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***UNITED STATES V. JICARILLA APACHE NATION: RELATED PAST PRECEDENT, THE
DECISION AND POTENTIAL FUTURE IMPLICATIONS***

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I. Development of the Doctrine of Federal Trust Responsibility

A. Foundational Cases

To understand the genesis of the modern federal trust responsibility to federally-recognized tribes, it is important to understand the three foundational cases of federal Indian law, also known as the Marshall Trilogy.² These three decisions are: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)³; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In Cherokee Nation, the Court addressed whether its original jurisdiction extended to Indian nations. In holding that it did not, the Court reasoned that Indian nations were not foreign nations, but, rather, “domestic dependent nations”. In Worcester, the Court considered whether the laws of Georgia applied within the territory of the Cherokee Nation. The Court concluded that the laws of Georgia had no force or effect within Indian country.

Both Cherokee Nation and Worcester are important to understanding the federal trust relationship. Cherokee Nation recognized the separate sovereignty of tribal nations. However, at the same time, Chief Justice recognized that in many respects tribal nations had given up aspects of their external sovereignty to the federal government. Worcester held that the laws of states generally do not apply in Indian country. Although subsequent congressional acts and court decisions have modified Worcester, the

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² This is a reference to Chief Justice Marshall.

³ This case raised the question of whether land grants made by tribal chiefs before the passage of the Trade and Intercourse Acts were valid. The Court held that these grants were invalid because the Doctrine of Discovery conveyed title to Great Britain, as the conquering European sovereign, and the United States of America obtained title to all land when it succeeded from Great Britain. As a result, American Indians only retained a right of occupancy in the land.

presumption against the applicability of state law in Indian country remains, and, therefore, tribal courts may assert their authority without interference from state courts in numerous areas. Taken together, Cherokee Nation and Worcester can be seen to stand for several important principles. First, in becoming “dependent” nations, tribal nations had become reliant on the federal government and therefore the federal government owed tribal nations external protection. Second, because of this relationship between tribal nations and the federal government, it is primarily of a federal character.

The U.S. Supreme Court was relatively silent on the issue of federal Indian law following its decision in Worcester, until Congress passed the Major Crimes Act approximately 50 years later. The Major Crimes Act is more fully discussed below in the section on criminal jurisdiction in Indian country. The Court determined that Congress had the authority to enact the Major Crimes Act in United States v. Kagama, 118 U.S. 375 (1886). See also Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In reaching this decision, the Court determined that the United States owes Indian tribes a “duty of protection” and, therefore, the federal government has plenary authority over Indian country. Id. at 385. Since this time, the federal government has exercised substantial authority in Indian country.

B. Categories of Breach of Trust Claims

As briefly discussed below, there are generally thought to be three categories of claims that can be brought by tribes against the federal government. These three categories include: 1) general trust claims, 2) bare/limited trust claims and 3) full trust claims.

The cases discussed above (Cherokee Nation, Worcester, Kagama and Lone Wolf) may be used as the basis to form a claim under the first category of trust responsibility cases, a general trust claim. Based on these cases and the historic relationship between the federal government and federally-recognized tribes, it may be argued that liability exists. A claim based on a general trust responsibility is usually unsuccessful if the sole basis of the claim.

Later, the Court recognized a second category of liability under the federal trust responsibility, a claim for breach of a bare or limited trust responsibility. In 1980, the Supreme Court decided United States v. Mitchell, 445 U.S. 535 (Mitchell I). In Mitchell I, the Court considered whether the Secretary of the Interior was liable under section 5 of the General Allotment Act, 25 U.S.C. § 348, for an alleged breach of trust related to the management of timber resources and related funds. Although the General Allotment Act included language that land was to be held “in trust”, the Court concluded that this language only created a bare trust responsibility because the Act did not require that the federal government manage the land. Because the Act did not place any affirmative management duties on the federal government, the Court held in favor of the Secretary.

However, in 1983, the Court considered a related breach of trust claim from the same tribe in United States v. Mitchell, 463 U.S. 206 (Mitchell II). Mitchell II differed from Mitchell I, however, because in Mitchell II the tribe based its claim on several statutes that had not been at issue in Mitchell I, arguing that these statutes created an affirmative duty for the Secretary to manage the lands in question. The Court agreed with the tribe, finding that the statutes in question “clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.” Mitchell II, 463 U.S. at 224. Having determined liability for the breach of trust, the Court then turned to private trust law precedent to determine the extent of the federal government’s liability, as the statutes did not expressly require compensation. The Court’s decision in Mitchell II is an example of the third category of trust cases – a claim based on a full trust responsibility.

C. *Modern Application:* United States v. White Mountain Apache *and* United States v. Navajo Nation

In 2003, the Supreme Court released two decisions that impacted the development of the law related to the federal trust responsibility. In United States v. White Mountain Apache, 537 U.S. 465 (2003), the Supreme Court considered a claim brought by a federally-recognized tribe alleging that the federal government failed to adequately manage Fort Apache for the benefit of the tribe. The statute at issue required that the federal government hold Fort Apache in trust for the tribe and, importantly, gave the federal government “authority to make direct use of portion of the trust corpus.” Id. at 474. As a result of these two facts, the Court determined that the tribe had sufficiently alleged a breach of trust claim on a full trust similar to the trust at issue in Mitchell II, and awarded the tribe damages.⁴

In United States v. Navajo Nation, 537 U.S. 488 (2003), the Court did not find in favor of the tribe. Here, the Navajo Nation alleged that the Secretary of the Interior acted inappropriately in his role in the negotiation of mineral leases on the Navajo Nation. At issue in the case was the Mineral Leasing Act of 1938 and other related regulations. Ultimately, although the Court acknowledged the unprofessional behavior of the Secretary of the Interior, the Court held that the Navajo Nation had failed to establish a full trust. This is because the Mineral Leasing Act of 1938 gave the tribe the right to negotiate leases and, as a result, the Secretary of the Interior did not have full authority over management of the resources in question.

