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The "trust" relationship between the federal government and the Indians has been an evolving doctrine in Indian law. Initially, fiduciary language was used to describe a political and moral relationship between the government and Indians. Over the years, courts have cited the federal-Indian "trust" relationship as authority in several different contexts: to justify governmental exercise of power over Indian affairs, to check the authority of governmental officials, and to place an affirmative duty on the government to act on behalf of Indians. In addition, Congress has enacted statutes that contain both general and specific trust language.

1. Courts and lawyers use the term "trust" in a variety of senses. 1 A. Scott, THE LAW OF TRUSTS § 2 (3d ed. 1967). Throughout this Note, the term "trust" is used loosely to refer to the relationship between the federal government and Indians. Caution is required when using the term "trust" loosely because there are a number of relationships that resemble trusts. These other relationships are not, however, trusts in the narrower sense of the term, and many of the principles that are applicable to trusts are not applicable to the other relationships. Id. § 4A.


3. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (federal government has "moral obligations of the highest responsibility and trust"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831) (relationship described as that of a ward to a guardian; tribes are distinct political societies, "domestic dependent nations").

4. See, e.g., United States v. Candelaria, 271 U.S. 432, 440-41 (1926) (Pueblo Indians and lands subject to legislation of Congress enacted in exercise of the government's guardianship over the Indian tribes and their property); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (federal government has power to dispose of Indian land as guardian of the tribe); United States v. Kagama, 118 U.S. 375, 384 (1886) (Indians' position of weakness and helplessness gives the federal government the duty and the power to protect them).

United States v. Candelaria was the last case to cite the trust relationship as an independent source of power. Since then the Constitution has been cited for providing Congress with power over Indian tribes. U.S. CONST. art. I, § 8, cl. 3 (Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see F. COHEN, FEDERAL INDIAN LAW 207-28 (1982).


6. See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (affirmative federal duty to investigate and take action to protect Indians' right of occupancy); White v. Califano, 437 F. Supp. 543, 555 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978) (affirmative federal duty to pay hospital costs of an indigent Sioux when tribal court committed the Sioux to a state hospital).

Recently, plaintiffs have relied upon the federal-Indian trust relationship more often to provide a legal basis for holding the federal government liable in money damages for breach of its trust duties. In *United States v. Mitchell* (*Mitchell II*) the Supreme Court affirmed a Court of Claims decision holding the United States accountable in money damages for breach of fiduciary duties in its management of forest resources on allotted lands of the Quinault Reservation. Although it had rejected a similar claim by the same plaintiffs based on the General Allotment Act, the Court found that timber management statutes and regulations created governmental duties that implicitly required compensation for breach.

This Note will examine the elements of a money damages claim against the government for breach of trust in light of *Mitchell II*. It will first explore the grounds on which Indian plaintiffs may rely to establish fiduciary duties owed them by the government. It will then evaluate the Court's analogy to the common law of trusts to find that the government is liable in money damages for a breach of these duties.

I. BACKGROUND

The Quinault allottees filed actions in the Court of Claims under the...
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Tucker Act seeking money damages from the United States for alleged waste and mismanagement of timber lands on the Quinault Reservation. They claimed that the government had failed to obtain a fair market price for timber sold, failed to pay interest on certain funds, failed to manage timber on a sustained yield basis, failed to develop a proper system of roads and easements, and exacted improper administration fees. The allottees claimed that this mismanagement was a breach of the United States' fiduciary duty owed them under various federal statutes. The allottees brought their suit for money damages in the Court of Claims asserting Tucker Act jurisdiction.

