SUPREME COURT OF THE UNITED STATES

No. 01–1067

UNITED STATES, PETITIONER *v.* WHITE MOUNTAIN APACHE TRIBE

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

[March 4, 2003]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion, satisfied that it is not inconsistent with the opinion I wrote for the Court in *United States* v. *Navajo Nation*, *post*, p. __.

Both *Navajo* and the instant case are guided by *United States* v. *Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U. S. 206 (1983) (*Mitchell II*). While *Navajo* is properly aligned with *Mitchell I*, this case is properly ranked with *Mitchell II*. *Mitchell I* and *Mitchell II*, as *Navajo* explains, instruct that "[t]o state a claim cognizable under the Indian Tucker Act . . . , a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo*, *post*, at __ (slip op., at 15). If the Tribe satisfies that threshold, "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Ibid.* (quoting *Mitchell II*, 463 U. S., at 219).

In this case, the threshold set by the *Mitchell* cases is met. The 1960 Act, Pub Law 86–392, 74 Stat. 8, provides that Fort Apache shall be "held by the United States in trust for the White Mountain Apache Tribe" and, at the

same time, authorizes the Government to use and occupy the fort. *Ante*, at 1–2. Thus, as the Court here observes, the Act expressly and without qualification employs a term of art ("trust") commonly understood to entail certain fiduciary obligations, see *ante*, at 7–9, and "invest[s] the United States with discretionary authority to make direct use of portions of the trust corpus," *ante,* at 8; cf. *Navajo*, *post*, at __ (slip op., at 17) ("no provision of the IMLA or its regulations contains *any* trust language with respect to coal leasing"). Further, as the Court describes, the Tribe tenably maintains that the Government has "availed itself of its option" to "exercis[e] daily supervision . . . [and] enjo[y] daily occupation" of the trust corpus, *ante*, at 8, but has done so in a manner irreconcilable with its caretaker obligations. The dispositive question, accordingly, is whether the 1960 measure, in placing property in trust and simultaneously providing for the Government-trustee's use and occupancy, is fairly interpreted to mandate compensation for the harm caused by maladministration of the property.

Navajo, in contrast, turns on the threshold question whether the Indian Mineral Leasing Act (IMLA) and its regulations impose any concrete substantive obligations, fiduciary or otherwise, on the Government. *Navajo* answers that question in the negative. The "controversy . . . falls within *Mitchell I*'s domain," *Navajo* concludes, for "the Tribe's claim for compensation . . . does not derive from any liability-imposing provision of the IMLA or its implementing regulations." *Post*, at __ (slip op., at 1). The coal-leasing provisions of the IMLA and its allied regulations, *Navajo* explains, lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing; they did not even establish the "limited trust relationship" that existed under the law at issue in *Mitchell I*. See *post*, at __–__ (slip op., at 16–17).

In the instant case, as the Court's opinion develops, the 1960 Act in fact created a trust not fairly characterized as "bare," given the trustee's authorized use and management. The plenary control the United States exercises under the Act as sole manager and trustee, I agree, places this case within *Mitchell II*'s governance.* To the extent that the Government allowed trust property "to fall into ruin," *ante*, at 8, I further agree, a damages remedy is fairly inferable.

---

* *Mitchell I* does not tug against this placement. The General Allotment Act (GAA) at issue in *Mitchell I,* 445 U. S. 535 (1980), narrowly circumscribed its use of the term "trust" by making "the Indian allottee, and not a representative of the United States, . . . responsible for using the land for agricultural or grazing purposes." *Id.*, at 542–543. The GAA thus removed one of the "hallmarks of a more conventional fiduciary relationship." *Ante*, at 6 (citing *Navajo*, *post*, at __ (slip op., at 13) (the GAA "removed a standard element of a trust relationship."). The 1960 Act, in contrast, does not modify its mandate that the United States hold the property "in trust for the White Mountain Apache Tribe," except to confirm that the Government-trustee may occupy and use the property. See *ante*, at 7–8 (internal quotation marks omitted). Occupation of the trust corpus by the trustee is a common feature of trusteeship, and does not itself alter the fiduciary obligations that an expressly created trust ordinarily entails. See *ante*, at 8–10.