enunciating dependent status of Cherokee Tribe). In denying they were a state within Article III's grant of original jurisdiction to the Supreme Court, Justice Marshall characterized their status as "resembl[ing] that of a ward to his guardian." *Id.* The Cherokee Nation finally got to the Supreme Court to protest the State of Georgia's attempt to destroy them, but only because a white missionary was arrested for violating the state law barring anyone from entering Indian land without a permit. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 538 (1832). The Supreme Court held that federal treaties, statutes, and policy preempted Georgia's laws. *Id.* at 558-59. In that case, Justice Marshall more precisely compared Indian tribes to "tributary and feudatory states" which do not surrender their self-government. *Id.* at 561. Nevertheless, the guardian-ward language had a powerful effect on the development of Indian law, which was mostly negative, but partly positive. One of the negative aspects was the notion that tribes thus lacked capacity to sue on their own in federal or state courts. See Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 217 & n.114 (1984) [hereinafter *Newton, Federal Power*] (indicating that Indian status as wards of Government sometimes confused issue of tribal and individual standing to sue).

87. 28 U.S.C. § 1362 (1988). See ROBERT CLINTON ET AL., *AMERICAN INDIAN LAW* 159-60 (1991) (assessing impact of section 1362).

88. See DELORIA & LYTLE, *supra* note 24, at 151-60 (noting that success of Indian tribes can be attributed to competent representation by Indian Legal Services attorneys and outspoken interest groups, such as Native American Rights Fund).

89. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612 (creating Court of Claims and permitting appointment by President of three judges to hear complaints).

90. See Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767 (stating that jurisdiction will not extend to, or include, any claims against Government that are dependent on treaty stipulations entered into with Indians).

91. See Richard Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. REV. 447, 461-62 & n.108 (1981) (criticizing virtual exclusion of Indians from Court of Claims and noting that Indian claims could only be heard in Court of Claims pursuant to special jurisdictional statutes conferred by Congress).

This state of affairs continued for eighty-three years during which Indian tribes had to secure special jurisdictional statutes, granting the Court of Claims jurisdiction and waiving sovereign immunity for specific claims.⁹² The tribes had varying degrees of success on the merits because the special acts were construed so narrowly.⁹³

B. Indian Claims Commission

A cardinal purpose of the Indian Claims Commission Act was to "grant" Indian tribes equal access to the Court of Claims.⁹⁴ In addition, the Indian Claims Commission Act was designed to grant tribes their long-deferred day in court by permitting them to sue for historic wrongs in order to settle Indian tribes' grievances against the Government permanently.⁹⁵ Despite these positive intentions, the Act's major goal was to settle tribes' ancient grievances in order to prepare them for the termination of their special status under United States law.⁹⁶

The Indian Claims Commission Act created the Indian Claims Commission, which has jurisdiction over so-called "ancient claims,"

92. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 372-80 (1942) (providing examples of special jurisdictional statutes); see also Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 *CATH. U. L. REV.* 635, 636 n.10 (1982) [hereinafter Newton, *Enforcing the Federal-Indian Trust Relationship*] (discussing requirement of special jurisdictional act and commenting that Indian tribes sought to establish that Federal Government's exclusive regulatory power creates concomitant fiduciary duties). The Article notes that in response to the essential fairness of the Indian's claim, courts have awarded, in a limited number of cases, equitable relief and monetary damages for suits against the Federal Government involving breach of trust. *Id.*

93. Because these statutes waived sovereign immunity, they were construed narrowly. See *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 336 (1945) (involving special jurisdictional act of Congress permitting claims arising out of Treaty of Box Elder). The Court held the statute insufficient to vest jurisdiction for a taking of tribal land because the treaty did not create an interest in land. *Id.* at 354.

94. See 92 *CONG. REC.* A4923 (1946) (statement of Rep. Mundt) ("This ought to be an example for all the world to follow in its treatment of minorities.").

95. See Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2, 60 Stat. 1049, 1050 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978) (defining classes of complaints Commission shall hear against United States on behalf of Indians).

96. See Russell Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 *N.D. L. REV.* 7, 37 (1982) (stating Indian claims settlement policy). Scholars wrote a thoughtful collection of essays assessing the Indian Claims Commission and faulting the process on many grounds. See *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* (Imre Sutton ed. 1985); see *id.* at 6 ("[T]he litigation process—once perceived as their only recourse—has not fully met their expectations of an honorable resolution."). Even the Indian Claims Commission's own historian, Harvey D. Rosenthal, criticized the Commission. See Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission*, in *IRREDEEMABLE AMERICA, supra*, at 63 ("It became obvious that the commission broke no new ground and was really a government measure to enhance its own efficiency by disposing of the old claims and terminating the Indian tribes.").

or those arising before the jurisdictional cut-off date of 1951.⁹⁷ The statute created five broad classes of claims:

(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress . . . ; (4) claims arising from the taking by the United States . . . of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.⁹⁸

The last chair of the Indian Claims Commission, John T. Vance, criticized the Commission for adopting an adversary model, instead of the more cooperative model permitted by the legislation.⁹⁹ Congress, for example, included a basis to bring nonlegal claims as well as a provision for the Commission to set up an Investigation Division to "make a complete and thorough search for all evidence affecting claims, utilizing all documents and records in the possession of the Court of Claims and the several government departments, and shall submit such evidence to the Commission."¹⁰⁰ In short, Commissioner Vance argued that the Act did not mandate an adversary system.¹⁰¹

Unfortunately, the Commission adopted an adversary model and never established an Investigation Division.¹⁰² Although all the ini-

97. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 12, 60 Stat. 1049, 1052 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

98. *Id.* § 2, 60 Stat. 1049, 1050 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

99. See John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 332-35 (1969) (attributing failings of Indian Claims Commissions to adoption of adversarial procedures utilized under various jurisdictional acts prior to its creation).

100. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 12, 60 Stat. 1049, 1052 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

101. See Vance, *supra* note 99, at 332 (noting, for example, that Congress did not require Indian to be represented by counsel).

102. See Vance, *supra* note 99, at 333 (suggesting that Commission set up Investigation Division, but only on paper). Vance was not alone in criticizing the adversarial structure of the Commission as was reflected in its failure to set up an Investigation Division. See Sandra Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 374-80 (1973) (attacking numerous aspects of Indian Claims Court procedures including investigation); Nancy Oestreich Lurie, *Epilogue*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 363, 369-71 (Imre Sutton ed. 1985) (stating that greatest error of implementation of 1946 Act was first Commissioner's failure to establish Investigation Division).

tial commissioners were attorneys, none had experience in Indian law, and only one had experience in claims law. Harvey Rosenthal, the Commission's official historian, posited several reasons the Commission reconstituted itself into a court.¹⁰³ The Government certainly feared the Commission might adopt the generous Indian tradition known as the giveaway and simply transfer millions of dollars to undeserving tribes.¹⁰⁴ Additionally, the tribes' Washington attorneys were familiar with the adversary system of the Court of Claims and, no doubt, were opposed to any system that would cut them out of the process.¹⁰⁵ Finally, Rosenthal notes that Indian people themselves demanded an adversary proceeding.¹⁰⁶ If this last point is true, it makes some sense. Indian people have never spoken with one voice and those who come to Congress to testify are often selected by congressional committees to express the appropriate viewpoint.¹⁰⁷ One could imagine why Indian people might be deeply distrustful of congressional agencies that were supposed to act in their interests, but instead handed down edicts without any tribal input. Perhaps they believed an adversary system would, at a minimum, permit them to participate in the decision-making through their attorneys. In other words, viewing their choices as either governmental paternalism or an adversarial model, Indian tribes might well have chosen the latter.

Once the Commission became a court, it became a claims court. In other words, it viewed its remedial arsenal as restricted to money damages, a view that seems consistent with the legislative intent.¹⁰⁸ The Indian Claims Commission Act provided for review of Indian Claims Commission decisions to the Court of Claims, followed by certiorari review to the Supreme Court.¹⁰⁹

103. See Rosenthal, *supra* note 96, at 35-70 (providing overview of Indian Claims Commission).

104. Rosenthal, *supra* note 96, at 47.

105. *Id.*

106. *Id.*

107. See Barsh, *supra* note 96, at 11-16 (reviewing testimony before congressional committee concerning Indian land claims commission).

108. The Act referred to the "amount" of liability, and appropriation of "sums as are necessary to pay the final determination of the Commission." Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, §§ 19, 22, 60 Stat. 1049, 1054-55 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

109. *Id.* § 20(2)(c); see Wilkinson, *supra* note 6, at 518-19 (noting Court of Claims had decided 90 appeals by 1966).

C. *The Tucker Act: The Federal District Court, the Court of Claims, and the Claims Court*

As noted above, the Indian Claims Commission Act also removed the actual barrier regarding treaty claims and the perceived barrier against all Indian claims by providing Tucker Act jurisdiction for all claims arising after 1946 in the Court of Claims.¹¹⁰ The Supreme Court has stated that this vesting of jurisdiction did not add any substantive claims to those already present in the Tucker Act, but merely removed the impediment to suit by tribes.¹¹¹ Consequently, Indian tribes can now bring claims against the Government in the Court of Claims for money damages. In addition, tribes can bring smaller claims, those under \$10,000, to federal district court, with appeal to the regional courts of appeal, under the Little Tucker Act.¹¹² Even after the passage of the Indian Claims Commission Act, Congress continued to enact statutes permitting tribes to bring claims in the Court of Claims or the Indian Claims Commission to remove impediments to adjudicating claims on the merits after the tribe had been unsuccessful in the Indian Claims Commission.¹¹³

When Congress finally dissolved the Indian Claims Commission in 1978, it transferred its 102 remaining cases to the Court of Claims.¹¹⁴ When the Claims Court was created in 1982, the entire jurisdiction of the Court of Claims was transferred to the new Article I court. As a result, the new court must resolve ancient claims that had never been tried in the Indian Claims Commission.¹¹⁵ It also must hear claims on appeal from the Indian Claims Commission, modern claims arising from the Tucker Act, congressional ref-

110. See 28 U.S.C. § 1505 (1988) (stating that Court of Claims would have jurisdiction over any claims against United States after Aug. 13, 1946).

111. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*) (stating that Tucker Act is jurisdictional statute only and does not create substantive rights enforceable against United States for money damages). The Court relied on language from *United States v. Testan*, 424 U.S. 392, 398 (1976).

112. 28 U.S.C. § 1346(a)(2) (1988). See generally *Rogers v. United States*, 877 F.2d 1550 (Fed. Cir. 1989) (discussing appeal of Little Tucker Act case raising breach of trust issues).

113. Congress, for example, permitted the Sioux Nation to relitigate their claim to the Black Hills free from the defense of *res judicata*. More frequently, the special jurisdictional act lifts the bar of the statute of limitations. See *Zuni Indian Tribe v. United States*, 16 Cl. Ct. 670, 676 (1989) (lifting statute of limitations bar with special jurisdictional act to permit claim based on 19th-century taking of Zuni aboriginal land). The statute provides jurisdiction to the Claims Court with respect to all claims made by the Zuni Act of May 15, 1978, Pub. L. No. 95-280, 92 Stat. 244.

114. See UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT 20 (1978).

115. In 1990, 12 cases remained of the Indian Claims Commission Act cases transferred to the Court of Claims. See REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table G-3a, at 245 (1990) (reporting statistics from the Claims Court for year ending Sept. 30, 1990).

erence claims,¹¹⁶ and claims from new jurisdictional statutes.¹¹⁷ As a result, the judges, many of them coming from the patent bar or for other reasons having no knowledge of Indian law, must plunge immediately into the mysteries of the Indian Claims Commission Act's law.

Although the Claims Court is nearly finished with all ancient claims, it will never be completely finished, for Congress has referred to the claims in the Indian Claims Commission as bases for suit in at least one modern jurisdictional statute and may continue to do so in the future.¹¹⁸

D. Review in the United States Court of Appeals for the Federal Circuit

Under the old system, appeals from a Court of Claims decision was by writ of certiorari to the Supreme Court. Nevertheless, an internal process operated as a kind of appellate review. A panel of Article III judges on the Court of Claims automatically reviewed decisions of the Court of Claims trial judges.¹¹⁹ Under the FCIA, the Article I Claims Court is the trial court, and appeals from the Claims Court and from Little Tucker Act cases in federal district court must be taken to the United States Court of Appeals for the Federal Circuit.¹²⁰

To what extent, if at all, has this structure affected the substance of the law applied in Indian claims? To answer this question, it is necessary to review the development of Indian law in the claims courts and assess the Federal Circuit's impact on that law in the ten years since its inception.

116. I am aware of only one congressional reference case involving an Indian claim. In that case, Congress requested the Claims Court to apply a "fair and honorable dealings" standard, to determine whether the United States had adequately protected the tribe's aboriginal land in Texas. *Battise v. United States*, 12 Cl. Ct. 426, 433 (1987) (reporting to Congress that tribe had not shown exclusive use and occupancy of aboriginal land and that there was no basis for concluding Government had responsibility for loss of tribe's land).

117. *Zuni Indian Tribe v. United States*, 16 Cl. Ct. 670, 675 (1989) (applying special jurisdiction conferred by Act of May 15, 1978, Pub. L. No. 95-280, 92 Stat. 244, to hold that United States took aboriginal, but not recognized title).

118. See *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1386 (Fed. Cir. 1983) (remanding to Claims Court to consider merits of case previously dismissed as beyond scope of jurisdictional statute).

119. See David Anthony, *Decisions to Appeal: Substantive and Procedural Considerations—Various Perspectives*, Remarks at the Claims Court Breakout Session, First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, in 100 F.R.D. 499, 541 (1983) (noting confusion caused by oversimplified statement that trial function of Court of Claims was transferred to Claims Court, and its appellate function was transferred to Federal Circuit because Court of Claims had no true appeals); see also Adams, *supra* note 2, at 66 (noting Claims Court has virtually same jurisdiction as trial division of old Court of Claims).

120. The FCIA provided that claims based on statutes must still be appealed to the regional court system, but all other claims could only be appealed to the Federal Circuit. See 28 U.S.C. § 1295(a)(2) (1988) (defining examples of jurisdiction of Federal Circuit).

III. CLAIMS LAW

The following portions of this Article focus first on the basis, development, and scope of a claim for breach of trust. The Article next focuses on issues arising in property cases, including the problems arising from the length of time it takes to adjudicate these cases. Finally, to complete the discussion of law, the Article will focus on a recent Federal Circuit decision upholding an Indian person's right to sue for tort damages based on a treaty.¹²¹ Although the case sets only a limited precedent, I will discuss it to illustrate both the importance of the ancient treaties as potential bases for recovery and also the continued need for creative lawyering in this field.

A. The Trust Relationship: The Convenient Distinction Between Moral and Legal Claims

1. Breach of fair and honorable dealing

One might justifiably ask why it is necessary to focus on the law created in these ancient claims, if the Indian Claims Commission is no longer in existence. The answer is that the formalistic rules developed in Indian Claims Commission cases, especially those rules limiting liability and setting the boundaries of the permissible, continue to be cited and relied on today, even by the Supreme Court.¹²² The widespread belief that tribes could not sue in federal district court before 1965 also resulted in an acceptance by tribal advocates and tribes of the basic premise of claims law: that payments of cash could and perhaps should be the only remedy for wrongs. As tribes perceived that they had alternatives to money damages claims, such as claims for equitable relief in federal courts of general jurisdiction, strategic options dramatically increased. Focusing on these early cases sets the stage to understand this development and demonstrates why tribes have begun to reject the equation of lost land and destruction of peoplehood with money.

Clause 5 of the Indian Claims Commission Act provides for "claims based upon fair and honorable dealings that are not recog-

121. See *Tsosié v. United States*, 825 F.2d 393, 394 (Fed. Cir. 1987) (discussing claim brought pursuant to treaty by member of Navajo Tribe for damages for alleged sexual assault by hospital employee on Navajo Reservation).

122. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 386 (1986) (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F.2d 686, 690-94 (Ct. Cl. 1968) and adopting restrictive test devised by Claims Court in review of Indian Claims Commission decision); *Battise v. United States*, 12 Cl. Ct. 426, 432-33 (1987) (applying concepts of aboriginal title and fair and honorable dealings to congressional reference case).

nized by any existing rule of law or equity.”¹²³ Congress designed the fair and honorable dealings clause to allow the Commission to go beyond the confines of existing formal law. The deliberately open-ended language held out the promise that the Commission could apply moral principles to the entire course of dealings between the Government and Indian tribes. Only by this process could the old wounds be healed and Congress be freed from the necessity of continually revisiting them.

According to the House Committee Report, “it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts.”¹²⁴ This clause and the legislative history emboldened some tribes to lodge complaints that went beyond seeking accounting for mishandling of funds and that failed to fit into the neat structure of existing legal principles.

Because the Commission gave priority to land claims, the remaining claims were left to the end. Thus, the Commission’s first breach of fair and honorable dealings case did not reach the Court of Claims until 1970 in *Gila River Pima-Maricopa Indian Community v. United States*.¹²⁵ The Gila River Pima-Maricopa Indians were prosperous and peaceful farmers at the time of contact. Because they sought to accommodate the Euro-Americans, they fought no war and secured no treaty, merely assurances of good faith and a better life once they became acculturated. By the 1950s, they were one of the poorest tribes in the United States, with the highest mortality rate and the lowest level of education.¹²⁶ They filed several cases with the Commission, seeking compensation for government actions depriving them of much of their land base and their water rights.¹²⁷ In addition, they brought an accounting claim seeking damages for mismanagement of their property, especially leases made under the authority of the Secretary of the Interior.¹²⁸ Their

123. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2(5), 60 Stat. 1049, 1054 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978).

124. H.R. REP. NO. 1466, 79th Cong., 1st Sess. 10 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1355, 1355-56.

125. 427 F.2d 1194 (Ct. Cl.), *cert. denied*, 400 U.S. 819 (1970).

126. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1195 (Ct. Cl.), *cert. denied*, 400 U.S. 819 (1970).

127. *See Gila River Pima-Maricopa Indian Community v. United States*, 135 Ct. Cl. 180, 183 (1970) (bringing cause of action to recover alleged illegal assessment of operation and maintenance charges collected by United States for delivery of waters of Gila River).

128. *See id.* (seeking recovery for breaches of contractual obligations in connection with leasing of land to War Relocation Authority).

clause 5 claim was truly sweeping. The tribe argued that the Government had reduced them to wardship with no concomitant benefits.¹²⁹ The Government had undertaken to provide them with educational and medical services, but the services actually provided were inadequate. Most seriously, the reduction to wardship, according to the tribe, resulted in "a stagnation of self-expression . . . [and] bridled petitioner into cultural impotency."¹³⁰

Declining to give the fair and honorable dealings clause an expansive interpretation, the Court of Claims upheld the Commission's grant of summary judgment.¹³¹ The court reasoned that the broad language regarding moral claims must be balanced against the fact that the Indian Claims Commission Act abrogated sovereign immunity from suit.¹³² "While the remedial purpose and intent of [clause 5] should be effectuated, its scope should not be unduly extended."¹³³ Because the Indian Claims Commission Act was designed to obviate the need for further special jurisdictional acts, the Court of Claims reasoned that Congress intended that clause 5 could only encompass the same kinds of claims brought earlier.¹³⁴ Conveniently ignoring the many cases upholding the Department of Interior's administrative power to govern Indians without the need for statutory authority, the Court of Claims held that a claim by a tribe seeking compensation based on actions undertaken by the Government had to rely on a "treaty, agreement, order or statute which expressly obligated the United States to perform [any] services."¹³⁵ Because there was no such formal promise in this case, the claim was dismissed and the tribe was relegated to the "political process."¹³⁶

In his concurrence, Judge Davis was a little more honest about the reasons for the crabbed interpretation of the statute. Given the "historic national policy of semi-apartheid," permitting the Gila River Pima-Maricopa Tribe to recover would subject the Government to far greater liability than legislators must have intended.¹³⁷ Judge Nichols concurred in the result, noting that the Commission structure could not accommodate "every possible dispute that

129. *Gila River*, 427 F.2d at 1195.

130. *See id.* (quoting petition of Gila River Pima-Maricopa Indian Community).

131. *Id.* at 1200.

132. *Id.* at 1198.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1200.

137. *Id.* at 1201 (Davis, J., concurring).

might have arisen between the United States and the Indians in 170 years of history."¹³⁸

The *Gila River* opinion represents a classic example of claims doublespeak. The court dismissed the tribe's broad claims as moral claims beyond the scope of clause 5. At the same time, the court also refused to treat the tribe like a person injured by a good samaritan.¹³⁹ Such a claim would not fall within clause 5 not because it was too broad, but because it resembled a tort claim and clause 5 was limited to claims other than those "fall[ing] within established legal or equitable principles."¹⁴⁰ This statement at least provided some hope that a tribe properly pleading a tort claim cognizable under section 2(2) of the Indian Claims Commission Act¹⁴¹ could recover for destruction of its right to exist as a tribe, or in the words of Judge Davis, its "peoplehood."¹⁴²

The small hope of a tort suit was dashed by the decision in *Fort Sill Apache Tribe v. United States* in 1973.¹⁴³ The Apache Tribe crafted a tort suit for loss of tribal identity caused by the tribe's unlawful incarceration for twenty-seven years. The Apache people had resisted the Government's attempt to make them stay on the San Carlos Reservation to which they had been moved during 1876 and 1877.¹⁴⁴ By 1886, the Government decided that something had to be done to end the constant outbreaks of hostilities. Although most of the Chiricahua Apaches had not joined Geronimo, the Government incarcerated the entire tribe as prisoners of war in Florida, Alabama, and finally, in Fort Sill, Oklahoma.¹⁴⁵ After imprisoning the main part of the tribe, the Government concentrated on rounding up the Bands of hostile Indians.¹⁴⁶ With the defeat of Geronimo in 1886, the armed-resistance of the Chiricahua Apaches came to an end.¹⁴⁷

138. *Id.* (Nichols, J., concurring).

139. *Id.* at 1200.

140. *Id.* at 1200 n.3.

141. Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2(2), 60 Stat. 1049, 1054.

142. *Gila River*, 427 F.2d at 1201 (Davis, J., concurring) (commenting on Indian complaint that Federal Government destroyed Indian peoplehood by failing to provide proper education, medical care, and self-government).

143. *See Fort Sill Apache Tribe v. United States*, 477 F.2d 1360, 1361 (Ct. Cl. 1973) (addressing Apache claim to recover compensation for wrongdoing to tribe as result of 27 years of internment).

144. *See id.* (clarifying that it was ancestors of Chiricahua Apache Tribe that did not wish to be removed to San Carlos Indian Reservation).

145. *See id.* (noting that court uses sanitized term "relocation" instead of imprisonment). The imprisonment plan was designed by General Philip Sheridan. *Id.*

146. *See id.* (commenting that Indian rebel leaders were Mangus, Geronimo, and Natchez).

147. *See id.* (stating Geronimo surrendered in Mexico on Sept. 4, 1886, and was interned at Fort Pickens, Florida).

The imprisonment devastated the Chiricahua people and destroyed the tribe as an entity. During the first three and one-half years of confinement, 119 of the 498 tribespeople died.¹⁴⁸ One hundred twelve of the Apache children were dispatched to boarding school at Fort Carlisle, Pennsylvania,¹⁴⁹ where thirty died during the first year of instruction. The court carefully noted, however, that these deaths occurred "despite good sanitary conditions."¹⁵⁰

In 1913, after twenty-seven years of what the court assumed to be "wrongful arrest, imprisonment, and excessive punishment of some individual Indians," the Government finally released the Apaches.¹⁵¹ The remnants of the tribe stayed on the Fort Sill Reservation, although most of them moved to the Mescalero Apache Reservation in New Mexico.¹⁵²

The tribe sued for the loss of its tribal identity, arguing that the destruction of the tribe's political structure was both a tort compensable under clause 2 and a breach of fair and honorable dealings under clause 5.¹⁵³ The Indian Claims Commission dismissed the claims.¹⁵⁴ Although the tort of wrongful imprisonment existed as a legal claim, the Commission held that the Indian Claims Commission Act waived sovereign immunity only for tribal claims, and not individual claims.¹⁵⁵ As to fair and honorable dealings, the Commission relied on the court's insistence in *Gila River*¹⁵⁶ on evidence that the Government expressly undertook some finite duty to the tribe.¹⁵⁷

The Court of Claims affirmed.¹⁵⁸ The court held that the tribe could not bring a tort claim based on harm to a group right or interest because Congress had not intended to recognize a "distinct right in the tribe to foster and protect its own form and structure."¹⁵⁹ According to the Court of Claims, the case presented the same

148. *Id.* at 1366.

149. *Id.*

150. *Id.*

151. *Id.* at 1361.

152. *Id.* at 1362.

153. *Fort Sill Apache Tribe v. United States*, 26 Indian Cl. Comm'n 281, 285 (1971).

154. *Id.* at 301 (dismissing Indian claim without trial on grounds of lack of subject matter jurisdiction and failure to state claim).

155. *Id.* at 287.

156. *See Gila River*, 427 F.2d at 1199 ("Affirmative acts such as those allegedly undertaken in our case may lead to liability if they are indeed less than 'fair and honorable,' and if there is a duty owed; they do not of themselves, create that duty.").

157. *Fort Sill Apache Tribe*, 26 Indian Cl. Comm'n at 288.

158. *Fort Sill Apache Tribe*, 477 F.2d at 1368.

159. *Id.* at 1365. The court distinguished a successful nuisance claim brought by a church on the ground that the church asserted property rights. *Id.* at 1363 (citing *Baltimore & P. R.R. v. Fifth Baptist Church*, 108 U.S. 317, 329 (1883)).

problem as *Gila River*: "Each [tribe] felt Government action caused damage to the power structure and viability of the tribal unit; that is, damage to Indian peoplehood in general. Opening the door to appellants in this case would leave it open for a multitude of other claims based on facts more closely akin to those in *Gila River*."¹⁶⁰

Although admitting that "the tribe did not prosper from the injuries suffered by its constituent members,"¹⁶¹ the court stated that, at best, the claim was one for a multitude of individual claims for wrongful imprisonment, and thus outside the jurisdiction of the Indian Claims Commission Act.¹⁶²

In discussing the scope of clause 5, the court also relied on *Gila River*, noting, apparently without irony, that the clause "is limited to somewhat fewer situations than a literal reading would imply."¹⁶³ To satisfy the requirements of *Gila River*, the tribe would have to demonstrate that the Government undertook a duty to protect the tribe's power structure.¹⁶⁴ Most assuredly, the Government had not undertaken such a duty in treaties or statutes.¹⁶⁵ The court recounted the history of the Apache wars, stressing the wars were long and hard-fought by both sides.¹⁶⁶ In this context, the imprisonment of the "sagacious savages"¹⁶⁷ was an act of war. Perhaps it was "unwarranted and reparations should be given to the Apache Indians for their suffering after surrender."¹⁶⁸ Nevertheless, while not condoning the Government's action, the majority concluded it had no jurisdiction: "We take the law as we find it."¹⁶⁹

Judge Davis concurred with his customary frankness, noting that permitting a claim for destruction of tribal existence would permit tribes to argue that the Government had no power to terminate its tribal existence by "unilaterally but peacefully disbanding the tribe and insisting that its members assimilate into the general population."¹⁷⁰ Such an interference with congressional power was clearly unthinkable to Judge Davis.

Judge Nichols's dissent doubted the tribe's ability to recover, both because of the passage of time and because of the difficulty of measuring damages, but argued that the tribe should be given its chance

160. *Id.* at 1364.

161. *Id.* at 1365.

162. *Id.*

163. *Id.*

164. *Id.* at 1364.

165. *Id.*

166. *Id.* at 1361-62.

167. *Id.* at 1367 (quoting *Scott v. United States*, 33 Ct. Cl. 486, 488 (1898)).

