No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT

PAUL E. FRYE
LISA M. ENFIELD
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111
(505) 296-9400

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-6345

Counsel for Respondent

* Counsel of Record

January 9, 2009

QUESTIONS PRESENTED

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); and

2. Whether the court of appeals properly held that the United States is liable to the Navajo Nation for indisputable breaches of trust arising under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS INVOLVED

The principal statutes and regulations involved are set out in the Addenda to the Navajo Nation's Opposition Brief.

STATEMENT OF THE CASE

The Government holds Navajo coal in an express trust established by Congress for the benefit of the Navajo Nation. In the Navajo and Hopi Rehabilitation Act of 1950, Congress recognized the special circumstances of the Navajo Nation and charged the Department of the Interior with implementing a program for the development of Navajo coal and other resources to allow the Navajo to achieve self-sufficiency and attain a standard of living comparable to that enjoyed by other Americans. 25 U.S.C. § 631. Congress coupled that duty and power over resource development with enforceable obligations to use care in approving mineral leases and to communicate candidly with the Nation and accept its reasonable recommendations, so that the Nation would be able to participate meaningfully in decisions affecting its property. The lease at issue is a central part of the Rehabilitation Act program. Moreover, that Act, and other federal laws, taken together, confer on the United States comprehensive control and supervision over all aspects of Navajo coal leasing. These laws impose trust asset management duties on the Interior Department.

The trial court found that, even under the "most generous interpretation" of the agreed-upon facts, the Department violated basic trust duties by favoring the coal lessee's interests over the Nation's and intentionally misleading the Nation in the process,

and that there is "no plausible defense" for the Government's misconduct. Petition App. ("App.") 136a. The court of appeals agreed, and held that under this Court's precedents, the Government's conduct violated money-mandating duties to the Nation imposed by federal law. When Congress passed the Indian Tucker Act to ensure that the Department could not "'mishandle funds and lands of a national trusteeship without complete accountability,'" *United States* v. *Mitchell*, 463 U.S. 206, 214 n.13 (1983) ("*Mitchell II*"), it contemplated that the United States would be liable for violating specific statutes intended to benefit the Navajo and for intentionally mismanaging trust resources.

The Government argues that *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo*"), terminated all Navajo claims against the Government. But this Court held only that the Nation could not recover under the Indian Mineral Leasing Act ("IMLA") and two other minor provisions of federal law. It left open whether other federal laws – including the Rehabilitation Act and a network of statutes and regulations giving the Government comprehensive authority over Navajo mineral leasing – impose money-mandating duties on the Government. The Federal Circuit held that they do, and its judgment should be affirmed.

1. *Statutory and Regulatory Framework.* Under federal law, the Interior Department controls all aspects of Navajo coal exploration, negotiations, leasing, operations, reclamation, and royalty setting and collecting. Moreover, the Department's control must be exercised for the special benefit of the Navajo.

The United States-Navajo relationship is founded on two treaties, ratified in 1850 and 1868. *United*

States v. *Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, the Navajo accepted the United States' "sole and exclusive right of regulating the trade and intercourse" with the Navajo and agreed that certain laws then in force would bind the Navajo "as if said laws had been passed for their sole benefit and protection." In return, the United States agreed to "so legislate and act as to secure the permanent prosperity and happiness" of the Navajo. Treaty with the Navajo, arts. 3, 11, Sept. 9, 1849, 9 Stat. 974, 974-75.

The 1868 Treaty, 15 Stat. 667, established a permanent homeland for the Navajo Tribe. President Arthur added the lands relevant here to the Navajo Reservation by Executive Order on May 17, 1884. 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* 876 (1904). Congress formally included those lands in the Navajo Reservation in the Act of June 14, 1934, ch. 521, 48 Stat. 960. In 1974, Congress confirmed that the "lands described in the Act of June 14, 1934 . . . shall be held in trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a). The coal at issue is thus subject to an express trust created by Congress. App. 26a.

Federal law has controlled the sale or lease of tribal property since the first Congress of the United States. See 25 U.S.C. § 177 (1790 Indian Trade and Intercourse Act). The Interior Department dominated Navajo activities through the 1930s. See Robert W. Young, *A Political History of the Navajo Tribe* 55, 58, 89-90 (1978). Federal regulations approved in 1938 authorized only the Bureau of Indian Affairs ("BIA") to call its hand-picked Navajo Tribal Council into session. *Id.* at 93-100, 113. Through at least 1970, the Council "remain[ed] structurally and functionally dependent upon and responsive

to . . . the Department of Interior." Aubrey W. Williams, *Navajo Political Process* 26 (1970).

Appalling physical conditions on the Navajo Reservation prompted Congress to pass the Rehabilitation Act in 1950. For example, the United States utterly defaulted on its Treaty obligation to provide schools for the Navajo. See Treaty with the Navajo, art. 6, June 1, 1868, 15 Stat. 667, 669; 26 Cong. Rec. 7703 (1894); H.R. Rep. No. 81-963, at 2 (1949). Accordingly, 80% of Navajos were illiterate as of 1948, living in "abject poverty." S. Rep. No. 81-550, at 5, 7 (1949). The Rehabilitation Act was intended to "further the purposes of existing treaties with the Navajo Indians" so that the Navajo would "ultimately attain standards of living comparable with those enjoyed by other citizens." 25 U.S.C. § 631.

The Act prescribes a federal development program for Navajo resources, directing the "Secretary of the Interior . . . to undertake . . . a program of basic improvements for the . . . development of the resources of the Navajo." *Id.* The coal lease here was approved as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act." Joint Appendix ("JA") 569 (Stewart Udall testimony). Like the timber statutes in *Mitchell II*, the Rehabilitation Act permits Indians to convey their resources subject to Secretarial approval. See 25 U.S.C. §§ 406(a), 635(a).

The Rehabilitation Act also includes a section "giv[ing] the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2. Under that section, the Secretary is required to keep the Navajo Tribal Council informed of plans pertaining to the development program and to "follow [its] recommendations whenever he deems them feasible and consistent with the [Act's]

objectives." 25 U.S.C. § 638. The Act thus provided the Nation with rights to receive information and make recommendations – rights critical to its exercise of the limited self-determination in resource management that Congress intended. In addition, the Act offered the Navajo the opportunity to adopt a constitution which "shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary." *Id.* § 636. The Secretary, however, *rejected* the constitution adopted by the Navajo in 1954, in large part because it would have given the Tribe control over its mineral leasing. *Proposed Constitution for Navajo Tribe*, 2 Op. Sol. of Dep't of Interior on Indian Affairs 1641, 1642 (1954).

The Act also contains specific provisions addressing federal liability for improvident transfers of tribal resources. Two subsections of section 5 expressly exempt the Government from liability in connection with certain conveyances of Navajo property. See 25 U.S.C. § 635(b), (c). But subsection (a), the provision requiring Secretarial approval of natural resource leases, does *not* exempt the Secretary from liability for such transactions. *Id.* § 635(a).

The Rehabilitation Act further requires that its natural resource development program be "administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs," *id.* § 632, which include regulations implementing the generally applicable Indian mineral leasing laws. Those regulations imposed Secretarial control over mineral lease negotiations, 25 C.F.R.

§ 211.2;[1] App. 144; JA 174-75; the size, shape and duration of leases, 25 C.F.R. §§ 211.8-.10; royalty rates, *id.* § 211.15(c); and, by requiring use of the Department's form lease, the terms of any negotiated lease, *id.* § 211.30. The Department controlled coal-resource planning under the Rehabilitation Act and regulated coal exploration under 25 C.F.R. Part 216 subpart A. App. 27a; 25 C.F.R. §§ 216.2(a), 216.6. These regulations also required approval of surface mining plans by the United States Geological Survey and permitted USGS to enter the land and cancel leases for noncompliance with the plans. 25 C.F.R. §§ 216.7, 216.9-.10, 216.12.

The Government supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing. See *Peabody Coal Co.*, 53 IBLA 261 (1981); *Peabody Coal Co.*, 72 IBLA 337 (1983). After the Linowes Commission informed Congress that "'the general problems of verifying production . . . and designing an effective audit program are common to all minerals,'" see 51 Fed. Reg. 8168 (1986) (quoting Commission's Report) (omission in original), Congress required the Secretary to report back on "the adequacy of royalty management for coal . . . on . . . Indian lands . . . [with] proposed legislation if the Secretary determines that such legislation is necessary." Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA") § 303, 30 U.S.C. § 1752, hist. notes.

The Secretary reported that new legislation was unnecessary because the Minerals Management Service ("MMS") already had adequate statutory

---

[1] Unless otherwise noted, all references to published regulations are to those in effect from 1985 through 1987, the relevant time period here. *See Navajo*, 537 U.S. at 511 n.15.

power to manage coal royalties. See 51 Fed. Reg. 15,763, 15,764 (1986). MMS implemented the FOGRMA directive for Indian coal by establishing the Auditing and Financial System in 1984, see 49 Fed. Reg. 37,336 (1984) (promulgating 30 C.F.R. pts. 212 and 218), and the Production Auditing and Accounting System in 1986, see 51 Fed. Reg. 8168 (promulgating 30 C.F.R. pt. 216). In doing so, the Department "FOGRMA-tize[d] the coal industry" – *i.e.*, subjected Indian coal to the same regime as oil and gas regarding royalty collection and management. Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W. Va. L. Rev. 887, 926 (1995) (emphasis omitted); JA 561-62.

Federal rules proposed in 1986 and published as final in 1989 for calculating Indian mineral royalties reflect additional *actual* federal control over Navajo coal royalties during the relevant time period, as the Government acknowledged below. App. 29a-31a. The Department's control was supposed to be exercised to assure the "maximum rate of return" for Indian leases and in furtherance of the "trust responsibilities of the United States with respect to the administration of Indian coal leases." *Id.* 30a.