A. Tucker Act Jurisdiction

Congress enacted the Tucker Act to give the Court of Claims jurisdiction to hear claims against the United States for money damages. Congress later enacted the Indian Tucker Act, allowing the Court of Claims to hear tribal claims that would be cognizable in the Court of Claims if the claimant were not an Indian tribe. Courts have construed the Tucker Act to require claimants to establish (1) a federally recognized substantive right that (2) can be fairly interpreted as mandating compensation. The

17. Id.
18. Id.
19. Id. The Court of Claims in Mitchell v. United States, 591 F.2d 1300, 1302 (Ct. Cl. 1979), concluded that the General Allotment Act created a fiduciary duty of the United States to manage the timber resources properly. The Supreme Court reversed and remanded in Mitchell I, 445 U.S. 535, 542 (1980), holding that the General Allotment Act created only a limited trust relationship that did not impose any duty on the government to manage timber resources, and that any right to money damages must be found in some other source of law. Id. at 546 n.7. In Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), the Court of Claims once again ruled for the allottees and held that the timber management statutes implicitly require compensation for damages sustained as a result of the government's breach of its duties. The Court affirmed this decision in Mitchell II, 103 S. Ct. at 2965.

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1) (1982). The Tucker Act also provides concurrent jurisdiction in the district courts over claims not exceeding $10,000. Id. § 1346(a)(2).

first element is derived from the sources of law listed in the Tucker Act; the Tucker Act does not of itself create any substantive rights. Therefore, these other sources of law must create a substantive right in a claimant. The second element requires that the substantive right be "fairly interpreted as mandating compensation." Thus, only claims for money damages under these substantive rights are cognizable under the Tucker Act.

B. The Mitchell I Opinion

In United States v. Mitchell (Mitchell I), the allottees argued that the General Allotment Act created a fiduciary obligation requiring the government to compensate them for timber mismanagement. The Court denied the claim. The Court first held that the Tucker Act itself does not waive sovereign immunity. Rather, waiver must be found in the source of law relied upon for the substantive claim.

The Court then held that the General Allotment Act does not establish a right to recover money damages against the United States. Although the Act provides that the United States will hold land "in trust" for Indian allottees, the Court held that the Act created only a limited trust relationship. The Court found that the Act does not impose any fiduciary management duties on the government, nor render it liable for breach.

Prior to Mitchell II, the Court reasoned that the Tucker Act did not waive sovereign immunity; waiver had to be found separately in the source of law on which the claim was brought. See infra Parts IB, II.

24. The Tucker Act lists several sources of law for which it provides jurisdiction. See supra note 20. Most claims brought for money damages against the United States for breach of trust have been based on either an act of Congress or a regulation of an executive department.


27. Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967); see also Mitchell II, 103 S. Ct. at 2968; United States v. Testan, 424 U.S. at 400. The Court in Eastport S.S. Corp. gave examples of two types of claims that would fall within Tucker Act jurisdiction. The first is where the plaintiff has paid money over to the government and seeks its return. The second is where the plaintiff alleges that the law entitles the plaintiff to be paid a certain sum, either expressly or by implication. 372 F.2d at 1007–08.


30. Id. at 538.

31. Id.; see infra Part II (discussion of this issue in Mitchell II).


35. Id. at 544. The Court stated that the purpose of the Act was to prevent improvident alienation of the allotted lands and to assure the immunity of the lands from state taxation. Id.
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Having begun the opinion with a search for a statutory waiver of sovereign immunity, the Court used principles of strict construction appropriate to finding such a waiver. The Court did not then consider whether the General Allotment Act constituted a waiver of sovereign immunity, yet it continued to use strict construction in interpreting the General Allotment Act. Using strict construction principles, the Court found that the language of the Act did not "unambiguously provide" that the United States had undertaken a fiduciary duty to manage the allotted lands. Therefore, after Mitchell I, commentators feared that claimants could no longer rely on courts to liberally construe statutes as imposing trust duties on the government. The Court remanded the case to the Court of Claims to consider other statutes that may have created governmental management duties.

II. THE MITCHELL II OPINION

The Mitchell II Court affirmed the Court of Claims decision that the timber management statutes impose fiduciary duties on the government that impliedly require compensation for breach. The Court reached this holding for several reasons. First, the Mitchell II Court held that the United States has presumptively consented to suit for claims under the Tucker Act. The Court thereby overruled the Mitchell I holding that a waiver of sovereign immunity must be found separately in the source of law on which a claim is brought under the Tucker Act.