168. *Id.*

169. *Id.*

170. *Id.* at 1368 (Davis, J., concurring).

to air its grievances in the public forum of a Commission proceeding.¹⁷¹ Given the violence of that war, he noted that "justifying the imprisonment may well prove easier than condemning it; in any case, we should not fear to cast the light of day on this murky chapter of our nation's past, if Congress wished it."¹⁷²

Judge Nichols criticized the majority's rejection of the aggregated claims of individuals drawing on analogies from international law in which the U.S. Government settled claims brought by foreign countries on behalf of their individual citizens.¹⁷³ In a particularly eloquent portion of his dissent, Judge Nichols criticized the Court of Claims and the Commission for taking an excessively narrow view of the Commission's role:

[W]e must watch ourselves to avoid slipping into the excessive legalism we as lawyers, are normally prone to, wrongly limiting our task to the intellectual games so revolting to Mr. Justice Jackson: . . . The Congress sought to put us on a broader plateau. It is error to pretend we face purely legal issues. Excessive legalism, a forgetting that the tribunal is called on not just for legal niceties, but statecraft too, produces . . . absurdities.¹⁷⁴

Tracing the history of the Indian Claims Commission Act and focusing on its expansive language, Judge Nichols stated: "It is hard to imagine how Congress could have written a more broadly worded jurisdictional statute."¹⁷⁵ Judge Nichols concluded that those who argued that claims should be limited to land and property rights were mistakenly relying on language by President Truman in his signing statement that referred to opening the doors of the Court of Claims to modern claims brought after 1946 under the Indian

171. *Id.* at 1368-69 (Nichols, J., dissenting). Judge Nichols took the same position in a 1981 case in which the majority refused to reopen a claim. *Compare Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1088-89 (Ct. Cl. 1981) (dismissing as untimely motion to present new evidence that attorney's stipulation was unauthorized) *with id.* at 1089 (Nichols, J., dissenting) (urging remand and chiding court for refusing to take any testimony or set case for argument).

172. *Fort Still Apache Tribe*, 477 F.2d at 1370 (Nichols J., dissenting).

173. *See id.* (analogizing to Alabama claims where privately owned ships and cargoes were destroyed by Confederate cruisers fitted for war by England in violation of country's duty to be neutral under international law).

174. *Id.* at 1375 (Nichols, J., dissenting). In 1955, Justice Jackson wrote a concurring opinion expressing belief that Indian concepts of property were so foreign to U.S. concepts that application of private property law to tribal property was artificial. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 354 (1945) (Jackson, J., concurring). *But see* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1249-51 (1980) [hereinafter Newton, *At the Whim of the Sovereign*] (criticizing Justice Jackson's concurring opinion in *Northwestern Bands of Shoshone Indians*).

175. *Fort Sill Apache Tribe*, 477 F.2d at 1376 (Nichols, J., dissenting).

Tucker Act,¹⁷⁶ which did not contain a fair and honorable dealings provision.

Fort Sill and *Gila River* reduced the fair and honorable dealings clause to nothing more than a statutory or treaty claim,¹⁷⁷ duplicating claims adjudicated under other provisions of the Indian Claims Commission Act. Consequently, clause 5 became practically a dead letter. Of the more than 600 claims adjudicated by the Claims Commission, in only one did clause 5 provide the sole basis for relief. In *Aleut Community v. United States*,¹⁷⁸ the Court of Claims held that the Aleut people of St. Paul Island, who were kept in virtual slavery for seventy-six years, could recover damages, not because they were forbidden to leave the island, forbidden to marry anyone off the island, and forced to work in the seal trade at less than minimum wages for a lessee of the U.S. Government, but because two statutes authorizing leases of rights to trade in seal furs contained provisions specifically protecting the natives.¹⁷⁹ *Aleut Community* established the reach of the fair and honorable dealings clause as requiring the plaintiff to show (1) the United States undertook an obligation to a tribe by treaty, statute, or agreement; (2) the United States failed to meet the obligation; and (3) this failure resulted in damages.¹⁸⁰ Unfortunately, as of March 1983, this claim was still pending.¹⁸¹

As Nancy Oestreich Lurie stated, the judicial interpretation of the fair and honorable dealings claims pushed the claims process in the

176. 28 U.S.C. § 1505 (1988).

177. See *supra* notes 125-38, 143-62 and accompanying text (explaining judicial reluctance to entertain broad moral claims under ICCA's fair and honorable dealings clause as unwillingness to subject Federal Government to seemingly unlimited liability).

178. 480 F.2d 831 (Ct. Cl. 1973).

179. See *Aleut Community v. United States*, 480 F.2d 831, 839-41 (Ct. Cl. 1973) (listing wide range of civil rights abuses endured by St. Paul Island Aleuts, but pointing to two federal seal-trade statutes as source of U.S. responsibility for protection of Aleuts). The first statute discussed is the Act of July 1, 1870, ch. 189, § 1, 16 Stat. 180, which states that the "natives of [St. Paul Island] shall have the privilege of killing such . . . seals as may be necessary for their own food and clothing . . . and for the manufacture of boats for their own use . . ." *Id.* This provision explicitly recognizes the reliance placed by these Aleuts on seal hunting, and thus the Act acknowledges the impact government-sanctioned hunting will have on the Islanders by mandating that federal authorities "shall have due regard [for] the . . . comfort, maintenance, and education of the natives . . ." *Id.* § 4. The second statute discussed is the Act of April 21, 1910, ch. 183, § 3, 36 Stat. 326, which protects the Aleuts from exploitative fur traders by providing that they "shall receive for their labor fair compensation." The court in *Aleut Community* used this language to find that the U.S. Government was party to a "special relationship" with the Aleuts and was thus obliged to provide for the well-being of the natives. *Aleut Community*, 480 F.2d at 840.

180. *Aleut Community*, 480 F.2d at 839.

181. See *Aleut Tribe v. United States*, 702 F.2d 1015, 1016 (Fed. Cir. 1983) (relating that Government filed motion to dismiss fair and honorable dealings claim in Court of Claims in 1980 and dismissing interlocutory appeal with leave to seek another appeal in future).

direction of very simple, easily quantifiable claims.¹⁸² But what made this fact inevitable was the very structure of the system for judicial resolution of ancient claims. The determination that money damages can be the only remedy for ancient wrongs inevitably shapes the kinds of wrongs that can be remedied. Ironically then, the worst crimes against tribes were the least remediable.

2. *Breach of trust in the federal district courts*

Indian cases were relatively rare in the federal courts until 1965, when Congress opened the doors of the federal district courts to tribal suits.¹⁸³ Tribes retained local legal services and private attorneys to represent their interests in regional courts. The diversity of cases and numbers of attorneys taking an interest in Indian law contributed considerably to the development of Indian law. In addition, tribes often discovered a more hospitable forum, and favorable precedents from the district court in turn influenced the claims courts. One of the great contributions of the tribal rights movement of the 1960s was the development of a cause of action seeking equitable relief for breach of trust. Relying on language in one early Supreme Court case likening the Government's responsibility toward Indian tribes as "that of a ward to his guardian"¹⁸⁴ and on language in several Court of Claims cases decided under jurisdictional statutes that instructed the Court of Claims to apply trust principles,¹⁸⁵ advocates argued that a general trust relationship existed that imposed duties on the Government that were remediable under the general equitable powers of the federal courts.¹⁸⁶

182. See Lurie, *supra* note 102, at 372 (discussing dismissal of *Fort Sill Apache* case on grounds that claim involved multiple individual grievances rather than single collective grievance of tribe, band, or group).

183. See *supra* note 87 and accompanying text (stating that Congress explicitly specified that federal courts could hear Indian claims without United States serving as guardian).

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

185. See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating that Federal Government has repeatedly assumed "moral obligations of the highest responsibility and trust" with respect to Indians and therefore should be "judged by the most exacting fiduciary standards"); *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 19 (1944) (finding it is settled doctrine that United States acts as trustee for Indian's property). A major portion of the Indian Claims Commission's docket was comprised of claims for accounting of property and money managed by the United States. Rosenthal, *supra* note 96, at 50. In these cases, the Commission applied principles from the common law of trusts to measure the Government's duties. See *Temoak Bands of W. Shoshone Indians v. United States*, 31 Indian Cl. Comm'n 427, 429 (1973) (stating that Federal Government is not private law trustee, but that in its capacity as fiduciary for Indian funds, Government is held to standard no less exacting than that applicable to private trustees), *rev'd in part sub nom. United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

186. See generally Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (discussing development of trust theory via federal common law adjudication).

Unlike their colleagues on the Court of Claims, federal judges had not been schooled in the complexities of Indian law. Moreover, the Federal Rules did not accord the Government as much deference as the old Court of Claims rules in the matter of discovery and sanctions.¹⁸⁷ For example, a tiny Band of Pomo Indians inhabiting the Manchester-Point Arena Rancheria sued for mismanagement of funds earned from their tribal dairy business.¹⁸⁸ Their trustee, the Government, failed to pay interest on some funds, and paid only a minuscule amount on another fund. Because the amount in controversy was under \$10,000, the Band's legal services attorneys filed suit in federal court in Northern California under the Little Tucker Act.¹⁸⁹ When the Government defendants repeatedly refused to supply the court with an accounting of the funds, the federal judge imposed sanctions, finding the facts alleged by the plaintiffs to be true.¹⁹⁰ The Government then argued that it had authority under its plenary power to hold tribal money in the Treasury without paying interest because of a statute that stated that four percent interest could be assessed on some funds. The Government also invoked the "no interest rule" to argue that four percent simple interest was the most the tribe was entitled to recover. This rule provides that, absent a constitutional claim or a statute requiring it, interest cannot be paid by the United States.¹⁹¹ The trial judge disagreed with this argument and chose instead to apply the prudent investor's rule of private trust law to the Government in its capacity as a trustee.¹⁹²

187. See Nell Jessup Newton, Note, *Indian Tribal Trust Funds*, 27 HASTINGS L.J. 519, 540-41 (1975) [hereinafter Newton, Note, *Trust Funds*] (criticizing Court of Claims procedures with regard to discovery).

188. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1240-41 (N.D. Cal. 1973).

189. See 28 U.S.C. § 1346(a)(2) (1988) (providing concurrent original jurisdiction to United States district courts and Claims Court for civil claims against Federal Government not exceeding \$10,000).

190. *Manchester Band of Pomo Indians*, 363 F. Supp. at 1250-52; see FED. R. CIV. P. 37(b)(2)(A) (defining procedure by which certain facts will be deemed established if one party in litigation fails to obey court order to present evidence). Although the Court of Claims rules also provided for sanctions, they were rarely imposed. See W. Ney Evans, *Current Procedures in the Court of Claims*, 55 GEO. L.J. 422, 439-40 (1966) (stating that Court of Claims rarely penalizes Government for delaying litigation; in fact, extensions are almost uniformly granted to Government attorneys). The same is true today. See Newton, Note, *Trust Funds*, *supra* note 187, at 540-41 (analyzing similar modern day Claims Court practices).

191. 28 U.S.C. § 2516(a) (1988). The purpose of this rule is to prevent assessment of pre-judgment interest on claims against the Government. See *Library of Congress v. Shaw*, 478 U.S. 310, 315-16 (1986) (tracing rule's origins to sovereign immunity from lawsuits in absence of consent). For an excellent analysis on the impact of this rule on Indian claims, see Howard M. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U. L. REV. 26 (1970).

192. See RESTATEMENT (SECOND) OF TRUSTS § 181 cmt. c (1957) (describing trustee's duty to beneficiary to use reasonable care and skill to invest monetary trusts so that trust fund produces income; trustee who fails to invest funds is liable for amount of income that would normally accrue via proper investment).

Although statutes permitted the Government to hold trust money at four percent simple interest, the court interpreted the entire statutory scheme as one setting four percent as a floor. When safe investments earning more than four percent are available, the court held that the Government must invest the funds at the prevailing rates.¹⁹³ Accordingly, the court held that the tribe could recover as damages what its funds would have earned if they had been properly invested.¹⁹⁴

At the time of the decision in *Manchester Band of Pomo Indians*, appeal from Little Tucker Act cases went to the courts of appeal, as the Federal Circuit was not yet in existence. Given the relatively small amount of damages, it is not surprising that the Government decided not to appeal the district court's decision.¹⁹⁵ From the Government's perspective, the generalist judges of the United States Court of Appeals for the Ninth Circuit could be expected to be as open both to the general principles of trust law and to the basic appeal of the tribe's trust theory as had the district court.

3. *Breach of trust in the Court of Claims*

These innovative cases applying trust principles to the Government had a salutary impact on the development of a claim for breach of trust under the Tucker Act. Tribes began to bring claims for mismanagement of property and money in the Court of Claims, invoking the Tucker Act provision that permits claims "founded . . . upon . . . any Act of Congress."¹⁹⁶ Its role in reviewing breach of accounting claims and deciding special act cases had familiarized the Court of Claims both with the chronic problem of mismanagement and with the possibility of consulting private trust law for standards. Consequently, the Court of Claims interpreted its jurisdictional mandate broadly, permitting tribes to specify even general statutes as creating a special relationship between the tribe and the Government as a basis for a claim for damages owing to mismanagement.

193. The court interpreted 25 U.S.C. § 162a, which authorizes investment of Indian trust funds, to be sufficient to permit assessment of lost investment interest. *Manchester Band of Pomo Indians*, 363 F. Supp. at 1244-45. Cf. *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1316-18, 1320-22 (Ct. Cl. 1975) (applying no-interest rule to claim that accrued before enactment of 25 U.S.C. § 162a in Indian Claims Commission action for breach of trust in mismanaging tribal trust funds and rejecting argument that interest, technically speaking, would be part of direct damages flowing from breach), *cert. denied*, 425 U.S. 911 (1976).

194. *Manchester Band of Pomo Indians*, 363 F. Supp. at 1247-48.

195. See *id.* at 1247-48 (explaining that exact computation of damages resulting from mismanagement of funds is not possible without more detailed evidence, but that magnitude of damages is on order of 4% or higher annual interest on \$7500 for years 1938-1956 and on \$3500 for years 1957-1973).

196. 28 U.S.C. § 1491 (1988).

Once the court concluded the relationship existed, it then applied common law principles defining the duties of a trustee and the applicable remedies to grant relief.

In *United States v. Mitchell (Mitchell I)*,¹⁹⁷ for example, Indian allottees claimed damages for mismanagement of their timber resources and trust funds. The Court of Claims held that the General Allotment Act,¹⁹⁸ a statute applying to many of the tribes in the West, whose reservations were carved up into individual allotments during the late nineteenth and early twentieth centuries, was by itself sufficient to create a trust relationship because it specified that the land would be held in trust for the allottees.¹⁹⁹ Unfortunately, although the Indian plaintiffs also invoked many statutes specifically addressing both management of timber resources and trust funds,²⁰⁰ the Court of Claims held that the language stating the allotted land was to be "held in trust" in the General Allotment Act made consideration of other more specific statutes unnecessary.²⁰¹ Because the U.S. Government claims to hold most Indian tribal land in trust under either the General Allotment Act or the Indian Reorganization Act,²⁰² the analysis in *Mitchell* had the potential to open the doors of the Court of Claims to many other breach of trust suits.

The opinion in *Mitchell I* seriously undermined not just Indian claims but also Tucker Act jurisdiction in general. The Court held that the Tucker Act itself did not waive sovereign immunity for claims based on statutes.²⁰³ As a result, a claimant had to rely on a separate statute waiving sovereign immunity and creating a claim that could "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."²⁰⁴ Because waivers of sovereign immunity are strictly interpreted against the claimant, the Supreme Court's approach raised the question whether any Indian claim for breach of trust could be brought in the Court of Claims absent clear language expressly stating that the tribe could sue for the particular type of mismanagement. The reaction to the

197. 445 U.S. 535 (1980).

198. Indian Gen. Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358, 381 (1988)).

199. *Mitchell v. United States*, 591 F.2d 1300, 1302-04 (Cl. Ct.), *rev'd and remanded*, 445 U.S. 535 (1979).

200. *Id.* at 1304 n.18 (citing specific statutes).

201. *Id.* at 1302 (construing 25 U.S.C. § 348 (1988)).

202. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

203. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*). This was the position advanced by the Justice Department in its brief. See Brief for United States at 32-33, *United States v. Mitchell*, 445 U.S. 535 (1980) (No. 78-1756).

204. *Mitchell I*, 445 U.S. at 546-47 (White, J., dissenting) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

Mitchell I case was immediate and critical. Richard Hughes pointed out that the Court was deviating from well-established precedent because the Tucker Act itself constituted a waiver of sovereign immunity,²⁰⁵ and I argued that permitting the Government to manage property without a clear statutory basis, while denying the tribe a money damages action to deter future mismanagement, was fundamentally unfair.²⁰⁶

On remand,²⁰⁷ the Court of Claims focused on the statutes dealing specifically with timber resource management, noting that the statutes required the Secretary of the Interior to use the income from the timber for the benefit of the tribe,²⁰⁸ and also to operate the forests on a sustained-yield basis.²⁰⁹ Moreover, the court emphasized that situations such as the timber management in *Mitchell*, in which the Government was pervasively involved, created "a general fiduciary obligation on the Government in the management and operation of the forest lands with which Interior was entrusted."²¹⁰ This general fiduciary obligation provided the basis for the court to interpret the statutes liberally as creating a duty that could be the basis for a claim in the Court of Claims. Moreover, the existence of this general fiduciary obligation permitted the court to consult private trust principles to determine whether the breach of the statutory duty is one that requires compensation in money damages. Reasoning that a claim for money damages is essential for a beneficiary of a private trust, the court held that the timber management scheme as a whole created a claim for which money damages were mandated.²¹¹

When the Government appealed,²¹² the Supreme Court confessed to having caused a little confusion in its earlier opinion intimating that the Tucker Act did not waive sovereign immunity for statutory claims. Once the issue was framed in terms of finding a statutory claim, rather than in terms of finding a waiver which re-

205. Hughes, *supra* note 91, at 456-60, 490-93.

206. Newton, *Enforcing the Federal-Indian Trust Relationship*, *supra* note 92, at 644-45 (arguing that *Mitchell I* decision leaves Indian tribes "in the unhappy position they were in during the six decades before the trust law victories" in that Government manages their assets and resources but cannot be held accountable for mismanagement in any way).

207. *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).

208. *See id.* at 269 (quoting from 25 U.S.C. § 406(a) (1988) that timber sales shall "be based upon a consideration of the needs and best interests of the Indian owner and his heirs").

209. *See id.* (quoting from 25 U.S.C. § 466 (1988) that regulations regarding "the operation and management of Indian forestry units" should be made "on the principle of sustained yield management").

210. *Id.* at 270.

211. *Id.* at 273.

212. *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

quires strict construction, principles of liberal construction favoring Indian interests came into play. Consequently, the Court did not require explicit statutory statements that created a trust especially in cases in which there was in fact pervasive involvement of the Federal Government in tribal resource or money management.²¹³

The dissenting justices accused the majority of "overruling *Mitchell I sub silentio*,"²¹⁴ and, at least as to Tucker Act jurisdiction, I agree with them, although I am delighted where they were dismayed. *Mitchell II* is a rare victory for Indian tribes. To permit the Government to manage tribal resources without granting the tribes an effective remedy loads the dice too heavily in the Government's favor.²¹⁵ Nevertheless, the *Mitchell* cases have certainly called a halt to the kind of free-wheeling trust analysis that the Court of Claims and district courts employed in Little Tucker Act cases to impose wide-ranging trust duties, at least as far as damages remedies are concerned. Since the *Mitchell* cases, Tucker Act jurisdiction for breach of trust must be carefully based on either statutes that speak fairly specifically to trust obligations or on actual management by the Government of most phases of a tribe's resources under some sort of comprehensive regulatory scheme.

Mitchell II was decided after the Federal Courts Improvement Act created the new claims system. Consequently, the newly created Claims Court was left with the task of sketching the contours of trust-based claims.

4. Breach of trust in the Claims Court and Federal Circuit

Despite the promise of *Mitchell II*, Indian tribes have been remarkably unsuccessful in breach of trust claims in the Claims Court and the Federal Circuit. The claimants have succeeded in only two instances of the twenty Tucker Act cases addressing trust issues in the last ten years.²¹⁶ First, individual members of the Northern Paiute

213. *Id.* at 225. The Supreme Court quoted from the Court of Claims' opinion in *Navajo Tribe v. United States* as follows:

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. (quoting *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)).

214. *Id.* at 233 (Powell, J., dissenting).

215. See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1181-83 (1990) (discussing *Mitchell* cases and concluding that *Mitchell II* struck an appropriate balance between trust accountability and judicial intrusion into executive affairs).

216. Two of the Federal Circuit opinions involved review of fair and honorable dealings clause claims based on breach of trust. See *Gila River Pima-Maricopa Indian Community v.*

Nation who had been wrongly denied their share in a judgment fund received \$5000 each.²¹⁷ Second, the Short plaintiffs, Indians living on the Hoopa Valley Reservation who had been wrongfully denied their share in proceeds from timber sales, succeeded in the court,²¹⁸ although they were ultimately defeated in Congress.²¹⁹ Neither case raised difficult issues regarding the existence or scope of a trust relationship. The Government won dismissals in most of the other cases either because the statute of limitations had run²²⁰ or for lack of jurisdiction under the standards articulated in *Mitchell II*.²²¹

In fact, the *Mitchell* claimants themselves, almost ten years after the Supreme Court decision on jurisdiction, have yet to recover anything for the breaches of trust alleged in that case, first filed in 1971.²²² The Claims Court held that the statute of limitations bars

United States, 877 F.2d 961, 965 (Fed. Cir. 1989) (finding no breach of trust or fair and honorable dealings in leasing and managing land and water resources); Minnesota Chippewa Tribe Red Lake Band v. United States, 768 F.2d 338, 342 (Fed. Cir. 1985) (requiring United States to provide separate accountings to each tribe beyond scope of original complaint only if Government is clearly notified of accounting request and if such request is held to be valid).

217. See *Rogers v. United States*, 877 F.2d 1550, 1559-60 (Fed. Cir. 1989) (finding Bureau of Indian Affairs' failure to notify potential recipients of compensation for taking of Northern Paiute aboriginal homelands as breach of trust).

218. *Short v. United States*, 719 F.2d 1133, 1140 (Fed. Cir. 1983) (finding governmental breach of trust in arbitrary distribution of proceeds from timber sales to Hoopa Valley Tribe only, instead of to all "Indians of the Reservation"), *cert. denied*, 467 U.S. 1256 (1984).

219. The Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. § 1300i (1988)).

220. See *Tunica-Biloxi Tribe v. United States*, No. 90-5145, 1991 U.S. App. LEXIS 17865, at *3 (Fed. Cir. May 17, 1991) (unpublished opinion) (finding statute of limitations bars claim for damages based on failure to protect tribal land base in Louisiana), *cert. denied*, 112 S. Ct. 197 (1991); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1582 (Fed. Cir. 1988) (dismissing claim for unlawful termination of rancheria as barred by statute of limitations); *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 723 (Fed. Cir.) (holding forest mismanagement claims barred), *cert. denied*, 469 U.S. 826 (1984).

221. See *Pawnee v. United States*, 830 F.2d 187, 191-92 (Fed. Cir. 1987) (holding oil and gas royalties claim barred under *Mitchell II* because Federal Government acted in complete accordance with oil and gas regulations and leases, and thus did not breach its fiduciary duty), *cert. denied*, 486 U.S. 1032 (1988); *Grey v. United States*, 21 Cl. Ct. 285, 292-94 (1990) (distinguishing water resource and management scheme from pervasive governmental timber management of *Mitchell II*), *aff'd*, No. 91-5001, 1991 U.S. App. LEXIS 11705 (unpublished opinion) (Fed. Cir. May 24, 1991), *cert. denied*, 60 U.S.L.W. 3498 (U.S. Jan. 21, 1992); *Begay v. United States*, 16 Cl. Ct. 107, 124-30 (1987) (finding claim for economic, social, cultural, and psychological damages resulting from relocation lacks essential elements of trust to fall under ambit of *Mitchell II*), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988); *Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988) (dismissing suit for equivalency funding for school as failure to meet trust requirement of *Mitchell II*).

222. See *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272, 1273 (Ct. Cl. 1972) (stating that initial petition in *Mitchell* litigation was filed on Mar. 15, 1971), *later proceeding*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974), *later proceeding sub nom. Mitchell v. United States*, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd and remanded*, 445 U.S. 535, *reh'g denied*, 446 U.S. 992 (1980), *on remand*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd and remanded*, 463 U.S. 206 (1983), *on remand*, 10 Cl. Ct. 63, *modified on reconsideration*, 10 Cl. Ct. 787 (1986), *later opinion*, 13 Cl. Ct. 474 (1987), *later proceeding*, No. 772-71, 1988 U.S. Cl. Ct. LEXIS 99 (June 10, 1988). In its petition for certiorari in *Mitchell II*, the Government claimed that over \$100 million was at issue in this litigation. *Mitchell II*, 463 U.S. at 211 n.7.

presentation of many of their claims.²²³ In 1988, the Government continued to attempt to interpose jurisdictional barriers, including many of those rejected by the Supreme Court and the Claims Court in the past.²²⁴ The major claim involving mismanagement of timber sales has yet to be resolved, partly because the parties strongly disagree on the standard of care owed by the Government.²²⁵ A great deal of money was expended in this litigation, with two trips to the Supreme Court and eight opinions issued by the old Court of Claims and the new Claims Court. Yet, in the world of Indian claims, *Mitchell* is regarded as a victory. Whether it constitutes only a symbolic victory, as did the *Cherokee Cases*²²⁶ of old, remains to be seen.

In cases raising breach of trust issues after the enactment of the FCIA, the Federal Circuit has affirmed the Claims Court for the most part, thus indicating its satisfaction with the job done by the Claims Court in determining the reach of the trust relationship. In so doing, the Federal Circuit has put its imprimatur on a liability-reducing theory regarding the statute of limitations requirements that has had a devastating effect on most of these claims.²²⁷ In addition, the Federal Circuit has affirmed several cases in which the Claims Court has adopted very strict readings of the nature and scope of the trust relationship. For the most part, the courts have settled the contours of the trust relationship, at least for the purposes of Tucker Act jurisdiction. An important issue remains open, however, and that is the standard that should be applied to breach of trust cases.²²⁸ While the Government consistently argues for either a strict statutory standard or a standard that would only impose liability for arbitrary actions, Indian tribal advocates argue for standards based more solidly on private trust law. After a brief syn-

223. See *Mitchell v. United States*, 13 Cl. Ct. 474, 478-83 (1987) (holding road use permit claims and mismanagement of funds barred except for six-year period prior to filing suit); *Mitchell v. United States*, 10 Cl. Ct. 63, 68-77 (holding stumpage and regeneration of timber claims barred by statute of limitations except for period within six years prior to filing suit), *modified on reconsideration*, 10 Cl. Ct. 787, 788-89 (1986) (clarifying that allottees can bring claim for any trees not regenerated within six year period prior to filing suit).

224. See *Mitchell v. United States*, No. 772-71, 1988 U.S. Cl. Ct. LEXIS 99, at *7, 14 (June 10, 1988) (calling one jurisdictional argument "astonishing" and noting, as to another argument, that "it would be fair to question why the point was raised at all for the history of these cases shows that the Court of Claims had previously rejected precisely the same argument when it was raised as a defense to other claims in these suits").

225. *Id.* at *65 (suggesting the parties moderate their positions, noting that "[n]either position is reasonable").

226. See *supra* notes 64-81 and accompanying text (discussing *Cherokee* cases).

227. See *supra* note 220 (listing examples of Federal Circuit opinions limiting Federal Government liability for finding Indian claims time barred).

