No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

NAVAJO NATION,

Respondent.

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

OPPOSITION BRIEF

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QUESTIONS PRESENTED

The Navajo Nation would restate the questions presented as follows:

1. Whether *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003), forecloses the court of appeals' holding that the United States was liable for its breach of fiduciary duties in connection with the Navajo coal lease amendments based on treaties, statutes and regulations not addressed by this Court in that case.

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

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INTRODUCTION

The Government asks this Court to review an interlocutory Federal Circuit decision involving the application of settled legal principles to a specific network of treaty, statutory and regulatory rights in a unique factual setting. Under this Court's precedents, each Indian breach of trust case turns on the provisions of the particular treaties, statutes and regulations and the individual facts presented. See, *e.g.*, *United States* v. *Mitchell,* 445 U.S. 535 (1980) ("*Mitchell I*"); *United States* v. *Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). This case is no exception. The Federal Circuit's determination that the Government breached compensable trust duties to the Navajo Nation rests on a network of legal provisions specific to the 1964 Navajo coal lease, whose operative provisions are themselves unique.

The Government's contention that the Court has already resolved this case in its entirety in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo*") is wrong. This Court did not remand with instructions to dismiss in *Navajo*; it remanded for further proceedings. The Court's decision was expressly cabined, commencing with the following statement: "This case concerns the Indian Mineral Leasing Act of 1938 . . . 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." *Id.* at 493. The holding was also similarly limited. *Id.* Thus, in *Navajo*, as in *Mitchell I*, this Court held that a particular federal statute and its implementing regulations did not create a money-mandating fiduciary duty. Both decisions left open the question – answered affirmatively in the decision below and in *Mitchell II* – whether other federal laws might do so.

The judgment below is faithful to this Court's precedents. In *Mitchell II*, this Court determined that fiduciary duties in the management of property held in an express trust arose due to the Government's pervasive supervision of virtually all aspects of the Indian resource. The statutes and regulations in *Mitchell II* provided the "contours" of the federal trust duty. See 463 U.S. at 224. To fill in those contours, this Court looked to general trust law standards in both *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ("*Apache*"). See *Mitchell II*, 463 U.S. at 225 n.29 (supporting fiduciary management duties where the Government assumes control over property belonging to Indians); *Apache*, 537 U.S. at 475 (relying on "elementary trust law" to subject Government to management duties to preserve the trust property although the relevant statute did not "expressly subject the Government to duties of management and conservation"). Federal control over Navajo coal during the relevant time period was at least as pervasive as the control found sufficient to create money-mandating trust duties with respect to the timber resource in *Mitchell II*. And here, the Government breached not only its basic management duties of care, candor and loyalty, but also other duties specifically prescribed by Congress for the protection of Navajo economic interests.

The interlocutory decision in this case is of no importance in future Indian trust disputes. Two of the principal statutes, the Rehabilitation Act and the Indian Lands section of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), apply as a practical matter to only three Indian tribes, the Navajo, Hopi and Crow. Key regulations, including the one requiring the Secretary to include non-

environmental terms requested by the tribes in coal lease amendments, are no longer in effect. In 2006, Congress provided an avenue for the tribes to assume the comprehensive control over the entire process of coal surface mining which had been controlled exclusively by the Department from 1984-1987.

At bottom, the Government is arguing that the court below misapplied correctly stated legal principles in an interlocutory decision of no recurring importance. Accordingly, this case does not merit the Court's attention. If this were a petition filed by a private litigant, it would surely be denied. The United States' disappointment that the Court's earlier ruling did not terminate the Navajo's claim provides no warrant for further review.

COUNTER-STATEMENT OF THE CASE

1. Statutory And Regulatory Frame-work.

Navajo coal is held under an express statutory trust. As detailed below, federal statutes and regulations govern Navajo coal "from the creation of its leases to the reclamation of land." *Peabody Coal Co.* v. *State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988).

The federal-Navajo relationship is founded on two treaties, ratified in 1849 and 1868. In the first, the Navajo recognized the federal government's "sole and exclusive right of regulating the trade and intercourse with the said Navajoes"; in return the United States agreed to "so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo, arts. 3, 11, Sept. 9, 1849, 9 Stat. 974, 974-75. The coal land at issue was formally included in the Navajo Reservation under 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 Indian Mineral Leasing Act ("IMLA") was passed in 1938. Its "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Like the timber statute in *Mitchell II*, IMLA permits the Indians to convey their resources with Secretarial approval. See 25 U.S.C. §§ 396a, 406(a). However, IMLA proved inadequate to meet the needs of the Navajo.

Appalling conditions on the Navajo Reservation prompted Congress to pass the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638.[1] That Act "further[s] the purposes of existing treaties with the Navajo Indians," so that the Navajo will "ultimately attain standards of living comparable with those enjoyed by other citizens." *Id.* § 631. The Rehabilitation Act prescribed 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 at issue was approved as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act." C.A. App. A3575 (Udall testimony).

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[1] For example, the United States had failed to fulfill 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). In 1948, 80% of Navajos were illiterate, living in "abject poverty." *E.g.*, S. Rep. No. 81-550, at 5, 7 (1949).

The Rehabilitation Act included a section "to give the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2 (1949). That section requires the Secretary 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 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, but the Secretary *rejected* the constitution adopted by the Navajo, in 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 1641, 1642 (1954).

