ORIGINAL

In the

Supreme Court of the United States

UNITED STATES, PETITIONER,	)	
V.	)	
HELEN MITCHELL ET AL., RESPONDENTS.	)	No. 78-1756

Washington, D. C.
December 3, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner, v. HELEN MITCHELL ET AL., Respondents.	No. 78-1756

Washington, D. C.,

Monday, December 3, 1979.

The above-entitled matter came on for oral argument at 10:56 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

CHARLES A. HOBBS, ESQ., 1735 New York Avenue, N.W., Washington, D. C. 20006; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1756, United States v. Helen Mitchell Et Al.

Mr. Claiborne, you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

This case is here from a judgment of the Court of Claims on the petition of the United States. In that court the plaintiffs were first some 1,500 Indian allottees. On association consisting of those allottees and perhaps others and the Quinault Tribe itself. The case concerns the management of timber on the Quinault Reservation. That reservation was created in 1873 by presidential order. It was provided for some 20 years earlier by treaty, leaving the location and dimensions of the reservation to be determined by the President at some later time.

The reservation consists of some 200,000 acres of land, mostly covered by timber. Some one-third of that area has now been taken out of trust, but the remainder and the land we are told involved in this case is some 130,000 acres of timberland. Because the land was overgrown with timber, it was originally thought that it was not appropriate for allotment

into individual parcels, but -- and indeed, that was the administrative view until this Court set the matter right in 1924.

During the decade that followed this Court's decision in Payne in 1924 and until 1933 or 4 or 5, most of this reservation was allotted in individual parcels, or indeed, perhaps all of it was. Typically they were 80-acre allotments and we're told some 2,000 of them.

The tribal interest here is derivative in that since the Indian Reorganization Act, some small portion of the allotted lands have returned into tribal ownership, but a mere 4,000 acres as compared to the very much larger portion in individual allotments.

Beginning in 1910 the Secretary of the Interior was given statutory authority to consent to the sale of timber on Indian allotted land as well as on Indian tribal land, and whether or not those allotted lands were technically held in trust or were held by some other restricted patent. In 1934 as a part of the Indian Reorganization Act, the Secretary was required when managing Indian timber lands to do so on a sustained yield basis.

These plaintiffs brought this action in the Court of Claims alleging a number of complaints against the Secretary's management of their timberlands. They said that he had failed to obtain a fair market value in the sales contracts, that he

had failed to manage it on a sustained yield basis, that he'd failed in some cases to obtain any payment for the timber, that he'd not developed a proper system of roads, and that he'd made improper charges against the allottees for some of those roadworks, that he'd failed to pay interest on certain sums or insufficient interest, and finally, that he had exacted administrative charges, it being clear that the Secretary's entitled to make a charge for his management of the timber, but the allottees claim the actual charges were excessive.

In all of these respects, of course, the allottees claimed money damages. It is fair to say that the case proceeded for some years in the Court of Claims before the United States interposed the defense which is presently before this Court. That defense, the motion to dismiss, was premised on the notion that these claims for monetary relief against the United States in respect of its management of the timber did not lie under the Tucker Act or under its counterpart, Section 1505 of the Judicial Code, in the Court of Claims or indeed in any other court.

That defense was no doubt prompted by this Court's decision in United States v. Testan in 1976.

At all events, when the motion came before the Court of Claims, that Court overruled it, holding that applying the rationale of Testan and its own decisions, the United States here through its agents, the Secretary of the Interior, the

Bureau of Indian Affairs, had violated statutory duties which fairly mandated compensation in damages under the Tucker Act, or under Section 1505 against the United States. It is that ruling against which we complain.

The case is primarily one under the Tucker Act, Section 1491 of the Judicial Code. Much is made of the companion provision, as we call it, Section 1505, which pertains however only to the claims of Indian tribes or identifiable groups. Here the great majority of the plaintiffs areindividual allottees who cannot, in our view, make any claim except under the Tucker Act itself. And indeed, the Court of Claims did not suggest otherwise. 1505 was in the case, in the view of the Court of Claims, simply because there is a small tribal claim.

At all events, as we have elaborated in our brief, the two statutory provisions are entirely co-extensive. 1505 allows no more monetary relief than does the Tucker Act itself.

QUESTION: Mr. Claiborne, in your brief you indicate that one and only one question is presented, but doesn't the question embrace at least two questions: First of all, is there a private right of action created, and secondly, if so, if the answer to that is yes, does the defendant have sovereign immunity?

MR. CLAIBORNE: Mr. Justice Stewart, in the context of this case, a case based entirely on an act of Congress,

within the terminology of the Tucker Act, we view those questions as the same, analytically different but in practice the same. May I --

QUESTION: I suppose if Congress had created a private right of action, it would thereby waive the sovereign immunity?

MR. CLAIBORNE: Exactly.

QUESTION: But nonetheless, aren't there two questions?

MR. CLAIBORNE: Analytically, Mr. Justice Stewart, I think you're right, there are two questions. We place our entire emphasis on the first of those questions. That is, did Congress in the general allotment act primarily relied on and entirely relied on by the Court of Claims, impliedly or expressly create a right of action in money damages --

QUESTION: Against the United States.

MR. CLAIBORNE: -- against the United States, when an alleged breach of trust duty is found.

