No. 03-768L

(Filed October 29, 2004)

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SHERWYN ZEPHIER,
ADELE ZEPHIER,
RODERICA ROUSE,
LLOYD B. ONE STAR,
EDNA LITTLE ELK,
CHRISTINE MEDICINE HORN,
AND LOIS L. LONG,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

****

Jeffrey M. Herman, Herman & Mermelstein, P.A., Hollywood, Florida, for plaintiffs.

Caroline M. Blanco, General Litigation Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant.

Order and Opinion

Plaintiffs, seven members of the Sioux Nation, sue the United States under the Tucker Act, 28 U.S.C. § 1491, for $25 billion in damages allegedly caused by sexual, physical, and mental abuse suffered during 1921-1924 and perhaps other unspecified dates at Indian boarding schools managed by various church organizations, and overseen by the Bureau of Indian Affairs ("BIA") within the U.S. Department of the Interior ("Interior"). Compl. ¶¶ 14, 36.

Plaintiffs also seek to certify and represent a class of similarly-situated plaintiffs. Compl. ¶¶ 31-41.

Defendant has moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

For the reasons stated below, the court grants defendant's motion.

I. Background

On February 16, 1869, the Senate provided its advice and consent to an 1868 peace treaty with certain Sioux Indian tribes. The treaty included the following provision:

> If bad men among the whites, or among people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Treaty between the United States and Different Tribes of Sioux Indians ("Treaty"), Apr. 29, 1868, art. I, 15 Stat. 635 (emphasis added); Compl. ¶¶ 12-13.

The term "bad men" commonly appears in other treaties between the United States and native American Indian groups. Compl. ¶ 13; **Tsosie v. United States**, 825 F.2d 393, 395 (Fed. Cir. 1987). The Sioux Treaty also states, at art. I:

> [T]he President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper.

Sioux Treaty, art. I. \[1]

Under the Treaty, the Sioux agreed to move onto a designated reservation, to permit the construction of railroads not passing over the reservation, to refrain from attacking, killing, carrying off, or scalping people of the United States, and to compel their children to attend school "[i]n order to insure the civilization of the Indians entering into th[e] treaty." Sioux Treaty, arts. II, VII, XI, XV.

In exchange, the United States pledged to establish a reservation and, with certain exceptions: to ban the entry of non-Native Americans, to construct various buildings, to provide certain subsidies, aid, and technical assistance, and to provide a teacher for every thirty children desiring an "English education." Sioux Treaty, arts. II, IV, VI - X, XIII - XIV.

\[1] It does not appear that such regulations ever were promulgated.

The $25 billion sought by plaintiffs is based on theories of strict liability, for the breach of the "bad men" clause of the treaty, and for breach of fiduciary duty, based on the United States' special relationship with Native Americans. Compl. ¶¶ 9, 43-44, 47-49.

The government argues that plaintiffs failed to exhaust their available administrative remedies, Def.'s Mot. to Dismiss ("Def.'s Mot.") at 6-9, and that their claims do not state a valid cause of action under the Tucker Act, id. at 9-14. To support the argument that administrative remedies are available, defendant submits the declaration of Charles R. Babst ("Babst Decl."). Mr. Babst, an Interior Department attorney, avows that Interior has conducted several administrative reviews of "bad men" claims over the years, that it has developed administrative procedures to adjudicate such claims, and that it has awarded money damages with respect to at least one meritorious claim. Babst Decl. at 1-2.

Plaintiffs contend that they need not exhaust administrative remedies as to their "bad men" claims because this would be futile, since Interior and the BIA have no authority to award money damages on their claims. Pls.' Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Mem.") at 8. They base their claim of entitlement to bring a direct Tucker Act claim on several Supreme Court cases permitting Indians to recover damages for breach of trust. Id. at 16.

II. Discussion

A. Standard of Review

In deciding whether to dismiss a claim for lack of subject matter jurisdiction or for failure to state a cause of action, the court must construe unchallenged allegations of the complaint favorably to the non-movant, and should not dismiss the complaint unless it is beyond doubt that the plaintiff can prove no set of facts entitling it to relief. **Hamlet v. United States**, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

If "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." **Toxgon Corp. v. BNFL, Inc.**, 312 F.3d 1379, 1382 (Fed. Cir. 2002).

Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. **Tuthill Ranch, Inc. v. United States**, 381 F.3d 1132, 1134-35 (Fed. Cir. 2004) (citing FED. R. CIV. P. 56(c), and **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247-48 (1986)).

The party moving for summary judgment must demonstrate the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. **Toxgon Corp.**, 312 F.3d at 1383 (*quoting* **Celotex Corp. v. Catrett**, 477 U.S. 317, 323-26 (1986)). The adverse party then "must set forth specific facts showing that there is a genuine issue for trial." **Id.** (*quoting* **Anderson v. Liberty Lobby, Inc.**, 477 U.S. at 250).

A court may consider evidence outside the pleadings when deciding a Rule 12(b)(1) motion without converting the motion to one for summary judgment. See **Indium Corp. of America v. Semi-Alloys, Inc.**, 781 F.2d 879, 884 (Fed. Cir. 1985).

Defendant's declaration from Mr. Babst therefore may be considered in deciding whether plaintiffs have exhausted their administrative remedies so as to give the court subject-matter jurisdiction over plaintiffs' claim in Count I for treaty damages. It is irrelevant to whether plaintiffs have stated a claim in Count II for breach of trust.

B. Breach of Treaty Claim

Defendant argues that plaintiffs have failed to exhaust the administrative remedies "expressly required" in the Sioux Treaty, specifically, providing proof to the Indian agent of the wrong committed by the "bad men," so that the claim might be forwarded to the Commissioner of Indian Affairs. Def.'s Am. Reply at 1, 4-8.

Plaintiffs claim that exhaustion is futile because it would not provide the relief requested. Also, for the first time in their amended opposition to defendant's motion to dismiss, plaintiffs claim that, in the Jurisdictional Act of 1891, Congress expressly authorized the Court of Federal Claims to decide "bad men" claims. Pls.' Am. Mem. at 19. \[2]

The central purpose of requiring exhaustion of administrative remedies is "to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." **Parisi v. Davidson**, 405 U.S. 34, 37 (1972); **Sandvik Steel Co. v. United States**, 164 F.3d 596, 599 (Fed. Cir. 1998). Congressional intent is of "paramount importance" in any exhaustion inquiry. **McCarthy v. Madigan**, 503 U.S. 140, 144 (1992) (*quoting* **Patsy v. Bd. of Regents of Regents of Florida**, 457 U.S. 496, 501 (1982)).

\[2] Plaintiffs' argument that the Jurisdictional Act of 1891 gives this court original jurisdiction over "bad men" claims is patently incorrect. As plaintiffs state, the statute refers to "claims for property of citizens of the United States taken or destroyed by Indians . . ." Pls.' Am. Mem. at 20 (emphasis added). The text plaintiffs cite says nothing about claims by Indians against the United States or its citizens.

When Congress specifically requires it, exhaustion is a prerequisite for filing a complaint. "Where Congress has not clearly required exhaustion, sound judicial discretion governs." **Id**. (*quoting* **Coit Independence Joint Venture v. FSLIC**, 489 U.S. 561, 579 (1989)).

In **McCarthy v. Madigan**, supra, 503 U.S. at 146-48, the leading case on exceptions to the exhaustion doctrine, the Supreme Court identified three circumstances when exhaustion of administrative remedies is unnecessary: 1) when an administrative remedy "may occasion undue prejudice to subsequent assertion of a court action," 2) when there is "some doubt as to whether the agency [has been] empowered to grant effective relief," e.g., if the agency "lacks institutional competence" to adjudicate the issue or lacks the authority to grant the relief sought, or 3) when the administrative body is "biased or has otherwise predetermined the issue before it." **Id**.

