Oklahoma Law Review

Volume 70 | Number 4

2018

Rebuilding Trust? The Sand Creek Massacre and the Federal-Tribal Trust Relationship in *Flute v. United States*

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Rebuilding Trust? The Sand Creek Massacre and the Federal-Tribal Trust Relationship in *Flute v. United States*

I. Introduction

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[1] At sunrise on November 29, 1864, approximately 700 United States troops attacked and massacred members of the Arapaho and Cheyenne Tribes camped at Sand Creek in the Colorado Territory.[2] After a congressional investigation, the officers responsible resigned their commissions, and "the United States entered into the Treaty of Little Arkansas," which promised to pay reparations to the survivors.[3] But these reparations have never been paid.[4] In *Flute v. United States*, descendants of those massacred at Sand Creek brought suit, alleging the United States had acted as trustee of the promised funds and was in breach of its trust obligations.[5] The United States asserted sovereign immunity,[6] the case was dismissed,[7] and the Supreme Court subsequently denied certiorari.[8]

For reasons discussed below, the purported waiver of sovereign immunity identified by the Plaintiffs in *Flute* was bound to fail. This Note proposes an alternative waiver of sovereign immunity, focusing on the Administrative Procedure Act, 5 U.S.C. § 702. Part II outlines the legal background of the federal-tribal trust relationship and the sovereign immunity doctrine. Part III discusses the factual background of *Flute* and analyzes the Tenth Circuit's reasoning. Finally, Part IV identifies an alternative waiver of sovereign immunity that could have been more successful.

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1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).
2. Flute v. United States, 808 F.3d 1234, 1237 (10th Cir. 2015), *cert. denied*, 137 S. Ct. 146 (2016).
3. *Id.* at 1237-38.
4. *Id.* at 1238.
5. *Id.* at 1238-39.
6. Flute v. United States, 67 F. Supp. 3d 1178, 1184 (D. Colo. 2014).
7. *Id.* at 1188.
8. *Flute*, 808 F.3d at 1234.

II. The Law Before Flute v. United States

A. The Federal-Tribal Trust Relationship

The federal-tribal trust relationship has its roots in common law[9] and was first articulated in *Cherokee Nation v. Georgia*.[10] There, the Supreme Court determined that, because of the historical dependency of Indian tribes, "[t]heir relation to the United States resembles that of a ward to his guardian."[11] This status of dependency brings with it both benefits and burdens; the trust relationship provides a source of protection for the tribes as well as a justification for overbearing and colonialist treatment.[12] The trust duties of the United States are enforceable through litigation,[13] and trust relationship claims were historically governed by general, common law fiduciary principles.[14] For example, in *Coast Indian Community v. United States*, members of a tribal association sued the United States for breach of trust after the Bureau of Indian Affairs (BIA) conveyed a right-of-way across their reservation for an allegedly inadequate price.[15] The plaintiffs were never formally designated as beneficiaries,[16] and the statute authorizing the BIA to convey the land imposed no fiduciary obligation.[17] Nevertheless, the court determined that a common-law trust relationship existed and that the fiduciary duty had been breached.[18]

This reliance on common law principles changed with the *Mitchell* cases in 1980, and courts have since focused on obligations imposed by treaty or

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9. Brett J. Stavin, Comment, *Responsible Remedies: Suggestions for Indian Tribes in Trust Relationship Cases*, 44 ARIZ. ST. L.J. 1743, 1744 (2012) ("The trust doctrine originally developed through federal common law.").

10. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 6 (1831).

11. *Id.* at 17. The phrase "ward to his guardian" has been used to demonstrate early recognition of the federal-tribal trust relationship, but does not demonstrate a literal, legal guardian-ward relationship. *See* Cobell v. Norton, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

12. Stavin, *supra* note 9, at 1743 (citing WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 189 (2010)). For example, in *Lone Wolf v. Hitchcock*, the Supreme Court held that due to the Indians' "relation of dependency," Congress had the right to unilaterally "abrogate the provisions of an Indian treaty." 187 U.S. 553, 564, 566 (1903).

13. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 493 (1937).

14. Stavin, *supra* note 9, at 1744.

15. Coast Indian Cmty. v. United States, 550 F.2d 639, 641 (Ct. Cl. 1977).

16. *Id.* at 645.

17. *See* 25 U.S.C. § 323 (2012).

18. *Coast Indian Cmty.*, 550 F.2d at 653.

statute.[19] In *Mitchell I*, tribal members sought damages from the United States for its alleged mismanagement of tribal timber resources.[20] The tribe argued that the General Allotment Act of 1887 created a trust relationship, but the United States moved to dismiss, asserting that it had not waived sovereign immunity.[21] The General Allotment Act allotted tracts of lands to individual Indians and provided that "the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made."[22] The court below determined that the Act imposed a fiduciary duty on the United States and constituted a waiver of sovereign immunity for a breach of that duty.[23] The Supreme Court reversed and remanded, however, concluding that the Act created "only a limited trust relationship" that did not impose fiduciary duties on the United States.[24] The Court held that, because the individual allottees occupied the land for personal use and had the responsibility of managing the land, the United States had no fiduciary obligation.[25]

Actual control of the land by the tribal member was the essential factor in the Court's decision. The Court looked to the legislative history of the Act and concluded that the Act's purpose was to prevent alienation of tribal land and ensure that the allottees remained immune from state taxation.[26] Because nothing in the statutory scheme envisioned United States control over or management of the land, it created no fiduciary responsibility.[27] The Court noted in closing that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act."[28]

On remand, the tribal members found such a source. In *Mitchell II*, the Court determined that a trust relationship arose from an amalgamation of

19. *See* United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*); United States v. Mitchell, 445 U.S. 535 (1980) (*Mitchell I*).

