No. 01-1067

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE MOUNTAIN APACHE TRIBE

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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In its brief in opposition, respondent White Mountain Apache Tribe (Tribe) devotes its efforts to defending the ruling of the divided court of appeals below that the United States is accountable in money damages for the alleged mismanagement of property placed in trust by the 1960 Act, even though that Act does not obligate the government to manage the property for the benefit of the Tribe and, instead, reserves to the *government* the right to use the property for its *own* purposes. The decision below directly contravenes this Court's *Mitchell* decisions,[1] as well as the bedrock sovereign-immunity principles on which those decisions are founded. The Court should grant certiorari and provide needed guidance on when the United States may be liable in damages for breach of an alleged trust responsibility owed to an Indian Tribe.

1. The Tribe's characterization of the 1960 Act (see Br. in Opp. 11-16) is contradicted by the Act's own terms. While

[1] *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980); *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206 (1983); see Pet. 11-13.

the Act "declare[s]" the property at issue "to be held by the United States in trust for the White Mountain Apache Tribe," it states that such declaration is "*subject to* the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8 (emphasis added). Thus, whatever interest the Tribe has in the trust property, that interest is subordinate to the government's right to use the property for governmental purposes.[2] The Tribe asserts (Br. in Opp. 12) "that many of the subject buildings are no longer used or needed by the Secretary of Interior for school or administrative purposes." The court of appeals' decision in this case, however, is based on the understanding that the government *does* "use such trust property for its own purposes" (Pet. App. 17a) and, indeed, the government still operates an Indian boarding school on the site. *Id.* at 3a.

The Tribe argues (Br. in Opp. 13 (heading)) that the 1960 Act "is for the benefit of the Tribe." As the court of appeals recognized, however, "[i]t is undisputed that the 1960 Act contains no * * * requirement" that the United States "manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." Pet. App. 14a. Both Chief Judge Mayer and the Court of Federal Claims reached the same conclusion. See *id.* at 33a-34a ("Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust.") (Chief Judge Mayer); *id.* at 48a ("As the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for

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[2] The Tribe characterizes (at 10) the nature of its interest in the property at issue as a "present indefeasible" interest. As explained in the petition (at 21 & n.9), that characterization is incorrect and, more to the point, does not bear on the basic question presented by this case.

the benefit of the Tribe.") (Court of Federal Claims). None of the general Indian canons of statutory construction on which the Tribe now relies (Br. in Opp. 13) can alter, or override, the plain terms of the Act. See, *e.g.*, *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Moreover, respondent's invocation of those canons to claim a property interest, in derogation of the express statutory reservation to the United States of the right to use both the land and the improvements for its own governmental purposes is contrary to the established canon of construction that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

Many of the buildings or structures on the Fort Apache site are more than a century old. Pet. 3-4. There is no evidence that in enacting the 1960 Act, Congress intended to impose on the Secretary of the Interior a duty to undertake historic preservation efforts at Fort Apache, and certainly no evidence that Congress intended to assume a duty on the part of the United States to preserve the fort in the state necessary to promote the Tribe's own "tourism-based economy." Br. in. Opp. 2 n.2.

2. The Tribe argues that its damages claim "fall[s] squarely within the holding of *Mitchell I* and *II*." Br. in Opp. 10 n.13; see *id.* at 9, 29. As explained in the petition (at 14-22), that contention—which divided the courts below, compare Pet. App. 26a (panel majority), with *id.* at 33a-34a (Chief Judge Mayer) and *id.* at 47a-48a (Court of Federal Claims)—cannot be reconciled with this Court's decisions.

a. The conflict between the decision below and *Mitchell I* is particularly stark. In *Mitchell I*, the Court rejected the argument that the General Allotment Act supports a damages action against the United States for mismanagement of timber on allotted lands. The Court explained that the Act

"does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands" and, instead, creates "only a limited trust relationship between the United States and the [Tribe]." 445 U.S. at 542. The Court reached that conclusion even though, as it pointed out, the General Allotment Act explicitly obligates the United States to hold land "'in trust for *the sole use and benefit of the Indian* to whom such allotment shall have been made.'" *Id.* at 541 (emphasis added). If, as *Mitchell I* held, that provision does not give rise to a duty on the part of the United States with respect to the management of the trust property that is enforceable in a suit for money damages, then it follows *a fortiori* that the 1960 Act—which expressly reserves to the government the right to use the trust property for governmental purposes—does not give rise to such a duty with respect to the management of the trust property.

b. In *Mitchell II*, the Court concluded that a different set of statutes and regulations *did* give rise to a money-mandating duty on the part of the United States with respect to timber on allotted lands. See Pet. 12-13, 16-17, 19-20. In reaching that conclusion, however, the Court emphasized two factors, *both* of which are absent here. First, the Court stated that "the statutes and regulations [at issue] clearly give the Federal Government *full* responsibility to manage Indian resources and land *for the benefit of the Indians*." 463 U.S. at 224 (emphasis added). Second, the Court emphasized that the statutes and regulations gave the government "elaborate control over forest and property belonging to Indians." *Id.* at 225.