The Court next held that the timber management statutes and regula-

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36. Id. at 538; see also Newton, supra note 2, at 657.
38. Id. (Act does not unambiguously provide that United States has undertaken fiduciary duties); see also Newton, supra note 2, at 644.
40. After the strict construction approach taken by the Court in Mitchell I for claims based on statutes, commentators looked to other sources in the Tucker Act as possible authority for breach of trust claims.
43. Id. Interestingly, Justice Marshall was the author of both Mitchell I and Mitchell II.
tions\(^4\) created substantive rights in the allottees.\(^5\) The Court contrasted the fiduciary duties created by the forest management statutes to the "bare" trust created by the General Allotment Act relied on by the allottees in \textit{Mitchell I}.\(^6\) It found that the more specific statutes relied on in \textit{Mitchell II} clearly make the federal government responsible for managing Indian resources for the allottees' benefit.\(^7\)

Additionally, the Court adopted the Court of Claims' reasoning that where the government assumes control or supervision over property belonging to the Indians a fiduciary relationship necessarily arises.\(^8\) The Court apparently offered the control rationale as an independent ground for finding a fiduciary duty.\(^9\) In doing so, the Court reasoned that all of the elements of a common law trust were present.\(^10\)

After concluding that a substantive right had been created, the Court analogized to the common law of trusts to hold that the statutes and regulations mandated compensation.\(^11\) The Court reasoned that liability in money damages naturally follows when a trustee breaches a fiduciary duty.\(^12\) In addition, the Court relied on prior precedent recognizing a damages remedy when the government breaches its trust relationship with an Indian or Indian tribe.\(^13\) The Court also reasoned that a damages remedy furthered the purpose of the statutes, and that prospective equitable remedies were totally inadequate.\(^14\) The Court therefore allowed the allot-
tees to proceed with their claims, and remanded the case to the Court of Claims for further proceedings.

The dissent argued that the majority departed from clear precedent in holding that the Tucker Act waives sovereign immunity. In addition, the dissent disagreed with the conclusion that the timber management statutes imposed management duties on the government that could fairly be interpreted as mandating compensation. The dissent would have strictly construed congressional intent in interpreting the statutes. Finally, the dissent argued that the majority was applying bootstrap reasoning to find that liability followed from breach of trust duties by analogizing to the common law of trusts.

III. ANALYSIS

After Mitchell II, it is unclear what will establish a substantive right in breach of trust cases. After a right is established, however, under Mitchell II the right will be found to mandate compensation by analogizing to the common law of trusts. The first section of this analysis examines the substantive right requirement of the Tucker Act in light of Mitchell II. The second section evaluates the Mitchell II Court's analogy to the common law of trusts in holding that a substantive right can be fairly interpreted as mandating compensation.

A. The First Requirement: Substantive Right

In breach of trust cases, the substantive right that claimants must establish is a governmental fiduciary duty. The Mitchell II Court held that the statutes and regulations at issue clearly established fiduciary duties in the management of Indian timber resources. The Court also held that a fiduciary relationship arises when the government assumes control over Indian property. Thus, there are two possible sources of fiduciary duties—statutes and assumption of control. In the first, a court could take a strict construction approach to find a fiduciary duty, or it could infer a

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56. Id. at 2975–77.
57. Id.
58. Id. at 2977–78.
60. Id. at 2972.
61. A final source of a substantive right may be an affirmative duty on the part of the government to take action where no statutory management scheme exists. See cases cited supra note 6. The discussion of an affirmative duty is beyond the scope of this Note, which examines only money damages as a remedy for malfeasance of duties.
duty from the statutory scheme. Under the strict construction approach, however, most claims would fail. More logical and equitable results would be reached by inferring a duty from a statute or by finding a duty in the second source—governmental assumption of control in an area of Indian affairs. *Mitchell II* contains support for these latter two approaches.

1. **Statutory Basis**

In determining whether particular statutes impose fiduciary duties toward Indians, prior courts have examined the plain language of the statute or regulation, its legislative history, and the rules of construction applicable to Indian law. In evaluating these indicia of congressional intent, the majority and dissent disagreed over the level of scrutiny to be applied in *Mitchell II*. The *Mitchell I* Court reasoned that the language of the provisions directly supports the existence of a fiduciary relationship, as does the legislative history, and rules of construction. The dissenting judges, however, disagreed with each of these findings. These rules of construction are not limited to treaties. The policy of the rules is rooted in the trust relationship between the United States and Indian tribes.


