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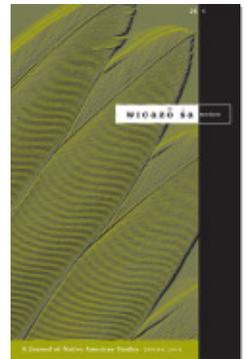
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**"Subject to the Right of the Secretary of the Interior": The White Mountain Apache Reclamation of the Fort Apache and Theodore Roosevelt School Historic District**

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## **“Subject to the Right of the Secretary of the Interior”**

### **The White Mountain Apache Reclamation of the Fort Apache and Theodore Roosevelt School Historic District**

*John R. Welch and Robert C. Brauchli*

In Apache, we believe *igoya'i bee goz'aa*, “wisdom sits in places.” Our Mountains, our Springs, other places, all hold stories that tell us who we are and how to live. We have many places that hold wisdom in our Homeland. We also have Fort Apache. We did not build it, but we were the reason it was built. It was a military post. The year was 1869. We had seen Europeans before when Coronado passed through our lands in the 1500s. We held off the Spanish soldiers and later the Mexican soldiers for 300 years. Then finally, the Americans came in great numbers and built a Fort on our land. We all knew that life would never be the same again.

—Ronnie Lupe, Chairman, White Mountain Apache Tribe, remarks to World Monument Watch, New York City, September 5, 1997

**T**his is a case study of power embedded in places pivotal to relationships between tribes and the federal government. We review collaborations among White Mountain Apache Tribe leaders, cultural

experts, historic preservation specialists, and attorneys on efforts to rescue and return to beneficial service the Fort Apache and Theodore Roosevelt School National Register Historic District in east-central Arizona.<sup>1</sup> Our review of Fort Apache history provides the backdrop for examining litigation brought by the Tribe against its trustee, the United States, for breach of its fiduciary obligations to the Tribe. What began as a simple request by the Tribe that the government repair damages it caused to the Tribe's Fort Apache property while under the government's control eventually pulled the Tribe into the U.S. Supreme Court for a redress of its grievances against the government. Our conclusions highlight consequences that the Court's breach of trust decision is having for the White Mountain Apache Tribe and may have for other tribes in regard to their government-to-government relationships with the United States, as well as Indian assertions of tribal sovereignty, self-governance, self-determination, and self-representation.

### **F O R T   A P A C H E   A S   C O N T E S T E D   G R O U N D**

For the past few decades the United States has been coming to terms with disconnections between cherished notions of national history (for example, discovery, Manifest Destiny, and post-Civil War unity) and the realities and legacies of the complex relationships between the United States and Indigenous nations.<sup>2</sup> Historical sites—most particularly places linked to violent conflict, such as Sand Creek and Custer Battlefield—have emerged as contexts for recognizing and seeking to move beyond the often stark differences among American Indian and non-Indian perceptions, descriptions, and interpretations of history.<sup>3</sup> An important instance of place-based reconciliation initiatives concerns the White Mountain Apache Tribe's efforts to add chapters to the history of Fort Apache, the site most commonly associated with Apache subjugation.<sup>4</sup>

Hollywood has ensconced Fort Apache in popular imaginations as an outpost that civilized the Southwest's savage wilderness. Fort Apache's more complicated and less publicized history involves the use of this single site by diverse groups for various purposes: Pueblo and Apache occupation and use from time immemorial until reservation confinements in the early 1870s; Apache-army negotiations before and during military occupation (May 16, 1870, through October 20, 1922); Bureau of Indian Affairs (BIA) co-optation of army facilities as the Theodore Roosevelt School for Indian boarding and day students (1923–present); and White Mountain Apache Tribe reassertions of sovereignty through litigation and initial implementation of heritage perpetuation and tourism plans (1969–present). Although actual instances of physical, interpersonal violence were not especially common at Fort Apache, memories of the successive site use, occupation, and

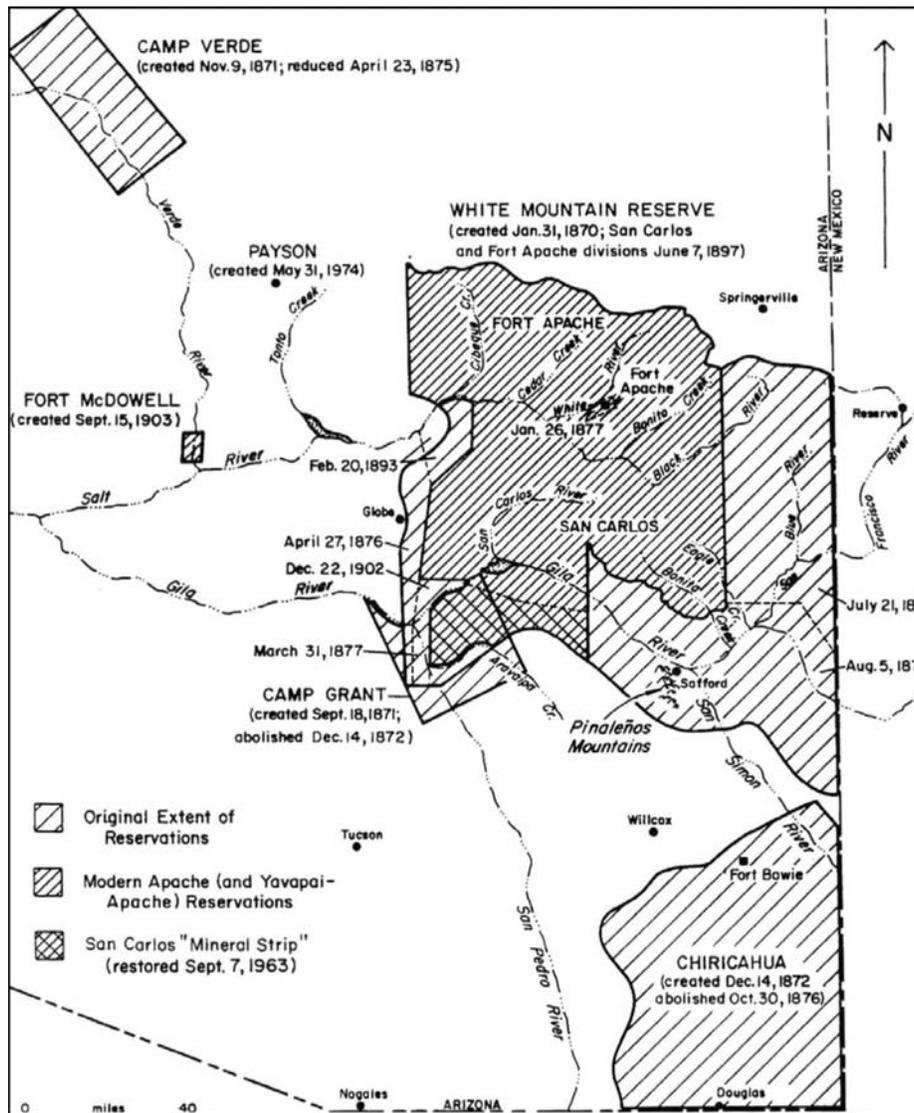
symbolization by Pueblo, Apache, army, and BIA cultures are dominated by conflict. None of the groups has relinquished attachments.