In **McCarthy**, a federal prisoner brought an action for money damages against four prison employees for violating his Eighth Amendment rights, pursuant to **Bivens v. Six Unknown Fed. Narcotics Agents**, 403 U.S. 308 (1971). **Id**. at 142. The Tenth Circuit affirmed the district court's dismissal on exhaustion grounds. **Id**. at 141-42; see also **McCarthy v. Madigan**, 914 F.2d 1411 (10th Cir. 1990).

Reversing, the Supreme Court determined that Congress did not require exhaustion and held that the lack of any requirement to pay money damages in the prison regulations "weigh[ed] heavily against" the government's argument that exhaustion was required. **McCarthy**, 403 U.S. at 154, 156. The short filing deadlines for administrative relief, which heightened the risk that a claimant inadvertently might forfeit a claim, also made it appear unlikely that exhaustion would be required. **Id**. at 152-53.

Plaintiffs rely only on the second **McCarthy** exception, claiming that Interior has no power to grant them effective relief, specifically, money damages. Pls.' Am. Mem. at 10. For support, they point to Congress' failure to pass regulations expressly governing the adjudication of "bad men" claims, and to treaty language that is so "laden with ambiguity and confusion," that administrative review is impossible. See Pls.' Am. Mem. at 15 n.6, n.7.

The Constitution grants Congress plenary power to manage relations with American Indian tribes within the territory of the United States. U.S. Const. art. I, § 8, cl. 3. ("The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes.") The earliest U.S. treaties with American Indian tribes were submitted for the Senate's advice and consent. See RESTATEMENT (SECOND) of Foreign Relations Law § 117 n.2 (1965).

The courts describe Indian tribes as "alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation." **Elk v. Wilkins**, 112 U.S. 94, 99 (1884).

A treaty between the United States and an Indian tribe is a contract, and individual Indians may bring suit under the Tucker Act for its breach. See **Tsosie v. United States**, 825 F.2d 393, 397, 401 (Fed. Cir. 1987) (citations omitted); **Hebah v. United States**, 192 Ct. Cl. 792, 794 (1970).

In interpreting treaty language, a court looks to its "ordinary meaning in the context of the treaty" and seeks the interpretation that will "best fulfill the purpose of the treaty." See **United Techs. Corp. v. United States**, 315 F.3d 1320, 1322 (Fed. Cir. 2003) (citation omitted); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §325(1) (1987) ("An international agreement is to be interpreted in good faith

in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.") See, e.g., **Lower Sioux Indian Cmty. in Minn. v. United States**, 163 Ct. Cl. 329, 333 (1963) (*quoting* **Miami Tribe of Oklahoma v. United States**, 150 Ct. Cl. 725, 740 (1960) (*quoting* **Geofroy v. Riggs**, 133 U.S. 258, 270 (1890) ("It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable.")).

The Sioux Treaty, like others, clearly states that the United States will both arrest a non-Native American government representative who harms a Sioux or his property and reimburse the damages sustained by the claimant, "upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city." Sioux Treaty, art. I.

The treaty language requiring proof, together with the explanation as to why it is needed (to forward to the Commissioner), and that administrative review is contemplated, if arrest and/or compensation is desired, is straightforward and clear.

The Interior Department's general authority to review claims against the Department is equally clear. The Secretary of Interior has authorized the Director of the Office of Hearings and Appeals ("OHA"), to adjudicate, on behalf of the Secretary, "matters within the jurisdiction of the Department involving hearings, and appeals, and other review functions of the Secretary." 43 C.F.R. § 4.1.

A Hearings Division within the OHA, staffed by administrative law judges, and several appeals boards, including a Board of Indian Appeals with jurisdiction over appeals of administrative actions by officials of the BIA, are authorized to conduct hearings and review appeals thereto, respectively, in cases arising under statutes and Interior regulations. 43 C.F.R. § 4.1. Treaties are considered to be statutes for these purposes. See **Valentine v. United States**, 299 U.S.

5, 10 (1936) (Since the Constitution states that a treaty is "the law of the land," courts should regard treaties "as equivalent to an act of the legislature.")

