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 *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATES OF NEW MEXICO, ARIZONA, AND UTAH

GARY KING
Attorney General of the State of New Mexico
DAVID THOMSON
Deputy Attorney General
Office of the Attorney General of New Mexico
Counsel of Record
P.O. Drawer 1508
Santa Fe, NM 87504-1508
505-827-6039
Counsel for Amicus Curiae State of New Mexico

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TERRY GODDARD
Attorney General of the
State of Arizona
1275 W. Washington Ave.
Phoenix, AZ 85007-2926
602-542-8986

MARK SHURTLEFF
Attorney General of the
State of Utah
Office of the Attorney General
350 North State Street, Suite 230
PO Box 142320
Salt Lake City, UT 84114-2320
801-538-1191

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INTEREST OF *AMICI CURIAE*

The Navajo Nation is located within the boundaries of *amici curiae* States of New Mexico, Arizona and Utah (the "States"). Individuals residing within the Navajo Nation are citizens of the States. The States, in cooperation with the Navajo Nation, strive to provide essential governmental infrastructure and services to those citizens. *See Shepherd v. Platt*, 865 P.2d 107, 108 (Ariz. Ct. App. 1993).

The States tax the proceeds of mineral extraction within the Navajo Nation and federal law mandates that portions of certain mineral royalties in Utah be dedicated to improving the general welfare of Navajos residing in San Juan County, Utah. Therefore, when the Department of the Interior fails to require mineral developers on the Reservation to pay reasonable royalties, the burden on the States is increased. The States therefore have a significant stake in ensuring that mineral lessees on the Navajo Reservation pay fair market value for the minerals they extract. The case was decided below on cross-motions for summary judgment. The States rely on what they understand to be undisputed facts.

ARGUMENT

The infrastructure and services challenges on the Navajo Reservation are daunting. *See* United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975) at 41-42 (showing $3.778

billion infrastructure deficit on the Reservation). As the federal government long ago recognized, because of the "complexity of the Navajo problem . . . [its] solution will require large amounts of money and take time," U.S. Department of Interior, *Report on the Navajo, Long Range Program of Navajo Rehabilitation* at 25 (March 1948) (J.A. Krug, Interior Secretary).[1] The "*Report*" emphasized that "[a] maximum of cooperation with the states in which the Navajos live is required, since the Indians must eventually become integrated with the non-Indian population of those states. This can be achieved through formal and informal arrangements with the state agencies concerned with education, welfare, agriculture, irrigation, roads, publicity, and various other pertinent activities," *Report* at 24. The States have taken their responsibility seriously. Most importantly, all of the States provide educational facilities and funding for Navajo students.

The Navajo and Hopi Rehabilitation Act of 1950 was based in large part on the *Report on the Navajo*. *See*, *e.g.*, S. Rep. No. 81-1474 (1950) at 5; H.R. Rep. No. 81-963 (1949) at 6; H.R. Rep. No. 81-550 (1949) at 4, 8; Joint Appendix ("J.A.") 365-67 (cover page and index to *Report*). The Rehabilitation Act was passed

[1] The Navajo Nation submitted this part of the *Report* in the Court of Federal Claims as Exhibit 131, in Vol. III of its "Appendix to Brief in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on its First Claim for Relief" (filed Dec. 15, 1997) at 1759-60.

to encourage the development of Navajo natural resources, to provide federal funds for roads, schools and other infrastructure on the Reservation, and ultimately to promote self-sustaining Navajo communities and the prosperity of the Navajo people, in fulfillment of treaty provisions. 25 U.S.C. § 631; Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1850); Treaty Between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 (1868).

