No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Federal Circuit held that the United States may be liable to the Navajo Nation (Tribe) for up to $600 million in damages for breach of fiduciary duty, without finding that the Secretary violated any specific statutory or regulatory duty. In this Court, the Tribe likewise fails to identify the violation of any specific statutory or regulatory duty, much less one that can fairly be read to mandate monetary compensation in the event of a violation. The Tribe suggests that the United States may be held liable in damages based simply on the breach of a generalized trust relationship. But that expansive alternative theory for affirming the judgment below is contradicted by the terms of the Tucker Act, this Court's precedents, and bedrock sovereign immunity principles.

A. The Existence Of A General Trust Relationship Does Not Alter The Scope Of The Tucker Act's Limited Waiver Of Sovereign Immunity

1. The Tribe refuses to recognize the limits on the waiver of sovereign immunity effected by the Tucker Act. The Tucker Act itself does "not create any substantive right enforceable against the United States for money damages."

United States v. *Mitchell*, 463 U.S. 206, 216 (1983) (*Mitchell II*); see U.S. Br. 21-24. Rather, in order to state a cause of action for damages under the Tucker Act, a plaintiff suing other than for breach of contract must point to an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. As discussed in the government's opening brief (Br. 26-40) and in Point B, *infra*, the Tribe has not identified the violation of any such statute or regulation.

2. Instead of attempting to ground its claims on the violation of an Act of Congress or implementing regulation, the Tribe argues (Br. 16) that "*Mitchell II* held that the Tucker Act waived the Government's immunity for claims of breach of trust concerning federal management of Indian resources." See Resp. Br. 16-20. Thus, according to the Tribe (Br. 19), "once an active trust relationship is found to arise from [a] statutory scheme, there is no need to go back and look for a separate 'money-mandating' statute or regulation to state a claim cognizable under the Tucker Act." See also Br. for Amicus Nat'l Congress of American Indians (NCAI Br.) 6, 12-14. But neither *Mitchell II* nor this Court's other Tucker Act decisions support such an expansive interpretation of the Tucker Act.

In *Mitchell II*, the Court did not simply point to "an active trust relationship" (Resp. Br. 19) and hold that damages were available under the Tucker Act for generalized breaches of such a relationship as a court may conceive of it. To the contrary, the Court examined in detail the "various Acts of Congress and executive department regulations" governing Indian timber sales and looked to "whether *they* [*i.e.*, the statutes and regulations] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added); see *id.* at 219-223. So too, the Indian plaintiffs in *Mitchell II* based their claims on alleged violations of specific statutory and regulatory provisions. See *id.* at 210; U.S. Br. 27-28. In stark contrast, while "[a]lleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision." Pet. App. 66a (Court of Federal Claims); *id.* at 26a (Judge Schall); U.S. Br. 29-38. Thus, to allow a damages action in this case under the Tucker Act would require a significant departure from *Mitchell II*.

The Tribe suggests (Br. 19, 20) that the existence of federal control over an Indian resource is alone sufficient to support a damages claim against the United States for mismanagement of that resource. In *Mitchell II*, however, the Court did not look to the existence of federal control in the abstract. Instead, the Court looked to whether the particular statutes and regulations on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added). Thus, instead of adopting the sort of generalized control test advanced by the Tribe here, the Court required the Indians to show the violation of a specific statutory or regulatory duty in exercising control. U.S. Br. 40-46.[1]

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[1] The Tribe argues (Br. 15) that "[t]here is no principled distinction between the statutory scheme governing Indian coal at issue here and that governing Indian timber in *Mitchell II*." See Br. 20. But as the Court of Federal Claims concluded, the regulatory scheme in this case "falls far short of [creating] the detailed fiduciary responsibilities of *Mitchell II*." Pet. App. 68a; see U.S. Br. 41-42. The Tribe asserts (Br. 25-27) that the Department has issued "comprehensive regulations" to implement the IMLA. But none of the regulations cited by the Tribe imposes any specific requirements with respect to the Secretary's decision to approve a lease or lease amendments, with the exception of ensuring that a lease contains the minimum federal royalty rate. See U.S. Br. 3. By contrast, the statutes and regulations governing Indian timber sales established numerous specific duties with respect to the particular aspects