QUESTION: Well, the Court of Claims doesn't disagree with you, does it, on the fact that you must find some kind of a substantive right in the, in some statutes other than the jurisdictional statutes?

MR. CLAIBORNE: That is so, Mr. Justice White --

QUESTION: And so you do just differ on whether you do find that?

MR. CLAIBORNE: Our disagreement is with the ease with which they find such a relaxation of the rule.

QUESTION: Mr. Claiborne, could you tell me, where do you find the waiver of sovereign immunity in the ordinary contract case, and where do you find the implied right? The United States just signs a contract for, a construction contract to build a building or something, and then allegedly it is breached --

MR. CLAIBORNE: Mr. Justice White, I have some difficulty reconciling my answer with the literal words of the Testan opinion, so --

QUESTION: Go ahead and try.

MR. CLAIBORNE: I have to read Testan perhaps less strictly than its words say. Testan says that the Tucker Act is no more than a jurisdictional statute. If by that is meant the court which will hear such a claim, I have to suggest that that language is too narrow for --

QUESTION: You mean the Tucker Act actually contains the waiver of sovereign immunity?

MR. CLAIBORNE: The Tucker Act, when one looks at its original language and when one reads the long list of cases in this court, must in some sense be viewed as a waiver of sovereign immunity.

QUESTION: So you look to that -- that contains the waiver of sovereign immunity, but it still doesn't get you home because you must have an implied right of action somewhere, or expressed?

MR. CLAIBORNE: That's so, and in a contract case, it's certainly the Tucker Act that waives the sovereign immunity --

QUESTION: I see, I see.

MR. CLAIBORNE: -- it can't be the government contractor, who has no such power.

QUESTION: So that you don't, when you get around to finding out if there's a private cause of action, you don't approach it as you would a sovereign immunity question, namely very strict construction?

MR. CLAIBORNE: Mr. Justice White, my answer is the opposite, because --

QUESTION: Because it would expand the sovereign immunity to have a loose construction?

MR. CLAIBORNE: Precisely because the Tucker Act is the waiver of sovereign immunity in some sense, one must construe it narrowly. And because the very same considerations go to determining whether or not the United States has made itself liable in damages, as the question whether the United States has opened itself to suit in any way.

I would put it in this way, if I may, that there's a presumption against monetary liability of the government. That presumption derives from the principle of sovereign immunity from all suit, but the principle of sovereign immunity, the core of it, is liability to a judgment which will expend itself

against the Federal Treasury or against the federal land. Indeed, there are suggestions that that's all that's left of the doctrine of sovereign immunity.

QUESTION: You would say, then, if you were in a district court in some kind of a case and the question was an injunction, there wouldn't be a sovereign immunity case?

MR. CLAIBORNE: Exactly so. I would have said that, Mr. Justice White, even before the amendment of the administrative procedure act --

QUESTION: Even if you're in the court of claims and the issue is an injunction, the party seeking the injunction might lose, but not because of sovereign immunity; it would be because of the limits of the jurisdiction of the court of claims?

MR. CLAIBORNE: Exactly so. Because it's not a novel notion that the United States and its offices open themselves up to actions for prospective relief and hold the bar to accountability in money damages. One need only think of the hundreds of cases in which courts review the action of administrators without there being any sovereign immunity bar, and courts do direct the different action be taken in the future, whether it's a matter of the FDA withholding improperly permission to market a new drug, or any other example I can think of -- the Department of Interior making an error in surveying land. Those are matters which are correctable by courts for

the future, and indeed to some extent perhaps, retroactively.

But we do not give rise to liability and damages against the United States.

QUESTION: But if you find some statute that you think clearly enough gives a substantive right to damages to a private individual, if you just pose that kind of a statute, you can take it to the Court of Claims, you can have your case in the Court of Claims and the sovereign immunity is not an issue at all.

MR. CLAIBORNE: Mr. Justice White, I think it's right that if one finds a statutory duty which clearly permits recovery and damages for breach, the function of the Tucker Act in such a case is to permit you to join the United States in --

QUESTION: And even if you find a statute that's very arguable and you file in the Court of Claims, the argument is not sovereign immunity but the argument you are making here?

MR. CLAIBORNE: Exactly, sir.

QUESTION: Mr. Claiborne, before you leave that line of inquiry that Mr. Justice White raised, I want to be sure I understand your response to his question about the ordinary breach of contract case, where the contractor claims the government defaulted on an obligation, or so forth. What is the source of the implied cause of action in that sort of case?

MR. CLAIBORNE: Mr. Justice Stevens, I think one must say that the tradition, that the remedy for breach of contract

is money, is the source of the obligation of the United States like any other contractor whenbreaching a contract, to pay, the ability to sue the United States is granted by the Tucker Act in waiving the technical objection of sovereign immunity.

QUESTION: Whether we're talking in terms of waiver of sovereign immunity or creation of cause of action, whatever we need in the way of statutory authority for the litigation to proceed is found in the Tucker Act?

MR. CLAIBORNE: But in a contract case, which of course is not the category we're concerned with today, is the law of contracts that provides the remedy and damages.

QUESTION: Why doesn't the law of trust provide the remedy here? That's the next question you have to keep in mind.