228. See *supra* notes 197-201 and accompanying text (delineating breach of trust arguments put forth by Indians and Federal Government in context of *Mitchell I* case).

thesis of the state of the breach of trust claim in the Claims Court and Federal Circuit, the Article analyzes these developments.

a. Tolling the statute of limitations

One of the reasons given by Justice Marshall in *Mitchell II* for recognizing the existence of a claim for money damages was the ineffectiveness of equitable relief.²²⁹ He noted that tribes and Indian people who had been told they were not capable of managing their own resources could hardly be expected to undertake the kind of sophisticated monitoring required to ensure that the Government complied with court orders.²³⁰ Second, equitable relief may come too late, as would be the case with the timber resources in *Mitchell*: "[B]y the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless."²³¹ Although this statement seems premised on a tribe's ability to sue upon discovery of governmental mismanagement, later cases in the Claims Court and the Federal Circuit have adopted a rule of constructive knowledge that has resulted in the dismissal of many claims and has greatly limited the period for which claims can be brought.

Probably the most significant development in this area is the Federal Circuit's significant modification of two theories first adopted by a California district court in *Manchester Band of Pomo Indians v. United States*, discussed earlier.²³² The district court held that the Tucker Act's six-year statute of limitations did not bar the claim, applying the rule from private trust law that the statute of limitations does not begin to run until the trustee repudiates the trust.²³³ The court saw no reason to deviate from this rule in a case in which the breach of trust was a failure to credit a trust fund with trust income.²³⁴ As an alternative basis, the court applied the rule that the statute does not run until the plaintiff has reason to know the facts giving rise to a claim for breach of trust.²³⁵ The court stated that

229. *United States v. Mitchell*, 463 U.S. 206, 227-28 (1983).

230. *Id.* at 227 (explaining Indian's inability to manage lands is due to poor education, absence from lands, and lack of knowledge of precise physical location of allotments).

231. *Id.*

232. *See supra* notes 188-94 and accompanying text (discussing *Manchester Band of Pomo Indians*).

233. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973).

234. *See id.* (acknowledging lack of precedential support for extension of rule but reasoning that rule "concentrates on the necessity of dealing fairly with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty'" (quoting *Dodge v. United States*, 362 F.2d 1810, 1813 (Ct. Cl. 1966))).

235. *Id.*

the Band could not determine there had been a breach until discovery because the Government had managed the funds without making either regular payments to the Band or supplying the Band with periodic accountings.²³⁶

An expansive interpretation of either of these theories for tolling the statute of limitations, the "trust" theory or the "blameless ignorance" theory, could open the courts to many mismanagement claims. The theory that a tribe could base a claim on the trust relationship was just developing. Although many of the ancient claims filed in the Indian Claims Commission turned into breach of trust claims at the accounting stage, tribes had not been aware that they could base a claim against the Government on the trust relationship until the beginning of the 1970s. Tribes could be expected to take every advantage of this new theory of liability.

The Federal Circuit addressed tolling issues first in *Menominee Tribe of Indians v. United States*,²³⁷ reversing a Claims Court decision that awarded the tribe \$7.2 million for mismanagement of its forest resources for the period 1951-1967. Specifically, the tribe claimed that the Government failed to manage the forest prudently by setting too low an annual limitation on the number of trees harvested, thus reducing the amount of income generated by timber sales. Unfortunately, because the Government terminated its trust relationship with the Menominee Tribe in 1961 and turned the management of the forest over to the tribe, there was only a four- or five-day period in the six years prior to filing the claim during which the U.S. Government had any responsibility to manage the forest. The court held that both the blameless ignorance and the trust theories justified tolling the statute of limitations.²³⁸

In reversing the Claims Court decision, the Federal Circuit first addressed the "blameless ignorance" argument.²³⁹ Noting that ignorance as to the law is never sufficient to toll the statute, the court criticized the trial court's fact finding as being merely an uncritical adoption of the plaintiff's argument.²⁴⁰ The Federal Circuit cited evidence that the Menominee Council had asked the Government to increase the harvest limitation in 1956. Moreover, the court stressed the Menominee's ability to seek legal counsel, the fact that they had representation during the termination procedure, and the

236. *Id.* at 1249-50.

237. 726 F.2d 718 (Fed. Cir.), *cert. denied*, 469 U.S. 826 (1984).

238. *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722-23 (Fed. Cir.), *cert. denied*, 469 U.S. 826 (1984).

239. *Id.* at 720-21.

240. *Id.* at 721 n.8.

fact that they had brought a successful claim for forest mismanagement under the Indian Claims Commission Act as evidence that "the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim."²⁴¹ For a tribe successfully to rely on the blameless ignorance theory to toll the statute, it must argue that the facts were "inherently unknowable."²⁴²

Apart from a case involving active concealment by the Government,²⁴³ it is hard to imagine what kind of trust claim could be inherently unknowable by a tribe that was represented by an attorney to broker its relations with the Government regarding resource management. Although the rule that failure to know about the law does not toll the statute of limitations is a rule applied outside the Indian law context, like many "neutral" rules, it has a special bite in the context of Indian claims. Surely the facts regarding mismanagement have been known to tribes for many years, but it was not until cases like *Manchester Band of Pomo Indians* that tribes began to have hope that courts would require the Government to answer for its mismanagement.²⁴⁴

The trust theory advanced by the plaintiffs in *Menominee Tribe* proved equally unsuccessful.²⁴⁵ The Federal Circuit rejected any kind of blanket tolling because of a trust relationship, leaving open only the possibility that tolling might be permissible in a claim for breach of an express trust.²⁴⁶ This possibility was soon foreclosed by *Jones v. United States*,²⁴⁷ in which successors to an allottee claimed damages against the Government for failure to protect their allotted trust land from sale in 1937 to pay county taxes. In 1972, they sued the county, the purchasers, and the United States for return of the land and damages for loss of use. The Government realigned as a plaintiff in 1977, and the claimants' land was restored.²⁴⁸ The United States Court of Appeals for the Ninth Circuit upheld the lower court on liability, but stated that the district court could re-

241. *Id.*

242. *Id.*

243. The court was willing to concede that active concealment would be sufficient to toll the statute of limitations. *Menominee Tribe*, 726 F.2d at 721. Such concealment was held sufficient to toll the statute of limitations in a case brought by Japanese-Americans for compensation for their relocation during World War II. The claimants, however, lost on the merits. *Hohri v. United States*, 782 F.2d 227, 256 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987).

244. See *supra* notes 188-94 and accompanying text (describing success of *Manchester Band of Pomo Indians* lawsuit in obtaining interest damages for governmental mismanagement).

245. *Menominee Tribe*, 726 F.2d at 721-22.

246. *Id.* at 722.

247. 801 F.2d 1334 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

248. *Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

duce the damages if it found "[l]ack of diligence by the Government in exercising its role as trustee" during the ensuing fifty-four years out of fairness to the county.²⁴⁹ On remand, the district court reduced the award by half to \$108,000, finding the "Government was most dilatory in the exercising of its role as trustee" in prosecuting the claims.²⁵⁰ As a result, the claimants sued the Government for breach of trust in the Claims Court for the reduction.²⁵¹

Judge Kozinski, then Chief Judge of the Claims Court, expressed sympathy for the plaintiffs, but held the statute barred the claim.²⁵² As to the trust theory, the court distinguished actions for the trust corpus from actions for misfeasance or nonfeasance of the trust. Actions for the trust corpus are not tolled until repudiation because the beneficiary always has the right to demand the trust corpus from the trustee.²⁵³ At repudiation, the trustee claims the corpus adverse to the beneficiary, which is why repudiation tolls the statute.²⁵⁴ In contrast, mismanagement and nonfeasance cases are more like breach of contract cases. When a contract is breached, the parties dispute both the fact and extent of liability; thus the statute of limitations runs from the time of the breach.²⁵⁵ Moreover, the incredibly long period of inaction by the United States could be likened to an implicit repudiation.²⁵⁶ The Federal Circuit affirmed the Claims Court decision, but based its affirmation on this last narrower ground.²⁵⁷ The rule regarding repudiation is the general rule, the court stated, but a repudiation need not be express.²⁵⁸ The trustee in this case took actions²⁵⁹ inconsistent with its duties.²⁶⁰

249. *Brooks v. Nez Perce County*, 670 F.2d 835, 837 (9th Cir. 1982) (remanding damages claim to district court which reduced damages by 50%). Plaintiff Jones later sued in United States Claims Court to recover the amount of the reduction. *Jones v. United States*, 9 Cl. Ct. 292 (1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

250. *See Jones v. United States*, 9 Cl. Ct. 292, 294 (1985) (quoting from remanded opinion, *Brooks v. Nez Perce County*, No. 2-72-27, slip op. at 3 (D. Idaho Mar. 3, 1983)), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987).

251. *Jones*, 9 Cl. Ct. at 292.

252. *Id.* at 295-96.

253. *Id.* at 295.

254. *Id.* at 295-96.

255. *Id.* at 296 (citing GEORGE G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 861-880 (2d ed. 1984)).

256. *Id.*

257. *Jones*, 801 F.2d at 1335-36.

258. *Id.*

259. The "actions taken by the Government as trustee" were actually failures to act. The Government obtained a district court decree in 1918 voiding a tax assessment on the plaintiff's property and enjoining any future taxation of the property. In 1923, the county levied another tax on the property; the Government failed to challenge the assessment or take any other action to enforce the 1918 decree, and thus the plaintiff was evicted in 1927 for failure to pay property taxes. *Jones*, 9 Cl. Ct. at 293-94.

260. *Jones*, 801 F.2d at 1336. Had the court reached the merits, it could have resolved an important open issue with regard to the trust relationship: to what extent does a statute that

What does the analysis in *Jones* have to do with the theory advanced in *Manchester Band of Pomo Indians*? The latter case also involved mismanagement rather than repudiation of an express trust. Judge Kozinski stated in a footnote that "[t]o the extent that *Manchester Band* . . . suggests a contrary rule, the court is unpersuaded and declines to follow."²⁶¹ The Federal Circuit made no reference to the tolling theory relied on in *Manchester Band of Pomo Indians*.²⁶²

Not until 1988, in another case involving California Rancheria Indians,²⁶³ *Hopland Band of Pomo Indians v. United States*,²⁶⁴ did the Federal Circuit give full-dress attention to the trust tolling theory. In 1978, a Hopland Band member sought injunctive and declaratory relief against the Government in federal district court on the grounds that termination of the Hopland Rancheria had been unlawful. In response to the suit, the Government formally notified all Band members that the termination had in fact been unlawful.²⁶⁵ The district court held that a trust relationship continued to exist between the Hopland Band and the Government because of the unlawful termination.²⁶⁶ The district court's remedy was limited to equitable relief. The court declared that the individual Indian distributees of the former rancheria lands could reconvey the land to the Government for restoration to trust (and common ownership) status.²⁶⁷ Nevertheless, the court could do nothing about the land that was then held by non-Indian bona fide purchasers. Eventually, other distributees joined the suit and the parties stipulated to a final judgment.

In 1980, the Government formally assumed a government-to-government relationship with the Band, and in 1981, the Band adopted a constitution.²⁶⁸ With tribal officials to act on its behalf, the Band then sued the Government in the Claims Court for damages caused

has been interpreted (despite the use of the word "shall") as authorizing the Government to represent Indians in land cases impose any duty to do so if the failure to act causes loss of the land?

261. *Jones*, 9 Cl. Ct. at 296 n.1.

262. See *Jones*, 801 F.2d at 1334-36 (failing to cite or discuss result in *Manchester Band of Pomo Indians*).

263. See generally Newton, *Enforcing the Federal-Indian Trust Relationship*, *supra* note 92, at 649-51, 664-66 (discussing California rancheria cases).

264. 855 F.2d 1573 (Fed. Cir. 1988).

265. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1575 (Fed. Cir. 1988).

266. *Smith v. United States*, 515 F. Supp. 56, 60 (N.D. Cal. 1978) (discussing case of Hopland Band member); see *Duncan v. United States*, 667 F.2d 36, 38-49 (Ct. Cl. 1981) (detailing history of California rancheria legislation), *cert. denied*, 463 U.S. 1228 (1983).

267. *Smith*, 515 F. Supp. at 61.

268. *Hopland Band of Pomo Indians*, 855 F.2d at 1576.

by the unlawful conveyance of the Band's property and also for damages based on lost benefits during the period of wrongful termination.²⁶⁹ The Band's goal was to gain sufficient damages to repurchase Parcel 1 from its non-Indian owners to make the rancheria whole again.²⁷⁰

Although the district court addressed the merits of some of these complaints, albeit adversely to the Band, the Federal Circuit remanded with instructions to dismiss the action as time-barred.²⁷¹ Reiterating the now familiar injunction that the statute of limitations is a jurisdictional requirement, Judge Michel, writing for the court, explained that tolling of the accrual of a cause of action is routinely permitted, but once a cause of action has accrued, the courts do not have jurisdiction in light of Congress' explicit setting of a six-year limit to toll the running of the statute itself.²⁷² These conclusions are not surprising because the Federal Circuit and the Claims Court interpret the limitations period strictly as part of the Government's waiver of sovereign immunity.²⁷³ Since the six-year statute of limitations is quite clear, the court has been unwilling to find any implied exception.²⁷⁴

In addition, Judge Michel noted that the trust theory appeared to apply to this case because the plaintiff was seeking return of the part of the trust corpus called Parcel 1.²⁷⁵ Nevertheless, even applying the trust theory, the court held that the Band had waited too long because the sale took place in 1964, and at the very latest, the repudiation took place when the Government illegally terminated the rancheria in 1967.²⁷⁶

The Hopland Band argued that it was unable to bring suit because the Government terminated its relationship with the tribe; thus it was only after the Government reestablished the relationship that they could form a recognized Indian tribe again. The tribe ar-

269. *Hopland Band of Pomo Indians v. United States*, 13 Cl. Ct. 276, 279 (1987), *vacated and remanded*, 855 F.2d 1573 (Fed. Cir. 1988).

270. *See id.* at 278-79 (describing "Parcel 1" as 1400 acre tract of grazing and recreation land that was sold to hunting club when rancheria was terminated).

271. *Hopland Band of Pomo Indians*, 855 F.2d at 1582.

272. *Id.* at 1577-78.

273. *See Williams v. United States*, 11 Cl. Ct. 189, 191 (1986) (stating that where U.S. Government gives its consent to be sued, terms of such consent define court's jurisdiction and is strictly interpreted), *aff'd*, 818 F.2d 877 (Fed. Cir. 1987). Because the statute of limitations is jurisdictional, it can be raised by the parties at any time or by the court sua sponte. *See Bray v. United States*, 785 F.2d 989, 992 n.2 (Fed. Cir. 1986) (listing cases holding statute of limitations as jurisdictional in nature).

274. *See Hopland Band of Pomo Indians*, 855 F.2d at 1577-78 (stressing explicitness with which Congress mandated six-year statute of limitations).

275. *Id.* at 1578.

276. *Id.* at 1580.

gued that the Government's acts in terminating the tribe thus prevented the tribe from suing, and were thus similar to acts of concealment.²⁷⁷

The Supreme Court has repeatedly stated that congressional plenary power over Indian tribes justifies Congress in abrogating tribal sovereignty completely.²⁷⁸ The Claims Court's discussion of the Government's ability to prevent the Band from suing to protest its termination demonstrates either a lack of familiarity with these cases or an unargued conclusion that they are no longer accurate statements of the law.

The court stated that Congress had no power to prevent the Band from suing as an Indian tribe. To do so would mean that a terminated tribe would have no legal remedy to protest its termination. According to the court, "that simply cannot be the rule."²⁷⁹ This argument must have come as a great surprise to all the terminated tribes of the 1950s, who came to that precise conclusion. *Smith v. United States*²⁸⁰ was brought in federal court by individual members of the Hopland Band because federal jurisdiction under 28 U.S.C. § 1362 applies only to "recognized" Indian tribes.²⁸¹ Admittedly, the Indian Tucker Act does not specifically require tribes to be federally recognized to bring suit in the Claims Court, but the force of the plenary power doctrine is such that it has generally been assumed that unrecognized tribes could not sue.²⁸² Unfortunately, the result of this good news about the Government's inability to de-

277. *Id.* at 1579.

278. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (recognizing that Congress has "plenary authority to . . . eliminate the powers of local self-government. . . ."); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating that sovereignty of Indian tribes is of limited character and that it exists "only at the sufferance of Congress"); Newton, *Federal Power*, *supra* note 86, at 196-97 (discussing development of plenary power doctrine and stating that although doctrine has been narrowed, courts continue to invoke it).

279. *Hopland Band of Pomo Indians*, 855 F.2d at 1579-80.

280. 515 F. Supp. 56 (N.D. Cal. 1978).

281. *Hopland Band of Pomo Indians*, 855 F.2d at 1579. Section 1362 states that the "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1988).

282. Cf. *Hopland Band of Pomo Indians*, 855 F.2d at 1579 (citing *Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980), for proposition that Indian tribes are not powerless to sue Government for wrongful termination in absence of governmental acknowledgment of wrong). In *Menominee Tribe*, a terminated tribe was permitted to sue for violation of termination statutes, but the termination process for the Menominees explicitly provided that they would retain their legal status as an Indian tribe. *Menominee Tribe*, 607 F.2d at 1338 n.1. The case, therefore, does not contradict the general understanding that unrecognized tribes may not sue under the Indian Tucker Act, 28 U.S.C. § 1505 (1988).

stroy tribal existence is that the relevant facts took place six years before the re-recognized tribe brought suit.

The Claims Court has recognized a factor mitigating the strict application of the statute of limitations in cases in which the Government's actions can be classed as a continuing wrong.²⁸³ In such cases, a tribe can recover damages incurred in the six years prior to the date of filing suit on the theory that partial liability is better than permitting the defendant to gain a license to continue its wrong because of the lapse of the statute of limitations. For example, in *Mitchell I*, the court permitted the plaintiffs to pursue their timber claim on the theory that failure to regenerate the timber creates a continuing wrong.²⁸⁴ Yet, although the Hopland Band sought to recover damages for the six years prior to filing suit, they were unsuccessful because the Government reinstated its relationship with the Band in 1980. From that period until the date of suit, the Band was eligible for services and suffered no further damages.²⁸⁵ In other words, there may only have been one or two days in which the Government could be charged with liability.

Again, this case serves as a wonderful example of the application of a perfectly neutral rule that creates perverse results in the case of Indian tribes. The reason for applying a six-year statute of limitations to a group is that it may take time for the individuals who become cognizant of an injury to form into a group capable of taking action. Yet, it operates unfairly against an Indian tribe that has been wrongfully terminated and left with the perfectly logical belief, given the history of United States-Indian relations, that no action could be taken.

283. See *Gila River Pima-Maricopa Indian Community v. United States*, 140 F. Supp. 776, 779 (Ct. Cl. 1956) (adopting rule in accounting case on appeal from Indian Claims Commission, stating that "[i]t is the usual rule that a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment. This is a good rule and we find nothing that would prevent its application here.").

284. See *Mitchell v. United States*, 10 Cl. Ct. 63, 68-77 (1986) (finding stumpage and regeneration of timber claims barred by statute of limitations except for period within six years prior to filing suit), *modified on reconsideration*, 10 Cl. Ct. 787, 788-89 (1986) (clarifying that allottees can bring claim for any trees not regenerated within six-year period prior to filing suit).

285. *Hopland Band of Pomo Indians*, 855 F.2d at 1581-82. The Claims Court has been reluctant to extend the use of this doctrine beyond claims for mismanagement of trust funds. See *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 269-70 (1985) (ruling that Claims Court lacked jurisdiction over tribe's claim that Government breached its fiduciary duty to clean up tailings from mills). The Claims Court rejected the tribe's argument that its pre-1946 claim could be extended to include a charge that the Government breached its fiduciary duty to the tribe by not covering up uranium mines. Although the mines had been opened up before the jurisdictional cut-off date, the Court held that the continuing wrong theory would only apply if mines had been abandoned in an unsafe condition *before* 1946. *Id.*

The *Hopland Band* case has been cited frequently by the Claims Court and the Federal Circuit in non-Indian law cases for the learned exegesis it contains about tolling the statute of limitations.²⁸⁶ *Hopland Band* and *Jones* have also settled the fact that the trust theory of tolling has only a limited effect. The theory does not apply to mismanagement or nonfeasance claims, which comprise the largest class of trust claims;²⁸⁷ it applies to actions to recover the trust corpus, which mainly arise in termination cases. In other words, the breach of trust itself acts as the repudiation. Because the fact of termination was known to the individual Indians at the time of termination, *Hopland* stands for the proposition that the terminated tribe as an entity must bring the case in a timely fashion. Thus, only a terminated tribe that has not been reinstated can bring a claim based on the continuing wrong theory.

b. *The trust relationship after Mitchell II*

A brief review of *Mitchell II* is necessary to focus on the questions left unanswered by that decision. The major contribution of *Mitchell II* was the Supreme Court's clear assertion that the Tucker Act waives sovereign immunity for statutory claims.²⁸⁸ By this concession, the Court took the waiver issue and its concomitant requirement of strict construction out of the calculus. As a result, what remained were two related but independent questions²⁸⁹ of whether a statute or statutory scheme creates a claim and whether that claim is remediable by money damages. Moreover, the Court noted that principles of strict construction need not, and indeed should not, apply in this determination.²⁹⁰ Instead, the Court referred to the

286. See *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1552 (Fed. Cir. 1991) (litigating takings claim); *Lunaas v. United States*, 936 F.2d 1277, 1279 (Fed. Cir. 1991) (analyzing loan repayment scheme), *cert. denied*, 112 S. Ct. 967 (1992); *Laughlin v. United States*, 22 Cl. Ct. 85, 99 (1990) (discussing inverse condemnation claim for flooded farmland); *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 344 (1990) (discussing health care claim), *aff'd*, 925 F.2d 1454 (Fed. Cir. 1991); *Tarnopol v. United States*, 18 Cl. Ct. 89, 92 n.5 (1989) (failing to return business records), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990).

287. See *Tunica-Biloxi Tribe v. United States*, No. 90-5145, 1991 U.S. App. LEXIS 17865, at *2-3 (Fed. Cir. May 17, 1991) (unpublished opinion) (illustrating typical claim for damages caused by governmental failure to protect tribal land base and maladministration of land commission and finding statute of limitations not tolled by mismanagement trust claim), *cert. denied*, 112 S. Ct. 197 (1991).

288. See *United States v. Mitchell*, 463 U.S. 206, 212-16 (1983) (*Mitchell II*) (explaining history of Tucker Act and finding waiver of sovereign immunity in claims brought under Court of Claims jurisdiction).

289. See *Mitchell v. United States*, 664 F.2d 265, 283 (11th Cir. 1981) (Nichols, J., concurring and dissenting) (stating that obligation to pay money damages under General Allotment Act must be alleged as "semantically separate and analytically independent proposition"), *aff'd and remanded*, 463 U.S. 206 (1983).

290. See *Mitchell II*, 463 U.S. at 219 (quoting *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) ("[T]he exemption of the sovereign from suit involves hardship

general trust relationship between tribes and the United States as reinforcing its liberal construction of the statutes.²⁹¹ Nevertheless, in later cases, the Government has continued to insist that a strict construction is necessary and has often succeeded.

In *Mitchell II*, the Court interpreted the statutes and regulations governing timber management as so pervasive and comprehensive as to create a trust relationship with respect to timber management. Once the Court concluded that the scheme created a trust relationship, it reasoned that the statutory scheme could fairly be read as mandating damages for two reasons: (1) a damage remedy is integral in the scheme of private trust law; and (2) equitable relief alone is not sufficient either to deter or remedy breaches because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless."²⁹²

Analysis of the post-*Mitchell II* cases fails to reveal clarity or consistency of terminology, much less the law that is applied. For clarity of analysis, this Article will adopt the Supreme Court's terminology, which refers to three kinds of trust relationships: a general trust, a limited or bare trust, and a fiduciary relationship.²⁹³ A general trust is merely the statement of the historic relationship between Indian tribes and the Government, tracing back to *Cherokee Nation v. Georgia* and the sentiment expressed in *Seminole Nation v. United States* that the Government's obligations to Indian tribes should be judged by the highest fiduciary standards. This phrase states an aspiration but is certainly not enforceable in the Claims Court. At the most, it provides the rationale for reading statutes liberally.²⁹⁴

A bare or limited trust refers to a trust established for a narrow and limited purpose.²⁹⁵ The Court characterized the General Allot-

enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.")).

291. *Id.* at 225.

292. *Id.* at 227.

293. *Id.* at 224.

294. *Id.* at 225-26; see *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 231 (1983) (noting statutes and regulations are to be read in light of general trust relationship existing between Indians and United States); *supra* note 64 and accompanying text (noting that in *Cherokee Nation v. Georgia*, court held that Georgia confiscatory laws are unconstitutional); *supra* note 185 (stating that Government in *Seminole Nation v. United States* assumed highest responsibility with respect to Indians and, therefore, should be judged by exacting fiduciary standards).

295. See *Mitchell II*, 463 U.S. at 224 (implying that, unlike fiduciary relationship, bare trust does not give Federal Government responsibility to manage Indian resources and land for benefit of Indians); *Mitchell I*, 445 U.S. 535, 542 (1980) (stating that limited trust does not impose duty on Federal Government to manage timber resources). Some of the judges on the Claims Court use the term "special relationship" to refer to this kind of statutory trust. Gila

ment Act provision that allotted lands to be held in trust as creating such a limited trust. The trust is limited to the original purpose for the statute, which is protecting Indian land from taxation and involuntary alienation because of failure to pay taxes or debts.²⁹⁶ For a damage remedy, the obligation for money compensation must be clear and strong.²⁹⁷

The third category is illustrated by *Mitchell II* itself. The statutes in that case created a fiduciary relationship for two apparently alternative reasons: first, because the timber management scheme was comprehensive and second, because of the pervasive federal management that took place.²⁹⁸ As to the latter aspect, the Court quoted with approval from *Navajo Tribe of Indians v. United States* that Federal Government supervision of tribal monies or properties gives rise to a fiduciary relationship "unless Congress has provided otherwise even though nothing is said expressly in the authorizing or underlying statute or other fundamental document about a trust fund, or a trust or a fiduciary connection."²⁹⁹ To distinguish this kind of trust more precisely from the two others, the term "full fiduciary relationship" will be used.³⁰⁰

While permitting breach of trust cases to go forward, the opinion in *Mitchell II* left important issues unresolved regarding both the creation and scope of this new claim for breach of trust. The resolution of these important questions will greatly affect the utility of a claim for breach of trust.³⁰¹

River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1199-1200 (Cl. Ct.), cert. denied, 400 U.S. 819 (1970).

296. *Mitchell II*, 463 U.S. at 217-18; *Mitchell I*, 445 U.S. at 542.

297. See *Cape Fox Corp.*, 4 Cl. Ct. at 232-34 (holding that Alaska Native Claims Settlement Act (ANCSA) created limited trust and that even if Government owes duties under ANCSA, breach of those duties is not remediable by money damages without clear and strong indication of congressional intent).

298. *Mitchell II*, 463 U.S. at 224.

299. *Id.* at 225 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl. Ct. 1980)).

300. Compare *Mitchell II*, 463 U.S. at 224 (referring to governmental duties created by statutes as "full responsibility" fiduciary obligations) with *id.* at 226 (calling presumably same governmental duties simply "fiduciary obligations"). Some of the Claims Court judges use the term "general fiduciary obligation."