20. *Mitchell I*, 445 U.S. at 537.

21. *Id.* at 537-38.

22. Pub. L. No. 49-119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348).

23. *Mitchell I*, 445 U.S. at 541.

24. *Id*. at 542.

25. *Id*. at 542-43.

26. *Id*. at 544.

27. *Id.*

28. *Id*. at 546.

various statutes[29] and the Indian Tucker Act.[30] The Court's analysis focused on the "elaborate control" the United States assumed over forests and tribal property.[31] Unlike in *Mitchell I*, where the General Allotment Act did not outline any governmental control over tribal property, in *Mitchell II*, the Department of the Interior exercised daily supervision over the harvesting and management of tribal timber.[32] Another key element in finding a fiduciary relationship was language in a timber statute, which provided that timber sales must be based on the "needs and best interests of the Indian owner."[33] Notably, the Court found that this fiduciary relationship existed despite the statutes' lack of express trust language:

> [W]here 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.[34]

Trust relationship cases applying the *Mitchell* analysis look to a relevant statute or treaty and determine the amount of governmental control it authorizes and envisions. For example, in *United States v. Navajo Nation*, the Court examined the Indian Mineral Leasing Act (IMLA) and found that it created no fiduciary obligation.[35] The IMLA grants the Secretary of the Interior authority to approve mining leases between tribes and private entities on unallotted reservation land.[36] *Navajo Nation* involved the renegotiation of one of these leases between the Navajo and Peabody Coal Company.[37] The tribe had been receiving approximately 2% of gross proceeds from the lease—substantially less than the 12.5% statutory

29. These included timber management statutes (25 U.S.C. §§ 406, 407, 466), statutes governing road building and rights of way (25 U.S.C §§ 318, 323-325), and statutes governing Indian funds and government fees (25 U.S.C §§ 162a, 413).

30. *Mitchell II*, 463 U.S. 206, 211-12 (1983) (citing Indian Tucker Act, 28 U.S.C. § 1505).

31. *Id.* at 225.

32. *Id.* at 222.

33. *Id.* at 224.

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

35. 537 U.S. 488, 493 (2003).

36. *Id.*

37. *Id*. at 495.

minimum required for similar leases on federal land—and the BIA issued an opinion letter stating that the rate should be raised to 20%.[38] Peabody then filed an administrative appeal; while the appeal was pending, Peabody representatives met privately with Interior Secretary Don Hodel.[39] No tribal representatives attended or were aware of this meeting.[40] Predictably, Secretary Hodel then drafted a memo stating that a decision on the appeal was not imminent and that the parties should return to the bargaining table.[41] The Navajo ultimately settled on a 12.5% rate that Secretary Hodel subsequently approved.[42]

The Court rejected the Navajo's claim that the IMLA created a trust relationship.[43] It reached this conclusion by comparing the IMLA to the statutory scheme in *Mitchell I* and contrasting it with the statutory scheme in *Mitchell II*.[44] Unlike in *Mitchell II*, where the United States assumed elaborate control over tribal property for the benefit of the tribe, in *Navajo Nation*, the Secretary of the Interior had no managerial role and was not "expressly invested with responsibility" to ensure that the needs and interests of the tribe were met.[45] The Court placed no weight on the Secretary's "ex parte communications from Peabody" and instead looked only to the relevant statute.[46]

Mitchell I, *Mitchell II*, and the line of cases that follow[47] leave tribes with a specific path to demonstrate a trust relationship: the tribe must identify a source of substantive law, such as a statute or treaty, which imposes a clear fiduciary obligation on the United States. This obligation does not require express trust language in the treaty or statute; instead, it requires that the government assume control over tribal property for tribal benefit.

B. United States' Sovereign Immunity and 5 U.S.C. § 702

As a fundamental principle of sovereign immunity, the United States, as a sovereign, is immune from suit unless it consents to being sued.[48] This

38. *Id*. at 496.
39. *Id*. at 497.
40. *Id*.
41. *Id*. at 497-98.
42. *Id*. at 498.
43. *Id*. at 506.
44. *Id*. at 507-08.
45. *Id*.
46. *Id*. at 510.
47. *See, e.g.*, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).
48. United States v. Sherwood, 312 U.S. 584, 586 (1941).

immunity also extends to injunctive relief.[49] Courts will not infer a waiver of sovereign immunity, but instead require an unequivocal expression.[50] One such waiver of sovereign immunity is found in the Administrative Procedure Act, 5 U.S.C. § 702, which provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .[51]

Section 702 is an express waiver of United States' sovereign immunity when an individual has suffered a legal wrong because of a federal agency's action, though the waiver is limited to suits in which the plaintiff seeks relief other than monetary damages. Prior to its 1976 amendment, § 702 provided, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[52] The amendment sought to "broaden the avenues of judicial review" and, when applicable, expressly eliminate sovereign immunity as a defense.[53]

The Supreme Court has interpreted this provision liberally and allowed suit against the United States even when the relief sought has "monetary aspects."[54] In *Bowen v. Massachusetts*, the Court determined that § 702 conferred federal jurisdiction over Massachusetts's claim that the Secretary of Health and Human Services (HHS) improperly refused to reimburse the state for Medicaid expenditures.[55] Massachusetts sought injunctive relief after HHS refused to reimburse over $6 million that the state had spent on care facilities for the mentally ill.[56] Although a successful outcome for the

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49. Hatahley v. United States, 351 U.S. 173, 182 (1956).