3. The Tribe argues (Br. 17) that the Indian Tucker Act "provides further support for *Mitchell II*'s conclusion that Congress intended a damage remedy for breaches of trust regarding Indian resource management." But in *Mitchell II* itself the Court reiterated that the Indian Tucker Act entitles Indian or tribal claimants to the "same" rights and remedies in suits against the United States that non-Indians enjoy under the Tucker Act, and not a special right to damages against the United States based on the existence of a generalized fiduciary relationship with Indian Tribes or resources. *Mitchell II*, 463 U.S. at 212 n.8; see *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*). In addition, as this Court has explained, the legislative history of the Indian Tucker Act confirms that Congress did not intend that Act "to be a waiver of sovereign immunity for any alleged breach of trust accruing *after* August 13, 1946" that is not based on a specific statutory or regulatory duty. *Id.* at 540 n.2 (emphasis added).

The Tribe claims (Br. 17) that its interpretation of the Indian Tucker Act is consistent with "this Court's decisions in special jurisdictional act cases that held the Government liable for breach of fiduciary duties." But the decisions on which it relies (see Br. 18 n.9) based the availability of damages *not* on the breach of a generalized trust relationship, but instead on the violation of specific statutory or treaty provisions. See *Seminole Nation* v. *United States*, 316 U.S. 286, 295-297 (1942) (violation of specific treaty obligation to disburse payments to individual tribal members); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938) (violation of specific treaty right to "absolute and

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of the federal management scheme at issue in *Mitchell II*. See 463 U.S. at 219-222. The IMLA regulations thus further underscore the disparity between this case and *Mitchell II* with respect to both the degree of federal control over the Indian resources in general and the particular action (lease approval) on which the Tribe focuses.

undisturbed use and occupation" of reservation lands); *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935) (violation of specific treaty provision conferring "fee simple title" to lands).[2]

4. The Tribe's argument that the Tucker Act confers jurisdiction over claims for breach of trust based on generalized conceptions of fiduciary duties is further contradicted by this Court's Tucker Act decisions stressing that the "grant of a right of action [for money damages] must be made with *specificity*." *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (emphasis added); accord *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982) (Under the Tucker Act, "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not *specifically* authorize awards of money damages.") (emphasis added). The Tribe's theory would vitiate that "specificity" requirement.

This Court shows similar restraint in determining whether an Act of Congress creates a federal right that is enforceable under 42 U.S.C. 1983. See *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2274-2275 (2002); U.S. Br. 24. In *Gonzaga*, this Court rejected "a relatively loose standard for finding rights enforceable by § 1983." 122 S. Ct. at 2274. Here, the Court should reject the even looser standard urged by the Tribe and its amici for determining when a money damages claim may be brought under the Tucker Act.

NCAI suggests (Br. 25-28) that this line of authority is inapposite. But here, as in the Section 1983 context, the question is whether rights allegedly conferred by a specific federal statute or implementing regulation are enforceable in an action brought under the general terms of a statute that allows for the recovery of damages for the violation of

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[2] In *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 254-255 (1935), the damages claim at issue did not fall within the terms of the special jurisdictional act, and therefore was dismissed.

federal rights. In both situations, it is not enough to point simply to a statute or regulation that a plaintiff seeks to enforce. Rather, the plaintiff must point to the violation of a statute that "confer[s] entitlements sufficiently specific and definite to qualify as enforceable rights," 122 S. Ct. at 2273, in the form of "specific monetary entitlements," *id.* at 2274. See *Testan*, 424 U.S. at 400. Indeed, in a critical respect, the inquiry under the Tucker Act is even more stringent than that under Section 1983: under the Tucker Act, the plaintiff must not only point to a statute or regulation that creates enforceable rights, but also establish that the statute or regulation mandates the payment of compensation for a violation. *Mitchell II*, 463 U.S. at 217-218.

B. The Tribe Has Not Identified The Violation Of Any Specific Statutory Or Regulatory Duty Mandating Compensation For A Violation

It is not until page 39 of its brief that the Tribe attempts to link the alleged breach of trust to the violation of any concrete duties. None of the purported duties identified by the Tribe supports its damages claim under the Tucker Act.