To coordinate the provision of governmental services and infrastructure on the Reservation, the States have enacted laws and entered into numerous intergovernmental agreements with the Navajo Nation. For example, New Mexico provides on an annual basis significant funding for capital improvements in Navajo Indian country, recently committing approximately $25 million to assist the Navajo Nation get potable water to its remote communities in the New Mexico portion of Navajo Indian country. *See*, *e.g.*, N.M. Session Laws 2007, Ch. 42, sec. 66, item 50 (appropriating $200,000 to plan, design and construct improvements to community well in Iyanbito Chapter of Navajo Nation); *id.* at item 109 (appropriating $800,000 to plan, design and construct water line and sewer system extensions in Shiprock Chapter of Navajo Nation). *See also* Statement of John R. D'Antonio, Jr., New Mexico State Engineer at 3 (June 27, 2007), Hearing Before Senate Energy and Natural Resources Committee, S. 1171, Northwestern New Mexico Rural Water Projects Act (Over the last

four years, the State of New Mexico "has invested approximately $9.7 million in a Gallup regional [water] distribution system and, this year, the New Mexico legislature appropriated $15.3 million to be used for the construction of the 'Cutter Lateral' pipeline on the eastern side of the project. New Mexico recognizes the importance of funding rural water supply and Indian water rights settlements and looks forward to a federal commitment commensurate with the federal government's trust and statutory responsibilities."), available at http://energy.senate.gov/public/_files/DAntonio.doc. New Mexico and the Navajo Nation are jointly pursuing an over $125 million effort to upgrade U.S. Highway 491. *See* N.M. Stat. Ann. § 67-3-59.2(B) (2003) (referring to laws 2003 ch. 3, §§ 27, 28); *id*. at § 67-3-59.4 (2003); N.M. Dep't of Transportation, "Transportation Secretary Rhonda Faught and Navajo Nation Leaders Renew Commitment to Complete GRIP U.S. 491 Reconstruction Project," March 2, 2006 (press release). The Nation will make various contributions, including some that are in-kind, Resolution of the Resources Committee of the Navajo Nation Council, 21st Navajo Nation Council, First Year, 2007, RCAU-52-07; *id.*, RCD-63-07, but New Mexico will provide the lion's share of the funding.

In the motor fuels tax context, the States have intergovernmental tax agreements with the Navajo Nation. *See* Intergovernmental Agreement Between Arizona Department of Transportation and Navajo Tax Commission (May 1999, Amended 2003); Amended

Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (March 9, 2004); Intergovernmental Agreement Between the State Tax Commission of Utah and Office of the Navajo Tax Commission (October 16, 2000). *See also* Ariz. Rev. Stat. § 28-401 (authorizing Arizona Department of Transportation to enter into fuel tax compacts with Tribes). The States of New Mexico and Utah provide a deduction for gallons sold on the Navajo Nation or a credit for fuel excise taxes paid to the Navajo Nation. *See* N.M. Stat. Ann. § 7-13-4(E) (1999); UTAH CODE ANN. § 59-13-201(9) (2004). Under the intergovernmental agreement with the State of Arizona, the Navajo Nation collects fuel taxes and remits a percentage to the State of Arizona to pay Arizona fuel tax liability. Net revenues from Navajo fuel taxes are deposited into the Navajo Nation Road Fund, which is dedicated to road development, maintenance and construction. Navajo Nation Code tit. 12 § 1002; *id.* at tit. 24 § 923.

The States impose taxes based on the gross proceeds of mineral lessees operating on the Navajo Reservation, including Peabody. *Peabody Coal Co. v. State*, 761 P.2d 1094 (Ariz. Ct. App. 1988), *cert. denied*, 490 U.S. 1051 (1989); *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989); *State of Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995). The State of New Mexico also provides an intergovernmental coal severance tax credit for coal severed on tribal lands. N.M. Stat. Ann. § 7-29C-2 (2001). The States use these

tax revenues, in part, to provide education, roads, and other government services and infrastructure badly needed on the Navajo Reservation. To the extent that the United States does not require mineral lessees to pay fair market value for Navajo minerals held in trust, the States' ability to provide services and infrastructure for their citizens, including their Navajo citizens, is impaired.

Significantly for the present case, Arizona and its political subdivisions impose certain taxes on Peabody's Navajo operations. *Peabody Coal Co.*, 761 P.2d at 1095 & n.1. As the record revealed in the *Peabody Coal Co.* decision, Arizona expended almost $120 million for school districts located wholly on the Navajo and Hopi reservations, and almost $215 million for school districts located partly on these reservations, from 1980 through 1985 alone. *Id.* at 1098. In addition, Arizona also spends substantial tax revenues derived from Peabody's operations on health and welfare services benefiting tribal members. *Id.*

All federal studies found that the valuable Navajo coal leased to Peabody should command at least a 20% royalty rate, but the Department "approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans," Pet. App. 137a-138a, and the "Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties" in those amendments. *Id.* at 131a.

