No. 04-_____

In The

Supreme Court of the United States

PEABODY COAL COMPANY,
PEABODY WESTERN COAL COMPANY, and
PEABODY HOLDING COMPANY, INC.,

Petitioners,

v.

THE NAVAJO NATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal question subject-matter jurisdiction arises pursuant to 28 U.S.C. § 1331 over an action to enforce an amendment to a mineral lease between a federally recognized Indian tribe and a private corporation, when both the lease and amendment have been approved by the Secretary of the Interior under the Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. § 396a, and when the tribe has disputed the validity of the lease amendment on grounds already rejected by this Court in *United States v. Navajo Nation*, 537 U.S. 488 (2003).

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), petitioners state that the parties to the proceeding in the court of appeals and district court were Peabody Coal Company, Peabody Western Coal Company, Peabody Holding Company, Inc., and the Navajo Nation.

RULE 29.6 STATEMENT

The parent corporation and publicly held company that owns 10 percent or more of the stock of petitioners is Peabody Energy Corporation. Fidelity Management & Research Company and Wellington Management Company, LLP, each own more than 10% of Peabody Energy.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively, "Peabody") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-14a) is reported at 373 F.3d 945. The opinion of the district court (*id.* 15a-26a) is unreported.

JURISDICTION

The court of appeals issued its decision on June 15, 2004. Peabody's timely petition for rehearing was denied on August 10, 2004. Pet. App. 28a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Indian Mineral Leasing Act of 1938 ("IMLA"), 52 Stat. 347, 25 U.S.C. § 396a, provides in relevant part:

> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for

terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

STATEMENT OF THE CASE

This case is a continuation of a dispute previously before this Court in *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo Nation*"). In *Navajo Nation*, this Court held that the Interior Secretary's approval of a package of coal lease amendments in 1987 (the "1987 Lease Amendments") was both substantively and procedurally valid. The Navajo Nation has been unwilling to accept that judgment and has continued to challenge the validity of the 1987 Lease Amendments in litigation with Peabody.

The question in this case is whether there is federal subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 over an action by Peabody to enforce the federally approved coal lease provisions against the Navajo Nation. The Ninth Circuit held that federal jurisdiction does not arise in such circumstances, even where the tribe has filed separate federal court actions seeking to invalidate the lease provisions and to challenge the Interior Secretary's approval as a breach of federal law.

The Ninth Circuit's holding conflicts with decisions in the Fifth, Eighth, and Tenth Circuits, which have recognized the existence of federal jurisdiction in similar situations involving federally approved agreements with Indian tribes.

Review is also warranted because the decision below concerns an important issue of federal law and will have significant ramifications for parties in commercial

relationships with Indian tribes. The court of appeals' decision threatens to strip private parties of the federal judicial forum for which they bargained and to disrupt the congressional scheme for encouraging commercial dealings with Indian tribes.

This case is a particularly suitable vehicle to resolve the questions presented because the reasons advanced by the Navajo Nation to repudiate the 1987 Lease Amendments are the very grounds rejected by this Court in its *Navajo Nation* decision. If federal jurisdiction to enforce a federally approved agreement does not lie in a case where an Indian tribe seeks to repudiate the agreement on grounds already rejected by this Court, it is difficult to imagine when such jurisdiction would ever arise. This Court's review is urgently needed.

A. Statutory Background.

Indian mineral leasing is subject to extensive federal regulation. The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), citing *Worcester v. Georgia*, 6 Pet. 515, 561 (1832). Statutes dating from the first Congress prohibit conveyances of Indian resources without federal approval. *See* 25 U.S.C. §§ 2, 177. The Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1849) grants the federal government "sole and exclusive right of regulating the trade and intercourse" with the Navajo.

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 (1891 Act), which authorized leases for terms not to

exceed 10 years on lands "bought and paid for" by the Indians. The 1891 Act was amended by the 1924 Act, which provided in pertinent part:

> Unallotted land . . . subject to lease for mining purposes for a period of ten years under section 397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian] council . . . , for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities.

In 1938, Congress enacted IMLA under which mineral leases between Native tribes and commercial companies are not effective unless approved by the Secretary of the Interior. 25 U.S.C. § 396a. Congress adopted IMLA in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess., 2 (1937).

The Act also established uniform leasing procedures. *See* 25 U.S.C. §§ 396b-396g. These procedures govern lease duration, payment methods, permits, inspections, federal approval of leases and permission to start operations, fees, penalties, assignment, surrender, cancellation, and numerous other issues. *See* 25 C.F.R. Part 211.

The federal government has long enforced minimum royalty rates through regulations, Secretarial orders, and binding policies. The Peabody leases at issue in this case have always complied with (or exceeded) these requirements. *See, e.g.*, 25 C.F.R. § 186.15 (1939) (minimum of 10 cents per ton); 25 C.F.R. § 186.15(c) (1957) (same); 25

C.F.R. § 171.15(c) (1981) (same); 25 C.F.R. § 211.15(c) (1987) (same); 25 C.F.R. § 211.43 (2000) (12.5% for surface-mined coal).