1. The Tribe argues (Br. 39) that "[t]he Department violated its duty to adjust the royalty rate under the original lease." Article VI of the lease made its royalty provisions "subject to" a "reasonable adjustment" by the Secretary upon the 20-year anniversary of the lease. Pet. App. 67a. As the Court of Federal Claims concluded (and the Tribe does not challenge in this Court), that provision was not contractually binding on the Secretary. *Id.* at 70a. Because Article VI of the lease itself merely authorized but did not mandate any royalty adjustment and did not contractually bind the Secretary, any claim for damages based on a failure to adjust the royalty (or to adjust it by a certain amount) must fail. Furthermore, a claim that the Secretary did not act in compliance with the terms of a *lease* is not a claim

based on an Act of Congress or implementing regulation, as required by the Tucker Act. See U.S. Br. 33.[3]

In addition, even if the lease had obligated the Secretary to adjust the royalty rate and that obligation were enforceable in an action under the Tucker Act, the lease would not have required the Secretary to adjust the rate in a manner that *maximized* profits for the Tribe, as the Tribe apparently maintains. The lease made the original royalty rate subject to "reasonable adjustment" (Pet. App. 67a), and determining what would be "reasonable" under a lease that protected both parties would properly take into account the interests of both parties, not only those of the Tribe. That conclusion is confirmed by the fact that Article VI of the lease provided for renegotiation and if necessary arbitration—standard contract procedures that allow for the play of both parties' interests—to resolve differences between the parties concerning a possible adjustment to the royalty rate if the land was no longer subject to federal jurisdiction at the time an adjustment could be made. J.A. 194.

The Tribe also relies (Br. 39-40) on paragraph 6 of 25 U.S.C. 399 in arguing that the Secretary breached a duty in connection with the royalty-adjustment clause of the original lease. That reliance is misplaced. Section 399, which was enacted in 1919, is not part of the Indian Mineral Leasing

[3] The Tribe argues that the lease is "a 'fundamental document'" that "define[s] the contours of the Government's trust duties." Resp. Br. 39 (citing *Pawnee* v. *United States*, 830 F.2d 187 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988)). In *Pawnee* and *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (1984), on reh'g, 782 F.2d 855 (en banc), supplemented, 793 F.2d 1171 (10th Cir.), cert. denied, 479 U.S. 970 (1986), on which the Tribe also relies (Br. 39), the relevant duties of the Secretary (to calculate and recover royalties) were imposed by a statute and regulations governing oil and gas leases, not the leases themselves. Reference to the leases was required only to ascertain the measure of the royalties to be collected for the Indians. The Tribe here, by contrast, relies on the lease to supply the duty that, it claims, is enforceable under the Tucker Act.

Act (IMLA), and thus does not govern the lease at issue in this case. In fact, because Section 399 governed leases of lands *by the Secretary*, rather than by a Tribe, it could not apply to the Navajo lease here. See U.S. Br. 44 n.16. Nor does the general discussion of lease renewals in paragraph 6 of Section 399 specify any duty with respect to the adjustment of royalty rates pursuant to a clause in an existing lease or the handling of administrative appeals concerning such an adjustment, and it in any event provides only for "reasonable" terms upon renewal, not a maximum return to the Tribe. 25 U.S.C. 399 para. 6.

Although the Tribe claims (Br. 39) that the Secretary breached a duty in failing to "adjust the royalty rate under the original lease," the Tribe does not seriously attempt to defend the ground on which the court of appeals relied in finding a breach of fiduciary duty that is enforceable under the Tucker Act, *i.e.*, the Secretary's actions in 1985 with respect to the administrative appeal. See Pet. App. 11a-12a. As explained in the government's opening brief (Br. 30-31), the Secretary's responsibilities with respect to administrative appeals are governed by the Department's general procedural rules and the Administrative Procedure Act (APA). The court of appeals did not identify a violation of any procedural rule or provision of the APA, and even if it had, procedures governing administrative appeals are not fairly interpreted as mandating compensation for any alleged injury. See U.S. Br. 30-32.[4]