The Rehabilitation Act has specific provisions concerning federal liability for improvident conveyances of tribal resources. The Act permits the Navajo Nation to convey its fee simple land, stating that "such disposition shall create no liability on the part of the United States." 25 U.S.C. § 635(b). The Secretary is also authorized to transfer tribal trust lands to municipal or tribal corporations organized under state law, "and thereafter the United States shall have no responsibility or liability for . . . the management, use, or disposition of such lands." *Id.* § 635(c). Tellingly, another subsection of the Act requires the Secretary to approve tribal leasing of "natural resources"; that subsection, in contrast to the others, does *not* exempt the United States from liability in connection with such transactions. See *id.* § 635(a).

The Rehabilitation Act contains the additional requirement that the federal development program be "administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs," *id.* § 632, including regulations implementing other Indian mineral leasing laws. Those regulations impose Secretarial control over mineral lease negotiations, 25 C.F.R. § 211.2 (1987); the size, shape and duration of leases, *id.* §§ 211.8-.10; and the terms of any negotiated lease, *id.* § 211.30. The Department controls coal-resource planning under the Rehabilitation Act, App. 27a, and regulates coal exploration under 25 C.F.R. Part 216 Subpart A (1987), see 25 C.F.R. §§ 216.2(a), 216.6 (1987). These regulations also require approval of any surface mining plans by the United States Geological Survey, include detailed reporting requirements to USGS, and permit USGS to enter the land and cancel leases for noncompliance with the plans. *Id.* §§ 216.7, 216.9, 216.10, 216.12.

The Government has at all relevant times 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); *Peabody Coal Co.*, 155 IBLA 83, 94-95 & n.12 (2001) (concerning 1984 royalty adjustment). After the Commission of Fiscal Accountability of the Nation's Energy Resources informed Congress in 1982 that the Government's mineral royalty management system had severe failings and that "'the general problems of verifying production . . . and designing an effective audit program are common to all minerals,'" see 51 Fed. Reg. 8168, 8168 (Mar. 7. 1986) (omission in original) (quoting Commission's Report), Congress required in the Federal Oil and Gas Royalty

Management Act of 1982 ("FOGRMA") that the Secretary 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." FOGRMA § 303, 30 U.S.C. § 1752, hist. notes.

The Secretary reported that new legislation was unnecessary because MMS already had adequate authority. See 51 Fed. Reg. 15,763, 15,764 (Apr. 28, 1986). MMS then implemented the FOGRMA directive for Indian coal by establishing the Auditing and Financial System in 1984, see 49 Fed. Reg. 37,336 (Sept. 21, 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.*, treated coal the same 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); C.A. App. 3435.

Rules proposed in 1986 and finalized in 1989 for calculating Indian mineral royalties reflect additional federal control over Navajo coal royalties during the relevant time period. See 51 Fed. Reg. 4507 (Feb. 5, 1986) (proposing rules); 54 Fed. Reg. 1492 (Jan. 13, 1989) (finalizing rules). These rules "largely continue[d] past practice for coal valuation," 54 Fed. Reg. at 1493 – that is, to seek the "long-term maximum rate of return for . . . Indian leases," 52 Fed. Reg. 1840, 1841 (Jan. 15, 1987), and "to ensure that the trust responsibilities of the United States

with respect to the administration of Indian coal leases are discharged," 30 C.F.R. § 206.250(d) (1989).[2]

The Secretary reserved exclusive authority to adjust the royalty rate under Article VI of the Rehabilitation Act lease. C.A. App. 284. The IMLA form lease had no such provision. See *id.* at 3648-52. After Congress raised the minimum royalty rate for federal surface-mined coal to 12½% in 1976,[3] 30 U.S.C. § 207(a), Secretary Andrus established 12½% as the "absolute minimum" rate for Indian leases, rejecting a lease negotiated by the Navajo for failing to achieve that minimum. C.A. App. 334.

Additional federal control of Navajo coal was added in 1977 in the Indian Lands Section of SMCRA, 30 U.S.C. § 1300. App. 27a-28a. There, the United States confirmed its control 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 enforce in leases after 1977 *other* terms and conditions requested by the tribes, *id.* § 1300(e). That provision was added to assist Indian tribes in their negotiations. App. 39a (citing 123 Cong. Rec. S. 15,575 (1977)). Thus, the relevant rule required that *non-environmental terms* requested by tribes be

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[2] These "past practices" are also reflected in the Department's Manual and its Coal Leasing Policy on Indian Lands during the relevant period. *See* C.A. App. 238 (130 DM 1.3E (1987)), 244-46 (54 BIAM O, § 604.05 (1984)), 332, 1862-63 (Coal Leasing Policy). These policies elucidate the agency's view of its statutory responsibilities. *See United States* v. *New Mexico*, 438 U.S. 696, 703 n.7 (1978).

[3] The 12½% rate was not the "standard" federal rate at this time, *cf.* Pet. 7; the Department routinely demanded a greater royalty for its more valuable reserves, C.A. App. 3673, 4224.

incorporated in coal leases. 30 C.F.R. § 750.20(b) (1987).[4]

Congress intended that the tribes would ultimately assume full regulatory authority over surface coal mines on Indian lands, 30 U.S.C. § 1300(a), but that authority was not granted until 2006. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 120 Stat. 2922, 3109 (to be codified at 30 U.S.C. § 1300(j)). During the relevant time period, the tribes 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 (Sept. 28, 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 (Dec. 16, 1977) (promulgating 25 C.F.R. pt. 177, redesignated as 25 C.F.R. pt. 216, subpt. B (1987)), 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 establish the federal Office of Surface Mining Reclamation and Enforcement ("OSM") as "the regulatory authority on Indian lands" with broad administrative and enforcement powers; the federal Bureau of Land Management as the agency responsible for approving and enforcing exploration and mining plans on Indian lands and verifying royalty calculations; the federal Mineral Management Service ("MMS") as the agency responsible for royalty collection, audit, and accounting; and the BIA

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[4] The Government relies on a later rule. Pet. 30. *But see Navajo*, 537 U.S. at 511 n.15.

as the agency charged with consulting with tribes on matters related to this comprehensive federal administrative scheme. 30 C.F.R. § 750.6 (1987). The regulations unilaterally amend Indian coal leases to include SMCRA environmental requirements. *Id.* § 750.20(a) (1987). These regulations were intended to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation." 49 Fed. Reg. at 38,462.