In his declaration in support of defendant's motion, Mr. Babst affirms that Interior previously has reviewed several administrative claims under the "bad men" clause of these treaties. Babst Decl. at 1-2. Although several cases ultimately were adjudged to be without merit, the department paid money damages in at least one such administrative appeal. Id. at 1.

Defendant relies on several "bad men" cases, e.g., **Hebah**, **Tsosie**, **Begay**, discussed infra, to support its argument that plaintiffs must present their claims administratively as a prerequisite to any relief. Plaintiffs assert that none of these decisions governs, either because not on point or for lack of precedential value. Defendant's view is more persuasive, as the cases themselves demonstrate.

In **Hebah v. United States**, 192 Ct. Cl. 785, 787-88 (1970), apparently the first claim for damages under a "bad men" clause, see **Tsosie v. United States**, 825 F.2d 393, 396 (Fed. Cir. 1987), Laura Hebah sought damages for her husband's alleged wrongful death at the hands of members of the Indian Police Force, invoking the1868 Shoshonee/Bannack Indian treaty "bad men" clause, which is identical to the clause in the Sioux Treaty.

Denying the government's motion to dismiss on the grounds that Native Americans had the right to sue individually for breach of the treaty at issue, the **Hebah** court stated that "the only prerequisite to suit required by the treaty" was the submission of a claim to the superintendent of the appropriate Indian agency and sending a copy to the Commissioner of Indian Affairs in Washington. **Hebah**, 192 Ct. Cl. at 795.

In a case strikingly similar to this, eleven female minors sued under the "bad men" clause of the 1868 Treaty between the United States and the Navajo Tribe of Indians, June 1, 1868, art. I, 15 Stat. 667 ("Navajo Treaty"), for sexual abuse they allegedly suffered while students at an Indian boarding school administered by the BIA. **Begay v. United States,** 219 Ct. Cl. 599, 600 (1979) ("**Begay I**").

Unlike the plaintiff in **Hebah**, the **Begay I** plaintiffs submitted a claim — to the Navajo reservation director — before bringing suit, and sent copies of the claim to the Assistant Secretary of Interior, who had inherited the responsibilities of the Commissioner of Indian Affairs. **Id.** at 600-1. While the plaintiffs did not await resolution of their administrative claim (bringing suit only seventeen days after notifying the reservation director), see **id.** at 601, the court nonetheless denied the government's motion to dismiss for failure to exhaust and suspended the proceedings for ninety days to allow the Department time to adjudicate the "bad men" claim administratively, **id.** at 603.

After a hearing, Interior apparently denied the **Begay I** plaintiffs' claims for lack of proof. See **Begay v. United States**, 224 Ct. Cl. 712, 714 (1980) ("**Begay II**") (unpublished opinion\[3]). Defendant then

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\[3] Under the rules of the Federal Circuit, any opinion or order designated as not to be cited may not be employed or cited as precedent. FED. CIR. R. 47.6(b). However, it may be cited for the purpose of showing the administrative history of a case. See, e.g., **Sorchini v. City of Covina**, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam) (*quoting* U.S. CT. OF APP. 9TH CIR. R. 36-3 (unpublished opinions may not be cited, except "for factual purposes")). Also, some courts have held that cases lacking precedential force may be cited as persuasive on material issues not addressed in any published opinions of the court. See, e.g., **First Capital Asset Mgmt., Inc. v. Satinwood, Inc.**, 385 F.3d 159, 175 n.13 (2d Cir. 2004) (*quoting* U.S. CT. APP. 10TH CIR. R. 36.3); see also **Giese v. Pierce Chem. Co.**, 43

moved for summary judgment in the Court of Claims, where the **Begay** plaintiffs asserted that Interior had no rules to govern treaty determinations. **Begay II**, 224 Ct. Cl. at 714. The court rejected that argument based on Interior's general rules governing hearings and appeals before the department in title 43 of the C.F.R., cited above. Id.\[4]

The complaint in **Tsosie v. United States**, 825 F.2d 393, 394, 397 (Fed. Cir. 1987) was brought under the Navajo Treaty "bad men" clause by a Navajo woman claiming that she was sexually abused while a patient in a government hospital on the reservation. Tsosie filed a claim with the Department of Health and Human Services under the Federal Tort Claims Act ("FTCA"). When this was denied, she filed an administrative claim at Interior under the Navajo Treaty, which also was denied. The Federal Circuit, deciding a certified question of law, held that the "bad men" clauses remained good law, **id.** at 397, without disturbing the Court of Federal Claims' stated inclination to reverse and remand the case to Interior for final determination. **Id.** at 402-3.