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[4] In a footnote, the Tribe asserts (Br. 48 n.27) for the first time in this case that the government violated "due process" by allegedly departing from agency procedures. But the Secretary did not depart from any established agency procedure. U.S. Br. 31-32. *Pueblo of Laguna* v. *Assistant Secretary for Indian Affairs*, 12 I.B.I.A. 80 (1983), is not to the contrary. In *Pueblo of Laguna*, which did not involve a claim for damages, the Interior Board of Indian Appeals *rejected* a claim that an administrative decision should be set aside on the ground that it was tainted by improper ex parte communications. 12 I.B.I.A. at 97. In any event, the

2. The Tribe argues (Br. 39) that "[t]he Department violated * * * its duty to supervise and limit negotiations to prevent unfairness and overreaching," citing 25 C.F.R. 211.2 (1985). See Resp. Br. 40-42. But as Judge Schall and the Court of Federal Claims recognized, the text of that regulation lends no support to the Tribe's position. Pet. App. 26a-27a n.5, 57a-58a. In pertinent part, the regulation allowed the negotiation of leases as an alternative to competitive bidding, "reserve[d]" to the Secretary the right "to direct that negotiated leases be rejected," and provided that negotiated leases "shall be filed" with the Indian agency within 30 days after negotiations were authorized, unless that time was extended. 25 C.F.R. 211.2 (1985). It said nothing about supervising negotiations. Moreover, the regulation did not refer to royalty adjustments under (or amendments to) *existing* leases. It instead was addressed to the negotiation of *new* leases, as an alternative to competitive bidding for such leases. But even if Section 211.2 imposed procedural parameters that were somehow violated by the Secretary, nothing in that provision can fairly be interpreted as mandating monetary compensation. See U.S. Br. 38-39 n.14.[5]

3. The Tribe argues (Br. 39) that "[t]he Department violated * * * its duty to review and approve any proposed coal lease with care to promote IMLA's basic purpose and the Navajo Nation's best interests," citing 25 U.S.C. 396a

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Tucker Act does not provide a damages remedy for violation of the Due Process Clause. See U.S. Br. 32.

[5] Indeed, under the Court of Claims' seminal decision in *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002 (1967), on which this Court has relied in its Tucker Act cases ever since (including in *Mitchell II*, see 463 U.S. at 217, 223 n.23), the Tribe's arguments (Br. 40-42) regarding the actions of the Interior Department that the Tribe alleges might have affected negotiations between the Tribe and Peabody sound in tort, and therefore are beyond the scope of the Tucker Act for that additional reason. See 372 F.2d at 1009-1011.

and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). See Resp. Br. 42-43. The breach of a generalized statutory directive to act in the interests of the Indians would not support a damages claim under the Tucker Act. Indeed, in *Mitchell I*, this Court held that the Indian plaintiffs failed to state a claim for damages that was enforceable under the Tucker Act even though the plaintiffs alleged a breach of trust under a statute that explicitly obligated the United States to hold allotted lands "'in trust for the sole use and benefit of [Indian allottees].'" 445 U.S. at 541 (quoting 25 U.S.C. 348). In any event, the IMLA does not specify the sort of duty urged by the Tribe. See U.S. Br. 37-39.

Section 396a of the IMLA states that a Tribe "may, with the approval of the Secretary of the Interior," lease unallotted lands for mining purposes. 25 U.S.C. 396a. Nothing in that provision specifically obligates the Secretary to determine, prior to approving a lease, whether a lease agreed to by a Tribe and a private party is in the Tribe's "best interests," much less that it maximizes the return to the Tribe. Furthermore, the IMLA's objective of promoting Indian self-determination would be directly undercut by requiring the Secretary to look behind every mineral lease negotiated by a Tribe and a private party and determine whether, in the government's view, the agreement was in fact in the Tribe's best interests. See U.S. Br. 41-42 & 44 n.16. The Department underscored that objective when it revised the IMLA regulations in 1996, and explained that "consistent with the United States' policy on self-determination, the Department has attempted to provide the Tribes as much freedom as possible to make their own determination on issues affecting the development of their minerals." 56 Fed. Reg. 58,733, 58,735 (1991).