In both White Mountain Apache and Navajo Nation, the Court seemed to focus its analysis on the amount of control by the federal government over the trust corpus in question. Where the federal government had near complete control over the trust corpus, White Mountain Apache, the Court found in the tribe’s favor. However, where the statute in question had given the tribe increased authority to negotiate leases, Navajo Nation, the Court found in favor of the federal government.

⁴ The Court’s decision in White Mountain Apache is also helpful in the development of the law related to the federal trust responsibility in that the Court explained that the Canons of Construction are applicable to the statutes allegedly creating the trust.

II. *United States v. Jicarilla Apache Nation*

On June 13, 2011, the U.S. Supreme Court decided United States v. Jicarilla Apache Nation, 131 S.Ct. 2313. The Court's decision in Jicarilla builds on the Court's past decisions regarding the extent of the federal trust relationship in Mitchell I, Mitchell II, Navajo Nation and White Mountain Apache. Jicarilla differs procedurally from the previous federal trust relationship decisions in that the appeal to the Supreme Court came as a writ of mandamus by the United States to vacate an order requiring the United States to release certain documents in a breach of trust claim brought against the federal government in the Court of Federal Claims. At issue in the underlying litigation is the federal government's management of the Nation's trust accounts from 1972 to 1992. Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation. The Nation filed a motion to compel production, and the Court of Federal Claims granted the motion in part. The Court of Federal Claims found that communication relating to the management of the Nation's trust funds fell within the "fiduciary exception" to the attorney-client privilege, and, as a result, that these documents should be produced. The federal government petitioned the Court of Appeals for the Federal Circuit with a writ of mandamus to prevent disclosure, but the Court of Appeals upheld the Court of Federal Claims decision.

The issue before the Supreme Court was whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when acting in its capacity as trustee for tribal trust assets. In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances. Furthermore, the Court reasoned that "[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' see, e.g., 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law." Jicarilla Apache Nation, 131 S.Ct. at 2323. Ultimately, the Court concluded that while common law principles may "inform our interpretation of statutes and to determine the scope of liability that Congress has imposed ... the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary obligations.'" Id. at 2325 (citing Mitchell II).

The Court went on to explain that two features must exist in order for the common-law fiduciary exception to apply: 1) a "real client" and 2) duty to disclose information regarding the trust. The Court concluded that the present case lacked both factors. First, the Court determined that the Jicarilla Apache Nation was not a real client of the federal government's attorneys as the Nation did not pay the attorneys. Additionally, the federal government sought advice from its attorneys in its role as a sovereign and not as a fiduciary for the Nation. Moreover, the Court determined that the federal government has an interest in its capacity as a sovereign in the administration of the Indian trust accounts separate from the interests of the beneficiaries.

With regard to the second feature that must exist for the fiduciary exception to apply, the Court rejected the Nation's argument that the federal government had a duty to disclose under the applicable statutes, finding instead that "[w]hatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. . . . Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations." *Id.* at 2330. Based on the foregoing, the Court reversed and remanded the Court of Appeals, leaving the Court of Appeals to determine whether the Court's decision met the standards for granting the federal government's writ of mandamus.

III. Future Implications of the Court's Decision in *United States v. Jicarilla Apache Nation*

Although the full scope of the Court's decision in Jicarilla Apache Nation remains uncertain, it most likely impacts the development of the law related to the federal trust responsibility to tribes. It also has a potential to impact other areas of the law. With regard to the federal trust responsibility doctrine, some may argue that the decision essentially makes the federal trust responsibility an "empty vessel". This is because the decision may be seen to stand for the proposition that the federal government is only liable to tribes for a breach of its trust responsibility when Congress has specifically accepted such liability through a statute or treaty. In this way, the third category of a breach of trust claim, a full trust claim, may be the only viable claim against the federal government following the Court's decision. Supporting this perspective, the Court of Federal Claims in an August 4, 2011 decision explained that trust responsibilities exist only to the extent Congress has accepted such duties by statute. Lummi Tribe of Lummi Reservation v. United States, 2011 WL 3417092 (Fed. Cl. 2011).

Furthermore, the Court's decision may impact areas of the law beyond the federal government's trust responsibility to tribes. On August 9, 2011, the U.S. District Court for the District of Columbia cited the Jicarilla Apache Nation decision for the proposition that courts may limit discovery based on equitable concerns. Slate v. American Broadcasting Companies, Inc., 2011 WL 3471007 (D.D.C. 2011). Moreover because the decision may be limited to tribal claims against the federal government, private trustees might find that this decision is cited to support the claims of beneficiaries to compel production of documents shared between trustees and their counsel. See Moore v. Metropolitan Life Ins. Co., 2011 WL 2746237 (M.D. Alabama 2011) (holding that the Jicarilla Apache Nation Court's decision regarding the fiduciary exception to the attorney-client privilege was limited to tribal claims against the federal government).

Additional Sources:⁵

- Felix Cohen, Handbook of Federal Indian Law (LexisNexis Matthew Bender 2005). See also supplements to the treatise released approximately every other year.
- William C. Canby, Jr., American Indian Law in a Nutshell (4th ed. 2004).

⁵ The purpose of this handout is to provide conference attendees a brief introduction to the panel topic. The suggested sources provide a more complete discussion of the federal government's trust responsibility to federally-recognized tribes.