MR. CLAIBORNE: There isn't reliance here on the law of trust -- I can't say the common law of trust, because it's a doctrine of equity -- but the unwritten law of trust is not what is invoked in this case. And indeed, the judgment of the Court of Claims is very plain that there is no reliance on the law of trust generally, or even on the fiduciary relationship between Indians and the United States.

The reliance is on an act of Congress, and specifically on the General Allotment Act of 1887.

QUESTION: -- stronger case for recovery?

MR. CLAIBORNE: I'm sorry?

QUESTION: So then shouldn't this be a stronger case

for recognizing the claim?

MR. CLAIBORNE: When reliance is placed on an act of Congress, Mr. Justice Stevens, we say, following Testan, that one must find in that act of Congress a provision fairly read as mandating a recovery in damages against the government, and that is simply wholly absent with respect to the General Allotment Act.

There is no suggestion here that the origin of the right to collect damages is based on the law of trust generally. And indeed, one might have a question, why the law of trust, like the law of contract, isn't, doesn't afford the same remedy under the Tucker Act. The answer must be that whereas the Tucker Act lists certain categories, it does not list law of trust as one of them. It lists contracts, it lists acts of Congress, it lists the Constitution, it lists regulations, but not the law of trust, and it expressly excludes the law of torts.

Now, the question is, we have seen --

QUESTION: Well, it does generically, arguably, cover it. It says, "The Court of Claims shall have jurisdiction to entertain a suit for liquidated or unliquidated damages in cases not sounding in tort," and that would generically include the law of trust or any other law except tort, wouldn't it?

MR. CLAIBORNE: Mr. Justice Stewart, commentators and courts have pondered over that last clause --

QUESTION: I am now doing so, too.

MR. CLAIBORNE: And have usually answered that it simply cannot be read literally, for if it were, it would absolve all that came before. It would be meaningless. And therefore the answer given usually is that clause cannot be read as it's written, but must be deemed to mean two things: First, that damages may be recovered even though unliquidated, and secondly, that recovery in tort is never permitted, and that the clause qualifies all that comes before.

QUESTION: Well, it's not permitted by the Tucker Act, it is permitted under another act.

MR. CLAIBORNE: And indeed in this case the Court of Claims in its words "skipped over" that last clause, placing no reliance on it, and the plaintiffs below have made no reliance on it. They did flirt with it at one stage, but in their brief on the merits they have abandoned that.

Coming now to the question whether the statute invoked, the General Allotment Act of 1887, can be read as fairly mandating relief in damages, we think the answer clear. That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the meantime, the United States was simply to hold title in trust solely for the purpose of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

QUESTION: Do you think that the question of construing a statute in order to ascertain whether the Congress intended to give a cause of action for damages, do you think that, our constructional problem is different than say, cases like Court v. Ashe? You would say that set of rules just doesn't apply here, or not?

MR. CLAIBORNE: I would, Mr. Justice White, say that some of those rules do apply, as they were indeed --

QUESTION: Well, maybe some of them, but you would just say, you wouldn't say, well, let's just approach this problem the same way as you would in determining whether under the Securities law, Congress intended a private cause of action?

MR. CLAIBORNE: No, Mr. Justice White, to that extent I invoke the approach followed in Testan; that is, that one requires a very clear indication, if not an express statement, in the act of Congress relied on that the remedy for its breach shall be damages, when --

QUESTION: Must not only find the right, but the remedy? In the statute?

MR. CLAIBORNE: Exactly so. The sovereign immunity may be waived by the Tucker Act, but the remedy and the right must both originate from the same statute relied on.

QUESTION: Mr. Claiborne, the United States did not press the issue of jurisdiction in U.S. against Mason, did it?

MR. CLAIBORNE: That is certainly true, Mr. Justice Blackmun, whether it was simply overlooked or whether it was thought that that was an exceptional case in that the very purpose of the General Allotment Act had been to exempt the allotted lands from state taxes. And that case involved the question whether the United States had breached its duty to assure that exemption from state taxes by failing to, or by paying over voluntarily the state taxes.

They might there have been a clearer relation between the breach alleged and the purpose of the statute, whereas here we're at a far remove from that situation.

It may also be that in Mason, the view could have been taken that we were paying with the Indians' money the taxes which arguably they did not owe, and to that extent we were misappropriating funds; the kind of activity which the Testan opinion recognizes does not require the same express provision in the statute.

The purposes of the General Allotment Act make it clear that the Congress of 1887 which wrote that statute would never have dreamt of providing that the United States shall be amenable in damages when it mismanages, as alleged, the timber on those lands. It is too remote from the expectations of those who wrote that statute to indulge any such idea, quite beyond the fact that the statute doesn't itself provide for any express remedy for breach.

QUESTION: When was the Tucker Act originally enacted?

MR. CLAIBORNE: 1887, as well.

QUESTION: Same year?

MR. CLAIBORNE: Same year.

Now, of course, the Tucker Act was a sequel to earlier legislation which had much the same effect in respect to the liability of the United States for cases founded on an act of Congress. That had been the law since --

QUESTION: The Tucker Act broadened the jurisdiction?

MR. CLAIBORNE: But not in this respect.

QUESTION: Didn't it?

MR. CLAIBORNE: The remedy for -- in respect of a claim founded on an act of Congress had been in the jurisdiction of the Court of Claims since 1855.