Section 396b of the IMLA addresses the public auction of oil and gas leases by the Department, and reserves to the

Secretary the right to reject the highest competitive bid for an oil and gas lease when the Secretary "shall determine that it is unwise in the interest of the Indians to accept the highest bid." 25 U.S.C 396b. The juxtaposition of Section 396a and Section 396b underscores that Congress did not specifically obligate the Secretary to conduct an "interest of the Indians" analysis in determining whether to *approve* a *coal* lease that was negotiated and agreed to in the first instance by a Tribe itself. That is especially true where, as here, the royalty rate and other provisions of the lease satisfied all applicable regulatory requirements.

The Tribe's reliance on *Kerr-McGee* is also misplaced. In that case, the Court held that the Navajo Tribe was authorized to impose certain business taxes without first obtaining the approval of the Secretary. 471 U.S. at 201. In dictum, the Court stated that a "basic purpose" of the IMLA is "to maximize tribal revenues from reservation lands," referring to a statement in a committee report accompanying the passage of that 1938 Act. *Id.* at 200 (citing S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937)). But in its subsequent decision in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989), this Court recognized that the statement in the same committee report referred to in *Kerr-McGee*—which "happened to include the phrase 'the greatest return from their property'"—cannot be given "talismanic effect." The *Cotton Petroleum* Court therefore rejected the argument "that the 1938 Act embodies a broad congressional policy of maximizing revenues for Indian tribes." *Id.* at 179; see U.S. Br. 42.[6]

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[6] Citing two decisions of the Interior Board of Land Appeals, the Tribe claims (Br. 31-32) that "the Department itself * * * has ruled that it is duty bound to maximize tribal revenues under IMLA." But in *General Crude Oil Co.*, 18 I.B.L.A. 326, 329 (1975), the Board determined that the Secretary properly rejected an offer for an oil and gas lease on trust lands under the Act of August 21, 1916; the IMLA was not involved at all. And in *Robert L. Bayless*, 149 I.B.L.A. 140, 150 (1999), the Board

As this Court explained in *Cotton Petroleum*, "[r]ead in the broadest terms possible, the relevant paragraph [in the legislative history] suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" 490 U.S. at 179 (citing S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)) (latter brackets added by this Court). That policy objective was met here inasmuch as the 12 1/2 percent royalty rate approved by the Secretary under the 1987 lease amendments equals the minimum rate set by Congress for coal mined on federal lands. See 30 U.S.C. 207(a); U.S. Br. 5 n.4, 34.[7]

The Tribe refers (Br. 30) to a provision of the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2103(b), which governs the Secretary's approval of *agreements* for the *development* of Indian mineral resources subject to that Act. The lease in this case is not subject to the IMDA. Moreover, Section 2103(b) of the IMDA only underscores that Congress knows how to direct the Secretary to consider specific factors in reviewing an agreement, and that it did not do so in Section 396a of the IMLA. Compare 25 U.S.C. 396a (authorizing Tribes to enter into mineral leases "with the approval of the Secretary of the Interior") with 25 U.S.C.

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merely noted that it was following a court of appeals' holding that where the Department "is faced with two reasonable interpretations of a regulation, it must choose the one that better promotes the Tribe's interests."

[7] In response to the statement by Amicus Peabody Coal Co. (Peabody Br. 26) that "a royalty rate of 12.5% * * * was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996," the Tribe points to a single federal coal lease with a royalty rate of 17.08 percent. See Resp. Br. 32 n.18 (citing *Peabody Coal Co.*, 93 I.B.L.A. 317 (1986)); *id.* at 11 (same). But the lease in *Peabody Coal* was "part of an experimental leasing policy tried by the Department for a short time [in which] bidders were permitted to bid for a higher royalty rate instead of submitting so large a cash bonus." 93 I.B.L.A. at 320.