Based on record estimates of the difference in royalties to be paid by Peabody between the 20% rate found reasonable by the Department's technical staff and the 12½% rate approved,[2] the cost to Arizona and its political subdivisions in reduced tax revenues is approximately $6 million. The impact on New Mexico, Utah, and their political subdivisions would be equally detrimental (the exact revenue loss figure would obviously differ) if the Department is permitted to approve conveyances of Navajo minerals in these states for less than fair market value. Pet. App. 162a ("The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty – a classic violation of common law fiduciary obligations."), *id.* at 136 (finding "no plausible defense" for the Secretary's misconduct); JA 574 (12½% rate "resulted in coal being conveyed . . . at substantially less than the Fair Market Value of the coal"); *see also id.* at 588-89 (no substantial change in power plant economics if 20% royalty rate had been imposed).

Navajos residing in San Juan County, Utah would suffer additional negative impacts if the United States so breaches its trust responsibilities regarding minerals in the Utah portion of the Navajo Reservation. Federal law currently provides that

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[2] *See* J.A. 417 (difference in royalties for Navajo coal delivered to one of Peabody's two customers is $347.5 million for 25 years).

37½% of oil and gas royalties derived from certain trust lands in the Utah portion of the Navajo Reservation shall be paid to Utah and be expended "for the health, education, and general welfare of the Navajo Indians residing in San Juan County . . . in cooperation with the appropriate . . . agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe." Act of March 1, 1933, 47 Stat. 1418, *as amended*, Act of May 17, 1968, Pub. L. 90-306, 82 Stat. 121.[3] If the United States does not require the payment of fair market value for these Navajo minerals, the amount of funds available for use in providing services to foster self-sustaining Navajo communities and improve the standard of living for Utah's San Juan County Navajo citizens is directly compromised.

Leasing of the Navajo Nation's natural resources under the Rehabilitation Act, 25 U.S.C. § 635(a), is intended to "make available the resources of the[ ] reservation[ ] for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens." 25 U.S.C. § 631. *Cf. Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 463-64 (1967) (States are required to receive "full

[3] The State of Utah is currently requesting that Congress designate a new manager for these funds.

fair compensation" for trust lands granted by the United States under the Arizona-New Mexico Enabling Act). If the United States does not require the payment of fair market value for Navajo coal, the burden on the States to provide basic services for those of its citizens who reside within the Navajo Nation is unduly increased.

The States have forged meaningful government-to-government relationships with the Navajo Nation and recognize Navajo self-determination. That recognition comports with modern federal Indian policy. *Cohen's Handbook of Federal Indian Law* § 1.07 (2005). Trusteeship and tribal self-determination are compatible. *See*, *e.g.*, 25 U.S.C. §§ 450n(2) (Indian Self-Determination and Education Assistance Act), 458ff(b) (tribal Self-Governance Act); Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573; President's Statement on Indian Policy, 1983 Pub. Papers 96. But "while the trust responsibility should support self-determination, that goal is illusory if it results from a compromised process or undue federal manipulation." Mary C. Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471, 1558.

Here, the Department controlled and supervised all aspects of Navajo coal development, "from the creation of leases to the reclamation of land." *Peabody Coal Co.*, 761 P.2d at 1099. As the lower courts found, the Department abused that control. In such a circumstance, the Indian Tucker Act should provide a

remedy for the Navajo Nation. *See United States v. Mitchell*, 463 U.S. 206, 224-27 (1983).

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GARY KING
Attorney General of the
State of New Mexico
DAVID THOMSON
Deputy Attorney General
Office of the Attorney General
of New Mexico
Counsel of Record
P.O. Drawer 1508
Santa Fe, NM 87504-1508
505-827-6039
Counsel for Amicus Curiae
State of New Mexico

TERRY GODDARD
Attorney General of the
State of Arizona
1275 W. Washington Ave.
Phoenix, AZ 85007-2926
602-542-8986

MARK SHURTLEFF
Attorney General of the
State of Utah
Office of the Attorney General
350 North State Street, Suite 230
PO Box 142320
Salt Lake City, UT 84114-2320
801-538-1191