No. 2006-5059

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NAVAJO NATION,

Plaintiff-Appellant,

v

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN NO. 93-763 L, JUDGE LAWRENCE M. BASKIR

BRIEF FOR APPELLANT, THE NAVAJO NATION

Louis Denetsosie
Attorney General
The Navajo Nation
P.O. Drawer 2010
Window Rock, AZ 86515
(928) 871-6345

Paul E. Frye, Counsel of Record
Lisa M. Enfield, Of Counsel
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE #310
Albuquerque, NM 87111
(505) 296-9400

Daniel I.S.J. Rey-Bear
The Nordhaus Law Firm
405 Martin Luther King Ave. N E.
Albuquerque, NM 87102-3541
(505) 243-4275

Attorneys for Appellant

June 8, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NAVAJO NATION V. US

NO. 2006-5059

CERTIFICATE OF INTEREST

Counsel for the appellant certifies the following:

1. The full name of every party or amicus represented by me is:
Navajo Nation, also referred to as **The Navajo Tribe of Indians**

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: [**not applicable**: the party named in the caption is the real party in interest]

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: **None**

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this court are:

   (a) Frye Law Firm, P.C.
   Paul E. Frye, owner (2003-present);
   Lisa M. Enfield, of counsel (2004-present)

   (b) Rothstein, Donatelli, Hughes, Schoenburg & Enfield, LLP
   Paul E. Frye, partner (2000-2003);
   Lisa M. Enfield, of counsel (2000-2003)

   (c) Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
   Daniel I.S.J. Rey-Bear, partner
   Shenan R. Atcitty, associate

(d) **Navajo Nation Department of Justice**
Louis Denetsosie, Attorney General
Levon Henry, Attorney General (1998-2003)
Herb Yazzie, Attorney General (1993-1998)
Britt E. Clapham II, Deputy Attorney General
Steven J. Bloxham, Assistant Attorney General
James R. Bellis, Assistant Attorney General
Stanley Pollack, Esq.
Luralene Tapahe, Esq.
William A. Johnson, Esq.

(e) **Ning, Lilly and Jones**
Stephen A. Jones, partner

(f) **Stein, Mitchell & Mezines**
Jacob A. Stein, partner

May 30, 2006
Date

Signature of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. TREATIES

II. CASES

III. STATUTES

IV. REGULATIONS

V. FEDERAL REGISTER NOTICES

VI. OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Two related appeals from the proceeding in the court below were filed in this Court.

1. In Navajo Nation, Plaintiff-Appellee, v. Gregory L. Leisse, Movant-Appellant, and United States, Defendant-Appellee, No. 96-5118 (filed July 12, 1996), Leisse, a former lawyer for third-party Peabody Coal Company, appealed a discovery order. After completion of briefing but before submittal to a panel, Leisse voluntarily dismissed the appeal, so no decision was rendered. The order of dismissal was issued by the Clerk on September 27, 1996. The Navajo Nation's request for sanctions was denied by Judge Plager in an Order filed October 17, 1996.

2. In Navajo Nation, Plaintiff/Respondent-Appellee, and Paul E. Frye, Respondent-Appellee v. United States, Defendant-Appellee v. Peabody Coal Company, Peabody Holding Company, Inc. and Peabody Western Coal Company, Movants-Appellants, No. 00-5072 (filed April 25, 2000), third-parties Peabody Coal Company, et al., appealed from the denial of their motion for sanctions against the Navajo Nation and its counsel for an alleged violation of a protective order. This Court rejected Peabody's appeal. See 7 Fed. Appx. 951 (Fed. Cir. 2001).

Other cases in other courts that will be directly affected by this Court's decision in this appeal are:

1. Navajo Nation v. Peabody Holding Company, Inc., Peabody Coal Company, Peabody Western Coal Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, Gregory Leisse, Edward Sullivan and Christopher Farrand, No. CA-99-0469-EGS (D.D.C. filed Feb. 25, 1999); and

2. Hopi Tribe v. United States , No. 00-CV-217 (Fed. Cl. filed April 18, 2000).

3. Navajo Nation v. Peabody Coal Co., CV 93-2342 PHX-SMM (D. Az. filed December 13, 1993).

JURISDICTIONAL STATEMENT

The Navajo Nation ("Nation") invoked Court of Federal Claims ("CFC") jurisdiction under 28 U.S.C. §§ 1491 and 1505, alleging breaches of federal trust duties concerning Navajo coal resources. The CFC granted the Government's cross-motion for summary judgment, denied the Nation's Rule 59 motion, and the Nation appealed. This Court reversed. The United States Supreme Court reversed and remanded. This Court remanded with instructions. See Navajo Nation v. United States, 46 Fed. Cl. 217 (Fed. Cl. 2000), rev'd, 263 F.3d 1325 (Fed. Cir. 2001), rev'd, 537 U.S. 488 (2003), on remand, 347 F.3d 1327 (Fed. Cir. 2003).

The CFC issued its final order on December 20, 2005. The Nation timely appealed on February 14, 2006. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES

1. Did the CFC err in holding that the network of Navajo treaties, the Navajo and Hopi Rehabilitation Act ("Rehabilitation Act"), the Indian Lands Section of the Surface Mining Control and Reclamation Act of 1977 ("Indian Lands Section" of "SMCRA"), the Indian coal-related provisions of the Federal Oil and Gas Royalty Management Act ("FOGRMA"), the Indian Right-of-Way Act, implementing regulations, the lease itself, and binding Departmental policies governing all aspects of Navajo coal lease negotiations, lease terms, royalties, approval, development, and

reclamation provides insufficient federal control or supervision for compensable trust management duties?

2. Did the CFC err in overlooking specific statutory and regulatory provisions that require the Government to act with care, candor, and loyalty when dealing with Navajo coal and to include provisions desired by the Nation in coal leases?

STATEMENT OF THE CASE

This case alleges breach of trust by the United States in its mismanagement of Navajo coal resources. The CFC found that the United States breached its most basic trust duties of care, candor, and loyalty regarding Navajo coal leased to the Peabody Coal Company by suppressing a well-founded royalty adjustment decision at the secret behest of Peabody, forcing the Nation back into extended negotiations unarmed with critical information and in violation of Interior regulations, intentionally misleading the Nation about its actions, subverting the Nation's bargaining position, and ultimately approving lease amendments with royalty rates far below what every federal study had determined fair and reasonable. See 46 Fed. Cl. at 226-27. This Court agreed, 263 F.3d at 1328, and the Supreme Court did not disturb this finding, see 537 U.S. at 501.

The Nation's Complaint, JA32-42, and summary judgment briefs in 1997 urged

that a comprehensive network of treaties, statutes, and regulations impose compensable trust management duties and establish CFC jurisdiction. However, the CFC focused on the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396a-396g, and held that IMLA alone did not confer sufficient control or supervision over the setting of royalty rates to establish a compensable trust. See, e.g., 46 Fed. Cl. at 220, 227, 228-34. This Court reversed, relying on IMLA but also mentioning 25 U.S.C. § 399 and the Indian Mineral Development Act ("IMDA"), 25 U.S.C. §§ 2101-08. 263 F.3d at 1330-32; see 347 F.3d at 1328. The Government's petition for certiorari focused solely on its duties under IMLA, and the Supreme Court's analysis was limited to IMLA, with passing references to IMDA and § 399. See 537 U.S. at 493, 506. The Supreme Court reversed and remanded.

On remand, this Court held that the Supreme Court's decision did not foreclose the Nation's claim based on a network of treaties, statutes, and regulations. This Court directed the CFC to determine: (1) if the Nation "waived a claim with respect to a 'network of other statutes and regulations'" and, if not, (2) "whether, apart from IMLA, section 399, and IMDA, 'a network of other statutes and regulations' imposes 'judicially enforceable duties upon the United States' in connection with the Peabody lease, and if so whether such duties were breached." 347 F.3d at 1332. This Court instructed the CFC to perform the latter task "in light of our own previous decisions

in related areas . . . ." Id.

In the CFC, the Nation argued that it had not waived the network claim and that the governing authorities impose both compensable trust management duties and specific duties of care, candor, and loyalty, all breached by the Government. The Nation urged again, as it had demonstrated earlier, that the royalty rate approved for the extraordinarily valuable Navajo coal was less than the minimum rate that the Government required for its own. E.g., JA3568.

The CFC held that the Nation had not waived its "network" claim. 68 Fed. Cl. at 808. However, it did not address the Nation's unrebutted showing that the approved royalty rate was less than the minimum that the Government demands for its own coal. The CFC also rejected the Nation's position that the governing authorities together imposed fiduciary duties to manage Navajo coal and individually imposed specific compensable trust duties. With no substantive discussion of this Court's governing precedents, the CFC merely adhered to its previous "jurisdictional" holding, see id. at 806, 811, 815, apparently believing that the Supreme Court had "restored" or "reinstated" its earlier judgment, contrary to this Court's decision. See 68 Fed. Cl. at 807, and cf. 347 F.3d at 1330-31; Quern v. Jordan, 440 U.S. 332, 337

(1979) (Supreme Court reviews appellate decisions, not those of trial courts).[1]

STATEMENT OF THE FACTS

The CFC set forth the facts in great detail. 46 Fed. Cl. at 221-24. This Court adopted them. 263 F.3d at 1327-28. The Supreme Court relied on them and did not question the CFC's finding that the Secretary had "flagrantly dishonored" his trust duties. 537 U.S. at 495-501. Thus, the facts are only summarized here.[2]

The coal at issue "is maybe the best deposit in the country, maybe in the world." Charles F. Wilkinson, Home Dance, the Hopi and Black Mesa Coal, 1996 B.Y.U.L.Rev. 449, 475 (1996); JA710 (coal is "exceptionally valuable"). Notwithstanding that mineral wealth, Congress learned that the Navajo people were living in "abject poverty," S. Rep. No. 81-550 at 4-5 (1949), and that 80% of Navajos were illiterate, all-weather roads were "practically nonexistent" on a reservation the size of West Virginia, and public health and other services were "completely inadequate," H.R. Rep. No. 81-963 at 3-4 (1949). Therefore, "[f]or the first time,"

---

[1] The Nation does not appeal from the denial of its motion to strike stray documents provided by Peabody's customer and attached to the Government's Supplemental Brief after the CFC denied Peabody's motion to file an amicus brief, see JA3460, because the CFC did not rely on any of those documents. However, the Nation preserves its position regarding that erroneous ruling if the Government or any amicus relies on those documents.

[2] An extensive statement of the undisputed facts is set forth in the Nation's Brief-in-Chief in the prior appeal, No. 00-5086 (Aug. 25, 2000) at 8-20.

Congress considered a bill dealing comprehensively with the needs of tribes in a specific region, "rather than by function, such as education and health, on a nation-wide basis," H.R. Rep. No. 81-963 at 2, and enacted the Rehabilitation Act, 25 U.S.C. §§ 631-38.

Under the Rehabilitation Act and other federal statutes and regulations, the United States controls every aspect of Navajo coal development, "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), cert. denied, 490 U.S. 1051 (1989). The coal leases at issue were drafted and approved by the Department of the Interior under the Rehabilitation Act. Stewart L. Udall Decl., JA3575; Sullivan Affidavit ¶ 9, JA4262; Austin v. Andrus, 638 F.2d 113, 114 (9th Cir. 1981). Indeed, the Peabody "leases and related developments were the centerpiece of the resources development program under the . . . Rehabilitation Act." JA3575 (Udall Decl.).

The Peabody lease initially provided an "extremely low royalty rate," 46 Fed. Cl. at 221, "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 Nation, 537 U.S. at 496. Federal agencies recognized the unfairness of the royalty rate from 1978 through 1984. E.g., JA351-54, 364.

But Article VI of the lease authorized the Secretary to adjust the royalty rate

in 1984. 46 Fed. Cl. at 221. The Secretary's delegate, a BIA Area Director, "implemented Article VI and significantly raised the royalty rate to twenty percent" based on federal studies. Id. at 222; JA406-36. Peabody "appealed the Area Director's decision formally in July 1984." Id. The deciding official in the appeal commissioned additional federal studies, all of which confirmed the propriety of the 20% rate. JA610-15, 649-714. In June 1985, after receiving briefs, reviewing the additional studies, and going over a proposed final decision line-by-line with his staff and legal counsel, "the decision document affirming the Area Director's decision awaited [the] signature" of the deciding official, Acting Assistant Secretary John Fritz. 46 Fed. Cl. at 222; JA1246.

However, someone in the Solicitor's Office leaked the pending decision to Peabody. JA725, 1089-90. So Peabody hired Stanley Hulett, Interior Secretary Hodel's close friend, to influence Hodel ex parte. JA746. Hulett met secretly with Hodel, and Hodel immediately agreed to sign a memorandum, prepared by Peabody's attorneys in the appeal, directing Fritz to withhold the decision. Id.; 46 Fed. Cl. at 222-23. Hodel then directed Fritz to mislead the Nation, and the Solicitor's Office did so. 46 Fed. Cl. at 223; see JA771.