2103(b) ("In approving or disapproving a Minerals Agreement, the Secretary shall determine if it is in the best interest of the Indian tribe or of any individual Indian who may be party to such agreement and shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement."). There is good reason for Congress and the Secretary to distinguish between the two statutes. The IMLA governs leases, which can be expected to have more standardized terms and can be measured against criteria of general applicability, such as a minimum royalty rate tied to the minimum rate for federal leases, while the IMDA authorizes a wide variety of joint ventures and other arrangements for which a more particularized evaluation is appropriate.[8]

The Tribe points (Br. 26, 31) to language in regulations promulgated in 1996, see 25 C.F.R. 211 (2001), more than a

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[8] The Secretary's regulations governing the approval of mineral agreements subject to the IMDA similarly specify detailed procedures not set forth in the IMLA or the IMLA's implementing regulations. See 25 C.F.R. 225.22. For example, the regulations direct the Secretary to issue "written findings" including an "environmental study" and "economic assessment" of a proposed minerals agreement, 25 C.F.R. 225.22(b)(1), and state that "[a] minerals agreement shall be approved if, at the Secretary's discretion, it is determined that * * * [t]he minerals agreement is in the best interest of the Indian mineral owner," 25 C.F.R. 225.22(c)(1); see 25 C.F.R. 225.22(d) (specifying factors to take into account on "[t]he question of 'best interest'"). Notably, with respect to the "economic assessment," the IMDA regulations further specify that the Secretary "shall address," *inter alia*, "[w]hether the production royalties or other form of return on mineral resources is *adequate*." 25 C.F.R. 225.23(b) (emphasis added). Thus, the regulations do not require the Secretary to ensure that the royalty rate or other form of return *maximizes* profits to the Tribe. *A fortiori* that claim must be rejected here, where there is no statute or regulation that required the Secretary to undertake any economic analysis of an IMLA lease beyond assuring that the royalty rate satisfied the minimum specified by the Secretary's regulations.

decade *after* the events at issue here. As explained in the government's opening brief (Br. 37-38), even if the current regulations were applicable here, they would not support the Tribe's argument that the IMLA creates a free-floating "best interest" standard, much less a requirement, enforceable in a damages action under the Tucker Act, that the Secretary disapprove a lease unless he finds it would provide the *maximum* return to the Tribe. The regulations in fact refute that notion. They require only that a royalty rate be at least equal to 12 1/2 percent or, if less than 12 1/2 percent, that the Secretary determine that it nonetheless is in the best interest of the Indians, 25 C.F.R. 211.43(b) (see U.S. Br. 45-46), which the Secretary has construed to mean that it provides "adequate" consideration for the Tribe. 61 Fed. Reg. 35,634, 35,646 (1996).[9]

4. The Tribe suggests (Br. 43) that the Secretary violated an asserted duty to perform an independent economic analysis before approving the lease amendments in 1987, referring to internal agency manuals. See Pet. App. 24a, 58a. But the internal manual provisions relied upon by the Tribe (see Resp. C.A. Br. 55) do not suggest any such duty. One provision (54 BIAM 604.05) applies only to new *oil and gas*

[9] See also 61 Fed. Reg. at 35,645 (minimum royalty rate "may be raised upon agreement of the parties to a lease" or "may be reduced upon agreement of the parties *and the findings of the Department that a lower rate is in the best interest of the Indian mineral owner*") (emphasis added); *id.* at 35,646 (the determination whether to approve a lease with "a lower royalty rate" than the minimum rate specified in the regulations "will require a higher level of analysis to assure that the tribe is receiving adequate consideration"; "Tribes and industry are required to justify proposed *lower* royalty rates for leases on a case-by-case basis") (emphasis added). Accordingly, even if the adjusted 12 1/2 percent royalty rate included in the lease amendments approved by the Secretary in 1987 were subject to the 1996 regulations, that rate would not trigger any duty on the part of the Secretary to conduct a particularized best interest determination because, even today, the royalty rate is equal to the minimum royalty rate specified in the IMLA regulations. See 25 C.F.R. 211.43(a)(2) (2001).

leases; the other (130 DM 10.5) merely describes the functions of the Department's former Division of Energy and Minerals Resources and does not purport to call for an analysis in any particular circumstance. Moreover, those manual provisions are for internal agency guidance only, were not published in the *Federal Register*, and do not have the force of a regulation. Cf. *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). As such, the manuals could not provide the basis for a claim founded on an Act of Congress or implementing regulation, as required by the Tucker Act. As explained above, the IMLA and regulations implementing that Act do not require such an independent economic analysis, in contrast to the IMDA and regulations implementing that Act, which do impose such a requirement for mineral development agreements.