301. Not all questions arising in breach of trust cases are of equal importance or are even controversial, at least in the legal sense. For example, the beneficiaries of a trust can enforce it, but the courts may have to interpret statutes and treaties to determine who the beneficiaries are. In the longest running modern case dealing with interpretation of Indian trusts, *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983), cert. denied, 467 U.S. 1256 (1984), the Federal Circuit upheld Claims Court decisions maintaining that an 1864 treaty setting aside the Hoopa Valley Reservation for the "Indians of the Reservation" meant that all Indians subsequently placed on the land became part of the reservation and were entitled to share equally in the trust proceeds. As a result, the court held that the Government's distribution of trust monies to members of only one tribe, the Hoopa Valley Tribe, was a breach of trust. *Id.* at 1143; see *Rogers v. United States*, 877 F.2d 1550, 1559-60 (Fed. Cir. 1989) (examining

5. *Creation of the trust*

Obviously the timber management statutes at issue in *Mitchell II* are sufficient to create a full fiduciary relationship imposing obligations in favor of allottees.³⁰² The Government, however, has not conceded *Mitchell II* any force beyond its narrow terms. In *Short v. United States*,³⁰³ for example, the Government argued that *Mitchell II* did not apply to a timber mismanagement claim brought by a tribe rather than by individual allottees because individual allottees are covered by a different statutory provision than the one at issue in *Mitchell II*.³⁰⁴ The Federal Circuit dismissed this argument for two reasons. First, the court noted that the Court in *Mitchell II* treated both provisions as imposing a fiduciary duty on the Government.³⁰⁵ Moreover, the statute governing tribal timber had the same purpose and was substantially the same in wording as the statute governing individually owned timber. Each requires the timber to be sold to benefit the tribe, or the tribal or individual beneficiaries.³⁰⁶ Second, the Federal Circuit reasoned that the Government's elaborate control over the timber resource was an alternative, if not the primary, reason for imposing fiduciary obligations.³⁰⁷

The statutes and regulations regarding the Government's role in regulating mineral leasing are similar to those dealing with timber management. It was thus not surprising when the United States Court of Appeals for the Tenth Circuit held that the Mineral Leas-

Secretary of Interior's failure to provide notice to plaintiffs of available compensation for governmental taking of Northern Paiute aboriginal homelands, and analyzing Secretary's failure as "breach of trust").

302. See *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir.) (citing *Mitchell II* in support of assumption that trust relationship exists between Indians and Federal Government regarding management of Indians' forests), *cert. denied*, 469 U.S. 826 (1984); *Short v. United States*, 719 F.2d 1133, 1134-35 (Fed. Cir. 1983) (invoking *Mitchell II* to find fiduciary relationship between Indians and Federal Government with respect to distribution of timber sale proceeds), *cert. denied*, 467 U.S. 1256 (1984).

303. 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984).

304. See *Short v. United States*, 719 F.2d 1133, 1135-36 (Fed. Cir. 1983) (discussing Government's contention that *Mitchell II* dealt only with allotted trust lands under 25 U.S.C. § 406, whereas *Short* litigation involved unallotted lands under 25 U.S.C. § 407), *cert. denied*, 467 U.S. 1256 (1984).

305. See *id.* (citing *Mitchell II*, 463 U.S. at 208-11, 219-28, for proposition that no difference exists between Government's fiduciary obligation to Indians under 25 U.S.C. §§ 406-407).

306. Compare Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857 (codified as amended at 25 U.S.C. § 406(a) (1988)) (requiring proceeds from timber sales to be paid to individual owner or owners of timberland or otherwise disposed of for their benefit by Secretary of Interior) with Act of June 25, 1910, ch. 431, § 7, 36 Stat. 857 (codified as amended at 25 U.S.C. § 407 (1988)) (allowing proceeds from timber sales to be used as determined by governing bodies of tribes or, in absence of governing body, as determined by Secretary of Interior for tribe involved).

307. *Short*, 719 F.2d at 1135-36.

ing Act of 1938³⁰⁸ and its accompanying regulations together comprised a comprehensive regulatory scheme creating a full fiduciary relationship upon which a tribe could base its claim for equitable relief.³⁰⁹ Although the Claims Court came to a different conclusion, distinguishing the Tenth Circuit case as involving tribal leases while the case before it involved individual allottees' leases,³¹⁰ the Federal Circuit held there was jurisdiction under the Tucker Act.³¹¹ While the statute regulating Indian allottees' mineral rights was less extensive, the regulations and the amount of control exercised by the Government were the same.

Actual elaborate governmental management was stated as sufficient to create a full fiduciary relationship in *Mitchell II*. Is this a separate basis for creation of a full fiduciary relationship even in the absence of a comprehensive scheme? Perhaps there is no real distinction between elaborate control as a basis for the full fiduciary relationship and a comprehensive scheme. It seems that any time Congress enacts a comprehensive legislative scheme there would be elaborate control of the resource. The significance of the focus on elaborate control appears to be that, absent a comprehensive scheme and assuming a statutory basis at least permitting the action, actual control may be a sufficient factor on which to base a claim for breach of fiduciary duty by mismanagement of the trust. The management of tribal and individual Indian trust funds appears to fit within this framework, for although the Government controls and even gets the benefit of tribal trust money, the statutory scheme is less comprehensive. As long as the Government, and not the Indian or the tribe, has actual control over the management of a resource, the exercise of this control can create a trust claim.

Until the *Manchester Band* case was decided, Indian tribal trust funds were kept in the United States Treasury at rates as low as four percent simple interest.³¹² The *Mitchell II* case involved manage-

308. 25 U.S.C. §§ 396a-g (1988).

309. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986).

310. *Pawnee v. United States*, 830 F.2d 187, 188-89 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1092 (1988).

311. *See id.* at 189-90 (finding Federal Government owes fiduciary obligation to Indians for administration, collection, and payment of royalties under oil and gas leases).

312. As an added insult, the amount of interest earned on tribal trust funds was placed in a separate fund earning no interest, so as not to violate the "no-interest rule" that interest cannot be paid by the United States, absent a treaty or statute requiring such payment. *See supra* note 191 and accompanying text (explaining no-interest rule in context of *Manchester Band of Pomo Indians v. United States*). Furthermore, the court applies strict construction to the rule barring governmental payment of interest. *See* JOHN M. STEADMAN ET AL., *LITIGATION WITH THE FEDERAL GOVERNMENT* § 6.120 (2d ed. 1983) (explaining function of no-interest rule in context of Claims Court).

ment of trust funds into which timber proceeds had been placed pursuant to 25 U.S.C. § 162a, authorizing the Secretary of the Interior to invest such funds.³¹³ While not discussing the funds separately, the Court noted that "the pattern of pervasive federal control evident in the area of timber sales and timber management applies equally to grants of rights-of-way and to management of Indian funds."³¹⁴

The conclusion that tribes should be able to bring claims for mismanagement of any trust funds held by the Government, no matter the source, is consonant with an earlier Court of Claims decision holding that funds subject to section 162a are trust funds on which a Tucker Act claim could be based. Since *Cheyenne-Arapaho Tribes v. United States*,³¹⁵ the Federal Government has begun investing the \$1.6 billion it holds in trust for Indian tribes and individuals.³¹⁶ Thus, the threat posed by successful breach of trust suits has yielded greatly improved management of Indian trust funds and much greater revenue for the tribes. In short, it appears fairly well established that any money held in trust for tribes or individual Indians pursuant to some statutory or treaty authority comprises a trust fund, and mismanagement of these funds is a breach of trust remediable by money damages in the Claims Court.³¹⁷

In addition to timber, mineral resources, and trust funds, it seems that any governmental mismanagement of tribal natural resources should suffice as a basis for a breach of trust claim. If the statutory scheme is not comprehensive, pervasive actual control will probably suffice, with the caveat that control must rest with the Government and not the individual. Although there are no Tucker Act cases since *Mitchell II* applying this theory to management of other resources, one Indian Claims Commission opinion involving breach of trust has relied on the reasoning in *Mitchell II* to hold that manage-

313. See *Mitchell II*, 463 U.S. at 223 n.24 (describing broad authority allocated to Federal Government to invest tribal and individual Indian trust funds if "deemed advisable" and for "best interest" of Indians); see also Act of June 24, 1938, ch. 648, § 1, 52 Stat. 1037 (codified as amended at 25 U.S.C. § 162a (1988)) (authorizing Secretary of Interior to invest and manage Indian trust funds and detailing procedures to be followed to guarantee protection of Indians' "best interest[s]").

314. *Mitchell II*, 463 U.S. at 225 n.29.

315. 512 F.2d 1390 (Ct. Cl. 1975).

316. See *Hearing on S. 1999 and S. 2000 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 15 (1984) (statement of Hon. Kenneth L. Smith, Assistant Secretary for Indian Affairs, Department of Interior) (discussing disposition of \$1.6 billion trust fund held for Indians).

317. See *Short v. United States*, 719 F.2d 1133, 1137 (Fed. Cir. 1983) (finding accounts containing proceeds of individual Indian labor, and interest thereon, to be designated as trust funds), *cert. denied*, 467 U.S. 1256 (1984); see also *Rogers v. United States*, 877 F.2d 1550, 1553 (Fed. Cir. 1989) (interpreting damages award for taking of aboriginal homelands as trust fund subject to statutory duty to invest).

ment of a resource created a statutory duty upon which a tribe can premise its claim.³¹⁸

Failure to find a full fiduciary relationship does not, however, necessarily leave a tribe without remedy. The tribe may have a remedy in federal district court or the tribe may have a money damages remedy, but in much more limited circumstances. In *Mitchell I*, for example, the Supreme Court held that the General Allotment Act provision stating that the Government would hold allotted land "in trust" for the allottee was not sufficient to create a full fiduciary relationship, but only imposed a limited trust.³¹⁹ The Court interpreted the Act's general language in light of the purpose of the statute, which admittedly fulfilled the counter-trust goal to break up Indian tribal land holdings.³²⁰ The limited purpose of holding the land in trust was only to prevent its improvident alienation or sale by the state to pay taxes until the allottee became sufficiently westernized to manage their own affairs. Nevertheless, if an allottee could establish that the Government stood by and did nothing while the state taxed the land and subsequently sold it to collect taxes, it would seem that this failure to act in contravention of the purpose of the limited trust would ground a claim for money damages.³²¹

Consequently, while claims fitting within the narrow statute may be permissible, general statutes setting policy for all tribes, such as the Indian Reorganization Act³²² or the Allotment Act, or for one group of Indians, such as the Alaska Native Claims Settlement Act,³²³ do not create full fiduciary obligations.³²⁴

318. See *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 626-28 (1987) (finding that elaborate governmental control over tribal water resources did not exist but that governmental exercise of statutory authority to approve all tribal expenditures for irrigation purposes provided sufficient actual control to establish enforceable duty to protect existing water resources), *dismissed on other grounds*, 20 Cl. Ct. 371 (1990).

319. *Mitchell I*, 445 U.S. 535, 542 (1980).

320. See *id.* at 544 n.5 (explaining partial justification for General Allotment Act as congressional desire to persuade Indians to abandon tribal life and become private landowners).

321. See *Jones v. United States*, 801 F.2d 1334, 1335-36 (Fed. Cir. 1986) (finding claim fitting this fact pattern to be barred by statute of limitations), *cert. denied*, 481 U.S. 1013 (1987).

322. See *Hydaburg Coop. Ass'n v. United States*, 667 F.2d 64, 67-68 (Ct. Cl. 1981) (construing § 5 of Indian Reorganization Act, 25 U.S.C. § 465, as creating limited trust imposing duty on Government to prevent alienation of Indian lands, but not to promote all assets or enterprises acquired by Indians), *cert. denied*, 459 U.S. 905 (1982).

323. See *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 799 (D. Alaska 1978) (quoting explicit congressional language stating that Alaska Native Claims Settlement Act does not create trust relationship between Indians and Federal Government), *rev'd in part*, 646 F.2d 399 (9th Cir. 1981); see also *Begay v. United States*, 865 F.2d 230, 231-32 (Fed. Cir. 1988) (discussing and affirming Claims Court decision that Navajo and Hopi Indian Settlement Act does not create full governmental obligations).

324. See *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 427-28 (1991) (finding grant of reservation to Indians under General Allotment Act contained implied reservation of water rights, but that Government is not obliged to guarantee amount of water); *Eastern Band*

There appears to be some conflict over the extent to which the Government's trust relationship requires it to manage tribal water resources, but the reason is that management of water rights is best analyzed as falling within the limited trust concept. There is no scheme imposing comprehensive duties on the Secretary of the Interior to manage tribal water. In addition, the Government does not manage tribal water resources on a day-to-day basis, owing in part to the unique origin of tribal water rights. Tribal water rights in the West have been defined by judicial decree. In *Winters v. United States*,³²⁵ the Supreme Court held that creation of a reservation for Indians implicitly reserved to them sufficient water for the purpose for which the reservation was established. Because reservations in the Southwest were established to encourage tribes to change from their "nomadic and uncivilized" ways into a "pastoral and civilized" people,³²⁶ this decision affirmed that the tribes are owners of valuable water rights under the prior appropriations doctrine³²⁷ followed in the West.

The Indians' opponents in tribal water cases have been private parties and local water districts, in addition to the U.S. Government. More important, the Secretary of the Interior has conflicting statutory duties to provide water to non-Indian users.³²⁸ Under these circumstances, the Supreme Court held in *Nevada v. United States*,³²⁹ that, whatever the scope of the duty owed to tribes, Congress has required the Department of the Interior to "carry water on at least two shoulders."³³⁰ Consequently, Congress could not have intended that "the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary" solely by representing conflicting interests without the beneficiary's consent,³³¹ be

of *Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988) (stating that 25 U.S.C. § 2008(b) establishes general trust relationship only, not complete obligation mandating monetary damages for educational deficiencies); *Montana Bank v. United States*, 7 Cl. Ct. 601, 614 (1985) (finding that 25 U.S.C. § 81, statute used by Fort Belknap Indian Community as basis for federal fiduciary obligation, creates only limited trust).

325. 207 U.S. 564 (1908).

326. *Winters v. United States*, 207 U.S. 564, 576 (1908).

327. CHARLES WILKINSON & RENNARD STRICKLAND, EDs., *HANDBOOK OF FEDERAL INDIAN LAW* 575-78 (1982 ed.) (contrasting prior appropriation and riparian rights systems).

328. See Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 388-90 (codified as amended in scattered sections of 43 U.S.C. §§ 371-498 (1988)) (providing mechanism for Secretary of Interior to use water for beneficial irrigation purposes, which includes non-Indian uses); Act of April 21, 1904, ch. 1402, § 26, 33 Stat. 225 (authorizing United States to build reclamation projects under authority of Reclamation Act of 1902, and specifically authorizing use of Indian land for Pyramid Lake project at issue in *Winters*, provided that five acres of irrigable reservation land are reserved for each member of reservation).

329. 463 U.S. 110 (1983).

330. *Nevada v. United States*, 463 U.S. 110, 128 (1983).

331. *Id.*

applied against the Government. *Nevada* was not a claims case and can be limited to cases in which Congress has given the Department of the Interior conflicting mandates and in which a tribe essentially argues the Government breached its duty of loyalty as a trustee.³³² In addition, *Nevada* was an unusual case because the Government itself sued on behalf of the tribe and admitted that it had not represented the tribe adequately when it entered into a water settlement in 1954. The remedy sought in *Nevada* would have required modification of a water judgment, with resultant destabilization of the legitimate expectations of thousands of non-Indian water users. Nevertheless, even in other settings, the law is far from settled with respect to breach of trust regarding management of water.

In a two-paragraph unpublished opinion, the Federal Circuit affirmed a Claims Court dismissal of a claim brought by allottees of the Salt River Reservation for breach of trust by failure to deliver water to individual allotments as required by the *Winters* doctrine.³³³ The Claims Court opinion distinguished the case from *Mitchell II* on several bases, but primarily on the ground that there was no trust corpus analogous to the timber in *Mitchell II*. The court noted that water for irrigation is not a resource that can be treated as a trust corpus because it is not a source of wealth that must be managed so as to conserve the asset while maximizing income that must then be disbursed as profits.³³⁴

The Claims Court also held that the specific statutes relied on by the Indians only created a limited or bare trust requiring the Department of the Interior to allocate water fairly to the eligible allottees. It did not impose a duty to manage water resources on the Government.³³⁵ Provisions of the General Allotment Act dealing with allotments of irrigable land and regulations governing irrigation provide only for delivery to the allotments of whatever water allottees are entitled to, but do not impose any duties to manage the water resource for the allottees.³³⁶ At most, the statute and regulations require that the Secretary not discriminate in allocating irriga-

332. See Roger Florio, *Water Rights: Enforcing the Federal-Indian Trust After Nevada v. United States*, 13 AM. INDIAN L. REV. 79, 93-98 (1987) (arguing that *Nevada* unnecessarily weakened Indian trust claims by severing water adjudication from governmental trust responsibilities).

333. *Grey v. United States*, No. 91-5001, 1991 U.S. App. LEXIS 11705 (unpublished opinion) (Fed. Cir. May 24, 1991), *aff'g* 21 Cl. Ct. 285 (1990), *cert. denied*, 60 U.S.L.W. 3498 (U.S. Jan. 21, 1992).

334. *Grey*, 21 Cl. Ct. at 293.

335. *Id.*

336. *Id.* (finding no evidence that Congress intended Secretary of Interior to act as trustee with respect to irrigating each allotment).

tion water among allotted lands.³³⁷ There was no charge that he had done so. In sum, the allottees' claim, which was essentially that they had to pay more for water than users on non-Indian land,³³⁸ was not within the narrow scope of the applicable statutes. Again, this result does not necessarily mean that Government actions with regard to tribal water rights are never remediable, but only that the claim must be within the existing statutory scheme or be based on actual control by the United States.

In *Nevada v. United States*, for example, the Supreme Court left open the question of whether a tribe may bring a claim against the United States for breach of trust if the United States had in fact breached a duty of care in representing the tribe's interests in a water suit.³³⁹ A recent Claims Court case involving the Fort Mojave and Colorado River Indian Tribes, *Fort Mojave Indian Tribe v. United States*,³⁴⁰ raised this issue explicitly. The tribes argued that the Government breached its fiduciary duty of acting as the tribes' attorney by omitting a portion of their land in determining the amount of acreage entitled to water for irrigation. They sought damages to compensate them for the water rights lost as a result of the Government's miscalculation. In a thorough opinion, Judge Andewelt upheld the court's jurisdiction, applying two alternative bases to do so. First, he held that the executive orders creating the reservation and the statute authorizing the Government to sue to protect Indian

337. *Id.* at 299. The court also held that the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. §§ 371-498), did not create a claim because it provided nothing more than a foundation for United States ownership of tribal water rights that had been appropriated and put to beneficial use under the *Winters* doctrine. *Id.* at 295. The court concluded that water reclamation laws thus do not establish any basis for allocating additional water to individual tribe members. *Id.*

The court in *Grey* went on to find that the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, § 10, 102 Stat. 2549, established Claims Court jurisdiction only in causes of action arising from that statute's extinguishment of claims existing in 1991. The Settlement Act itself did not provide a mechanism for the advancement of new claims. *Grey*, 21 Cl. Ct. at 296. For these reasons, the court decided that the Government had no duty to deliver more water to the allottees than they were entitled to under existing court decrees. In addition, the court found that no daily supervision and control existed that would permit a breach of trust finding based on the elaborate governmental control theory of *Navajo Tribe*. *Id.* at 294.

338. Apparently, several statutes permitting the Secretary of the Interior to charge allottees for a share of water delivery system construction costs were responsible for this difference in price, because the non-Indian users' water was subsidized in part by the water project. Although the plaintiffs alleged that they had to pay higher prices for water than individuals on nonreservation land, they presented no evidence on water pricing. Accordingly, the court explicitly declined to make findings as to the effect these statutes might have on the reservations. *Id.* at 295 n.11.

339. See *Nevada v. United States*, 463 U.S. 110, 135 n.14 (1983) (citing case brought on grounds of governmental breach of duty to provide sufficient water for fishing). The cited case, *Northern Paiute Nation v. United States*, 30 Indian Cl. Comm'n 210 (1973), was settled rather than litigated on the merits. *Nevada*, 463 U.S. at 135 n.14.

340. *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991).

tribes' resource interests,³⁴¹ coupled with the Government's representation of the tribe, was sufficient to invoke the elaborate control theory creating full fiduciary responsibilities.³⁴² Alternatively, the court stated that the statute itself, while not requiring the Government to take every case, imposed duties on the United States in the cases taken.³⁴³ In other words, although the statute created a limited trust, the actions of the United States were within that trust.

At first blush, these two recent Claims Court decisions seem completely contradictory. In *Grey*, Judge Tidwell flatly stated that *Winters* water rights did not represent a trust corpus, while in *Fort Mojave Indian Tribe v. United States*, Judge Andewelt insisted that *Winters* rights can be a trust corpus.³⁴⁴ The distinctions between the cases lie both in the source of the trust and the duty breached. In *Grey*, the statutory scheme was skimpy and the Government did not assume control over delivery of water to allottees; in fact, allottees themselves had control over their own water resources.³⁴⁵ Moreover, the allottees sought to impose an affirmative duty on the Government. In *Fort Mojave*, the tribal claimants alleged that the Government acted to harm their water rights. In sum, tribes may base a claim for breach of trust on mismanagement of tribal natural resources, including water, and to trust funds if the Government actually controls the resources generating the funds. If there is no actual control, tribes may still rely on a comprehensive statutory scheme, provided one exists. Cases involving claims that do not arise out of actual mismanagement in a skimpy statutory and regulatory context present more difficult issues.

6. *Applying the appropriate standard*

A determination that jurisdiction exists is, however, but one issue. The most problematic issues involve the scope of trust duties. The Federal Circuit has given no guidance on the standard to be applied to measure the Government's actions, in part because there have been very few cases in which the tribe's claim moved beyond thresh-

341. 25 U.S.C. § 175 (1988). The Act states that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity." *Id.* Despite this mandatory representation language, courts have held that Congress intended to give the United States attorney the authority to represent tribes, but did not require the United States to represent tribes in every action.

342. *Fort Mojave Indian Tribe*, 23 Cl. Ct. at 425-26.

343. *Id.* at 426.

344. *See id.* ("[T]he title to plaintiffs' water rights constitutes the trust property, or the res, which the government, as trustee, has a duty to preserve.").

345. The reader might recall that in *Mitchell I* and *Mitchell II*, the General Allotment Act permitted substantial control by allottees, which was one reason the Act was held not to impose full fiduciary obligations.

old issues. *Mitchell II* merely held that the Court of Claims had proper jurisdiction; it did not reach the separate question of what the precise duties of the Government trustee would be. One issue regarding standards is well settled by cases decided after *Mitchell II*. In claims against the Government for money damages, at least, a finding that the tribe invoked a limited trust signifies that the court will think in terms of a narrow remedy.³⁴⁶ Although the court may apply principles of liberal construction to determine the meaning of an ambiguous statute, the court will be less willing to decide that the statute can fairly be mandated as creating a claim for compensation in the *Eastport* sense.³⁴⁷ Whether the finding of a full fiduciary relationship carries with it the requirement that a stricter standard be applied to measure the conduct of the Secretary of the Interior is far less settled.

In measuring the applicable standards for breach of trust regarding management of trust funds before *Mitchell II* and in the opinion on remand from *Mitchell I*, the Court of Claims applied the common law of trusts to define the Government's duties as trustee. In each case, the court held that the prudent investor rule³⁴⁸ applied, requiring the United States to maximize returns on the funds within the parameters of suitable investments set for all U.S.-managed trust funds.³⁴⁹ Unfortunately, subsequent Claims Court cases have not been consistent in applying any particular standard to determine whether the Secretary's actions constitute a breach of trust.³⁵⁰ Overall, the Claims Court decisions reflect a willingness to apply a less rigorous standard to the Government as trustee in place of the

346. For example, in *Cape Fox Corp. v. United States*, the Court of Claims stated that the Alaska Native Claims Settlement Act reflects clear congressional intent to avoid creating a trust relationship. *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 233-34 (1983). Consequently, the court decided that liberal construction of the Act is inappropriate in deciding what duties the Government may owe and whether those duties are remediable by damages. *Id.* at 233-34.

347. See *supra* note 204 and accompanying text (explaining implications of *Mitchell I* majority decision in *Eastport* sense). *Eastport* held that, in order to obtain relief, civil claimants against the Federal Government must bring claims under statutes, other than the Tucker Act, that specifically waive sovereign immunity and provide the party a damages remedy. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

348. See *supra* note 192 (explaining prudent investor's rule).

349. These parameters are explained in the federal district court opinion of *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1244-45 (N.D. Cal. 1973). The Court of Claims has incorporated this portion of the *Manchester Band of Pomo Indians* opinion into its own jurisprudence. See *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975) (adopting *Manchester Band of Pomo Indians* analysis of suitable investments for Indian trust funds).

350. See *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 677-78 (1986) (applying private trust law standards to determine liability for breach of fair and honorable dealings claim), *aff'd*, 877 F.2d 961 (Fed. Cir. 1989).

private trust law standards applied by the Court of Claims and the district court some fifteen years earlier.

Moreover, the Government continued to argue that a far more forgiving standard should be applied to measure the Secretary's actions. This question becomes particularly important in cases in which the statutory scheme gives the Secretary discretion to take certain actions for the benefit of Indians but does not mandate these actions. In the cases decided after *Mitchell II*, the Government has continued to argue, often successfully, that the Administrative Procedure Act standard, "so arbitrary and capricious as to be an abuse of discretion," should be applied. In other words, if a reasonably prudent trustee would make a certain type of investment, can the Government be assessed lost income damages for failing to make the same investment under a scheme authorizing, but not requiring, the Government to make a similar investment? Will a damages remedy always follow whenever the court determines that a trust was created?

As stated above, the Federal Circuit has had no occasion to rule on the appropriate standard. While a federal court has applied private trust law standards to determine that the Secretary breached this trust, the Federal Circuit has treated this same issue more cavalierly in an opinion that may indicate a judicial hostility to the breach of trust doctrine. In *Jicarilla Apache Tribe v. Supron Energy Corp.*,³⁵¹ the Tenth Circuit held it was a breach of trust not to use a system of calculating royalties designed to ensure that the tribe would receive the highest return on its mineral leases.³⁵² In defense, the Secretary of the Interior argued that he followed applicable federal leasing regulations in adopting a method of calculating royalties.³⁵³ Although such a defense would be adequate were this simply an administrative law case, the full court adopted the opinion of Judge Seymour, who dissented from the panel decision.³⁵⁴

Judge Seymour found that the majority of the panel erred in implementing an "administrative law analysis without considering what role, if any, the Secretary's fiduciary duty should play in a court's examination of his administrative action."³⁵⁵ He then deter-

351. 782 F.2d 885 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986).

352. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986) (en banc) (per curiam) (reversing court's limitation on tribe's recovery), *rev'g* 728 F.2d 1555 (10th Cir. 1984) (panel), *cert. denied*, 479 U.S. 970 (1986).

353. See *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1557-60 (10th Cir. 1984) (panel) (discussing Government's defenses to tribe's claims).

354. *Id.* at 1566-69 (Seymour, J., dissenting) (arguing that dual system of accounting should have been used).

355. *Id.* at 1566 (Seymour, J., dissenting).

mined that the situation required the Secretary's actions to be "constrained by principles of Indian trust obligations as well as by standards of administrative law."³⁵⁶ Consequently, the court en banc followed Judge Seymour's analysis and held that the Secretary was required to adopt a dual system of accounting to maximize royalty income.³⁵⁷ With *Jicarilla Apache* and some Claims Court cases (admittedly applying the fair and honorable dealings clause, but invoking and relying on *Mitchell II*³⁵⁸), in conjunction with the Supreme Court's invocation of private trust law standards in *Mitchell II*, the courts could be read to indicate that, when a full fiduciary relationship is present, private trust law standards will and should be applied to measure the Government's performance as trustee.

356. *Id.* at 1567 (Seymour, J., dissenting).

357. See *Jicarilla Apache Tribe*, 782 F.2d at 857 (adopting Judge Seymour's reasoning for requiring dual accounting system).

358. Although fair and honorable dealings cases began as purely moral claims, they have metamorphosed into legal, statutory claims. As a result, there has been a certain amount of cross-pollination between the fair and honorable dealings accounting cases, involving claims of mismanagement and nonfeasance of trust resources, and breach of trust claims raising basically the same issues. The Claims Court, for example, has cited and relied on *Mitchell II* as requiring a comprehensive scheme or elaborate control. See *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 619-20, 669 (1987) (finding that timber scheme similar to *Mitchell II* creates fiduciary relationship between Government and tribe); *Gila River Pima-Maricopa Tribe v. United States*, 9 Cl. Ct. 660, 676-77 n.15 (1986) (finding extensive control of leases by Government can create trust or fiduciary relationship).