The Nation opposed continued negotiations, and had so informed the Secretary. E.g., JA751, 767. Nonetheless, the Secretary facilitated Peabody's "maximum delay"

strategy, see JA452, violating his own regulation designed to protect tribes from corporate overreaching, 46 Fed. Cl. at 229 (citing 25 C.F.R. § 211.2); JA2048-49 (PPFs 262-64).[3] The Nation endured two more years of negligible royalties. It negotiated with Peabody both "unarmed with critical knowledge," 46 Fed. Cl. at 227; see JA4214-19, and "facing severe economic pressures," Navajo Nation, 263 F.3d at 1328.

The royalty rate in the resulting "negotiated" 1987 lease amendments was "well below the rate that had previously been determined appropriate" by Interior officials. 46 Fed. Cl. at 226-27. Moreover, the Navajo Nation had to give up $88 million in back royalties and taxes to get the facial 12½% rate, and the effective royalty rate was well below 12½%, the minimum for federal coal. JA2058, 2064 (PPFs 315, 350); see JA787, 3673-74; 30 U.S.C. § 207(a).[4]

In September 1987, both the Nation and the BIA requested the Department to review the "negotiated" lease amendments to determine if they were in the Nation's

---

[3] The Plaintiff's Proposed Findings ("PPFs") cited in this brief are all unchallenged by the Government.

[4] The Nation urged this repeatedly, see JA107, 124, 133, 1973 (Motion for Summary Judgment (Dec. 15, 1997) at 25, 40, 49, and Ex. 136); JA2046, 2058 (PPFs 247, 315); JA2771, 2796 (Consolidated Response (June 17, 1998) at 8, 33), yet the CFC stated that the Nation had not done so, 46 Fed. Cl. 233, and then inexplicably refused to correct this basic error, either in response to the Nation's Rule 59 motion, JA3382-83, or upon the Nation's further showing on remand, JA3568, 3673-74.

best interest. JA836-37. They did so under regulations published as final that required economic analyses of proposed mineral lease amendments, see 52 Fed. Reg. 31,916, 31,933 (Aug. 24, 1987) (promulgating 25 C.F.R. § 211.34), because such analysis is essential to "ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable compensation," see 52 Fed. Reg. at 31,930 (promulgating 25 C.F.R. § 211.1(a)), 31,918, 31,922. However, any economic analysis of these lease amendments would have shown their unfairness, see, e.g., JA2051-56 (PPFs 279, 281-302), and the Department suspended the rules' effective date shortly after the Nation's and BIA's requests. Assistant Solicitor Field, who "shepherded" the lease amendments through the Department for Peabody, JA920; JA2047 (PPF 254), was responsible for the legal advice leading to the deferral at the behest of "industry." 52 Fed. Reg. 39,332 (Oct. 21, 1987). Six weeks later, Secretary Hodel privately committed to Peabody to approve the lease amendments, without even a recommendation from any Interior employee. JA2056-57 (PPFs 304-06). The merits of the transaction were simply irrelevant to Interior. JA2047, 2051 (PPFs 252-53, 277-78).

These facts amply support the CFC's findings that the United States violated the most basic trust duties of care, loyalty, and candor:

> [W]e find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

46 Fed. Cl. at 226.

SUMMARY OF THE ARGUMENT

The coal at issue is held in trust. Its development was authorized under the Rehabilitation Act, which seeks in unmistakable terms to promote the Nation's best interests. Under the Rehabilitation Act and other statutes, regulations, and the lease itself, the United States controls or supervises every aspect of Navajo coal development, from lease creation, negotiation and approval; to royalty setting, collection, and audit; and to daily operations and land reclamation. This comprehensive control over Navajo coal creates a classic Mitchell II jurisdictional trust, as "virtually every stage of the process is under federal control." United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 222 (1983). Moreover, several governing authorities impose specific duties of care, candor, and loyalty. The Government's proven violations of all these duties resulted in an effective royalty rate less than the federal minimum.

Rather than analyzing the claim with reference to precedents of this Court, as

instructed, the CFC largely adopted its own prior analysis of the case, and continued to rely on a case that was overruled sub silentio by this Court in Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996). The CFC ruled that no jurisdictional trust existed here, stating that none of the authorities "'impose specific duties regarding the Secretary's adjustment of royalty rates for coal.'" 68 Fed. Cl. at 812 (quoting 46 Fed. Cl. at 233).

To the contrary, where the governing statutes and regulations establish more than a "bare trust" by imposing federal control or supervision over all aspects of the leasing and development of a tribal resource, the Government's money-mandating duties include the common-law duties of a trustee engaged in the management of trust assets. Even if specific duties concerning royalty setting must be set out in applicable authorities, specific duties of care, loyalty, and candor in royalty setting are imposed by the Rehabilitation Act and the Indian Lands Section. The Government's violations of these duties mandate compensation.

ARGUMENT

I. THE CFC'S DECISION IS REVIEWED *DE NOVO* AND GOVERNING STATUTES AND REGULATIONS MUST BE GENEROUSLY CONSTRUED IN FAVOR OF THE NATION.

The CFC resolved this case on cross-motions for summary judgment, and the grant and denial of those motions are both reviewable. See Little Six, Inc. v. United

States, 280 F.3d 1371, 1373-74 (Fed. Cir. 2002). The CFC's judgment on cross-motions for summary judgment and its dismissal on jurisdictional grounds are reviewed de novo without deference, because the decision below turns on whether the treaties, statutes, and regulations are money-mandating, see Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc). Also, because the CFC's denial of the Nation's motion for summary judgment was based on those grounds, review of that decision is also without deference. See id.; MNOPF Trustees Ltd. v. United States, 123 F.3d 1460, 1463 (Fed. Cir. 1997) (de novo review of statutory interpretation); Little Six, Inc. v. United States, 210 F.3d 1361, 1363, 1366 (Fed. Cir. 2000) (summary judgment denial generally reviewed for abuse of discretion, but misinterpretation of statutory scheme constitutes abuse of discretion), vacated on other grounds, 534 U.S. 1052 (2001), op. after remand, 280 F.3d 1371 (Fed. Cir. 2002).

Where the merits and jurisdiction are intertwined and the case is resolved on summary judgment, see 46 Fed. Cl. at 227, review of jurisdictional fact finding is plenary, see, e.g., Lawrence v. Dunbar, 919 F.2d 1525, 1530 (11th Cir. 1990) (per curiam). In such a case, the evidence on both jurisdiction and the merits is construed favorably to the appellant. See Little Six, 280 F.3d at 1374 (merits); Bell v. United States, 127 F.3d 1226, 1228 (10th Cir. 1997) (jurisdiction).

In interpreting statutes, this Court properly resolves doubts in favor of Indians. Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1352 (Fed. Cir. 2004), cert. denied, 544 U.S. 973 (2005). The trust relationship requires similar interpretation of regulations. HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000). Therefore, when a tribe invokes CFC jurisdiction, the relevant statutes and regulations must be construed generously in light of the undisputed general trust relationship. Mitchell II, 463 U.S. at 225.

II. THE CFC HAD JURISDICTION OVER THE NATION'S CLAIM BECAUSE THE APPLICABLE AUTHORITIES ARE FAIRLY INTERPRETED AS "MONEY-MANDATING."

A. Compensable Trust Duties Are Inferred from Statutes and Regulations That Either Impose Federal Supervision or Control or Prescribe Specific Conduct.

CFC jurisdiction and the "money-mandating" nature of the relevant authorities are decided in a single step in which the trial court determines both "whether the statute provides the predicate for its jurisdiction and . . .whether the statute on its merits provides a money mandating remedy." Fisher, 402 F.3d at 1173. A statute is money-mandating "if it 'can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s].'" Id. (quoting Mitchell II, 463 U.S. at 217).

> This "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity . . . . It is enough, then, 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.

Id. at 1173-74 (quoting, with emphasis added, United States v. White Mountain Apache Tribe, 537 U.S. 465, 472-73 (2003)).

Statutes, regulations, and other fundamental documents that apply to Indian trust property create money-mandating duties if, taken together, they impose federal management responsibilities regarding that property. In such cases, "it naturally follows that the Government should be liable for breaches of the duties they impose." Mitchell II, 463 U.S. at 226. Whether such management duties exist depends on if the authorities create a "bare" trust with no federal management or if they impose federal supervision or control over the trust property. See Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (Fed. Cir. 2005). Thus, compensable trust duties do not exist under the General Allotment Act which, while creating an express trust, provides that the Indian "allottee, and not the United States, was to manage the land," United States v. Mitchell, 445 U.S. 535, 543 (1981), or under the approval requirement of IMLA, which "neither assigned a comprehensive managerial role, nor . . . expressly invested [the Secretary] with responsibility to secure 'the needs and best

interests of the Indian owner . . . .'" Navajo Nation, 537 U.S. at 507-08.

In contrast, compensable trust management duties apply where statutes and regulations require the Secretary to "manage Indian resources so as to generate proceeds for the Indians," Mitchell II, 463 U.S. at 226-27; see also Cobell v. Norton, 310 F.Supp.2d 98, 100 (D.D.C. 2004) (trust asset "management" consists of "actions that control, govern, administer, supervise or regulate the use or disposition" of trust assets). Also, a statute that subjects Indian property to an express trust and actual federal control gives rise to a "fair inference" that the Indian owner may recover damages for the Government's failure to comply with common law trust duties, White Mountain, 537 U.S. at 473-75; see id. at 481 (Navajo suit failed because the provisions of IMLA at issue assigned "no managerial role over coal leasing") (Ginsburg, J., concurring). Therefore, where the backdrop of a general trust relationship exists, statutes and regulations that go beyond the "'bare' or minimal level" create money-mandating trust obligations. White Mountain, 537 U.S. at 477-78; Mitchell II, 463 U.S. at 224-26; Shoshone, 364 F.3d at 1352-53.

Contrary to the CFC's requirement that the Nation must identify a particular statute or regulation that expressly invests the Government with the power to negotiate and set royalty rates, e.g., 68 Fed. Cl. at 811, 812, enforceable trust duties are created even when the applicable statutes and regulations do not expressly impose

the duties alleged to have been breached. In White Mountain, the statute did not "expressly subject the Government to duties of management and conservation," but the Court inferred a compensable duty to preserve and maintain the trust asset. 537 U.S. at 475. In Mitchell II, no statute expressly required the Government to ensure market value for Indian timber or develop a road system to maximize sales, but the Court upheld those claims where "[v]irtually every stage of the [timber harvesting] process is under federal control." 463 U.S. at 223; see id. at 210 (noting claims), 224-29 (finding jurisdiction without tying specific statute or regulation to particular claims). Similarly, there is no need for a statute to expressly establish the trust; federal control or supervision suffices. Mitchell II, 463 U.S. at 225; Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980).

Finally, particular statutory or regulatory provisions may impose duties that are fairly interpreted, individually, as mandating compensation for breaches of the duties they impose. See, e.g., Shoshone, 364 F.3d at 1351-54; Duncan v. United States, 667 F.2d 36, 43 (Ct. Cl. 1981), cert. denied, 463 U.S. 1228 (1983). But even in that situation the relevant statutes and regulations are not properly read either in isolation or with the same rigor as statutes asserted to waive the Government's immunity, as the CFC did below. Rather, to determine if such individual statutes or regulations are money-mandating, this Court "looks not only to the particular statutory language, but

to the design of the statute as a whole and its object and policy." Samish, 419 F.3d at 1353 (citation omitted); see generally White Mountain, 537 U.S. at 472-73, 477.

The CFC failed to apply the general federal control or supervision test mandated by Mitchell II and White Mountain, and misstated and misapplied the alternative test under Shoshone and Duncan. The correct application of the proper tests requires reversal.

B. The United States' Comprehensive Control of Navajo Coal Leasing, Royalties, and Development Establishes Jurisdiction.

The United States controls or supervises every aspect of Navajo coal development, "from the creation of its leases to the reclamation of land." Peabody Coal, 761 P.2d at 1099. This control or supervision creates compensable trust management duties, a classic Mitchell II trust.

The applicable authorities are interrelated and mutually reinforcing. Statutes passed in the first Congress prohibit conveyances of Indian resources without federal approval. The two Navajo treaties establish the foundation of the trust relationship concerning Navajo resources. IMLA set a floor for royalties for Indian mineral development generally. When the conditions on the Navajo Reservation demanded more than that floor, Congress specifically addressed mineral development there in the Rehabilitation Act, providing concrete goals and requiring adherence to particular

trust duties. The Peabody lease, drafted by the Interior Department to effect the goals of the Rehabilitation Act, expressly reserved federal authority to administer its terms, including the exclusive power to adjust the royalty rate.