As will be described in what follows, the White Mountain Apache Tribe has applied moral, political, and legal authority to regain control over Fort Apache and to begin transforming the approximately 400-acre property into a place of historical conscience. Pueblo ruins, petroglyphs, Apache scout camps, twenty army-period historic buildings, seven pre-1950 BIA buildings, and numerous landscape elements are being preserved and interpreted to enhance Apache sovereign authority, especially the rights to represent collective memories of the past and work toward desired futures. In 1993, the Tribe adopted the *Fort Apache Historic Park Master Plan*. It then created the Tribal Historic Preservation Office in 1996, renovated the Tribal Cultural Center and Museum in 1997, and chartered the nonprofit Fort Apache Heritage Foundation in 1998. In 1999, the Tribe sued the U.S. government for failing to maintain the buildings and grounds, a case that eventually led the Tribe to victory in the Supreme Court. Through these and other initiatives employing Native American perspectives and voices to complement published interpretations of site and regional history, the Tribe has begun deconstructing Fort Apache's iconic position on the imagined Western frontier.<sup>5</sup>

### **FORT APACHE IN ROMANCE AND REALITY**

In 1869, in the first documented description of the site that was to become Fort Apache, Major John Green referred to it as a "garden spot."<sup>6</sup> In consultation with Western Apache leaders who foresaw the need for government protection of their ancestral territory from encroachment by non-Indians and from escalating violence in Chiricahua Apache territory, Green selected the high ground above the White River confluence as the site for an army post. After establishing a foothold in the White Mountain Apache homeland, surveying the exterior boundaries for an expansive reservation (1870–1871), and constructing a compound of log cabins and support facilities, the army began to use the post as an offensive weapon against the Apaches. Beginning in the Tonto Basin campaigns (1872–1873) and continuing through the end of the "Apache Wars," the post gained army recognition and support as a node in the network of forts established in response to Apache resistance to American expansionism. Map 1 shows Fort Apache in relation to the deletions and additions to the Arizona Apache reservations.

Fort Apache's roles in the restriction of American Indian sovereignty and the promotion of non-Indian residence and commerce across eastern Arizona and western New Mexico have been recognized by historians and celebrated in popular media.<sup>7</sup> By the early 1870s Fort Apache had become a crossroads for diverse people, goods, services, and ideas.



Map 1. Arizona's Apache Reservations through Time

Fort Apache was an original site for the recruitment of Apache scouts, who saw army collaboration as an expedited route to regional peace and a means for replacing lost status and material support for their families.<sup>8</sup> Due largely to the scouts' contributions to the relentless mode of field campaigning established by General Crook during his Arizona commands (1871–1875, 1882–1886), Fort Apache was a crucial source of personnel and supplies for subjugating and policing the Western and Chiricahua Apache Nations. With Geronimo's surrender to General Miles in 1886, it was from Fort Apache that most Chiricahua Apache were rounded up and excluded from their homeland for twenty-six years as prisoners of war. Soldiers from each of the army's four African American regiments, the Twenty-third and Twenty-fourth Infantry and the Ninth and Tenth Cavalry were garrisoned at Fort Apache. Fort Apache

**Figure 1. Federal Authorities Instrumental in the History of Fort Apache and TR School**

<i>Action and Date</i>	<i>Purpose/Consequences</i>
Grant's Executive Order, <b>November 9, 1871</b> , as interpreted by Army	Established the White Mountain Indian Reservation and appointed, through Army command, an Indian Agent / Enacted policy to compel all Western Apaches to remain within Reservation boundaries or suffer pursuit
Grant's Executive Order, <b>December 14, 1872</b>	Expanded existing reservation to create, "San Carlos division" by including terrain south of the Gila River / Created a "target" for criticism by non-Indians hungry for land, water, and other resources
Grant's Executive Orders, <b>August 5, 1873, July 21, 1874, and April 27, 1876</b>	Reduced Reservation size to make ore deposits in eastern reaches available for exploitation by non-Indians / Confirmed Apache suspicions that the U.S. government was not an Apache ally
Grant's Executive Order, <b>January 26, 1877.</b>	Withdrew 7,579 acres from the Reservation for Camp Apache use / Created fee simple land parcel surrounded by reservation (trust) land
Hayes's Executive Order, <b>March 31, 1877</b>	Reduced the size of the Reservation to make resources available for exploitation by non-Indians / Further eroded Apache confidence in U.S.
Congressional Act, <b>June 7, 1897</b> (30 Stat. 64)	Established separate Reservation for White Mountain Apache on land north of the Salt or Black River, to be known as the Fort Apache Indian Reservation / Divided White Mountain Indian Reservation in two; facilitated creation of San Carlos Apache and White Mountain Apache "tribes"
Roosevelt's Executive Order, <b>December 22, 1902</b>	Reduced the size of the Reservation / Opened additional Apache land, minerals, and water to exploitation by non-Indians
Harding's Executive Order, <b>October 4, 1922</b>	Transferred land withdrawn by Order of January 26, 1877 from the Army to the Secretary of Interior / Created TR School land base
Congressional Act, <b>January 24, 1923</b> (42 Stat. 1187, 25 USC §277)	Established Theodore Roosevelt Indian School at the former Fort Apache, providing that the post, and the land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purpose / indicated intent to return control of land and buildings to Tribe's custody following use as TR School

(continued)

**Figure 1. Federal Authorities Instrumental in the History of Fort Apache and TR School (continued)**

<i>Action and Date</i>	<i>Purpose/Consequences</i>
<p>Congressional Act,  <b>March 18, 1960</b>                      (74 Stat. 8, 25                      USC §277</p>	<p>Declared in trust the TR School land (7,579 acres) and improvements (formerly held in fee simple by U.S.) for the White Mountain Apache Tribe, <i>subject to the right of the Secretary of the Interior</i> to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose. / Secretary continues use of 410 acres and improvements thereon as TR School</p>
<p>Clinton's Executive Order 13096 of  <b>August 6, 1998</b></p>	<p>Reinvigorated federal commitment to Indian education / Established goals and interagency task force to improve Indian education at all levels / Facilitated funding for curricular and facilities upgrades</p>
<p><b>March 18, 1999</b></p>	<p>Tribe files suit in Court of Federal Claims against U.S. for money damages for failure to maintain Fort Apache; Court grants U.S. motion to dismiss; Tribe appeals to Federal Circuit Court of Appeals which reverses 249 F.3d 1364 (2001); U.S. files successful petition for Supreme Court hearing</p>
<p>Supreme Court Decision of <b>March 4, 2003</b>, <i>U.S. vs. White Mountain Apache Tribe</i>, 537 U.S. 465 (2003)</p>	<p>Affirmed Tribe's contention that the U.S. was liable for BIA's breach of fiduciary performance in the preservation and maintenance of the Tribe's trust land and improvements used as the TR School / Encouraged U.S. to negotiate a Settlement Plan with the Tribe and cede most of Fort Apache control</p>
<p>Settlement Agreement (April 2005) effective on or about <b>July 13, 2006</b></p>	<p>Provided funds (\$12,000,000) and management framework as resolution to <i>U.S. v. White Mountain Apache Tribe</i> / Created a basis for preservation of Fort Apache; empowered the Fort Apache Heritage Foundation as the <i>de facto</i> successor trustee for Fort Apache; restricts expenditure of settlement funds to Fort Apache.</p>

encouraged Apache participation in the cash economy by making manufactured goods available and purchasing thousands of loads of fuel wood and hay from Apache entrepreneurs. Prior to its "surrender" to civilian authorities in 1922, Fort Apache was the last non-mechanized army facility in the United States. Figure 1 lists important federal government decisions relating to Fort Apache and the Theodore Roosevelt (TR) School.

## THEODORE ROOSEVELT SCHOOL

In 1923, when the BIA took over the former post for use as the TR School, Fort Apache changed names, methods, and supervisors, but not its core mission of American Indian control and manipulation. As a BIA school, Fort Apache expanded its role as a regional hub for systematic assimilation of White Mountain Apache and other tribes of the Southwest. Fort Apache was one of about fifteen military facilities that made the transition to use in Indian policy implementation under civilian authorities. Bureaucrats and local school employees succeeded army officers and Apache scouts. The initial 1923 enrollment of 250 Navajo and Hopi children replaced enlisted men as occupants of the post's dilapidated barracks, as drill teams marching on the parade ground, and as laborers for TR School farms, orchards, shops, ditches, and other infrastructure.

The BIA rehabilitated the army post, reinforcing and expanding Fort Apache's structured layout and feeling of military discipline. The BIA added a barracks-inspired classroom building along barracks row, two massive sandstone dormitories to redefine the parade ground as an athletic field, and a BIA clubhouse and physician's quarters along officers' row. These and other structural and administrative barriers separated students from their families, boys from girls, and non-Indian staff from students. With or without explicit intent, the federal government's investments in the property's layout and buildings contributed to the establishment and maintenance of a showpiece intended to intimidate rather than a context for peaceful education and constructive reconciliation of the differences between Natives and non-Natives.