QUESTION: Did the Tucker Act add any express or implied contract of the United States?

MR. CLAIBORNE: It certainly -- I think not, but I think it did add the Constitution, and I think it did also add the last clause, the clause Your Honor mentioned a moment ago.

And it did in other respects change the procedure for collecting judgments, which were previously not so much judgments as they were recommendations to Congress for an appropriation.

QUESTION: Mr. Claiborne, let me call your attention

to the language from the General Allotment Act cited on page 3 of the Government's brief, the last sentence, where it says, "and if any conveyance shall be made of the land set apart and allotted as herein provided or any contract made touching the same before the expiration of the time above-mentioned, such conveyance or contract shall be absolutely null and void."

Now, sir, is that referring to a conveyance by the government?

MR. CLAIBORNE: I think probably both, Mr. Justice Rehnquist.

QUESTION: Then don't you have an expressio unius argument to rely on there, that the remedy against the government, if it breached its trust under the General Allotment Act, was simply to declare the conveyance null and void?

MR. CLAIBORNE: I am grateful to Your Honor. I don't know why we should have overlooked that argument. It does seem to me available to say that the statute itself provided its own remedy, clearly not one in damages, and that is an additional reason why one shouldn't strain to find here a different --

QUESTION: But not available in the Court of Claims?

MR. CLAIBORNE: This remedy, of course, would not be in the Court of Claims.

QUESTION: But if in the District Court, how about restitution when you declare the act a contract void? How about if it involved money?

MR. CLAIBORNE: It may be that in the case of an alienation which is wholly unauthorized --

QUESTION: What about timber? The United States has, let's say, illegally parted with Indian timber, and it's a void contract but the timber is gone and the U.S. has the money. Can you get a judgment against the United States for money?

MR. CLAIBORNE: Well, I think that would probably be money wrongfully retained within the exception noted in Testan. It might also be a taking within the just compensation clause. In both cases it would be recoverable under the Tucker Act without regard to the reliance on an act of Congress.

If I may reserve the balance of my time --

QUESTION: And where do you get the cause of action, the implied cause of action or the expressed cause of action when there's a constitutional claim?

MR. CLAIBORNE: From the Constitution itself. But of course the Tucker Act does --

QUESTION: Well, you don't read it in the Constitution.

MR. CLAIBORNE: Well, this Court has done precisely that.

QUESTION: I know, but you don't -- can you just find it there?

MR. CLAIBORNE: Well, the just compensation clause

in words says that when the property of a private citizen is taken --

QUESTION: Oh, you say that's the only clause in the Constitution for which there's a remedy against the United States?

MR. CLAIBORNE: Remedy in damages, so far as I'm aware, against the United States.

QUESTION: So your answer is yes?

MR. CLAIBORNE: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Hobbs.

ORAL ARGUMENT OF CHARLES A. HOBBS, ESQ.,

ON BEHALF OF HELEN MITCHELL ET AL.

MR. HOBBS: Mr. Chief Justice, and may it please the Court:

As a preliminary matter I would like to call the Court's attention to the recent publication of the Whiskers case. The citation is 600 Fed. 2d 1332.

The Whiskers case was decided by the Tenth Circuit and that court agreed with the Court of Claims below. We sent a letter to the clerk of this Court asking him to pass the citation on to you. He said he had no authority to do that, and for us to make this known to you at oral argument.

QUESTION: 600 Fed. 2d 1332?

MR. HOBBS: Yes, Your Honor.

I would like to begin by expressing a little indignation

to hear Justice claiming at this late date that it does not have, the Court does not have jurisdiction over this case. When these claims were filed in 1971, the law of the land was that the Court of Claims did have jurisdiction over these claims, and that's what the Court of Claims initially held in the Klamath case five years before we filed these claims, and in the Fields case a year and a half before we filed these claims, in Capoeman involving one of these very plaintiffs six months before we filed these claims, the Court of Claims held it had jurisdiction under 1491.

QUESTION: Well, you say you feel indignation, Mr. Hobbs. Isn't it the Government's responsibility to call to the attention of any court of the United States an apparent lack of jurisdiction on its part?

MR. HOBBS: Yes. Why did the Government wait so long to spot this apparent lack?

QUESTION: Well, that may be attributable to a number of reasons, but once they spotted it, it was certainly their obligation to call it to the attention of the Court.

MR. HOBBS: No doubt. We had gone through an enormous amount of litigation well past the time when ordinarily a litigant should raise a point of jurisdiction, if he has one. We had had six years of discovery, we had three fully briefed reported decisions of the Court of Claims, we had 26,000 pages of exhibits developed and handed over to the Government, we had

a three week trial. After the trial is when the Government for the first time raised the question of jurisdiction. Up until that point the law of the land was settled. That's why they didn't raise the issue in the Mason case. No one questioned jurisdiction at that late date.

QUESTION: But we've had jurisdictional questions raised sua sponte in this Court as to the jurisdiction of district courts because that's the law.

MR. HOBBS: Justice Rehnquist, I'm not saying that this Court cannot entertain the question of jurisdiction. I am only pointing out the enormous cost and inconvenience to us of having delayed so long, while case after case, a total of I believe nine cases went by with jurisdiction being upheld in each one until finally they, in the wake of the Testan case, saw that there might be an argument to be made in this case. And they have raised it.