Further, the operation of surface mining activities on Indian lands is regulated by a host of federal statutes. The Surface Mining Control and Reclamation Act of 1977 ("SMCRA") contains a special section regarding Indian lands. 30 U.S.C. § 1300. Regulations promulgated under SMCRA address signs and markers, post-mining use of land, backfilling and grading, disposal of waste materials, preservation of topsoil, protection of hydrologic systems, revegetation, federal inspections, enforcement by the Department, civil penalties, and appeals of federal decisions under these regulations. *See* 25 C.F.R. Part 216, Subpart B.

The federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") is "the regulatory authority on Indian lands." 30 C.F.R. § 750.6(a)(1). OSMRE is authorized to approve or disapprove permits to conduct surface coal mining operations on Indian lands, conduct inspections, assure that operators comply with special requirements relating to the protection of non-coal resources on Indian lands, and review environmental performance bond. *Id.* at § 750.6(a). The federal Bureau of Land Management ("BLM") is responsible for reviewing coal exploration and mining plans, administering and enforcing requirements for coal exploration plans, administering lease terms and conditions, and enforcing lease terms relating to production verification for royalty purposes. *Id.* at § 750.6(b). The Minerals Management Service ("MMS") is the federal agency responsible for collecting and accounting for royalties and other income from Indian royalty agreements. *Id.* at § 750.6(c); *see also id.* at § 750.1.

The Bureau of Indian Affairs ("BIA") is responsible for consulting directly with and providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands. *Id.* at § 750.6(d).

B. The 1987 Lease Amendments.

This case involves two federally approved coal leases between Peabody and the Navajo Nation: Lease 8580, also known as the North Lease, approved in 1964, and Lease 9910, known as the South Lease, approved in 1966. The original North Lease provided for payment of royalties based upon the volume of coal sold by Peabody. The original lease also provided that the specified royalty rates could be reopened and reasonably readjusted by the Interior Secretary twenty years after its effective date. The South Lease has no reopener provision.

In March 1984, the Navajo Nation Chairman unilaterally sent an ex parte letter to Interior Secretary Clark requesting an increase for North Lease royalty rate to 12.5%, and asked for his assistance in securing a voluntary adjustment of the other leases. In June 1984, Area Director Donald Dodge of the BIA, purporting to act on behalf of the Interior Secretary, issued an "opinion letter" adjusting the North Lease royalty rate from 37.5 cents per ton of coal to 20% of the gross coal proceeds. The "opinion letter" did not address the South Leases.

In July 1984, Peabody filed an informal administrative appeal of the Dodge rate within the Interior Department. On July 5, 1985, Peabody sent a letter to newly appointed Interior Secretary Hodel, with a copy to the Navajo Nation, stating that the Navajo Nation had

learned of an imminent and favorable ruling and urging the Secretary to postpone resolution of the administrative proceedings in favor of a voluntary settlement by the parties. Subsequently in July 1985, a consultant retained by Peabody and known to Secretary Hodel, met directly with the Secretary to ask that any ruling be deferred to allow the parties to complete ongoing settlement negotiations. On July 17, 1985, Secretary Hodel sent a memorandum "suggest[ing]" that Fritz "inform the involved parties that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." "Any royalty adjustment which is imposed on those parties without their concurrence," the memorandum stated, "will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. Secretary Hodel added, however, that the memorandum "was not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." 537 U.S. at 498. The Tribe was not told of the Secretary's memorandum, but learned that "someone from Washington" had urged a return to the bargaining table. *Id.* (citation omitted).

As this Court held in *Navajo Nation*, the Secretary's conduct did not violate applicable procedural regulations, and the Secretary had the authority to modify any royalty rate that would have resulted from the informal administrative appeal process. Further, the Navajo Nation failed to invoke the more formal procedures for administrative review that were available. 537 U.S. at 513-14.

In September 1987, the parties reached a tentative agreement on a package of lease amendments. On November

20, 1987, the Navajo Nation and Peabody executed the 1987 Lease Amendments, which provided, among other things, a royalty rate of 12.5% for the North Lease. The parties agreed to petition the Secretary to vacate the Area Director's previous decision setting the rate at 20%. The amendments also contained a number of additional benefits for plaintiffs, including a royalty rate adjustment on the South Leases to 12.5% despite the absence of a rate reopener provision. In addition, Peabody agreed to pay the Tribe $1.5 million when the amendments became effective upon Secretarial approval, and $7.5 million more when Peabody began mining additional coal as authorized by the Lease Amendment. The 1987 Lease Amendments also addressed the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments.

The amendments also created new procedures to adjust royalty rates in the future. Removing the provision in the North Lease that permitted the Secretary to adjust the royalty rate, the parties substituted arbitration clauses in both leases as "the sole and exclusive method for the determination or readjustment of royalty rates . . . for periods beginning on and after February 1, 1984." The Navajo Nation also agreed to waive its sovereign immunity from actions to enforce or appeal any resulting arbitration decision:

> Lessor and its officers acting in their official capacity consent to suit in the United States District Court for the District of Arizona for the limited purpose of the enforcement or appeal of any arbitration decision pursuant to this Article, and agree not to raise sovereign immunity or exhaustion of tribal remedies as a defense to such suit.

Pet. App. 4a.