As Washington policy priorities shifted through the 1920s, 1930s, and 1940s, TR School responded. Following use as an off-reservation boarding school for Navajo and Hopi students, the former fort served as the BIA's regional trachoma school (1933–1939), where both laboratory primates and Indian children were used in experiments to refine treatments for this contagious eye disease. As was true elsewhere, World War II brought momentous change for the Apache people and tribes, introducing hundreds of tribal members to education, work, and challenges beyond reservation boundaries. Boarding and day students at TR School from Apache, Havasupai, Hualapai, Maricopa, Mohave, Pima, Yavapai, and elsewhere served as the "raw" materials for government efforts to "manufacture" workers, soldiers, and citizens.

The mid-twentieth-century history of TR School runs parallel to developments elsewhere in Indian Country, often echoing even older processes and dynamics. New technologies and ways of thinking influenced most White Mountain Apaches. Many turned to education as a means for affording access for their children to a broader range of opportunities and for endowing them with pride and responsibility

for cultural traditions and historical accomplishments. “While the war itself was a strong factor in encouraging the Indian people to improve their education, in the postwar years Indian leaders had little time for education problems. Their primary concern was preserving the status quo in the long fight against termination” that simmered through the 1950s and 1960s.<sup>9</sup> The White Mountain Apache response to termination policies emphasized economic self-sufficiency, and the Tribe vigorously pursued outdoor recreation developments, timber operations, farming, and cattle ranching. This encouraged TR School to continue its enduring emphasis on vocational and technical training. Excellence in reading, math, science, and preparation for higher education remained distant goals.

In 1960, three decades after the execution of a BIA–Arizona agreement for the education of Indian students in public schools, the BIA contracted with the Arizona State Department of Education to provide schools for Apache children. The state built Alchesay High School and Whiteriver Elementary School about 5 miles north of Fort Apache, and local Apache students flocked to the new, non-BIA schools. Ever ready to respond to administrative demands, TR School was transformed into an elementary school for grades three through eight. The ethnic makeup of the school’s students also changed. Fewer and fewer Navajo and Hopi students attended, as BIA schools were now available closer to home. On the other hand, increasing numbers of students from tribes that had not benefited from BIA–Arizona contract arrangements—Hualapai, Havasupai, Yavapai, Mohave, Pima, Maricopa, and Papago (Tohono O’odham after circa 1984)—started or continued their formal education at TR School.

The TR School curriculum also responded to these transformations. Mrs. Madeline (Jolly) Palmer, a career educator and a former teacher and administrator at TR School beginning around 1968, recalled:

Back in the old days I always heard the school was really self-sufficient. I know that they taught English and such, but life skills were also really important. They raised chickens, grew vegetables in a school garden, and even had a dairy farm for a while. They also did their own laundry, made a lot of the clothes, and had kitchen duty. When I taught there we still had some vocational-tech and home economics kinds of classes, but nothing like they used to have.

We didn’t really have a curriculum. . . . It was based on outdated, tattered textbooks. . . . They were so horrible most people just taught what they knew best or what they liked to teach. I focused mainly on reading, English, and math. I didn’t really do science and we never had the

equipment for it anyway. We were always extremely underfunded and never had any supplies. My mom used to send me broken pencils, half boxes of crayons, and used tablets just so I had supplies in the classroom.

Unfortunately, we also had an extremely high staff turnover and a high percentage of really poor teachers. I don't know if other boarding schools had the same kind of staffing problems, but I do know that most teachers employed by the BIA shouldn't have been teaching in the first place.<sup>10</sup>

Recreational activities included field trips, hiking, cookouts, plays and talent shows, ice cream socials and dances, skiing, swimming, roller-skating, and movies. Organized sports included football, volleyball, softball, baseball, track, cross country, and wrestling. TR School also offered clubs and classes in guitar, puppetry, weightlifting, arts and crafts, cheerleading, and dorm leadership.

Palmer also observed that the diverse, intertribal population distinguished TR School from other schools on or near reservations. She noted that TR School had the stigma of being a reformatory, as it seemed to be a last stop for many students in what she called the "musical school syndrome." Palmer noted that most students were not miscreants, of course; many attended simply because there were no schools on their reservations and their other alternatives were overenrolled.<sup>11</sup>

Despite BIA efforts to use TR School in accommodating and contributing to Indian education policy, problematic change came again in the mid 1970s, when the TR School student population declined precipitously. Tribes such as the Havasupai, Hualapai, and Pima at last had local schools, and their students enrolled there. Plummeting TR School enrollments led to the closure of the boys' dormitory and the transfer of all residential students to the girls' dorm. Because BIA school budgets are based on student enrollments, supplies dwindled, seasoned personnel resigned, and maintenance and repair needs accumulated. By the late 1970s, attendance averaged one hundred or fewer students, most of whom were Apache. The BIA eliminated grades three, four, and five. Instead of seeking beneficial new uses for underutilized TR School facilities, the BIA demolished several buildings without consulting with either the Tribe or the Arizona State Historic Preservation Office, which had championed the listing of Fort Apache in the National Register of Historic Properties as part of the U.S. bicentennial celebration.<sup>12</sup>

In the late 1980s, the White Mountain Apache Tribe appointed a school board and assumed control over the administrative operations of the school, leaving the BIA in charge of overarching policies and maintenance of the TR School facilities (buildings and grounds). As of 2009, TR School is a BIA-funded, on-reservation day and boarding

school focused on the needs of White Mountain Apache children in grades six through eight. TR School now contracts with the BIA to provide facilities management as well. The school emphasizes standard academic preparation as well as Apache language, history, and culture. The TR School mission, adopted in the late 1990s, is "to prepare and empower all students for the choices and challenges they will face in the future by providing a positive, healthy, social and educational environment which is based on White Mountain Apache knowledge and language."

Of the many hundreds of army and BIA facilities established to address the "Indian problem," only the Fort Apache and TR School preserves facilities reflecting with high integrity a full spectrum of military and civilian Indian policies and management practices since 1870. Both layout and architecture in this complex and evocative historic district represent successive policies of containment, subjugation, control, assimilation, termination, and self-determination. Log, wood frame, and masonry houses arranged by the army and embraced by the BIA as "officers' row" foster a "small-town" feeling of communal serenity that supported individuals and families involved in often morally challenging, politically contentious, and physically perilous campaigns of conquest and social engineering. Massive adobe and frame buildings served initially as commissaries and stables to outfit troops for field duty and subsequently as warehouses, training shops, and a dairy to serve the TR School's mission of assimilation through vocational-technical training and basic education. Most additions to Fort Apache since the cafeteria was built in 1948 have been removed or reversed through diligent historic preservation efforts by the White Mountain Apache Tribe and the Fort Apache Heritage Foundation, the nonprofit chartered by the Tribe in 1998 to facilitate the property's redevelopment. The site and setting emphatically convey historical character and associations while challenging visitors to explore and untangle army and BIA contributions to the place, the White Mountain Apache, eastern Arizona, and Indian America.

### **THE CULTURAL CENTER AND THE 1993 MASTER PLAN**

The only nonhistoric building within the Fort Apache district is *Nohwike' Bágowa* (House of Our Footprints), the White Mountain Apache Cultural Center and Museum. By the late 1960s, the White Mountain Apache, along with other Indian nations, had begun to reassert its inherent and retained tribal sovereignty by aggressively pursuing goals of self-governance, self-determination, self-sufficiency, and, in particular, self-representation. In accord with increasing concern with tribal prerogatives, the Tribe's 1969 answer to local and national questions concerning cultural heritage

stewardship was to invest scarce resources in the perpetuation of Apache culture and language traditions by opening the White Mountain Apache Tribe Cultural Center in the last-remaining log cabin at Fort Apache.<sup>13</sup> The Cultural Center's first director, Apache language specialist Edgar Perry, dedicated his efforts to recording fast-disappearing White Mountain Apache stories and songs and producing the first Apache–English dictionary.<sup>14</sup> In 1976, with technical assistance from the Arizona Historical Society and funds and collections from local and national sources, the Tribe relocated the Cultural Center to the last-remaining barracks. In this larger space the institution thrived as a gathering place for elders and cultural specialists, an Apache crafts outlet, and a destination for visitors from many countries.