50. United States v. King, 395 U.S. 1, 4 (1969).

51. 5 U.S.C. § 702 (2012).

52. Bowen v. Massachusetts, 487 U.S. 879, 891-92 (1988) (quoting S. REP. NO. 94-996, at 19-20 (1976)).

53. *Id.*

54. *See id*. at 893.

55. *Id.* at 882-83.

56. *Id.* at 887-88.

state would have resulted in a monetary payment, the Court concluded that it was not an action for monetary damages.[57] Monetary damages provide an individual with compensation for an injury, while "the recovery of specific property or monies" is an action for equitable relief.[58] Accordingly, § 702 applied and the suit could proceed.[59]

Because an assertion of sovereign immunity is likely to appear at the motion to dismiss stage in suits against the federal government,[60] every tribe in a breach of trust or breach of treaty action must be prepared with a relevant waiver of sovereign immunity.

III. Flute v. United States

A. Factual History

The 1861 Treaty of Fort Wise ceded a tract of land on the Arkansas River to the Arapaho and Cheyenne Tribes.[61] Later, in 1864, Colorado Territorial Governor and Superintendent of Indian Affairs John Evans told the tribes that they should relocate to Fort Lyon in the Colorado Territory.[62] At his behest, the tribes did so, and set up their camp at the nearby Sand Creek, where they flew an American flag with a white flag of truce beneath it.[63] Nonetheless, John Chivington, a colonel in the United States Army, conspired with Evans to order an unprovoked attack on the peaceful camp.[64] The details of the attack are appalling. Before the first shots were fired, Lieutenant Luther Wilson took companies of the Colorado First and Third Cavalries to disperse a nearby herd of horses in order to prevent escape.[65] The ensuing slaughter lasted from sunrise until three in the

57. *Id.* at 893.

58. *Id.* (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949)).

59. *Id.* at 912.

60. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 602 (2003) ("'[S]overeign immunity' . . . underlies and permeates the question of federal governmental liability in court. For any suit against the United States or its agencies to survive a motion to dismiss, a claimant must find a specific statute that waives the sovereign immunity of the government . . . .").

61. Treaty Between the Arapaho and Cheyenne Indians of the Upper Arkansas River, arts. 1, 4, Feb. 18, 1861, 12 Stat. 1163.

62. *Flute*, 67 F. Supp. 3d 1178, 1180-81 (D. Colo. 2014).

63. *Id*. at 1181.

64. *Id*.

65. Brief of Plaintiffs-Appellants at 9, *Flute*, 808 F.3d 1234 (10th Cir. 2015) (No. 14-1405), 2014 WL 7212984, at *9.

afternoon.[66] Although the exact number of dead remains unknown, eyewitnesses reported that a majority of the victims were women and children.[67]

In the aftermath of the massacre, Colonel Chivington resigned his commission and the United States House of Representatives ordered a committee to investigate the incident.[68] The committee's report ultimately led to the Treaty of Little Arkansas,[69] signed in 1865, which provides:

> The United States being desirous to express its condemnation of, and, as far as may be, repudiate the gross and wanton out-rages perpetrated against certain bands of Cheyenne and Arapahoe Indians . . . will grant three hundred and twenty acres of land by patent to each of the following-named chiefs of said bands . . . and will in like manner grant to each other person of said bands made a widow, or who lost a parent upon that occasion, one hundred and sixty acres of land, the names of such persons to be ascertained under the direction of the Secretary of the Interior . . . . The United States will also pay in United States securities, animals, goods, provisions, or such other useful articles as may, in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions of the persons named in the schedule hereto annexed . . . .[70]

The following year, Congress appropriated money to fund these promises. The 1866 Indian Appropriations Act provides:

> For reimbursing members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek, November twenty-ninth, eighteen hundred and sixty-four, to be paid in United States securities, animals, goods, provisions, or such

66. *Flute*, 67 F. Supp. 3d. at 1181.

67. *Id.*

68. *Id.*

69. On October 28, 1867, the tribes and the United States entered into the Treaty of Medicine Lodge Creek, which "purported to establish a new reparations scheme." *Flute*, 808 F.3d at 1238 n.3. The Plaintiffs argued that the Treaty of Medicine Lodge Creek was never concluded, and that the Treaty of Little Arkansas controlled the case. *Id.* The court did not necessarily accept the Plaintiffs' assertion, but determined that the validity of the Treaty of Medicine Lodge Creek did not affect its analysis. *Id.* Consequently, it focused on the Treaty of Little Arkansas. *Id.*

70. Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians, art. 6, Oct. 14, 1865, 14 Stat. 703 [hereinafter 1865 Treaty with the Cheyenne and Arapaho].