The Government's exclusive authority to grant rights-of-way on Navajo land enhances federal control over Navajo coal, and has reinforced the Government's acknowledged duty of care to provide fair coal royalties to the Navajo Nation. The Indian Lands Section serves analogous purposes for non-renewable coal resources as the sustained-yield statute served for timber in Mitchell II. It also independently confirms the Secretary's control of coal lease terms and establishes duties of care and loyalty by requiring inclusion of lease terms desired by Indian tribes.

Finally, the Government's detailed and exclusive responsibilities over coal royalties under FOGRMA serve the aims of the Rehabilitation Act under which this lease was issued – to further the purposes of the Navajo treaties and allow the Nation to attain economic self-sufficiency.

1. The Nonintercourse Act, two Treaties, the 1884 Executive Order, and the 1934 boundary bill establish the foundation of trust duties.

Federal law has strictly controlled the sale or lease of tribal property through the Trade and Intercourse Act since the founding of the Republic. See 25 U.S.C. § 177; Wheeler v. United States, 435 U.S. 313, 326 (1978). The United States

specifically applied the policy of the Trade and Intercourse Act to the Nation in the 1849 Treaty. Under that treaty, the Nation submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo. 9 Stat. 974. In exchange, the Government promised to give the Treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo. Id. at 975. Those commitments indicate the Government's "willing assumption" of trust duties concerning Navajo resources, see Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 n.1 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as modified on other grounds, 782 F.2d 855 (en banc), supplemented, 793 F.2d 1171, cert. denied, 479 U.S. 970 (1986), and such statutory and treaty-based restrictions inform the analysis of CFC jurisdiction over Indian claims. See Brown, 86 F.3d at 1562; Navajo Tribe v. United States, 9 Cl. Ct. 227, 232 (1985).

The 1868 Treaty, 15 Stat. 667, established a homeland for the Navajo, which was expanded by the May 17, 1884 Executive Order adding the land at issue here to the Reservation. I Charles J. Kappler, Indian Affairs, Laws and Treaties 876 (1904). In the Act of June 14, 1934, ch. 521, 48 Stat. 960-62, Congress confirmed Navajo beneficial title to this property. Sekaquaptewa v. McDonald, 619 F.2d 801, 805 (9th Cir.), cert. denied, 449 U.S. 1010 (1980). Thus, the coal at issue is held in trust.

Navajo Nation, 537 U.S. at 495.

2. The Rehabilitation Act governs Navajo coal leasing.

In 1938, Congress exercised its general control over tribal minerals by passing IMLA.[5] That statute proved inadequate to protect the Nation. Accordingly, Congress enacted the Rehabilitation Act in 1950 after learning that the Navajo people were living in abject poverty and lacked even third-world government services and utilities. Congress therefore legislated for the first time to remedy the unique problems of particular tribes, the Navajo and Hopi.

The Rehabilitation Act authorized and directed the Secretary to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo" including its coal, to "further the purposes of existing treaties with the Navajo Indians." 25 U.S.C. § 631. The Secretary was directed to make available such resources "for use in promoting a self-supporting economy and self-reliant communities" so that the Navajo may "ultimately attain standards of living comparable with those enjoyed by other citizens." Id. That goal remains elusive, as the Navajo remain the "poorest of America's poor." JA1950.

The Rehabilitation Act establishes standards for the Secretary in its

[5] This Court ruled that IMLA cannot be included in the network. 347 F.3d at 1332. However, the Nation preserves its argument that all relevant statutes should be considered.

implementation, codifying the trustee's duty of candor and loyalty by expressly requiring the Secretary to keep the Nation informed about actions taken thereunder and to "consider the recommendations of the tribal councils and [to] follow such recommendations whenever he deems them feasible and consistent with the objectives of [the Act]." 25 U.S.C. § 638. These provisions certainly governed the Government's setting and adjustment of royalty rates for Navajo coal here, because the Peabody leases, drafted and approved by the Secretary, were the "centerpiece" of the Rehabilitation Act's development program. JA3575 (Udall Decl.). The CFC's conclusion that the Rehabilitation Act "adds no more substance to the Secretary's duties respecting royalties," 68 Fed. Cl. at 813, is wholly unfounded.

As former Secretary Udall testified, in "planning and decision making [for the Peabody leases 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." JA3575. The Department has consistently maintained that interpretation. See First Mesa Consol. Villages 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 (IBIA is "an authorized representative of the Secretary").[6] That interpretation is entitled to substantial deference. See Udall v. Tallman, 380 U.S. 1, 16 (1965); Duncan, 667 F.2d at 42.

3. Federal regulations govern all aspects of Navajo mineral leasing and must be construed consistent with the Rehabilitation Act.

IMLA addressed tribal mineral leasing generally in 1938, and the Rehabilitation Act did so more recently in 1950, focusing specifically on mineral leasing on the Navajo and Hopi reservations. The Rehabilitation Act authorized leasing "under such regulations as may be prescribed by the Secretary," 25 U.S.C. § 635(a), and the Secretary chose largely to use regulations developed under other mineral leasing laws, Austin, 638 F.2d at 114. Therefore, the Rehabilitation Act and the older mineral leasing statutes must be construed together, and the applicable regulations typically associated with leasing under other Indian mineral leasing statutes must be construed and applied consistently with the more specific policies, goals, and provisions of the Rehabilitation Act. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 143 (2000); Theiss v. Witt, 100 F.3d 915, 919 (Fed. Cir. 1996).

The Government controls or supervises every aspect of Navajo coal

[6] Unless otherwise indicated, all C.F.R. citations are to the 1987 edition.

development, "from the creation of its leases to the reclamation of land." Peabody Coal, 761 P.2d at 1099; JA3590-92. Notably, the breadth and degree of federal control and supervision over Navajo coal under applicable authorities is far greater than that over Indian oil and gas. This the Government effectively conceded, see JA2108, 2986, and the Nation's Rule 59 submission further demonstrated, after the CFC ruled sua sponte to the contrary. JA3350-79, 3388-3438. That showing remains unrebutted.

Regulations governing all tribal mineral development, including leasing under the Rehabilitation Act, impose "uniform leasing procedures designed to protect the Indians." Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985). They address the size and shape of leases, their duration, the right of the Government to purchase the minerals, the requirement that tribes get permission from the BIA before negotiating lease terms, limitations on the duration of negotiations, bonding and collateral, submission of corporate information, rents and royalties, and lease approval and cancellation by the Secretary. See 25 C.F.R. Part 211. At all times, the Department required mineral leases to be on forms prescribed by the Secretary. See Navajo Tribe, 9 Cl. Ct. at 236 (1938 regulations); 25 C.F.R. § 211.30. These and other requirements support money-mandating duties in lease approval and administration. See, e.g., Brown, 86 F.3d at 1561-62.

Three substantive changes to these regulations before 1987 concerned minerals other than oil and gas, and expanded federal oversight and control over them. In 1958, the Department applied the auction process used for oil and gas leases to hard-rock minerals unless the BIA "grants to the Indian owners written permission to negotiate for a lease." 23 Fed. Reg. 9393 (promulgating 25 C.F.R. 171.2 (1958), redesignated to 25 C.F.R. § 211.2). That rule strictly regulated the conduct of negotiations, by allowing the tribal mineral owner 30 days to negotiate, plus a "reasonable extension" if requested before that period expired. Id. The second amendment effectively prohibited royalty reductions for hard-rock mineral leases during economic downturns. See 24 Fed. Reg. 9510 (1959) (promulgating 25 C.F.R. § 171.14a (1960), redesignated to 25 C.F.R. § 211.14a). The third amendment imposed comprehensive requirements on surface exploration, mining, and reclamation. 34 Fed. Reg. 813 (1969) (promulgating 25 C.F.R. Part 177 (1970), redesignated to 25 C.F.R. Part 216, Subpart A).

In addition, the Navajo Nation and BIA both sought review of the lease amendments under regulations published as final on August 24, 1987. 52 Fed. Reg. 31,916. These final rules, to be effective September 23, 1987, id., were "intended to ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable remuneration," 52 Fed. Reg. at 31,930 (25 C.F.R. § 211.1(a)), and

specifically required the Secretary to "prepare a written economic assessment" of a lease amendment, id. at 31,933 (25 C.F.R. § 211.34(b)). But this requirement, like the royalty adjustment, was scuttled when the Department deferred the effective date at the behest of "industry" and under the guidance of Associate Solicitor Field, the person responsible for "shepherding" the lease amendments through for Peabody. See supra at 9.

Binding Departmental policies have always required that the best interests of the Indians be served when leasing their minerals. The applicable Department Manual states that its mission is to assist Indian landowners to "realize maximum benefits" from trust resources. JA238 (130 DM 1.3E (1987)). The applicable Bureau of Indian Affairs Manual applies the 12½% royalty rate to coal, and requires higher rates where the land is on a proven structure, as here. JA244-46 (54 BIAM O, § 604.05 (1984)). The Department's 1975 Coal Leasing Policy on Indian Lands, binding at all relevant times, explicitly adopts the best interest standard, and also requires the Department to provide tribes with "technical advice and assistance to assure that . . . development will provide . . . a fair monetary return reflecting the true value of their developed coal resources." JA332, 1862-63. Secretary Andrus set 12½% as the "absolute minimum" royalty rate for Indian coal in 1977, specifically referencing the trustee's duty of care, and that policy was also binding at all relevant

times. JA334, 1872. Indeed, after reviewing economic analyses, Secretary Andrus had rejected a proposed Navajo coal lease amendment that he found not to be in the Nation's best interest. JA1997 (PPFs 43-46); 336-50.

4. The Rehabilitation Act, general mineral leasing regulations, and the Indian Land Section impose Federal control or supervision over all stages of Navajo coal development.

In addition to other regulations, Navajo coal leases are governed by regulations that require federal approval of exploration plans and mining plans and limit the role of the Nation. See United Nuclear Corp. v. United States, 912 F.2d 1432, 1434, 1438 (Fed. Cir. 1990). These rules provide for performance bonds payable to the Secretary and detailed reporting to the Department, suspension of operations by federal mining supervisors, and appeals of decisions under Departmental rules. See id. at 1434; 25 C.F.R. Part 216, Subpart A. This substantial additional layer of federal control and supervision was adopted in 1969 pursuant to existing mining laws for the "interest of the Indian owners" and to "protect[ ] and conserv[e] . . . nonmineral resource[s]." 25 C.F.R. §§ 216.1, 216.2(a). These special regulations apply to leases of Indian coal issued under all authorities, such as the Rehabilitation Act. See 25 C.F.R. § 216.2(a). There is no comparable federal control of Indian oil and gas operations; indeed, these regulations exclude oil and gas operations. 25 C.F.R. § 216.2(b).

When Congress enacted SMCRA in 1977, it included a special provision

governing Indian coal, 30 U.S.C. § 1300, knowing that the Nation was one of only four tribes to benefit, see, e.g., H.R. Rep. No. 95-218 at 84 (1977); H.R. Rep. No. 94-45 at 78 (1975). The Indian Lands Section establishes yet more pervasive federal control over all surface coal mining activities on Navajo lands, and it confirms Secretarial control and duties regarding the terms of Indian coal leases and lease amendments. See id. § 1300(c)-(f). Regulations promulgated under the Indian Lands Section in 1977 and 1984 govern Peabody's operations. See Hopi Tribe v. OSMRE, 109 IBLA 374, 381 n.16 (1989); Peabody Coal Co., 123 IBLA 195 (1992). These regulations also independently mandate compliance with the special 1969 Indian mining regulations. See 30 C.F.R. §§ 750.6(b), 750.6(d)(3), 750.11(c)(3), 750.12(d)(1), 750.15, 750.18(c); see also 30 C.F.R. § 750.12(c)(3)(i) (incorporating certain provisions of 25 C.F.R. Part 211).

Congress could have left these matters to the tribes to regulate under their own laws but opted for federal regulation, 30 U.S.C. § 1300(c), (d), while requiring the Secretary to submit "proposed legislation designed to allow Indian tribes to elect to assume regulatory authority on Indian lands," id. § 1300(a); In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1363-65 (D.C. Cir. 1980). The Secretary chose to keep exclusive authority to regulate such mining, and has not submitted any such proposed legislation. Id. at 1365 & n.21. Thus, Congress has yet to allow tribes to

regulate surface coal mining on their own lands.

Regulations controlling surface coal mining operations under the Indian Lands Section were promulgated in 1977. 42 Fed. Reg. 63,394 (promulgating 25 C.F.R. Part 177, redesignated as 25 C.F.R. Part 216, Subpart B). These regulations control signs, postmining land use, grading, waste disposal, topsoil preservation, protection of hydrologic systems, impoundments, revegetation, steep-slope mining, and federal inspections and enforcement. Id.