These rules of construction are not limited to treaties. The policy of the rules is rooted in the trust relationship between the United States and Indian tribes.

65. The *Mitchell II* Court reasoned that the language of the provisions directly supports the existence of a fiduciary relationship, 103 S. Ct. at 2972, as does the legislative history, *id.* at 2969–71, and rules of construction, *id.* at 2972. The dissenting judges, however, disagreed with each of these findings. *Id.* at 2975–77 (Powell, J., dissenting).

66. *Mitchell I*, 445 U.S. at 538, 542 (General Allotment Act does not "unambiguously provide" that the United States has undertaken management responsibilities).

where a statute or regulation expressly creates trust responsibilities and specifically provides that the United States will be liable in money damages for breach.

The majority in Mitchell II inferred congressional intent to create fiduciary duties from the existence of a comprehensive statutory management scheme.\(^{68}\) The Mitchell II Court distinguished the General Allotment Act relied on in Mitchell I from the timber management statutes before it. According to the Court, the more particular statutes clearly gave the government detailed responsibilities in managing Indian timber.\(^{69}\) In contrast, the Court found that the General Allotment Act created no particular management duties.\(^{70}\) Thus, it appears that the statutory scheme relied upon must delineate management duties.

In addition, rather than require express fiduciary language, the Mitchell II approach relies on both the "general trust relationship" between the federal government and Indians\(^{71}\) and the liberal rules of construction applicable to Indian law\(^{72}\) in finding a fiduciary duty. Thus, the presence or absence of trust language is not dispositive.\(^{73}\) Indeed, the Court in Mitchell II reaffirmed its Mitchell I conclusion that the General Allotment Act creates only a limited trust relationship,\(^{74}\) despite the language in the

\(^{68}\) Mitchell II, 103 S. Ct. at 2972.

\(^{69}\) Id. at 2971–72.

\(^{70}\) Id. at 2964–65 (quoting Mitchell I, 445 U.S. at 542). The Court in Mitchell I held that the trust language of the General Allotment Act served only to prevent improvident alienation of the allotted lands and to assure their immunity from state taxation. 445 U.S. at 544.

\(^{71}\) The Court in Mitchell II recognized the "undisputed existence of a general trust relationship" between the Indians and the United States. 103 S. Ct. at 2972.

At least one court has used this relationship as the sole basis for a breach of trust claim. Cramer v. United States, 261 U.S. 219, 229 (1923) (fact that Indians' right of occupancy of lands finds no recognition in any statute or other formal governmental action is not conclusive; under the circumstances, the right flows from a settled governmental policy). Other courts have also tended to base holdings for breach of trust claims on the general trust relationship; however, in those cases there were also general statutes in the background. See People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979); Eric v. Secretary of United States Dep’t of Hous., 464 F. Supp. 44, 46–47 (D. Alaska 1978) (action under governmental assistance statute, but court recognized the trust relationship as a common law doctrine); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973) (general federal trust duties are based on the vast amount of case law and the detailed statutory scheme for Indian affairs in 25 U.S.C.), rev’d on other grounds, 499 F.2d 1095 (D.C. Cir. 1974); Edwardsen v. Morton, 369 F. Supp. 1359, 1375 (D.D.C. 1973); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243, 1247 (N.D. Cal. 1973).

\(^{72}\) See supra note 64.

\(^{73}\) The underlying statute or regulation need not actually use the word "trust" to create fiduciary duties. Mitchell II, 103 S. Ct. at 2972 (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Cl. Ct. 1980)). This position had been taken by the Court of Claims. See, e.g., American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Cl. Ct. 1981), cert. denied, 456 U.S. 989 (1982); Duncan v. United States, 667 F.2d 36, 41–43 (Cl. Ct. 1981), cert. denied, 103 S. Ct. 3569 (1983); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Cl. Ct. 1980); Cherry v. United States, 594 F.2d 795, 799–800 (Cl. Ct. 1979).