The Navajo Nation also agreed that the original lease and the 1987 Amendments are "valid and enforceable and in the best interests of Lessee and Lessor and its people." The Navajo Nation sought the approval of the 1987 Lease Amendments by the Interior Secretary pursuant to IMLA, 25 U.S.C. § 396a. On December 14, 1987, the Secretary approved the 1987 Lease Amendments.

C. The 1998 Lease Amendments.

In February 1998, the Navajo Nation initiated arbitration proceedings pursuant to the 1987 Lease Amendments. In a submission to the U.S. District Court in Arizona, the Navajo Nation recognized the existence of federal question jurisdiction over its arbitration request: "[t]his Court has jurisdiction over this petition pursuant to 28 U.S.C. §§ 1331 and 1362. The Navajo Nation's authority to enter into the Coal Leases arises under federal law [citing IMLA]." Joint Petition ¶ 4 (filed June 1, 1998).

After assembling an arbitration panel and undertaking discovery, the Navajo Nation executed an Arbitration Settlement Agreement, physically attached to which was a Stipulated Arbitration Award as Exhibit A and a Lease Amendment as Exhibit B (the "1998 Lease Amendments"). The Arbitration Settlement Agreement provided that "the parties have agreed to a settlement premised on the final and irrevocable resolution of the arbitration proceedings and the submission of the Lease Amendment Agreement . . . to the Secretary of the Interior for approval."

The Arbitration Settlement Agreement provided that "[t]he entry of the final arbitration award shall not be contingent or otherwise dependent upon the approval of the Navajo Nation Council or the Secretary of the Lease Amendment Agreement." The Settlement Agreement provided that, within ten days of entry of the arbitration award, Peabody would pay the Navajo Nation two one-million-dollar bonuses required under both the North and South Leases pursuant to the 1987 Lease Amendments. This obligation was triggered by the entry of the final arbitration award and was not contingent on approval by the Secretary of the 1998 Lease Amendments.

The Arbitration Settlement Agreement also specified that Peabody "and the Navajo Nation agree that they shall execute and [*sic*] diligently and in good faith urge, support and encourage the Secretary to approve the Lease Amendment Agreement as expeditiously as reasonably possible [and] *[i]f the Secretary fails to approve the Lease Amendment Agreement, then [Peabody] shall have no obligation to make any of the payments set forth therein.*" (emphasis added).

The 1998 Lease Amendments provided for additional payments by Peabody to the Navajo Nation – separate and apart from the two one-million-dollar bonuses required under the 1987 Lease Amendments upon entry of the arbitration award. In particular, the 1998 Lease Amendments provided for a lump sum payment of $1 million within ten days of the Secretary's approval of 1998 Lease Amendments if approved on or before March 31, 1999, and annual payments by Peabody of $3.5 million for the years 1998 through 2007.

Thus, entry of the Arbitration Award required a bonus payment to the Navajo Nation within ten days (as provided for in the 1987 Lease Amendments), but Peabody would otherwise have no obligations under the 1998 Lease Amendments *until they were approved by the Secretary*.

By letter of October 14, 1998, the Navajo Nation requested the Interior Secretary to approve the 1998 Lease Amendments. On March 29, 1999, the Secretary approved the 1998 Lease Amendments under IMLA, thereby rendering them "effective."

In September 1998, Peabody paid the Navajo Nation the two one-million-dollar bonus payments required under the terms of the 1987 Lease Amendments. In April 1999, Peabody paid the Navajo Nation the payments required under the 1998 Lease Amendments totaling $4.5 million. Since 1987, and pursuant to these federally approved lease amendments, Peabody has provided the Navajo Nation with hundreds of millions of dollars in economic benefits.

D. The Navajo Nation's Challenges To The Lease Amendments.

Despite the enormous financial benefits conferred by Peabody, the Navajo Nation has taken repeated steps to attack the federally approved 1987 and 1998 Lease Amendments. The Navajo Nation has sought to challenge those amendments in lawsuits filed against the United States as well as against Peabody.

1. The Navajo Nation's Suit Against The United States.

In 1993, the Navajo Nation filed suit against the United States in the Court of Federal Claims, alleging a

breach of trust by the Secretary of the Interior in the proceedings leading to the approval of the 1987 Amendments. The tribe sought some $600 million in damages.

The Court of Federal Claims dismissed the suit, holding that the Navajo Nation had failed to establish a specific fiduciary duty owed by the Secretary of the Interior or any breach thereof. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 229 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003). A divided panel of the Federal Circuit reversed, finding that the Interior Secretary had specific fiduciary duties under IMLA, 25 U.S.C. § 396a, the Indian Mineral Development Act, 25 U.S.C. § 2101 ("IMDA"), 25 U.S.C. § 399, and their implementing regulations. 263 F.3d 1325, 1330-32 (Fed. Cir. 2001).

This Court granted certiorari and reversed the Federal Circuit's judgment, holding (as had the CFC) that the Navajo Nation had failed to establish either a specific fiduciary duty or a breach thereof. *Navajo Nation*, 537 U.S. at 507-09. This Court opined that "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514. In particular, this Court rejected the Navajo Nation's claim that the Secretary breached his duties by intervening in Peabody's administrative appeal, allegedly resulting in an unfair royalty rate. The Court held that the Secretary's conduct was consistent with IMLA and the applicable regulations; that the Navajo Nation had failed to invoke the more formal administrative review procedures that were available; and that the Secretary had the authority to modify any royalty rate that would have resulted from the administrative appeal process in any event. 537 U.S. at 513-14.