> other useful articles as the Secretary of the Interior may direct, as per sixth article treaty of October fourteenth, eighteen hundred and sixty-five, thirty-nine thousand and fifty dollars.[71]

Instead of distributing the funds to the specific individuals named in the treaty, however, the Department of the Interior (DOI) distributed some of the money directly to the tribes and returned the rest as "surplus."[72] The DOI has never attempted to identify the individuals owed reparations. Further, it has never completed an accounting of the reparations distributed, withheld, and still owed.[73]

B. Procedural History

Plaintiffs, citizens of Oklahoma and members of federally recognized tribes, filed a class action in federal court on behalf of themselves and other descendants of the Sand Creek Massacre.[74] They named the BIA,[75] the Department of the Interior, and the United States as defendants.[76] The Plaintiffs alleged that the United States served as trustee of the funds promised in the Treaty of Little Arkansas and appropriated in the 1866 Indian Appropriations Act.[77] They further alleged that the United States breached its trust obligations by failing to provide an accounting.[78] The Plaintiffs "expressly disavowed any claim for damages"[79] and instead sought an accounting of the reparation payments and an award of funds still owed.[80] At the district court, the Defendants moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[81] The district court concluded that the United States had not waived its sovereign immunity and thus granted the motion to dismiss on the ground that it lacked subject matter jurisdiction.[82]

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71. 1866 Indian Appropriations Act, ch. 266, 14 Stat. 255, 276.
72. *Flute*, 67 F. Supp. at 1182-83.
73. *Id.* at 1183.
74. *Id.*
75. Created in 1849, the BIA was initially placed within the Department of the Army and later moved to the Department of the Interior, where it oversaw responsibility of Indian affairs on behalf of the federal government. *Id.* at 1180.
76. *Id.* at 1178.
77. *Flute*, 808 F.3d 1234, 1239 (10th Cir. 2015).
78. *Id.*
79. *Id.* at 1242 n.6.
80. *Flute*, 67 F. Supp. 3d at 1180.
81. *Id.* at 1183.
82. *Id.* at 1188.

C. Decision

On appeal, the Tenth Circuit considered two issues. First, whether the United States had waived its sovereign immunity.[83] And second, whether a trust relationship existed between the Plaintiffs and the United States.[84] It answered both questions in the negative and affirmed the dismissal.[85]

The Plaintiffs argued that the United States waived its sovereign immunity in a statute appropriating money to the DOI.[86] Title I of The Department of the Interior, Environment, And Related Agencies Appropriations Act, 2010 ("DOI Appropriation Act") provides:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss . . . .[87]

According to the Plaintiffs, this language both tolled the statute of limitations until they received an accounting and waived sovereign immunity.[88] The court disagreed. Because a waiver of sovereign immunity must be expressed unequivocally,[89] and because nothing in the DOI Appropriation Act even mentioned sovereign immunity, the court concluded that the United States had not consented to be sued.[90]

In arguing otherwise, the Plaintiffs relied on *Shoshone Indian Tribe of Wind River Reservation v. United States*.[91] There, Indian tribes filed a lawsuit against the United States, alleging that the United States had breached its trust obligations by mismanaging the tribes' sand and gravel resources.[92] The government argued that the claim was barred by the applicable six-year statute of limitations,[93] while the tribes maintained that

83. *Flute*, 808 F.3d at 1240.
84. *Id.* at 1243.
85. *Id.* at 1247.
86. *Id.* at 1240.
87. Pub. L. No. 111-88, tit. I, 123 Stat. 2904, 2922 (2009).
88. *Flute*, 808 F.3d at 1240.
89. United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992).
90. *Flute*, 808 F.3d at 1240.
91. 364 F.3d 1339 (Fed. Cir. 2004) (*Shoshone II*).
92. *Id.* at 1341.
93. *See* 28 U.S.C. § 2501 (2012).

the DOI Appropriation Act[94] tolled it.[95] The Federal Circuit agreed with the tribe, holding that "[b]y the plain language of the [DOI Appropriation] Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided."[96]

In *Flute*, the Plaintiffs used this language to argue that the DOI Appropriation Act waived sovereign immunity for their claim as well.[97] Again, the Tenth Circuit disagreed. Although it admitted that the Federal Circuit's language was "imprecise," the court examined the context of *Shoshone II* to clarify the language's meaning.[98] The claims in *Shoshone II* arose under the Tucker Act[99] and the Indian Tucker Act,[100] statutes that each contained an express waiver of sovereign immunity.[101] In *Shoshone I*, the Federal Circuit determined that sovereign immunity had been waived under those statutes,[102] while the issue in *Shoshone II* was the applicable statute of limitations.[103] The Tenth Circuit concluded that in *Flute*, unlike in the *Shoshone* litigation, the Plaintiffs could not identify any waiver of sovereign immunity other than the DOI Appropriation Act.[104] Finally, the court noted that even if the Plaintiffs correctly interpreted the Federal Circuit's holding, it would still refuse to follow that holding because of the long-established rule that waivers of sovereign immunity must be unequivocal.[105]

In their jurisdictional statement, the Plaintiffs in *Flute* asserted that "[t]he District Court's jurisdiction in this case arises from 5 U.S.C. § 702."[106] This provision was never cited again, nor did the Plaintiffs explain how it conferred jurisdiction. In a footnote, the court concluded that this "passing reference" would not be considered because the Plaintiffs had provided no

94. *Shoshone II* involved the 2003 version of the DOI Appropriation Act, while the present case involves the 2009 version. The relevant language is the same.

95. *Shoshone II*, 364 F.3d at 1344.

96. *Id*. at 1346.

97. *Flute*, 808 F.3d 1234, 1241 (10th Cir. 2015).

98. *Id*.

99. 28 U.S.C. § 1491 (2012) (as amended).

100. 28 U.S.C. § 1505 (2012) (as amended).

101. *Flute*, 808 F.3d at 1241.