The Department promulgated a third set of regulations governing surface coal mines on Indian lands in 1984. 49 Fed. Reg. 38,462 (1984) (amending 30 C.F.R. Parts 700, 701 and 710, and promulgating 30 C.F.R. Parts 750 and 755). These regulations require, as does the Indian Lands Section itself, that the "Secretary shall include and enforce in such leases [issued after 1977] terms and conditions which are requested in writing by the Indian tribe whose interest is affected by such leases." 30 C.F.R. § 750.20(b) (implementing 30 U.S.C. § 1300(e)). That regulation, like others under the Indian Lands Section, was promulgated to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation," 49 Fed. Reg. 38,462 (1984), and to honor the "special relationship between the U.S. Government and the Indian tribes," id. at 38,464; see 123 Cong. Rec. 15,575 (May 19, 1977) (referring specifically to the Navajo and Hopi Reservations, Senator Goldwater states

that the Indian Lands Section "deals specifically with how the Indians will be protected, and so forth, as they negotiate"). Moreover, the regulations charge BIA with "[c]onsulting directly with tribes and providing representation for" Indian tribes, and with making recommendations on their behalf. 30 C.F.R. § 750.6(d). The regulations explicitly deny the Secretary authority to delegate to tribes duties regarding the regulation of surface coal mining operations, because "[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain with the BIA." 49 Fed. Reg. at 38,469.

The 1984 regulations establish the federal Office of Surface Mining Reclamation and Enforcement ("OSM") as "the regulatory authority on Indian lands," 30 C.F.R. § 750.6(a)(1), empowered to approve or disapprove permits to conduct operations on Indian lands, conduct inspections, require operators to protect non-coal resources, approve bonds and insurance, and require compliance with federal environmental laws, id. § 750.6(a). Here, the federal permit application under 30 C.F.R. §§ 750.11 and .12 requires a wall full of three-ring binders; by contrast, an application to drill an oil and gas well on Indian lands is only one page long. JA 3394, 3396-3410.

The regulations designate the federal Bureau of Land Management ("BLM") as the agency responsible for approving and enforcing coal exploration plans and

mining plans on Indian lands, administering lease terms, and verifying production for royalty purposes. 30 C.F.R. § 750.6(b). They even designate the Mineral Management Service ("MMS") as the federal agency responsible for collecting and accounting for royalties from Indian minerals. Id. § 750.6(c); see id. § 750.1.

The 1984 regulations allow federal officials, not the Indian landowner, to determine if tribal lands are "unsuitable for mining." 30 C.F.R. § 750.14. They require coal exploration to be conducted in accordance with 25 C.F.R. Part 216 or 43 C.F.R. Part 3480. 30 C.F.R. § 750.15. They require operators to comply with either 25 C.F.R. Part 216, Subpart B, or, after a federal permit is issued, with the performance standards of 30 C.F.R. Parts 816-17, 819, 822-23, 827-28. 30 C.F.R. § 750.16. They require bonding in accordance with 30 C.F.R. Subchapter J (i.e., Parts 800-828). 30 C.F.R. § 750.17. They provide for federal inspections and enforcement of the regulations, with appeals going to federal adjudicators. 30 C.F.R. § 750.18. They require federal certification of blasters. 30 C.F.R. § 750.19. The regulations even amend all Indian coal leases to require compliance with federal performance standards. See 30 U.S.C. § 1300(c), (d); 30 C.F.R. § 750.20(a). Clearly, as in Mitchell II, "[v]irtually every stage of the process is under federal control" under the Indian Lands Section.

5. The Secretary controlled the setting of the royalty rate under the lease, the Rehabilitation Act, the Indian Lands Section, and binding Departmental policies.

The Secretary had exclusive control over the royalty rate under the lease, and comprehensive supervision and control over royalty rates of Indian mineral leases generally. The contours of the Secretary's compensable trust management duties therefore include central issues in this case – the Secretary's decisions to scuttle a well-supported royalty rate adjustment and to approve a deal with royalty rates the Department knew to be unfair to the Navajo.

In a case involving trust management duties through comprehensive federal control or supervision of tribal property, the network includes any "fundamental document." See Mitchell II, 463 U.S. at 225; White Mountain Apache Tribe, 249 F.3d at 1380. A mineral lease is such a "fundamental document." Pawnee v. United States, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

Article VI of the lease grants exclusive control over setting the royalty rate to the Secretary. JA284. The IMLA form lease contained no such term, JA3648–52; that extraordinary term furthers the more focused purposes of the Rehabilitation Act. The Government conceded that "the Secretary's duties in the administration of mineral leases are admittedly quite comprehensive . . . and might therefore give rise to a claim for money damages if breached." JA2986; see Wright & Miller, Federal

Practice and Procedure § 2722 at 390-91 (3d ed. 1998) (such concession is an "admission on file" under Rule 56). And the Government had assured the Nation that it would pursue its "responsibility" under this lease provision. E.g., JA379.

The Chairman of the Navajo Tribal Council, and its legal department, requested in writing that the Secretary adjust the royalty rate to a reasonable rate, even as the Secretary was making his secret deal with Peabody. E.g., JA480-81, 608, 646-47, 750-51, 766-67. All federal studies found that an adjustment to 20% was fair and reasonable. JA671-93, 705-14. The Department had an express statutory duty under the Rehabilitation Act and the Indian Lands Section to include that term in the lease. See 25 U.S.C. § 638; 30 U.S.C. § 1300(e); 30 C.F.R. § 750.20.

More generally, the Department has always enforced minimum royalty rates through regulations. 25 C.F.R. § 186.15 (1939) (minimum of 10 cents per ton); 25 C.F.R. § 211.15(c) (1987) (same). The Department's 1975 "Coal Leasing Policy on Indian Lands" requires "fair monetary return reflecting the true value" of Indian coal. JA 331-32, 1862-63.

After Congress established the 12½% minimum rate for federal coal in 1976, 30 U.S.C. § 207(a), Secretary Andrus immediately established as binding Departmental policy the 12½% rate as the "absolute minimum" royalty rate for Indian strip-mined coal, reasoning that, "as trustee, I cannot approve a lease which

would return to the beneficiaries of the trust less than I would be required by law to charge for the trustee's . . . identical resources." JA334, 1872. The BIA Manual incorporated the Andrus policy, and required greater than 12½% if "the land is on a proven structure," as here. JA244-46; see also JA 379. These policies, though not published as rules, bound the Government in its dealings with the Navajo. See Farrell v. Department of the Interior, 314 F.3d 584, 591 (Fed. Cir. 2002).

6. Regulations under FOGRMA and the leasing statutes further establish comprehensive Federal supervision and control of Navajo coal royalties.

Just as reports in the 1970s about unfair royalties led to the establishment of the 12½% minimum royalty rate for federal and Indian coal leases, reports in the early 1980s about failings of the Government's royalty management system led to the development of more comprehensive production and accounting systems for Indian coal royalties. In January 1982, the Commission of Fiscal Accountability of the Nation's Energy Resources (the "Linowes Commission") issued its influential report to Congress on these issues. See H.R. Rep. No. 97-859 at 15-16, 42 (1982). The Linowes Commission reported that "'the Federal Government has a special responsibility as trustee for proper management of . . . Indian minerals.'" Pawnee, 830 F.2d at 190 n.3 (quoting Report). Secretary Watt immediately established the MMS to "provide greater management oversight and accountability" for federal and

Indian mineral royalties. Secretarial Order 3071 (Jan. 19, 1982); see 48 Fed. Reg. 35,639 (1983).

The Linowes Commission also concluded 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 Report). Therefore, in FOGRMA, 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 . . . ." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes.

The Secretary reported that new legislation was unnecessary because "MMS already has adequate authority under the mineral leasing laws to obtain from lessees the information necessary to determine and account for royalty payments." See 51 Fed. Reg. 15,763, 15,764 (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 (promulgating 30 C.F.R. Parts 212 and 218), and by establishing the Production Auditing and Accounting System in 1986, see 51 Fed. Reg. 8168 (promulgating 30 C.F.R. Part 216). By promulgating these regulations, the Department satisfied the congressional mandate by "FOGRMA-tiz[ing] the coal industry" – i.e., by treating coal the same as oil and gas regarding royalty collection

and management. Brian E. McGee, Coal Royalty Valuation: The Federal Perspective, 33 Pub. Land & Resources Dig. 111, 150 (1996); JA3435.

In addition, MMS proposed regulations in 1986 for calculating Indian mineral royalties. See 51 Fed. Reg. 4507 (1986). These regulations continued preexisting federal practices intended to yield "long-term maximum rate of return for . . . Indian leases." 52 Fed. Reg. 1840, 1840-41 (1987). They comprehensively govern coal valuation for Indian coal royalties, see 30 C.F.R. § 206.250 et seq. (1989) (redesignated to 30 C.F.R. § 206.450 et seq.), and are "intended 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). Because these regulations continued past practices and standards, 54 Fed. Reg. 1492, 1493 (1989), they are properly considered as part of the network even though not formalized until January 1989. See Pawnee, 830 F.2d at 190; Coast Indian Community v. United States, 550 F.2d 639, 651 (Ct. Cl. 1977).

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., 72 IBLA 337 (1983); Peabody Coal Co., 53 IBLA 261 (1981); Peabody Coal Co., 155 IBLA 83, 95 & n.12 (2001) (concerning 1984 royalty adjustment). It performs these tasks "to meet its congressionally mandated

accounting and audit responsibilities relating to . . . Indian mineral royalty management," 30 C.F.R. § 210.10(a). The CFC erred in disregarding this federal control and supervision as irrelevant or previously rejected. 68 Fed. Cl. at 814.

7. The Indian Right-of-Way Act fills out the Government's comprehensive management authority over Navajo coal.

The Government's comprehensive control over Indian rights-of-way augments its control over Navajo coal development even more than it did over timber production in Mitchell II. The statute and regulations are unchanged since Mitchell II. See 463 U.S. at 223 (citing 25 U.S.C. §§ 323-28 and 25 C.F.R. Part 169). This regulatory scheme exists to protect the Indians' "best interests," 33 Fed. Reg. 19,803, 19,804 (1968), and gives rise to enforceable trust duties, Mitchell II, 463 U.S. at 223-24 & nn.29, 31; Coast Indian Community, 550 F.2d at 652-54.

But unlike timber, rights-of-way for coal strip mines on Indian reservations are also subject to federal control under the Indian Lands Section. See 30 C.F.R. §§ 700.5, 750.11(a). Under these regulations, Peabody must obtain both a right-of-way from the Secretary and a permit from OSM to construct access roads, haul roads, and roads to move its drag lines. See Hopi Tribe v. OSM, 109 IBLA 374 (1989) (concerning Peabody haul road).

This control over rights-of-way augments federal control over other aspects of

Navajo coal development. As trustee, the Department used its control over rights-of-way to seek fair royalties when it learned that Peabody had no valid right-of-way for its access road. JA3640-47. On the other hand, the Department reserves the right to circumvent Navajo consent required for leasing Navajo lands by issuing "rights-of-way" for those lands over Navajo objections if the Nation does not correctly discern its own best interests. Disposal of Rights in Indian Tribal Lands without Tribal Consent, H.R. Rep. No. 91-78 (1969) ("House Report") at 7, 13. Contrary to the CFC's view, 68 Fed. Cl. at 812, federal control over rights-of-way is relevant to the jurisdictional analysis in a case alleging breach of trust asset management duties under Mitchell II. See 463 U.S. at 223-24.

C. Governing Statutes and Regulations Are Fairly Interpreted as Mandating Compensation for Breaches of the Duties They Impose.

1. Jurisdiction exists under the "control or supervision" test.

This Court ordered the CFC to evaluate the Navajo Nation's claim "in light of our own previous decisions in related areas." 347 F.3d at 1332. The CFC did not examine this rich body of case law.

The CFC originally observed that the "United States assumed the responsibility to manage [tribal] minerals such as coal in a fiduciary capacity" and that it would "clearly ha[ve] jurisdiction over breach of trust claims where the corpus of the trust

is a resource over which '[v]irtually every stage of the process is under federal control.'" 46 Fed. Cl. at 228, 231 (quoting Mitchell II). On remand, the CFC acknowledged that the Navajo Nation "demonstrate[d] comprehensive management as well as Federal supervision and control," 68 Fed. Cl. at 813, but then applied an entirely new test for determining jurisdiction. It focused not on whether a statute or regulation confers supervisory authority on the Government, but determined that "the critical inquiry in this case is whether the [statute] restricts the Navajo in a meaningful way concerning economic matters." Id. at 814. It ultimately relied on an old CFC decision, Wright v. United States, 32 Fed. Cl. 54 (1994), app. dis'd, 48 F.3d 1235 (Fed. Cir. 1995), for the proposition that, even with comprehensive management, control, and supervision, an Indian plaintiff must show that the "United States has undertaken full fiduciary responsibilities as to the particular aspect of the relationship complained of" to invoke CFC jurisdiction, 68 Fed. Cl. at 815, and dismissed because none of the cited authorities "impose specific duties regarding the Secretary's adjustment of royalty rates for coal," id. at 812 (quoting 46 Fed. Cl. at 233).