We don't say they can't raise it. In the Mason case, it wasn't just the Court of Claims that helped give the bar the feeling that the law was settled. It was this Court.

In the Mason case, jurisdiction was invoked under 1491. It was not seriously challenged by the Government below. They did raise a question, but the Court of Claims held it had jurisdiction.

QUESTION: The plaintiffs were not an Indian tribe?

MR. HOBBS: No, the plaintiff was an individual in

the Mason case.

QUESTION: So it didn't involve 1505? It involved 1491.

MR. HOBBS: Correct.

This Court adjudicated the Mason case on the merits and it noted in Footnote 5 that the suit was brought under 28 USC 1491, which gives the Court jurisdiction to render judgment upon claims against the United States, and so forth. Now, this certainly tells the ordinary observer that, well, here's a case that's been to the Supreme Court and they had no problem with it, and then in the test of the Mason case, Mr. Justice Marshall wrote, on page 398, "There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that as such it is duty bound to exercise great care in administering its trust." Duty bound.

Now, at the time that the court below decided in our favor that there was jurisdiction under 1491 and 1505, 1491 of course is the Tucker Act, 1505 is the extension of the Indian Claims Commission Act for future cases. I am coming to the question of individual versus group claims, the court below decided our case, there were two lines of cases in existence on the jurisdictional question.

The Klamath and the Mason cases were one line. They defined jurisdiction under 1491 and 1505 for Indian plaintiffs, and the other line was the Testan case decided by this Court

and the Eastport case, decided by the Court of Claims in 1967.

Eastport is the court that wrote the fairly mandating compensation test which this Court adopted in the Testan case, and neither Testan nor Eastport, of course, was an Indian case. The Klamath-Mason line of cases specifically upheld jurisdiction in cases like ours, and the Testan-Eastport line was an open question in cases like ours with the Department of Justice saying below that Testan-Eastport meant there was no jurisdiction even in an Indian case, and we of course arguing the contrary.

The Court of Claims en banc with every single judge concurring, including I might add Judge Bennett, who had dissented in the Testan case and had been upheld by this Court when it reversed the Testan case, all agreed that the Testan-Eastport line of cases was entirely in harmony with the Klamath-Mason line of cases, and under both lines, the Court had jurisdiction.

Let's look at the Testan case now. Now, first and foremost, Testan was not an Indian case. Indian cases are special, as this court has held time after time. There are special canons of construction that apply in Indian cases. There is the knowledge --

QUESTION: Was this the position of the Court of Claims?

MR. HOBBS: It did not speak to that question.

QUESTION: No. Thank you.

MR. HOBBS: There is the underlying knowledge that the land of the United States originally belonged to the Indians --

QUESTION: -- support of the Court of Claims jurisdiction in the Court of Claims?

MR. HOBBS: Yes, Your Honor.

QUESTION: That is, Indian cases are special cases?

MR. HOBBS: Yes.

QUESTION: You did.

MR. HOBBS: And we argued the rule of construction, which is --

QUESTION: So I gather your feeling, you suggest that you can rely on it here, even though the Court of Claims didn't justify its jurisdiction --

MR. HOBBS: Justice Brennan, I assume that we can urge any ground that we urged below in support of affirmance of the Court of Claims. Of course, the --

QUESTION: Even though the Court of Claims didn't rely on that ground? You urged it, but they didn't, they relied on something else.

MR. HOBBS: Yes. It's of course a rule for the convenience of the court whether to listen to such an argument if the Court of Claims did not address it.

But it is a fact of the case that this is an Indian case.

In the second case, also important is the fact that the Testan case did not involve a trust. It's instructive, I think, to consider the kind of claim that Testan and Eastport involved.

Testan involved the claim of a government emplovee that he was entitled to the next higher grade and he should be paid for that, and he sued for damages for the pay, back pay, for the next higher position which he said he should have had.

The Eastport case involved someone who was disappointed with the ruling of the Shipping Board, which failed to give him a license to enable him to sell a ship in foreign commerce which he had wanted.

Both of these cases involve governmental discretion, and complex governmental decisions. Neither involves any indication by Congress that, of any intention that there would be a right to recover damages for that kind of case. In our case, we have a specific trust relationship established by Congress in the General Allotment Act.

I would like to refresh ourselves on the language of that Act, the part that is relevant here. 25 USC 348, which was passed in 1887, says, quote, "The United States does and will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the state or territory

where such land is located, and that at the expiration of such period, the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charges or encumberance whatsoever."

In the Capoeman case, this Court held that that language created a trust that had an important purpose of bringing the Indian to a state of competency.

QUESTION: It says nothing about damages, does it?

MR. HOBBS: The General Allotment Act?

QUESTION: Yes.

MR. HOBBS: No, neither do most contracts, Your Honor, and yet it's implied when a dutv imposed by contract has been breached, there is a duty to respond in damages, and we say the same applies in a breach of trust case.

QUESTION: What about the last language, the last sentence quoted in the Government's brief, where it says that if the Government conveys in violation of the General Allotment Act such contract shall be null and void? Isn't there some argument to be gained for the Government there by saying that Congress specified the remedy as well as the right?