In *White Mountain Apache*, the tribe claimed damages for overgrazing of its rangeland. See *White Mountain Apache*, 11 Cl. Ct. at 649 (claiming that Government's allowance of overgrazing resulted in severe deterioration and erosion of rangeland). The court noted that despite the absence of any statutory or regulatory-based duty, the Government's "program of leasing grazing land under permits to non-Indian livestock owners" constituted an exercise of elaborate control over the rangeland sufficient to create a fiduciary duty. *Id.* at 620, 649-50. When these factors are present, the court analyzes the claims as if they are breach of trust claims. In *White Mountain Apache*, the court dismissed most of the tribe's water claims, however, because no statutes, treaties, or regulations required the United States to develop water resources. *Id.* at 628 (citing *Gila River* in support of holding that fiduciary duty does not exist in absence of treaty, statute, or agreement). Nevertheless, the Court relied on Interior Department regulations stating that any appropriations from tribal funds for reclamation projects had to be approved by the Secretary of the Interior and provide a potential basis for the exercise of "elaborate control." If the tribe could establish that the Government appropriated tribal funds or water for Interior Department or Department of the Army needs, the tribe might have a claim. *Id.* at 644. The tribe was unsuccessful, however. *Id.* at 646-47.

In this sense, the analysis derived from *Mitchell II* seems to be broader than the analysis previously applied to fair and honorable dealings claims which required a statute. The Claims Court seems to regard *Mitchell II* as a broader basis for recovery than the fair and honorable dealings clause. In *Gila River*, the court noted that "plaintiffs' arguments reflect tailoring and adjustments to take advantage of new developments in legal concepts that were not available at the time the claims were filed in 1951, or tried in 1972." *Gila River*, 9 Cl. Ct. at 6. On the other hand, the Government maintains that the fair and honorable dealings cases are in fact applying a much broader (liability-creating) analysis in keeping with its original basis as moral claims. If *Mitchell II* now sets the standards for creation of a trust entitling the tribe to damages under the fair and honorable dealings clause, it seems only fair to argue that the courts are applying the same liability rules. Given the small number of cases, it seems that, at the least, counsel should be cautious in invoking these cases as precedent.

On the other hand, *Jicarilla Apache* raised a federal question issue³⁵⁹ brought in federal court and seeking only equitable relief. Moreover, because an Indian claimant may base a federal question on federal common law, including the trust relationship, the need to tie the claim to a federal statute is not as essential to the jurisdiction as it is in Claims Court.³⁶⁰

In *Pawnee v. United States*,³⁶¹ an allottee claimed that the same royalty calculation method held wanting in *Jicarilla Apache* was a breach of trust entitling him to a money damages remedy under the Tucker Act. The Claims Court held that the plaintiff had failed to state a claim under the Tucker Act because the statutory scheme was not sufficient to create a trust relationship requiring a damages remedy.³⁶² The court distinguished *Jicarilla Apache* on the ground that the statutory scheme regarding allottees was "different," and the Tenth Circuit's "conclusory" analysis was "no more persuasive than the plaintiff's here."³⁶³

On appeal, the Federal Circuit disagreed with this reasoning, but not the ultimate result. The Federal Circuit held that the comprehensive scheme for regulating tribal oil and gas resources, together with the elaborate control over leasing of oil and gas, created the kind of trust relationship contemplated in *Mitchell II*.³⁶⁴ Nevertheless, the Federal Circuit denied any remedy and remanded with an order to dismiss the complaint for failure to state a claim,³⁶⁵ in an

359. 28 U.S.C. § 1331 (1988). In 1965, Congress enacted a statute to remove any doubts that Indian tribes could sue in federal court in cases in which the United States did not represent them, either because the United States declined or because the tribe did not want the United States to represent them. 28 U.S.C. § 1362 (1988).

360. See *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1399-1400 & n.7 (8th Cir. 1987) (modifying statutory trust terms to permit transfer of money from tribe's "sawmill account" to "general account" if operation of sawmill was not found to be economically prudent). In an earlier article, I argued that it is appropriate for the federal courts to apply liberal standards to the creation of a trust relationship that can serve as a basis for a claim under 28 U.S.C. § 1331 and to questions regarding the scope of the Government's duties. See Newton, *Enforcing the Federal-Indian Trust Relationship*, *supra* note 92, at 680 (analyzing availability of equitable relief after *Mitchell I* decision).

361. 14 Indian L. Rep. 4024 (Cl. Ct. 1986) (unpublished opinion), *aff'd on other grounds*, 830 F.2d 187 (Fed. Cir. 1987).

362. *Pawnee v. United States*, 14 Indian L. Rep. 4024, 4025 (Cl. Ct. 1986) (unpublished opinion) (finding "no pervasive governmental involvement in the management of the resource"), *aff'd on other grounds*, 830 F.2d 187 (Fed. Cir. 1987).

363. *Id.* at 4026; see 25 U.S.C. § 396 (1988) (requiring Secretary's approval for oil and gas leases on individual allottee's land). Earlier in the opinion, the court distinguished the statutes relating to allotted land because they did not specifically refer "to the needs and best interests of the Indian owners." *Pawnee*, 14 Indian L. Rep. at 4025. The applicable regulations were the same as those in *Jicarilla Apache*, however.

364. See *Pawnee*, 830 F.2d at 190-91 (citing *Jicarilla Apache* with approval for this holding).

365. *Id.* at 191-92 (holding that *Pawnee* failed to state claim for breach of fiduciary duty because claim essentially required Secretary "to go contrary and beyond" applicable regulations and terms of leases).

opinion that raises some serious questions regarding the Federal Circuit's approach to trust questions. The court distinguished *Jicarilla Apache* on the basis that the plaintiffs in *Jicarilla Apache* challenged the regulations themselves, while the plaintiffs in *Pawnee* had not.³⁶⁶

Both the repudiated panel decision in *Jicarilla Apache* and the Federal Circuit opinion in *Pawnee* take a crimped and crabbed look at the statutes and regulations, applying the lens more of administrative law than of Indian trust law in the interpretive process. In both opinions, for example, the court relied on the fact that the statutory scheme, while requiring management in the best interests of the lessors, did not require the Secretary to obtain the highest return for the tribe.³⁶⁷ Imposing a requirement on the claimants to challenge the regulations could implicitly indicate that the regulations can only be challenged when they are not within the scope of delegated power or promulgated in accordance with the procedures set forth in the Administrative Procedure Act.³⁶⁸ The court stated in *Pawnee* that "the scope and extent of the fiduciary relationship, with respect to this particular matter, is established by the regulation and leases."³⁶⁹ If this is true, it is doubtful whether the Federal Circuit will be willing to apply a higher standard to the Government. Thus, the first question, whether private trust law standards can or will be applied by the Federal Circuit, is still unsettled.

A second difficult question regarding standards arises when the gist of the complaint is not actual mismanagement but failure to act. Recall the Cherokee Nation's complaint described in the introduction to this Article.³⁷⁰ The tribe has not accused the United States of managing its resources badly, but of nonfeasance. If the United States does nothing as trespassers take over the valuable riverbed land belonging to the Cherokee Nation, can the tribe argue there is a breach of trust? The Government has argued there is no jurisdiction over the Cherokee Nation's nonfeasance claims because there is no remediable trust relationship in the *Mitchell II* sense. Judge Tidwell has dismissed all of the Cherokee Nation's claims except the claim that the United States is obligated to remove trespassers from the tribe's mineral land. Somewhat reluctantly, the court held that *Pawnee* does establish that the Mineral Leasing Act creates a full fi-

366. *Id.*

367. *Id.* at 191.

368. 5 U.S.C. §§ 551-701 (1988).

369. *Pawnee*, 830 F.2d at 192.

370. See *supra* notes 63-81 and accompanying text (discussing Cherokee Nation's litigation with Government over Oklahoma land rights).

duciary relationship. Thus, the claim could not be dismissed out of hand.³⁷¹ Nevertheless, the issue of just what, if any, duty 25 U.S.C. § 175³⁷² imposes upon the Government to act to remove trespassers has yet to be addressed.³⁷³ Whether the Federal Circuit will adopt the parsimonious view of Judge Tidwell³⁷⁴ or the more expansive view of Judge Andewelt³⁷⁵ remains to be seen, but its opinion in *Pawnee* does not bode well for tribal trust claims.

By now the limits of this new claim for money damages for breach of trust must be clear. In addition to the procedural and technical hurdles, two major principles keep this a weapon that is only useful, but enormously so, in a few situations. First, because Congress creates the trust, it sets the limits of its own liability. It follows that Congress can terminate a trust relationship without incurring any liability.³⁷⁶ The court's role will be limited to determining whether

371. *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 577 (1990). Judge Tidwell stated:

The existence of a general fiduciary duty "does not mean . . . that every Government action disliked by the Indians is automatically a violation of that trust." Nevertheless, comparing the language in plaintiff's complaint with the statutes and regulations cited, the court finds that plaintiff ostensibly has met the requirements of *Pawnee*. Thus, at trial, plaintiff must show with particularity which statutes and regulations apply, and how defendant failed to follow the statutory requirements.

Id. (quoting *Pawnee*, 830 F.2d at 190 n.5) (emphasis in original). As of March 3, 1992, the Cherokee claim remains alive, but only barely, after three amended complaints. The tribal claimants have listed more potential trespassers, and the Court has implied that the tribe may amend their complaint later as more information develops. *Cherokee Nation v. United States*, No. 218-89L, 1992 WL 41510 (Cl. Ct. Mar. 5, 1992) (denying in part Government's motions to strike third amended complaint and denying motion to dismiss with prejudice). *Cf. Choctaw Nation v. United States*, No. 218-89L, 1992 WL 43324 (Cl. Ct. Mar. 9, 1992) (granting in part defendant's motion to strike, but refusing to dismiss with prejudice in claim raising identical issues of fact and law brought by Choctaw Nation).

372. 25 U.S.C. § 175 (1988). The statute states that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law or in equity." *Id.*

373. In fact, the issue may never be addressed. The parties are involved in a standoff that does not bode well for the tribe. The court has ordered the tribe to name the trespassers with particularity. The tribe asserts it cannot because the Government has not done the survey.

374. See *Cherokee Nation v. United States*, 23 Cl. Ct. 117, 118-19 (1991) (holding that striking of portions of plaintiff's pleading is appropriate when certain issues addressed in amended complaint have previously been disposed of by court and when complaint fails to supply information expressly required by court in prior ruling); *Sankey v. United States*, 22 Cl. Ct. 743, 746-48 (1991) (holding that statute of limitations bars breach of fiduciary duty claim, and that Government did not have duty to exercise royalty in kind provision); *Grey v. United States*, 21 Cl. Ct. 285, 300 (1990) (holding that no fiduciary relationship exists, and that statutes do not give rise to comprehensive scheme that would otherwise form trust relationship), *aff'd without opinion*, 935 F.2d 281 (Fed. Cir. 1991); *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 582 (1990) (dismissing majority of plaintiff's claims, including claims for failure to remove trespassers from tribal land).

375. See *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 432 (1991) (denying majority of Government's motion for summary judgment because material issues of fact exist regarding whether Government actions constitute breach of trust).

376. See *Menominee Tribe of Indians v. United States*, 607 F.2d 1335, 1339 (Ct. Cl. 1979) (finding no cognizable claim against Government for intentional termination), *cert. denied*, 445 U.S. 950 (1980).

the executive branch properly executed the provisions of the termination statute. For example, terminating a rancheria without assuring the tribe a proper sewage system, as promised in the termination statute, is a breach of trust.³⁷⁷ Absent any breach of the statute, however, just as property rules prevented tribes from recovering for land lost through allotment, the trust rules prevent tribes from recovering for the termination era.

The second principle is that the claim encompasses only damages to money and property held in trust by the Government. The Claims Court and Federal Circuit have relied on the earlier fair and honorable dealings claims cases, such as *Fort Sill* and *Gila River*, to reiterate that no claim exists for damages to a tribe's cultural integrity, right to exist, or psychological harm. In *Begay v. United States*,³⁷⁸ both these principles came into play. The Federal Circuit affirmed the Claims Court's dismissal of the suit on grounds that the claimants had no action for psychological harm and damage to their community caused by the forced relocation of Navajo elders from Hopi land pursuant to the Navajo-Hopi Land Settlement Act of 1974.³⁷⁹ No trust corpus was administered by the United States nor was there any intent to create a trust.³⁸⁰ Moreover, Congress ordered the relocation and there was no allegation that the executive department had violated the statute.³⁸¹ At most, the Navajo-Hopi Land Settlement Act created a claim for statutory benefits and the claimants had not alleged any denial of such benefits.³⁸²

377. See *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981) (determining California Rancheria Act directing Secretary to construct whatever irrigation and sanitation systems agreed to by tribe and United States created claim for damages to compensate for failure to provide sewer system), *cert. denied*, 463 U.S. 1228 (1983); *Smith v. United States*, 515 F. Supp. 56, 57-60 (N.D. Cal. 1978) (holding that termination of Indian rancheria was unlawful because United States failed to comply with California Rancheria Act requiring provision of sanitation facilities prior to termination).

378. 865 F.2d 230 (Fed. Cir. 1988).

379. *Begay v. United States*, 865 F.2d 230, 231-32 (Fed. Cir. 1988) (reaffirming Claims Court's denial of damages for social, economic, cultural, and psychological harm founded on theories of breach of statutory trust and breach of trust). See generally Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (codified at 25 U.S.C. §§ 640d-640d-28 (1974)) (providing final settlement of conflicting land rights and interests of Hopi and Navajo Tribes).

380. *Begay*, 865 F.2d at 231-32 (affirming Claims Court finding that essential elements creating common law trust were lacking).

381. There is a problem with conceptualizing a trust corpus in the water cases. See *Grey v. United States*, 21 Cl. Ct. 285, 300 (1990) (holding that no trust relationship existed), *aff'd without opinion*, 935 F.2d 281 (Fed. Cir. 1991); *supra* notes 333-37 and accompanying text (discussing water cases).

382. *Begay*, 865 F.2d at 251.

B. Property Claims in the Indian Claims Commission and the Court of Claims

Four of the five classes of claims created by the Indian Claims Commission Act have been invoked as bases for claims involving property.³⁸³ Some tribes regarded these claims as an opportunity to recoup the difference between the incredibly low prices paid when land was taken in the 18th and 19th centuries and the value of the land in the 20th century.³⁸⁴ In fact, a major goal of the legislation was to remove clouds from land titles.³⁸⁵ There were many barriers to successful completion of these claims. The reader might recall, for instance, that the Commission adopted the adversary process and never funded the planned Investigation Division. As a result, tribes faced considerable problems, including (1) proof that the tribe had actual control over a certain area before dispossession; (2) proof that the dispossession did in fact occur; and (3) proof that the Government was responsible.³⁸⁶ Anthropologists and historians testified as expert witnesses for both the Government and the tribes, often presenting competing versions of the truth. Of course one of the problems with the adversary nature of the proceedings was that the Justice Department attorneys threw themselves into the task of contesting every inch of acreage and denying each tale of injustice.³⁸⁷

Proving that the Government had in fact acquired the land unjustly was only the beginning of the problems, for the tribes had to

383. See *supra* note 98 and accompanying text (detailing five classes of claims created by Indian Claims Commission Act). The four clauses that have been invoked as bases for property claims are clause one, which creates a claim for constitutional takings; clause three, the so-called "treaty revision" clause, which permits the Commission to grant additional payment if a treaty was based on "unconscionable consideration"; clause four which addresses other takings of property; and clause five, the fair and honorable dealings clause. *Id.*

384. See DELORIA, *BEHIND THE TRAIL*, *supra* note 24, at 227 (discussing function and effect of Indian claims decisions); Rosenthal, *supra* note 96, at 65 (discussing Indian's perceptions of role of Indian Claims Commission).

385. See Rosenthal, *supra* note 96, at 65-66 (discussing purpose of Indian Claims Commission Act).

386. See *Pawnee Indian Tribe v. United States*, 1 Indian Cl. Comm'n 245, 258-59 (1950) (finding that whether tribe can establish aboriginal title is question of fact and tribe must prove occupancy of land to exclusion of other tribes), *rev'd in part on other grounds*, 301 F.2d 667 (Ct. Cl. 1962), *cert. denied*, 370 U.S. 918 (1962); see also Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. FED. 425, 436-521 (1979) (discussing proof necessary to establish aboriginal title and providing cases addressing issue); *supra* notes 98-105 and accompanying text (discussing Commission's failure to establish Investigation Division for gathering evidence relevant to claims, and adoption instead of adversary model).

387. SHATTUCK & NORGRÉN, *supra* note 24, at 148-49 (describing overzealousness of Justice Department attorneys); see also *Oglala Sioux Tribe v. United States*, 15 Cl. Ct. 615, 616 (1988) (criticizing each side's attorneys for "exhibit[ing] a propensity towards what can only be characterized as 'one-upmanship' . . . and dilatory posturing").

walk through a minefield of liability-limiting rules.³⁸⁸ In the Indian Claims Commission Act, for example, Congress provided for "gratuitous offsets."³⁸⁹ Thus, the Government had the opportunity to present evidence of literally every blanket given to a tribe to offset the judgment.³⁹⁰ In the offset phase of the Sioux Nation claim that was only finally resolved in 1988, the Government claimed the right to offset \$65 million against the \$44 million award.³⁹¹

The rationales for permitting the offsets seem rather dubious. The first was that tribes would have paid for the items anyway. This seems doubtful because many of the benefits, such as religious education by missionaries, were not welcomed by the tribes. Other desirable benefits may not have been so regarded had the tribes been informed they would have to pay for them later. The second rationale was that, because the Government provided for adjudication of moral claims, it was only fair to balance this inclusion by providing for offsets. In light of the earlier discussion of the fate of the fair and honorable dealings clause of the Indian Claims Commission Act,³⁹² this rationale seems laughable. Finally, although less often cited, the desire to protect the Treasury seems to have been paramount.³⁹³ Out of a sense of fairness, the Indian Claims Commission did, however, develop an ameliorating rule. If a tribe had resisted the Government and signed a treaty only after a war, then it would not necessarily be liable for offsets because the treaty could not be compared to a contract nor could the offsets be likened to part of the compensation. On the other hand, if the treaty was a voluntary treaty ceding land, the offsets could be counted as part of the consideration. This distinction is known as the "treaty of peace (no off-

388. For an excellent economic analysis of these limiting rules, see generally Leonard A. Carlson, *What Was It Worth?*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 87 (Imre Sutton ed. 1985).

389. See Indian Claims Commission Act of 1946, ch. 959, § 2, 60 Stat. 1049, 1050 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978) (granting Commission power to set off gratuitous expenditures made by Government against any award made to claimant). See generally MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN* 494-504 (1973) (criticizing offset provision and giving examples, such as case offsetting \$12 million from award of \$17 million).

390. See Rosenthal, *supra* note 96, at 47-48 (discussing allowance of Government to deduct gratuitous expenditures from final award).

391. See *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80, 80 (1985) (noting importance of offset phase of claim), *vacated sub nom. Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986), *cert. denied*, 482 U.S. 913 (1987). This claim for adequate compensation for land ceded in an 1868 treaty is discussed *infra* text accompanying notes 458-75.

392. See *supra* notes 122-82 and accompanying text (discussing fair and honorable dealings clause).

393. See Carlson, *supra* note 388, at 97 (discussing three justifications for allowance of gratuitous offsets and noting that one such justification was that offsets reduced amount of award, thereby "protect[ing] the federal treasury from unusually large claims").

sets allowed)/treaty of cession (offsets allowed)" distinction.³⁹⁴ Although the Commission also attempted to deny the Government offsets upon evidence of dishonorable conduct by the United States no matter how the treaty might be characterized,³⁹⁵ the Court of Claims reversed, holding that the only appropriate question was whether the treaty was one of peace or one of cession.³⁹⁶

Howard Friedman has argued that the Commission and Court of Claims designed some of the rules to avoid assessing interest on ancient claims.³⁹⁷ The courts, for example, measure the fair market value of land taken at the date of taking, i.e., in 19th-century and not late 20th-century dollars. In addition, the Government is only liable for interest on a claim if there is a statute, contract, or constitutional claim because of the no-interest rule.³⁹⁸ Thus, the successful tribal claimant in an inverse condemnation suit brought under the Fifth Amendment takings clause is entitled to interest. If the tribal claimant's land has not been taken in the constitutional sense, however, the tribe only has a statutory claim, and nothing in the Indian Claims Commission Act provides for an interest award in a nonconstitutional claim.³⁹⁹ It is true that the no-interest rule applies across-the-board to all litigants, including Indian tribes. Other litigants are not in the same position as Indian tribes, however, because the Government barred only Indian tribes from suing the Government for confiscation in the Court of Claims. As a result, the unavailability of interest in the cases in which tribes have been able to recover for a confiscation of aboriginal title since the courts were opened to them, their damages awards have been completely inadequate to restore them to their original position.

Furthermore, application of the no-interest rule became a powerful incentive to the development of further liability-reducing rules.

394. See *Sioux Tribe*, 8 Cl. Ct. at 82 (discussing use of "treaty of peace" rule by Indian Claims Commission and Court of Claims).

395. *Sioux Tribe of Indians v. United States*, 42 Indian Cl. Comm'n 214, 232 (1978) (stating conduct of United States "tainted the course of dealings between the United States and the Sioux [so] that we cannot in good conscience offset any gratuitous expenditures.").

396. *United States v. Sioux Tribe of Indians*, 616 F.2d 485, 487 (Ct. Cl. 1980) (interpreting 1868 treaty of cession under which gratuitous offsets must be allowed).

397. Friedman, *supra* note 191, at 26.

398. See *supra* note 191 and accompanying text (discussing no-interest rule).

399. See *Loyal Creek Band of Indians v. United States*, 1 Indian Cl. Comm'n 195, 207, 215-17 (1950) (holding that upon accepting \$600,000 award in 1903, Band was estopped from denying finality of award), *rev'd sub nom. Loyal Band of Creek Indians v. United States*, 97 F. Supp. 426 (Ct. Cl.), *cert. denied*, 342 U.S. 813 (1951). On appeal, the Court of Claims reversed the Commission's decision and awarded the Band \$600,000. While the court felt inclined to favor the view that interest should be paid on the award, it deferred to the Supreme Court's view that the Government was exempt from paying interest. See *Loyal Band of Creek Indians v. United States*, 97 F. Supp. 426, 431 (Ct. Cl.) (discussing why court declined to include over 40 years of interest in award), *cert. denied*, 342 U.S. 813 (1951).

Where a treaty exists, for example, whether fraudulent or coerced, the claim can only be treated as a treaty revision claim and not one based on the Constitution. If the claim can be characterized as a breach of trust instead of a taking in the constitutional sense, interest may also be avoided.⁴⁰⁰

The Commission alone cannot be blamed for developing these liability reducing rules because early in the Commission's history, the Supreme Court sent a clear and deliberate signal that the Government purse was to be protected. In the infamous 1955 case of *Tee-Hit-Ton Indians v. United States*,⁴⁰¹ the Court drew a distinction between aboriginal Indian title, land owned and occupied since time immemorial by an Indian tribe, and "recognized" title, land granted to an Indian tribe by Congress in a treaty or statute.⁴⁰² In effect, the Court held that if the tribes did not have a deed for their ancestral land they did not own it, at least not in the constitutional sense.⁴⁰³ Thus, the Federal Government could take it away without incurring any liability. In fact, in addition to ethnocentrism at best and racism at worst, the other major impetus for this decision was fiscal. The Government had attached an appendix to a predecessor case, listing all of the Indian Claims Commission cases involving property and asserting that the Government's liability would be over \$9 billion, with \$8 billion of that amount constituting interest.⁴⁰⁴ In addition, the case itself arose in the context of Government-authorized cutting of timber in the Tongass Forest in Alaska, where vast mineral resources only recently had been discovered. Alaskan Natives held most of Alaska in "aboriginal" title. The *Tee-Hit-Ton* decision enabled the American people to acquire Alaska without any enforceable duty to pay for it.⁴⁰⁵

After the decision in *Tee-Hit-Ton*, the Government urged the Indian Claims Commission to import this same distinction into all five clauses of the Indian Claims Commission Act, by arguing that the Indian Claims Commission Act had no jurisdiction over any claims

400. See generally Friedman, *supra* note 191 (discussing various liability reducing rules); Carlson, *supra* note 388, at 96, 106 n.8 (arguing that, on average, tribe would receive same award today if it either was paid market rate of interest or was allowed to hold its land longer).

401. 348 U.S. 272 (1955).

402. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-91 (1955) (holding that Indian occupancy may be terminated by Government without compensation where Congress has not specifically recognized "occupancy" as ownership).

403. *Id.*

404. Brief for Petitioner at 55-57, *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951) (per curiam) (No. 281).

405. See Newton, *At the Whim of the Sovereign*, *supra* note 174, at 1272 (stating that *Tee-Hit-Ton* decision prompted native groups to lobby Congress for compensation leading to enactment of Alaska Native Claims Settlement Act).

not based on recognized title. The Commission rejected this argument, holding that the distinction mattered only for the purposes of a clause 1, constitutional claim.⁴⁰⁶ Nevertheless, the liability-reducing rules discussed above prevented many claims from falling into clause 1.

Only recently did the Supreme Court put its imprimatur on one of the rules developed by the Commission to avoid payment of interest, albeit in a case in which the Court adopted the stringent standard, yet found that the tribe met it. In *Sioux Nation of Indians v. United States*,⁴⁰⁷ the Supreme Court applied what claims lawyers know as the *Fort Berthold*⁴⁰⁸ test to distinguish between a taking for which interest is owed and a mere breach of trust for which no interest is owed. This test directs the court to assess whether Congress was acting as a trustee by merely transmuting the tribe's land into money or as a sovereign confiscating tribal land.⁴⁰⁹ The best way to make this determination is, of course, to see whether the Government "purported to give an adequate consideration" for the property.⁴¹⁰ Under the *Fort Berthold* test, a good faith, but incompetent, effort to pay the tribe insulates the Government from Fifth Amendment liability. Fortunately, in applying this test, the Supreme Court decided that telling the Sioux to sign a treaty or starve was not the act of a guardian but that of a sovereign.⁴¹¹

Again, this test was influenced by fear of the liability that might result if the same test was applied to Indian tribes as that applied when a physical invasion of property results in a taking: a per se rule, absent consent by the landowner.⁴¹² Many more of the ancient claims, including those that arose during the allotment era when the

406. See *Otoe & Missouri Tribe of Indians v. United States*, 131 F. Supp. 265, 275 (Ct. Cl. 1955) (discussing legislative purpose behind Indian Claims Commission Act), *cert. denied*, 350 U.S. 848 (1955).

407. 448 U.S. 371 (1980).

408. *Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968) (determining that Congress only acts in two capacities in dealing with Indian people).

409. See *id.* at 691 (setting guidelines for courts to determine Congress' capacity to act).

410. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (discussing whether taking of Indian property occurred without just compensation).

411. See *Sioux Nation of Indians v. United States*, 448 U.S. 371, 423 (1980) (finding that, in assuming obligation to provide rations to Indians, Congress did not intend such provision as compensation for taking of land). The Government attached the "sell-or-starve" rider to the treaty during the winter when the Government prevented the tribe from hunting, moved most of the members into stockades, and threatened to withhold rations if they did not agree to the treaty.

412. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (affirming traditional rule that Government's "permanent physical occupation of property" constitutes taking); see also Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 260 (1982) (criticizing Court's application of good faith effort test in *Sioux Nation*).