5. The Tribe has not alleged a violation of the Department's regulation specifying the minimum royalty rate for leases subject to the IMLA. That regulation is intended to assure that Tribes receive what the Secretary has determined to be a "reasonable" return. See 56 Fed. Reg. 58,736 (1991) (minimum royalty rates are "helpful in providing additional guidance to potential lessees while providing *reasonable* royalty rates for lessors") (emphasis added). It is the sort of specific regulatory requirement that might be interpreted as mandating compensation if the Secretary approved a lease providing for a lower royalty without determining that the lower rate still afforded the Tribe an adequate return. The Court may therefore assume for present purposes that a failure by the Secretary to ensure, prior to approving a proposed lease, that its terms (or amendments) comply with the regulation specifying the minimum royalty rate to which the parties may agree would support a claim under the Tucker Act. But in 1987, when the lease amendments at issue were approved by the Secretary, the 12 1/2 percent royalty rate agreed to by the Tribe was well

in excess of the applicable minimum royalty rate. See U.S. Br. 34, 38.[10]

C. Principles Derived From The Common Law Cannot Supply A Substantive Right To Damages Not Specified By Congress

The Tribe argues that when, as here, Congress has not prescribed either a specific duty or a damages remedy for alleged breach of trust, "the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a 'necessary expedient.'" Resp. Br. 37 (quoting *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 237 (1985)). That is incorrect. *County of Oneida* did not involve a damages action against the United States or the Tucker Act. The Tucker Act requires a plaintiff not suing for breach of contract to point to the violation of an Act of Congress or implementing regulation, and thus does not authorize claims against the United States based on principles drawn from the common law. See U.S. Br. 46.

According to the Tribe (Br. 36), "Congress should be understood to have imported established principles of trust law" under the Indian Tucker Act. But the Indian Tucker Act entitles Indian plaintiffs to the "same" rights and remedies in suits against the United States as those enjoyed by non-Indians, not more. *Mitchell I*, 445 U.S. at 539; see U.S. Br. 22. Moreover, the Indian Tucker Act could not have "imported" any common law trust principles enforceable against the United States in a damages action such as this because the Indian Tucker Act is merely a jurisdictional provision that did "not create any substantive right enforceable

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[10] By 1987, the Department's practice was not to approve IMLA leases with royalties less than the minimum rate for federal coal (*i.e.*, 12 1/2 percent). C.A. App. A1872. But as the Court of Federal Claims noted, "there is no claim by the Navajo Nation that the 1987 approval of Lease 8580, with royalties of 12.5%, ran afoul of that policy." Pet. App. 68a.

against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *Mitchell I*, 445 U.S. at 538, 540.

The Tribe suggests (Br. 38) that reliance on trust law principles "offers stability and predictability." But just the opposite is true. Holding that the United States may be liable in damages for the violation of any duty discoverable by a court in the "interstices" (Br. in Opp. 12) of the law of trusts would turn the Court of Federal Claims into a court of equity and leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid damages actions in undertaking a multitude of day-to-day actions affecting Indians and Indian resources.[11]

D. In Alleging Generalized Breaches Of Fiduciary Duty, The Tribe Mischaracterizes The Underlying Events

In alleging generalized breaches of fiduciary duty, the Tribe attempts to put the Secretary's conduct in the worst possible light, often making assertions and drawing conclusions that are both disputed and unsupported by the record.

For example, although the Tribe suggests (Br. 7) that the Department "leaked" a draft decision on Peabody's administrative appeal to Peabody and withheld it from the Tribe, the record indicates that Peabody learned of the draft decision from the Tribe. J.A. 99. The Tribe also asserts (Br. 7, 15) that Acting Assistant Secretary Fritz's decision was "final" in July 1985, but that is incorrect. See U.S. Br. 8 n.6; J.A. 125.

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[11] Amicus NCAI argues (Br. 21) that there is "a long-established tradition of requiring trustees to pay money damages for fiduciary breaches." But if anything the tradition is *not* to allow damages claims when, as here, the trustee is sovereign. See 2 A. Scott, *The Law of Trusts* § 95, at 17 (4th ed. 1987) ("At common law it was held that a use or trust could not be enforced against the Crown."); Restatement (Second) of Trusts § 95 (1959) ("The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State.").