102. Shoshone Indian Tribe v. United States, 51 Fed. Cl. 60, 62 (2001) (Shoshone I).

103. *Flute*, 808 F.3d at 1241.

104. *Id.*

105. *Id.* at 1242 (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992)).

106. Brief of Plaintiffs-Appellants at 1, *Flute*, 808 F.3d 1234 (10th Cir. 2015) (No. 14-1405), 2014 WL 7212984, at *1.

argument nor reasoned analysis to support their assertion.[107] The court also stated that § 702 does not operate to waive sovereign immunity for any claim that accrued before the provision's effective date of October 21, 1976.[108]

The Tenth Circuit based the dismissal on its conclusion that the United States had not waived sovereign immunity, but the court also held that even if sovereign immunity had been waived, the jurisdictional defect would remain because no trust relationship existed between the Plaintiffs and the United States.[109] The DOI Appropriation Act applies only to claims "concerning losses to or mismanagement of trust funds."[110] The court determined that because the Act requires a trust relationship and no trust relationship existed, any purported waiver of sovereign immunity in the Act was inapplicable to the Plaintiffs.[111]

The court's central conclusion regarding the existence of a trust relationship was, "The Government's Assumption of the Fiduciary Duties Associated with a Trust Relationship Must Be Established by Express Statutory or Regulatory Language,"[112] and that the Plaintiffs had failed to identify any such language.[113] According to the Plaintiffs, the Treaty of Little Arkansas and the 1866 Appropriations Act established the United States' fiduciary obligations.[114] The court rejected this argument, relying in part on the fact that "neither the treaty nor the 1866 Appropriations Act contain[ed] any express trust language."[115] It reasoned that nothing in either source indicated congressional intent to create an ongoing fiduciary obligation, but instead the treaty and the Act created the obligation for a one-time payment.[116] After considering the *Mitchell* cases, it contrasted *Flute* with *Mitchell II* by finding that neither the treaty nor the Act contemplated elaborate governmental control of tribal property.[117]

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107. *Flute*, 808 F.3d at 1240 n.4.

108. *Id.* (citing United States v. Murdock Mach. & Eng'g Co., 81 F.3d 922, 929 n.8 (10th Cir. 1996)).

109. *Id.* at 1242.

110. Pub. L. No. 111-88, tit. I, 123 Stat. 2904, 2922 (2009).

111. *Flute*, 808 F.3d at 1243.

112. *Id.*

113. *Id.* at 1245.

114. *Id.*

115. *Id.* at 1245-46.

116. *Id.* at 1246.

117. *Id.*

Similarly, it found that, unlike *Mitchell II*, there was no directive for the government to manage the property for the best interests of the Indian.[118]

Judge Phillips concurred in the judgment, agreeing that the United States had not waived sovereign immunity, but disagreed with the majority's conclusion that no trust relationship existed.[119] In his view, the majority placed "undue emphasis on the absence of express trust language."[120] He analyzed the *Mitchell* cases as well, concluding that the Supreme Court values "function over form."[121] Instead of requiring specific language, he argued, the Court looks at the level of comprehensive control and inquires whether the government was invested with the responsibility to secure the "best interests of the Indian."[122] He determined that the treaty, in directing the Secretary of the Interior to pay the tribes in securities and provisions in a way best adapted to their condition, invested the government with control over tribal property and invested the Secretary with enough discretion that a trust relationship existed.[123] According to Judge Phillips, the United States currently holds the Plaintiffs' money in trust.[124] Nevertheless, the dismissal was affirmed and on October 3, 2016, the Supreme Court denied a writ of certiorari.[125]

IV. Section 702: An Alternative Waiver of Sovereign Immunity

The Tenth Circuit correctly rejected the Plaintiffs' argument that an act tolling the statute of limitations also waives sovereign immunity. The well-established rule that "waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'"[126] leads to only one outcome when the purported waiver of sovereign immunity does not actually mention sovereign immunity. Section 702 of the Administrative Procedure Act, however, does expressly waive sovereign immunity, and provides a reasonable pathway for future plaintiffs in similar situations. Again, § 702 provides:

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118. *Id.*
119. *Id.* at 1247 (Phillips, J., concurring).
120. *Id.*
121. *Id.*
122. *Id.* at 1248 (quoting United States v. Navajo Nation, 537 U.S. 488, 507-08 (2003)).
123. *Id.* at 1249.
124. *Id.* at 1248 n.2.
125. *Flute*, 808 F.3d at 1234 (10th Cir. 2015), *cert. denied*, 137 S. Ct. 146 (2016).
126. United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .[127]

In order for § 702 to be applicable to the Plaintiffs' claim, it must be demonstrated that a trust relationship existed between the Plaintiffs and the United States,[128] that the Plaintiffs suffered a legal wrong or were adversely affected by agency action, and that the Plaintiffs sought relief other than monetary damages.

First, contrary to the holding of the Tenth Circuit, a trust relationship existed between the Plaintiffs and the United States. The *Mitchell* cases hold that to demonstrate a trust relationship, the tribe must identify a source of substantive law that imposes a fiduciary obligation on the government.[129] This obligation attaches when the government assumes control of tribal property for tribal benefit.[130] Here, the Treaty of Little Arkansas and the 1866 Appropriations Act imposed a fiduciary duty on the United States. The Secretary of the Interior was given complete control of the $39,050 appropriated by the Act, and as in *Mitchell II*, exercised managerial control over it. This control was demonstrated when the DOI took possession of the funds and distributed them to the wrong people. Unlike in *Mitchell I*, the tribal members had no ability to use the property. Instead, the United States had complete control of the tribal property and the Secretary was directed to manage it for tribal benefit. A key fact in finding a trust relationship in *Mitchell II* was the statutory directive that sales of timber "be based upon a consideration of the needs and best interests of the Indian . . . ."[131] Despite the Tenth Circuit's assertion otherwise,[132] here also the Secretary was

127. 5 U.S.C. § 702 (2012).