Government broke up the last great tribal land masses from 1887 to the early 1930s, would have been takings because many tribes did not consent to allotment.⁴¹³ As recently as the 1950s, the Government converted tribal land to cash for individual Indians as part of its termination policy, sometimes with the consent of the affected tribes, but oftentimes without consent.⁴¹⁴

Sioux Nation was decided shortly before enactment of the Federal Courts Improvement Act. Of the seven dispositions in property cases that have reached the Federal Circuit since its inception, only four opinions involving three claims addressed the merits of property issues.⁴¹⁵ In general, these cases illustrate that the substantive law applied to property cases is regarded as settled. They also illustrate that the Federal Circuit exercised appropriate supervision over the Claims Court judges, many of whom were new to the bizarre world of Indian claims in which a twenty-year-old case is regarded as "new." It is not surprising in such circumstances that the Claims Court judges occasionally erred in their application of substantive property law.⁴¹⁶ In their efforts to dispose of these old cases, the Claims Court occasionally went beyond the permissible. In another Sioux land claim, for example, the Claims Court ordered the eight tribes of the Sioux Nation to consider a settlement offer.⁴¹⁷ Although two tribes accepted, six tribes either explicitly or implicitly rejected the offer. The trial judge entered judgment at \$40 million, the amount of the Government's settlement offer "neither as a sanc-

413. See S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* 95-124 (1973) (relating history of allotment policy of 1887-1930 during which Indian tribes lost 90 million acres of tribal land).

414. See generally DONALD L. FIXICO, *TERMINATION AND RELOCATION* (1986) (relating history of termination period of 1945-60). According to Fixico, termination resulted in the loss of 1,369,000 acres by 1960. *Id.* at 183.

415. See *Gila River Pima-Maricopa Indian Community v. United States*, 765 F.2d 160 (unpublished opinion), 12 Indian L. Rep. 2049, 2050 (Fed. Cir. 1985) (disapproving basis for determining farmland); *Gila River Pima-Maricopa Indian Community v. United States*, 738 F.2d 452 (unpublished opinion), 11 Indian L. Rep. 2074, 2074 (Fed. Cir. 1984) (affirming lower court's compensatory award for extinguishment of aboriginal title; remanding for determination of amount of land available for farming); *Menominee Tribe of Indians v. United States*, 726 F.2d 712, 717 (Fed. Cir. 1983) (holding that there was no Fifth Amendment taking when Indians were not divested of preexisting property right); *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1386 (Fed. Cir. 1983) (reversing finding that tribe had abandoned aboriginal property and remanding to determine extent of aboriginal title and extent of Government liability).

416. The Claims Court misapplied settled law in one case. See *Menominee Tribe*, 726 F.2d at 714 (finding that judge erred because ruling was based on factors beyond court's jurisdiction). In another case, the court's failure to support its conclusions resulted in two reversals. See *Gila River*, 12 Indian L. Rep. at 2050 (vacating and increasing amount of farmable acreage after finding that Claims Court again failed to support its conclusion); *Gila River*, 11 Indian L. Rep. at 2075-76 (affirming damage award but remanding for redetermination of farmable acreage because Claims Court did not explain basis for its conclusion).

417. See *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80, 91-92 (1985) (discussing settlement offer made to Indians and their reactions to it).

tion nor as settlement offer per se, but simply as the court's considered judgment as to what would be fair and equitable compensation."⁴¹⁸ While sympathetic to the lower court's frustrations, the Federal Circuit vacated and remanded, noting that although the Court of Claims called for innovative handling of the ancient claims, no innovation permitted "the imposition of a settlement negotiated by counsel to which the parties did not agree."⁴¹⁹

Although few in number, both the procedural and substantive dispositions by the Federal Circuit contain insights into the claims process and why it will not go away. The opinions addressed three claims based on aboriginal title: one an ancient claim⁴²⁰ and two others based on modern claims.⁴²¹ The opinions broke no new grounds in substantive law.⁴²² One of the opinions appeared to find the *Tee-Hit-Ton* rule so unremarkable that the court asserted the tribe had no preexisting property right without supporting citation.⁴²³ Two of the opinions, finally bringing the Gila River Pima-

418. *Id.* at 92.

419. *See* *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1052 (Fed. Cir. 1986), *cert. denied*, 482 U.S. 913 (1987). A fuller discussion of this case and its ultimate resolution can be found in the discussion of representation issues at *infra* notes 458-75 and accompanying text. In a breach of trust case, a similar device was also rejected by the Federal Circuit. The Claims Court entered judgment at \$10 million, although the Government had offered to settle for \$13 million as a sanction for failure to comply with court orders. *See* *White Mountain Apache Tribe v. United States*, 6 Cl. Ct. 575, 581-83 (1984) (citing plaintiff's failure to comply with court orders regarding pre-trial exchange of testimony as inexcusable conduct), *vacated without opinion*, 776 F.2d 1063 (Fed. Cir. 1985).

420. *See* *Gila River*, 12 Indian L. Rep. at 2049 (stating that claim for taking of aboriginal title originally filed in Indian Claims Commission).

421. *See* *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1379 (Fed. Cir. 1983) (addressing claim brought pursuant to special jurisdictional act permitting late filing under Indian Claims Commission provisions); *Menominee Tribe of Indians v. United States*, 726 F.2d 712, 714 (Fed. Cir. 1983) (basing jurisdiction on Tucker Act).

422. In *Wichita Indian Tribe*, a 1978 special jurisdictional act permitted the claimants, present descendant groups of the Wichita Confederacy, to make out-of-time filings before the Indian Claims Commission. *See* Act of Mar. 21, 1978, Pub. L. No. 95-247, 92 Stat. 158, 158 (authorizing tribe to file claims against Government for takings which occurred without sufficient compensation and for other purposes with Indian Claims Commission); *Wichita Indian Tribe*, 696 F.2d at 1379 (discussing jurisdictional act's allowance of out-of-time filings). The Court of Claims dismissed the consolidated claims because the claimants failed to prove they held exclusive aboriginal title to the area in question. *Id.* In reversing the dismissal, the Federal Circuit relied on previous Indian Claims Commission cases regarding proof and extinguishment of aboriginal title. *See id.* at 1381 (holding that moving village sites or otherwise shifting patterns of occupancy is not sufficient to infer abandonment of aboriginal title) (citing *Omaha Tribe v. United States*, 4 Indian Cl. Comm'n 627, 662, 667 (1957)); *id.* at 1385 (finding that exclusive use was not undercut by permitting other Indian tribes to enter as traders or guests) (citing *Yakima Tribe v. United States*, 12 Indian Cl. Comm'n 301, 378-79 (1963)); *id.* at 1385 (holding that proof of extinguishment of aboriginal title must be clear) (citing *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967)).

423. *See* *Menominee Tribe*, 726 F.2d at 716 (finding that no taking occurred and barring tribe from compensation). In its unsuccessful effort to recover for its termination, the Menominee Tribe also claimed damages on the ground that the sustained yield and other deed restrictions were Fifth Amendment takings. While the Claims Court agreed with the tribe, the Federal Circuit reversed, holding that the regulations were legitimate regulations under the

Maricopa's claim for taking of 3,751,000 acres in Arizona to an end after thirty-four years of litigation, were unpublished but illustrate the "*Jarndyce v. Jarndyce*"⁴²⁴ quality of all Indian Claims Commission litigation. The case moved through the Indian Claims Commission in the stately progression common to the claims cases. Filed in 1951, the case was divided into the customary three phases. The trial in the liability phase was held in 1962. In 1970, the Indian Claims Commission issued its determination of the extent of the tribe's aboriginal holdings that had been taken. In 1972, the Indian Claims Commission held that the title had been extinguished in 1883. The trial on damages did not start until 1976. The case was transferred to the Court of Claims in 1978, and transferred again to the Claims Court in 1982. In 1985, on its third trip to the Federal Circuit,⁴²⁵ the tribe was finally awarded a judgment in the final valuation phase of the proceeding. The tribe received \$6.3 million as the fair market value of the 3.8 million acres in 1883.

Of course, no interest was due because the land had never been recognized by a treaty or statute. The case thus illustrates a tremendous irony in the application of the *Tee-Hit-Ton* rule, whereby the agricultural Gila River Pimas, praised as being more civilized than other "nomadic" Indians, tried to accommodate the white settlers and the U.S. Government instead of fighting them. There were no Indian wars with these people, and thus no treaty recognizing Indian title.

Government's "plenary authority to regulate Indian-owned forests." *Id.* Although the court did not cite a non-Indian regulatory takings case, the restrictions could be so justified. The more important basis of its decision was that the tribe had no property right:

The Tribe never had unfettered ownership of the land; nor was that kind of ownership given to them in the termination Act; accordingly, no property right was taken from the Indians when Congress required continued management on the sustained yield basis.

Id. As noted in the text, the Court did not cite *Tee-Hit-Ton* or any other case in support of this proposition.

424. CHARLES DICKENS, BLEAK HOUSE (1853).

425. See *Gila River*, 12 Indian L. Rep. at 2050 (setting aside court's determination of farmable acres in absence of sufficient explanation); *Gila River*, 11 Indian L. Rep. at 2075-76 (affirming damages award but remanding for redetermination of farmable acreage). The only issue before the Federal Circuit was whether the trial judge applied the correct valuation formula. The court reversed the trial judge and remanded, instructing him to explain his reasons for reducing the amount of the most valuable acreage by 100,000 acres. *Gila River*, 11 Indian L. Rep. at 2076. The Federal Circuit chastised the trial judge for ignoring its original order and adjusted the amount of farmland upwards by 75,000 acres, resulting in a \$731,250 increase. See *Gila River*, 12 Indian L. Rep. at 2050 (noting that increase in award reflected additional 75,000 acres treated as farmland).

In an interim unpublished decision, the Federal Circuit reversed the Claims Court's dismissal of the case for failure to prosecute. *Gila River*, 12 Indian L. Rep. at 2033. The court stated that although the failure to meet a pre-trial deadline was negligent, it did not appear to be an "intentional flouting" of the lower court's order. *Id.* Accordingly, the Federal Circuit reversed, while urging the parties to bring the case to an expeditious conclusion. *Id.*

Although much of the substantive law regarding Indian property claims has been decided, these cases remain important because they illustrate that rules of formal inequality are still applied in Indian law cases by judges who do not question either the racist/ethnocentric basis for these rules, or what these rules continue to say about the lack of regard for Indian issues by the judicial system today.⁴²⁶ That a judge in the 1990s can cite cases decided in 1886 referring to Indian tribes and people in degrading terms⁴²⁷ without a thought is perhaps no more surprising than having the same judge cite the dissenting opinion in *Mitchell II* as authority for a restrictive interpretation of that same case.⁴²⁸

Perhaps because the property cases have taken so long to go through the claims system, they also illustrate other pitfalls. Over a forty-year period, tribal governments have changed dramatically; attorneys have died or been discharged, and new attorneys have been added. Lawyering styles change from attorney to attorney. As new theories are developed, the attorneys quite naturally try to incorporate them into the claim. As new governing bodies take over, tribes want to rethink legal strategies. For these reasons, the property cases help to illuminate indirectly and directly problems concerning representation both by attorneys and by named plaintiffs.

1. United States v. Dann

The Western Shoshone claim, discussed in the introduction to this Article,⁴²⁹ was originally filed in 1951 by one of the twenty-two autonomous Bands loosely confederated as the Western Shoshone, the Temoak Band. Once the claim was filed, the Claims Commission designated an entity called the Western Shoshone Identifiable Group as the representative of all the Shoshone Indians.⁴³⁰ This

426. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1991) (illustrating racist and colonialist assumptions underlying much of modern Indian law); Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1, 5 (1991) ("This disparate treatment of both property and political rights is not the result of neutral rules being applied in a manner that has disparate impact. Rather, it is the result of *formally unequal rules.*") (emphasis in original).

427. See *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 573 n.3 (1990) (citing *United States v. Kagama*, 118 U.S. 375, 383 (1886) (stating that Indian tribes are "wards of the nation" and not trust beneficiaries)).

428. *Id.* (citing and relying on Justice Powell's dissent in *Mitchell II* to argue that relationship is one of guardian and ward and not of trust).

429. See *supra* notes 32-36 and accompanying text (discussing *Western Shoshone* case which held that U.S. Government confiscated Western Shoshone Indian land).

430. Indian Claims Commission Act of 1946, ch. 959, § 10, 60 Stat. 1049, 1052 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978) (providing guidelines for presentation of claims).

group elected a claims committee that then represented the group in its dealings with the tribal counsel.⁴³¹

Although the claim asserted a taking of aboriginal title, there was no single act of taking—no Indian war followed by a treaty, no statute taking the land away. The Claims Commission concluded that most of the land had been lost “by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States.”⁴³² Because no date of taking was pinpointed, an attorney for the plaintiff group stipulated that all the land had been taken, and that the formal date of taking occurred in the early 19th century.⁴³³ There were only a few problems. To begin with, fairly large amounts of this land, at least three million acres,⁴³⁴ including the Dann Band’s 5000 acres, is still used by Indian people who believe it to be theirs. The Dann sisters never joined in the claim and did not regard themselves as members of an entity called the Western Shoshone Nation, much less the Western Shoshone Identifiable Group. An organization of Western Shoshone Indians, including the Dannels, attempted, but to no avail, to intervene in the claim in 1974⁴³⁵ to remove presently occupied land from the claims case. The Court of Claims dismissed this effort as an intertribal dispute over litigation strategy which came too late in the claims process to permit intervention.⁴³⁶ The Temoak Band, an original plaintiff, even fired its attorney in 1976 and joined the efforts to stop the case. Apparently even the original plaintiffs assumed that land still occupied by the Shoshone people was not part of the claim. The chairman of the tribe explained the tribe’s concerns in a 1977 letter to the Secretary of the Interior:

There are many strange things about the way these lawyers have operated. They no longer report to us but to a “claims commit-

431. See Orlando, *supra* note 39, at 265-67 (discussing evolution of Western Shoshone claim).

432. Shoshone Tribe of Indians v. United States, 11 Indian Cl. Comm’n 387, 413-14, 416 (1962) (discussing findings of fact made by Indian Claims Commission).

433. Western Shoshone Identifiable Group v. United States, 29 Indian Cl. Comm’n 5, 7 (1972) (citing decision and description of stipulation).

434. See Imre Sutton, *Incident or Event? Land Restoration in the Claims Process*, in IRREDEEMABLE AMERICA: THE INDIANS’ ESTATE AND LAND CLAIMS 211, 221 (Imre Sutton ed. 1985) (estimating that tribe occupies 250,000 acres). Estimates of the acreage claimed vary. See United States v. Dann, 572 F.2d 222, 224 (9th Cir. 1978) (stating that estimates of acreage claimed ranges from three to twelve million acres).

435. See Western Shoshone Legal Defense & Educ. Ass’n v. United States, 531 F.2d 495, 497, 503 n.16 (Ct. Cl.) (finding request was made too late in proceeding for intervention and only reflected internal conflict within tribe), *cert. denied*, 429 U.S. 855 (1976). One reason given by the Claims Court for denial of intervention was that because the judgment had not yet been paid, the Western Shoshones could ask Congress to delay the payment while they litigated their claims to title of land currently occupied. *Id.* at 503 n.16.

436. *Id.* at 503-04.

tee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have but have fought our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association. We have now fired these claims lawyers and are looking for a replacement.⁴³⁷

The objectors asked for a stay of the Indian Claims Commission judgment pending an administrative appeal to the Secretary of the Interior. The Commission denied the stay and issued its final decision.⁴³⁸ The Court of Claims affirmed the Claims Commission,⁴³⁹ and the judgment funds were deposited in an interest-bearing fund in the Treasury for the plaintiff tribe.

The Danns argued that Congress never extinguished their aboriginal title to the land by any sovereign act.⁴⁴⁰ Until title was extinguished, their right to the land was as "good as the fee simple absolute of the Whites," under precedents stretching back to *Johnson v. McIntosh* and not even questioned in *Tee-Hit-Ton Indians v. United States*.⁴⁴¹ The Ninth Circuit agreed, holding that even if the Indian Claims Commission judgment had preclusive effect, the Danns were not precluded because the judgment, still not paid out to the tribal claimants, lacked finality.⁴⁴² In addition, the Ninth Circuit stated that the issue of title was never raised, litigated, and adjudicated as required by principles of collateral estoppel.⁴⁴³ Instead, the issue litigated was the extent of the Western Shoshone's holdings *before* "the arrival of the white man."⁴⁴⁴ In sum, the court concluded that

437. Appendix for Respondent at R2-R3, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

438. See *Western Shoshone Identifiable Group v. United States*, 40 Indian Cl. Comm'n 305, 308-09 (1977) (stating it was too late in litigation to stay proceedings so that plaintiff could introduce new theory on which to base claim), *aff'd sub nom.* *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979).

439. See *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994, 997-99, 1002 (Ct. Cl.) (ruling that Commission did not abuse its discretion in denying request to stay proceedings and affirming Commission's monetary award), *cert. denied*, 444 U.S. 973 (1979).

440. *United States v. Dann*, 572 F.2d 222, 226 (9th Cir. 1978).

441. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-90 (1955) (concluding that Government can extinguish title without compensation where Indian occupancy has not been "specifically recognized as ownership by action authorized by Congress"); see also *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240, 253-54 (1823) (explaining that while Indian Nations held aboriginal title to lands they inhabited, upon discovery of Indian lands, discovering nation gained fee title to lands, subject to Indians' right of occupancy and use).

442. *Dann*, 572 F.2d at 225-26.

443. *Id.* at 226.

444. *Id.*

"[t]he extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided."⁴⁴⁵

On certiorari, the Danns based most of their argument on principles of *res judicata*. In addition to supporting the Ninth Circuit's position, the Danns also contended that the case involved basic principles of due process in that the Danns were never adequately represented by the Western Shoshone Identifiable Group.⁴⁴⁶ They also argued that to permit the Indian Claims Commission's judgment to be used against them would result in permitting judicial extinguishment of aboriginal title. In other words, the judgment would effect a taking of the land when only Congress has the authority to confiscate land.⁴⁴⁷

The Supreme Court reversed the Ninth Circuit, in an opinion most notable for what it did not say and for treating the case as simply one of statutory construction.⁴⁴⁸ The Indian Claims Commission Act provides that payment of the claims will fully discharge all obligations of the United States,⁴⁴⁹ so the Court viewed its task as simply to determine whether crediting the judgment fund to a tribal account in the Treasury qualified as payment.⁴⁵⁰ Without discussing any of the more difficult issues regarding why the Dann sisters, whose Band had continuously occupied this land, should be bound to a decision entered on behalf of a group that seemed to have been formed just for the purpose of bringing this litigation, the Court applied general principles of trust law to determine whether payment had been made. Payment to a trustee is payment to the benefi-

445. *Id.* at 226-27 (footnote omitted). The only issue decided, according to the court, was the extent to which the Western Shoshone claimed title before contact. The Commission did not decide that Congress had extinguished that title. The stipulation only established a date of taking for purposes of valuation. *Id.* at 226.

446. *See* Brief for Respondent at 29-33, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476) (arguing that due process requires verification that representative, in fact, represents interests of entity, and that such verification was lacking in instant case); *Hansberry v. Lee*, 311 U.S. 32, 39-44 (1940) (holding that due process was violated by giving preclusive effect to judgments rendered in class action suits in which class members had not been given notice or opportunity to opt out).

447. Brief for Respondent at 25-29, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476). In addition, the Danns argued that the Indian Claims Commission payment provision should be interpreted to avoid these difficult constitutional questions by holding that the bar of § 22(a) was intended only to discharge Congress from any liability for money damages for what actually occurred during the years covered by the land claim. *Id.*

448. *See* *United States v. Dann*, 470 U.S. 39, 44-45 (1985) (holding that "payment" occurred under § 22(a) of Indian Claims Commission Act when Government placed funds into tribe's trust account).

449. Indian Claims Commission Act of 1946, ch. 959, § 22, 60 Stat. 1049, 1055 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978). Section 22 states that "[t]he payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." *Id.*

450. *Dann*, 470 U.S. at 44.

ciary; so when the Government as defendant handed the money over to itself as trustee, payment occurred.⁴⁵¹

It is notable that most of the Court's opinion focused on Congress' intent to settle all the ancient claims in enacting the Indian Claims Commission Act.⁴⁵² Whether the method chosen might violate fundamental principles of fairness was simply not of interest to the Court.⁴⁵³ Of greatest concern to the Court was to dispatch these claims cases once and for all.

Finality and the doctrine of repose are of the greatest importance when land claims are involved, whether or not those claims involve Indian people. Concerns that there may be some three million acres of unextinguished aboriginal title in the Southwest may have at least unconsciously influenced the courts to avoid upsetting settled expectations of non-Indians⁴⁵⁴ and long-range plans of the Department of the Interior for public lands. One can also understand why fair-minded people would fear that all the ancient claims might be reopened. Nevertheless, the Court should have faced squarely the difficult due process issues of attorney and class representation raised in the *Dann* case, instead of issuing a terse opinion that said, in effect, "no more."⁴⁵⁵

2. *The Sioux land claims*

The *Dann* sisters argued that they had never authorized the named plaintiffs or the attorney to represent their present possessory interest in land. In contrast, the Sioux Nation protested the denial of the tribe's right to discharge its attorneys and to stop the courts from finally determining the tribe's land claims, in order to

451. See *id.* at 47-50 (discussing meaning of word "payment" as used by Congress in § 22(a) of Indian Claims Commission Act). Congress amended the standing appropriation covering the Indian Claims Commission judgments to provide for automatic deposit in trust funds to the credit of the tribe's pending determination of how the money should be distributed. 31 U.S.C. § 724(a) (ed. 1976) (recodified as amended at 31 U.S.C. § 1304(a) (1988)). References to Indian Claims Commission judgments were omitted because the Commission was no longer in existence. See H.R. REP. NO. 651, 97th Cong., 2d Sess. 62, reprinted in 1982 U.S.C.A.N. 1895, 1956 (detailing reasons for changes in statutory language). The amendment had the salutary purpose of ensuring investment of these funds for the benefit of the tribe. Unfortunately, the same amendment created the vehicle for holding that the payment already had been made.

452. See *Dann*, 470 U.S. at 45-47 (discussing purposes of Indian Claims Commission Act).

453. See ROBERT WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 57-58, 359 (1979) (stating that Burger Court denigrated Indian claims cases by calling them "teepee" and "pee-wee" cases).

454. Unextinguished aboriginal title is good against third parties, if not against the Government. Thus, a tribe may sue for trespass or sue to eject non-Indian possessors. See *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 699 (9th Cir. 1976) (declaring railroad right of way invalid after ninety years).

455. See *Sutton*, *supra* note 434, at 223 (discussing *Dann* case).

seek a solution involving the return of land.⁴⁵⁶ The Black Hills case is the more famous of the Sioux land claims because of the amount of the judgment and the cultural, religious, and economic importance of the Black Hills to the Sioux Nation. A less well-known 1988 decision of the Federal Circuit upholding the Claims Court's award of \$40 million has brought another Sioux tribal claim to an end.⁴⁵⁷ In each of the Sioux land claims, the courts rebuffed efforts by constituent tribes within the Sioux Nation to dismiss their claims attorneys. In each case, as in *Dann*, the tribes still seek return of the land and have refused to accept any judgment money.

In 1978, the Indian Claims Commission awarded the Sioux Nation more than \$43 million in damages stemming from a claim that the price paid to the tribe for an 1868 cession of land was unconscionable.⁴⁵⁸ The Commission further held that the United States could not offset any property or money "gratuitously" given the tribe after the cession.⁴⁵⁹ The Government successfully appealed this aspect of the decision to the Court of Claims, which in turn held that the Commission should have allowed the Government to present evidence about offsets.⁴⁶⁰ While this appeal was proceeding, some of the eight Sioux Tribes comprising the petitioner Sioux Nation decided to change their litigation strategy to seek return of the land rather than money.⁴⁶¹ The tribes refused to renew the contract of the attorney who had represented them for some thirty years.

456. S. James Anaya has argued that the *Sioux Nation* case is the same as the *Dann* case. See S. James Anaya, *Native Land Claims in the United States: The Unatoned-for Spirit of Place* (Cambridge Lectures, 1991) (Frank E. McCardle, ed., forthcoming 1992) (analyzing *Sioux Nation* and *Dann* cases in discussion of Government's response to native land claims). I disagree for several reasons. First, there was no confiscation of the land of the Western Shoshones to constitute a sovereign act as there was in the *Sioux Nation* case. To interpret a merger and bar provision in a statute providing for redress for ancient claims as permitting extinguishment of title by a judicial decree violates basic principles of due process. Second, instead of arguing that the tribal claimant did not represent them, the Sioux Tribes argued that their attorneys misled them. Whatever happened between the Sioux Tribe and their attorneys, the tribes within the Sioux Nation were the appropriate entities to bring the case on behalf of their people. These tribes were not created for the purpose of litigation but actually existed as political entities. In other words, while the structure of the Indian Claims Commission system unfairly defeated the *Dann* sisters' present possessory interest in their land, the *Sioux Nation* case involved decisions of strategy by the tribes, as well as the attorneys for the tribes, that arguably turned out poorly for them.

457. *Sioux Tribe of Indians v. United States*, 862 F.2d 275 (Fed. Cir. 1988).

458. See *Sioux Tribe of Indians v. United States*, 42 Indian Cl. Comm'n 257, 257 (1978) (awarding Sioux Tribe \$49,949,700 for total value of Sioux interests extinguished under 1868 Treaty), *rev'd in part and remanded*, 616 F.2d 485 (Ct. Cl.), *cert. denied*, 446 U.S. 953 (1980).

459. *Id.*

460. See *United States v. Sioux Tribe of Indians*, 616 F.2d 485, 492 (Ct. Cl.) (holding that Commission erred in not considering reducing award by any "payments on the claim" or "gratuitous offsets"), *cert. denied*, 446 U.S. 953 (1980).

461. See *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80, 84 (1985) (noting that four tribes rejected settlement offer because it did not entail return of land and that two tribes rejected offer without explanation).

Although the attorney attempted to withdraw as counsel for the Oglala Sioux Tribe in 1980, and again in 1985 when he also sought to withdraw as counsel from the Cheyenne River Sioux Tribe, the court refused to permit the withdrawal until the tribe made an appropriate motion to substitute another attorney for the case. The tribe refused.

Meanwhile, the Indian Claims Commission was terminated and its remaining docket was transferred to the Claims Court. That court became impatient with efforts to get the tribes to agree to settle the issue. Because the offset procedure gives the Government and the tribe the respective opportunities to prove and to controvert the worth of literally every item given the tribe since the time of the cession, the trial judge was understandably anxious to avoid trial on these issues. The Government twice offered to settle the offset issue at \$4.2 million during the period from 1979 until 1985.⁴⁶² The offer was tentatively agreed upon by the attorneys but was rejected by a majority of the tribes.⁴⁶³ Finally, the trial judge imposed a settlement on the tribes.⁴⁶⁴ The Federal Circuit promptly vacated the order as not consented to, in an opinion noting that the impasse might be broken by the parties' stipulating "the total dollar amount of various categories of offsets to which the Government is entitled."⁴⁶⁵

When the attorneys did finally stipulate to a total amount of \$3.7 million, by naming five categories of offsets with a dollar amount for each, the Claims Court entered judgment.⁴⁶⁶ The Oglala and Rosebud Sioux Tribes filed a motion for relief of judgment, arguing that the stipulation was an unconsented settlement of the case and fur-

462. *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1048 (Fed. Cir. 1986), *cert. denied*, 482 U.S. 913 (1987).

463. *Sioux Tribe*, 8 Cl. Ct. at 84.

464. *Id.* at 92. In reaching its decision to impose a settlement on the parties, the court stated:

The simple fact that four of the reservation tribes are refusing to accept any settlement or award of this Court, which does not include the return of their land, is indicative of the [tribes'] refusal to comprehend, after 35 years of litigation, that this Court can only award money judgments. . . . As a result, this Court can envision the continuation of this litigation *ad infinitum* Thus, the case grinds its way slowly forward, regardless of the wishes of the plaintiff or of its attorneys, putting an ever increasing burden on the resources of this Court. It may well be that the past leaders of the current reservation tribes initiated this suit, some 35 years ago, for reasons that are no longer consistent with the wishes of the current tribal governing bodies.

Id. at 85-86.