However, both Wright and its test were essentially overruled by this Court in Brown. In Wright the CFC had dismissed a claim for breach of trust concerning commercial leases on allotted Indian land governed by regulations in 25 C.F.R. Part

162. See 32 Fed. Cl. at 57-58. The appeal of that decision was dismissed because the plaintiff did not bother to file a brief. A similar case, also premised primarily on 25 C.F.R. Part 162, was dismissed by the CFC about three months after the CFC's dismissal in Wright, and that second dismissal relied heavily on the CFC's Wright decision. Brown v. United States, 32 Fed. Cl. 509, 517-19 (1994). The Brown plaintiffs appealed, their counsel did file a brief, and this Court reversed. 86 F.3d 1554. Wright is therefore insubstantial authority.

The CFC simply ignored controlling decisions that it was directed to consider on remand which establish the correct test for CFC jurisdiction. Where "the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." Navajo Tribe, 624 F.2d at 987 (quoted with approval in Mitchell II, 463 U.S. at 225). And when the statutes and regulations "clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." Mitchell II, 463 U.S. at 226.

Mitchell II emphasized that, where sovereign immunity has been waived, as in the Indian Tucker Act, the statutes and regulations asserted to create money-mandating rights should not be construed narrowly. Id. at 218-19; accord White Mountain, 537 U.S. at 472. Rather, general trust law is properly used to infer that a statute is money-mandating, White Mountain, 537 U.S. at 477, and a "fair inference will do," id. at 473. Indeed, given the backdrop of the undisputed existence of a general trust relationship, the burden is on the Government to show that "Congress wished, contrary to historical principle, to depart from the norm of fiduciary duty." Mitchell v. United States, 664 F.2d 265, 270 (Ct. Cl. 1981), aff'd, 463 U.S. 206 (1983); see Duncan, 667 F.2d at 43.

A review of governing case law readily confirms that the statutes and regulations here establish fiduciary obligations in the management of Navajo coal. First, Mitchell II supports jurisdiction. In that case, a 1910 statute allowing the Indians to sell timber with federal approval, a section of the 1934 Indian Reorganization Act requiring sustained yield forestry, and the Indian Right-of-Way Act together "clearly established" fiduciary obligations in the management of Indian timber. The Court concluded that those statutes and implementing regulations could "fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property." Id.

at 228. These three statutes and regulations have direct analogs here.

Like the timber sales statute, the Rehabilitation Act allows the Indian to sell the resource with Secretarial approval. 25 U.S.C. §§ 406(a), 635(a). Both statutes were expressly intended to serve the Indians' best interests, and the Rehabilitation Act is directed specifically to the needs of the Navajo Nation and in furtherance of the Government's treaty obligations. 25 U.S.C. §§ 406(a), 631. Moreover, the Department has consistently construed the Rehabilitation Act to impose trust duties in the management of Navajo and Hopi property. First Mesa, 26 IBIA at 28; JA3575 (Udall Decl.). The sustained-yield requirement of the Mitchell II statutes for renewable resources, 25 U.S.C. §§ 407, 466, is found in the Rehabilitation Act, 25 U.S.C. § 632, and its counterpart for non-renewable coal resources is found in the Indian Lands Section, the regulations published thereunder, and Indian mineral leasing regulations intended to 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. §§ 216.1, 216.104. The Indian Right-of-Way Act applies equally to management of timber and coal, and additional requirements apply to rights-of-way associated with surface mining. See Mitchell II, 463 U.S. at 223; Hopi Tribe, supra.

This case involves many significant aspects of federal trust asset management beyond those which sufficed in Mitchell II. For example, the regulation governing

mineral lease negotiations that the Department violated here, 25 C.F.R. § 211.2, was intended to prevent precisely the kind of corporate overreaching that the Department facilitated here. 46 Fed. Cl. at 229. The Indian Lands Section requires that the Secretary include provisions in leases requested by the tribes, 30 U.S.C. § 1300(e), and the regulations implementing that requirement were promulgated to honor the Department's "trust responsibilities" and its "special relationship" with tribes. 49 Fed. Reg. 38,462, 38,464 (1984). The comprehensive royalty collection and management regulations were promulgated to meet "congressionally mandated accounting and audit responsibilities relating to . . . Indian mineral royalty management," 30 C.F.R. § 210.10(a), and in response to congressional concern that Indians were being short-changed, see FOGRMA § 303; Pawnee, 830 F.2d at 190 n.3.

Binding Departmental policies underscored the need to assure that Indian coal lessors received a "fair monetary return reflecting the true value of their developed coal resources," JA331-32; see JA242, 246 (BIA Manual requiring royalty rates greater than 12½% if mine on a proven structure), consistent with the express purpose of the Rehabilitation Act and even the "basic purpose" of the general leasing statute, to maximize revenues to the Indians, Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200 (1985). That is also the reason that the regulations promulgated as final in August 1987, just before the Navajo Nation and the BIA requested review of the

"negotiated" deal, required that the Department to "prepare a written economic assessment" of proposed lease amendments. 52 Fed. Reg. at 31,930 (25 C.F.R. § 211.1(a)); id. at 31,933 (25 C.F.R. § 211.34(b)); id. at 31,918, 31,922 (explaining rationale for requirement). Under all these authorities, the Government controls all aspects of Navajo coal "from the creation of its leases to the reclamation of land." Peabody Coal, 761 P.2d at 1099. This is certainly sufficient for jurisdiction under Mitchell II.

Pawnee also supports jurisdiction. There, the combination of FOGRMA, a mineral leasing act for individual Indian lands (25 U.S.C. § 396), and regulations promulgated thereunder provided jurisdiction over a claim of resource mismanagement. 830 F.2d at 190. In comparison, coal royalty management has been "FOGRMA-tized," Coal Royalty Valuation: The Federal Perspective, 33 Pub. Land & Resources Dig. at 150, the Rehabilitation Act is far more comprehensive and protective of Navajo interests than the single-paragraph § 396 is of allotted minerals, and the regulations cited in Pawnee are applicable to all minerals, see 25 C.F.R. Part 211, or have analogous or additional provisions for coal operations, see 25 C.F.R. Part 216; 30 C.F.R. Part 750; compare 43 C.F.R. Part 3160. These authorities therefore give rise to compensable trust asset management duties under Pawnee.

Brown supports jurisdiction. The plaintiffs in Brown alleged that the

Government breached compensable trust duties by failing to compel the lessees to fulfill their lease payment responsibilities and failing to cancel the lease when they did not. 86 F.3d at 1557. Against the backdrop of 25 U.S.C. § 177, Brown determined that the Indian business site leasing statute, 25 U.S.C. § 415(a), and regulations promulgated thereunder, 25 C.F.R. Part 162, conferred sufficient federal control over the leasing process to provide CFC jurisdiction over a claim of lease maladministration. 86 F.3d at 1561-62.

In Brown, this Court overruled the CFC's dismissal, which was predicated on the CFC's view that the statute did not expressly direct the Secretary to consider the Indians' "best interests or financial needs," that the Secretary's role is "simply confined to approval and fails to contemplate any comprehensive or on-going management responsibilities," and that the regulatory scheme was not "sufficiently pervasive and comprehensive . . . [to] clearly and unambiguously establish[ ] full fiduciary obligations in the United States." See 86 F.3d at 1558. This Court explained that "control" was distinct from "supervision and management" and that either could provide the basis for CFC jurisdiction over a claim of breach of trust. Id. at 1560-61. It determined that jurisdiction was present under the "control" portion of the Mitchell II test, because the Indian lessors could only grant leases that the Secretary approves and on terms and forms that the Secretary dictates, and that the

Indian lessor could not cancel the lease without the Secretary's prior approval but that the Secretary could do so without the Indian's consent. Id. at 1561-62.

This case presents at least as much control as Brown. Here, the Department drafted the original lease and the Secretary had supervening control over lease negotiations, terms, approval, and cancellation. See 25 U.S.C. §§ 635(a), 638; 30 U.S.C. § 1300(e); 25 C.F.R. §§ 211.2, 211.27, 211.30; 30 C.F.R. § 750.20. In addition, the Secretary had exclusive control over the royalty adjustment under Article VI of the lease, a "fundamental document" under Pawnee, and he deliberately abused that authority. Finally, the panoply of statutes and regulations applicable here do grant the Government elaborate powers with respect to coal leases and literal daily supervision over Navajo coal lands, in contrast to the less comprehensive statute and regulations in Brown.

Next, the Mitchell decision of the Court of Claims remains "binding precedent," Shoshone, 364 F.3d at 1354, and supports jurisdiction. There, the court found a money-mandating trust relationship where the three statutes applicable to timber management and sales "all (a) deal[t] with Indian-owned property, (b) directed to be managed and controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which Congress clearly wanted the Indians to obtain the financial benefits." 664 F.2d at 273. That is

precisely the situation here.

Finally, this Court's White Mountain decision supports jurisdiction under the "control" rubric. This Court found that the 1960 statute placing certain property in trust for the tribe, coupled with the Government's authorized use of that property, gave rise to a fair inference of money-mandating duties for the "government to act in accordance with the duties of a common law trustee," even though no statute or regulation set forth "clear guidelines as to how the government must manage the trust property." 249 F.3d at 1377. That approach was approved by the Supreme Court, 537 U.S. at 475, and applies with equal force here. Actual control matters. Id.

2. Money-mandating duties are fairly inferred from the Rehabilitation Act and the Indian Lands Section.

Money-mandating trust duties in the approval of Navajo coal leases are fairly inferred from the Rehabilitation Act alone. The leasing of the coal at issue was done pursuant to 25 U.S.C. § 635(a), which does not explicitly address federal liability for mismanagement or wrongful disposition of the resource. However, in context, it is clear that Congress intended monetary liability. The next subsection concerns leasing of land held in fee by the Navajo Tribe, and provides that "such disposition shall create no liability on the part of the United States." 25 U.S.C. § 635(b). The third subsection authorizes transfers of tribal trust land by the Secretary at the request of

the Navajo Tribal Council to tribal corporations or state municipal corporations and also expressly provides that "the United States shall have no responsibility or liability for . . . the management, use, or disposition of such lands." 25 U.S.C. § 635(c). Under familiar principles of statutory construction, these provisions give rise to a "fair inference" that Congress intended to shoulder liability and responsibility for mismanagement of Navajo property leased under § 635(a) by expressly exempting the United States from liability for similar transactions under subsections 635(b) and (c). See Ventas, Inc. v. United States, 381 F.3d 1156, 1161 (Fed. Cir. 2004).

A comparison with modern Indian mineral leasing statutes that do permit substantial tribal self-determination also gives rise to a "fair inference" that Congress intends the Government to be liable for mismanagement of Navajo coal under the Rehabilitation Act. For example, the Indian Tribal Energy Development and Self Determination Act of 2005, Pub. L. 109-58, to be codified at 25 U.S.C. §§ 2, 9 and 3501-04, permits the tribes to issue mineral leases without Secretarial approval, and provides that "the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease . . . ." 25 U.S.C. § 3504(e)(6)(D)(ii). Similarly, the IMDA expressly limits the Government's liability for "losses sustained by a tribe" under minerals agreements negotiated by tribes thereunder. 25 U.S.C. § 2103(e). Such a limitation on federal

liability is conspicuously absent in 25 U.S.C. § 635(a), again giving rise to a reasonable inference that Congress did not intend to depart from the norm of full fiduciary duty in conveyances under that subsection of the Rehabilitation Act.

In addition, the Rehabilitation Act expressly provides that the Secretary shall keep the Nation informed and to consider and follow the recommendations of the Navajo Tribal Council whenever feasible and consistent with the objectives of that Act. 25 U.S.C. § 638. This provision codifies the duties of loyalty and candor relevant to Navajo coal lease approval and administration, and easily satisfies even the CFC's overly restrictive statement of the jurisdictional standard. See 46 Fed. Cl. at 226 (discussing application of Restatement of Trusts §§ 170, 173). The Navajo Nation Council repeatedly expressed that it wanted the royalty rate adjusted and that it disfavored extended negotiations. JA480-81, 608, 646-47, 750-51, 766-67. Viewed in context of the "design of the statute as a whole and its object and policy," Samish, 419 F.3d at 1365, one may fairly infer that Congress would have intended the Navajo to recover its damages for the Secretary's grotesque violations of these statutory requirements. The Rehabilitation Act was intended to remedy the abject poverty of the Navajo and to promote a self-sufficient Navajo Nation, not to enrich a coal company with connections.

Finally, the command of 30 U.S.C. § 1300(e) could not be clearer: the

Secretary "shall" include terms in coal leases requested by tribes. In promulgating regulations implementing that command, the Department confirmed that it was intended to further the trust relationship. 49 Fed. Reg. 38,462 (1984); see also 123 Cong. Rec. 15,575 (May 19, 1977) (remarks of Sen. Goldwater). Here, the Secretary had exclusive control to adjust the royalty rate under the lease. The Nation consistently requested that the Secretary adjust the rate, and all federal studies found that the 20% rate was fair and reasonable. In the context of the Rehabilitation Act's design, goals, and policy, the Secretary's failure to heed that statutory command mandates payment for damages sustained.