With respect to the Rehabilitation Act lease at issue, the Secretary reserved for himself exclusive authority to adjust the royalty rate under Article VI of the lease. JA 194. And, after Congress raised the *minimum* royalty rate for federal surface-mined coal to 12½% in 1976, 30 U.S.C. § 207(a), Secretary Andrus exercised additional control over royalty rates, establishing 12½% as the "absolute minimum" rate for Indian leases and rejecting a lease negotiated by the Navajo for failing to achieve that threshold. JA 135, 370-71.

Additional federal control over Navajo coal was added in 1977 in the Indian Lands section of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1300. App. 27a-29a. The United States confirmed its authority over lease terms, see 30 U.S.C. § 1300(c), (d) (unilaterally modifying all Indian coal leases to incorporate environmental terms and conditions), and required the Secretary to include and enforce in leases after 1977 *other* terms and conditions requested by the tribes, *id.* § 1300(e); see 30 C.F.R. § 750.20(b).[2]

Congress intended that the tribes would ultimately assume full regulatory authority over surface coal mines on Indian land, 30 U.S.C. § 1300(a), but that authority was not conferred until 2006, see *id.* § 1300(j). During the relevant time period, the Nation had no authority to regulate surface coal mining because, under SMCRA, "[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain[ed] with BIA." 49 Fed. Reg. 38,462, 38,469 (1984) (promulgating Indian Lands rules).

Under SMCRA regulations promulgated in 1977 and 1984, the Secretary controlled all aspects of Navajo coal exploration, leasing, operations, and reclamation. See 42 Fed. Reg. 63,394 (1977) (promulgating 25 C.F.R. pt. 177, redesignated as 25 C.F.R. pt. 216 subpart B); 49 Fed. Reg. 38,462 (amending 30 C.F.R. pts. 700, 701 and 710 and promulgating 30 C.F.R. pts. 750 and 755). The regulations established the federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") as "the regulatory authority on Indian lands"; the

---

[2] The Government relies on a later rule, U.S. Br. 52, contrary to *Navajo*, *supra* n.1.

federal Bureau of Land Management ("BLM") as the agency responsible for approving and enforcing exploration and mining plans and verifying royalty calculations; MMS as the agency responsible for royalty collection, audit, and accounting; and BIA as the agency charged with consulting with tribes. 30 C.F.R. § 750.6.

Finally, SMCRA and the Indian Right-of-Way Act provide federal control over rights-of-way that are essential to coal development on the Navajo Reservation. See 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169; 30 C.F.R. §§ 700.5, 700.11(a); *Hopi Tribe* v. *OSMRE*, 109 IBLA 374 (1989) (Peabody road); C.A. App. 3640-47 (same).

In sum, during the relevant time period, the Nation was subject to a statutory and regulatory system that placed the Nation's coal interests and development under the Secretary's total control.

2. *Factual Background.* The relevant facts are undisputed. App. 123a-132a, 89a-90a, 98a, 99a, 3a-7a. We summarize them here; they are set forth in detail at JA 137-87.

The coal at issue is "exceptionally valuable." Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* 5, 8 (1985), JA 81, 86. The Department drafted the lease, JA 568, and approved it on August 28, 1964 as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950," *id.* 569. Nonetheless, the royalty rate proved "extremely low," App. 123a, and, by 1984, was "substantially lower . . . than the 12½ percent of gross proceeds rate Congress established in 1977 as the minimum permissible royalty for coal mined on federal lands," *Navajo*, 537 U.S. at 496. Article VI of

the lease provided that the Secretary unilaterally could raise the royalty rate to a reasonable level after 20 years. App. 123a-124a; JA 194.

In response to federal reports showing the lease was "economically inequitable," the Deputy Assistant Secretary facilitated efforts by the Navajo Nation to amend the Peabody lease as early as 1978. Br. in Supp. of Pl.'s Mot. for Summ. J. (Dec. 15. 1997), Exs. 15-19. Those efforts proved fruitless, see App. 129a; and, in March 1984, the Nation requested then-Secretary Clark to exercise his authority to adjust the royalty rate, JA 372.[3] The BIA responded that it was "pursuing [its] responsibility . . . by implementing an adjusted royalty rate as called for by the said lease." *Id.* 140. The BIA's Navajo Area Director received studies from the Bureau of Mines and the BIA's minerals office and, under delegated authority, issued a decision on June 18, 1984, adjusting the royalty rate to 20%, effective August 28, 1984. App. 125a-126a; JA 6-9, 376, 393; *Peabody Coal Co.*, 155 IBLA 83, 94-95 & n.12 (2001). Peabody and the operators of its two captive customers, the Salt River Project and Southern California Edison (collectively "Peabody") appealed. App. 126a.

Living conditions on the Navajo Reservation remained miserable. Coal was by far the most valuable resource for the Navajo; nonetheless, the Nation continued to receive wholly inadequate royalties for its coal pending appeal. See JA 138-40; App. 90a.

---

[3] Peabody and the Government suggest that this and other contacts with the Department were improper, but they clearly were not. *See Navajo*, 537 U.S. at 513; *Joint Bd. of Control* v. *United States*, 832 F.2d 1127, 1132 (9th Cir. 1987). Trustees and beneficiaries are expected to communicate, and the Rehabilitation Act mandates open communications between the Nation and its trustee. 25 U.S.C. § 638.

Since coal royalties were a primary source of income for the Nation, there was an urgent need to increase the amount received from coal. Nonetheless, in August 1984, the deciding official, Acting Assistant Secretary John Fritz, *sua sponte* ruled that Peabody would not have to pay the increased rate until the appeal was decided, JA 392-93, precluding the Nation's effort to make the Area Director's decision effective immediately, 25 C.F.R. § 2.3(b) (1984). Not surprisingly, in September 1984 Edison instructed its counsel to proceed on "maximum delay mode." JA 394.

On appeal, Peabody contended that the adjustment was untimely and that the proper royalty rate should be between 5.57% and 7.16%. *Id.* 144, 400. The Nation defended the Area Director's decision and provided documents showing all parties' understanding that the adjustment was timely. See *id.* 91. The Nation broke off negotiations with Peabody in November 1984 to await the decision on appeal.

Fritz then asked Dr. Rai to provide an objective economic analysis of the coal's value. *Id.* 145-46. Dr. Rai reviewed the submissions of the parties and the reports on which the Area Director relied and concluded in February 1985 that "a 20% royalty rate determination appears reasonable and defensible." *Id.* 22, 146. Dr. Rai further recommended that "Peabody . . . be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable," *id.* 22. Fritz thus requested in March 1985 that Peabody provide its actual costs and revenues for the lease. *Id.* 403. Based on the "tone of the letter," Edison feared that the "train is coming down the track and the Department is preparing to support the decision of the Area Director." *Id.* 147-48, 405.

Peabody immediately sought to meet *ex parte* with Secretary Hodel, who had just replaced Clark. Secretary Clark had refused to meet *ex parte*, App. 126a; JA 148-49, and Solicitor Richardson advised Hodel not to meet with them, JA 406-07. While no witness recalled the specifics of the meeting, two weeks later Peabody refused to provide any information to Fritz. *Id.* 409.

In light of Peabody's refusal, Fritz sought additional analysis from Dr. Rai. In turn, Rai consulted with the Bureau of Mines, which prepared exhaustive analyses of Peabody's mine economics. *Id.* 24-72. In May 1985, based on these studies, Dr. Rai determined that "coal deposits within the lease area from a geological, engineering, and economic standpoint are extremely valuable," *id.* 81, and recommended affirmance of the Area Director's decision, *id.* 88, 152. Dr. Rai *rejected* the notion that the customary 12½% rate for *federal* coal should be adopted, because under the system for federal coal, the value of "an unusually large and valuable deposit will be reflected not by an increase in the royalty rate, but by an increase in the amount of bonus to the lessor (Federal government). Therefore, a comparable royalty rate for coal under the subject lease based on current transactions involving Federal coal is inappropriate." *Id.* 83. In other words, the federal minimum royalty rate for its coal was not adequate because the extraordinary value of the tribal coal was not reflected in an appropriate bid bonus.

In June 1985, "the decision document affirming the Area Director's decision awaited Mr. Fritz' signature." App. 127a; *Navajo*, 537 U.S. at 496. The decision was printed on Department letterhead, copied and checkmarked for mailing to all parties. JA 89-97. However, on July 3, 1985, before Fritz

could return from military reserve duty to sign it, the Solicitor's Office leaked the decision to Peabody. JA 516; C.A. App. 725. On July 5, Peabody sent a letter addressed to Hodel seeking a stay of the appeal, JA 98. That letter was routed directly to Fritz, *id.* 155, whose office drafted an additional paragraph for the original decision rejecting Peabody's request; *id.* 161; 106-14 (revised decision document "as sent forward for signature").

To camouflage the Solicitor's Office's leak of the decision to Peabody two days earlier, Peabody's letter suggested that the Nation had learned of the decision.[4] *Id.* 99. But Peabody's *witness* testified to the contrary – that the Navajo Chairman "thought maybe, just like it says here, not for sure but the appeal may be decided in their favor." *Id.* 154-55. That is why the Nation had ceased negotiations seven months earlier. See App. 127a. The Nation was never informed of the draft decision until discovery in this case. JA 593-95, 599-602. Meanwhile, Peabody hired Hodel's close friend and later business partner, Stanley Hulett, to convince Hodel to ignore the best interests of the Navajo, jettison the rate increase, and delay the matter to promote Peabody's interests, App. 127a; JA 101.

---

[4] The Government makes the same suggestion, but the Nation's view that it was likely to prevail was based not simply on the "tone" of an Interior employee who provided a procedural status report for a departing tribal attorney in May 1985, but "on the relative strength of the briefs." JA 413, 420-21. Peabody's position in the appeal (that the proper royalty rate was about 6%) *had* to be rejected because that rate was only half the minimum for federal coal and half the "absolute minimum" established by Secretary Andrus for Indian leases. 30 U.S.C. § 207(a); JA 135, 370.