128. *Flute*, 67 F. Supp. 3d 1178, 1184 (D. Colo. 2014) ("In order to determine whether . . . the APA . . . waives defendants' sovereign immunity, the Court must determine whether plaintiffs have identified a source for defendants' alleged trust responsibilities.").

129. *See supra* notes 26-34 and accompanying text.

130. *See supra* notes 26-34 and accompanying text.

131. *Mitchell II*, 463 U.S. 206, 209 (1983) (quoting 25 U.S.C. § 406(a)).

132. *Flute*, 808 F.3d 1234, 1246 (10th Cir. 2015) ("And unlike *Mitchell II*, there is nothing in either the treaty or the 1866 Appropriations Act that contemplates the

invested with the authority and responsibility to act in the best interest of the tribes. The treaty provided: "The United States will also pay in United States securities, animals, goods, provisions, or such other useful articles *as may, in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions of the persons named* . . . ."[133]

In addition, the lack of express trust language is not dispositive. Judge Phillips correctly noted that the Supreme Court values "function over form."[134] In requiring express trust language, the Tenth Circuit applied a heightened standard contrary to Supreme Court precedent. The Court's position on this issue seems clear. In *Mitchell I*, the relevant statute provided "that the United States does and will hold the land thus allotted, for the period of twenty-five years, *in trust*,"[135] and the Court found that there was *not* a trust relationship.[136] Conversely in *Mitchell II*, the Court found a trust relationship despite the total absence of any express trust language.[137]

Second, the Plaintiffs suffered a legal wrong because of "agency action." As an initial matter, when judicial review is sought under a general review provision of the Administrative Procedure Act rather than a substantive statute, the agency action must be final.[138] "Agency action" is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[139] An agency action is "final" if it "mark[s] the 'consummation' of the agency's decisionmaking process"[140] and is "one by which 'rights or obligations have been determined,' or from which 'legal

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government's management of Indian property under an elaborate regulatory scheme which directs the government to do so in the best interests of the current and future beneficiaries of the proceeds from the resources on that property.").

133. 1865 Treaty with the Cheyenne and Arapaho, *supra* note 70, at art. 6, 14 Stat. 703 (emphasis added).

134. *Flute*, 808 F.3d at 1247 (Phillips, J., concurring).

135. Pub. L. No. 49-119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348) (emphasis added).

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

137. *Mitchell II*, 463 U.S. 206, 225 (1983).

138. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990). *But see* Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 523-26 (9th Cir. 1989); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 510 n.4 (1999) (Souter, J., dissenting) ("This waiver of immunity [§ 702] is not restricted by the requirement of final agency action that applies to suits under the Administrative Procedure Act.").

139. *Lujan*, 497 U.S. at 882 (citing 5 U.S.C. § 551(13)).

140. Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Chicago S. Airlines, Inc. v. Waterman S.S. Corp, 33 U.S. 103, 133 (1948)).

consequences will flow.'"[141] Here, the Secretary of the Interior's failure to follow the directives of the Treaty of Little Arkansas and the 1866 Appropriations Act constitutes "final agency action." The DOI's failure to pay the appropriated funds to the individuals named in the treaty was the conclusion of a decision-making process regarding who would receive the appropriated funds. This process also determined the rights of the named individuals to receive that which they were promised. Moreover, this agency action caused the Plaintiffs to suffer a legal wrong. "[A] treaty is in its nature a contract between two nations . . . ."[142] In failing to abide by the terms of the treaty it signed, the United States breached its promise to the Tribes. This breach ultimately caused the Plaintiffs' ancestors to be deprived of money that they were legally entitled to.

Finally, the Plaintiffs sought relief "other than monetary damages." The Plaintiffs sought only an accounting of the reparation payments owed and an award of those funds.[143] They "expressly disavowed any claim for damages."[144] An accounting of the reparation payments is certainly not a claim for monetary damages, and as *Bowen v. Massachusetts*[145] demonstrates, an award of funds still owed is not a claim for monetary damages either. Again, in allowing Massachusetts to bring suit under § 702, the Supreme Court held that "the recovery of specific property or monies" is not a claim for monetary damages.[146] Monetary damages provide a victim with compensation for an injury; the recovery of specific money is an action for equitable relief.[147] Here, the Plaintiffs were not seeking compensation for an injury; instead, they sought to recover a specific amount of money already owed. Indeed, that is why an accounting is so important: without a proper accounting, the specific amount of money owed cannot be determined.

The Tenth Circuit has already determined that the payment of specific money owed to descendants of tribal members is not a claim for monetary damages. In *Fletcher v. United States*, members of the Osage Tribe sued the United States, claiming that the United States had failed to pay them certain

141. *Id.* (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaquet Transatlantic, 400 U.S. 62, 71 (1970)).

142. Sanchez-Llamas v. Oregon, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting) (quoting Foster v. Neilson, 27 U.S. 253, 254 (1829)).

143. *Flute*, 67 F. Supp. 3d 1178, 1180 (D. Colo. 2014).