\(^{74}\) Mitchell II, 103 S. Ct. at 2971–72.
General Allotment Act that lands are held "in trust for the sole use and benefit of the Indian." 75

Although the Court reached the same conclusion regarding the Act in each case, it took a different approach to finding a fiduciary duty in each. Under the analysis of Mitchell I, a statute must "unambiguously provide" that the United States has undertaken a fiduciary duty. 76 Using this standard, the Court held that the General Allotment Act did not create a fiduciary duty. Under Mitchell II, however, a more liberal approach to finding a fiduciary duty was adopted. A detailed statutory management scheme will create fiduciary duties, 77 as will the government's assumption of control in Indian affairs. 78 Because neither of these theories was applied to the General Allotment Act, Mitchell II could be interpreted as affirming the decision that the General Allotment Act created no fiduciary duty.

The Mitchell II Court's approach is clearly preferable to that taken in Mitchell I. The Mitchell I Court's strict analysis is inconsistent with the liberal rules of statutory construction applied elsewhere in Indian law. 79 In addition, if statutes and regulations must "unambiguously provide" that trust responsibilities have been created, many claims would fail to meet the statutory test. Although the outcomes in the two cases can be reconciled, the strict construction approach of Mitchell I cannot be reconciled with the more liberal approach taken in Mitchell II and should be rejected. 80

The Mitchell II Court did not, however, determine how extensive a statute must be in delineating governmental duties before it will state an enforceable claim for money damages. The Court's acknowledgement of a general trust responsibility and of the liberal rules of construction applicable to Indian law suggest that detailed delineation of management duties might not always be required. In fact, the Court recognized elaborate control by the government over Indian property as an independent basis for its finding of a fiduciary duty. 81 This reasoning suggests that no spe-

77. Mitchell II, 103 S. Ct. at 2972.
78. See infra Part II A2.
79. See supra note 64; see also supra notes 36-40 and accompanying text.
80. Although the Court in Mitchell II overruled the holding of Mitchell I that the Tucker Act does not provide a waiver of sovereign immunity, 103 S. Ct. at 2967, it did not expressly reject the strict construction approach the Mitchell I Court took in holding that there was no fiduciary duty.
81. Mitchell II, 103 S. Ct. at 1961; see infra Part II A2; see also Duncan v. United States, 667 F.2d 36, 42-43 (Ct. Cl. 1980) (federal trust need not spell out all duties of the government due to the history of the governmental fiduciary obligation in management of Indian property—broad scale congressional establishment of trust is enough), cert. denied, 103 S. Ct. 3569 (1983). The Duncan court
specific statutory basis would be required to create a fiduciary duty in some cases. This will provide for an equitable solution in many cases, as most statutory schemes in Indian affairs are not as detailed as the timber management statutes.\footnote{Most statutes that regulate Indian affairs do not delineate specific management duties or provide for money damages as a remedy for mismanagement. See Newton, supra note 2, at 681. Mineral leasing statutes, however, also provide some detailed statutory regulation. See 25 U.S.C. §§ 396(a)-(g), 398, 398(a)-(c) (1982).}

2. Assumption of Control

Statutes are not the only sources of substantive rights. The \textit{Mitchell II} Court stated as an independent rationale for its decision that a substantive right exists because "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians."\footnote{Id. at 43 n.10.} \textit{Mitchell II} did not deal solely with this situation because a detailed statutory scheme was also present. Subsequent courts, however, may use this reasoning to hold that a substantive right need not require a detailed statutory scheme. In fact, the Court of Claims had adopted this reasoning prior to \textit{Mitchell II}, in a decision that was cited with approval in \textit{Mitchell II}.\footnote{Id. (citing Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980)).}

Two uncertainties exist in the application of assumption of control as a source of a fiduciary duty. First, the source of the substantive right must fit within Tucker Act jurisdiction. Second, it is unclear how much "control" is required before a right will be created.