Peabody sought to derail the royalty adjustment and force negotiations for several reasons. First, the difference between the 20% royalty rate and the minimum rate for federal coal of 12½% over the life of the Navajo Generating Station plant was estimated at $347.5 million, JA 156, and Peabody's other customer would incur similar added costs. Second, this Court had just upheld Navajo taxes that the companies had disputed since 1978, *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985); App. 126a-127a, leaving the companies with "significant exposure," JA 150. Third, Peabody had contracted to deliver 424 million tons of Black Mesa coal to the plants, but it had rights to only 400 million tons; and both of its customers needed additional Navajo coal to achieve their 35-year requirements. *Id.* 171. Finally, Peabody expected that if the royalty rate for the Navajo lease were raised to 20%, a similar rate would be imposed on the joint Navajo/Hopi coal lease. *Id.* 157. These were real concerns for Peabody, but the Secretary's fiduciary duties in this transaction were owed to the Nation.

Hulett promptly scheduled a meeting with Hodel, after which Hodel immediately agreed to sign a memorandum drafted and typed on Secretarial letterhead by Peabody. *Id.* 101-05, 163-64; App. 127a-128a. Hodel signed the instructions on July 17, and they were delivered to Fritz on July 22. JA 117, 102. The Secretary assumed "personal jurisdiction" over the appeal and issued "march or die" orders. App. 128a; JA 164, 512-14.

Peabody was informed of the delivery of the instruction memorandum that same day. JA 101-02, 164. The Nation was *never* notified of the meeting or the instructions. App. 127a-128a; JA 593-95, 599-602. Indeed, the Solicitor's Office warned that, if the

Navajo discovered the Secretary's actions, it would try to transfer the case to the Interior Board of Indian Appeals or take the Secretary's deposition. JA 122. Accordingly, after meetings with Hodel, the Solicitor's Office intentionally misled the Nation in an August 1985 letter. App. 128a; JA 124, 135-36. The letter's drafter admitted that she wrote it to conceal the truth and the Associate Solicitor who signed it admitted that it violated the trustee's duty of candor. JA 168-69. The Nation had no idea that the Secretary had personally scuttled the increased royalty rate. Having been deceived by the Secretary and the Solicitor's Office acting on his orders, the Nation construed this letter and other odd communications from the Department as signals that the *merits* of the 20% rate were being debated within the Department, C.A. App. 2854, even though the higher rate was fully supported, JA 134, 153.

The applicable regulation permitted lease negotiations only if requested by the tribes, and discussions were limited to 30 days to protect tribes from corporate overreaching. See 25 C.F.R. § 211.2; JA 174-75. The Nation had just informed the Secretary that it opposed further negotiations. *E.g.*, JA 120, 421. Nonetheless, the Department instructed the Nation to resume negotiations, furthering the companies' "maximum delay" strategy and placing pressure on the Nation, which was desperate to increase the royalty rate from its sub-2% 1984 level. *Id.* 394, 599-602. The Nation negotiated "unarmed with critical knowledge," and "could not truly be said to have negotiated from a position of equality with Peabody," App. 138a-139a, contrary to the objective of informed self-determination embodied in the Rehabilitation Act.

The Department knew the Nation would get "beat up" in negotiations with Peabody. JA 185; C.A. App. 1279-80 (Fritz), 1643-44 (Office of Trust Responsibility ["OTR"] Director Frank Ryan). And it did. For the next 2½ years, the Nation endured negligible royalties, and – lacking the knowledge that the Secretary had quashed the royalty rate increase and the other information the Department had provided to the companies[5] – Navajo leaders could not decide whether the 20% rate was vulnerable on its merits, whether to accept Peabody's offer of 12½%, whether to seek a decision from Fritz, or whether to sue for issuance of a decision or transfer of the appeal to the IBIA. See JA 436-41, 442-43 (disagreeing over the advisability of accepting Peabody's proposal), 448-52 (draft memo advising Chairman to reject proposal), 452-53 (draft letter to Department requesting decision within 30 days), 454-61 (memo advising rejection of proposal); C.A. App. 2857 (rejecting mandamus action).

"Facing severe economic pressures," App. 90a, and with its trustee serving Peabody's interests, the Navajo Chairman reached an agreement in principle with Peabody in July 1986. Peabody "achieved [its] objectives: royalties set at the federal minimum level (12.5%), exposure to the 20% royalty rate eliminated, [its] back tax problem resolved, a cap on future taxes established, all additional coal in the leasehold available for our use, and longstanding water related issues addressed productively." JA 462, 127-128.3. The amendments also eliminated the Secretary's power to adjust the royalty rate periodically –

---

[5] *See, e.g.,* JA 593-95, 599-602; *cf. id.* 101-02 (Peabody informed of delivery of Hodel's instructions); *id.* 126 (Edison's 1985 negotiating notes reveal intimate knowledge of Department's deliberations on the appeal).

authority the Secretary had never relinquished for leases of federal coal. *Id.* 186. The amendments were tabled by the Navajo Council. See *id.* 466. The BIA's Area Office, ignorant of Hodel's actions, requested a status report on the appeal in May 1987, but the Office of Trust Responsibilities was told "**NOT**" to provide one without Assistant Solicitor Field's express approval. *Id.* 471 (emphasis in original). The Area Director never received the report, the only time in his long career this happened. *Id.* 170.

After a change of tribal administration, the Nation finally signed the lease amendments in September 1987. The amendments bore no resemblance to the IMLA form lease. Compare JA 276-336 (lease amendments), with C.A. App. 3648-52 (IMLA form lease). Almost all the changes worked to the Nation's detriment.

In that month, the Nation and the BIA Area Office separately requested that the Department review the lease terms to determine whether they served the Nation's best interests. JA 172, 475. Review was requested under regulations that required economic analyses of lease amendments, essential to "ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable remuneration." See 52 Fed. Reg. 31,916, 31,918, 31,930 (promulgating 25 C.F.R. § 2.11(a)), 31,921-22 and 31,933 (promulgating 25 C.F.R. § 211.34) (1987). Review under the rules would have shown that the leases were unfair to the Navajo. JA 178-79. Thus, the Department suspended the rules' effective date shortly after the Nation's and BIA's requests, at the behest of "industry," 52 Fed. Reg. 39,332 (1987), under the guidance of Assistant Solicitor Field, who then "assisted Peabody in shepherding the amended

leases throughout the Department . . . for Secretarial approval," JA 173, 481.

The Department's review process was a paper-filing exercise. *Id.* 173-82. The "merits of the deal were simply irrelevant to high-level DOI officials." *Id.* 176. As OTR Director Ryan testified: "The way this happened was, we were rubber-stamping a bunch of amendments that we weren't supposed to review." *Id.* 173. The package came to Ryan for his sign-off and he refused to sign the memorandum prepared for his signature: "I knew – well, I thought that I would be participating in a breach of trust." App. 132a; JA 182-83. Independently, Peabody and Field were drafting the approval recommendation from Assistant Secretary Swimmer and the Secretary's approval document. JA 185-86.

Hodel committed to Peabody that he would approve the amendments before getting a recommendation or report from any subordinate, *id.* 132; C.A. App. 847; and he approved the deal on December 14, 1987, App. 132a; JA 185-86. The Department approved the nominal 12½% rate even though that rate was "well below the rate that had previously been determined appropriate," App. 137a-138a, and the true royalty rate was even below that "absolute minimum," JA 181, 521-22. The Nation received no up-front bonus for its dedication of 270 million tons[6] of additional coal; and it actually suffered a *negative* "bonus" under the deal, because it gave up back taxes and royalties of $89 million to get the nominal 12½% rate. App. 131a. The Nation was forced to limit taxes on coal upheld in *Kerr-McGee* and to confirm a tax waiver on *all* coal for one Peabody customer. JA 179, 293-94,

---

[6] *See* JA 277.

299-300. In sum, the coal was sold for "substantially less than [its] Fair Market Value." *Id.* 574.

3. *Prior Proceedings.* The Nation filed suit in 1993. Its first claim for relief was premised on the Government's supervision or control over all aspects of Navajo coal leasing and development under statutes and regulations administered by Government agencies, including BIA, BLM, MMS and OSMRE. The claim highlighted the Rehabilitation Act and also alleged violations of the specific duties to manage the coal resources as a trustee for the benefit of the Navajo. *Id.* 501-04.

After exhaustive discovery, during which Peabody concealed key documents in defiance of "[a]greements of counsel and Court orders," *Navajo Nation* v. *United States*, 46 Fed. Cl. 353, 354 (2000), the parties filed cross-motions for summary judgment.

The Court of Federal Claims ("CFC") dismissed the Nation's case. That court addressed only the Government's duties under the Indian Mineral Leasing Act of 1938 ("IMLA"), App. 121a, 141a-155a, and erroneously stated that the Nation did not claim that the Secretary's approval violated his duty to obtain a royalty rate at least as high as the Government demands for its own coal, *id.* 155a. In fact, the Nation had repeatedly argued and the Government conceded that the true royalty rate was below 12½%. JA 527-31, 181, 521-22, 534-35.

The Nation's Rule 59 motion urged the CFC to consider the entire network of statutes and regulations establishing federal control and supervision over Navajo coal, C.A. App. 3350-79. It also requested that the court correct its misstatement regarding the Nation's claim that the true royalty rate under the lease amendments was less than the

federal minimum, JA 565. The court denied the motion, failing again to address the Nation's unrebutted showing that the royalty rate was actually less than 12½%.

On appeal, the Nation continued to rely on the entire network of federal laws, but the court of appeals found that IMLA by itself imposed money mandating duties on the Government.[7] App. 95a-98a. The Government sought certiorari. The Question Presented concerned the Government's duties under IMLA. The Navajo Nation proposed a different Question Presented premised on the Government's control under all relevant laws, but the Court did not revise the Question.