At least in part because the Cultural Center is dedicated to serving Apache interests, the January 1985 fire that destroyed the barracks and most of the Cultural Center collections decimated, but did not eliminate, local support for linking heritage tourism and heritage stewardship at Fort Apache. Perry and other members of the Cultural Center staff returned what remained of their operation to its original log cabin home, resuming the institution's original emphasis on conserving Apache language and interpreting Fort Apache to visitors.

Despite the efforts of the Cultural Center staff, Fort Apache and the TR School property continued to deteriorate through the 1970s and 1980s. Although many politicians and regional boosters had, since the 1950s, advocated for the preservation and redevelopment of Fort Apache as a tourist destination, it was not until a 1991 visit to the site by Tribal Chairman Ronnie Lupe, BIA Superintendent Ben Nuvamsa, Tribal Attorney Robert C. Brauchli, and newly hired Tribal Grants Writer Joe Waters that a plan began to emerge. Through a proposal submitted to the recently created Arizona Heritage Fund, administered by Arizona State Parks, Waters secured \$12,500 to hire CDG Architects of Tucson to prepare a Master Plan for the property. Guided by Apache Elders—Annie Dawohongva, Edgar Perry, and Canyon Quintero—and professionals—Lori Davisson, Jefferson Reid, and John R. Welch—the CDG team leader, architect Stan Schuman, assembled a blueprint that guided historic preservation, community empowerment, public interpretation, and economic development efforts at the property for more than a decade.<sup>15</sup>

Formally adopted by the Tribe in 1993, the Master Plan envisioned a historic park to facilitate and integrate historic preservation, Apache cultural perpetuation and first-person interpretation of property history, and tourism-based economic development. The 1997 opening of the Nohwike' Bágowa Cultural Center and Museum, and the community integration facilitated thereby, was perhaps the single most important step in putting the Master Plan to work. Implementation has also entailed the rehabilitation of historic structures and landscape features,

including the 1996 rehabilitation of the log cabin for use as the Tribe's Office of Tourism and as exhibit space focused on the interpretation of military history. The Tribe developed an Elders Center in 1997 through adaptive rehabilitation of the sandstone captain's quarters on officers' row. In 1999 the BIA rehabilitated the former girls' dormitory to serve as a co-ed dormitory for continued use by TR School. In that same year, a nearly collapsed wood frame residence on officers' row residence dating from 1888 underwent extensive restoration to make it available again for residential use. In 2000 the second captain's quarters was rehabilitated to serve as the Tribe's Historic Preservation Office and headquarters for the Fort Apache Heritage Foundation. Rehabilitation of the 1876 adjutant's office was completed in 2001, allowing this adobe building to continue to be used for another seventy years as the Fort Apache Post Office. In 2001 the Tribe and its partners initiated the exterior restoration and interior rehabilitation of the post's last commanding officer's quarters. The restoration included reconstruction, based on historic photographic documentation, of the ornate observatory, or cupola feature. Since 2002, work has focused on the TR School buildings and the former boys dormitory. New generations of Apaches are acquiring skills relating to history and historic preservation, cultural heritage resource management and interpretation, museums, archives, and tourism-based enterprise development.<sup>16</sup>

As the White Mountain Apache Tribe pursued plans to restore Fort Apache and return it to active duty in service to the community, it is once again becoming a context for the exchange of technology and the negotiation of change.

## PRELUDE TO LITIGATION

The TR School's distinctive history eventually gave rise to a new dispute between the White Mountain Apache Tribe and the U.S. government. Although *U.S. v. White Mountain Apache Tribe* has unfolded only since 1999, the year the Tribe filed its complaint in the U.S. Court of Federal Claims, the case has roots deep in Fort Apache's past.<sup>17</sup> As such, it provides a contemporary reflection of longstanding federal Indian policy dynamics that will influence Fort Apache's preservation and interpretation, as well as White Mountain Apache society and economy, for the foreseeable future.

The roots of the conflict lie in the method the U.S. Congress selected to resolve a jurisdictional inconsistency stemming from the transfer of Fort Apache from the army to the BIA. The executive orders of January 26, 1877, and February 1, 1877, which created the Fort Apache Military Reserve, withdrew 7,579 acres from the Apache reservation land base for the army's exclusive use. Although the executive order of October 4, 1922, as well as subsequent Department of the Interior appropriations bills, provided congressional

authorization for Fort Apache's administrative transfer from the army to the secretary of the interior, the land remained held in fee simple by the United States and was legally separate from the Fort Apache Indian Reservation (trust land) that surrounded it.

This inconsistency between the land's legal fee simple status as a military reserve and its actual use as a BIA school persisted until the late 1950s. On September 16, 1958, as part of a Termination era inventory of federal government responsibilities on Indian lands, the BIA's Phoenix area director, F. M. Haverland, wrote to Albert M. Hawley, superintendent of the BIA's Fort Apache Agency, regarding "the abandoned Fort Apache Military Reserve containing 7,579.75 acres, more or less." Hawley's boss requested Hawley's recommendations, as well as "an expression from the tribe as to whether it would be willing to have the subject lands in a taxable status."<sup>18</sup>

The Tribe responded promptly. Minutes of the Tribal Council meeting of the White Mountain Apache Tribe on September 24, 1958, tell us that the area director's letter was read and discussed: "The Tribe felt that in as much as the land was withdrawn from the reservation by Executive Order without compensation to the White Mountain Apache Tribe as a Military Reserve, and in as much as the need for a Military Reserve has ceased, that the land should be returned to the United States in trust for the White Mountain Apache Tribe in the same status as the entire balance of the reservation." Contemporaneous reports reflect, and the legislative history confirms, that neither the TR School nor any other federal agency had any need for 7,579 acres within the White Mountain Apache Tribe's trust lands and that the school, under the auspices of the secretary of the interior, continued to use only the roughly 400 acres surrounding the school buildings.

In a favorable response to the Tribe's preferences, and following the customary committee meetings, the U.S. Congress passed the Act of March 18, 1960, conveying and vesting full equitable and beneficial title *in trust* to the Tribe of the entire 7,579 acres, including all of the buildings and improvements thereon. The act states:

[A]ll right, title and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive Order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 STAT. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, *subject to the right of the Secretary of the Interior* to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

The legislative history makes clear the act's consistency with lawmakers' intentions.<sup>19</sup> After the 1960 act, only bare legal title to the land and improvements remained in the United States, with the added proviso that the land and buildings were "subject to the right of the Secretary of the Interior" to use for administrative and school purposes for as long as needed for that purpose. By conveying full equitable and beneficial title of the entire Fort Apache property *in trust* to the Tribe, the statutory foundation was established by Congress for the Supreme Court to later find an enforceable federal trust duty obliging the secretary of the interior to care for the land and the buildings in accordance with Indian trust doctrine principles and standards. This inchoate trust duty ripened after March 18, 1960, into an enforceable fiduciary obligation, but only when the secretary of the interior exercised the right authorized in the 1960 act to control, use, and occupy the Fort Apache property for administrative and school purposes.

Prior to the 1960 act, White Mountain Apache students at TR School attended an "off-reservation" school in the midst of Indian Country, only minutes from their homes. Congress' 1960 act transformed the TR School overnight into an on-reservation boarding school enjoying the extra protection of trust status. This change was likely unnoticed by students and faculty. The secretary's trust responsibilities, delegated through the BIA to its Fort Apache agency superintendent, also went unnoticed until the mid 1960s, when Alchesay High School opened in Whiteriver, about five miles north of TR School. As the new high school drew students away, TR School lost students, and maintenance and repair funding fell proportionately.