2. The Navajo Nation's Arizona Suit Against Peabody.

In 1993, the Navajo Nation filed suit against Peabody in the U.S. District Court for the District of Arizona seeking a declaratory judgment that, inter alia, the 1987 Lease Amendments were invalid. The complaint expressly sought the cancellation, reformation, and renegotiation of the 1987 Lease Amendments. Tellingly, in ¶ 3 of its complaint in that case, the Navajo Nation recognized that there was federal question jurisdiction over its claim under IMLA. Pet. App. 12a n.4 (noting 1993 Navajo Nation suit challenging validity of leases).

3. The Navajo Nation's D.C. Suit Against Peabody.

In June 1999, the Navajo Nation filed a complaint in the United States District Court for the District of Columbia alleging violations of the civil RICO statute, fraud, and various other causes of action relating to the 1987 Lease Amendments. The district court observed that "the core" of the lawsuit was based on the same allegations as the Navajo Nation's action against the United States. *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 272 (D.D.C.), *aff'd*, 64 Fed. Appx. 783 (D.C. Cir. 2003).

The gravamen of the Navajo Nation's claim in the district court RICO action was that Peabody made prohibited *ex parte* communications to Secretary Hodel, inducing him to intervene in the administrative appeal process and to issue the July 1985 Hodel memorandum. The Navajo Nation's bargaining position was allegedly compromised,

resulting in the same "unfair" and "improvident" terms of the 1987 Lease Amendments.[1] This conduct supposedly represented a breach of the Secretary's fiduciary duties to the Navajo Nation, including an alleged duty to maximize its financial returns under the coal leases, which this Court has squarely rejected.[2] *Navajo Nation* 537 U.S. at 511 n.16.

The Navajo Nation sought a declaratory judgment that the 1987 Lease Amendments were invalid and should be "terminated." The Navajo Nation asked for a judicial ruling that it was entitled to "eject" Peabody from its land. Alternatively, the Navajo Nation sought retroactively to "reform" the coal leases to incorporate the 20% initially set in 1984 by the BIA Area Director royalty rate and to rescind the arbitration procedure the parties used in 1998 to achieve the award here.

E. The Instant Lawsuit.

In response to the Navajo Nation's repeated attempts to invalidate the federally approved lease amendments, Peabody filed the instant suit in the United States District Court for the District of Arizona on February 21, 2002. Peabody sought a declaratory judgment that the 1998 Arbitration Settlement Agreement, the Stipulated Arbitration Award, and the 1998 Lease Amendments were valid and binding on the Navajo Nation.

[1] NN Am. Compl., ¶¶ 14, 17, 20, 67, 68, 121, 122, 128, 133, 134, 142, 148, 154, 160, 169, 179, 191, 198, 207, 217, 227, 238, 248, 251, 262, 268, 272, 277.

[2] NN Am. Compl., ¶¶ 18, 19, 26, 82, 95, 102, 103, 125, 127, 128, 129, 164, 166, 167, 173, 175, 177, 179, 183, 185, 186, 191.

The district court dismissed Peabody's action for lack of federal subject-matter jurisdiction. The district court noted Peabody's argument that "the 'extensive involvement of IMLA' in the 1998 agreement is sufficient to confer federal question jurisdiction." Pet. App. 25a. The court recognized the holdings of decisions in other circuits finding jurisdiction in cases involving federally approved agreements. *Id.* But the district court held that "[t]his rule, as suggested by Peabody, contradicts the Ninth Circuit precedent which this court is bound to follow." *Id.*

The Ninth Circuit affirmed. The court of appeals held that federal jurisdiction was absent because the "arbitration award did not require approval by the Secretary" and "the final arbitration award for which Peabody seeks enforcement was *not* federally approved." Pet. App. 4a, 10a (emphasis in original). It was not enough that in 1998 the parties treated the Lease Amendments (which *did* require approval by the Secretary), as part of an integrated whole with the Arbitration Settlement Agreement and the Stipulated Arbitration Award. It was not enough that Peabody's complaint made repeated references to the 1998 Lease Amendments as well as the arbitral award. Peabody Arizona Complaint ¶¶ 46, 47, 48, 50, 51, 52, 53, 54, 77(g), 77(h), 77(i). Nor was it enough that the 1998 Arbitration Settlement Agreement stated that "the parties have agreed to a settlement premised on the final and irrevocable resolution on the arbitration proceedings *and the submission of the Lease Amendment Agreement* (attached hereto as Exhibit B) *to the Secretary of the Interior ('Secretary') for his approval.*" Peabody Arizona Complaint ¶ 40 (emphasis added).

The Ninth Circuit concluded that "no action of the . . . Secretary is necessary to give full and final effect to the

arbitration award," Pet. App. 4a-5a, even though the arbitral award became void if the Secretary did not approve the 1998 Lease Amendments that incorporated the royalty rate specified in the arbitral award, and even though Peabody's obligation to pay a $4.5 million bonus to the Navajo Nation was expressly contingent on the promises *both* in the 1998 Lease Amendments *and* in the Arbitration Settlement Agreement. Pet. App. 5a.