This Court reversed. It explicitly stated that "[t]his case concerns the Indian Mineral Leasing Act of 1938 (IMLA) and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." *Navajo*, 537 U.S. at 493 (citation omitted). To answer that specific question, the Court "consider[ed] whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case." *Id.* at 506. The Court narrowly held "that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations." *Id.* at 493. The matter was remanded for further proceedings. *Id.* at 514.

On remand, the court of appeals rejected the Government's assertion that this Court's remand was

---

[7] The court of appeals also found support in 25 U.S.C. § 399, which no party ever cited, and the 1982 Indian Mineral Development Act ("IMDA"), 25 U.S.C. §§ 2101-2108.

actually an order to dismiss with prejudice, and ordered the CFC to decide whether the Nation had waived its claim based on statutes other than IMLA, § 399, and IMDA, and, if not, whether these other authorities imposed judicially enforceable fiduciary duties on the Government. App. 81a. The Government did not seek review of that decision.

The CFC held that the Nation had not waived claims based on statutes other than IMLA, stating that "with minor exceptions the legal instruments cited by the Navajo Nation have always consisted of the same references." App. 51a. The CFC received additional evidence, including the unrebutted affidavit of Secretary Udall regarding the centrality of the Rehabilitation Act to the lease. *Id.* 62a. The CFC nonetheless dismissed the Nation's claims. *Id.* 69a. Its opinion did not mention the Nation's renewed showing that the actual royalty rate was less than the 12½% federal minimum. See C.A. App. 3568, 3666, 3668-73.

The court of appeals affirmed the CFC's holding on waiver, App. 18a-20a, but reversed on jurisdiction and liability. It held, on the basis of multiple federal statutes and regulatory provisions (apart from IMLA, § 399 and IMDA, see *id.* 9a), that the Government violated specific duties set forth in the Rehabilitation Act and SMCRA, and compensable management duties arising from its comprehensive control over all aspects of Navajo coal leasing and development, *id.* 24a-43a.

SUMMARY OF ARGUMENT

The Government claims that *Navajo* resolved this case, both by ordering dismissal of the Nation's claims and by establishing a legal framework that

independently requires dismissal. Both arguments are wrong.

First, the decision under review in *Navajo*, the question presented, and this Court's analysis and holding were all expressly cabined. They addressed IMLA and two other minor provisions, and did not explore whether the Rehabilitation Act or other federal laws imposed money-mandating duties on the Government in connection with the Peabody lease. This Court did not remand with instructions to dismiss; it remanded for further proceedings. As in *Mitchell I*, this Court left open the possibility that other federal laws might be the source of money-mandating duties; and, like the Court in *Mitchell II*, the Federal Circuit found that they were.

Second, the Government's argument that the court of appeals is wrong on the merits also misunderstands this Court's governing precedents. The Indian Tucker Act ("ITA"), 28 U.S.C. § 1505, was enacted to eradicate a stain on the national honor and to provide a damage remedy when the Government mismanages trust resources. *Mitchell II*, 463 U.S. at 214-15. The issue here is whether the ITA confers jurisdiction over the Navajo Nation's claim. The court of appeals correctly held that the claim arose under federal laws as required by the ITA because (1) two of the applicable statutes – the Rehabilitation Act and the Indian Lands section of SMCRA – prescribe specific duties that the Government violated and that are fairly interpreted as money-mandating, see App. 38a-42a, and (2) the applicable statutes and regulations, taken together, confer such comprehensive federal control over Navajo coal leasing and development that they give rise to compensable trust management duties measured by well established fiduciary

standards of care, candor and loyalty, which the Department violated, *id.* 24a-38a.

Former Secretary of the Interior Stewart Udall, under whose personal supervision the leases were drafted, negotiated and approved, testified that the Peabody leases and related development constitute "the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950." App. 62a (quoting JA 569). All parties to the Peabody lease have recognized that it was issued under the Rehabilitation Act. JA 569 (Secretary Udall), 467-68 (Peabody brief to Arizona Court of Appeals); *Austin* v. *Andrus*, 638 F.2d 113, 114 (9th Cir. 1981). Indeed, the United States successfully urged in *Austin* that the Secretary approved the Peabody leases "*[p]ursuant to 25 U.S.C. 635"* acting "*as trustee* for the Tribes." Brief for Federal Appellees at 31, No. 78-1896 (filed Sept. 5, 1978) ("*Austin* Brief")[8] (emphases supplied).

The Rehabilitation Act has specific provisions addressing federal liability for conveyances of Navajo property. Section 5 of the Act expressly provides that the Government has "no liability" for the disposition of tribal fee land, and "no responsibility or liability for . . . the management, use, or disposition" of trust lands conveyed to certain corporations organized under Arizona law, 25 U.S.C. § 635(b), (c). But section 5 contains *no* such exemption for the Secretary's approval of leases of "natural resources" held in trust under that section, see *id.* § 635(a). This gives rise not just to a "fair inference" that Congress intended monetary liability for improper management or disposition of those natural resources, but to

---

[8] Respondent has requested that a certified copy of this brief be lodged with the Court.

an almost ineluctable one. The Government did "not dispute the Nation's interpretation" of the Rehabilitation Act below. JA 34a. This Court need look no further to affirm.

Notably, Congress amended section 5 of the Act two months *after* the expiration of the ten-year primary development period highlighted by the Government, see U.S. Br. 44 (citing 25 U.S.C. § 632). And Congress repealed sections 9 and 10 of that Act in 1996 and 1974, respectively, but left intact the remaining provisions on which the court of appeals relied. Government expenditures for roads and schools were only one "*part* of an extensive plan to rehabilitate the Navajo and Hopi tribes of Arizona." *Warren Trading Post Co.* v. *Arizona State Tax Comm'n*, 380 U.S. 685, 690 n.17 (1965) (emphasis supplied).

Section 8 of the Rehabilitation Act, 25 U.S.C. § 638, couples the Secretary's added responsibilities and power over Navajo resources with specific duties of candor and loyalty. In the context of the design, purpose and policies of the Act, this section is also fairly interpreted as mandating compensation for violations of those duties.

SMCRA's Indian Lands section separately imposes money-mandating duties that the Department violated here. That section requires that coal mining operations comply with certain of SMCRA's environmental requirements. 30 U.S.C. § 1300(c), (d). The following subsection states: "[w]ith respect to leases issued after August 3, 1977, the Secretary shall include and enforce terms and conditions *in addition* to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases." *Id.* § 1300(e) (emphasis supplied). The applicable rule promulgated under

this subsection comported with its plain language. 30 C.F.R. § 750.20(b). The Department promulgated this rule expressly to satisfy its trust responsibilities to coal-owning tribes. App. 39a.

Here, the Nation reasonably requested the Department to adjust the royalty rate as the lease provided, but the Secretary scuttled the rate increase even though it was determined fair as measured by all federal studies. These violations of SMCRA are money-mandating, as the court of appeals held. App. 39a-41a.

There is a second, independent basis for imposing money-mandating duties on the United States. The Department controlled every aspect of Navajo coal leasing, negotiations, royalties, development, and reclamation under the Rehabilitation Act, SMCRA, and the Indian Right-of-Way Act, along with regulations implementing these statutes, § 303 of FOGRMA, and generally applicable mineral leasing regulations. *Peabody Coal Co.* v. *State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (federal statutes and regulations govern Navajo coal "from the creation of its leases to the reclamation of land"); App. 24a-36a; see JA 467-70 (Peabody brief).

"[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." *Mitchell II*, 463 U.S. at 225. Federal laws here "establish fiduciary obligations of the Government in the *management* . . . of Indian lands and resources" and therefore "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained" due to violations of those management duties. *Id.* at 226 (emphasis supplied).

The Government's position that its violations of duties of care, candor and loyalty in its management of trust property are not compensable because no statute or regulation so states in text would erroneously "read the trust relation out of Indian Tucker Act analysis." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003). In *Mitchell II*, for example, there was no "statute explicitly providing that inadequate timber management would be compensated through a suit for damages," *Apache*, 537 U.S. at 477, yet the Government was nonetheless held to account for breach of its management duties. Similarly, the statute in *Apache* did not "expressly subject the Government to duties of management," *id.* at 475, but this Court required the Government to answer for its breach of the "fundamental common-law dut[y] of a trustee . . . to preserve and maintain trust assets," *id.*

As the courts below found, the Department violated its duty of care under section 5 of the Rehabilitation Act, its duties of candor and loyalty under section 8 of that Act, its duty to increase the royalty rate as reasonably requested under SMCRA, and its fundamental trust management duties arising from its control over all aspects of Navajo coal leasing. The CFC found "no plausible defense" for the Department's secret collusion with Peabody and its violation of basic fiduciary duties. App. 136a, 162a. The court of appeals adopted the CFC's findings in the first appeal, *id.* 98a-99a, and adhered to them below, *id.* 38a, 42a-43a. This Court should adopt these findings, *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115 (1938), apply its prior decisions and affirm.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH *NAVAJO*'S REMAND FOR FURTHER PROCEEDINGS.

The Government contends that *Navajo* foreclosed the Nation's claims and terminated this case, despite (i) the limited scope of the court of appeals' initial decision, (ii) the limited Question Presented in *Navajo*, (iii) the narrow scope of the *Navajo* opinion, and (iv) its remand for further proceedings. The Government's position is based primarily on the fact that the Nation unsuccessfully *urged* the court of appeals and this Court to consider, as an alternative ground for judgment for the Nation, the argument that laws other than IMLA could fairly be interpreted as mandating compensation for the Nation's damages. Although the Nation presented these arguments, the court of appeals resolved the case on a narrower ground; and this Court chose not to address the Nation's alternative arguments. This is the Court's standard method of decision making. And the narrowness of the holding in *Navajo* is illustrated by this Court's remand for the further proceedings.

The Government's account of this Court's consideration of *Navajo* is incomplete and thus misleading. First, the question presented was limited to whether the Secretary violated statutory or regulatory duties "established pursuant to the IMLA":

> Whether the court of appeals properly held that the United States is liable to the Navajo Nation . . . without finding that the Secretary had violated *any specific statutory or regulatory duty established pursuant to the IMLA*. [U.S.