MR. HOBBS: I could not see when you were in dialogue with Government counsel, I could not see the existence of a remedy there. But these contracts for timber are in fact authorized by statute. The 1910 statute specifically authorizes the Secretary to make them, to sell the timber, or to approve,

technically to approve the sale by the allottee. Therefore the 1910 Act certainly superseded the General Allotment Act's ban on any contracts.

But to pick up with the Capoeman case again, in that case you held that the language of the General Allotment Act created an undertaking to hold, hold for the Indian, his allotment, and that it could not be diminished by taxes during the trust period, and I would ask you if you hold that the trust allotment cannot be diminished by taxes during the trust period, does it not follow that it should not be diminished by waste by the trustee during the trust period?

The intent of Congress certainly had to be the same in both cases that would diminish the value of the allotment.

The government has argued that the General Allotment Act did not contemplate a complex timber management operation. Perhaps it did not. We don't have to get into that because the only question here is whether there is jurisdiction and the cause of action for breach of trust.

The scope of that trust, whether it be broad or narrow, remains for further litigation.

QUESTION: But if the General Allotment Act contemplated only a skeletal type of trust to protect the Indians from improvident conveyances, and specified within it its own remedy, then that would have a bearing on the outcome of this case?

MR. HOBBS: Well, it might, but the 1910 Act expanded the General Allotment Act by permitting timber sales, and that is what we have here: Timber sales. We have congressionally authorized timber sales done under a trust arrangement created by the General Allotment Act.

QUESTION: But then you're saying that it's the 1910 Act you're relying on, not the General Allotment Act, because you say you don't have to get into the question of whether the General Allotment Act contemplated an elaborate timber management program?

MR. HOBBS: That's right. We do not have to get into that because the only question today is whether there is a cause of action for damages for breach of trust. It is not how wide or narrow the General Allotment Act trust is.

QUESTION: Well, then are you relying on the 1910 Act?

MR. HOBBS: I am citing the 1910 Act to you to show that when the question does come up of how wide the trust obligation is, the 1910 Act will help define that. So indeed will the 1934 Act which instructs the Secretary to manage the timber on a sustained yield basis, which he failed to do.

There are many acts, all cited in our brief, which define the duties of the trustee under the trust relationship, but those -- Justice agrees with this. Justice says in its brief as we do that this question is not before you now. The

scope of the trust is not before you.

If the General Allotment Act gave only one, or imposed only one duty on the United States after litigation, we suppose we were to find that out, still the question is whether we could sue on the breach of that duty for damages. We say sure we can for, by analogy to the contract, by the legislative history which I'm going to get to in a minute --

QUESTION: What if the General Allotment Act had said in the, in exactly the same words, imposed a trust on the United States, and said the exclusive remedy for a breach of this duty by the United States shall be an action for recision?

MR. HOBBS: Perhaps that would govern, to the exclusion of an action for damages. You have to also --

QUESTION: The last sentence of Section 5 refers just to conveyances and contracts, and any conveyance or contract with respect to these lands until the expiration of the allotment period under that sentence would be utterly void. Any contract or conveyance. And yet there were subsequent acts, as you say, which said expressly permitted certain kinds of conveyances and contracts, with respect to these lands. That is part of your argument, I take it?

MR. HOBBS: Yes.

QUESTION: And in any event, it refers only to contracts and conveyances, and part of your claims for breach of trust have nothing to do with a conveyance or a contract.

MR. HOBBS: Well, they have to do with the way the conveyance of the timber was carried out.

QUESTION: Well, I know, but the failure to pay interest hasn't got anything to do with that, does it? Or the failure to handle it on a sustained yield basis? That hasn't got a whole lot to do with the conveyance or a contract?

Well, anyway, go ahead.

MR. HOBBS: The contract is the matrix in which these breaches of trust occurred. We don't rely on any breach of contract, certainly. We rely on breach of trust, which occurred in the context of a contract. The contract, I guess you might say, is background.

Another thing you have to consider is the very fact that these timbered allotments were made at all. Normally, in the overwhelming number of cases of Indian allotments they are farm land, and the Indians expected to raise corn or cattle. In those cases, the Indian does the work and the government just helps him and gives him seed and supervises his labor. But when the government gave 2,400 Indians 80 acres of timber each, what are they going to do? You can't manage 80 acres of land, an individual Indian can't. For one thing, you only can harvest it once in a lifetime, and when you do, you're going to need equipment that most people don't have, especially an Indian.

For another thing, 80 acres is hopelessly small as an area of timber that can be managed, particularly if it is

located in the middle of a large forest. If it were an isolated woodland, there are techniques for management of that. This is in the middle of a dense forest, one of the densest forests in the United States.

The very allotment of those allotments, the very act of making those allotments, should have made clear that the trust was going to have to involve some management of timber, because the Indian could not possibly do that himself.

QUESTION: Are all of the respondents here allottees?

MR. HOBBS: They are allottees or successors of allottees who have a claim that arose while the land was in trust status; yes.

QUESTION: So you don't have to rely on 1505, then?

MR. HOBBS: No, that's correct. However, we do rely on 1505 as a second string to our bow, a point I'm coming to.