In addition, the Ninth Circuit opined that Peabody's complaint "does not allege that the Navajo Nation is currently in breach of any provision of a lease or lease amendment." Pet. App. 9a. According to the court of appeals, it was not enough that the Navajo Nation has filed three lawsuits seeking to invalidate those leases, as amended, including a declaration that they are voidable and further seeking Peabody's ejectment. *See* pp. 11-14, *supra*. The court held that there was no jurisdiction even though the Navajo Nation itself acknowledged the existence of federal question jurisdiction in its 1993 Arizona complaint and in the joint arbitration petition in 1998. *See* pp. 8, 12, *supra*.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has decided an important question of federal law in square conflict with the decisions of at least three other circuits. The court of appeals held that there is no federal question subject-matter jurisdiction over an action to enforce an arbitration award and a federally approved mineral lease amendment between a federally recognized Indian tribe and a private corporation. The Ninth Circuit reached that result even though the dispute between Peabody and the Navajo Nation is

centered on the validity of the federal approval of the lease amendments – not merely their construction or interpretation. The court's holding is squarely in conflict with decisions in the Fifth, Eighth, and Tenth Circuits.

The Ninth Circuit's decision is important because it threatens to disrupt the congressional scheme for fostering commercial relationships between Indian tribes and private parties. Congress has created extensive federal regulation of Indian mineral leasing and development. Under this scheme, an action to enforce a federally approved lease amendment properly belongs in federal court, particularly where a tribe disputes the validity of federal approval.

Peabody did everything possible to secure a federal forum for the enforcement of its lease amendments with the Navajo Nation, including obtaining Secretarial approvals. Yet the court of appeals held that this was not enough. The facts of this case are extreme: the parties expressly reaffirmed the validity of the federally approved 1987 Lease Amendments in 1998. In addition, they treated the 1998 arbitration award as inextricably intertwined with the 1998 Lease Amendments that received Secretarial approval, and further provided that the arbitral award would become void if the Secretary did not approve the 1998 Lease Amendments that incorporated the royalty rate specified in the arbitral award. If federal jurisdiction does not arise in this case, it is difficult to imagine any instance in which it would arise, under the Ninth Circuit's reasoning.

If the Ninth Circuit's decision is permitted to stand, parties in commercial dealings with Indian tribes will be unable to secure federal court enforcement of their federally

approved agreements, even when the agreements expressly contemplate Secretarial review and approval, federal court enforcement, and a waiver of tribal sovereign immunity in such circumstances. Private parties will have no recourse if the tribes attempt to invalidate or nullify those agreements, as the Navajo Nation has attempted to do here.

Indeed, the special circumstances of this case make summary reversal appropriate. The Navajo Nation has filed three lawsuits seeking to invalidate the 1987 Lease Amendments. The grounds raised by the tribe in its proliferation of lawsuits are the very grounds rejected by this Court in its *Navajo Nation* decision.

A. THE NINTH CIRCUIT'S JUDGMENT CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

The dispute between Peabody and the Navajo Nation centers on the validity of the federal approval of the 1987 Lease Amendments. The issue is not simply a matter of contract interpretation or construction. Accordingly, the validity of the lease amendments is an obvious federal question in this case. In *Norton v. Larney*, 266 U.S. 511, 515 (1925), for example, this Court held that there was federal question jurisdiction over a suit to quiet title for allotted Indian lands because the outcome directly hinged upon the meaning of the federal scheme (in particular, the mode of identifying the intended allottee). This Court opined: "it thus appears that the right set up by appellees would be defeated by the construction of the act, as appellants contend, but would be supported by the opposite construction. The case, therefore, in fact is one arising

under a law of the United States within the meaning of section 24, subdivision 1, of the Judicial Code." *Id.* at 515.

By the same token, in this case the Navajo Nation has taken the position that the Secretary's approval of the 1987 Lease Amendments is invalid and that the lease amendments should be canceled or reformed. In contrast to the Ninth Circuit, other circuits have held that the unique federal interests in federally approved Indian leases give rise to federal question jurisdiction over actions to establish the validity of the leases. The Ninth Circuit's judgment cannot be reconciled with these decisions. It is clear that, if this case had arisen in the Fifth, Eighth, or Tenth Circuits, the ruling below would have been precisely the opposite.

For example, in *Tenneco Oil Co., v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984), the Tenth Circuit found federal jurisdiction in a dispute between an Indian tribe and an oil company over oil and gas leases approved by the Secretary of the Interior. Pursuant to tribal law, the tribe petitioned a tribal administrative body to cancel the leases. In response, Tenneco brought a federal suit for declaratory and injunctive relief to affirm the validity of the leases and prevent their cancellation. The Tenth Circuit held that Tenneco's claim had raised a federal question. *Id.* at 575.