> Petition at I, *Navajo*, No. 01-1375 (emphasis supplied)].

The Government formulated its limited question based on the Federal Circuit's decision which relied on IMLA, and the Government observed in its petition and brief that only IMLA and the Indian Tucker Act were at issue. U.S. Brief at 2, *Navajo*, No. 01-1375; U.S. Petition at 2, *Navajo*, No, 01-1375. This Court ordinarily does "not decide issues outside the questions presented by the petition for certiorari," *Glover* v. *United States*, 531 U.S. 198, 205 (2001); and "decide[s] cases on the grounds raised and considered in the Court of Appeals," *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 431 (2002). It adhered to that practice in *Navajo*.

The *Navajo* decision is clearly limited. In its first paragraph, the Court twice made clear that the decision is confined to IMLA. The Court stated: "This case concerns the Indian Mineral Leasing Act of 1938 . . . ." 537 U.S. at 493. The Court then announced: "we hold that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations." *Id.*

The opinion contains further indicia of its limited scope. Part I.A, which provides statutory and regulatory background, addressed only the IMLA and its regulations. In Part II.C, the Court's analysis began by stating: "We now consider whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case. We conclude that they cannot." *Id.* at 506. The Court continued: "We rule only on the Government's role in the coal leasing process under the IMLA." *Id.* at 507 n.11. *Accord id.* at 508 ("the Secretary's involvement

in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA regarding allotted forest lands," analogizing IMLA to the General Allotment Act ("GAA") addressed in *United States* v. *Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*")); *id.* ("the IMLA and its regulations do not assign to the Secretary managerial control over coal leasing"); *id.* at 511 ("[i]n sum, neither the IMLA nor any of its regulations establishes anything more than a bare minimum royalty"). The dissent also focused on IMLA. See *Navajo*, 537 U.S. at 514 ("[t]he issue in this case is whether the Indian Mineral Leasing Act . . . and its regulations imply a specific duty on the Secretary") (Souter, J., dissenting); *Apache*, 537 U.S. at 480-81 (Ginsburg, J., concurring).

In addition, where *Navajo* considered the other statutes mentioned in the first Federal Circuit opinion, it recited those provisions and dealt with their impact expressly. Thus, as the Government notes (Br. 27), the Court addressed 25 U.S.C. § 399 and IMDA, but determined that they did not govern the lease at issue and were irrelevant. 537 U.S. at 509. The Court's express discussion of these two minor provisions does not assist the Government; it underscores that the Court did *not* address the Rehabilitation Act and more pertinent laws that actually give the United States control over Navajo coal.

Critically, moreover, this Court "remanded for further proceedings." *Id.* at 514. That remand gave the lower courts wide discretion to decide matters left open by the mandate. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). As the foregoing discussion demonstrates, the Court decided only the question presented – whether IMLA and its regulations

imposed a money-mandating duty in the coal lease approval context.

Nonetheless, the Government cites as dispositive selected phrases including the snippet that "'the Tribe's *claim* for compensation . . . fails,'" and the opinion's concluding phrase, which finds "'no warrant from *any relevant* statute or regulation'" to conclude that the Secretary had an enforceable duty. Br. 24-25 (emphasis supplied by U.S.) (quoting *Navajo*, 537 U.S. at 493, 514). However, such phrases cannot be interpreted divorced from context. Fairly read, the italicized text refers to the claim, statutes and regulations actually discussed in the opinion. See *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006).

Finally, while ultimately acknowledging that *Navajo* did *not* address the laws on which the Nation and the court below actually relied, the Government theorizes that if the Court had intended to leave open any claim, "it presumably would have stated . . . that the claim remained viable for further consideration on remand." U.S. Br. 28. The Government has it backwards. When this Court determines that dismissal is warranted, it does not remand for further proceedings – it "remand[s] with instructions to dismiss, with prejudice." *E.g.*, *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Deakins* v. *Monaghan*, 484 U.S. 193, 204 (1988).

This case has followed the precise path taken in *Mitchell I* and *Mitchell II*. The courts first held that a particular statute – in *Mitchell I* the GAA and in *Navajo*, IMLA – did not create money-mandating duties, but thereafter recognized that an additional network of federal laws *did* impose such duties. *Navajo* did not preclude the lower courts from following this path.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

A. The Indian Tucker Act Waives Sovereign Immunity Where The Government Violates Specific Money-Mandating Laws Or Violates Trust Management Duties Arising From Its Control Or Supervision Of Trust Resources.

The Indian Tucker Act, enacted in 1946, authorizes an Indian tribe to sue the United States for a claim which arises "under the Constitution, laws or treaties . . ., or Executive orders . . ., or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505. The Act replaced a system in which tribes, unable to sue under the Tucker Act, presented special jurisdictional bills to Congress. *Mitchell II*, 463 U.S. at 214. As one legislator explained, the Interior Department "'ought not be in a position where its employees can mishandle . . . lands of a national trusteeship without complete accountability.'" *Id.* at 214 n.13 (quoting 92 Cong. Rec. 5312 (1946) (Rep. Jackson)). The Act was based on Congress's recognition that if it "'den[ied] access to the courts when . . . fiduciary duties have been violated, we compromise the national honor of the United States.'" *Id.* at 215 (quoting H.R. Rep. No. 1466, at 5 (1945)).

In crafting the ITA, the Conference Committee Report recognized that it was "well settled that without express language the United States owes a very high degree of fiduciary duty to Indian Tribes." 92 Cong. Rec. 10,402 (1946). Indeed, when Congress passed the ITA, it understood that established principles of trust law would apply to ITA claims; this

Court had recently reaffirmed that the Government must adhere to the "most exacting fiduciary standards" in dealing with Tribes, famously stating that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 & n.12 (1942); see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("'[w]e assume that Congress is aware of existing law when it passes legislation'").

The ITA provides the United States' express consent to be sued for claims founded upon statutes or regulations that create substantive rights to money damages. *Mitchell II*, 463 U.S. at 218. Thus, as in *Mitchell II*, the question is whether the statutes and regulations at issue can fairly be interpreted as requiring compensation for the Government's undisputed breaches of its fiduciary obligations to the Nation. See *id.* In conducting this analysis, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." *Apache*, 537 U.S. at 473 (citation omitted).

Particular statutes or regulations may provide such a fair inference, as the Rehabilitation Act and SMCRA do here. See *United States* v. *Hvoslef*, 237 U.S. 1 (1915). In determining the effect of such statutes, the Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see *Navajo*, 537 U.S. at 508. As the Federal Circuit held and we demonstrate *infra*, the Nation's right to recover

damages is fairly inferred from specific provisions of the Rehabilitation Act and the Indian Lands section of SMCRA. App. 33a-34a, 38a-42a.

In addition, this Court infers that the Government has compensable trust duties under the ITA where, as here, federal statutes and regulations confer federal control or supervision over a trust resource. *Mitchell II*, 463 U.S. at 224-26. In such cases, the test is whether the Government has assumed a management role over the trust resource under the statutes and regulations. *Navajo*, 537 U.S. at 504-07; *Apache*, 537 U.S. at 473-75; *id.* at 480-81 (Ginsburg, J., concurring). Here, virtually every stage of the coal leasing process on the Navajo Reservation is under federal control or supervision, and the Government should be held to account for its violations of its basic management duties, as it was in *Mitchell II* and *Apache*.

B. The Rehabilitation Act And SMCRA Impose Specific Money-Mandating Duties On The Government.

1. In 1948, the Interior Department reported on the Navajo situation and proposed a "Long Range Program of Navajo Rehabilitation." See JA 365-67. The "Proposed Plan of Rehabilitation" had four discrete components. First among those was the development of Reservation resources, including minerals. *Id.* 366. Another category was federal investment in public service facilities, including roads and schools. *Id.* 367. This report was the basis of the bill that became the Rehabilitation Act. See H.R. Rep. No. 81-1474, at 5 (1950). The Truman administration proposed the bill to "carry out the legal and moral obligations of the Federal Government to the Navajo and Hopi people," S. Rep.

No. 81-550, at 2, 4, and to "strengthen this Nation's international prestige and moral position," *id.* at 3.

The Act's three-part definition of its objectives and policies is titled "[b]asic program for conservation and development of resources; projects; appropriations." 25 U.S.C. § 631. It is intended "to make available the resources of [the Tribes'] reservations" to promote self-sufficiency. *Id.* The Act thus provided for surveys of natural resources, including coal. *Id.* § 631(3). Such surveys were "needed so that we can develop [minerals] to more adequately serve these people." 95 Cong. Rec. 9500 (1949) (Rep. D'Ewart). Relatedly, the Act authorized the Secretary to approve mineral leases. 25 U.S.C. § 635(a).

The bill was characterized as one "to promote . . . better utilization of the resources of the Navajo and Hopi Indian Reservations." See H.R. Rep. No. 81-1474, at 1; S. Rep. No. 81-550, at 1. Mineral development was clearly viewed as a significant and realistic avenue for Reservation economic development. *E.g.*, S. Rep. No. 81-550, at 6 (statement of Assistant Secretary Warne); 96 Cong. Rec. 2087 (1950) (bill proposes "to make minerals and other resources available") (Rep. D'Ewart). Accordingly, the Act's program was "designed *first to develop the reservation resources* in order to support as many Navajos . . . as possible." H.R. Rep. No. 81-1474, at 2 (emphasis supplied); H.R. Rep. No. 81-963, at 3. Mineral leasing directly serves this part of the program, and the lease at issue was the "centerpiece" of the Act's resource development component. JA 569; *EEOC* v. *Peabody W. Coal Co.*, No. 01-1050, 2006 WL 2816603, at *10-11 (D. Ariz. Sept. 30, 2006), *on appeal*, No. 06-17261 (9th Cir., argued Sept. 22, 2008).