Finally, SMCRA and the general Indian Right-of-Way Act confer federal control over rights-of-way central to coal development on the Navajo Reservation. See 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169 (1987); 30 C.F.R. §§ 700.5, 700.11(a) (1987); *Hopi Tribe* v. *OSM,* 109 IBLA 374 (1984) (concerning Peabody haul road); C.A. App. 3640-47 (concerning Peabody access road). This Court considered such control in finding federal fiduciary obligations to manage Indian lands and resources in *Mitchell II,* 463 U.S. at 223-26 & nn.29, 31.

In sum, "[v]irtually every stage of the process is under federal control" and the relevant statutes and regulations therefore "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 222, 224.

2. Factual Background.

The relevant facts are sordid and undisputed. See App. 123a-132a, 89a-90a, 98a-99a, 3a-7a. They are summarized only briefly.

The coal at issue, leased to Peabody in 1964, is "exceptionally valuable." Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* 5, 8 (1985), C.A. App. 710, 713. As noted, the lease was drafted and approved by the Department as the "centerpiece" of the federal

resource development plan prescribed by the Rehabilitation Act, under personal supervision of the Secretary of the Interior, Stewart Udall. C.A. App. 3575 (Udall declaration), 4262 (declaration of Peabody counsel).

The lease provided an "extremely low royalty rate," App. 123a, "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. But the lease permitted the Secretary, unilaterally, to adjust the royalty rate in 1984. *Id.* at 495. In June of that year, a BIA Area Director, under delegated authority, implemented Article VI and raised the royalty rate to 20% which reflected the value of the coal. *Id.* at 496; App. 125a-126a; C.A. App. 406-36. Peabody and its two customers appealed. *Navajo*, 537 U.S. at 496. After receiving the briefs and reports of the parties, Acting Assistant Secretary John Fritz, the appellate decision maker, commissioned additional federal studies, all of which confirmed the propriety and fairness of the 20% rate. C.A. App. 610-15, 649-714. Fritz invited Peabody to supplement the record with additional cost, revenue, and investment data to substantiate its claim that the 20% rate was unreasonable. *Navajo*, 537 U.S. at 496; C.A. App. 616. Peabody declined to do so, C.A. App. 626.

In June 1985, "the decision document affirming the Area Director's decision awaited Mr. Fritz' signature." App. 127a; *Navajo*, 537 U.S. at 496. However, before Fritz could return from military reserve duty to sign the decision, the Solicitor's Office leaked the decision to Peabody. C.A. App. 725, 1089-90. Peabody hired Stanley Hulett, Interior Secretary Hodel's close personal friend, to influence Hodel *ex*

parte. Hulett met secretly with Hodel, and Hodel agreed to sign a memorandum, *prepared by Peabody's attorneys in the appeal*, instructing Fritz not to raise the royalty rate. App. 127a-128a; C.A. App. 746. The Navajo Nation was not notified of this meeting or the Secretary's instruction. App. 128a.

Rather, the Solicitor's Office originally warned that, if the Navajo learned of the Secretary's action, it would likely transfer the case to the IBIA, and the Secretary "would have to personally assume jurisdiction of the appeal to avoid a decision by the IBIA." C.A. App. 771. Thus, after meetings with Hodel, the Solicitor's Office intentionally misled the Navajo Nation in an August 1985 letter. App. 128a. The Associate Solicitor who signed that letter admitted that it was not candid, C.A. App. 1789, and the letter's drafter acknowledged that it was calculated to conceal the truth, *id.* at 1451-52. The Navajo Nation construed this letter and other odd communications from the Department[5] as a signal that the *merits* of the 20% rate were still being debated within the Department. *Id.* at 2854.

The applicable regulation permitted negotiations only if requested by the tribes and limited them generally to 30 days. See 25 C.F.R. § 211.2 (1987); C.A. App. 2048-49 (PPFs 262-264).[6] The Navajo Nation informed the Secretary that it opposed further negotiations. *E.g.*, C.A. App. 751, 766-67. Nonetheless, the Secretary sent the Nation back into negotiations, furthering the company's "maximum delay" strategy. See *id.* at 452. The Navajo Nation negotiated "unarmed with critical knowledge," App.

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[5] *See* Pet. 7 n.2.

[6] The Plaintiff's Proposed Findings ("PPFs") cited in this Opposition are all unrefuted.

138a, and "facing severe economic pressures," *id.* at 90a, C.A. App. 4214-19. "[T]he Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." App. 138a-139a.

The Navajo endured two more years of negligible royalties and finally capitulated. The facial 12½% royalty rate in the resulting 1987 lease amendments was "well below the rate that had previously been determined appropriate" by the Department. App. 137a-138a. To obtain even that rate, "[t]he Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties," *id.* at 131a, and was forced to limit taxes upheld in *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985). Despite the Court of Federal Claims' ("CFC") statement to the contrary, App. 155a, the Navajo Nation had urged repeatedly and demonstrated that the true royalty rate was less than the minimum that Congress had established for federal coal.[7] All major features of the amended leases damaged Navajo interests.[8]

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[7] *See* C.A. App. 107, 124, 133, 1973 (Mot. for Summ. J. (Dec. 15, 1997)); *id.* at 2046, 2058 (PPFs 247, 315); *id.* at 2771, 2796 (Consolidated Response (June 17, 1998)). The Nation's Rule 59 motion requested the CFC to correct its misstatement, *id.* at 3382-83, but the CFC did not address the matter either then or in response to the Nation's renewed request and further showing on remand, *id.* at 3568, 3673-74; *see also id.* at 3666 (coal conveyed "at substantially less than the Fair Market Value").