III. THE NAVAJO NATION STATED AND PROVED A CLAIM COGNIZABLE IN THE CFC BECAUSE THE GOVERNMENT BREACHED DUTIES WITHIN THE CONTOURS OF THE GOVERNING AUTHORITIES.

A plaintiff who has succeeded in showing that the governing authorities are "money-mandating" must also show that its claim fits within the contours of those authorities to state a claim under Fisher. 402 F.3d at 1175-76. In cases involving Indian trust assets supervised or controlled by the Government, this Court determines whether a claim is stated as follows:

> We must next determine whether the complaint . . . states a claim enforceable in a present suit for money damages with respect to the property controlled by the United States. . . . Once we have determined that a fiduciary obligation exists by virtue of the governing statute or

> regulations, it is well established that we then look to the common law of trusts, particularly as reflected in the Restatement (Second) of Trusts, for assistance in defining the nature of that obligation.

White Mountain, 249 F.3d at 1377.

Thus, the Government's duties to manage Indian property need not be set forth specifically in the relevant statutes, regulations, or other fundamental documents. E.g., White Mountain, 537 U.S. at 475-77; Mitchell II, 463 U.S. at 225; Duncan, 667 F.2d at 42-43 ("That is certainly unnecessary for Indian property with its long and established history . . . of government fiduciary obligation in the case of management of Indian property."); Navajo Tribe, 624 F.2d at 988. Rather, such authorities establish the "contours" of the fiduciary relationship. Mitchell II, 463 U.S. at 224. Within those contours, the Government's performance of its functions is judged by the most exacting fiduciary standards. E.g., Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Shoshone, 364 F.3d at 1348; Duncan, 667 F.2d at 45; Coast Indian Community, 550 F.2d at 652. This entails application of common law trust duties. See, e.g., White Mountain, 537 U.S. at 475; United States v. Mason, 412 U.S. 391 (1973); White Mountain, 249 F.3d at 1377. The Nation both stated and proved its claim under the above standards.

The most obvious duty within the contours of the trustee's management duties is the duty to "exercise great care in administering its trust" and to "'exercise such

care and skill as a man of ordinary prudence would exercise in dealing with his own property.'" Mason, 412 U.S. at 398. At all relevant times, the Government demanded a minimum of 12½% royalty for its own coal, 30 U.S.C. § 207(a), routinely leased its own coal for more than the minimum rate, and required substantial up-front bonuses to boot. JA4220-21, 4224; cf. JA3666 (facial 12½% rate "resulted in coal being conveyed up to the present at substantially less than the Fair Market Value of the coal"); 3674 (Nation received bonus "considerably below" that which the Government demanded for its own coal). Yet the unrebutted facts show that the Government leased the extraordinarily valuable Navajo coal for an effective royalty rate less than the federal minimum, even though all federal studies found that a 20% rate was merited, and even though the policies underlying the leasing of federal coal are less royalty-oriented than those for leasing Navajo coal under the Rehabilitation Act. Compare 25 U.S.C. § 631 with Boesche v. Udall, 373 U.S. 472, 481 (1963). Exercise of care in administering the royalty rate adjustment and in assuring fair compensation for the Navajo coal leased to Peabody falls within the contours of the management duties fairly inferred from the Government's control or supervision of all aspects of leasing and lease administration.

The Mitchell case confirms this. None of the governing statutes in that case expressly required the Government to seek fair value from the sale of Indian timber.

But having found comprehensive control and supervision over Indian timber sales and management, the Court of Claims held that the plaintiffs had stated a claim for the "difference between the actual proceeds and the greatest appropriate revenue which should have been obtained" due to the Government's failure to obtain fair market value for some of the timber. 664 F.2d at 271. Similarly, even if the Department here had attained the "absolute minimum" rate expressly required by binding Departmental policy, its management duties demanded that it use care to assure greater compensation. See Mitchell, 664 F.2d at 274; Seminole Nation, 316 U.S. at 303-04 (compliance with statute does not necessarily relieve Government of trust duties).

Coast Indian Community also supports finding a compensable breach of the duty of care. It involved a claim of incompetent right-of-way appraisals. The Court of Claims found that the right-of-way statute and regulations required the BIA to act according to standards applicable to a trustee engaged in the management of trust property. 550 F.2d at 650-52. It held that the Indians' claim was properly premised on the Government's failure to exercise due care, and that "a showing that the value realized from the trust property was so far below its fair market value as to constitute fraudulent conduct, gross negligence, or other breach of a fiduciary duty, will suffice without more to establish the trustee's liability." Id. at 653. Such is the case here.

Duncan supports liability. In Duncan, the Court of Claims found that legislation concerning Indian "rancherias" in California established general oversight of and a fiduciary obligation in the management of Indian property. Much like the Rehabilitation Act, the legislation in Duncan was designed to allow the Indians eventually to become self-sufficient. 667 F.2d at 45. It contemplated termination of the trust after the Secretary negotiated a distribution plan and made certain improvements. Id. at 39. The Duncan court found that the Indians had stated a claim for mismanagement when the Secretary did not come to the bargaining table as their fiduciary and had ensured neither fairness of procedure nor fairness of result in the negotiations. Id. The court also found that the Secretary's failure to disclose to the Indians crucial facts bearing on their rights was within the contours of the trustee's management duties, and that such failure breached the trustee's duty of fair dealing. Id.; accord Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); cf. 25 U.S.C. § 638.

This case parallels Duncan in many respects. The Nation repeatedly requested that the Secretary include an adjusted royalty rate in the original lease. The Secretary had exclusive control to do so under Article VI thereof, and the Rehabilitation Act and the Indian Lands Section, both intended to fulfill the trust relationship, required him to do so. All federal studies confirmed the propriety of that rate. But the

Secretary, at Peabody's concealed behest, scuttled the adjustment, forcing the Nation into extended negotiations at a decided negotiating disadvantage and in violation of 25 C.F.R. § 211.2. As a result, the Secretary assured the unfairness of the negotiation process, see 46 Fed. Cl. at 227, and unfairness of the result, where the Nation had to give up $88 million to get the sub-minimum royalty rate. E.g., JA3666.

Moreover, the Department itself benefitted from scuttling the royalty adjustment and approving the sub-minimum rate. It is a purchaser of the Navajo coal, having a 24.5% interest in one of the two power plants using that coal. See 46 Fed. Cl. at 235; JA 3657-59 (cost of Bureau of Reclamation project power cut in half through federal use of Peabody coal). Its action in forcing the royalty rate from the 20% set by the BIA and upheld by its own studies to a sub-12½% thus favored its own interests over the Nation's. The Nation's claim for these breaches of the duty of loyalty are well within the contours of the authorities that establish the asset management duty. See White Mountain, 249 F.3d at 1379-80; Navajo Tribe v. United States, 610 F.2d 766, 768-69 (Ct. Cl. 1979), cert. denied, 444 U.S. 1072 (1980); Navajo Tribe, 364 F.2d at 322-24.

Pawnee is a case where the statutes, regulations and lease established money-mandating trust duties, but the plaintiffs' claim did not fall within the contours of those authorities. Pawnee is distinguishable on this point, because there the

"pertinent regulations and leases were fully followed by Interior," the claim was based on the position that the Secretary was required to contravene governing lease terms, and plaintiffs did not claim that the leases were imprudently consummated or that the Department abused its discretion. 830 F.2d at 191 & n.6. In contrast, the Department here violated the requirements of loyalty and candor in both the Rehabilitation Act and the Indian Lands Section, as well as its own regulation governing the conduct of negotiations, e.g., JA2048-49, 2059-60 (PPFs 262-64 (citing 25 C.F.R. § 211.2), 324-26); the Nation sought to implement Article VI of the lease; and the Nation has alleged and shown both an imprudent consummation of the amended leases and serious abuses of discretion by the Secretary.

Finally, contrary to the CFC's suggestion, 68 Fed. Cl. at 813-14, the governing authorities imposing federal control over all aspects of Navajo coal leasing and development are not advancing general governmental interests. See White Mountain, 249 F.3d at 1372-73; Mitchell, 664 F.2d at 275. Rather, the statutes and implementing regulations include criteria like those which traditionally constrain the discretion of a private trustee and seek specifically to protect the Nation's financial and property interests by the exercise of independent judgment. See Brown, 86 F.3d at 1562-63; Mitchell, 664 F.2d at 272 ("such direct and continuous management of Indian forest property by federal officials was no more purely 'governmental' than

management of Indian funds in the hands of the Government"). In this case, the Government refused to exercise any independent judgment as trustee. It was secretly pursuing Peabody's agenda; the Secretary was just "rubber stamping a bunch of amendments [subordinate officials] weren't supposed to review." JA2047 (PPF 252).

IV. THE GOVERNMENT IS LIABLE IN DAMAGES.

A. Damages Naturally Follow from the Breaches of Fiduciary Duties Here.

The CFC found in no uncertain terms that the Government violated its most fundamental common law trust duties in its actions from 1985 to 1987. E.g., 46 Fed. Cl. at 226. Therefore, because the governing authorities confer comprehensive federal control or supervision over all aspects of Navajo coal leasing, lease administration, and development, "general trust law is properly considered in drawing the inference that Congress intended damages to remedy a breach of obligation." See White Mountain, 537 U.S. at 477; Mitchell II, 463 U.S. at 226.

Because the Nation has established both violations of specific obligations set forth in governing statutes and regulations, as well as trust management duties inferred from the Government's comprehensive control or supervision of Navajo coal, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." See Mitchell II, 463 U.S. at 226; White Mountain, 249 F.3d

at 1381 (citing Restatement (Second) of Trusts § 205 (1959)); Duncan, 667 F.2d at 46-48 (distinguishing cases involving compensable losses due to asset mismanagement from non-compensable claims alleging cultural and psychological injuries).

B. The Rehabilitation Act and Other Statutes Impose Federal Trusteeship over the Limited Authority Allowed the Nation.

The timber sales statute in Mitchell II permits the Indian to convey the resource with Secretarial approval. 25 U.S.C. § 406(a). The sustained-yield statute in Mitchell II was part of the Indian Reorganization Act, enacted to promote tribal self-determination and to end federal dominance in tribal affairs. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). Nonetheless, the Supreme Court held in Mitchell II that those authorities and the Indian Right-of-Way Act conferred sufficient federal control to mandate compensation for mismanagement of the Indians' timber.

Thus, concerns about the "ideal of Indian self-determination" under IMLA alone, see 537 U.S. at 508, 46 Fed. Cl. at 230, cannot preclude liability in this case, where governing authorities control all aspects of Navajo coal development. The Rehabilitation Act focuses not on tribal decision-making, but on Secretarial planning and implementation of a development program for Navajo resources. See 25 U.S.C. § 631. Like the timber sales statute in Mitchell II and the mineral leasing statute in

Pawnee, the Rehabilitation Act permits the Nation to lease only with Secretarial approval. Compare 25 U.S.C. § 635(a) with id. §§ 406(a), 396. The only nods to self-determination in the entire scheme of federal control of Navajo coal are the ability to make recommendations and requests that the Secretary is supposed to honor under the Rehabilitation Act and the Indian Lands Section, see 25 U.S.C. § 638, 30 U.S.C. § 1300(e), and the extremely limited negotiating authority provided in 25 C.F.R. § 211.2 – all of which authorities were violated here.

Federal approval of Navajo coal leases under the Rehabilitation Act is not a mere oversight power. Its exercise is a necessary prerequisite to a valid lease. 25 U.S.C. § 635(a); see Brown, 86 F.3d at 1562. Regulations required leases to be on forms prescribed by the Department. 25 C.F.R. § 211.30; JA3648-52. Indeed, the original lease here was drafted by the Department itself. The Nation cannot cancel the lease without Secretarial consent. 25 C.F.R. § 211.27. The negotiating ability of the Nation was controlled by Interior regulations, which permitted such negotiations only upon the written permission of the Secretary and for a 30-day period. 25 C.F.R. § 211.2. Moreover, the Nation expressly did not seek negotiations; rather, its informed position was that the Secretary should simply decide the royalty adjustment appeal. E.g., JA751, 767.

The Nation may only "technically" negotiate leases. See Shoshone Indian

Tribe v. United States, 56 Fed. Cl. 639, 647 n.10 (2003). The Nation leases at the pleasure of the Secretary or not at all. Brown, 86 F.3d at 1561-62; Judith V. Royster, Mineral Development in Indian Country: the Evolution of Tribal Control over Mineral Resources, 29 Tulsa L. J. 541, 560-65 & n.122 (1994). The fact that the Secretary ignored the considered position of the Nation and violated for several years the regulation governing the conduct of negotiations to facilitate Peabody's "maximum delay" strategy, see JA452, does not negate the Department's control over the negotiations; it shows that the Department abused that control. Finally, any retained self-determining feature of mineral leasing laws has been nullified by the Department, which exercises its asserted authority to grant "rights-of-way" covering Navajo land without Navajo consent. See House Report at 7, 13; see also JA4208-09.