TR School responded by eliminating grades nine through twelve and recruiting students from other tribes. But public school districts on other reservations were also expanding. By the late 1970s, the TR School campus had begun to fall into ruin. Lack of maintenance and repairs by the BIA made it difficult or impossible for the buildings to be used for school or administrative purposes. Instead of maintaining the historic structures, the BIA imported modular classrooms and dormitories and, at various times through the 1980s, attempted to transfer full responsibility for rapidly deteriorating buildings to the Tribe. The Tribe refused to accept the transfers unless the BIA made or funded repairs necessary to allow for the buildings' safe and beneficial use. The BIA ignored these stipulations and the loss of structural and historical integrity continued.

Initial discussions concerning prospective remedies occurred between the BIA and Tribal officials in 1994, when Welch identified BIA responsibilities pursuant to federal historic preservation law and policy as a means for attracting maintenance and repair funds.<sup>20</sup> Despite the Tribe's success in attracting preservation grants and partners to advance the 1993 Master Plan, the property's preservation needs far outstripped

available resources. Internal BIA efforts failed to produce the significant investments required to preserve the site, and in 1995 the Tribe joined in discussions concerning disposition of the Fort Apache and TR School property. The Tribe's legal research clarified the property's status as a tribal trust resource, per the terms of the 1960 act and legislative history (see Figure 1), and concluded that the government could be, and should be, held answerable for the waste, damage, and deterioration committed by the government after March 18, 1960, to the Tribe's trust property while under the government's exclusive control, use, and occupancy.

Protracted communications, involving multiple letters, site visits, and meetings with officials of the Department of the Interior, and the solicitor's office, reaching to then Secretary Bruce Babbitt, were unproductive. It became clear that it was the government's legal position that, although the 1960 act might have conveyed full beneficial title to the land and improvements of the Fort Apache property to the Tribe (which the government would later deny in court), the act was silent in regard to any obligation on the part of the United States to maintain the property while under the government's exclusive control, occupation, and use for administrative and school purposes. The government had no intention of repairing the Fort Apache and TR School property, and the Tribe was faced with either watching as the property fell into ruins or taking legal action. Prior to taking legal action, the Tribe, with the grant-writing assistance of Welch and the architectural skills of Schuman and a team of experts under his direction, prepared an intensive needs assessment and estimate to bring the Fort Apache property into building code compliance. The estimate came in at \$14 million.

### **THE ROAD TO THE SUPREME COURT**

On March 18, 1999, convinced that there was a sound basis for a breach of trust damage claim, and exactly thirty-nine years to the day from the March 18, 1960, date of the relevant congressional act, the Tribe filed a lawsuit against the United States for \$14 million in damages in the U.S. Court of Federal Claims.<sup>21</sup> The claim alleged, among other claims, that the United States had breached its trust obligation to the White Mountain Apache Tribe with respect to maintaining the Fort Apache land and improvements. Brauchli, the Tribe's long-time attorney, served as counsel.

The government immediately filed a motion to dismiss, arguing that the 1960 act was silent as to any trust obligation to maintain the property. The Court of Federal Claims agreed and dismissed the Tribe's lawsuit in November 1999. The court held that the 1960 legislation did not impose a fiduciary obligation on the government to protect, repair, or preserve Fort Apache for the benefit of the Tribe, or to

produce revenue for the Tribe from the fort, and that the Tribe did not have a presently vested property right in Fort Apache but, rather, was a remainderman to the property when the United States was finished with using it, if ever.<sup>22</sup> The Tribe promptly and successfully appealed that decision to the Federal Circuit Court of Appeals, which, in a 2–1 decision, reversed the Court of Federal Claims.<sup>23</sup>

The government's argument in the Federal Circuit Court of Appeals, and later in the U.S. Supreme Court, adroitly ignored the legislative history of the 1960 act, including a letter dated August 10, 1959, from Assistant Secretary of the Interior Roger Ernst, supporting an amendment to the bill, which added the "subject to" proviso in the 1960 act: "[T]his change is a technical one. The bill itself [S. 2268] is a conveyance of the equitable title, and in conveyancing terms the grant of title should be made subject to the right of the United States to use the property for school and administrative purposes."<sup>24</sup> Regardless of this and other legislative history, the federal government continued to argue the future tense—that the property "would" be put into trust for the Tribe only after the secretary of the interior had ceased using it for administrative and school purposes and therefore the Tribe did not have a presently vested right in the subject Fort Apache property. Thus, in a response to a question from the Federal Circuit Court of Appeals during the December 7, 2000, oral arguments, inquiring what the government's position would be if "the United States tomorrow dynamited to the ground all 36 buildings," the U.S. Department of Justice attorney replied, "I do believe that the United States has no special obligation to the Tribe with regard to any building needed for the operation of the school, and therefore *subject to* the reservation in the 1960 statute. So, therefore, if it were deemed appropriate to dynamite those buildings to the ground by the Secretary of Interior, it would be within the Secretary's discretion to do so" (emphasis added). In response to the court's further inquiry whether the Tribe had any property right that would be impaired by that destruction, the government's attorney replied, "I don't believe so, Your Honor. I believe that beneficial title has not even passed as to any of those portions of the site that are retained for exclusive use by the United States."<sup>25</sup>

The Tribe was convinced that overcoming the foregoing distortion of the common law of property was key to obtaining a favorable decision on the Tribe's breach of trust damage claim. In particular, the Tribe knew that it had to persuade the Federal Circuit Court of Appeals and the Supreme Court to agree with at least four closely related truths:

1. That the Tribe was not a mere contingent remainderman of the Fort Apache property, as suggested by the Court of Federal Claims, but was a presently vested owner, and had been since March 18, 1960, when the

act conveyed full beneficial title in trust of all of the Fort Apache property and improvements thereon to the White Mountain Apache Tribe.

2. That there had been no *exception* to or *carving out* of land or buildings prior to conveyance of the Fort Apache property to the Tribe, for the secretary to use for school or administrative purposes. That under the common law of property, the right of the secretary to use the Tribe's land and buildings was imposed and asserted on the property *after* the entire property had been conveyed into trust for the Tribe.
3. That the federal government's exercise of exclusive control, use, and occupancy of the Tribe's trust property *after* March 18, 1960, for administrative and school purposes, standing alone, without mention of any repair or maintenance obligations in the 1960 act, was sufficient to create an obligation or enforceable fiduciary duty in the trustee United States to maintain the Tribe's trust property and not allow it to deteriorate.
4. That the United States, as the trustee of the Tribe's trust property, was liable to the Tribe for waste, damage, and deterioration of the property while under its control and use.

The government, on the other hand, continued approaches it had used to rebuff previous attempts by Indian tribes to find the United States liable for the management of Indian trust resources. The U.S. strategy promoted a broad interpretation of *Mitchell I* (1980), an Indian trust decision of the U.S. Supreme Court, which held against Indian plaintiffs, and simultaneously a restrictive interpretation of *Mitchell II* (1983), which held in favor of Indian plaintiffs.<sup>26</sup> In addition to its interpretations of the *Mitchell* cases, the United States also argued in the Fort Apache litigation, without any citation to property law, that the Fort Apache property had not yet been conveyed into trust to the Tribe, because it was still under use by the government. Finally, it argued that the White Mountain Apache Tribe's claim was legally insufficient to create an enforceable trust duty because it was only based on control of the property by the secretary and there was no language in the 1960 act requiring the federal government to either manage the Fort Apache property to generate revenue for the Tribe or to maintain the property. Apparently concluding that the Fort Apache case would present a good opportunity to limit the trust obligation of the United States to Indian tribes, and perhaps buoyed by the composition of the Supreme Court, the government filed its petition for writ of certiorari.<sup>27</sup>

The Supreme Court granted the government's petition, indicating that at least four of the justices disagreed with the Federal Circuit Court of Appeals' decision in favor of the Tribe. Likewise, the Court granted certiorari in *United States v. Navajo Nation*, 537 U.S. 488 (2003), a breach of trust case involving mineral leases on the Navajo Reservation. Both cases were scheduled to be argued back to back before the Court on December 2, 2002.