[8] The Government touts the increase in royalty rate to 12½% for coal under another lease, Pet. 7, but all observers knew that if the 20% rate were affirmed for the Navajo lease, the rate for the adjacent Navajo and Hopi coal would also rise to 20%. *E.g.*, C.A. App. 740, 1072-73, 1522-23. The bonuses highlighted by the Government, Pet. 7, were "considerably below" bonuses that the United States demands for its own coal. C.A. App. 3673-74,

The lease amendments were, in essence, new leases, bearing no resemblance to the IMLA form lease. App. 42a; compare C.A. App. 793-835 (1987 lease), with *id.* at 3648-52 (form lease). In September 1987, both the Nation and the BIA Area Office requested that the Department review them to determine if they were in the Nation's best interest. *Id.* at 836-37. 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 renumeration." See 52 Fed. Reg. 31,916, 31,918, 31,930 (promulgating 25 C.F.R. § 211.1(a)), 31,921-22 and 31,933 (promulgating 25 C.F.R. § 211.34) (Aug. 24, 1987). Such review would have shown that the leases were unfair to the Navajo, see, *e.g.*, C.A. App. 2051-56 (PPFs 279, 281-302), and the Department suspended the rules' effective date shortly after the Nation's and BIA's requests, at the behest of "industry" and under the guidance of the Assistant Solicitor who "shepherded" the lease amendments through the Department for Peabody, 52 Fed. Reg. 39,332 (Oct. 21, 1987); C.A. App. 920, 2047 (PPF 254). Six weeks later, Hodel assured Peabody that he would approve the amendments, without a recommendation from any Interior employee. C.A. App. 2056-57 (PPFs 304-306). The merits of the transaction to the Navajo were irrelevant to the Department. *Id.* at 2047, 2051 (PPFs 252-253, 277-278).

Hodel's actions benefitted one of Peabody's customers, the Navajo Generating Station ("NGS"), in the amount of $347,500,000. C.A. App. 736. Because

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1857. Peabody's agreement in 1987 not to contest tribal taxes was insignificant because this Court had validated them in *Kerr-McGee*.

the Bureau of Reclamation owns a 24.5% interest in NGS, Hodel's actions directly benefited the Government in an amount in excess of $84 million. App. 159a-160a; C.A. App. 1860.

These unrebutted facts show that the Department violated the most basic trust duties of care, loyalty, and candor and that there is "no plausible defense" for the Department's actions here. App. 136a, 139a. "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 162a.

3. Prior Proceedings.

The Navajo Nation sued the United States, alleging a breach of trust in its mismanagement of Navajo coal controlled by the United States under a comprehensive federal statutory and regulatory scheme, including IMLA, the Rehabilitation Act, SMCRA, FOGRMA, and associated regulations. C.A. App. 32-42. The CFC unequivocally found that the United States had breached its duties of care, candor and loyalty. *E.g.*, App. 135a-139a, 162a. In its analysis, the CFC focused on only one of the cited statutes, IMLA. *Id.* at 139a-140a ("In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fiduciary duties on the government . . . ."); see *id.* at 141a-155a. The CFC held that the United States did not violate any duty mandating compensation under IMLA.

On appeal, the Navajo Nation continued to rely on its network of statutes and regulations, but the Federal Circuit determined that IMLA, by itself, established money-mandating duties that were

violated.[9] App. 95a-98a; see *id.* at 72a. IMLA applies to all tribes and all mineral-leasing activities. This Court thus granted certiorari to address the scope of IMLA, and it reversed. It held "that the Tribe's claim . . . fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations," and "remanded for further proceedings consistent with [its] opinion." *Navajo*, 537 U.S. at 493, 514.

On remand, the court of appeals found that this Court's decision held only that IMLA did not give rise to money-mandating duties and rejected the Government's contention that the remand should be treated as an order of dismissal with prejudice. App. 80a-81a. The court remanded to the CFC to decide "whether, apart from IMLA, section 399, and IMDA," *id.* at 81a, see *supra* n.9, "'a network of other statutes and regulations' imposes 'judicially enforceable fiduciary duties upon the United States' in connection with the Peabody lease and, if so, whether such duties were breached." App. 81a. The Federal Circuit denied the United States' petition for rehearing and rehearing *en banc* and the United States did not seek review by this Court.

On remand, the CFC took additional evidence, including the unrebutted affidavit of Secretary Udall and the reports of economists showing that the Navajo Nation obtained less compensation for its coal in bonuses and royalties than the federal government requires for its own coal. C.A. App. 3575, 3661-12.

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[9] The court of appeals also found support for its holding in the 1982 Indian Mineral Development Act ("IMDA") and 25 U.S.C. § 399. App. 89a, 95a-98a. The Nation had never relied on § 399, and had cited to IMDA only to contrast its focus on tribal self-determination with IMLA's "basic purpose – to maximize revenues from reservation lands." *Kerr-McGee*, 471 U.S. at 200.

Nonetheless, the CFC held that federal law did "not suffice to establish a money-mandating trust in the area of royalty rates" and again dismissed. App. 69a. The court of appeals reversed, holding on the basis of the array of statutes and regulatory provisions described *supra*, that the Government breached its management duties arising from its comprehensive control over all aspects of Navajo coal leasing and development, and violated specific duties set forth in the Rehabilitation Act and SMCRA. *Id.* at 32a-43a. The Government's petition for rehearing and rehearing *en banc* was denied without dissent.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS WHOLLY CONSISTENT WITH *NAVAJO*'S REMAND.