The court of appeals began by explaining that federal question jurisdiction was present in part because of the sovereign status of the Indian tribes, under this Court's precedent establishing that "in cases involving a sovereign other than the United States 'the primacy of federal concerns is evident' because of Congress' plenary power over foreign relations." *Id.* at 575 (quoting *Verlinden B.V.*

v. Central Bank of Nigeria, 461 U.S. 480, 493 (1993)). The Tenth Circuit also cited the fact that the mineral leases in question were "subject to the regulations of the Secretary of the Interior" and that the lease agreement evidenced an intent that the "structure of federal law would be the final arbitrator in all disputes concerning the lease." *Id.* at 575-76. The court noted that the lease provided that it "shall be subject to the regulations of the Secretary of Interior now or hereafter in force. . . . " *Id.* (internal quotation and citation omitted). Accordingly, the Tenth Circuit concluded "[w]e hold that federal question jurisdiction is present." *Id.* at 576.

Two years later, the Tenth Circuit followed *Tenneco* in another case that raised a jurisdictional issue regarding tribal oil and gas leases. In *Superior Oil Co. v. United States*, 798 F.2d 1324 (10th Cir. 1986), the court held that federal question jurisdiction was present where an oil company sought declaratory and injunctive relief requiring an Indian tribe to approve an oil and gas lease assignment and permits to undertake seismic exploration on tribal lands subject to commercial leases. The Tenth Circuit emphasized that federal question jurisdiction in *Tenneco* had been based on the system of federal regulation of oil and gas leases. 798 F.2d at 1330.

Similarly, in *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), the Fifth Circuit held that there was federal question jurisdiction over a dispute precipitated by a tribe's attempt to have mineral leases declared void. The tribe had filed two lawsuits – one in federal court, later voluntarily dismissed, and one in tribal court – alleging, among other things, that the leases were void. *Id.* at 569. The oil companies then sought declaratory relief in federal district

court, filing a motion in which they asked the court to rule "that the disputed leases are in full effect." *Id.* The tribe moved to dismiss, arguing that the district court lacked subject-matter jurisdiction. The district court rejected that argument, citing IMLA and finding that its authority to adjudicate the dispute was "beyond question." *Id.* at 573.

The Fifth Circuit affirmed, on the ground that the extensive federal regulation of oil and gas leases created subject-matter jurisdiction. The court of appeals began by rejecting the tribe's contention that jurisdiction was lacking "because the contested oil and gas leases were mere contracts." *Id.* The Fifth Circuit opined that the Indian mineral leases "belie[d] characterization as routine contracts" and stated that this was a "significant distinction" from those cases suggesting that routine contract disputes do not belong in federal court. *Id.* at 575. "Tribal oil and gas leases represent a very specialized subset of contracts" because of the federal regulatory scheme governing them. *Id.* at 574-75. "The federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction over the instant dispute between the Tribe and oil companies." *Id.* at 574. *Accord Chuska Energy Co. v. Mobil Exploration & Producing N. Am., Inc.*, 854 F.2d 727, 729-30 (5th Cir. 1988) (federal question jurisdiction over case involving oil and gas assignment would be permissible "if Chuska had sued . . . the Navajos to enforce the agreement").

Similarly, in *Rainbow Resources, Inc. v. Calf Looking*, 521 F.Supp. 682 (D. Mont. 1981), the plaintiff oil lessee, Rainbow Resources, Inc. ("Rainbow"), sought to block enforcement of a temporary restraining order issued in the Blackfeet Tribal Court, which prohibited Rainbow's removal of its equipment from the leased lands. *Id.* at 682.

The court concluded that: "Congress has chosen to grant exclusive authority for the regulation, administration and supervision of oil and gas leases on lands allotted to . . . Indians to the Secretary of the Interior. . . . [I]mplicit in this congressional act is a cause of action for declaratory and injunctive relief relating to enforcement of the regulations prescribed under 25 U.S.C. [§§] 396[a-396d]." *Id.* at 684.

The rule represented by these decisions governs even outside the context of mineral leases. For example, in *Gaming World International v. Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit held that there was federal jurisdiction over a dispute regarding the validity of an Indian gaming contract under the relevant federal regulatory scheme. The court opined that "the extensive regulatory scheme governing tribal oil and gas leases conferred federal jurisdiction over a contract dispute between a tribe and two oil companies in *Comstock*. The regulatory scope of [the federal Indian statute] is similarly far reaching in its supervisory power over Indian gaming contracts. . . . Since this case raises issues under the extensive regulatory framework of [the federal gaming statute] it is not a routine contract dispute." *Id.* at 848. *See also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (finding federal jurisdiction over casino dispute in which a management company went to federal court for an order to compel arbitration after a tribe had filed a declaratory action challenging validity of contract).

The Ninth Circuit's judgment cannot be squared with these decisions by other circuits, which properly recognize that disputes over Indian mineral leases are far removed from garden-variety contract claims. Mineral leases

between Indian tribes and private companies like Peabody are part and parcel of a federal regulatory scheme that not only requires Secretarial approval of mineral leases and their amendments – a significant federal issue in and of itself – but also implicates the strong federal interest in relations with other sovereign nations. Thus, the decisions outside the Ninth Circuit turn on the nature of the federal scheme for the approval of leases and regulation of mining activities – not simply on whether an Indian tribe has attempted to apply tribal law to the commercial activity of a non-Indian. Indeed, whether federal jurisdiction exists regarding a dispute over the validity of federal approval of a lease amendment cannot depend on whether, in a particular case, a tribe has chosen to attempt to apply tribal law to the activity in question. The voluntary actions of the parties cannot affect the federal question arising from the federal regulatory scheme.