### **A WELL-INTENTIONED INTERVENTION**

The prospect of two cases relating to federal trust obligations coming before the Court after a twenty-year hiatus since the *Mitchell* cases initiated a wave of apprehension that swept through Indian Country. A statement by one lawyer during a conference call on the prospects of the *White Mountain Apache Tribe* case going before the Supreme Court aptly summed up the feelings of many Supreme Court watchers when he declared that the White Mountain Apache Tribe "would be like a lamb going to the slaughter" when it went before the Supreme Court.<sup>28</sup>

Fueling the concern and pending at the time was a far-reaching class action accounting claim, *Cobell v. Norton*, filed in 1996 against the United States, the secretary of the interior, and other federal officials for alleged breach of their fiduciary duty to adequately account for oil and gas royalties due thousands of Individual Indian Money (IIM) beneficiaries (American Indians and their heirs).<sup>29</sup> Although the *Cobell* plaintiffs were not seeking compensatory damages, their claim alleged breach of various fiduciary duties and sought a declaratory judgment of the government's trust obligations to the IIM trust beneficiaries and injunctive relief to make sure those trust duties were performed. Counsel for *Cobell* and the class were the Native American Rights Fund (NARF) and a private law firm.

Anxiety about the anticipated outcome of the Tribe's case before the Supreme Court precipitated a letter to Brauchli in July 2002, from the National Congress of American Indians (NCAI), the oldest and largest national organization of tribal governments in the United States. The NCAI advised Brauchli that the *White Mountain Apache Tribe* case had been discussed with a number of attorneys with Supreme Court experience and that the consensus view was that the *White Mountain* case posed a significant risk of setting a precedent that could negatively impact every tribe in the country.

The NCAI further cautioned that the stakes were high in the pending *Cobell v. Norton* litigation because the claims were in the billions. The expressed fear was that the Supreme Court could relieve the government from the pressures of *Cobell* by ruling against the White Mountain Apache Tribe (WMAT). The NCAI suggested that the WMAT consider an alternative option and work with the NCAI to seek

a political solution through the congressional appropriations process, which could result in full restitution to the Tribe from the United States for the damages at Fort Apache. Restitution would make the pending Supreme Court case moot. If that option failed, then the Tribe could proceed with the litigation, and the NCAI could assist.

The injection of the NCAI's concerns and those of the Tribal Supreme Court Watch Project, a joint NCAI–NARF initiative intended to improve Supreme Court advocacy on behalf of Indian tribes, stimulated considerable discussion between the White Mountain Apache Tribe leadership and Brauchli. In the end, the Tribal Chairman and the Tribal Council concluded that the legal basis and underlying facts of the Tribe's claim were sound and that the Navajo Nation's breach of trust claim would actually pose a greater risk for Indian Country due to the self-determination factor underlying the Indian Mineral Leasing Act at issue in that case. The Apache leaders were well aware of their grave responsibility to Indian Country and were not dismissive of the valid concerns raised by the NCAI and the Tribal Supreme Court Watch Project. However, the Tribe was confident of the legal and factual underpinnings of its claim. It was also certain that any adverse decision from the Supreme Court would be narrowly limited to the 1960 act and the particular facts underlying the Tribe's claim and would not undermine the *Cobell* litigation or the precedents set in the *Mitchell* cases. Finally, the Tribe had diligently sought administrative and political remedies to the Fort Apache problem and found nothing to suggest that the prospects for success along those avenues had improved. The NCAI went along with the Tribe's decision not to "opt" out of the Supreme Court and filed a firm Amicus Brief in support of the Tribe's claim.

### A DAY IN COURT

The Supreme Court heard oral arguments for *United States v. White Mountain Apache Tribe* and *United States v. Navajo Nation* on December 2, 2002. Tribal members held prayer meetings outside the Supreme Court building in freezing weather. Hundreds of Native people from across the country queued up hours before the Court opened its doors to watch the arguments. The courtroom was packed. Secretary of the Interior Gale Norton had a front-row seat. It was a dramatic moment as those present, at the sound of the gavel, rose and remained standing until the robed justices were seated following the traditional chant: "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" The first cases in two decades the Supreme Court would hear

on the trust responsibility of the United States to Indian tribes were about to be argued.

The Apache case was heard first, and Brauchli addressed the Court with a summary of the Tribe's argument. In an encapsulation of differences between Apache and non-Indian perceptions of history, the following exchange took place between Justice Scalia and Brauchli early in the argument. Brauchli: "And the benefit is what Congress said, and Congress said, we're going to take this fort, which we established to kill Apaches and imprison them, and we're going to give it to the White Mountain Apache Tribe." Scalia: "I thought the fort was to protect white settlers. But . . . you can describe it the way you like." Brauchli: "Well, it was to protect white settlers . . . but from my clients' viewpoint, it was established to conquer them. So that's what I'm here for, my client." Scalia: "Yes, I understand."

On March 4, 2003, the U.S. Supreme Court affirmed the decision of the Federal Circuit Court of Appeals in favor of the White Mountain Apache Tribe.<sup>30</sup> In a 5–4 decision, the Supreme Court agreed that the government could be liable for money damages for breach of its fiduciary duty to protect and maintain the former military post during the time the buildings were being used by the secretary of the interior for school and administrative purposes. Justice Souter, writing for the majority, concluded "that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms a common sense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." Unfortunately, as some attorneys and legal scholars predicted, the Navajo Nation did not fare as well.<sup>31</sup>

The Court remanded *White Mountain Apache Tribe* back to the U.S. Court of Federal Claims for a determination of damages. The Supreme Court's decision set the stage for negotiations to resolve the dispute and, in April 2005, the White Mountain Apache Tribe signed a settlement agreement with the United States. Among other provisions, the United States agreed to pay the Tribe the sum of \$12 million as compensation for the waste committed by the federal government after March 18, 1960, the date the property had been conveyed to the Tribe by Congress. In the Tribe's public announcement of the settlement agreement, Dallas Massey, Sr., then Chairman of the Tribal Council, declared that the settlement "paves the way to restore the legendary Fort Apache military post which has long been recognized as an endangered, historical monument. . . . Fort Apache brought together in one place, Army Generals, Anglo-American soldiers, Chinese workers, African-American Buffalo soldiers, Apaches, Hispanics, and others. The Post has stood as an enduring symbol

of the history of the Old West for the Tribe and the rest of the world. With the settlement, the Tribe can now protect and preserve the Fort, and establish it as one of Arizona's finest tourist destinations."

On July 13, 2006, the secretarial plan for the use of the judgment funds (\$12 million and accrued interest) became effective after being approved by Congress. Thereafter, in February 2007, the United States and the Tribe formally signed the transfer for all Fort Apache district buildings no longer needed by the secretary for school or administrative purposes. With the exception of the three TR School buildings still being used by the secretary (main classroom and administration building, kitchen and cafeteria, and former girls' dormitory), the transfer extinguished forever the secretary's right to use and control the property pursuant to the 1960 act. In short, the "subject to" right of the secretary to use the Tribe's trust property ended. The transfer was accompanied by a one-time cash payment by the United States to the Tribe of \$12 million, plus accrued interest, as restitution for waste.

The congressionally approved Use and Distribution Plan for the Judgment Funds designates the Fort Apache Heritage Foundation as the management authority to assist the Tribe with the Fort Apache property's preservation, repair, rehabilitation, and redevelopment. The Tribe and the foundation are now responsible for maintenance of the transferred buildings and grounds. The secretary, through the BIA, retains maintenance and trust responsibility for the three TR School buildings still in use, as well as for the roads, water, and sewer systems within the district. The United States also retains limited trust obligations to the buildings transferred to the Tribe, but only in a very general sense, such as enforcing restraints against sale of the property, protecting the property from taxation by the state of Arizona, and other responsibilities observed for lands held in trust by the United States for the use and benefit of the Tribe.<sup>32</sup>

The court-approved settlement agreement is having substantial implications for the Fort Apache property's management, preservation, and interpretation. For the three TR School buildings remaining under BIA control and use pursuant to the 1960 act, the terms of the settlement require that the BIA maintain and repair those buildings until such time as they are no longer needed by the secretary for administrative or school purposes and are subsequently turned over to the Tribe. The BIA must continue to maintain the athletic field (former army parade ground), the water and sewer systems, and the streets until the three TR School buildings are transferred to the Tribe. Even after those buildings are transferred, the main entry and exit roads will continue to be maintained by the BIA as part of the designated BIA roads system.