The Tribe asserts that it lacked knowledge of the Hodel-Hulett meeting, but concedes (Br. 8) that it "did receive a copy of Peabody's July 5, 1985 letter to Hodel." That letter (J.A. 98-100) stated, *inter alia*, that "the Tribe has received word of an imminent and favorable decision on the appeal," and has "suspended [negotiations] until the Department ruled on the appeal of the Area Director's decision." J.A. 99. The letter further urged the Secretary "to (1) assume direct responsibility for this unusual royalty appeal case, and (2) either postpone a judgement to allow for a voluntary settlement or grant Peabody's appeal of the Area Director's decision." J.A. 100. The Tribe also concedes (Br. 10) that it subsequently learned that the Secretary preferred that the parties resume negotiations. See J.A. 342-343 (testimony of Michael C. Nelson). Accordingly, although the Tribe claims (Br. 2) that it negotiated "at a decided bargaining disadvantage," the Tribe was aware that Peabody had affirmatively sought the Secretary's assistance to facilitate a mutually agreed-upon adjustment to the royalty rate; that the Secretary had concluded that the parties should resume negotiations; and that the Acting Assistant Secretary's decision on Peabody's pending appeal "ha[d] not yet been finalized." J.A. 125.

The Tribe accuses (Br. 10) the Secretary of "forcing" it to negotiate with Peabody by delaying a decision on the administrative appeal, but the Tribe had the ability to terminate negotiations unilaterally at any time and could have sought to compel the Department to decide the appeal by requesting that it be transferred to the Interior Board of Indian Appeals. See J.A. 12, 122; U.S. Br. 35. The Tribe suggests (Br. 41) that the negotiations "dragged out" for years. But in fact the parties "quickly reached a tentative agreement" less than a month after resuming negotiations in August 1985. Pet. App. 42a. Although the tentative agreement was not formally approved by the Tribe until 1987, after a political change in the Tribe's leadership, the agreement approved in 1987 was "essentially the same agreement" reached in 1985, and included a provision for the payment of back royalties at the increased rate of 12 1/2 percent, retroactive to February 1984. Pet. App. 42a; U.S. Br. 9-10.

The Tribe suggests (Br. 9) that the Secretary struck a "deal with Peabody" in July 1985, and improperly thwarted the issuance of a draft decision by his subordinate, Acting Assistant Secretary Fritz. But in his memorandum to Fritz in July 1985, the Secretary said that he "d[id] not necessarily agree" with all the points in Peabody's July 5 letter, but that there would appear to be "significant advantages" to a negotiated solution rather than a royalty adjustment imposed on the parties, which would "almost certainly" lead to protracted and costly appeals and impair the ongoing contractual relationship under the lease. J.A. 117. The Secretary therefore simply "suggest[ed] that [Fritz] inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." *Ibid.* At the same time, the Secretary "assure[d]" Fritz that he had *not* made any decision on "the merits of the arguments of the parties with respect to the issues which are subject to the appeal." J.A. 118.

Finally, the Tribe complains (Br. 11-12) that elements of the package of lease amendments that it negotiated with Peabody were unfair, but does not mention the "many aspects of the renegotiated lease package" that the Tribe's counsel "conceded [in the Court of Federal Claims] * * * are favorable to the Navajo Nation." Pet. App. 50a. In addition, although the Tribe objects to the Secretary's approval of the lease amendments that the Tribe negotiated with Peabody, it fails to acknowledge that its own Tribal Council approved the amendments only after finding that they were in "the best interest of the [Tribe]." C.A. App. A2432-A2433.

Nor does the Tribe seek to set aside the lease amendments approved in 1987. See Pet. App. 50a ("counsel informed the Court that the Navajo did not wish to invalidate the entire agreement."). Rather, the Tribe seeks to hold on to the "many aspects of the renegotiated lease package that are favorable to the Navajo Nation," *ibid.*, and secure damages from the United States for the Secretary's refusal to insist on an increase in the royalty rate well above what the parties agreed to (from 12 1/2 to 20 percent), and far in excess of the applicable minimum rate for leases subject to the IMLA. Nothing in the IMLA, the Tucker Act, or this Court's decisions sanctions that damages claim.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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