The court of appeals below focused on the latter factor, and reasoned that "control alone is sufficient" to give rise to a money-mandating duty on the part of the United States. Pet. App. 15a. The Tribe agrees. See Br. in Opp. 17 n.22 (In *Mitchell II*, "[t]his Court recognized elaborate control by the Government over Indian property as an *independent* basis

for its finding of a fiduciary duty.") (emphasis added); see *id.* at 19-20 & n.24. But there are at least two fundamental flaws with that reasoning. First, in *Mitchell II*, the Court pointed to the existence of federal control not in the abstract, but rather in conjunction with its finding that the statutes and regulations at issue "clearly" obligated the government to "manage Indian resources and land for the benefit of the Indians." 463 U.S. at 224. Second, in *Mitchell II*, the Court focused on the existence of federal control not in a *factual* sense, but instead from the standpoint of management duties rooted in the express terms of the governing statutes and regulations. *Id.* at 224-225.

The Tribe asserts (Br. in Opp. 17 n.22) that *Mitchell II* "indicates that detailed delineation of management duties [is] not required." Just the opposite is true. The Court in *Mitchell II* explained at length that the pertinent statutes and regulations created extensive and carefully delineated management duties with respect to the trust property at issue. See 463 U.S. at 219-223; see *id.* at 220 ("The regulations addressed virtually every aspect of forest management."); *ibid.* ("Congress imposed * * * strict[] duties upon the Government with respect to Indian timber management."); *id.* at 222 ("The timber management statutes and the regulations promulgated thereunder establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber.") (citations omitted). The 1960 Act, by contrast, does not express *any* management duties with respect to the property at issue here, and does not provide for any implementing regulations prescribing any such duties.

The Tribe suggests (Br. in Opp. 15-16) that if Congress did not want to subject the United States to damages actions for failure to maintain the trust property covered by the 1960 Act, Congress "could have provided in the 1960 Act that * * * the Secretary would not be obligated to maintain, repair and preserve the property it was using," or it could

have excluded particular buildings from the Act's declaration that the property in question is to be held in trust. Of course that is true. But nothing in this Court's decisions obligates Congress to legislate *around* a supposed background rule that the United States is subject to damages claims with respect to alleged mismanagement of property held in trust for an Indian Tribe unless Congress says otherwise. The *Mitchell* decisions, not to mention the long-settled principles of sovereign immunity on which those decisions are grounded, establish precisely the opposite background rule. See Pet. 11-13.

c. Because the 1960 Act does not provide for the Secretary to assume any fiduciary management duty with respect to the property at issue, the court of appeals turned to the common law of trusts to supply such a duty. See Pet. App. 18a-19a ("Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the property, we think it is reasonable to infer that the government's use of the property requires it to act in accordance with the duties of a common law trustee."). As explained in the petition (at 17-20), that, too, was error under the *Mitchell* framework. To establish a money-mandating obligation on the part of the United States, a management duty must be clearly grounded in a statute or implementing regulation, not simply drawn from the *Restatement of Trusts*. See *ibid.* The Tribe argues (Br. in Opp. 24 n.30) that "the standards of a private fiduciary must be adhered to by executive officials administering Indian property." This Court, however, has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). More to the point, while an analogy to a private trustee may be helpful in certain circumstances, the Court has never suggested that the United States assumes the *money-mandating* obligations of a common law trustee.

If that were true, there would have been no reason for the Court to devote its attention in *Mitchell I* and *Mitchell II* to ascertaining whether such an obligation existed in the governing statutes or regulations.

3. The Tribe argues (Br. in Opp. 22-23) that the notion that the existence of federal control alone "may be the basis for a money-mandating claim" is "a well-established principle in Federal Indian law and policy." That argument, too, is belied by *Mitchell II*. There, the Court explained that, under the Tucker Acts, claims for damages against the United States must be "founded upon statutes or regulations that create substantive rights to money damages." 463 U.S. at 218. Accordingly, in determining whether to allow the damages claims in *Mitchell II*, the Court focused not simply on the existence of "federal control" over the trust property at issue, but instead on whether the *statutes and regulations* on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." *Id.* at 219 (emphasis added); see *id.* at 228.