F. Supp.2d 98, 104 n.1 (D. Mass. 1999) (construing the Federal Circuit rule to mean that a lower court should "take the circuit rules at their word and, when an 'unpublished opinion' is persuasive, go ahead and cite it — noting its unpublished status . . . — not as precedent but as one would cite a law review article by three respected authors.").

\[4] The "bad men" clause in the Navajo Treaty at issue in **Begay I** and **Begay II**, unlike that in the Sioux Treaty, precludes the payment of damages "until examined and passed upon by the Commissioner of Indian Affairs." The court dismissed that claim when plaintiffs failed to show that Interior's denial of the claims was arbitrary and capricious.

Plaintiffs' protestations to the contrary notwithstanding, in the only cases that have focused on the mechanics of prosecuting claims under the "bad men" clauses of Indian treaties, the courts either have found that the plain language of the treaties mandates exhaustion of administrative remedies or have accepted without question that such remedies are available. The Babst declaration, and 43 C.F.R. § 4.1, make it clear that Interior is equipped to adjudicate "bad men" claims, including those for sexual abuse meriting the payment of money damages.

While plaintiffs argue that **Tsosie** merely holds that "bad men" claims are enforceable under the Tucker Act, and that **Hebah** and the two **Begay** cases did not consider the specific issue of whether the BIA or Interior had authority to grant money damages, none of these cases holds that administrative review is precluded if money damages are sought or that money damages are not permitted. This is understandable when the treaty itself expressly contemplates "reimbursement for the damages sustained," which presumes a monetary payment.

Plaintiffs also assert in a footnote that the size of the damages they claim — $25 billion, presumably based upon the expectation that a class will be certified — precludes administrative review and mandates judicial disposition. However, plaintiffs cite no authority for this view. The court fails to see the relevance of the size of the demand, and notes that administrative review is routinely performed by all federal agencies in cases involving large sums of money, including tort claims under the FTCA, and contract damages cases. By way of example, Interior regulations establishing procedures for administrative FTCA claims set no upper limit on the amount that may be paid, stating only that the payment of awards above $25,000 requires the prior, written consent of the Attorney General. 43 C.F.R. § 22.2(a). Moreover, **McCarthy**, the case upon which plaintiffs rely to support their claim that exhaustion is not required, provides no support for the general proposition that exhaustion is not required

when the remedy sought is a large sum of money. The Babst declaration, on the other hand, states that Tsosie received money damages in an administrative proceeding.

Exhaustion of plaintiffs' administrative remedies would contribute to judicial efficiency by allowing the responsible agency to make a factual record, apply its expertise, and correct its own errors so as to moot judicial controversies. See **Parisi v. Davidson**, 405 U.S. 34, 37 (1972). Such an administrative review would serve to bring forth key facts, such as the dates that the alleged abuse occurred.\[5]

The six-year Tucker Act statute of limitations period, 28 U.S.C. § 2501, is jurisdictional. **Bath Iron Works Corp. v. United States**, 20 F.3d 1567, 1572 (1994) (*quoting* **Hart v. United States**, 910 F.2d 815, 818-19 (Fed. Cir. 1990)). "A court may and should raise the question of its jurisdiction sua sponte at any time it appears in doubt." **Arctic Corner, Inc. v. United States**, 845 F.2d 999, 1000 (Fed. Cir. 1988) (*quoting* **Duke City Lumber Co. v. Butz**, 539 F.2d 220, 221 n. 2 (D.C. Cir. 1976). Since plaintiffs' claim would likely not accrue until the conclusion of any mandatory administrative proceedings, **Martinez v. United States**, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (*citing* **Crown Coat Front Co. v. United States**, 386 U.S. 503, 511 (1967)), whether some of the plaintiffs have claims within this court's jurisdiction may be decided if and when they challenge Interior's administrative determination.