In short, under decisions outside the Ninth Circuit, the Navajo Nation's attempts to invalidate the 1987 and 1998 Lease Amendments plainly would have been enough to trigger federal question jurisdiction. The Ninth Circuit's judgment creates a circuit conflict and warrants this Court's review.

B. THIS COURT'S REVIEW IS NECESSARY BECAUSE THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented by this case is an important issue of federal law. Congress required private parties to tribal mineral leases to obtain secretarial approval and Peabody compiled, and secured the consent of the tribe to a specific federal judicial forum in which to enforce its

lease amendments with the Navajo Nation. It did everything it could to assure that a federal court would be available to adjudicate the validity of the leases. But the Ninth Circuit has held that Peabody's efforts were in vain. In so holding, the court of appeals has left Peabody – and all other similarly situated private parties – without any remedy and has rendered the federally approved lease amendments a federally approved right without a remedy.

There is no feasible alternative to federal judicial enforcement. The Navajo Nation has suggested that Peabody sue in Indian tribal court, but the Navajo Nation has not waived sovereign immunity in tribal court. Nor are state courts adequate forums. "Federal protection of tribal self-government precludes either criminal or civil jurisdiction of state courts over Indians or their property absent the consent of Congress." Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 6.C.2.a (1982); *see also Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754-55 (1998) (state court lacked authority to entertain civil suit against Indian tribe); *Morgan v. Colorado River Indian Tribe*, 436 P.2d 484, 486 (Ariz. App.), *vacated on other grounds*, 443 P.2d 421 (1968) (Arizona state courts lack jurisdiction over suits against Indian tribes absent congressional authorization); 28 U.S.C. § 1360(a) (granting six states (but not Arizona) limited jurisdiction over certain civil actions involving Indians).

The problems created by the Ninth Circuit's holding are not limited to Peabody or to coal leases. The court of appeals' decision has staggering implications well beyond this case. Congress has enacted a wide variety of statutes requiring the Department of Interior's approval of agreements relating to Indian land transactions. *See, e.g.*, 25 U.S.C. § 311 (public highways); §§ 312-318 (railroad,

telegraph, telephone line rights-of-way, and town site stations); § 319 (telephone and telegraph rights-of-way); § 320 (railway reservoirs or materials); § 321 (pipeline rights-of-way); § 323 (rights-of-way for any purpose); §§ 396a-396g (leases for oil and gas mining and permits to prospect); § 399 (leases for mining purposes); § 407 (sale of dead and fallen timber).

Private parties and Indian tribes have entered into agreements under all of these statutes. The decision below casts into doubt the ability of private parties to avail themselves of federal court jurisdiction to establish the validity of any such leases or contracts, even if the agreements expressly contemplate Secretarial review and approval, federal court enforcement, and a waiver of tribal sovereign immunity. The net result will be to disrupt the congressional scheme for encouraging private parties to do business with federally approved Indian tribes.

If the decision below is permitted to stand, economic investment and development will be stifled for the very Indians that Congress has sought to assist. The Ninth Circuit's decision will substantially interfere with federal Indian policy – not simply in the context of coal mining leases, but across the board.

C. SUMMARY REVERSAL IS WARRANTED HERE.

This Court's review is especially appropriate in this case because the reasons advanced by the tribe in its lawsuits against Peabody to repudiate the validity of the 1987 Lease Amendments are the very arguments asserted by the tribe and rejected by this Court in *Navajo Nation*.

In its Arizona and Washington, D.C. lawsuits against Peabody, the Navajo Nation has challenged the validity of the 1987 Lease Amendments. In particular, the Navajo Nation has argued: (i) that the Interior Department engaged in improper *ex parte* communications with Peabody's consultant in the 1980s; (ii) that these contacts resulted in the Interior Secretary's improper intervention in, and stay of, an administrative appeal of a royalty rate decision on the Navajo North Lease (Lease No. 8580); (iii) that this intervention, and the Navajo Nation's ignorance of these events, placed the Navajo Nation at a bargaining disadvantage during the negotiations leading to the 1987 Lease Amendments; and (iv) that the Secretary's subsequent approval of the 1987 Lease Amendments contained unfair and improvident terms. *See* pp. 11-14, *supra.*

Yet these are the very same allegations rejected by this Court in *Navajo Nation*. This Court considered the tribe's "principal" contention that "the [Indian Mineral Leasing Act's ('IMLA')] statutory and regulatory scheme, viewed in its entirety, attaches fiduciary duties to each Government function under that scheme, and that the Secretary acted in contravention of those duties by approving the 12½ percent royalty contained in the amended Lease." 537 U.S. at 506-07. The Navajo Nation contended that Secretarial approval of a 12.5% rate was "improvident, . . . because it allowed the Tribe's coal to be conveyed for what [the Secretary] knew to be about half of its value." *Id.* at 510 (internal quotation marks omitted). This Court flatly rejected that contention and held that the Secretary's approval of the 12.5% royalty rate was entirely proper:

> the Tribe can point to no guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee. Regulations under the IMLA in effect in 1987 established a minimum royalty of ten cents per ton. *See* 25 C.F.R. § 211.15(c) (1985). But the royalty contained in Lease 8580 well exceeded that regulatory floor. . . . At the time the Secretary approved the amended Lease, it bears repetition, 12½ percent was the rate the United States itself customarily received from leases to mine coal on federal lands. Similarly, the customary rate for coal leases on Indian lands issued or readjusted after 1976 did not exceed 12½ percent.