Congress has never viewed the trust duty and tribal self-determination as inconsistent. See, e.g., 25 U.S.C. §§ 450n(2), 458ff(b). Nor has the President. See, e.g., Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573; President's Statement on Indian Policy, 1983 Pub. Papers 96. Indeed, the trust responsibility should support self-determination, but that "goal is illusory if it results from a compromised process or undue federal manipulation." See Mary C. Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1558. Honest consultation with, not deception of, the

Nation was required by statute, 25 U.S.C. § 638, and that principle is still the cornerstone of the federal-tribal relationship. See Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (2000).

The actuality of federal control or supervision pursuant to federal law should govern. White Mountain, 537 U.S. at 475; see Mississippi Dep't of Rehab. Svcs. v. United States, 61 Fed. Cl. 20, 28 (2004) (in deciding who "operates" a cafeteria, the court is "not concerned with 'spin,' but with reality"). Federal control need not be exclusive to permit compensation for breach of trust. White Mountain, 249 F.3d 1376; Brown, 86 F.3d at 1561-62; Shoshone Indian Tribe v. United States, 58 Fed. Cl. 77, 83-86 (2003).

In any event, the self-determination principle in the context of this case is really a variant of the consent defense in a breach of trust suit. See Mitchell II, 463 U.S. at 237 n.11, (Blackmun, J., dissenting). The Government cannot satisfy the elements of that defense. See, e.g., Bogert, The Law of Trusts and Trustees § 941 at 511 (1995) (to establish defense, trustee must show that beneficiary acted "with full knowledge of the facts of the case and of his rights, and not under the influence or misrepresentation, concealment, or other wrongful conduct . . . of the trustee or another"); cf. 46 Fed. Cl. at 226-27; JA771, 4214-19.

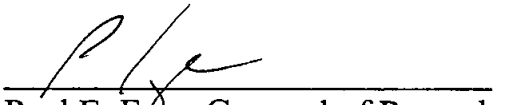
Liability exists here under the above standards. The Nation, like other tribes, was subjected to the imposition of the trustee-beneficiary relationship. Shoshone, 364 F.3d at 1348. At all relevant times, the Navajo Nation had only the ability to negotiate for 30 days if the Secretary granted his "written permission," and the right to be the formal lessor of its coal if the Secretary did not exercise his "right" to reject the lease terms. 25 C.F.R. § 211.2. By contrast, the governing authorities imposed actual federal control and daily supervision over all aspects of Navajo coal exploration, negotiations, royalties, leasing, operations, and reclamation. This is no "bare" trust. It has all the hallmarks of a conventional fiduciary relationship, which imposes on the Government compensable trust duties of care, candor, and loyalty in the administration of the trust. The Government's breach of those duties mandates compensation here.

CONCLUSION

The decision of the Court of Federal Claims should be reversed and the case remanded for a determination of damages.

Respectfully submitted,

FRYE LAW FIRM, P.C.



Paul E. Frye, Counsel of Record
Lisa M. Enfield, Of Counsel
10400 Academy N.E., Suite 310
Albuquerque, New Mexico 87111

Louis Denetsosie
Attorney General
The Navajo Nation
P.O. Drawer 2010
Window Rock, Arizona 86515

Daniel I.S.J. Rey-Bear
The Nordhaus Law Firm
405 Martin Luther King Ave., N.E.
Albuquerque, New Mexico 87102-3541

The NAVAJO NATION, Plaintiff,

v.

The UNITED STATES of America, Defendant.

No. 93-763L.

United States Court of Federal Claims.

Dec. 20, 2005.

Background: Navajo Nation brought suit alleging that Secretary of Interior breached fiduciary duties owed to Nation by approving coal lease amendments negotiated by Nation and lessee. The Court of Federal Claims, 46 Fed.Cl. 217, dismissed complaint. Nation appealed. The Court of Appeals for the Federal Circuit, 263 F.3d 1325, reversed. Certiorari was granted. The Supreme Court, 123 S.Ct. 1079, reversed and remanded. On remand, the Court of Appeals, 347 F.3d 1327, remanded.

Holding: The Court of Federal Claims, Baskir, J., held that jurisdiction was lacking over claims of Navajo Nation that the Secretary breached fiduciary duties owed to the Nation when Secretary approved coal lease amendments establishing a royalty rate of 12.5 and not 20 percent of the lessee's gross revenues, as statutory and regulatory framework cited by the Nation did not establish a money-mandating trust in the area of royalty rates.

Dismissed.

Federal Courts ⇐1081

Court of Federal Claims lacked jurisdiction over claims of Navajo Nation that the Secretary of Interior breached fiduciary duties owed to the Nation when the Secretary approved coal lease amendments establishing a royalty rate of 12.5 and not 20 percent of the lessee's gross revenues, where statutory and regulatory framework cited by the Nation did not establish a money-mandating trust in the area of royalty rates.

Paul E. Frye, Albuquerque, NM, for plaintiff.

Devon M. McCune, Washington, D.C., with whom were Todd S. Aagaard, Kristine S. Tardiff, for defendant. Stephen L. Simpson, Washington, D.C., of counsel.

John Bergen, Law clerk.

OPINION

BASKIR, Judge.

This case has been presented to us on remand from the U.S. Court of Appeals for the Federal Circuit. In brief, the Plaintiff's Complaint charges a trust or contract violation in the Secretary of the Interior's approval of coal lease amendments viewed as detrimental to the Navajo Nation, primarily in the establishment of a royalty rate of 12.5 and not 20 percent of the lessee's gross revenues. The Navajo Nation claims damages in the amount of $600 million have resulted from the Government's breach. We refer the reader to the very detailed summary of the Plaintiff's claims as set forth in our initial Opinion. *See Navajo Nation v. United States*, 46 Fed.Cl. 217 (2000) (*Navajo I*).

In that Opinion, we ruled in favor of the Government on cross-motions for summary judgment and dismissed the Navajo Nation's Complaint on what amounted to jurisdictional grounds. The Plaintiff argued then, as it does now, that jurisdiction is established by virtue of the trust relationship that exists between the United States and the Navajo Nation. In this Opinion, we respond to questions addressed to us by the Court of Appeals on remand. First, however, we must relate the procedural history of the case in order to put the remand in its proper context.

PROCEDURAL BACKGROUND

The question presented initially during summary judgment proceedings and now on remand rests entirely on the legal interpretation of the treaties, statutes and regulations that form the basis for the trust duties allegedly breached.

Jurisdiction in Indian trust cases is determined by the level of governmental control and supervision of the trust property involved—in this case, royalties from coal leases. Presented with the task of determining where the Plaintiff's claims fit within a spectrum of Indian trust cases, we found "that the Secretary's role in the Navajo's coal leasing—that is, his control *or* supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other." *Navajo I*, 46 Fed.Cl. at 234–35.

The Plaintiff successfully appealed to the U.S. Court of Appeals for the Federal Circuit. On August 10, 2001, a divided panel of the Court of Appeals arrived at the opposite conclusion, finding that the primary statute relied upon by the Navajo Nation—the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (1938), 25 U.S.C. §§ 396a–396g—and its implementing regulations demonstrated pervasive control by the United States over Indian mineral leasing activities. *Navajo Nation v. United States*, 263 F.3d 1325, 1331 (Fed.Cir. 2001) (*Navajo III*). *But see, id.* at 1333 (concurring in part and dissenting in part, Schall, C.J.). The majority concluded:

> The United States breached its fiduciary obligations to the Navajo Nation in connection with these coal leases with Peabody. A claim for damages for that breach is within the jurisdiction of the Court of Federal Claims. The dismissal is reversed, and the case is remanded for further proceedings including determination of damages.

Navajo III, 263 F.3d at 1333. The Court's judgment so stated. Subsequent attempts by the Government to gain rehearing and reconsideration *en banc* were denied on November 16, 2001. On November 23, 2001, the Court issued its mandate formally reversing our judgment and remanding the case.

However, the Defendant successfully petitioned for certiorari, *United States v. Navajo Nation*, 535 U.S. 1111, 122 S.Ct. 2326, 153 L.Ed.2d 158 (2002), and the case was argued before the Supreme Court on December 2, 2002. Relying upon the same rationale initially advanced by this Court, the Supreme

Court concluded that the "controversy here falls within *Mitchell I's* domain." *United States v. Navajo Nation*, 537 U.S. 488, 493, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (*Navajo IV*). The majority opinion closed with the following:

> However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act. The judgment of the United States Court of Appeals for the Federal Circuit is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

Id. at 514, 123 S.Ct. 1079. The Supreme Court's mandate thus vacated the Federal Circuit's order, effectively reinstating the judgment of the Court of Federal Claims.

Upon remand to the Circuit Court, the case's appellate posture was back to "square one"—the Plaintiff's unresolved appeal of an adverse trial court judgment dismissing the Complaint for lack of subject matter jurisdiction. Upon consideration of the Supreme Court's decision, the Court of Appeals ordered that:

> (1) The mandate is recalled and the appeal is reinstated.
>
> (2) The case shall be returned for consideration to the original merits panel.

Order (Oct. 24, 2003). At this point, however, the panel declined to act on the merits of the Navajo appeal. The original appellate panel, again divided but along different lines, reasoned that the Supreme Court's decision "in this case was limited to the question of whether [the Indian Mineral Leasing Act of 1938, (IMLA) 52 Stat. 347, 25 U.S.C. § 396a *et seq.*] imposes judicially enforceable duties upon the United States in connection with the Peabody lease." *Navajo Nation v. United States*, 347 F.3d 1327, 1332 (Fed.Cir.2003) (*Navajo V*). The panel further observed of the Supreme Court's disposition:

> [I]n deciding that issue, the Court stated that 25 U.S.C. § 399 does not govern the lease and that the lease "falls outside IMDA's [the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq.*] domain."
>
> The Court did not decide whether, apart from IMLA, section 399, and IMDA, "a network of other statutes and regulations" imposes judicially enforceable duties upon the United States in connection with the lease.

Id. The Court, however, did not immediately address the merits of that position. Instead the Federal Circuit sought further consideration of the question of jurisdiction. On March 16, 2004, the divided panel's remand order to us was issued as a mandate with the following direction:

- In the first instance, the Court should determine whether, as the Government asserts, the Tribe waived a claim with respect to "a network of other statutes and regulations."
- If the Court determines that such a claim was not waived, it should decide whether, apart from IMLA, section 399, and IMDA, 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.

Id. But see, id. at 1332–35 (Newman, C.J. dissenting in part, on the basis that IMLA and IMDA should not be excluded from consideration upon remand). We note that the Court of Appeals in its remand to us did not vacate or reverse this Court's judgment, now restored by virtue of the Supreme Court's decision.

DISCUSSION

I. *Waiver:*

Pursuant to the remand, our first order of business is to consider whether the Plaintiff's "network" theory survives the waiver doctrine. *Navajo V*, 263 F.3d at 1332. Generally, a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). The waiver doctrine is intended to prevent unfair surprise and corresponding prejudice to the opposing party. *See id.* (doctrine is "essential in order that

parties may have the opportunity to offer all the evidence they believe relevant to the issues . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.") (quoting *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941)).

There is no hard and fast rule on waiver. As the Supreme Court has directed, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* Here the Federal Circuit has seemingly delegated that function to us. As an initial matter, we note that typical concerns in waiver cases are allayed in this instance. First, as we describe below, the "network" argument, if not the specific components of this network, was considered and rejected by this Court. *See e.g., Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1538 (10th Cir.1996) (distinguishing *Singleton* on the basis that the district court implicitly addressed the issue, the appellant explicitly challenged the court's determination in his appellate brief and the appellees declined the opportunity to respond). Secondly, the Tribe's "argument concerns a purely legal question," thus "mitigat[ing] the force of the considerations underlying the policy of refusing to consider issues not raised below." *Id.* (citing *Stahmann Farms, Inc. v. United States*, 624 F.2d 958, 961 (10th Cir.1980)).

Preservation of issues for appeal "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Consolidation Coal Co. et al. v. United States*, 351 F.3d 1374, 1378 (Fed.Cir.2003). The Plaintiff has always asserted that a jurisdictional trust was created by the so-called "network," what it sometimes described as the "comprehensive statutory and regulatory scheme."[4] In the allegations within the Complaint, the Navajo Nation described the network:

> The leasing of coal of the Navajo Nation is subject to a comprehensive statutory and regulatory scheme of the United States, executed by the agencies of the United States including the Bureau of Indian Affairs, the Office of Surface Mining Reclamation and Enforcement, the Bureau of Land Management, the Minerals Management Service and other agencies.

Complaint at ¶ 20. This paragraph of the Complaint goes on to cite not only IMLA and IMDA, but also the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701–1757 (FOGRMA), as well as regulations promulgated under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*, (SMCRA)—each components of the network theory asserted on remand. *Id.* Also invoked by the Tribe's pleadings is the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–38, another key authority in its remand brief. *See* Complaint at ¶ 21 ("The United States has adopted specific policies under the Navajo and Hopi Rehabilitation Act of 1950 to promote interests of the Navajo Nation.")