While I am still on the question of what actually happened here, what are the -- for practical purposes, what really went on here, I want to say this, that the Indians understandably took no part in the management of this forest, even though they were the owners of it by the small parcel, they took no part in its management. The Secretary had a large office located, one of them, in Portland, one of them in Washington, D.C., and another one, later, in Everett, Washington. They decided when the timber was to be sold; when they decided that they would go visit the Indian or communicate

with him and have him come in and sign a power of attorney. That would authorize the Secretary to do all things necessary to manage and sell that timber.

The government then would put out invitations for bids. The government would let the contract. When the contract was let, the government would supervise the contractor. It had inspectors in the field that inspected the logging; they saw to the proper scaling of the timber; they saw to the collection of money, security deposits from the loggers.

They collected the money; they deducted their 10 percent fee, and they credited the balance to the allottees. All the allottee had to do after he signed the power of attorney was open the envelope with the check. That's all he had to do with a very complex management scheme involving hundreds of employees of the Interior Department.

This clearly distinguishes our case from the background of either Testan or Eastport. We don't say, of course, that the rules of those cases don't apply; they do, of course. The Eastport-Testan rule says that when you sue the government for damages, you've got to find outside the Tucker Act some statute that gives you a right to sue for damages. Justice says this has to be express. I think I heard during oral argument a retreat from that, and it may as well be, because the Testan case, when it comes to Testan's own conclusion, it picks up the Eastport conclusion, which is in our brief on page 13, which I

would like to quote for us.

This is this Court laying down the rule. "Entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained,'" citing Eastport, and continuing, "We are not ready to tamper with these established principles."

Well, the Eastport case that you approved, of course, was the rule laid down by the very court and including some of the very judges that have said that we, in our case, have jurisdiction. So the question is whether the language of the General Allotment Act, which is to say language establishing a trust, can be fairly mandating as saying that you have a right of action for damages.

The Court of Claims said yes. The Whiskers case has said yes. Two district courts in California have said yes; they are cited in our brief.

You have said yes in cases that we don't find substantially similar -- or, dissimilar. In Jacobs v. United States, which was a just compensation case, you upheld jurisdiction under Fifth Amendment taking claim, even though the Constitution is silent as to any right to sue for damages. You said this was part of the self-executing aspect of the Constitution.

Well, isn't this also true of a trust? If a trustee

breaches his trust, isn't it an inherent part of that relationship that he respond in damages?

In United States v. Wickersham, which was another government employee case, unlike Testan he already had his job and he was illegally fired from it. Yet he was held to have an implied right to go to court and sue for damages for the back pay during the period he'd been laid off illegally, because you said that this was a suit for denial of emoluments of a Civil Service position and that was presumably an implied fairly mandated cause of action.

QUESTION: I suppose the Bivens case and last term's Passman case also help you, don't they?

MR. HOBBS: By holding implied rights of action in the Constitution?

QUESTION: Yes.

MR. HOBBS: Yes, they do. The Justice Department did not raise the point and we decided, in view of the enormous number of points to raise, not to raise it ourselves, but we did think that they helped us.

QUESTION: Well, you relied on the other case, which held that the only jurisdiction was the takings clause of the Constitution.

MR. HOBBS: Well, the Jacobs case.

QUESTION: Yes.

MR. HOBBS: Yes. We did rely on that.

QUESTION: And those two cases that I mentioned, other provisions of the Constitution were held to confer private rights of action.

MR. HOBBS: We also didn't argue the Cort case, C-o-r-t, because we thought our case was raised sharper issues. The Cort case was vaguer, less tied down, less nailed down, had less square corners than our case.

We have a trust agreement here, and we think therefore that the very existence of that trust confers a right of action for damages. Otherwise --

QUESTION: It's not a mine run, plain vanilla trust, is it?

MR. HOBBS: No, it is a trust to bring the Indians to a status --

QUESTION: The statute uses the word "trust" but it also provides that there shall be an allotment to individual Indians, and it's the individual Indians who have control of the property, unlike a mine run trust where the trustee does.

MR. HOBBS: In the case of farmland, the Indian does have control of the property. In the case of timberland, he does not. These allottees don't even know where their lands are.

QUESTION: Don't you think that the allottees could insist that they be permitted to operate their own timberland if they so desire?

MR. HOBBS: They tried, Your Honor, in 1941, and the court threw them out. That was the Eastman case. It was a suit for injunction to permit the Indians to run the timberland the way they wanted to, and the court said, "Why, nonsense. The Secretary would be foolish if he let the Indians run their own allotments. It would be a madhouse in the forest," and they threw them out on the grounds that the Secretary had to manage this forest as a single unit.

They tried the injunction route and they were thrown out.

QUESTION: That's a Ninth Circuit case; that's not a case from this Court, is it?

MR. HOBBS: No, that's true.

Now, Justice agrees that some of our claims are within the Tucker Act, claims for money improperly withheld. Why is land held by the government with an obligation to turn it over at the end of the trust period any different from money held?

If the Court of Claims has jurisdiction on a money claim, then why not for a land claim, a land for return of the money originally given to the trustee?

Contract. Suppose there were a contract between these Indians and the government and the obligation of the government under that contract was to competently manage these forest lands. Would anyone question that the Court of Claims

had jurisdiction over such a claim? I don't think so.

What about the fact that the Indians have paid fees in this case? The United States collects up to a 10 percent fee to pay it for its administrative services. Is that not an implied contract, if the services are not properly performed, to be paid to make the trust property whole?