The Tucker Act does not include federal common law as a basis for a substantive right.\footnote{See supra note 20.} However, there are two theories by which a plaintiff could bring an assumption of control claim under the Tucker Act. First, the general trust relationship could provide the statutory source of substantive law if the relationship is found in the many statutes, treaties, and regulations dealing with Indians.\footnote{See, e.g., 25 U.S.C. (1982); see also infra text accompanying note 88.} Second, a general statute in an area of

\footnote{Further, the Court in \textit{Mitchell II} emphasized the existence of a general trust relationship between the government and Indians. 103 S. Ct. at 2972. Although the general trust relationship alone prob-
Indian affairs could be held to apply in most cases. However, neither a
general statute nor the general trust relationship is likely to support a
claim for money damages for a breach of duty. Nevertheless, either could
provide the source of law on which to base the right, and the govern-
ment's assumption of control could define the contours of the right.

Assumption of control by the government is necessary in order to hold
the government liable for breach of trust where there is no detailed statu-
tory scheme. It would be difficult to show that the general trust relation-
ship or a vague statute imposes any specific fiduciary duties on the gov-
ernment. Where there is nothing from which to define a duty, a court
would not likely be willing to find the government liable in money dam-
ages for breach of trust. In addition, it would be difficult to decide which
Indian interests should be protected. For example, prior courts have been
reluctant to extend the trust doctrine to include a duty to protect a tribe's
autonomy, governmental powers, or actual identity. 87

However, once the government has assumed responsibilities in Indian
affairs, those responsibilities can define the scope of its trust duties. Once
having undertaken control in specific areas of Indian affairs, the govern-
ment should be held to the high standard of care appropriate to its fiduci-
ary relationship with Indians. Logic and fairness both suggest that the
government should be responsible to the extent of the fiduciary responsi-
bility actually assumed.

Moreover, this would produce a more equitable result. Absent specific
statutory or regulatory authority, the government assumes responsibilities
under the federal-Indian trust relationship embodied in the broad statutes
that govern Indian affairs. 88 If the government assumes management du-
ties under the general trust relationship it should be held liable for mis-
management under the same doctrine. Otherwise, the government can as-

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87. See, e.g., North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) (denying
claim for injunction against off-shore leasing, even though it could harm the bowhead whale, which
was part of tribe's subsistence culture); see also Chambers, supra note 2, at 1242–46; Newton, supra
note 2, at 676–77.

88. See supra note 4.
sume unlimited authority in Indian affairs without any corresponding liability for misuse of that authority. Such a result conflicts with the policy underlying the general trust relationship between the federal government and the Indians. Courts in the future should recognize a governmental fiduciary duty whenever the government assumes control over Indian affairs. The absence of a detailed statutory scheme should not prevent such a recognition.

There is a danger, however, in reading too broadly the language in *Mitchell II* that adopts the assumption of control reasoning. After reasoning that a fiduciary relationship arose when the government assumed control over Indian property, the Court also decided that the elements of a common law trust were present. Thus, the Court used common law trust reasoning to find a substantive right as well as a damages remedy. As a result, the *Mitchell II* decision may be read to suggest that successful claimants in breach of trust cases must establish only the elements of a common law trust (a trustee, a beneficiary, and a trust corpus). The federal-Indian relationship is, however, sui generis and should not be governed by the common law of trusts—a separate and distinct body of law. The Court probably did not intend that the elements of a common law trust be all that is required to determine that an enforceable trust relationship for money damages exists between the federal government and the Indians. Viewed in context, the Court actually relied on the assumption of control reasoning to conclude that a fiduciary duty had been created and was merely restating its conclusion by saying that the elements of a common law trust were present.

**B. The Second Requirement: Fairly Interpreted as Mandating Compensation**

Establishing a federally recognized right that may fit within the scope of the Tucker Act is only the first step in establishing a claim for money damages. Courts have also required that the source of the substantive right “can fairly be interpreted as mandating compensation” by the fed-

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89. *Mitchell II*, 103 S. Ct. at 2972–73. For example, the Court states:

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).