The court of appeals carefully considered and rejected the Government's contention that *Navajo*'s remand for further proceedings *precluded* further proceedings to consider statutes and regulations not at issue in *Navajo*. App. 2a; *id.* at 78a-81a. That determination is clearly correct.

As formulated by the Government, the Question Presented in this Court's *Navajo* decision was limited to the scope of the United States' duties under IMLA:

> Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated *any specific statutory or regulatory duty established pursuant to the IMLA.* [Petition at i, *United States* v. *Navajo Nation*, No. 01-1375 (filed Mar. 15, 2002) (Emphasis added).]

The Government's decision to craft a limited Question Presented is understandable, because the court of appeals' decision had not addressed any of the other statutes comprising the Navajo Nation's network. As the Government notes, the Nation relied on other statutes and regulations in its briefs, but this Court adhered to its customary practice and addressed only the Question Presented.

The text of the decision removes any doubt. *Navajo* stated first 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." 537 U.S. at 493. To answer that question, this 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; see *id.* at 507 n.11 ("We rule only on the Government's role in the coal leasing process under the IMLA."). This Court reasoned that "the Secretary's involvement in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA [General Allotment Act] regarding allotted forest lands" in *Mitchell I*, 445 U.S. 535, *Navajo*, 537 U.S. at 508, and similarly rejected liability for the Secretary's *ex parte* contacts with Peabody because "[n]othing in . . . IMLA's basic provision, or in the IMLA's implementing regulations proscribed" them, 537 U.S. at 513.

The Court's holding is likewise restricted to the IMLA question presented by the Government: "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.* at 493. Finally, this Court remanded for further proceedings. *Id.* at 514.

The Government's argument that the remand for further proceedings actually foreclosed them contradicts basic principles of this Court's jurisprudence. First, this Court does "not decide issues outside the questions presented by the petition for certiorari." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). Moreover, this Court "'decide[s] cases on the grounds raised and considered in the Court of Appeals.'" *Owasso Indep. Sch. Dist. No. 1-011* v. *Falvo*, 534 U.S. 426, 431 (2002). Here, neither the Question Presented nor the prior decision of the Federal Circuit adverted to the other statutes and regulations upon which the Navajo Nation has always based its claim. Thus, *Navajo*'s "remand[] . . . 'for further proceedings'" gave the lower courts full discretion to consider and decide any matters left open by the mandate. *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). The Government's contrary argument is based on a single phrase in *Navajo* "we have no warrant from *any relevant statute or regulation*" upon which to base enforceable duties. Pet. 19. That phrase must be read in light of the appellate decision under review (discussing only IMLA, § 399, and IMDA) and the issue before the Court – *i.e.*, "the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary." *Navajo* 537 U.S. at 493; see *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). The Government's argument ignores not only the relevant context and limited Question Presented, but also the Court's express language confining the issue, the analysis, and the holding to the Government's duties under IMLA.

This Court knows how to remand with instructions that result in dismissal. It "remand[s] with instruc-

tions to dismiss, with prejudice." See *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). *Navajo* did not take this course. Rather, this case has followed precisely the same course as that in *Mitchell I* and *Mitchell II*, with the courts first concluding that a particular statute – in *Mitchell I*, the General Allotment Act, and in *Navajo*, IMLA – did not create money-mandating trust duties, but thereafter recognizing that an additional network of federal laws *did*. Nothing in *Navajo* precluded the Federal Circuit from following this path.

II. THE DECISION BELOW FAITHFULLY APPLIES GOVERNING PRECEDENT.

The Government next argues that the analysis in the decision below is inconsistent with *Navajo* and the *Mitchell* cases in two respects. First, the Government contends that the Federal Circuit did not require the Navajo to "'allege a violation of a specific rights-creating or duty-imposing statute or regulation,'" and instead authorized money damages solely for a violation of "'common-law trust duties.'" Pet. 22. Second, the Government claims that the court's conclusion that federal laws impose money-mandating obligations on the United States is wrong. *Id.* at 28. The first argument misunderstands the decision below, which correctly states and faithfully follows this Court's precedent. The second argument is that the Federal Circuit misapplied the governing legal standard. It is both wrong and plainly not worthy of this Court's review.

1. The Government's first argument is based on a mischaracterization of the decision below. The court of appeals set out this Court's pathmarking precedents in great detail and accurately recited the legal framework for determining whether federal law

mandates a right of recovery in damages. App. 10a-15a. The court recognized that "[t]here must be 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id.* at 24a, 37a.

In arguing that the court ignored this requirement and instead authorized damages based solely on violations of common-law trust duties, Pet. 23, the Government focuses on the part of the Federal Circuit's opinion addressing the relationship between statutory and regulatory prescriptions and the common law of trusts. See App. 37a-38a. Review of the opinion, however, reveals an accurate description of the relevant roles of each set of legal rules in determining the Government's liability for damages.

Specifically, the court properly understood *Apache* to permit the general trust law to be used to infer a remedy in damages for breach of fiduciary duty. App. 37a (quoting *Apache*, 537 U.S. at 477); accord *Mitchell II*, 463 U.S. at 226. The Government concedes this point. Pet. 25-26. But the Government insists that the *only* duties that the Government must perform in the Indian trust context are those *expressly* set forth in a statute or regulation. As the Federal Circuit correctly held, this Court rejected that argument in *Apache*.