465. *Cheyenne River Sioux Tribe*, 806 F.2d at 1053.

466. *Sioux Tribe of Indians v. United States*, 14 Cl. Ct. 94, 99 (1987), *aff'd*, 862 F.2d 275 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

ther, that they had not authorized the attorney to act for them in any capacity.⁴⁶⁷ The Claims Court refused to grant the remedy.⁴⁶⁸

The Federal Circuit affirmed, stating that the stipulation to the amount was not a settlement of the case, but merely a factual stipulation to the dollar amounts to be used once the judge determined whether the law permitted the particular category of offset to be deducted.⁴⁶⁹ Furthermore, the court held the attempted discharge of counsel ineffective, stating that the Claims Court rightfully refused to allow the tribes to terminate counsel who had been working on the case for thirty years and were close to completing it, unless the change would be made without undue delay to the litigation.⁴⁷⁰

In dissent, Judge Newman disagreed with the court's handling of the termination of counsel issue. Judge Newman found it inconceivable that "with over half the clientele in loud revolt, nominal counsel has the authority to bind these tribes, against their intentions and instructions."⁴⁷¹ Judge Newman further noted that both the Government and the Claims Court were aware throughout the litigation that most of the tribes were unhappy with the negotiations and the proposed settlement.⁴⁷²

Arguing that it is the courts who are ultimately responsible for the supervision of counsel, Judge Newman then stated that there was an obligation to respect "the authority of the tribes to ascertain their own best interests, and not to impose on the tribes the views of their

467. *Id.* at 100.

468. *Id.* at 105-06. In refusing to grant the remedy, Judge York stated:

Neither movant party has ever asked this Court to substitute new counsel, or sought to enter a separate appearance, or otherwise attempted to assert through legal process a position independent of the Sioux Tribe and of the six other Sioux Tribes in these proceedings. It is too late in the game to do this now. Having failed over a 37-year period to raise any substantive objection to what was happening, the Oglala Sioux Tribe and the Rosebud Sioux Tribe now are precluded and estopped from initiating their belated attack upon the judgment of this Court, an attack which the Sioux Tribe and the six other Sioux tribal representatives do not join.

Id. at 104-05 (footnotes omitted).

469. *Sioux Tribe of Indians v. United States*, 862 F.2d 275, 279-80 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

470. *Id.* at 281.

471. *Id.* at 282 (Newman, J., dissenting).

472. *Id.* In a footnote, Judge Newman added:

As discussed by the Claims Court, of the eight plaintiff Sioux Tribes, appellants and the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Lower Brule Sioux Tribe, and the Fort Peck Sioux Tribe, desired to seek a return of ancestral land rather than a money award; the Crow Creek Sioux Tribe and the Santee Sioux Tribe were the only plaintiffs willing to accept the money settlement.

Id. at 282 n.1 (Newman, J., dissenting) (citations omitted) (citing *Sioux Tribe of Indians v. United States*, 8 Ct. Cl. 80, 86-90 (1985)).

lawyer. The prolonged pendency of this case does not justify the irregular procedure whereby it has been brought to an end."⁴⁷³

Although the Claims Court has not adopted the Model Rules of Professional Conduct, these rules have been adopted in over one-half of the states and detail basic norms regarding discharge of attorneys. While a client may be acting foolishly to do so, these rules permit discharge, even late in a proceeding.⁴⁷⁴ The only exceptions noted in Rule 1.16 involve appointed counsel, in which case "applicable law" may limit a client's ability to discharge his or her attorney.⁴⁷⁵

Admittedly, attempts to discharge counsel after thirty years of proceedings raise difficult issues, but there exists no reason why the Claims Court could not permit the tribe to dismiss its counsel. If the tribal counsel's contract with the tribe did not contain a provision for payment for services actually rendered, it would be within the power of the court to order restitution.

The 1988 decision in the Sioux 1868 treaty claim is the last of the ancient Indian property claims, but the decision has not in any real way resolved the underlying dispute just as the decisions in the *Sioux Nation Black Hills* and *Dann* cases have not resolved those disputes. At this time the tribes involved will accept no resolution that does not include the return of some of the land. Attempts to use the federal courts to assert possessory rights to the lands involved in these disputes have been unsuccessful,⁴⁷⁶ yet the dismissal of such lawsuits on various procedural grounds relating to finality has not

473. *Id.* at 283 (Newman, J., dissenting).

474. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1991) (stating when attorney may decline or terminate representation). Rule 1.16 states in part: "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . (3) the lawyer is discharged." *Id.* The comments to the Model Rules make clear that discharge can come at any point in the proceedings: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." *Id.* cmt. 4.

475. Nevertheless, the Model Rules do not appear to provide for an attorney to continue to represent such a client over the client's objections. Comment 5 notes only that discharge of an appointed attorney, if unjustified, may result in the client having to represent himself or herself. *Id.* cmt. 5. Comment 6 addresses situations in which the client is mentally incompetent or for other reasons "the discharge may be seriously adverse to the client's interests." *Id.* cmt. 6.

476. See *Western Shoshone Nat'l Council v. Molini*, 951 F. 2d 200, 203 (9th Cir. 1991) (dismissing suit seeking declaration that state wildlife regulations interfered with tribal property rights on grounds that Indian Claims Commission decision barred relitigation of all title issues whether against Federal Government, third parties, or states); *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143-44 (8th Cir. 1981) (dismissing suit asserting possessory rights on ground Indian Claims Commission Act provided exclusive remedy); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1409 (8th Cir. 1983) (applying res judicata to dismiss quiet title action).

provided a resolution either. Only a true agreement with these tribes hammered out between the Federal Government and the tribes authorized representatives including the return of some land will truly end these disputes.⁴⁷⁷

*C. Enforcement of Treaties: The Promise of Tsoosie v. United States*⁴⁷⁸

Many treaties made with Indian tribes remain in force and represent important repositories of tribal rights.⁴⁷⁹ These tribal rights are usually represented in claims law by the cases in which tribes rely on treaties recognizing tribal title as a basis for Fifth Amendment takings claims.⁴⁸⁰ In addition, section 1491 of the Tucker Act specifically grants jurisdiction for claims based on treaties.⁴⁸¹ In a recent case, the Federal Circuit upheld the Claims Court's determination that an 1868 treaty could serve as a basis for a claim brought under the Tucker Act. Nine treaties entered into between 1867 and 1868 contain clauses indemnifying tribes from harm caused by "bad men among whites":⁴⁸²

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the

477. At least one bill has been introduced to convey federally held land within the Black Hills back to the tribe, but to date such efforts have been unsuccessful. See S. 1453, 99th Cong., 1st Sess. (1985).

478. 11 Cl. Ct. 62 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987).

479. Congress can abrogate treaties with Indian tribes, although abrogation may create liability for a taking of property. See *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871) (rationalizing that Indian treaties shall be accorded no higher sanctity than international treaties); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (interpreting statute as not abrogating earlier treaty on theory that Congress would have stated its intention to abrogate more clearly because abrogation would subject it to liability). Until abrogation, however, treaties exist and create rights. See *United States v. Dion*, 476 U.S. 734, 738-40 (1986) (requiring clear evidence that Congress intended to abrogate Indian treaty); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (discussing treaty protecting off-reservation fishing rights with Indian tribe contract).

480. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980) (stating that abrogation of treaty recognizing title constituted Fifth Amendment taking).

481. *Hebah v. United States*, 428 F.2d 1334, 1338-40 (Cl. Ct. 1970) (explaining that, while Indian tribe can base treaty claim on 28 U.S.C. § 1505, individual can base suit on 28 U.S.C. § 1491, commonly referred to as "Tucker Act").

482. Treaty with the Kiowas and Comanches, Oct. 21, 1867, art. I, 15 Stat. 581, 581; Treaty with the Kiowa Indians, Oct. 21, 1867, art. IV, 15 Stat. 589, 590; Treaty with the Cheyenne Indians, Oct. 28, 1867, art. I, 15 Stat. 593, 593; Treaty with the Sioux Indians, Apr. 29, 1868, art. I, 15 Stat. 635, 635; Treaty with the Crow Indians, May 7, 1868, art. I, 15 Stat. 649, 649; Treaty with the Cheyenne Indians, May 10, 1868, art. I, 15 Stat. 655, 655; Treaty with the Navajo Indians, June 1, 1868, art. I, 15 Stat. 667, 667; Treaty with the Ute Indians, Mar. 2, 1868, art. VI, 15 Stat. 619, 620; Treaty with the Eastern Band of Shoshonees and Bannacks, July 3, 1868, art. I, 15 Stat. 673, 673.

offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.⁴⁸³

This clause was probably intended more for the protection of the offenders than to benefit the Indian tribes, but the promise to reimburse is clear and plain. Venita Tsosie, a Navajo woman, alleged that a Public Health Service lab technician, pretending to be a doctor, conducted a spurious physical examination on her which left her physically and psychologically injured. She filed an administrative claim under the Federal Tort Claims Act (FTCA),⁴⁸⁴ alleging both assault and battery by the technician and negligent hiring and supervision by the Public Health Service. The Department of Health and Human Services denied her claim against the hospital on the grounds that she failed to allege sufficient facts. As to her assault and battery claim, the Department denied it on the ground that the FTCA does not apply to intentional torts.⁴⁸⁵

Ms. Tsosie then filed a claim with the Department of the Interior, invoking the "bad men" clause. The Assistant Secretary denied the claim on the grounds that the clause was no longer operative. The Government's essential argument was that the purpose of the clause, to maintain peace, had been achieved, and thus the clause was no longer necessary because there was no present threat of warfare between the United States and the Navajo Nation.⁴⁸⁶ Such an argument, if adopted, could eviscerate all Indian treaties since the purpose of these treaties was to ensure peace between the tribes and the United States. Although the Claims Court rejected the Government's argument, it did so reluctantly, believing it was bound by precedent of the Court of Claims.⁴⁸⁷ Nevertheless, Judge Yock was so impressed by the Government's "innovative and able" arguments that he devoted several pages of the opinion to analyzing why he

483. Treaty with the Navajo Indians, June 1, 1868, art. I, 15 Stat. 667, 667 (emphasis added).

484. 28 U.S.C. §§ 2671-2680 (1988) (covering tortious conduct committed by federal employees acting within scope of employment).

485. *Tsosie v. United States*, 11 Cl. Ct. 62, 64 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987).

486. *Id.*

487. *Id.* at 70-71. The Court of Claims took jurisdiction over two claims based on the "bad men" clause, although in neither was the claimant ultimately successful. *Hebah v. United States*, 428 F.2d 1334, 1340 (Ct. Cl. 1970) (denying Government's motion to dismiss wrongful death action based on "bad men" clause); *Hebah v. United States*, 456 F.2d 696, 710 (affirming trial commissioner's findings against plaintiff on merits), *cert. denied*, 409 U.S. 870 (1972); *Begay v. United States*, 650 F.2d 288 (Ct. Cl. 1980) (affirming report unfavorable to plaintiffs by Department of the Interior), *cert. denied*, 450 U.S. 1040 (1981).

believed the precedent could be distinguished and why the Government's arguments should carry the day.⁴⁸⁸

Judge Yock had shown his impatience with Indian claims before, by ordering a tribe's attorney to settle a claim even though the tribe had attempted to fire the attorney.⁴⁸⁹ His opinion in *Tsosie* similarly indicates an impatience with Indian claims. He noted, for example, that the opening of the courts to Indian claims by the Indian Claims Commission Act and the availability of the Federal Tort Claims Act "supplanted the need for Indians to retain their bad men reimbursement provisions."⁴⁹⁰ In doing so, Judge Yock apparently did not notice the irony of holding out the promise of a FTCA recovery for an intentional tort, even though he had just noted that it only covered negligence actions. The court certified the question regarding the treaty for immediate appeal to the Federal Circuit.⁴⁹¹ The Federal Circuit voted not to hear the case in banc as requested by the Government, and the panel affirmed the Claims Court.⁴⁹²

In the last Indian law opinion he wrote before his death in 1990, Senior Circuit Judge Philip Nichols firmly rejected the Government's argument that the clause was no longer operative. Labeling a treaty clause obsolete because the tribe had maintained peaceful relations with the United States could permit the Government to argue that the tribe should now give up its land because keeping the peace was one of the purposes for creating the Navajo Reservation. The court rejected such an "ungracious" interpretation of the treaty, which was intended as a whole to "have a permanent impact on Navajo life."⁴⁹³ The Government also argued that the tribe's failure to rely on the "bad men" clause for nearly one hundred years after signing the treaty indicated that the treaty promise had lapsed. Judge Nichols noted, however, that the Government denied the

488. *Tsosie*, 11 Cl. Ct. at 65 (characterizing defendant's five arguments why plaintiff's "bad men" claim should not be reviewed by Court as "innovative and able"). The Government's five arguments were (1) the treaty's bad men reimbursement provision had to be implemented by further congressional action before it could be implemented; (2) the reimbursement provision was obsolete because the parties to the treaty intended the provision to expire; (3) specific language of article IV of the treaty precluded judicial review of the Department of the Interior's final decision; (4) the plaintiff's claim was based on tort law and the statute of limitations for such claims had expired; and (5) in the alternative, the equitable doctrine of laches should preclude judicial review in the Claims Court. *Id.*

489. *See supra* notes 58-62 and accompanying text (explaining that Oglala Sioux Tribe refused to renew their attorney's contract but Court of Claims would not let attorneys withdraw from case).

490. *Tsosie*, 11 Cl. Ct. at 70.

491. *Id.* at 76 (certifying question to Federal Circuit for appeal based on 28 U.S.C. § 1292(d)(2), as amended by § 125(b) of the Federal Courts Improvement Act of 1982).

492. *See Tsosie v. United States*, 825 F.2d 393, 395 (Fed. Cir. 1987) (explaining that court did not feel necessity of hearing case in banc).

493. *Id.* at 399.

Court of Claims jurisdiction to take any claims based on treaties with Indian tribes until 1949 when the offending language was removed from the Tucker Act.⁴⁹⁴ The court remanded for an administrative determination on the merits of the claim.

The *Tsosie* case holds out some limited promise for the tribes with treaties containing "bad men" clauses.⁴⁹⁵ Judge Nichols pointed out that the clauses applied not just to employees or agents of the U.S. Government, but to anyone under United States authority who harms Indians protected by the clause, including Indians who are not members of the tribe.⁴⁹⁶ Professor Robert Laurence urged tribal advocates to make greater use of the "bad men" clause as a weapon to remedy some of the on-reservation torts that have proved so difficult to remedy:

When corporations pollute tribal water sources or leave behind toxic waste dumps or fail to return mined land to a useable state, when lenders doing business on the reservation treat Indian borrowers unfairly, when lemons are sold or prices gouge buyers or consumers [are] cheated or harassed, when contracts are entered into and then ignored, when Indians are lied to or treated unfairly by non-members coming on the reservation: these are all, it seems to me, occasions of "bad men among the whites."⁴⁹⁷

Given the reluctance of the Claims Court to open the doors of the court to Ms. Tsosie's claim and the Government's efforts to limit liability, only time will tell whether the "bad men" clause can be given the expansive reading urged by Professor Laurence.

IV. STRUCTURE AND PROCESS

As discussed above, tribal disputes with the Federal Government can also be adjudicated in Article III federal courts, as long as the plaintiff tribe or group seeks equitable or injunctive relief.⁴⁹⁸ Nev-

494. *See id.* at 401 (referring to Act of May 24, 1949, ch. 189, § 88, 63 Stat. 102). The Act deleted a phrase that prevented cases based on treaties "with the Indians" from being heard in federal courts. *Id.* The court also held that, if the lack of jurisdiction rendered the treaty clause non-self-executing during the interim period, the 1949 statute cured the defect. *Id.* at 403.

495. *See Benally v. United States*, 14 Cl. Ct. 8 (1987) (dismissing "bad men" claim by Navajo molested by BIA employee because plaintiff's earlier filing in district court constituted election of remedies).

496. *See Tsosie*, 825 F.2d at 400 n.2 (explaining that "bad men" clause refers to all whites and nonwhites).

497. Robert Laurence, "Bad Men Among the Whites", 23 Am. Indian L. Newsl. (Am. Indian Law Ctr., Albuquerque, N.M.), Aug. 1990, at 9 (summarizing "bad men" clause and impact of *Tsosie* case).

498. *See supra* notes 183-95 and accompanying text (discussing jurisdiction in Article III federal courts). A recent Supreme Court decision holds out the possibility that Indian tribal advocates may be able to obtain federal district court jurisdiction by invoking the Administrative Procedure Act as a waiver of sovereign immunity, at least in a case in which the relief

ertheless, many claims against the Government seek and require a money damages remedy, including the kinds of cases discussed above: takings claims, claims primarily seeking payment of money for mismanagement of trust funds, and claims for compensation for breach of treaty. Even though equitable relief may be available to force the Government to manage tribal property properly, a tribe needs a damages remedy to recover for the loss it has incurred up to the time of judgment. The existence of a money damages remedy serves as a powerful deterrent to mismanagement, as Justice White noted in his dissent in *Mitchell I*.⁴⁹⁹ In fact, in an appropriate case, a tribe may want to bring both actions simultaneously to keep pressure on the Government and to ensure a complete remedy once liability is determined.

To make these strategic decisions, it is necessary to consider not only the substantive law applied in each court, but also the structure of that court and the process employed within it. In other words, if the old system appeared biased in favor of the Government in all cases or even only in Indian cases, does the new system remove the appearance or reality of bias, either because of the way it has been constituted or because of the procedures adopted? If not, should tribes try to avoid these courts even more than they do now? Or, is the alternative similarly flawed? If the formal rules applied in the system of Indian law are skewed against Indian interests such that the choice of forum has nothing to do with the outcome, the choice of forum would be less important to a tribe. Or, as happens in civil rights law generally in times like these, tribes would have to become attuned to nuances in substantive law that can be located in differences in structure or process, carefully selecting the appropriate forum, flawed as it is, for strategic purposes.⁵⁰⁰

requested can be fairly characterized as equitable, even though the result may be a release of funds looking very much like a money damages remedy. See *Bowen v. Massachusetts*, 487 U.S. 879, 905-12 (1988) (holding district court has jurisdiction over suit seeking declaratory and injunctive relief resulting in release of money due state under Medicaid program). Only time will tell whether *Bowen* has in fact broadened district court jurisdiction. Compare Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction after Bowen v. Massachusetts*, 40 CATH. U. L. REV. 571, 603 (1991) (arguing that *Bowen* should be limited to its facts because of congressional intent that Medicaid noncompliance cases be heard in regional court of appeals) with Richard H. Fallon, Jr., *Claims Courts at the Crossroads*, 40 CATH. U. L. REV. 517, 531-32 (1991) (approving of case as expanding federal court jurisdiction in cases involving challenges to administration of federal grant programs). Even if there is more room for concurrent jurisdiction in some cases, tribal claims for takings of property, claims for mismanagement of trust money, and claims for compensation under a treaty would remain classic actions for damages.

499. *United States v. Mitchell*, 445 U.S. 535, 550 (1980) (White, J., dissenting).

500. A tribe, for example, may choose to bring a mismanagement claim in federal district court because the APA clearly waives the doctrine of sovereign immunity for such actions. In addition, district courts may be more willing to apply principles of liberal construction of

This section of the Article will turn to the landscape created by the Federal Courts Improvement Act for the resolution of claims, focusing on questions of structure and process. Where relevant, I will note the differences between the old and the new system. The purpose of this inquiry is not to focus on differences between the old and new so much as to try to locate points that may affect the decision whether to litigate, and if so, in which court.

A. Adoption of the Federal Rules by the Claims Court

The Claims Court has adopted rules based on the Federal Rules of Civil Procedure.⁵⁰¹ Before adopting these rules, the Government strongly resisted compliance with discovery orders in trust accounting cases in both the Indian Claims Commission and the Court of Claims. The Federal Rules of Civil Procedure, however, permit the federal district courts to impose sanctions for refusal to comply with discovery. In *Manchester Band of Pomo Indians v. United States*,⁵⁰² the federal district court imposed sanctions by finding the Board's allegations to be true after the Government refused to answer interrogatories for over two years.⁵⁰³ By adopting Rule 37 along with the other federal rules regarding discovery, the Claims Court opened the door for sanctions against the Government.⁵⁰⁴

During the 1985 Federal Circuit Judicial Conference, a question from the audience exhibited a certain amount of disbelief that the Federal Circuit would get tough with the Government, at least in the case of Rule 11 sanctions.⁵⁰⁵ Judge Kozinski's frank answer ad-

ambiguous statutes to create enforceable trust duties. The Claims Court still regards the question of whether a claim is founded upon a statute to be jurisdictional. Thus, the court may be less willing to apply principles of liberal construction to determine whether an offered statute creates a trust relationship that can be enforced in money damages. Compare *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986) (en banc) (per curiam) (applying principles of liberal construction to find oil and gas statutes created trust relationship) with *Pawnee v. United States*, 830 F.2d 187, 189-91 (Fed. Cir. 1987) (finding similar statutory duties created relationship but construing statutory duties narrowly).

501. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 139(b)(1), 96 Stat. 25, 42 (amending 28 U.S.C. § 2503 (1992)).

502. 363 F. Supp. 1238 (N.D. Cal. 1973); see *supra* notes 188-94 and accompanying text (discussing *Manchester Band of Pomo Indians*).

503. *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1241 (N.D. Cal. 1973) (giving history of unsuccessful efforts to force compliance with discovery orders).

504. Cl. Cr. R. 37 (providing sanctions for failure to make or cooperate in discovery); see Sward & Page, *supra* note 2, at 406 (discussing court's adoption of federal discovery rules).

505. Alex Kozinski, Remarks at The Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 17, 1985), in 108 F.R.D. 465, 492-93 (1985) (addressing question regarding Rule 11 sanctions). Then Chief Judge Kozinski read aloud the following question from the audience: "Does the court feel free in appropriate cases to enter Rule 11 sanctions against the Justice Department and/or [Justice] Department attorneys? What about attorneys' fees?" *Id.*

dressed concerns about the role of the government attorney compared to a private attorney:

I suspect that there are some quasi-legal questions lurking in here. If there are, I don't mean here to preclude sanctions on the government if ever a case should arise. . . . [T]here is no reason why the Justice Department or any other litigant ought to be in a different position from the run-of-the-mill attorney or litigant.

. . .
The difficulty in dealing with Justice Department attorneys, as is sometimes the case with attorneys for private parties, is the question of who is in charge? . . . [T]he new person at the Department of Justice, is it the Assistant Attorney General? Who really is in charge?⁵⁰⁶

In 1989, the Claims Court imposed Rule 11 sanctions on the Government for misrepresenting that the BIA had begun an accounting of the tribe's trust funds, when in fact the BIA had done nothing to secure an accounting of the funds.⁵⁰⁷ Recognizing that the Justice Department attorney "at most is a cog in the entire procedure," the court declined to fine the attorney, but instead assessed costs and attorneys fees against the Government.⁵⁰⁸

The Claims Court has sanctioned a tribe by dismissing a multi-million dollar tribal claim with prejudice. The dismissal was overturned on appeal, however. Newly retained counsel for the tribe objected that the Government's outstanding settlement offer of \$13 million was too low, but objected to turning over expert reports to the Government, because doing so would prejudice the tribe's case in two related lawsuits.⁵⁰⁹ The court noted that imposition of a sanction on the client because of attorney misconduct should be a rare occurrence, but concluded that such dismissal was appropriate because the tribal counsel had been apprised of the court's orders and thus shared the blame.⁵¹⁰ The court concluded that its authority to dismiss with prejudice necessarily subsumed a lesser authority to enter judgment in an amount lower than the Government's last settlement offer. Although noting the novelty of this action, the

506. *Id.*

507. *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. United States*, 16 Cl. Ct. 158 (1989).

508. *Id.* at 166.

509. *See White Mountain Apache Tribe v. United States*, 6 Cl. Ct. 575, 585-86 (1984) (invoking CL. CT. R. 16(f), 37(b)(2)(C), and 41(b) to fix amount of judgment as sanction for failure to comply with pre-trial orders), *vacated and remanded*, 776 F.2d 1063 (Fed. Cir. 1985) (unpublished opinion).

510. *White Mountain Apache Tribe*, 6 Cl. Ct. at 580.

court set \$10 million as an appropriate recovery.⁵¹¹ In an unpublished opinion, the Federal Circuit vacated and remanded the Claims Court's judgment.

The Federal Circuit's adoption of the Federal Rules is not surprising given its status as a court of appeals on the same level with the regional courts of appeals in the federal system. Attorneys working in the area of civil rights have raised concerns about the relatively recent liberalization of Rule 11, permitting sanctions for frivolous appeals, in cases appealed to the regional courts.⁵¹² Although to date no Rule 11 sanctions have been imposed against tribes in Indian claims, the Federal Circuit has not hesitated to impose sanctions in other claims in which private parties seek remedies from the Government.⁵¹³ Commenting on the frequent use of Rule 11 sanctions in public employment cases, for example, Professor Robert Vaughn of the Washington College of Law of The American University cautioned the court that use of the device for legitimate purposes to keep the court's docket manageable can unduly discourage petitioners with claims "on the periphery of existing precedent or provisions."⁵¹⁴ Indian law has developed so rapidly in the 1970s and 1980s that caution should be used in imposing sanctions on cases raising novel legal issues or challenging bad law.

A federal judge noted the problem faced by attorneys trying to advocate changes in the law with a particularly apt example: "Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*."⁵¹⁵ Similarly, tribal advocates urging the funda-

511. *Id.* at 585 (noting that neither old Court of Claims nor Federal Circuit had approved of such sanction to date).

512. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989) (stating that disagreement exists among federal courts of appeals on almost all interpretation and policy questions arising under Rule 11); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1352-53 (1986) (concluding Rule 11 has potential to stifle creativity especially when employed in punitive manner); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 526 (1988-89) (arguing that enforcement of Rule 11 should be severely circumscribed).

513. See Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603, 640-43 (1985) (analyzing Federal Circuit's standard for imposing Rule 11 sanctions and describing it as "strict").

514. Robert G. Vaughn, Remarks at The Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (Apr. 23, 1986), in 112 F.R.D. 439, 464 (1986) (addressing risks involved in applying frivolous appeal sanctions).

515. *Eastway Constr. Corp. v. City of N.Y.*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986). The Claims Court has also adopted Rule 11. See generally Judge Christine Cook Nettesheim, Remarks at The Second Annual Judicial Conference of the United States Court of Appeals for

mental wrongness of rules like the *Tee-Hit-Ton* rule ought to have room to make such arguments without fearing the sanction of Rule 11.

B. *The Nonpublication Controversy*

The Federal Circuit has taken to the nonpublication rule⁵¹⁶ with a vengeance, publishing only one-third of its opinions in the early years. This change has not resulted in much of a difference as far as Indian claims are concerned, however, and may actually result in more of them getting published expeditiously. Because the old Court of Claims published every opinion, Indian claims attorneys grew accustomed to being able to read and cite every case. On the other hand, because of the length and volume of the old Court of Claims opinions, the official reporters were often two years behind. As a result, counsel became dependent on the West Publishing Company. As a profit-making enterprise, West selectively published opinions, and was loathe to publish Indian claims cases, especially appeals from the Indian Claims Commission Act.⁵¹⁷ According to Judge Nichols, the Court of Claims began making more dispositions by de facto unpublished opinions, called "Orders."⁵¹⁸ Although these orders were eventually published in bound volumes, they were not distributed along with other slip opinions and were consequently rather hard to locate. The Government, being defendant in all the Tucker Act cases, had easy access to these orders and the court itself often cited them, creating at the very least an appearance of unfairness.⁵¹⁹ At present, West publishes all the opinions of the Claims Court and the nonpublication practice of the Federal Circuit has not been used as frequently in Indian claims as it has in other areas under its jurisdiction.

C. *Appeals*

Adoption of the Federal Rules by the Claims Court and the Federal Circuit had several additional effects on claims cases. The Court

the Federal Circuit (Apr. 26, 1984), in 104 F.R.D. 207, 245 (1984) (discussing changes in court's rules to conform to Federal Rule 11).