C. Breach of Trust

In Count II of the complaint, relying on **United States v. Mitchell**, 463 U.S. 206 (1983), and **United States v. White Mountain Apache Tribe**, 537 U.S. 465 (2003), plaintiffs claim that the United

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\[5] Plaintiffs have not provided this information, other than one instance of alleged abuse allegedly taking place eighty years ago.

States owed them a fiduciary duty to protect their safety and well-being while they were being educated in government-run schools, and that it breached this duty by failing to protect them while there from physical, sexual, and psychological abuse. Compl. ¶¶ 48-50. They also claim that a fiduciary relationship resulted from the government's "exercise[] [of] complete and pervasive dominion and control" over the Indian boarding schools where they allegedly were harmed. Pls.' Am. Mem. at 1-2, 21.

In **Mitchell I**, nearly 1,500 members of the Quinault Tribe, suing under the Tucker Act, claimed that the government's mismanagement of forests located on the tribe's reservation breached a fiduciary duty under the General Allotment Act of 1887 ("GAA"). \[6] **United States v. Mitchell**, 219 Ct. Cl. 95, 97 (1979) (en banc) ("**Mitchell I**"). The GAA allotted a certain number of acres of land to individual tribe members for agricultural or grazing purposes, but directed that the United States was to retain title to the lands indefinitely, "in trust and for the sole use and benefit of the Indian to whom such allotment shall have been made." The Court of Claims, sitting en banc, denied the government's motion to dismiss, finding that the GAA established a fiduciary duty that the government breached. **Id.** at 98, 103.

The Supreme Court reversed, concluding that the GAA "created only a limited trust relationship . . . that did not impose any duty upon the Government to manage timber resources." **United States v. Mitchell**, 445 U.S. 535, 542 (1980) ("**Mitchell II**"). Critical to the Court's decision were the GAA's lack of an "unambiguous[] provi[sion] that the United States has undertaken full fiduciary responsibilities," Indian management of the land, and the overriding purposes of the legislation — to prevent alienation of the land and to prevent the state from taxing it. **Id.** at 542-44.

\[6] 24 Stat. 388, et seq., codified at 25 U.S.C. § 331, et seq.

On remand, the Court of Claims considered alternate statutory bases for liability and again found the United States liable for money damages. See **United States v. Mitchell**, 229 Ct. Cl. 1, 2, 13-15 (1981) (en banc) ("**Mitchell III**"). On certiorari, the Court in **United States v. Mitchell**, 463 U.S. 206, 211 (1983) ("**Mitchell IV**"), discovered that, in contrast to the "bare trust" described in **Mitchell II**, a complex web of statutes governed Indian resource management and created a fiduciary relationship because the government assumed "elaborate control over forests and property belonging to Indians." **Id.** at 224-25.

In **White Mountain Apache Tribe v. United States**, 46 Fed. Cl. 20 (1999), the tribe sued the government in the Court of Federal Claims under the Indian Tucker Act \7 for the cost of rehabilitating the historic buildings of Fort Apache, which had fallen into severe disrepair. Congress had directed by statute that the United States hold the Fort in trust for the tribe, subject to the right to use the grounds for school purposes. The Court of Federal Claims concluded that no trust responsibility existed since Congress, as in **Mitchell II**, had created a "bare trust." **Id.** at 26.

The Federal Circuit reversed, concluding that the law specifically created a trust. **White Mountain Apache Tribe v. United States**, 249 F.3d 1364, 1376-77 (Fed. Cir. 2001). The Supreme Court affirmed the appeals court, deciding that the law in question expressly defined a fiduciary relationship and gave the government the right to use the land, and these created an inference that the United States had an obligation to preserve and maintain the property, just as in a common law trust. **United States v. White Mountain Apache Tribe**, 537 U.S. 465, 474-75 (2003).