In *Apache*, the relevant statute failed to "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, this Court decided that

> the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. *This is so because elementary trust law, after all, confirms the*

> *commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.* [*Id.* (emphasis added).]

The Court cited the Bogert trust treatise, the *Restatement (Second) of Trusts*, and *United States* v. *Mason*, 412 U.S. 391 (1973), for the proposition that the federal trustee must administer trust assets it controls with care and skill, even though that duty is not set forth in any statute or regulation. 537 U.S. at 475.

The Government also misreads *Mitchell II*. Here, as in *Mitchell II*, the property is held in an express trust established by Congress, 25 U.S.C. § 640d-9(a), and the trust has all of the hallmarks of a conventional fiduciary relationship, see *Mitchell II*, 463 U.S. at 225; *Apache*, 537 U.S. at 473. Here, too, the Department exercised literally daily supervision over all aspects of the trust resource and virtually every stage of the process was under federal control, including royalty rates.[10] *Mitchell II*, 463 U.S. at 222; App. 16a, 27a-34a. In this setting, the relevant statutes and regulations "establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Mitchell II*, 463 U.S. at 226; accord *Apache*, 537 U.S. at 475. The statutes and regulations establish the "contours" of those management duties. *Mitchell II*, 463 U.S. at 224.

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[10] The court of appeals properly rejected the Government's position that it could exert plenary control over the determination of the increased royalty rate and then disclaim liability for exercising such control. App. 15a-16a; *see Mitchell II*, 463 U.S. at 225.

The Government incorrectly asserts that *Mitchell II* found liability based only on violations of "a *specific* duty separately set forth in one of the statutes or regulations governing federal Indian timber management." Pet. 25. Not so. No statute or regulation expressly required the Government to seek fair value for Indian timber or establish a road system to permit profitable exploitation or obtain more than the minimum rate of return on monies collected and invested by the United States. However, after considering the purposes of the comprehensive statutory scheme and the Government's control over rights-of-way and proceeds from timber sales, this Court affirmed liability for the Government's failure to undertake these acts. See *Mitchell II*, 463 U.S. at 228, *aff'g Mitchell* v. *United States*, 664 F.2d 265, 267, 273 (Ct. Cl. 1981).

Further, *Apache* eliminates any doubt as to whether violations of general trust law standards may be compensable even if the operative statute and regulations do not expressly delineate the acts required to fulfill the trust duties. See also *Varity Corp.* v. *Howe*, 516 U.S. 489, 504 (1996) ("If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.").

The Federal Circuit's discussion of *Apache* reveals its full understanding of the relationship between specific rights-creating and duty-imposing language and common law principles. It did not rely on government duties "in other areas" to "impose[ ] new and additional duties" on the Government. Pet. 26 (emphasis omitted). It relied, in part, on common-law trust standards to measure the Government's performance of its management duties under comprehensive statutes and regulations that govern every

aspect of coal development and leasing on Navajo trust land.

The key distinction between *Mitchell I* and *Mitchell II* (and, indeed, *Navajo* and *Mitchell II*), is that the former involved only a "'bare'" or "'limited'" trust with no federal responsibility to manage the trust resource, while the latter involved "statutes and regulations specifically addressing the management of [the trust resource] on allotted lands." See *Apache*, 537 U.S. at 473-74. As *Mitchell II* requires, the Federal Circuit assessed the degree of authorized or mandated federal control over Navajo coal lands, including their leasing and exploitation, and concluded that the Government exercised comprehensive control over all aspects of that resource. App. 24a-34a. Specifically, the court observed that the Government planned the Navajo's coal development from the outset under the Rehabilitation Act, *id.* at 27a; approved the original lease which established both the royalty rate and the exclusive means by which it would be adjusted, see *id.* at 3a-6a; C.A. App. 4262; controlled the royalty adjustment process and negotiation by contract, regulation and in reality, see App. 3a-4a, 32a-33a; 25 C.F.R. § 211.2 (1987); C.A. App. 284; controlled coal mining operations, App. 27a-29a; controlled collection and management of royalties, *id.* at 29a-31a; and controlled the content of the Navajo's coal leases, *id.* at 31a-33a. The Federal Circuit also found that the Government "exercise[d] actual control over the terms and conditions of coal mining leases, including those already in existence," rejecting the Government's contention that there can

be no liability here in the absence of specific control over coal *leasing*. *Id.* at 33a.[11]

In addition, the court below properly relied on the Rehabilitation Act as providing a "'fair inference'" of liability for the Secretary's approval of leases of Navajo minerals. App. 33a-34a; see *Apache*, 537 U.S. at 472-73. As the court pointed out, while Congress expressly exempted the Government from liability for certain Navajo transactions in subsections (b) and (c) of § 635, subsection (a) contains no such exemption, giving rise to a fair inference that the Government is liable for wrongful approval of such leases. App. 33a-34a.

The Government's pervasive control is intended to benefit the Navajo. App. 34a-36a. As in *Mitchell II*, the comprehensive control embodied in the relevant statutes and regulations can "'fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property.'" *Id.* at 13a (quoting *Mitchell II*, 463 U.S. at 228). Federal law provides the "contours" of those management duties, and general trust law helps to determine their nature and scope. See *Mitchell II*, 463 U.S. at 224-26 & n.30; *Apache*, 537 U.S. at 475; *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998) (distinguishing "contours" from "definite rules").