90. *Id.*

91. *Id.*

92. See infra note 104.

93. See infra Part IIIB (discussion of the impropriety of applying the common law of trusts to Indian law).
eral government for the damages sustained. 94 Mitchell I held that the source of law must expressly mandate compensation for damages. 95 Other courts have looked beyond the particular source of law and have found an implicit requirement of compensation for breach by looking to the common law of trusts. 96 The Court in Mitchell II adopted the latter view. 97

Ordinary trust law presumes that the common law of trusts will define the terms of a trust unless the settlor manifests a different intention. 98 Under the common law of trusts, liability follows from breach of trust. 99 Thus, under the Mitchell II analysis, unless Congress has expressly provided otherwise, liability automatically follows from breach whenever a court finds governmental fiduciary duties.

Prior courts have adopted this “implicitly required” analysis in order to make trust duties meaningful in Indian law cases. Most statutes and treaties dealing with Indian issues do not expressly state that the United States will be liable for damages caused by breach. 100 Thus, unless the analogy to trust law is used, the government will seldom be held liable for a breach of trust. Furthermore, a retrospective damages remedy may deter

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95. Mitchell I, 445 U.S. at 542 (Act does not unambiguously provide that the United States has taken full fiduciary responsibilities as to the management of allotted lands; the Act created only a limited trust relationship).

Several other federal courts have imposed the same requirement. See, e.g., North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) (without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, whatever fiduciary obligation that otherwise exists must be a limited one); Table Bluff Band of Indians v. Andrus, 532 F. Supp. 255, 264 (N.D. Cal. 1981); Hopi Indian Tribe v. Block, 8 INDIAN L. REP. (AM. INDIAN LAW, TRAINING PROGRAM) 3073, 3076-77 (D.D.C. June 15, 1981).


98. A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 4 (1960). Following this reasoning, courts have used the source of the trust to define the scope of the duties, and the common law of trusts to define the manner in which the trust is to be carried out. See Moose v. United States, 674 F.2d 1277, 1281 (9th Cir. 1982); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973); Eric v. Secretary of United States Dep’t of Hous., 464 F. Supp. 44, 49 (D. Alaska 1978).


100. See supra note 82 and accompanying text; see also Orme, supra note 20, at 872.
federal officials from breaching their trust duties.\textsuperscript{101} In cases such as this, prospective equitable remedies are virtually worthless.\textsuperscript{102} Finally, government liability for breach of trust is necessary to compensate Indians for waste of their resources.

The Court, however, did not merely analogize to common law trust reasoning. The Court used language which suggests that a common law trust had actually been created.\textsuperscript{103} It was neither necessary nor appropriate to find an actual common law trust. More importantly, the legal consequences of a common law trust are inconsistent with the federal-Indian relationship.\textsuperscript{104}

First, the origin and basis of the federal-Indian trust relationship differ from those of a common law trust relationship.\textsuperscript{105} The federal-Indian trust relationship was developed initially as a guardianship, and later, a trust. The relationship was never described as a common law trust.\textsuperscript{106} Second, several aspects of a common law trust do not apply in a federal-Indian relationship. At common law, a variety of damages are available for breach of trust.\textsuperscript{107} Money damages are not limited to restitution when wrongs are committed by a trustee.\textsuperscript{108} It seems unlikely that the courts will be willing to award damages against the federal government for the myriad of consequential injuries awarded at common law in breach of trust cases.\textsuperscript{109} In addition, a private fiduciary has the duty of acting with honesty and candor, solely in the interest of the benefici-