\7 The Indian Tucker Act, 28 U.S.C. § 1505, permits suits by Indian tribes, while the Tucker Act, 28 U.S.C. § 1491, allows suits by individual Indians.

From these cases, plaintiffs extrapolate a right to seek monetary damages, alleging that the government "exercised complete and pervasive dominion and control over Indian boarding schools," the sites where the wrongs allegedly were committed.

Defendant contends that plaintiffs' claims sound in tort and thus are beyond the jurisdiction of this court, and that the complaint fails to state a claim upon which relief can be granted. Def.'s Am. Reply at 4.

Actions for breach of trust clearly are tort actions. See RESTATEMENT (SECOND) OF TORTS § 874 Comment b (1979) (When a fiduciary breaches his fiduciary duties, the fiduciary has committed a tort, and the beneficiary is entitled to tort damages for any harm caused by the breach.); see also 37 C.J.S. Fraud § 6 (2004) ("A breach of a fiduciary or confidential relationship is virtually the same tort as constructive fraud . . .").

The Tucker Act gives the Court of Federal Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation . . . , or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." **Mitchell IV**, 463 U.S. at 212 (*quoting* the Tucker Act, 28 U.S.C. §1491(a)(1)) (emphasis added).

However, the Tucker Act is a jurisdictional statute only, and does not create a substantive, enforceable right against the United States for money damages. **Brown v. United States**, 86 F.3d 1554, 1559 (Fed. Cir. 1996) (citation omitted). Such a right "must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" **Mitchell IV**, 463 U.S. at 212 (*quoting* the Tucker Act, 28 U.S.C. §1491(a)(1)).

A trust is defined as "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

While **Mitchell IV** held that a fiduciary relationship resulted from the government's assumption of "elaborate control" over Indian property, central to the outcome of the case was the fact that all the elements of a common-law trust were present, i.e., a trustee (the government), a beneficiary (the Native Americans), and a trust corpus (the timber, land, and money). See **Mitchell IV**, 463 U.S. at 225. The same is true in **White Mountain Apache**, Fort Apache itself serving as the trust corpus. **White Mountain Apache Tribe**, 537 U.S. at 469.

The cases recognizing breach of trust claims by Native American tribes against the United States universally concern alleged government mismanagement of a property interest held to benefit those tribes (a corpus). See, e.g., **United States v. Navajo Nation**, 537 U.S. 488 (2003) (mining leases); **Pawnee v. United States**, 830 F.2d 187 (Fed. Cir. 1987) (oil and gas mining leases); **Brown v. United States**, 86 F.3d 1554 (Fed. Cir. 1996) (commercial leasing of allotted lands); **Shoshone Indian Tribe of the Wind River Reservation v. United States**, 364 F.3d 1339 (Fed. Cir. 2004) (sand and gravel leases).

Plaintiffs here do not even allege the existence of a trust corpus. Calling a tort claim a contract claim does not make it one. Claims of abusive treatment by government employees sound essentially in tort, and are expressly beyond the jurisdiction of this court. See **Smithson v. United States**, 847 F.2d 791 (1988) ("natural reading" of complaint that government officials breached loan agreement by engaging in arbitrary, capricious, and bad faith conduct was that it sounded in tort, not contract); see also **Campbell v. United States**, 16 Cl. Ct. 690

(1989) (claims by borrowers that government loan officials acted abusively and negligently, resulting in breach of loan agreements, "sound[ed] essentially in tort").

In sum, the physical, sexual, and psychological abuse claimed by the plaintiffs in this case, even if true, consists of tortious actions not remediable by this court.

III. Conclusion

Having failed to bring their claims administratively, plaintiffs are barred from seeking relief from this court. Recasting the claims as breach of trust actions is of no avail, because there is no property interest at issue here and because, in essence, these are tort claims. Therefore, defendant's motion to dismiss for lack of jurisdiction is GRANTED.

The Clerk of the Court shall enter judgment for the defendant.

DIANE GILBERT SYPOLT
Judge, U.S. Court of Federal Claims