The Circuit proceeded as this Court instructed. First, it examined the relevant federal laws to

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[11] The Government attacks the lower court's statement in dicta that Government control of the Navajo's coal resources generally would support the Tribe's claim even if the Government had not exercised specific control over leasing, relying on a rule of statutory construction. Pet. 27-28. This overreading of dicta is not worthy of review.

identify specific "rights-creating [and] duty-imposing" provisions. Then it applied common-law trust principles to fill in the contours of the Government's management duties, concluding quite properly that the Government is held to standards of care,[12] loyalty,[13] and candor[14] in its administration of Navajo coal. It concluded, as did the CFC, that the Government had breached these basic fiduciary duties. App. 42a. The Government's view that the Federal Circuit misunderstood the relevant legal framework is wrong.

2. Finally, the Government argues that even if the Federal Circuit correctly stated the applicable legal standards, it misapplied them here. The Government likely files numerous oppositions every year urging this Court to deny petitions that make such an assertion, and this Court consistently denies these petitions. In all events, the Government is wrong.

The Government seeks to undermine the Federal Circuit's decision first by ignoring the broad bases for the court's finding of a full fiduciary relationship concerning Navajo coal, and then segregating each statutory provision and regulation to minimize the cumulative evidence of comprehensive federal control

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[12] *See Apache*, 537 U.S. at 475; *Mason*, 412 U.S. at 398.

[13] *See Seminole Nation* v. *United States*, 316 U.S. 286, 297 n.12 (1942) (trustee's duty of loyalty must be enforced with uncompromising rigidity).

[14] "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 of behavior." *Seminole*, 316 U.S. at 297 n.12 (internal quotation marks omitted); *accord Varity Corp.*, 516 U.S. at 506 ("'[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries . . . .'").

and authority. However, it is clear that the Government controls or supervises every facet of Navajo coal development "from the creation of its leases to the reclamation of land." *Peabody Coal*, 761 P.2d at 1099.

The two treaties establish the foundation of the trust relationship, and regulations under IMLA, at issue in *Navajo*, set a floor for Indian coal royalties. Although these regulations were "designed to protect the Indians," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985), conditions on the Navajo reservation required that the federal government assume a more robust role with respect to Navajo resources. Congress passed the Rehabilitation Act in response. This Act directed the *Secretary* to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo." 25 U.S.C. § 631. The leasing here was accomplished under that Act. App. 62a; C.A. App. 3575. Indeed, as Secretary Udall testified, the leases at issue were the "centerpiece" of the Act's resource development program. C.A. App. 3575.

Moreover, as noted, the Rehabilitation Act requires the Secretary to approve leases of natural resources held in trust for the Navajo. App. 33a-34a (citing 25 U.S.C. § 635(a)). In context, that section demonstrates that the Government is liable for breach of fiduciary obligation in connection with such approvals, because the *other* two subsections of § 635 expressly *exempt* the United States from liability for other transactions, while the subsection mandating secretarial approval of mineral leases does not. As the court of appeals noted, "[t]he government does not dispute the Nation's interpretation [of § 635], and we agree that government liability from the approval of such leases is a 'fair interpretation.'" App. 34a.

The Government was acting as trustee in exercising its lease approval function. As Secretary Udall explained, in

> planning and decision making [for the Peabody lease and related development], I acted in the capacity as trustee for the Indians, as I understood the law to require, and I believed then and do believe now that such trusteeship was of paramount importance in the Department of the Interior's implementation of the development program under the . . . Rehabilitation Act. [C.A. App. 3575.]

This is the Department's consistent interpretation of the Act. See *First Mesa Consol. Vills.* v. *Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994) (pursuant to 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"). This interpretation, and not the Government's present litigation posture, is entitled to considerable deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Rehabilitation Act also required that the Secretary "follow" the Nation's recommendations when feasible and that the Tribe be "'kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized,' including the 'program of basic improvements for the conservation and development of the resources of the Navajo . . . Indians.'" App. 38a (quoting 25 U.S.C. §§ 631, 638). The Peabody lease at issue was plainly part of that resource development program, and the Government had a duty to keep the Navajo informed of relevant developments. Both the Rehabilitation Act and SMCRA independently mandated that the Secretary effect the Tribe's

requests and recommendations regarding the resource development program, 25 U.S.C. § 638; 30 U.S.C. § 1300(e); 30 C.F.R. § 750.20(b) (1987), but the Secretary rejected the Navajo Nation's request and recommendation that the royalty rate be adjusted to 20%, although that figure was found to be proper by all federal studies. These provisions essentially codify the Secretary's trust duties of candor and loyalty to the Navajo in this limited context, and they were undeniably violated. See App. 38a-42a.[15]

The Government contends that the Rehabilitation Act does not create money-mandating duties because certain of its programs were almost completed around 1964, the year that the original Peabody lease was approved. Pet. 28-29. This position is contrary to the consistent position of the Department, see C.A. App. 3575; *First Mesa*, 26 IBIA at 27-28 & n.14, and to the natural reading of the Act itself. Although the Act's programs related to federal expenditures for schools, roads, and other infrastructure were financed and thus complete in the early 1960s, see S. Rep. No. 93-11, at 1 (1973), the same was not true of the Act's general provisions relating to resource development, including lease approval. Critically, although Congress has amended or repealed several provisions of the Act, those governing Navajo resource conveyances (§§ 631, 635) and the Secretary's duties of candor and loyalty (§ 638) remain intact.

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[15] Likewise, under 30 C.F.R. § 750.6(d) (1987), the BIA was charged with "[c]onsulting directly with . . . Indian minerals owners . . . in matters relating to surface coal mining and reclamation operations on Indian lands" but the Department's secrecy and misinformation campaign precluded compliance with this regulatory duty, also. *See* C.A. App. 771, 773, 784, 1027, 4214-19.