Another "equally important part of the program is to provide adequate education, health, roads, and other public services which are now completely inadequate." H.R. Rep. No. 81-1474, at 2; H.R. Rep. No. 81-963, at 3. But this infrastructure component of the program, on which the Government exclusively focuses, was only a "*part* of an extensive plan to rehabilitate the Navajo and Hopi tribes of Arizona," *Warren Trading Post*, 380 U.S. at 690 n.17 (emphasis supplied).

Relevant here, the Rehabilitation Act has specific provisions addressing federal liability for improvident transfers of tribal resources. The structure of 25 U.S.C. § 635 clearly reflects Congress's intent that improper mineral leasing decisions by the Secretary would expose the Government to liability to the Nation.

Two subsections expressly exempt the Government from liability in connection with separate components of the Rehabilitation Act program – conveyances of fee land and transfer of tribal trust lands to municipal or tribal corporations. Specifically, subsection (b) provides that the disposition by the Navajo of its fee lands "shall create no liability on the part of the United States," and subsection (c) states that the United States "shall have no responsibility or liability for . . . the management, use or disposition" of trust lands conveyed to certain Arizona corporations. Critically, however, subsection (a), the provision requiring Secretarial approval of natural resource leases, does *not* exempt the Secretary from liability in connection with such transactions. 25 U.S.C. § 635(a).[9]

---

[9] The fair inference of liability from the Rehabilitation Act is heightened by comparing this provision with modern statutes

The "fair[est] inference" from the structure of section 5 is unmistakable – the Government is liable for breaches of trust in connection with its approval of natural resource leases, including the Peabody lease. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The Federal Circuit's decision should be affirmed on this basis alone.

Section 5 is not, however, the sole source of money-mandating duties in the Rehabilitation Act. The Act also includes sections "to give the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2. Congress added what became section 8 of the Act at the Nation's request. See H.R. Rep. No. 81-1474, at 6. This section requires that the Nation be "kept informed" about the development program, and that the Secretary give the Nation the opportunity to "consider from their inception plans pertaining to the [development] program" and "consider the recommendations of the tribal council[ ] and . . . follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U.S.C. § 638.

Thus, the Rehabilitation Act imposed upon the Government specific duties to foster the Nation's participatory rights in connection with the Secretary's resource development program. These specific duties of disclosure, communication and participation dovetail with the federal policy of increased tribal involvement in the mineral leasing process. Congress understood, and common sense

---

that focus on tribal self-determination in mineral leasing and expressly exempt the United States from liability if leases negotiated by tribes prove ill-advised. *See* 25 U.S.C. §§ 3504(e)(6)(D)(ii) (Indian Tribal Energy Development and Self Determination Act of 2005), 2103(e).

confirms, the crucial importance of Governmental disclosure, communication and participation if the Navajo were effectively to advance and protect their own interests in this process.

In this case, however, the Department refused to follow the recommendation of the Nation to adjust the royalty rate, even though that request was fully justified by all Departmental studies and expressly provided for in the lease. App. 39a. Then the Department intentionally misled the Nation about its secret deal with private interests and sent the Nation to get "beat up" in extended negotiations in violation of 25 C.F.R. § 211.2. The Department's dishonesty violated § 638 and the Government's most basic trust duty. See *Seminole*, 316 U.S. at 297 n.12; *Varity Corp.* v. *Howe*, 516 U.S. 489, 506 (1996) ("'[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries'").

These Rehabilitation Act provisions are a full answer to the Government's argument that federal promotion of tribal independence and self-determination in natural resources management exempts the Government from liability for misconduct. The Act reflects Congress's determination that the Nation should play a shared role in this program, but only with the statutory assurance that the Nation would be fully informed, that federal supervision would be constructive, not destructive, and that the Nation would have at least a level playing field in negotiations. The Government's misconduct here defeated the express statutory purpose to advance the self-sufficiency of the Nation and statutory requirements of informed Navajo participation. Moreover, the Government's violation of the Nation's rights led directly and foreseeably to the Nation's injuries.

The Government "d[id] not dispute the Nation's interpretation" of 25 U.S.C. § 635 below, see App. 34a; nor did it challenge the CFC's findings that the Department failed to keep the Nation informed of its activities, intentionally misled the Nation, and failed to follow the Nation's recommendation to adjust the royalty rate. It now contends, however, that the Rehabilitation Act is inapplicable to the Peabody leases, relying on testimony of Field and other Department lawyers early in this litigation and proposed findings based on that testimony. See JA 524-25.

But the remand to the CFC authorized that court to take additional evidence. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258-59 (1895). After doing so, the CFC found that the lease the Secretary drafted and approved was central to the Rehabilitation Act program, App. 62a – a finding compelled by testimony of former Secretary Udall, the primary architect of the federal development program for Navajo resources. Indeed, Udall testified without contradiction that the Peabody leases were the "centerpiece" of the Act's resource development program. JA 569; App. 62a; *Peabody*, 2006 WL 2816603, at *10-11. Peabody recognizes this fact. JA 467-68. Until this proceeding, the Government acknowledged the centrality of the Rehabilitation Act to this leasing activity, successfully arguing in *Austin* that the Secretary reviewed and approved the Peabody lease pursuant to 25 U.S.C. § 635; that he fulfilled his trust duties in doing so; and that such duties were "especially owed" to the Nation in light of the special conditions recognized in the Rehabilitation Act. *Austin* Brief at 31; see *id.* at 4-5, 25-26. Moreover, the United States has consistently asserted that it acts as a trustee in exercising the

Department's lease approval functions under the Act. *Id.* at 31; JA 569 (Udall testimony); *First Mesa Consol. Vills.* v. *Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994) (under the Rehabilitation Act, the "BIA must perform its lease approval function in a manner consistent with the trust responsibility of the United States for the management of tribal lands"); 43 C.F.R. § 4.1 (1994) (IBIA speaks for Secretary).

These consistent positions – that the lease was approved under the Rehabilitation Act and that the Department acts as a trustee in approving natural resource leases under that Act – are entitled to deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Government should not be permitted to alter these positions for litigation convenience. Cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-51 (2001).

In arguing that Rehabilitation Act programs are finished, the Government highlights the ten-year period when it funded public services and infrastructure. See 25 U.S.C. § 632. But, as noted above, that was only one component of the rehabilitation program, *Warren Trading Post*, 380 U.S. at 690 n.17. Indeed, Congress amended 25 U.S.C. § 635 *after* that period expired and repealed § 9 of the Act in 1996 and § 10 in 1974,[10] while leaving §§ 635 and 638 intact.

Neither the lease nor the lease amendments were approved as IMLA leases, as the Government now argues. The royalty adjustment provision of the original lease, central to this case, is not found in the IMLA form lease; and neither lease bears any resemblance to the IMLA form lease whose use was mandatory at all relevant times for other Indian mineral leasing. See 25 C.F.R. § 171.30 (1964); *id.*

---

[10] The legislation repealing § 10 was the same legislation that established the express trust. *See* 25 U.S.C. § 640d-9(a).

§ 211.30; compare JA 188-220 (original lease), and 276-336 (1987 amendments), with C.A. App. 3648-52 (form lease). Instead, as the Act directed, the Secretary drafted and has administered the Peabody leases in accordance with both the Rehabilitation Act *and* "existing laws relating to Indian affairs." 25 U.S.C. § 632; see JA 467-70 (identifying regulations from 25 C.F.R. parts 162 and 211 as applicable to the Peabody lease under the Rehabilitation Act); *Austin* Brief at 5, 25-26, 31 (identifying 25 U.S.C. §§ 635(a) and 415 as authority for Peabody lease approval). Whatever "existing laws related to Indian affairs" in addition to the Rehabilitation Act apply here, they cannot be interpreted or applied to eliminate the money-mandating duties the Act imposes on the Secretary in connection with natural resource lease approval. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 143 (2000).

The Rehabilitation Act governs the Peabody lease. The Act was passed to promote the Nation's best economic interests. The plain language, structure and goals of that Act provide more than a "fair inference" that Congress intended to impose monetary liability for violations of the Government's duty of care in lease approvals under 25 U.S.C. § 635(a) and the Government's duties of candor and loyalty under 25 U.S.C. § 638.

2. The Indian Lands section of SMCRA unambiguously mandates that the Secretary "shall include and enforce terms and conditions . . . as may be requested by the Indian tribe" in coal leases. 30 U.S.C. § 1300(e). The *only* explanation for this provision in the legislative history supports the plain meaning of the text. Senator Goldwater, referring specifically to the Navajo and Hopi reservations, stated: "This is Indian land. There is a section in

this bill that deals specifically with how the Indians will be protected, and so forth, as they negotiate." 123 Cong. Rec. 15,575 (1977). The applicable regulation reflects that broad purpose. 30 C.F.R. § 750.20(b).

As the Federal Circuit noted, "[t]he Nation did not ask the Secretary to incorporate an outrageous term or condition. Rather, the Nation asked that the royalty rate be adjusted to a reasonable level, and Peabody had consented to such a reasonable adjustment explicitly in Lease 8580." App. 39a. Congress' use of the word "shall" generally makes a statute money-mandating, *Agwiak* v. *United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003); and the Nation's reasonable request to adjust the royalty rate should have been adopted. See *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772-79 (1984); App. 39a-42a.

The Government's reliance on *noscitur a sociis* and *ejusdem generis* is misplaced. These maxims apply only when a statutory term is ambiguous, not where the language of the statute is "clear, broad, and unqualified." *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128-29 (1991). The statutory structure here is not a list of specific items followed by a general term – the usual structure to which these canons of construction are applied. See *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379-80 (2006).

The Government also relies on a 1989 amendment to the Indian Lands regulation that actually operated between 1985 and 1987. This argument runs directly contrary to common sense and *Navajo*, 537 U.S. at 511 n.15, both of which require that the legality of conduct be decided under the laws applicable at the time of a particular act. At any rate, even the 1989

regulation relied on by the Government assured tribes that "[a]ll coal lease terms . . . are ultimately subject to Secretarial approval, thereby ensuring that tribal economic and environmental interests are protected." 54 Fed. Reg. 22,182, 22,187 (1989).