Id. at 510-11 (footnotes and citations omitted). *See also id.* at 500 n.6. Inasmuch as the Secretary approved a royalty rate well in excess of the "bare minimum royalty rate" established by federal regulations for Indian coal mining leases, this Court found nothing "improvident" about the Secretary's approval of the 1987 Lease Amendments. In this regard, the Court specifically rejected the Navajo Nation's attempts to impose a duty on the Secretary in approving Indian coal royalty rates to maximize profits for the Tribes, to act in the best interests of the Tribes, or to conduct independent economic studies. *Id.* at 508 n.12, 511 & n.16.

This Court likewise rejected the Navajo Nation's "second argument" – the contention that "concentrates on the 'skew[ing]' effect of Secretary Hodel's 1985 intervention, *i.e.*, his direction to Deputy Assistant Secretary Fritz to withhold action on Peabody's appeal from the Area Director's decision setting a royalty rate of 20 percent." *Id.* at 511. The Navajo Nation argued that the "Secretary's actions, both in intervening in the administrative appeal process, and in approving the amended Lease, . . . were not

based upon an assessment of the merits of the royalty issue; instead, . . . they were attributable entirely to the undue influence Peabody exerted through *ex parte* communications with the Secretary." *Id.* This Court characterized the Navajo Nation's legal contention as a complaint that, as a result, "its bargaining position was seriously compromised when it resumed negotiations with Peabody in 1985," resulting in "the Secretary's ultimate approval of the 12½ percent royalty [that] was an outcome fundamentally unfair to the Tribe." *Id.* at 512-13.

Again, this Court flatly rejected the tribe's argument. This Court held that the Secretary's *ex parte* communications were entirely permissible, wholly eliminating the underpinnings of the Navajo Nation's claims of procedural infirmity. "Nothing in § 396a, the IMLA's basic provision, or in the IMLA's implementing regulations proscribed the *ex parte* communications in this case, which occurred during an administrative appeal process largely unconstrained by formal requirements." *Id.* at 513 (citing 25 C.F.R. § 2.20 (1985) (Commissioner may rely on 'any information available to [him] . . . whether formally part of the record or not.))."

This Court also observed that the Navajo Nation had an administrative mechanism at its disposal that would have provided for formal review of the Area Director's decision, but the Navajo Nation declined to invoke this procedure. 537 U.S. at 513. This Court noted that the then-applicable Interior Department regulations provided two different tracks for securing administrative review of an Area Director's decision: an *informal* review before the Indian Commissioner (who, due to a vacancy, was the Deputy Assistant Secretary); and a *formal* administrative adjudication before the Board of Indian Appeals. The parties were pursuing an informal administrative appeal,

which this Court noted did not prohibit *ex parte* communications. *Id.* Under this informal track, when the Deputy Assistant Secretary did not issue a decision by June 1985, the Navajo Nation could have exercised its right to transfer the appeal to the formal track before the Board of Indian Appeals. The Tribe failed to do so:

> Either party could have effected a transfer of Peabody's appeal to the Board of Indian Appeals. . . . Exercise of that option would have triggered review of a more formal character, in which *ex parte* communications would have been prohibited. *See* 43 C.F.R. § 4.27(b) (1985). But the Tribe did not elect to transfer the matter to the Board, and the regulatory proscription on *ex parte* contacts applicable in Board proceedings thus did not govern.

Id. at 513 (citations omitted).

Finally, this Court found the Navajo Nation's reliance upon Deputy Assistant Secretary Fritz's "draft opinion letter" to be misplaced because:

> even if Deputy Assistant Secretary Fritz had rendered an opinion affirming the 20 percent royalty approved by the Area Director, it would have been open to the Secretary to set aside or modify his subordinate's decision. . . . As head of the Department of the Interior, the Secretary had "authority to review any decision of any employee or employees of the Department." 43 C.F.R. § 4.5(a)(2) (1985). . . . Accordingly, rejection of Peabody's appeal by the Deputy Assistant Secretary would not necessarily have yielded a higher royalty for the Tribe.

Id. at 513-14.

CONCLUSION

This Court has already rejected the arguments asserted by the tribe against Peabody to dispute the validity of the 1987 Lease Amendments.

The jurisdictional question at issue here is of broad and recurring significance – can private parties invoke federal court jurisdiction to enforce tribal contracts approved by the Interior Secretary, especially when the validity of that approval is disputed. Judicial review of the validity of federal administrative action properly belongs in federal, and not tribal, court.

This Court should summarily reverse the Ninth Circuit's judgment so that Peabody is able to enforce this Court's decision in *Navajo Nation* against the tribe and secure a judgment establishing the procedural and substantive validity of the 1987 Lease Amendments.

The petition for writ of certiorari should be granted. Alternatively, because the Ninth Circuit has interfered with Peabody's ability to enforce this Court's mandate in *Navajo Nation*, summary reversal is warranted.

Respectfully submitted,

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