516. FED. CIR. R. 47.8(a) (giving court ability to announce disposition of appeals in unpublished opinion or order).

517. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 913 (1986) (stating that West had "special antipathy" toward publishing opinions covering what they regarded as unpopular subject matter such as Indian claims under Indian Claims Commission Act).

518. *Id.* at 917 (stating that "Orders" were unpublished, but citable).

519. *Id.* Other concerns raised about nonpublication are that the courts will excuse a sloppy opinion by not publishing it or hide classes of cases that may reflect badly on the court.

of Claims did not have true appellate jurisdiction, except over Indian Claims Commission cases. But the creation of a trial division after *Glidden Co. v. Zdanok*,⁵²⁰ created the opportunity for frequent three-judge panel reviews of trial judge interlocutory decisions because the trial judges did not have authority to enter final judgments.⁵²¹ As a result, mistakes made by the trial judges could be quickly remedied. Counsel became accustomed to review by four judges before getting a final decision. In addition, the Court of Claims judges gained a fair amount of expertise in Indian claims because of the frequency with which they dealt with them. Much of this expertise, at least initially, was transferred to the Federal Circuit when seven Court of Claims judges became Federal Circuit judges. At present, however, no active judges remain from the Court of Claims.⁵²²

Under this new system, the standard of review of factual questions will necessarily be much more deferential to the court of first instance. The Claims Court has now adopted Rule 52(a) of the Federal Rules applying a clearly erroneous standard to appeals.⁵²³ The old Court of Claims panels, on the other hand, could correct trial judge's factual findings, applying only a standard requiring "due regard" for the trial court's facts.⁵²⁴ This change could result in a restriction on tribal claimants' abilities to obtain review of facts.⁵²⁵ Indian claims are often extremely difficult factually because of their scope and duration. A judge today, for example, has to decide how many of the three million acres taken in the late 19th century should be classified as farmland as of that date for purposes of determining the amount that would have been paid for such prime acreage. Such a determination is difficult at best for a judge experienced in handling Indian claims. Fortunately, the Federal Circuit appears sensitive to this concern. Recently, the court reversed a Claims Court judge's determination regarding the amount of acreage to be classi-

520. 370 U.S. 530 (1962).

521. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962) (holding that Court of Claims and Court of Customs and Patent Appeals are Article III courts, entitling their judges to constitutional protection in tenure and compensation and, thus, vesting them with power to sit in judgment in district courts and courts of appeals).

522. Several original Court of Claims judges retain senior status and have been sitting frequently because the circuit court is operating with less than a full complement of judges.

523. Cl. Ct. R. 52(a). Rule 52(a) states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."

524. See *Sward & Page*, *supra* note 2, at 406 n.139 (discussing standard of former Court of Claims for reviewing trial judge's decisions).

525. David V. Anthony, Remarks at The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 20, 1983), in 100 F.R.D. 499, 542-43 (1987) (discussing limited availability of appeals in Federal Circuit).

fied as farmland under the clearly erroneous standard and finally set the amount itself, thus raising the final award by \$731,250.⁵²⁶

There are other sides of these arguments, of course. Frequent interlocutory reviews by both sides was one of the systemic problems most criticized in the Indian Claims Commission and Court of Claims and was one of the reasons the cases lasted interminably.⁵²⁷ In refusing an interlocutory appeal by a tribe in a case in which the Claims Court had ruled in favor of the tribe in denying the Government's motion to dismiss, the Federal Circuit served notice that the days of easy appeals were over, even in cases transferred from the Court of Claims under the FCIA.⁵²⁸ In other words, the court has treated transfer cases as appeals from the newly created Claims Court, even if the appealed order had been made by a Court of Claims trial judge.⁵²⁹ Despite the loss of the chance for easy review of factual determinations, permitting fewer appeals must surely be a net gain in terms of efficiency and savings for tribal plaintiffs as well as for the Government.⁵³⁰

The Federal Circuit can mitigate concerns about inexperience by taking its duty to exercise appellate jurisdiction seriously and policing errors of law and at least clearly erroneous errors of fact. To date, there is no evidence that these differences have made any negative impact on the substantive law developed under the new system. The Federal Circuit has made corrections when Claims Court judges, inexperienced in Indian matters, have allowed their frustrations with the process to get the better of their judgment.⁵³¹

526. *Gila River Pima-Maricopa Indian Community v. United States*, 765 F.2d 160 (unpublished opinion), 12 Indian L. Rep. 2049, 2050 (Fed. Cir. 1985).

527. See Adams, *supra* note 2, at 63 (criticizing fact that litigants could stop case to get review of any dispositive motion); Newton, Note, *Trust Funds*, *supra* note 187, at 538-39 (criticizing cumbrance and slow procedures in Indian Claims Commission).

528. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 403(a), 96 Stat. 25, 57-58 (amending 28 U.S.C. § 2503 (1992)) (providing for transfer of pending claims).

529. See *Aleut Tribe v. United States*, 702 F.2d 1015, 1017, 1019 (Fed. Cir. 1983) (noting interlocutory appeals are more limited under FCIA).

530. See, e.g., Lurie, *supra* note 102, at 368-69 (noting that original tribal leaders responsible for bringing claims and many attorneys litigating claims had died during long pendency of cases).

531. See *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986) (reviewing forced settlement by Claims Court judge, *cert denied*, 482 U.S. 913 (1987)); *White Mountain Apache Tribe v. United States*, 776 F.2d 1063 (Fed. Cir. 1985) (unpublished opinion), *vacating and remanding* 6 Cl. Ct. 575 (1984); *Gila River Pima-Maricopa Indian Community v. United States*, 765 F.2d 160 (unpublished opinion), 12 Indian L. Rep. 2049, 2050 (Fed. Cir. 1985) (reversing factual determination as clearly erroneous).

*D. The Judges**1. Bias*

Nevertheless, it cannot be denied that Article III judges will have much less influence over Indian claims, while the old system provided for frequent oversight by Article III judges. This concern is only legitimate, of course, if there is reason to believe that Article III judges are more impartial than Article I judges.⁵³² The Indian Claims Commission and the Court of Claims were perceived to be pro-Government at worst, or behind the times or "strict constructionist" at best.⁵³³ This perception has not changed in some classes of cases, such as public employment cases, and it has not changed in Indian claims either. The Claims Court judges' status and the enormous influence the Department of Justice wields in their appointment and reappointment may explain this perception that the court is biased toward the Government. To begin with, the Department recommends persons to be appointed as Claims Court judges.⁵³⁴ The requirement of a recommendation for reappointment is an especially sore point with the judges because they only have fifteen-year contracts.⁵³⁵ The judges inevitably must consider their options after their term expires. As Chief Judge Smith candidly stated, "A judge may be unduly dependent on the Justice Department which is the appointment authority as well as the representative of the Defendant or looks to the Plaintiff Bar for employment; and that's just a situation that shouldn't prevail."⁵³⁶ Because Indian law claims firms are small in number, one suspects that the Government would appear to be a more likely employer for such a judge. Moreover, a judge who seeks reappointment must win the approval of the Department of Justice. That such a judge might at least unconsciously

532. See Judith Resnik, *From "Cases" to "Litigation,"* 54 *LAW & CONTEMP. PROBS.* 5, 60-61 (1991) (discussing tendency of Article III judges to encourage settlements to avoid lawmaking in complex cases).

533. See Lurie, *supra* note 102, at 364 (noting that first Indian Claims Commissioners, though able and sincere men, "made simplistic, inadvertently biased interpretations owing to their lack of awareness of the historical and cultural complexities underlying Indian grievances" and that Commissioner Watkins, appointed later because of his experience in Indian Affairs as advocate of program to terminate Indian tribes "had a lot of preconceptions, if no more cultural and historical understanding."). Despite this perception, toward the end of its existence the Court of Claims issued some very innovative decisions in the breach of trust area. Admittedly these opinions were greatly influenced by a parallel development occurring in the federal district courts. Nevertheless, they were potentially far-reaching. Arguably, the more recent Claims Court opinions have been much more like the old Court of Claims.

534. See Miller, *supra* note 4, at 58-59 (noting that President has authority to solicit written opinions from "Department heads" concerning qualifications of judicial appointees).

535. Loren A. Smith, Remarks at The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), in 128 *F.R.D.* 409, 460 (1989) (discussing lack of tenure system).

536. *Id.* (stating that lack of tenure forces judges into marketplace at end of term).

react to such pressure is not out of the question. The marginalization of Indian claims within the Claims Court's workload, the small number of attorneys working in Indian claims, and the remoteness of the court from the reservations may make the tendency to favor the Government almost irresistible. An Article III review court with little expertise or experience in Indian claims may not adequately correct this bias, especially given the specialist subject matter of the Federal Circuit. Since the Federal Circuit's creation, conservative presidents have been able to mold the court considerably. In short, it is unlikely that the Federal Circuit brings any special sensitivity to issues involving Indian claims.

2. *Background*

Despite the lack of tenure and its status as a stepchild, the Claims Court has attracted able judges. Unfortunately, most of the judges had no experience in Indian law before coming to the bench.⁵³⁷ In light of the focus of the court's work, it is doubtful that an attorney with special expertise in Indian claims law will ever be appointed.

Moreover, the Department of Justice, by virtue of being the Government's attorney, has a great deal of subtle control over the judges. One criticism of specialized courts is that it is easier to predict how judges will rule on specific issues than it is to make more general predictions about their behavior. This factor may impact on Indian claims in a more subtle manner than most might think. Given the small number of cases involving Indian claims that come before the court each year, it is unlikely that the Department of Justice would use any kind of litmus test regarding Indian issues. It is more likely that it would try to ascertain a judge's stance on particular issues that are a much greater part of the court's jurisdiction. Appointees to the Claims Court, for example, have included judges with backgrounds in government contracts and public employment law, subject matters that are frequently litigated.⁵³⁸ Other appointees tend to be attorneys from the Department of Justice⁵³⁹ or men

537. Judge Marian Blank Horn, appointed by President Reagan in 1986, served in various Department of Interior positions before being appointed to the bench. She did not serve in the Office of the Associate Solicitor for Indian Affairs, however, where most of the work on Indian issues takes place. She was Acting Solicitor for the entire department immediately before joining the court, however, so she should have had some familiarity with Indian issues.

538. *E.g.*, Judges Eric Bruggink (Merit Systems Protection Board); John Wiese (government contracts); and Robert Yock (government contracts).

539. *E.g.*, Judges Roger B. Andewelt (antitrust division) and Bohdan Futey (Foreign Claims Settlement Commission at Department).

and women who have labored in the political vineyards of the incumbent Republican administrations.⁵⁴⁰

The Federal Circuit judges have similar professional backgrounds.⁵⁴¹ Only two of the Federal Circuit judges and three of the sixteen Claims Court judges are women, and there is only one African-American judge on either court, Judge Reginald B. Gibson on the Claims Court. This pattern of racial and gender underinclusion on the claims courts, however, is on a par with the pattern of President Bush's appointees to the federal courts, 85% of whom are white males.⁵⁴² Assuming that members of traditionally subordinated groups might be more sensitive to cases involving similar groups, an Indian tribe might conclude that insofar as race and gender may make a particular forum more hospitable, these factors play no role in choosing between the district court and the Claims Court in a case presenting that choice.

Nevertheless, more subtle factors affect both the quality of judges and the quality of the judging, as noted in the introduction to this Article. Recall that the Court of Claims jurisdiction, including Indian claims, was made part of the new court system to counter the arguments that the Federal Circuit would be overly specialized. Chief Judge Loren Smith has protested frequently that the Claims Court is not a specialized court because of the diversity of its subject matters. Others have also labeled the Federal Circuit as generalist. As Ellen Sward and Rodney Page have stated, however, "[T]he Federal Circuit is 'generalist' only if one means by 'generalist' that it specializes in several areas.⁵⁴³ This point is very important in the context of Indian claims because Indian law is regarded as an obscure branch of the law containing special technical rules setting it apart from all other areas of law. This substantive law marginalization combined with the obscurity of the courts removes Indian

540. *E.g.*, Judges Robert Hodges (staff of Sen. Strom Thurmond); Moody Tidwell (Department of Interior under James Watt); Diane Weinstein (counsel to Vice President Quayle). Chief Judge Loren Smith had worked on the Reagan campaign and has been referred to as a "former administration utility player." Terry Carter, *After Bork, A Rift Widens*, NATIONAL LAW JOURNAL, Mar. 28, 1988, at 44. Chief Judge Smith is highly regarded as being both exceptionally able and open-minded by bench and bar alike.

541. The newer judges' expertise reflects the Federal Circuit's workload. *E.g.*, Glenn Archer (Department of Justice Tax Division); Alan D. Lourie (private patent law experience); Pauline Newman (same). Appointments with political backgrounds include Judge Paul R. Michel (Department of Justice Public Integrity Section, then prosecutor on staff of Arlen Specter in Philadelphia); S. Jay Plager (Office of Management and Budget).

542. Terence Moran, *Bush Judge Appointments: White, Male and Cautious*, THE CONNECTICUT LAW TRIBUNE, Feb. 4, 1991, at 2 ("The archtypal Bush judicial nominee is a white man in his mid-40s, active in Republican politics, removed from academic debate, with a net worth of upwards of \$1 million and some experience in government.").

543. Sward & Page, *supra* note 2, at 397.

claims even further from the critical scrutiny of the academic and progressive legal communities and from the glare of public opinion as well. Moreover, although the federal judiciary is increasingly conservative, the cross-fertilization of ideas that inevitably occurs in a court of general jurisdiction creates an atmosphere more conducive to bringing Indian law into the mainstream. It is no accident that the early cases holding the United States accountable for breach of trust were decided by federal district court judges. Although not familiar with Indian law, or even particularly over-sensitized to Indian issues, these judges were familiar with the basic principles of fiduciary law and did not hesitate to apply them to the Government.⁵⁴⁴

E. The Attorneys

1. The Department of Justice

Both the old and new claims courts are courts of nationwide jurisdiction, located in Washington, D.C., and obviously remote from most Indian communities. Although the Claims Court has experimented with holding trials outside of Washington and also using teleconferencing, most Indian claims are still litigated in Washington, D.C.⁵⁴⁵

The location of the courts is good for the Government, which is always the defendant in Indian claims cases. The security of a regular paycheck, not driven by the numbers and kinds of cases brought, frees Government attorneys to spend their time not on generating clients, but on working the Government's program. Moreover, the Department of Justice is in charge of the program and does not have to worry about rogue attorneys mucking up the process by filing or appealing the wrong kinds of cases. A central authority can call the shots, make a decision not to challenge a "bad" decision, or encourage the court to publish a particular opinion favorable to the Government. In the case of Indian claims, the Department of Justice argues consistently for the strictest possible interpretations of Tucker Act jurisdiction.

544. See *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973) (discussing Government's trust obligations to Indians); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 258 (D.D.C. 1973) (contending that regulation is arbitrary and capricious).

545. Some judges, however, do not like telephone conferencing, and even one who does, Judge Kenneth Harkins, has stated that, if he were the attorney in a case, he would prefer "the eye-to-eye contact." *Claims Court Reports Drop in Tax Cases, Increase in New Contract Cases*, Daily Report for Executives (BNA), Oct. 31, 1983, at G-1.

2. *The tribal advocate*

As noted, tribes have traditionally relied on a rather small group of Indian claims attorneys. The Indian Tucker Act provides for contingency fees for these attorneys. Obviously the purpose of this provision, which was also present in the Indian Claims Commission Act, was a progressive one: to enable tribes to retain good attorneys.

In recent years it has become fashionable to criticize all the claims lawyers as Washington hacks more interested in earning their ten percent contingency fee rather than helping Indian people.⁵⁴⁶ In a powerful dissenting opinion issued when he sat on the Court of Claims, Judge Philip Nichols forthrightly discussed the potential for conflicts of interest inherent in the contingent fee system for Indian claims, noting that "the attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself."⁵⁴⁷ Unfortunately, those participating in this debate tend toward extremes. Although an attorney may work for years on a big claim and receive only expenses, ten percent of a multimillion dollar judgment can be a powerful incentive if the attorney thinks the case is a good one.⁵⁴⁸ The truth, I believe, is that some lawyers served their Indian clients poorly, but many served them well while working within the con-

546. Vine Deloria has been the leading exponent of this point of view. See generally DELORIA, *BEHIND THE TRAIL*, *supra* note 24, at 226 ("The high moral purpose of settling the Indian claims boiled down in the end to a lucrative bonanza for a select group of attorneys possessing the special skills to practice Indian law . . .").

547. See *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1090 (Ct. Cl. 1981) (Nichols, J., dissenting) (claiming that Indian Claims Commission Act generates conflict of interest and predicting that these conflicts will grow larger in future).

548. See generally *Klamath & Modoc Tribes v. United States*, 1 Cl. Ct. 378 (1983) (awarding \$1,485,000 pursuant to contract with tribe, representing 9% of final judgment after 30 years' litigation); *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 1 Cl. Ct. 599 (1982) (awarding \$14,173, representing 10% of final judgment and 2266.5 hours of work for tribal client). After reading the book by his son, one could conclude that Arthur Lazarus, the attorney for the Sioux Nation, was nearly perfect, while the Sioux Nation's original attorney, hired in 1911 by elders of the tribe was completely incompetent. LAZARUS, *supra* note 25, at 228-31 (describing motion to reopen claim on grounds that attorney had been incompetent). Ralph Case, the original attorney, became an alcoholic and made some terrible mistakes later in the claim. But surely he was not the only claims attorney ever to lapse. Moreover, some of his earlier mistakes, as described by Mr. Lazarus, seem predicated on a not-completely irrational belief that having created the Indian Claims Commission, the Government would not fight the tribe at every step in court and also that the tribe would be entitled to full compensation for the lost land, including the value of the minerals. *Id.* at 148. Case believed that the tribe was entitled to the value of gold taken. *Id.* He based the ICC case on the fair and honorable dealings clause as the broadest basis for recovery, while dropping his claim for a Fifth Amendment taking. *Id.* at 191.

finer of the claims structure. In other words, it is the structure and not the attorneys working within it that has for the most part caused the problems. This structure has contributed to the marginalization of Indian claims. This marginalization serves the Government but not the Indian tribes. Moreover, it keeps rules, like that of *Tee-Hit-Ton*, hidden from the majority of people as an obscure rule of Indian property law that surely has no relevance in the modern world.

Until 1965, an Indian lawyer was either a claims lawyer or a Government lawyer because tribes were not able to sue on their own behalf in federal court. Just as judges can be captured by the program, so can attorneys. Nowhere is this problem more serious than in the remedial issues regarding land versus money. Given a choice between devising a remedy that might permit a tribe to keep its land, but which would have to be pursued locally and without the assurance of a contingent fee, an attorney could conclude in good faith that the tribe has no choice but to admit its land was taken and try to get the best judgment possible. Faced with a trial that may take decades, an attorney might be tempted to stipulate to a date of taking and an amount taken to avoid the trial, especially if the resulting judgment would be in the millions of dollars. An attorney thinks first of the familiar remedy, the one that will work; it is only human nature.

CONCLUSION

The single greatest influence on the development of modern Indian law was the opening of the federal courts to Indian tribes in 1965. At the same time, the Office of Economic Opportunity began to fund legal services programs on reservations and a summer program to help Indian students prepare for law school at the American Indian Law Center in Albuquerque, New Mexico. A new generation of attorneys began to bring two important and very new perspectives to the practice of Indian law: the Indian perspective and the generalist perspective. The federal district courts provided forums willing to listen to new doctrines in Indian law, in part because this explosion came at the heyday of judicial activism and in part because they were staffed by generalist judges ignorant of the intricacies of the formal rules developed in claims law jurisprudence.

Some of these cases, in turn, had a salutary impact on Indian claims in the claims courts. This impact, however, has not been far-reaching enough to result in significant changes for aggrieved tribes. Widening the array of courts to which Indians can bring their claims has simply not erased the rules that, by twists and turns,

seem so often to result in no recovery for Indian tribes. Having access to a federal court of general jurisdiction and the claims court, for example, was not sufficient to redress the grievances of the Navajo Tribe and tribal people arising from the uranium mining of Navajo land, described above.⁵⁴⁹ Lawsuits brought against the company by injured miners in Navajo tribal court were held to be beyond tribal jurisdiction.⁵⁵⁰ The miners sued the company in federal court, but were remitted to Arizona's workers' compensation scheme.⁵⁵¹ The miners next brought a Federal Tort Claims action against the U.S. Government. The Public Health Service had conducted a study which revealed high levels of exposure to radiation among Navajo miners. The miners sought recovery for negligence in failing to warn them about the dangers of radiation. Reluctantly dismissing the suit, the lower court felt it necessary to distinguish the human experimentation carried out in concentration camps in World War II, stating, "The PHS physicians were not studying human beings. They were gathering data" ⁵⁵² The court noted that, while "[t]his tragedy of the nuclear age . . . cries out for redress," ⁵⁵³ the discretionary function exception to the waiver of sovereign immunity in the Federal Tort Claims Act⁵⁵⁴ barred the suit. Finally, the tribe sued the Federal Government in the Claims Court, arguing that the failure to seal abandoned mines and to contain the uranium tailings was a breach of trust and constituted a continuing wrong within the jurisdiction of the Indian Claims Commission Act. The

549. See *supra* notes 9-13 and accompanying text (discussing problems arising from leasing tribal lands and negative effects of uranium mining on those lands).

550. *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 363 (D.N.M. 1981) (sustaining injunction against tribal court jurisdiction, holding tribal jurisdiction does not extend beyond boundaries of reservation); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1047, 1051 (D. Ariz. 1981) (holding that tribe is without power to exercise jurisdiction because UNC conduct occurred off reservation).

551. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982). Federal law and policy dealing with Indian affairs usually preempts application of state law on Indian reservations. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (stating that exercising state jurisdiction would infringe on Indians' right of self-governance, thus motion to dismiss state jurisdiction was granted). The Ninth Circuit, however, held that a federal statute permitted the application of state workers compensation laws on Indian reservations. *Begay*, 682 F. 2d at 1319 (citing 40 U.S.C. § 290).

552. See *Begay v. United States*, 591 F. Supp. 991, 1012-13 (D. Ariz. 1984) (sustaining dismissal due to lack of subject matter jurisdiction since alleged acts of government officials were shielded from tort liability by discretionary function exception to Federal Tort Claims Act), *aff'd*, 768 F.2d 1059 (9th Cir. 1985).

553. *Id.* at 1013. The court stated that decisions such as the failure to warn in conducting a public health study reflect the kinds of social, economic, and political decisions that come within the exception. *Id.* Federal regulations also authorized the Surgeon General to withhold information upon a determination that doing so would further the public interest. *Id.* at 1011 (quoting 42 C.F.R. § 1.103(c)(2)).

554. 28 U.S.C. § 2680(a) (1988).

Claims Court rejected the attempt as untimely.⁵⁵⁵ Although it had no jurisdiction, the court went on to note its conclusion that even if there were jurisdiction, the plaintiff had not proved any injuries resulting from the tailings or depreciation of its land values.

After the courts failed completely to give any remedy for this wrong, Congress enacted a law to set up a mechanism to dispose of all tailings in the Western states.⁵⁵⁶ Finally, in 1990, Congress enacted the Radiation Exposure Compensation Act,⁵⁵⁷ which provides a \$100 million pool for miners and those downwind exposed to radiation. Although this legislative action is promising, it is notable that more non-Indians were affected by uranium mining practices in the West than Indians. The convergence of interests had more to do with the legislative remedy than the specific wrongs to the Navajo people. Nevertheless, Congress has been sympathetic to Indian tribes' attempts to regain land and protect resources, even after unsuccessful litigation.⁵⁵⁸

That substantive Indian law has not served Indian tribes well is hardly an earth-shaking conclusion. That much of this law has been created in the claims courts may be one reason that the rules are tolerated. Recently, scholars whose primary work is outside the field of Indian law have become interested in the field, in part be-

555. See *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 269 (1985) (noting that uranium had not been processed before 1954). The court also noted there was no evidence that the Government had been motivated by self-dealing, or had sufficient knowledge of the dangers of radiation to impose a fiduciary duty on the Government. *Id.* at 270 n.42.

556. See generally *Uranium Mill Tailings Radiation Control Act of 1978*, Pub. L. No. 95-604, 95 Stat. 3021 (codified as amended at 42 U.S.C. §§ 7901-7942) (providing for cleaning up radiation sites in Western states by 1994).

557. *Radiation Exposure Compensation Act*, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified at 42 U.S.C. § 2210 note). Mary Helmlinger-Jones, a third-year student at The American University, Washington College of Law, has written an excellent seminar paper giving the full background of the Navajo struggle to gain remedies through the courts and Congress. Mary S. Helmlinger-Jones, "Lo Doo Naa Zihii": *The Sore that Never Heals* (Jan. 1992) (unpublished paper on file with *The American University Law Review*).

558. In a congressional reference case, for example, the Claims Court held that the Alabama-Coushatta Tribe of Texas had not established that they held exclusive title to land in Texas, and even if they had, the lands were taken by Mexico, the Republic of Texas, and other third parties, with no evidence that the Government had been responsible. *Battise v. United States*, 12 Cl. Ct. 427, 434 (1987) (Congressional Reference No. 3-83). Subsequently, Congress authorized the restoration of the Alabama Coushatta Tribe as a tribe with a government-to-government relationship with the United States and also authorized a payment of \$1.3 million. Act of Aug. 22, 1988, Pub. L. No. 100-411, 100th Cong., 2d Sess., 102 Stat. 1097; see also *Main Indian Claims Settlement Act of 1980*, 25 U.S.C. §§ 1721-1735 (establishing settlement fund of \$27 million; land acquisition fund of \$54.5 million); John F. Martin, *From Judgment to Land Restoration: The Havasupai Land Claims Case*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 271, 271 (Imre Sutton ed. 1985) (noting return of 185,000 acres to reservation and grant of exclusive use for traditional purposes of 95,300 acres of National Forest).

cause of their reactions as scholars to Supreme Court cases that have been fairly widely publicized.⁵⁵⁹

My hope is that readers of this Article will understand that the voluminous records of the Indian Claims Commission, the Court of Claims, and the claims courts raise questions of deep importance to those who care about the rule of law. The cases discussed in this Article raise questions about the impact of court structures on the development of the law; the role of excess formalism and the impact of neutral rules in the law relating to minority groups; the reasons why rules of formal inequality are tolerated when they burden Indian tribes, but not other groups; the resistance to protecting separate communities under American law; the importance of history in dispelling myths about present power allocations; the use and misuse of historical and anthropological data in the litigation process; the role of the lawyering process including the difference between styles of lawyers that can be studied in the same case over a forty-year period during which counsel may change several times; and the appropriate role for white lawyers representing outsider groups.⁵⁶⁰ In particular, the cases represent stories not just of individual persons but of peoples who continue to struggle to maintain their right to exist separately in a world still waiting for them to assimilate. The claims from which these stories spring represent ancient grievances as well as recent wrongs. By listening to these stories carefully and relating them to those in power, it may be possible to begin to work through to real resolutions of Indian grievances, resolutions that involve some land and recognition of real power.

559. See generally Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (criticizing complacency of much of then-existing Indian scholarship); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991) (discussing mutual recognition of legal communities' authority, legitimacy, and juridical dignity); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) (examining forces that created tribal rule that discriminates based on gender); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (criticizing transformation of sovereignty into property issues and vice versa to disadvantage Indian interests).

560. Literature regarding the lawyering process, for example, has enriched my understanding of the complexities of the attorney-client relationship. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (criticizing civil rights lawyers for failing to respond to shifts in parental priorities in school desegregation cases); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) (discussing pros and cons of client-centered counseling and opting for latter model which results in richer counseling between lawyer and client); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (recounting history of Black South African village, Driefontein, and lawyer models, which seek to empower villagers); see also Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (reflecting on impact of "an inner circle of about a dozen white, male writers" regarding development of civil rights law).