C. The Government's Comprehensive Control Over All Aspects Of Navajo Coal Leasing Gives Rise To Compensable Management Duties Violated Here.

1. The statutes and regulations conferring federal control over Navajo trust lands, and the coal found on those lands, are at least as comprehensive and precise as those addressing federal authority over the Quinault trust lands and its constituent timber in *Mitchell II* and the Indian property in *Apache*. These provisions support the argument in Part II.B that the Rehabilitation Act and SMCRA impose money-mandating duties. In addition, they independently demonstrate that the United States has comprehensive supervision and control over Navajo coal, giving rise to money-mandating duties under the standards established in *Mitchell II* and *Apache*.

In *Mitchell II*, this Court observed initially that the lands at issue were held by the United States "for the use of the Quinault" tribal plaintiff and were held "in trust for the sole use and benefit" of the allottee plaintiffs. 463 U.S. at 208 nn.4-5. Likewise, the Navajo's lands, including the coal resources,[11] are "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo," Act of June 14, 1934, ch. 521, § 1, 48 Stat. at 961; and in 1974, Congress confirmed that these lands are "held in

---

[11] *See Shoshone*, 304 U.S. at 116; App. 26a.

trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a).

Having determined that the land was held under an express trust, *Mitchell II* then looked to the specific laws and regulations governing the sale and harvesting of Indian timber. *Mitchell II* noted first that the 1910 statute permitting the Indians to sell their timber required the consent of the Secretary of the Interior. 463 U.S. at 220; see 25 U.S.C. § 406(a). The same is true for leases of Navajo coal under the Rehabilitation Act. 25 U.S.C. § 635(a).

Mitchell II next relied on regulations adopted under the 1910 Act that were intended to maximize revenues for the Indians consistent with sound conservation and that addressed virtually every aspect of forest management on both tribal and allotted trust lands, including the size of tracts, contract procedures, advertisements, billing methods, bonding requirements, and harvesting techniques and standards unique to timber. 463 U.S. at 220. The Court noted that Congress imposed even stricter duties on the Government in the Indian Reorganization Act of 1934, which required that the Department manage the forests on the principle of sustained yield management. *Id.* at 220-21. Regulations under that law called for the development of long-term management plans, planting of new stands, and minimization of erosion due to run-off to ensure that the Indians receive the benefit of all profit the forest was capable of yielding. *Id.* at 221-22; see 25 C.F.R. § 163.3(a)(3), (b) (1983) (Secretary must manage timber in the "best interest of the Indian owner" and to "promote self-sustaining communities").

Similar provisions govern the United States' supervision of Navajo coal: the Rehabilitation Act requires the Secretary to effect a "program of basic

improvements for the conservation and development of the resources of the Navajo and Hopi Indians." 25 U.S.C. § 631. That program was, in part, designed "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can . . . ultimately attain standards of living comparable with those enjoyed by other citizens." *Id.* Funds generated under the Act were to be used as "designated by the Navajo Tribal Council and approved by the Secretary." *Id.* § 637. The Rehabilitation Act similarly contemplated a partnership between the Tribe and the Department, requiring the Department to keep the Nation informed, to give the Nation the opportunity to provide input to the Department, and to adopt the Nation's recommendations when consistent with the Act's objectives. *Id.* § 638.

The Rehabilitation Act mirrors the requirement that renewable timber resources be managed on a "sustained-yield" basis, *id.* § 632, but coal, of course, is nonrenewable. For nonrenewable resources such as coal, analogous rules ensure that mineable coal is not left behind and that the surface of the land is returned to full productivity. See 30 U.S.C. § 1300(c), (d); 25 C.F.R. § 216.104.

Regarding leasing and operations, federal laws and regulations governing Navajo coal are even more detailed and comprehensive than those governing timber. See App. 24a-36a. During the relevant time, federal law controlled everything "from the creation of its leases to the reclamation of land." *Peabody Coal*, 761 P.2d at 1099; JA 467-70 (Peabody states that the list of federal regulations regulating its Navajo operations "could go on almost *ad infinitum*"); *supra* at 3-9; see 25 U.S.C. § 632 (directing Secretary

to administer development program in accordance with both the Rehabilitation Act and "existing laws relating to Indian affairs"); *id.* §§ 631, 635, 637-638; *id.* §§ 396a-396g; 30 U.S.C. § 1300; 25 C.F.R. pts. 162,[12] 211, 216; 30 C.F.R. pt. 750 (incorporating numerous parts of 30 C.F.R. relating to permit applications, performance standards, bonding requirements, inspections, enforcement and certification of blasters). No detail is left unregulated.

The final authority cited in *Mitchell II* for its conclusion that Government supervision of Indian timber was sufficiently pervasive to infer compensable management duties was the Indian Right-of-Way Act with its implementing regulations. 463 U.S. at 223 (citing 25 U.S.C. §§ 323-325; 25 C.F.R. pt. 169). These comprehensive laws apply equally to management of coal, and *additional* requirements apply to rights-of-way associated with surface coal mining. See 30 C.F.R. §§ 700.5, 750.11(a); *Hopi Tribe* v. *OSMRE*, 109 IBLA 374 (1989) (regarding Peabody haul road); C.A. App. 3640-47 (concerning Peabody access road).[13] Thus, this Court's conclusion that such laws evidenced the Secretary's comprehensive

---

[12] Indeed, the regulations of 25 C.F.R. Part 162, which Peabody and the Government have considered applicable in prior litigation, *see* JA 468 (Peabody Brief); *Austin* Brief at 5, 26 (citing 25 U.S.C. § 415, the principal authority for part 162), are alone sufficiently comprehensive to impose compensable trust duties regarding lease approvals. *Brown* v. *United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996).

[13] The Federal Circuit erroneously concluded that *Mitchell II* cited right-of-way laws only "as a point of comparison," not as a component of the Government's comprehensive control or supervision over Indian timber. App. 22a. To the contrary, *see Mitchell II,* 463 U.S. at 211, 223, 226.

control over Indian trust land and timber in *Mitchell II* is equally applicable here.

This case involves many significant aspects of federal trust asset management beyond those which sufficed to create money-mandating duties in *Mitchell II*. For example, in addition to the actual control exercised over the royalty rate by the Secretary, see App. 29a-31a, the Government supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing at all relevant times. See, *e.g.*, *Peabody Coal Co.*, 53 IBLA 261; *Peabody Coal Co.*, 72 IBLA 337; *Peabody Coal Co.*, 155 IBLA at 94-95 & n.12 (concerning 1984 royalty adjustment); *supra* at 6-7. Likewise, the regulation governing mineral lease negotiations that the Department violated, 25 C.F.R. § 211.2, was intended to prevent precisely the kind of over-reaching that the Department facilitated here, JA 174-75; the *Mitchell II* matrix contained no comparable protection.[14] Finally, the Indian Lands section affirms federal control over lease terms and requires that the Secretary include provisions in coal leases specified by Congress and requested by tribes;

---

[14] Enacted in 1982, IMDA authorized companies to negotiate with tribes without time limits (which was forbidden under IMLA and 25 C.F.R. § 211.2). Congress coupled IMDA's new negotiation flexibility with the requirement that the Secretary provide "advice, assistance, and information during the [tribes'] negotiation of a Minerals Agreement," 25 U.S.C. § 2106; that the Secretary's approval further the "best interest of the Indian tribe," *id.* § 2103(b); and that the Government be absolved from liability only "[w]here the Secretary has approved [the] Minerals Agreement in compliance with [IMDA]," *id.* § 2103(e). The Government claims Peabody's extended negotiations with the Nation were governed by IMLA; in fact, they were authorized only under IMDA. In either event, the Department failed to perform its duties under federal law.

there is no analog in the authorities governing Indian timber. To an even greater extent than in *Mitchell II*, "[v]irtually every stage of the process is under federal control." 463 U.S. at 222.

The statute found to mandate compensation in *Apache* was far less specific in establishing particular federal duties than the authorities at issue in *Mitchell II* and in this case. Yet this Court found that statute sufficient to create compensable trust management duties.

The statute at issue there provided that certain property was "held by the United State in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose." *Apache*, 537 U.S. at 469. The Court held that the fact that the statutory language "expressly defines a fiduciary relationship," coupled with the Secretary's "discretionary authority to make direct use of portions of the trust corpus," was sufficient to distinguish the trust from a "bare trust" and to infer mandatory compensation for violation of the trustee's duty of care (in that case by failing to maintain the property during the period of authorized use). See *id.* at 474-75; *id.* at 481 (Ginsburg, J., concurring). The Government's duties to manage and control Navajo coal are far more comprehensive and exacting than the general requirement held sufficient in *Apache*. In addition, federal law gives the Government "discretionary authority" to use the trust resource as it did in *Apache*, because the Government retains a preferential purchase right. 25 C.F.R. § 211.11. The result should be no different here.

2. The Government did not supervise and manage Navajo coal as part of its general regulatory

functions. Congress has made clear that the Department's comprehensive control and supervision of Navajo coal is intended for the Navajo's special benefit and that it occurs in the context of the express trust established by Congress and in the context of natural resource exploitation to further the Navajo's interests. In this setting, supervision and control give rise to money-mandating duties.

The Government's treaty promises to apply its laws for the "sole benefit and protection" of the Navajo and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo reflect a willing assumption of trust responsibilities. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552-55 (1832). The general prohibition against tribes conveying property interests without federal approval, first embodied in the 1790 Trade and Intercourse Act, was intended to prevent unfair conveyances of Indian property. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960). The Rehabilitation Act includes a federal approval requirement for natural resources conveyances that is a significant component of the Government's trust responsibility. *Navajo*, 537 U.S. at 516 (Souter, J., dissenting). As shown above, the Act's language, structure, and clearly expressed purpose provide specificity to the Government's general trust duties in connection with conveyances of the Navajo's natural resources, and the agency charged with its implementation has consistently and correctly construed the Rehabilitation Act as requiring the Department to act as a prudent trustee in its lease approval function.