The Government also incorrectly suggests that the lease was subject only to IMLA and that the Circuit's reliance on the Rehabilitation Act is misplaced. It selectively cites an excerpt from the Navajo Nation's Rule 59 motion filed in 2000 when proceedings were focused on IMLA. Pet. 31. Subsequently, the CFC, on remand for further proceedings, properly accepted additional evidence and argument. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258-59 (1895). That evidence included testimony from former Secretary Udall and Peabody's counsel demonstrating that the lease was drafted and approved by the Department of the Interior under the Rehabilitation Act, C.A. App. 3575, 4261-62; *Austin* v. *Andrus*, 638 F.2d 113, 114 (9th Cir. 1981), and bore no resemblance to the Interior form lease required under IMLA. See *supra* at 4-5; App. 62a (describing lease as centerpiece of Rehabilitation Act programs).

In sum, the Federal Circuit's determination that federal law imposed money-mandating duties on the United States in connection with coal leasing approval is correct.

III. THIS CASE HAS LITTLE CONSEQUENCE FOR ANY OTHER CASE.

This case arises from events occurring almost a quarter-century ago under a regulatory scheme that had limited application and has been completely changed since that time. Recurrence of the issue presented is impossible.

First, one of the key statutes, the Rehabilitation Act applies to only two tribes, the Navajo and Hopi, and another, SMCRA, applies only to these two tribes and one other, since the fourth tribe having strippable coal has decided not to allow coal mining on its lands. See, *e.g.*, H.R. Rep. No. 95-218, at 84

(1977) (reflecting only four coal-leasing tribes); Act of Oct. 9, 1980, Pub. L. No. 96-401, 94 Stat. 1701 (cancelling all coal leases on Northern Cheyenne Reservation).

Second, the Department has amended the regulation in effect from 1984-1987 that mandated inclusion of non-economic terms in coal leases requested by tribes. See 54 Fed. Reg. 22,182, 22,187 (May 22, 1989) (amending 30 C.F.R. § 750.20(b) (1987)).

Third, after 30 years of comprehensive federal regulation of surface coal mining on Indian lands, Congress recently authorized the tribes to undertake full responsibility. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 119 Stat. at 3019 (to be codified at 30 U.S.C. § 1300(j)).

Fourth, the Department completely overhauled the regulations under Indian mineral leasing statutes in 1996. 61 Fed. Reg. 35,634 (July 8, 1996) (promulgating 25 C.F.R. pt. 211). And, in 2005 "Congress authorized the most significant change in the way energy resources can be developed since . . . [IMDA] [in the] Indian Tribal Energy Development and Self-Determination Act," 25 U.S.C. §§ 3501-3506 ("ITEDSDA"). *Cohen's Handbook of Federal Indian Law*, 2007 Supp. at 114 (Nell J. Newton ed. 2005), (footnotes omitted). The ITEDSDA permits any tribe to lease its minerals *without* federal approval once the tribe enters into an energy resource agreement with the Secretary under 25 U.S.C. § 3504(e). Congress specifically addressed the Secretary's trust duties there. See 25 U.S.C. § 3504(e)(6). This highlights the contrasting federal approval requirements that existed when the Peabody lease was negotiated. See *id.* §§ 396a; 635(a).

The facts here simply cannot recur. They concern a royalty adjustment term not found in any other Indian mineral lease (including the Hopi lease at issue in its tag-along case, see Pet. 32) and complicated circumstances arising out of Peabody's appeal of the BIA's royalty adjustment decision under that lease term. These peculiar facts include a warning by the Solicitor's Office of what would happen if the Navajo learned of the Secretary's collusion with Peabody and his "'march or die'" instruction not to raise the royalty rate. C.A. App. 771; App. 128a. They include the Department's intentional deception of the Navajo leadership.

The notion that imposing liability in this case will leave the BIA unsure of what may or may not be permissible conduct (Pet. 32-33) is silly. Neither then nor today can the Department plausibly claim doubt as to the propriety of the Secretary "meet[ing] secretly with parties having interests adverse to those of the trust beneficiary, adopt[ing] the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead[ing] the beneficiary concerning these events." App. 136a. Everyone involved knew the Department was breaching its trust; that is why the Department painstakingly concealed the facts not just from the Navajo Nation, but even from the BIA. *Id.* at 128a-129a, 138a-139a; C.A. App. 771, 773, 784 (BIA Area Director "**NOT**" to be told of status of appeal), 2823 (only time in Area Director's career that he was refused such a status report).

This Court established the governing principles in Indian trust cases in the *Mitchell* cases in the early 1980s and recently explicated and refined the law in the companion *Navajo* and *Apache* cases. The court of appeals correctly stated the law established by this

Court. App. 10a-14a, 24a. The Court of Federal Claims understands the limited reach of the decision below. See *Samish Indian Nation* v. *United States,* 82 Fed. Cl. 54, 65-66 (2008).[16] This Court has denied review in similar cases.[17] The issue presented here will not recur. The interlocutory nature of the decision, which counsels against review, reinforces that certiorari should be denied. See *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

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[16] The Government claims that the decision below will significantly expand the United States' trust responsibilities, citing *Wolfchild* v. *United States*, 78 Fed. Cl. 472 (2007), *appeal pending*, No. 2008-5018 (Fed. Cir.), as an exemplar. Pet. 32. Nothing in *Wolfchild* supports the Government's characterization. The CFC cited the decision below solely to support the settled proposition that a fiduciary relationship normally exists where the Government has control or supervision over tribal monies or properties. *See* 78 Fed. Cl. at 483 n.15.

[17] *See United States* v. *Shoshone Indian Tribe*, 544 U.S. 973 (2005); *Eastern Shoshone Tribe* v. *United States*, 544 U.S. 973 (2005).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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