## CONCLUDING DISCUSSION

In the 1980s the Supreme Court gave guidance to determine when an actionable fiduciary duty toward Indians and tribes arises. In *Mitchell I*, tribal members on the Quinault Indian Reservation made a claim against the United States for federal mismanagement of the Tribe's timber resources.<sup>33</sup> The Court acknowledged that, although the Indian General Allotment Act of 1887 (since repealed) established a trust relationship on behalf of Indians, the relationship was "limited" and did not impose on the government a particular duty to manage the Indians' timber resources. The Court remanded the case to the Court of Federal Claims to consider whether other statutes might provide a basis for liability.

When the case returned to the Supreme Court, the Court examined various timber management statutes that Congress had enacted after the General Allotment Act. The Court found that those statutes directed the government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the Indian landowners. The Court held that those statutes imposed specific duties on the government and that the pervasive control exercised by the government over the lands confirmed an enforceable fiduciary obligation. This became known as the *Mitchell II* decision.<sup>34</sup>

*Mitchell I* and *Mitchell II* constitute the *Mitchell* doctrine, meaning that, to create an actionable U.S. fiduciary duty toward Indian tribes, a statute must give the government pervasive control over the resource at issue. *United States v. Navajo Nation* and *United States v. White Mountain Apache Tribe* currently anchor the opposite ends of the continuum along which courts apply the *Mitchell* doctrine. In *White Mountain Apache Tribe*, the federal government's involvement was pervasive, if not total. After the 1960 act transferred the land and buildings of the former Fort Apache military post in trust to the Tribe, the federal government, through the BIA, occupied, used, and controlled the land and buildings thereon to the exclusion of the Tribe. The 1960 act expressly recognized a trust relationship between the government and the Tribe with respect to the land and improvements. When the federal agency allowed the buildings on the land to fall into dangerous disrepair, the Court held that the United States had fiduciary obligations to the land and improvements. On the other hand, in *Navajo Nation*, the Supreme Court concluded that the Indian Mineral Leasing Act was intended to give the tribes control over the making of coal leases. Because the applicable statutes and regulations did not impose duties on the secretary to ensure that the Navajo received the highest rate of return, the Court concluded that the secretary had breached no statutory or regulatory duty enforceable by money damages by meeting without Navajo knowledge with coal company representatives.

As recently observed by the Ninth Circuit Court of Appeals, the *Mitchell* cases, *Navajo Nation*, and *White Mountain Apache Tribe* together define the state of the law with respect to the Indian Trust Doctrine.<sup>35</sup> In the aftermath of *White Mountain Apache Tribe*, the United States will likely continue to reduce the exposure of the United States to claims based upon enforceable fiduciary obligations to tribes by reviewing and rewriting federal statutes, regulations, and policies to immunize the United States against future breach of trust claims. The United States is also likely to seek further Supreme Court reviews of Indian trust cases. Tribes can also expect an increase in federal government efforts to effect de facto transfers of trust management responsibilities over tribal natural resources to tribes through various mechanisms. The Indian Self-Determination Act and "partnering" arrangements may be used as vehicles for the BIA to characterize timber, mineral, and trust resource management plans as being coauthored or directed by tribes in order to insulate the government against breach of trust management claims, even where tribes have little influence over the plans or their implementation. Attempts at "trust reform" by the Department of the Interior merit scrutiny by tribes to insure the "reforms" do not undermine, diminish, or extinguish the government's trust responsibilities to tribes.

Although eloquently summarized as a mandate to treat American Indians "with the Greatest Respect and Fidelity," the Indian Trust Doctrine will require vigilance, defense, and reinforcement by tribes in continuing response to the U.S. government's failure to uphold the highest fiduciary standards in its management and oversight of Indian trust resources.<sup>36</sup> Despite the erosion of tribal regulatory and adjudicative authority over non-members under certain factual circumstances as a result of Supreme Court decisions since 1978, the Indian Trust Doctrine remains a viable restraint on U.S. actions that adversely affect tribes. It is ironic that the *White Mountain Apache Tribe's* claim, which confirmed the Indian Trust Doctrine in the Supreme Court, and the subsequent favorable settlement with the government, will be used to restore Fort Apache, an enduring symbol of invasion of the *White Mountain Apache* people. This time, however, Fort Apache will be reactivated to serve the Apache people, not to celebrate their subjugation.

#### N O T E S

We are grateful for our long associations with the *White Mountain Apache* people and Tribe and especially for the great gift of trust that the Tribe has placed in our work. We give particular thanks to Ronnie Lupe for his leadership, vision, and permission to pursue

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- 1 Except as noted, the source of historical information presented here pertaining to Fort Apache is John R. Welch, National Historic Landmark Nomination for Fort Apache and Theodore Roosevelt School (Washington, D.C.: Historic Sites Review Board, National Park Service, 2008). See also Keith H. Basso, *Western Apache Raiding and Warfare: From the Notes of Grenville Goodwin* (Tucson: University of Arizona Press, 1971).
- 2 See, for example, Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1969); Patricia N. Limerick, *Legacy of Conquest* (New York: W. W. Norton, 1987); and David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground, American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).
- 3 See Edward T. Linenthal, *Sacred Ground: Americans and Their Battlefields* (Chicago: University of Illinois Press, 1991).
- 4 John R. Welch and Ramon Riley, "Reclaiming Land and Spirit in the Western Apache Homeland," *American Indian Quarterly* 25, no. 1 (2001): 5–12; John R. Welch, "Places, Displacements, Histories, and Memories at a Frontier Icon in Indian Country," in *Monuments, Landscapes, and Cultural Memory*, ed. Patricia E. Rubertone (Walnut Creek, Calif.: World Archaeological Congress and Left Coast Press, 2008), 101–34.
- 5 Stan Schuman and others, *Fort Apache Historic Park Master Plan* (Tucson, Ariz.: CDG Architects, 2003); John R. Welch, "The White Mountain Apache Tribe Heritage Program: Origin, Operations, and Challenges," in *Working Together: Native Americans and Archaeologists*, ed. Kurt E. Dongoske, Mark Aldenderfer, and Karen Doehner (Washington, D.C.: Society for American Archaeology, 2000), 67–83; John R. Welch, "'A Monument to Native Civilization': Byron Cummings' Still-Unfolding Vision for Kinishba Ruins," *Journal of the Southwest* 49, no. 1 (2007): 1–94; and Karl A. Hoerig, "The Cibecue School Scrapbooks: Returning Apache Art and History to an Apache Community," *American Indian Art Magazine* 32, no. 4 (2007): 66–73.
- 6 Quoted in Lori Davisson, "Fort Apache, Arizona Territory: 1870–1922," *The Smoke Signal*, no. 78 (Tucson, Ariz.: Corral of the Westerners, 2004). Our historical review also relies on Ralph F. Ogle, *Federal Control of the Western Apache, 1848–1886* (Albuquerque: University of New Mexico Press, 1940); and Dan L. Thrapp, *The Conquest of Apacheria* (Norman: University of Oklahoma Press, 1967).
- 7 Davisson, "Fort Apache, Arizona Territory: 1870–1922"; Ogle, *Federal Control of the Western Apache, 1848–1886*; Thrapp, *The Conquest of Apacheria*.
- 8 Dan L. Thrapp, "Evolution, Use, and Effectiveness of the Apache Indian Scouts," *Fort Huachuca Historical Museum Newsletter*, no. 4 (1975); Michael L. Tate, *Apache Scouts, Police, and Judges as Agents of Acculturation*, doctoral dissertation, Department of History, University of Toledo (Ann Arbor, Mich.: University Microforms, Inc. 1974); and Michael L. Tate, "John P. Clum and the Origins of an Apache Constabulary," *American Indian Quarterly* 3 (1977): 99–120.
- 9 Margaret Connell Szasz, *Education and the American Indian: The Road to Self-Determination since 1928* (Albuquerque: University of New Mexico Press, 1999), 6.