Other network provisions likewise reveal that the Department's control or supervision is to be exercised in the Nation's best interest. The Government closely supervises Navajo coal royalties "to meet its

congressionally mandated accounting and audit responsibilities relating to . . . Indian mineral royalty management," 30 C.F.R. § 210.10(a), and to ensure "a reasonable and long-term maximum rate of return for . . . Indian leases," 52 Fed. Reg. 1840, 1841 (1987). Likewise, the generally applicable mineral leasing regulations employed in part here are "designed to protect the Indians." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Similarly, the Department controls rights-of-way under comprehensive regulations to protect the Indians' best interests. 33 Fed. Reg. 19,803, 19,804 (1968) (promulgating 25 C.F.R. pt. 161, redesignated to 25 C.F.R. pt. 169).

Finally, the Indian Lands section of SMCRA was intended to benefit tribes. The relevant regulations under that section were promulgated to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation," 49 Fed. Reg. at 38,462, and to honor the "special relationship between the U.S. Government and the Indian tribes," *id.* at 38,464.

In sum, the network of federal laws creating comprehensive federal control and supervision over Navajo coal is not simply regulation. This network arises in the context of an express trust relationship with the Nation, in relation to the exploitation of the Nation's natural resources, and in order to protect the Nation's best interests. The duties imposed by these federal laws are thus money mandating.

3. The Government's contrary arguments are unsound.

a. The Government contends that the Federal Circuit erred in finding duties in general trust law, rather than in statutes and regulations themselves,

and that general trust law may only be used to infer a damage remedy once an enforceable duty is found elsewhere. This argument is merely a variant of the argument that the Government unsuccessfully deployed in both *Mitchell II* and *Apache*. See U.S. Brief at 45 n.36, *Mitchell II*, No. 81-1748; U.S. Brief at 12, 34, *Apache*, No. 01-1067. Where the Government controls or supervises a trust resource, the applicable statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224; cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (distinguishing "contours" from "definite rules"). General trust law helps to define the Government's fiduciary responsibilities within the contours of the statutes and regulations that impose trust management duties. App. 38a.

Both *Mitchell II* and *Apache* use general trust law to establish the nature and extent of the Government's duties after concluding that the federal laws at issue imposed management responsibilities on the Government. The Government's position "fail[s] to appreciate . . . the role of trust law *in drawing a fair inference*" that statutes and regulations impose money-mandating *duties*. *Apache*, 537 U.S. at 477 (emphasis supplied); see *Varity*, 516 U.S. at 504.

This is most obvious in *Apache*. *Apache* recognized that the relevant federal statute did not "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, the Court inferred a *duty* "to preserve the property improvements," relying on "elementary trust law." *Id.* (citing G. Bogert, *Law of Trusts & Trustees* (2d ed. 1980), and the *Restatement (Second) of Trusts* (1957)).

"Given this duty on the part of the trustee," the Court explained, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.* at 475-76 (quotation marks omitted).

Similarly, in *Mitchell II* the Court of Claims granted judgment to the plaintiffs for, among other things, the Government's failure to seek fair value for timber or establish a road system to permit profitable exploitation or obtain more than the minimum rate of return on monies collected. No statute or regulation expressly required the Government to perform these duties. Nonetheless, after considering the purposes of the comprehensive statutory scheme and the Government's control over timber operations, rights-of-way and proceeds from timber sales, this Court affirmed liability for the Government's failure to undertake these acts. *Mitchell II*, 463 U.S. at 228, *aff'g Mitchell* v. *United States*, 664 F.2d 265, 267, 273 (Ct. Cl. 1981). Here, the Department did not demand for extraordinarily valuable Navajo coal even the minimum it requires for its own coal.[15] Cf. *United States* v. *Mason*, 412 U.S. 391, 398 (1973).

The test is whether the statutes and regulations establish only a bare trust or whether they give the Government a managerial role with respect to trust resources. If the latter, those laws satisfy the requirement of "specific rights-creating or duty-imposing statutory or regulatory prescriptions." See *Navajo*, 537 U.S. at 506. The specific duties are those

---

[15] This Court's dictum that the Nation did not argue this point in the CFC, *Navajo*, 537 U.S. at 498 n.6, is not binding, because its assumed predicate is incorrect. *See* JA 521-22, 526-31, 534-35, 565; *Katz*, 546 U.S. at 363.

of a trustee managing trust resources, and they are explicated by established trust law principles within the contours of the applicable laws.

b. The Government's claim that imposing liability here would cause confusion at the Department about the scope of its responsibilities is not credible. The Department plainly knew that it is improper and a breach of trust for the Secretary to "meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." App. 136a. Everyone involved knew at the time that the Department was breaching its trust, which is why the Department concealed the facts not just from the Nation, but also from the BIA. *Id.* 128a-129a, 138a-139a; JA 122-25, 168-70, 599-602.

The Government's stated concern is also belied by the Department's subsequent actions. IMLA regulations adopted in 1996 require that the Department maximize the benefits of minerals to Indians and act in their best interests after considering all relevant factors, including economic studies. 25 C.F.R. §§ 211.1(a), 211.3 (2008). This standard is even more demanding than the common law standard of care.

The Government's contention that use of the common law in the trust context will cause untenable uncertainty has no more validity than a contention that use of the common law of contracts in suits under the Tucker Act should be disallowed. Cf. *Franconia Assocs.* v. *United States*, 536 U.S. 129, 142-43 (2002). It is precisely because the basic features of trust law are so well known that the *Mitchell* framework, informed by established trust law principles, offers stability and predictability. See

NLRB v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 217 (2002) (contours of the term "equitable relief" are so well known that courts rarely need to inquire further than the Restatements and respected treatises).

c. The Government notes that protracted litigation over the appeal was likely, suggesting that its deception caused no harm to the Nation. However, the Nation informed the Secretary in July 1985 that it preferred to litigate rather than to settle for a 12½% rate. JA 422. "The threat of litigation may be intimidating, but careful analysis of relevant factors [by the trustee] takes precedence over avoiding a lawsuit." *Cheyenne-Arapaho Tribes* v. *United States*, 966 F.2d 583, 590 (10th Cir. 1992).

d. That the Nation may have had remedies under the Administrative Procedure Act had it not been deceived does not bar a claim under the ITA. See *Mitchell II,* 463 U.S. at 227. Nonetheless, the Government and its *amici* contend that the Nation chose not to move the case to the IBIA, where *ex parte* contacts were expressly prohibited. That position misconstrues the Nation's claim, which has never been predicated on the Secretary's conversations with Peabody, but rather on the Department's actions *after* the Secretary secretly allied himself with Peabody. App. 119a-120a.

Moreover, the Government's contention implicitly assumes that the Nation made an informed choice of forum. The undisputed facts, however, show that the Department intentionally misled the Nation about the relevant events to prevent the Nation from attempting to remove the case to the IBIA. JA 122, 165-69; cf. *Seminole*, 316 U.S. at 297 & n.12; App. 137a (consent to breach requires "full disclosure and

ratification, both absent here"). And, seeking IBIA jurisdiction would have been futile anyway, since Secretary Hodel had taken personal jurisdiction, JA 164, 512-14, and the IBIA had no power to take the case from him, see 43 C.F.R. § 4.5(a)(1) (1986). The Secretary's failure to notify the Nation of his assumption of jurisdiction underscores the impropriety of his actions. *Id.* § 4.5(c).

e. Finally, the Government suggests that the Navajo should have been content with the negative $89 million "bonus," see App. 131a; JA 128, 187, and the federal minimum rate, relying on a partial report commissioned by Peabody (JA 538-46) that the Court struck in *Navajo*, Order (Oct. 7, 2002) (per William K. Suter, Clerk); portions of proceedings in a 1997 arbitration, JA 547-55; and a 1996 MMS report showing *no* customary royalty rate for Indian leases, *id.* 511; *accord id.* 546. These documents relate to damages and not to liability. See *Navajo*, 537 U.S. at 521 (Souter, J., dissenting). Moreover, the Nation showed that the Peabody report is misleading and technically flawed, JA 604; the Nation's agreement to a 12½% rate in two *other* coal leases actually *supports* the 20% rate for the exceptionally valuable Peabody coal, *id.* 605. In addition, the results of the 1997 arbitration are irrelevant to the propriety of the 12½% rate in 1987. *Id.* 606.[16] Indeed, the Government often demanded more than the 12½% minimum rate during the relevant time period, and a Peabody memorandum confirmed Dr. Rai's observation that, after the Government standardized its royalty rate,

---

[16] The Department attempted to require the Nation to ratify the 1987 lease amendments as a condition to approving the increased payments to the Nation under the arbitration, but the Nation refused. JA 596-98.

"[b]onus bids [for valuable coal] . . . have been substantial." *Id.* 608; *id.* 83.

* * * *

The Nation, like other tribes, operated within a trustee-beneficiary relationship. Congress invited the Nation to adopt a constitution allowing it the "fullest possible participation" in administering its affairs, but the Interior Department vetoed Navajo control over Navajo minerals. During the relevant time period, federal law imposed plenary federal control and daily supervision over all aspects of Navajo coal exploration, negotiations, leasing, royalties, operations and reclamation.

This is no "bare" trust. It has all the hallmarks of a conventional fiduciary relationship. In exercising its control under an express trust established by Congress, the Government violated specific statutory provisions that are fairly interpreted to be money-mandating and violated basic management duties arising from the statutes, treaties and regulations that control Navajo coal from the creation of leases through reclamation. The court of appeals correctly applied this Court's guiding precedents and held the Government liable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL E. FRYE
LISA M. ENFIELD
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111
(505) 296-9400

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT A. PARKER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-6345

Counsel for Respondent

January 9, 2009

* Counsel of Record