The Interior Department agrees with us. Now, for a good reason: When the Indian Claims Commission Act was passed, they testified that they wanted to be accountable in order to make the government employees have an incentive to do a proper job under the trust responsibility. They so testified, and the language is quoted in our brief.

QUESTION: Could I enter a few -- just a moment -- do you think technically this is a jurisdictional issue? The way the government puts it, they say the Court of Claims jurisdictional statute reads right on it, there has been a waiver of sovereign immunity in the Tucker Act. The question is one of statutory construction, whether or not, at the threshold of the case, whether or not the statute should be construed to permit a cause of action for damages.

Suppose the statute said there was, just said it in black and white. And suppose another one said there shouldn't be, and another one is more arguable. You at least have a -- the Court of Claims has got jurisdiction, figure out whether the statute grants a cause of action or not, and if they decide

it doesn't, the claimant just loses his case.

MR. HOBBS: That is so.

QUESTION: Well, is that a jurisdictional question or not?

MR. HOBBS: I have to confess considerable confusion over the question of waiver of sovereign immunity and creation of a cause of action --

QUESTION: Sovereign immunity, the government concedes has been waived by the Tucker Act.

MR. HOBBS: Well, that's not what this Court said in Testan.

QUESTION: Well, I -- the government -- well, I don't know. That depends on how you read Testan about that.

MR. HOBBS: Well --

QUESTION: And I don't know that Testan is any different in that regard than the government's argument here that the way you construe the statute with respect to whether or not a cause of action has been granted, you should remember that you're talking about the scope of sovereign immunity.

But I'm not sure that converts it into a kind of a jurisdictional question that the normal rules about raising issues shouldn't apply to.

MR. HOBBS: Your Honor, I have a second argument that is just as solid as the first, and I must turn my attention to it now.

QUESTION: Go ahead.

MR. HOBBS: That is the legislative history. You cannot read this legislative history of 1505 without concluding that Congress intended tribes and identifiable groups to have a cause of action for damages for breach of trust. You cannot conclude otherwise.

The question is whether our plaintiffs fit within the definition of tribe or identifiable group.

Tribe, we have the Quinault Tribe, and as to their 4,000 acres, clearly they're within that. Whether you call it a waiver of sovereign immunity or creation of a cause of action, that legislative history did both, and no question about that.

As to identifiable group, these 1,465 plaintiffs are an identifiable group. They were so held by the Court of Claims -- well, they were held to be a class by the Court of Claims, and the Court of Claims has rulings that we think would make them agree that this is an identifiable group.

If, however, you do not agree that they are an identifiable group, then the doctrine of in pari materia must lead you to conclude that 1491 has to be construed the same way as 1505. That is what the Court of Claims held in the Hebah case, cited in our brief, and that is the case upon which we would rely if we got to that point.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Claiborne, do you have anything further?

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CLAIBORNE: Briefly, Mr. Chief Justice.

I simply want to suggest that the proposition now put forward is a novel one. In one respect, this case seems to be tailored for Indian cases, but we know from the Cherry case decided by the same court subsequently that this notion that there is amenibility to damages for breach of trust is not limited to Indian cases, and indeed why should it be. There is such a principle. It will range far and wide and we invite the Court not to open that door which, if it is opened, it has been open since 1887 and yet it didn't occur for anyone, Indian or non-Indian, to put it forward until at the earliest a decade ago.

QUESTION: There is nothing terribly unusual about that, is there? We recently construed the Sherman Act to include the type of cause of action that had not been thought of by anybody since 1881 or 1887, whenever the Act was passed.

MR. CLAIBORNE: Mr. Chief Justice, it happens but it is unusual to discover a hundred years later that the Tucker Act, there available since then, has now for the first time provided a remedy for breach of trust because it happens -- it might not have -- that the allotment in this case was under the

General Allotment Act. If it had been made under the very treaty of Olympia involved in this case, it would not be a trust allotment, it would be a restricted allotment and there would be no technical breach of trust.

QUESTION: Assuming that a breach of trust on the theory that the case was brought, what kind of an action kind of remedy would there be in terms of an accounting?

MR. CLAIBORNE: Mr. Chief Justice, with respect -- of course, my first answer is that there is a prospective remedy to enjoin the continuation of the breach by the Secretary of the Bureau of Indian Affairs or whoever is violating the statutory duty.

QUESTION: Where would that be, where would juris diction for that kind of an action be?

MR. CLAIBORNE: In the District Court under 5 U.S.C. 702, to review and correct the action of the Administrator in violating the statute; whether it is called trust or not, it is mismanagement of the forests, in violation of the statute. That remedy is plainly available and certainly is today with the amendment of the Administrative Procedure Act.

There may also be a remedy to recoup any monies wrongfully exacted or wrongfully retained from the Indians. That is an exception which the Court recognized in Testan and we concede here may well be available to these plaintiffs in respect of the claims that the administration fees charged

by the government were excessive. To that extent, it would be a wrongful retention or exaction which may be recouped, but it is not damages in the usual sense.

QUESTION: Would that be restitution?

MR. CLAIBORNE: It would in effect be restitution. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:59 o'clock p.m., the case in the above-entitled matter was submitted.)

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