144. *Flute*, 808 F.3d 1234, 1242, n.6 (10th Cir. 2015).

145. 487 U.S. 879 (1988).

146. *Id.* at 893.

147. *Id.*

oil and gas royalties.[148] The Osage Allotment Act,[149] passed in 1906, provided that each tribal member was to receive an interest in the tribe's mineral estate.[150] Plaintiffs, descendants of those on the tribal membership rolls when the Allotment Act was passed, alleged that the United States breached its trust obligations by allowing the alienation of mineral royalties to non-members of the tribe.[151] The United States asserted sovereign immunity,[152] but the court determined that waiver occurred under § 702.[153] It analyzed *Bowen v. Massachusetts* and concluded that an order directing the United States to comply with the Allotment Act and pay specific royalties was not an action for monetary damages.[154]

Because the *Flute* Plaintiffs suffered a legal wrong due to the DOI's actions and because they sought relief other than monetary damages, § 702 should have provided a waiver of sovereign immunity. The Tenth Circuit did not even consider these arguments, and instead stated that § 702 does not apply to any claim that accrued before its effective date of October 21, 1976.[155] This assertion, however, does not comport with other federal circuits that have more thoroughly addressed the issue.

For example, the Ninth Circuit has explicitly held that § 702 is applicable to claims arising prior to 1976. In *Hill v. United States*, a government employee sued the United States, alleging that he had been unlawfully denied classification to a higher civil service grade.[156] The employee was terminated in 1969 and the action was commenced in 1973,[157] well before the relevant amendment to § 702 in 1976. The court discussed *Bradley v. Richmond School Board*, where the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a

148. 160 F. App'x 792, 796 (10th Cir. 2005). This case returned to the Tenth Circuit in 2013, where it reversed the district court's dismissal. Fletcher v. United States, 730 F.3d 1206, 1216 (10th Cir. 2013).

149. Pub. L. No. 59-321, 34 Stat. 539 (1906).

150. *Fletcher*, 160 F. App'x at 793.

151. *Id.*

152. *Id.* at 795.

153. *Id.* at 797.

154. *Id.* at 796-97.

155. *Flute*, 808 F.3d 1234, 1239 n.4 (10th Cir. 2015).

156. 571 F.2d 1098, 1100 (9th Cir. 1978).

157. *Id*. at 1102 n.6.

statutory direction or legislative history to the contrary."[158] Because the legislative history was silent regarding the provision's retroactive effect, and because no manifest injustice would result by applying a voluntary waiver of sovereign immunity, the Ninth Circuit applied § 702 to a claim that arose in 1969.[159]

The D.C. Circuit has also applied § 702 to claims that accrued prior to 1976. In *Cobell v. Norton*, beneficiaries of Individual Indian Money (IIM) trust accounts brought suit against the Secretary of the Interior.[160] They alleged a breach of fiduciary obligation and sought a historical accounting of the funds held in trust.[161] The General Allotment Act of 1887[162] divided tribal land into distinct parcels and allotted those parcels to individual tribal members.[163] The United States, as trustee, acquired beneficial title to allotted land for a period of twenty-five years, after which fee patent would issue to the individual tribal owner.[164] The Indian Reorganization Act of 1934[165] ended the allotment of tribal lands, but the federal government retained indefinite control of any parcel that had been allotted but not yet fee-patented.[166] The funds produced from these trust lands created the IIM accounts at the center of the case,[167] and these accounts were severely mismanaged from their inception.[168] The court found that the trusts at issue were formed when the United States acquired beneficial title to the allotted

158. *Id*. at 1102 (quoting Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974)); *accord* Cort v. Ash, 422 U.S. 66, 76-77 (1975); Hamling v. United States, 418 U.S. 87, 102 (1974).

159. *Hill*, 571 F.2d at 1102.

160. 240 F.3d 1081, 1086 (D.C. Cir. 2001).

161. *Id*. at 1093.

162. The Act is often referred to as the "Dawes Act." Pub. L. No. 49-119, 24 Stat. 338 (1887) (codified as amended at 25 U.S.C. § 331).

163. *Cobell*, 240 F.3d at 1087.

164. *Id.*

165. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461).

166. *Cobell*, 240 F.3d at 1087.

167. *Id.*

168. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/T-AIMD-93-4, FINANCIAL MANAGEMENT: BIA'S MANAGEMENT OF THE INDIAN TRUST FUNDS (1993); U.S. GEN. ACCOUNTING OFFICE, GAO/T-AIMD-94-99, FINANCIAL MANAGEMENT: STATUS OF BIA'S EFFORTS TO RECONCILE INDIAN TRUST FUND ACCOUNTS AND IMPLEMENT MANAGEMENT IMPROVEMENTS (1994); COMM. ON GOV'T OPERATIONS, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499, at 2-3 (1992).

land under the General Allotment Act of 1887.[169] All trustees have a fiduciary duty to maintain records and provide an accounting of the trust corpus if the beneficiary so requests.[170] By failing to do so, the United States breached its fiduciary duty.[171] Notably, even though the mismanagement of the trust accounts giving rise to the claim occurred well before the enactment of § 702,[172] the court determined that § 702 operated to waive sovereign immunity.[173] The court did not limit the claim to mismanagement that had occurred after 1976, but instead ordered an accounting of all IIMs created by the Indian Reorganization Act of 1934.[174]