\textsuperscript{101.} Mitchell II, 103 S. Ct. at 2973 (quoting in part Mitchell I, 445 U.S. at 550 (White, J., dissenting)).
\textsuperscript{102.} See supra note 54.
\textsuperscript{103.} Mitchell II, 103 S. Ct. at 2972. Justice Marshall stated that all of the elements of a common law trust were present: "a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." Id.
\textsuperscript{104.} Commentators and courts have criticized the casual application of private trust law to the federal-Indian trust relationship. Federal power over Indian lands is different in nature and origin from the autonomy of a private trustee. See Note, supra note 2, at 142-43. The power of the United States is not based upon conventional legal concepts; therefore, it should not be circumscribed by private trust law. Indeed, "the relationship began as one of exploitation rather than protection." See Note, Trusts: Toward an Effective Indian Remedy for Breach of Trust, 8 AM. INDIAN L. REV. 429, 434 (1980); see also Mitchell II, 103 S. Ct. at 2977 (Powell, J., dissenting) (to say that the United States' duties are those of a common law trustee, and that all other consequences of the law of trusts follow, is to use bootstrap reasoning).
\textsuperscript{105.} The trust relationship was recognized by the early courts as a political, moral obligation, not as a legal relationship. See Note, supra note 2, at 142-43.
\textsuperscript{106.} See, e.g., United States v. Candelaria, 271 U.S. 432, 440-41 (1926) (legislation enacted due to government's guardianship over Indian tribes and property); Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (federal government has "moral obligations of the highest responsibility and trust").
\textsuperscript{108.} Id. §§ 198, 205.
\textsuperscript{109.} See supra note 87 and accompanying text.
ary.110 This duty does not seem to be consistent with the actions of the federal government.111 An ordinary trustee can resign in the event of a conflict of interest,112 while the federal officer cannot. Moreover, courts are without power to remove the United States from its position as trustee.113

If the United States is to be fully liable as a common law trustee, then it follows that the government would also have the full power associated with a common law trustee to regulate Indian affairs. Declaring that a common law trust relationship exists in an area of Indian affairs where a statute does not impose particular duties would give the government free rein to administer the trust as it sees fit, thereby taking the management power from Indians and interfering with tribal sovereignty. In effect, the government would have more power than a common law trustee, as the government cannot be removed from its position as trustee unless Congress chooses to remove it.

Where no congressional intent exists with respect to responsibilities and duties in an area of Indian affairs, it would be unwise to find that the government is a common law trustee. If the government has assumed particular duties, it can still be held liable for mismanagement by analogizing to trust law. It should not be given the powers incumbent on a common law trustee.

IV. CONCLUSION

After Mitchell II, a claimant for money damages against the federal government for breach of trust must still establish a substantive right as the basis for fiduciary duties on the part of the United States. Once trust duties are established, courts can analogize to ordinary trust law to deter-

110. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); G. BOGERT, supra note 99, § 543.
111. In Nevada v. United States, 103 S. Ct. 2906, 2917 (1983) (rejecting conflict of interest argument where United States represents both a reservation and a reclamation project; Indians' interest is not compromised), the Court stated that "the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent." See also Note, A Remedy for a Breach of the Government-Indian Trust Duties, 1 N.M.L. REV. 321, 323-24 (1971) (government does not always act with honesty and in the interest of the Indian).
112. A. SCOTT, supra note 98, § 170.23.
113. In addition, in order to alter the common law presumptions of the content of a trust, the trust instrument (in this case probably a statute or regulation) must clearly establish what presumptions do not apply. 1 A. SCOTT, supra note 1, § 4. It is unlikely that Congress' silence will be assumed to be intended to adopt the common law presumptions of a trust. Congress would not likely take pains to except from all statutes dealing with Indian affairs all of the common law presumptions relating to a trust that it did not intend to be effective. In addition, where the government has assumed control of particular Indian affairs, there would be no written instrument in which to document congressional intent.
mine that the substantive right mandates compensation in case of breach.\textsuperscript{114}

Ultimately, whether a claimant prevails will depend on how strictly the court chooses to interpret the source of law relied upon. A court may use strict construction to determine that the statute or regulation does not expressly impose fiduciary duties on the government, or that the government's willingness to assume duties was not such that the government will be held liable in money damages for breach of those duties. However, a court guided by the liberal principles generally applicable to Indian law can look to either express statutory obligations or governmental assumption of control in Indian affairs as creating the substantive right required for a damages remedy against the government. After Mitchell II, courts should clearly be guided by the latter approach.

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\footnotesize{\textsuperscript{114} In some cases, money damages will be the only appropriate remedy; they should, therefore, be available to Indians for breach of trust duties by the United States. However, equitable remedies remain available (although not under the Tucker Act), and in some cases will be the more desirable remedy. In any case, an Indian or tribe should have the choice of which remedy to seek when the United States has breached its trust responsibilities.}