- 10 Personal communication to John R. Welch, Fort Apache, 1998.
- 11 For a compelling fictionalized account of student life at TR School, see Brady Udall, *The Miracle Life of Edgar Mint* (New York: Vintage Books, 2001).
- 12 John M. Treeful, *Fort Apache Historic District, National Register of Historic Places Inventory. Nomination Submitted to the Keeper of the National Register* (Washington, D.C.: National Park Service, 1975).
- 13 John R. Welch, Karl A. Hoerig, and Raymond Endfield Jr., "Enhancing Cultural Heritage Management and Research through Tourism on White Mountain Apache Tribe Trust Lands," *SAA Archaeological Record* 5, no. 3 (2005): 15–19; Welch and Riley, "Reclaiming Land and Spirit in the Western Apache Homeland," 5–12.
- 14 Edgar Perry, Canyon Z. Quintero Sr., Catherine D. Davenport, and Connie B. Perry, *Western Apache Dictionary* (Fort Apache, Ariz.: White Mountain Apache Tribe, 1972).
- 15 Davisson, "Fort Apache, Arizona Territory: 1870–1922"; Ogle, *Federal Control of the Western Apache, 1848–1886*; Thrapp, *The Conquest of Apacheria*.
- 16 The most important sources of financial and technical assistance for the ongoing preservation and rehabilitation of the district buildings and grounds include Arizona Heritage Fund grants administered by Arizona State Parks and the Arizona State Historic Preservation Office; the Save America's Treasures and Tribal Historic Preservation Fund grants programs administered by the U.S. National Park Service; the 100 Most Endangered grant program administered by the World Monuments Fund; the Fort Apache Heritage Foundation; the U.S. Department of Housing and Urban Development; and the U.S. Postal Service. A U.S. Department of Interior economic development grant financed detailed plans for the rehabilitation and adaptive reuse of five of the historic buildings. American Express support for the World Monuments Fund grant allowed the tribe to develop detailed cost estimates to bring the district buildings and infrastructure up to code. These estimates provided the baseline for the Tribe's legal claim for damages against the United States.
- 17 *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).
- 18 Unless otherwise stated, all correspondence and administrative and legal documents referred to in the text are on file in the archives of the White Mountain Apache Tribe Heritage Program, Fort Apache, Arizona.
- 19 The Report to the House Committee on Interior and Insular Affairs submitted on August 12, 1959; the statement made by the Honorable Stewart L. Udall, congressman from the state of Arizona, on February 11, 1960, to the House Subcommittee on Indian Affairs; and the February 22, 1960, Report to the Committee of the Whole House align perfectly on the issues of full and immediate conveyance, in trust status, of the land and improvements to the Tribe.
- 20 In the codification of Nixon's executive order 11593 (May 13, 1971), Section 110 of the National Historic Preservation Act (16 U.S.C. 470, as amended in 1980) requires federal agencies to manage and maintain historic properties under agency jurisdiction or control in a manner that considers

the preservation of their historic, architectural, archaeological, and cultural values [Sec. 110(a)(1), Sec. 110 (a)(2)(B), Sec. 110(b)]. The act also requires agencies to give priority to the use of historic properties to carry out agency missions [Sec. 110(a)(1)]. [www.nps.gov/history/hps/fapa\\_110.htm](http://www.nps.gov/history/hps/fapa_110.htm) accessed November 20, 2008).

- 21 See Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror," *American University Law Review*, 41 (1991/92): 804: "[A]ssuming a statutory basis at least permitting the action, actual control may be a sufficient factor in which to base a claim for breach of fiduciary duty by mismanagement of the trust. . . . As long as the government, and not the Indian or the tribe, has actual control over the management of a resource, the exercise of this control can create a trust claim."
- 22 *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20 (1999).
- 23 *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (2001).
- 24 Senate Report No. 671 [S. 2268], 86th Cong., 1st Sess., Calendar No. 677, report of Roger Ernest, assistant secretary of the interior, August 10, 1959.
- 25 Transcript of hearing held December 7, 2000, 23.
- 26 See 445 U.S. 535 (1980) and 463 U.S. 206 (1983), respectively.
- 27 In making this request for Supreme Court hearing, the United States may have been relying on the recent string of victories over tribes. Under Chief Justice Rehnquist the Supreme Court had ruled against Indian tribes in about 77 percent of cases since 1984 and in 82 percent of the cases in the ten years immediately preceding the White Mountain Apache Tribe's argument. The Tribe's review of those cases indicated that most of the adverse decisions involved Tribal authority over the conduct of non-Indians, non-Indian property within a reservation, the application of state law, the zoning of non-Indian lands with reservations, taxation, and tribal court jurisdictional limits, but not the Indian Trust Doctrine.
- 28 David Osterfeld, personal communication to Brauchli in April or May 2002.
- 29 *Cobell v. Babbitt*, 30 F.Supp.2d.24 (D.C.C. 1998) and *Cobell v. Norton*, 240 F.3d. 1081 (D.C.Cir.2001). For details relating to this case and pertinent precedents, visit [www.indiantrust.com/index.cfm](http://www.indiantrust.com/index.cfm) (accessed November 20, 2008).
- 30 *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1133 (2003)—the "fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the [government] as trustee"—a case for damages under the Tucker Act.
- 31 See *U.S. v. The Navajo Nation*, 537 U.S. 488 (2003). The Court, in a 6-3 opinion, rejected the claim of the Navajo Nation, concluding that the secretary of the interior's ex parte meeting with the Peabody Coal Co. During coal leasing rate negotiations did not exercise a level of control over the coal lease sufficient to support a breach of trust claim by the Navajo against the United States. After remand by the U.S. Supreme Court, Navajo appealed again to the federal circuit, arguing that a network of other statutes and regulations other than the Indian Mineral Leasing Act of 1938 gave rise to

an enforceable fiduciary claim against the federal government. The federal circuit agreed, extensively citing *U.S. v. WMAT*; see *Navajo Nation v. United States* 501 F.3d 327 (2007). The U.S. petition for certiorari was granted by the Supreme Court on October 1, 2008 (07–1410). Argument was heard on February 23, 2009. The Court ruled unanimously against the Navajo Nation on April 6, 2009, holding that none of the sources of law cited by the federal circuit and relied upon by the Tribe provided any more sound a basis for its lawsuit than those analyzed by the Court in *U.S. v. The Navajo Nation*, 537 U.S. 488 (2003), 8–14.

32 However, should the Tribe enter into a long-term lease of any of the buildings with an outside entity (i.e., any individual or entity other than the Tribe), then the code of federal regulations regarding the lease of Indian lands will apply, and the United States, acting by and through the BIA, will have a trust obligation

to insure that fair market value is received for the lease (see 25 C.F.R. §162 *et seq.*). Moreover, the obligations of the lessee to the Tribe as lessor will also be to the United States during the lease term, although lease payments will go exclusively to the Tribe.

33 445 U.S. 535, at 541–46, 100 S. Ct. 1349 (1980).

34 463 U.S. 206, 103 S. Ct. 2961 (1983).

35 *Marceau v. Blackfeet Housing Authority* (08–881) 519 F.3d 838 (C.A.9, Mont.) (2008).

36 Vine Deloria Jr. and Clifford M. Lytle, "Federal Responsibility and Power over Indian Affairs," in *American Indians, American Justice* (Austin: University of Texas Press, 1983), 25–57; David E. Wilkins and K. Tsianina Lomawaima, "'With the Greatest Respect and Fidelity': The Trust Doctrine," in *Uneven Ground, American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001), 65–97.