The Tenth Circuit itself has arguably already applied § 702 to waive sovereign immunity to claims that accrued prior to 1976. In *Fletcher v. United States*, the Osage Allotment Act, enacted in 1906, created the tribal mineral interests.[175] As discussed above, the tribal members alleged the United States breached its trust obligations by allowing alienation of these mineral interests to non-members of the tribe.[176] Between 1906, when the Act was passed, and 1978, when alienation was proscribed by Congress, nearly one-third of the tribe's oil and gas rights were alienated.[177] In deciding that § 702 waived sovereign immunity, the court did not address retroactivity. Moreover, it neither inquired into the dates of each specific alienation nor limited the case only to those that took place after 1976. Instead, it allowed all claims, even those based on alienation occurring prior to 1976, to proceed. *Fletcher*, however, is distinguishable from *Flute* in one sense. At oral argument in *Fletcher*, the plaintiffs' counsel stated that the tribal members did not seek repayment of royalties that had been withheld in the past, but only sought royalties accruing from the date that the

169. *Cobell*, 240 F.3d at 1086 ("The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

170. 3 RESTATEMENT (THIRD) OF TRUSTS § 83 (AM. LAW INST. 2007) ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to provide beneficiaries with reports or accountings.").

171. *Cobell*, 240 F.3d at 1107, 1110.

172. *Id.* at 1086 ("The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

173. *Id.* at 1094.

174. *Id.* at 1110.

175. Fletcher v. United States, 160 F. App'x 792, 793 (10th Cir. 2005).

176. *Id.*

177. Appellants' Opening Brief at 6-7, *Fletcher*, 160 F. App'x at 793 (No. 04-5112), 2005 WL 3986894.

complaint was filed.[178] Nonetheless, although the remedy in *Fletcher* related to a point in time after the effective date of § 702, at least some of the harm giving rise to that remedy occurred prior to the provision's enactment.

In *Flute*, a trust relationship existed between the Plaintiffs and the United States because the Secretary of the Interior exercised managerial control over the funds appropriated by the 1866 Appropriations Act and was directed to do so in the best interests of the tribes. The Secretary's failure to do so constituted agency action and caused a legal harm. The Plaintiffs' attempt to receive an accounting of these funds and recover any funds still owed is not an action for monetary damages because it is neither compensatory nor punitive, but is instead equitable and seeks to recover specific money. And, the fact that this claim accrued prior to 1976 is not material. Accordingly, § 702 operated to waive the sovereign immunity of the United States in this case.

V. Conclusion

In its brief, the United States began its statement of the case as follows:

> In all of American history there is no episode more contemptible nor more abhorrent than the depredations of the United States cavalry on the banks of Sand Creek in Colorado Territory during the early morning hours of November 29, 1864. The "Sand Creek Massacre" was a tragedy and a disgrace.[179]

It then went on to make a number of technical arguments with the ultimate goal of avoiding its indisputable moral responsibility to compensate for those "depredations." This is particularly egregious because that the United States also signed a document which created an additional legal responsibility to provide compensation.

This Note aimed to outline a reasonable and justified pathway that the Plaintiffs in *Flute* could have followed to get their case to trial. Even if one finds that pathway unpersuasive, is there not a marked difference between whether the United States can assert sovereign immunity and whether it should? As Justice Black noted in his oft-quoted dissent, "Great nations,

178. *Fletcher*, 160 F. App'x at 797.

179. Response Brief for Defendants-Appellees at 2, *Flute*, 808 F.3d 1234 (10th Cir. 2015) (No. 14-1405), 2015 WL 1275679.

like great men, should keep their word."[180] Bearing in mind how much money was spent litigating this very case, and that the United States could potentially avoid paying any pre-judgment interest,[181] it stands to reason that the treasury could endure the $39,050 appropriated for the reparations.[182] Consider that Congress has recently awarded $683,600 to the Virginia Commission for the Arts to help produce *silent* adaptations of Shakespeare's plays.[183]

The Supreme Court has endorsed the view that

> [T]he doctrine [of sovereign immunity] may be satisfactory to technicians but not at all to persons whose main concern is with justice . . . . The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words. In our judgment a fair consideration of practical matters supports the conclusion that the district courts and the regional courts of appeals have jurisdiction to review agency action of the kind involved in these cases . . . .[184]

For those whose main concern is with justice, a fair consideration of the practical matters in *Flute* supports the conclusion that because the Plaintiffs have been wronged by the United States, they should have the ability to seek redress in its courts.

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180. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

181. United States v. Pend Oreille Pub. Util. Dist., 28 F.3d 1544, 1553 (9th Cir. 1994) (holding that an award of prejudgment interest "rests within the sound discretion of the court") (quoting Home Sav. Bank, F.S.B. v. Gilliam, 952 F.2d 1152, 1161 (9th Cir. 1991)).

182. 1866 Indian Appropriations Act, ch. 266, 14 Stat. 255, 267.

183. JAMES LANKFORD, FEDERAL FUMBLES: 100 WAYS THE GOVERNMENT DROPPED THE BALL 10 (2015), https://www.lankford.senate.gov/imo/media/doc/Federal_Fumbles_ 2015.pdf (questioning whether Polonius was right when he said in *Hamlet*, "Give every man thy ear, but few thy voice"); James Bovard, *A Silenced Shakespeare in Washington*, WALL ST. J. (July 13, 2015), https://www.wsj.com/articles/a-silenced-shakespeare-in-washington-1436825550?alg=y.

184. Bowen v. Massachusetts, 487 U.S. 879, 912 (1988) (internal quotation marks omitted).