One of the most problematic aspects of the court of appeals' decision in this case is that it redirects the inquiry called for by the Tucker Acts and this Court's *Mitchell* decisions for determining whether the United States may be liable for damages for breach of trust from the terms of the governing statutes and regulations to a fact-bound examination of the extent to which the particular property at issue is subject to federal control or use. Accordingly, under the Federal Circuit's decision, the determination of whether, or to what extent, the United States is accountable for money damages for breach of trust with respect to the property placed in trust by the 1960 Act ultimately depends on a parcel-by-parcel inquiry into "the extent of the government's control and use" of the "many buildings and grounds comprising Fort Apache"—an inquiry the court

directed the Court of Federal Claims to conduct on remand. Pet. App. 18a; see *id.* at 31a; Pet. 21-22.

The Tribe recognizes (Br. in Opp. 22) the parcel-specific nature of the inquiry into "exclusivity of control" and "duration of use" that "the Court of Federal Claims would have to resolve upon remand," but asserts (*ibid.*) that "the same type [of] inquiry was condoned by this Court in *Mitchell I*." That is incorrect. As this Court specifically recognized in *Mitchell II*, in *Mitchell I* the Court remanded for consideration of whether "other *statutes* render the United States answerable in money damages for the alleged mismanagement in this case," 463 U.S. at 211 (emphasis added), and not for fact-finding concerning the existence, degree, or duration of federal control with respect to the particular allotments or forests at issue.

The Tribe refers to lower court decisions in arguing that federal control alone "may be the basis for a money-mandating claim." Br. in Opp. 23; see *id.* at 23-25 & nn.29-32. Some of those decisions predate this Court's *Mitchell* decisions, and some do not even involve claims for money damages (*Pyramid Paiute Tribe of Indians* v. *Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990); *Northern Arapahoe Tribe* v. *Hodel*, 808 F.2d 741 (10th Cir. 1987)). In addition, none of the cases cited by the Tribe involved a statute, like the 1960 Act, that expressly reserves to the government the right to use the property at issue for its own purposes. In any event, to the extent that the cases in fact suggest—despite the teachings of this Court's *Mitchell* decisions—that federal control or use affecting a trust resource is sufficient in itself to give rise to a damages claim against the United States for breach of trust, those cases only heighten the need for review by this Court to ensure the proper application of sovereign immunity principles and the *Mitchell* decisions.

4. The Tribe's reliance (at 29 & n.36) on *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), is not only misplaced,

but further underscores the extent to which the decision below departs from this Court's precedents. In *Shoshone Tribe*, the Court held that the United States was liable in damages to the Tribe for "breach of treaty stipulations," *id.* at 484, that specifically "charged the Government with a duty to see to it that strangers should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation," *id.* at 494. See *id.* at 486 (discussing the "solemn pledge" made by the United States). Moreover, the Tribe's claim for damages for breach of that express treaty duty was authorized by a specific jurisdictional act relating to the controversy. See *id.* at 484-485 & n.1. In short, quite unlike this case, in *Shoshone Tribe*, there was a clear textual basis for recognizing a money damages claim against the United States.

5. The Tribe fails in its attempt (Br. in Opp. 26-28) to downplay the importance of this case. As discussed in the petition (at 24-25), both the Federal Circuit and the Court of Federal Claims already have applied the fundamentally flawed reasoning of the decision below in considering damages claims against the United States for breach of an alleged trust responsibility owed to an Indian Tribe. See *United States* v. *Navajo Nation*, 263 F.3d 1325, 1329-1330, 1335 (2001), petition for cert. pending, No. 01-1375; *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001). Although the Tribe suggests (Br. in Opp. 27-28 & n.34) that the courts' reliance in those cases on the reasoning of the Federal Circuit's decision in this case is unremarkable, that suggestion is based entirely on the Tribe's mistaken belief that the decision below comports with the "*Mitchell I* and *II* criteria" (Br. in Opp. 27).

On March 15, 2002, the United States filed a petition for a writ of certiorari in *Navajo Nation* (No. 01-1375). As explained in that petition, the court of appeals' decision in *Navajo Nation* holds that the United States may be liable to the Navajo Nation for up to $600 million in damages for

breach of fiduciary duty in connection with the Secretary of Interior's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty assumed by the United States. The *Navajo Nation* decision—which, like the decision here, divided the Federal Circuit panel—also conflicts with this Court's *Mitchell* decisions. See No. 01-1375 Pet. at 16-26.

Although this case and *Navajo Nation* both concern the necessary predicate that an Indian Tribe must establish to bring a claim for damages against the United States for breach of fiduciary duty, they each present that issue in a quite different light due to the different statutory schemes involved in the two cases. Granting review in both this case and *Navajo Nation* would enable the Court to consider the proper application of its *Mitchell* decisions in a broader context. As these two cases alone demonstrate, questions concerning the amenability of the United States to damages actions for breach of trust are of substantial and recurring importance in the lower courts. The Court should grant review in both cases to ensure that it will be in a position to address those questions, and the proper application of its *Mitchell* decisions, in a comprehensive manner.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2002