In the network proposed in its remand briefs, Plaintiff includes the following: 25 U.S.C. § 2 and 25 U.S.C. § 177; two treaties between the United States and the Navajo Tribe of Indians, 9 Stat. 974 (1849) and 15 Stat. 667 (1868); the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–38; SMCRA, in particular, the Indian Lands section, 30 U.S.C. § 1300, and the implementing regulations, 25 C.F.R. Parts 200, 216, subpart B, and 30 C.F.R. Parts 750 and 955; FOGRMA and implementing regulations applying its oil and gas provisions to Indian coal, 30 C.F.R. § 206.450 and 30 C.F.R. § 211.4; the Indian Right–of–Way Statute, 25 U.S.C. §§ 323–328, and implementing regulations found at 25 C.F.R. Part 169; and, contrary to the express terms of the mandate, IMLA, and the regulations implementing it, 25 C.F.R. Parts 211 and 216 subpart A and 43 C.F.R. Part 3480. Indeed, with minor exceptions the legal instruments cited by the Navajo Nation have always consisted of the same references.

The initial briefs filed by the Navajo Nation included an Appendix with the sub-caption "Constitutional Provisions, Treaties, Statutes and Regulations; Exhibits 1–128." This particular volume of Plaintiff's Appendix

(there were two volumes) includes 97 pages of statutes, regulations, treaties, executive orders and internal policies. All but one of the authorities cited now on remand—25 U.S.C. § 2—were previously cited by the Navajo Nation.

For the most part, these statutes and regulations were not discussed in the parties' briefs, however. Where they were cited it was often to demonstrate the general trust relationship that existed with respect to Indian tribal resources and the Federal Government. *See e.g.*, Pl. Mot. for Summary Judgment on the Issue of Liability on its First Claim for Relief (Dec. 15, 1997) ("Pl. Mot. for Summary Judgment") at 33 (Citing the Navajo and Hopi Rehabilitation Act, Plaintiff argued "Congress passed special legislation designed to combat the poverty and demoralization of the Navajo Tribe, to create a self-supporting Navajo economy, and to allow Navajos to attain a decent standard of living.").

The regulatory provisions relied upon by the Plaintiff were likewise not given extended treatment in earlier attempts to establish a compensable trust. Yet the "network" theme was always present even in its supporting role vis á vis IMLA, as the following excerpts from Plaintiff's briefs demonstrate. In its initial brief, the Plaintiff stated:

> DOI has promulgated comprehensive regulations governing every aspect of mineral leasing and production on reservation land (citation omitted). These regulations assign the responsibilities for carrying out the Government's comprehensive authority over the Indian mineral leasing to BIA and several other DOI agencies. *See* 25 C.F.R. Part 211 (1985) (prospecting, leasing procedures, substantive lease terms and conditions, payments of rents and royalties, and regulation of operations); 25 C.F.R. Part 216 (1985) (surface coal mining exploration, mining plans, operations and reclamation of Indian lands); 25 C.F.R. Part 169 (1985) (governing rights-of-way); 25 C.F.R. Part 200 (1993) (incorporation into Indian coal leases of terms and conditions regarding reclamation).

Pl. Br. in Support of Summary Judgement (Dec 15, 1997) at 33–34. In its opposition to the Government's cross-motion, Plaintiff argued:

> This Court has jurisdiction over the Navajo Nation's claims here: In the 1849 Treaty with the Navajo, the United States promised always to "act ... to secure the permanent prosperity and happiness of [the Navajo people]." In the 1849 Treaty, the 1938 Indian Mineral Leasing Act, and relevant DOI. regulations, the United States undertook the "exclusive right of regulating trade and intercourse" with the Navajo, and developed a comprehensive federal scheme that controls every aspect of the management of Navajo coal resources. "These regulations detail in exhausting thoroughness the government's management and regulatory responsibilities." Under that comprehensive scheme, the Department in 1964 approved the 8580 Lease, which granted exclusive authority to the Secretary of the Interior to adjust the royalty rate to a reasonable level after 20 years.

Navajo Nation's Consolidated Response to Def. Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Pl. Motion for Summary Judgment on the Issue of Liability on Its First Claim for Relief (Jun. 17, 1998) at 12–13 (internal citations omitted).

Despite its relatively brief treatment by the Plaintiff in these early papers, Plaintiff did not abandon its network argument. Indeed, in its motion for reconsideration, the Navajo Nation repeatedly argued that this Court had ignored this theory and had made an arbitrary distinction between regulation of coal royalties, on the one hand, and oil and gas royalties, on the other. *See e.g.* Mot. to Alter or Amend Judgment (Feb. 18, 2000) at 16–18 (reinforcing contention that "regulations governing the development, operation, and reclamation of coal mines on Indian lands are far more comprehensive than the relevant regulations governing oil and gas exploration and production.") Plaintiff referenced statutes such as the Federal Surface Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and the SMCRA, among others. *Id.* at 16. Moreover, in its Rule 59 motion the Tribe provided a list of

the "numerous federal agencies that supervise the various aspects of coal mining on Indian lands." *See id.* at 18.

The Court disagreed that it had ignored this argument:

> The primary thrust of the Navajo Nation's motion is aimed at the Court's observations regarding the lesser degree of federal regulation or control over coal-leasing royalties in this case as compared to the regulation of other Indian resources in cases where the Court's jurisdiction was successfully invoked. Essentially, the plaintiff quarrels with the manner in which we analyzed those cases. We are familiar with plaintiff's arguments in this respect—we considered them when the Navajo Nation challenged defendant's position on the same issues.
>
> The Navajo Nation alleges that the government conceded the basis for liability—comprehensive regulation of coal royalties—and "had no notice that a contrary view would form the basis of the Court's judgment." Mem. In Support of Mot. to Alter or Amend Judgment at 22, n. 11. The United States provides copious citations to its briefs to rebut this assertion. The Navajo Nation had ample opportunity to persuade the Court that the jurisdictional prerequisites were met. It was unsuccessful.

Order (Apr. 10, 2000) (*Navajo II*) at 3.

As the Plaintiff has demonstrated, the Navajo Nation asserted the comprehensive scheme, at least with the inclusion of IMLA, to both the Federal Circuit on the initial stage of appeal and to the Supreme Court, but each Court addressed only IMLA. *See* Pl. Suggestion for Proceedings on Remand (Apr. 7, 2003) at 6 (citing Brief for Appellant at 36–44 and Brief on the Merits for Respondent, Navajo Nation at 25–29).

With the failure of its primary theory based on IMLA, the Navajo Nation has greatly elaborated on its treatment of the once secondary network argument. In its submission to the Court of Appeals after the remand from the Supreme Court, the Plaintiff devotes renewed focus to this claim, "although the Navajo Nation pled and preserved [it] at every stage in these proceedings." Pl. Suggestion for Proceedings on Remand (Apr. 7, 2003) at 4. And in its subsequent submission to this Court, the elaboration of the network jurisdiction theory occupies nearly 30 pages. *See* Brief of the Navajo Nation on Remand From the Federal Circuit (Aug. 24, 2004) at 15–45. In fact, the discussion of the Navajo and Hopi Rehabilitation Act, alone, occupied 10 pages of the main brief, whereas the Plaintiff had offered but one citation to this particular statute during the original summary judgment briefing. *Compare id.*, at 18–23, 27–28, and 40–44, *with* Pl. Mot. for Summ. Judgment (Dec. 15, 1997) at 33; *see also* Reply Br. of Navajo Nation on Remand (Apr. 25, 2005) at 19–27.

In its earlier expositions, the network theme had IMLA as its centerpiece. IMLA and its regulations are cited throughout the summary judgment brief while other statutory and regulatory authorities Plaintiff emphasizes here were relegated to a string citation. *See* Pl. Mot. for Summ. Judgment at 34 (citing 25 C.F.R. Part 211 (1985), 25 C.F.R. Part 216 (1985), 25 C.F.R. Part 200 (1993), and 25 C.F.R. Part 169 (1985)—regulations promulgated under IMLA, SMCRA and the Indian Rights-of-Way Statute). There was, of course, no reason why the Plaintiff should advocate this theory without reference to IMLA. However, after the Federal Circuit panel majority took IMLA "off the table," Plaintiff was for the first time obligated to present its network theory without reference to that statute. (Strictly speaking, § 399 and IMDA join IMLA in removal by the panel majority from further consideration.)

We may conclude from this review that Plaintiff's advocacy on behalf of jurisdiction always included the network argument, albeit in a secondary role; that it always featured IMLA in a central position; and that Plaintiff's network argument *absent IMLA* has yet to be presented even after the Court of Appeals for the Federal Circuit directed Plaintiff to do so.

In any event, we do not view this issue as one that could be waived by the parties, insofar as it affects our jurisdiction under the Indian Tucker Act. Had we never been pre-

sented with the argument that there is a comprehensive scheme of governmental control over Indian coal-leasing—had we never been advised by Plaintiff of the existence of "a network of other statutes and regulations" purportedly establishing that control—an appellate court in its discretion would still properly consider the issue *sua sponte*. *See Consolidated Coal Co v. United States*, 351 F.3d 1374, 1378 (Fed.Cir.2003) ("[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues") (citing *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1555 (Fed.Cir.1991)).

II. *Reassessment of the Network Argument:*

In its second remand instruction, the Court of Appeals for the Federal Circuit directs us to consider the jurisdictional sufficiency of the network argument without reference to IMLA, 25 U.S.C. § 399 and IMDA, all of which have been rejected by the Supreme Court. *Navajo IV*, 537 U.S. at 509–11, 123 S.Ct. 1079. We confess to some procedural uncertainty as to the mechanism for this reassessment since the Circuit has not vacated our original judgment. As a rule, proceedings on remand "should be in accordance with both the mandate of the appellate court and the result contemplated in the appellate opinion." 5 Am.Jur.2d § 782 (West 2005). Furthermore, the trial court must implement "both the letter and the spirit of the mandate . . . taking into account the appellate court's opinion, and the circumstances it embraces." *Id.* We attempt here to comply with both the letter and the spirit of the Court's mandate.

Accordingly, we find no reason to revise our previous rejection of this argument as we expressed on two occasions, the original ruling (*Navajo I*) and the ruling on reconsideration (*Navajo II*). Our conclusions were based on our understanding of the precepts of *Mitchell II*. That is, to be judicially enforceable, the trust obligation must be directly related to the alleged breach. In other words, since the Plaintiff's claim involved the setting of royalty rates, the jurisdictional trust must encompass royalty setting. It is not sufficient that the asserted Government control extend to the implementation of coal leases or even to the collection of royalties. Thus, Plaintiff's recent extended treatment of the constituent elements of the "network" all concern implementation of coal leasing; they do not address the formation of coal leases, much less the establishment of royalty rates. With or without IMLA, the Plaintiff's current approach has the same deficiency. And we persist in our conclusion that it is unavailing as a basis for establishing jurisdiction.

Plaintiff has criticized this approach—first argued by the Government and adopted by the Supreme Court, *see e.g.*, 537 U.S. at 510–12, 123 S.Ct. 1079—as "myopic" and contrary to *Mitchell II*. Pl. Opp. at 22. Myopic or not, we found the Government's argument compelling as applied to the entirety of the regulatory scheme, including IMLA. It is even more definitive *without* IMLA. Although in its most recent brief to us, the Plaintiff devotes 30 pages to an exposition of its network theory, Plaintiff's argument on remand still fails to tie specific laws or regulatory provisions to the issue at hand—the Interior Secretary's approval of the royalty rate for the Navajo's coal. We examine the Navajo's exposition in some detail.

Plaintiff first cites 25 U.S.C. § 177 (1790) and 25 U.S.C. § 2 (1832). These two statutes represent Congress' earliest interventions concerning Indian affairs. The 1832 statute merely establishes within the Interior Department the Bureau of Indian Affairs, and charges the Commissioner of the Bureau with the responsibility to manage all Indian affairs and matters arising out of Indian relations. The 1790 statute, on the other hand, merely provides for the generally accepted principle that the Government may control the sale or lease of tribal property. Each of these laws is consistent with the undisputed general trust relationship between the Government and the Navajo; Plaintiff has cited no case law applying the statutes specifically in the context of a trust duty related to approval of coal leases.

Plaintiff also cites the 1849 and 1868 treaties upon which it has relied from the inception of this case. As we have previously recognized, the origins of the trust relation-

ship between the United States and the Navajo Nation, including the Government's "responsibility to regulate trade and intercourse with the Navajo and to secure their permanent prosperity and happiness," can be traced to these treaties. *Navajo I*, 46 Fed. Cl. at 221; *see also*, 9 Stat. 974 and 15 Stat. 667. The principles of these treaties are echoed again and again in the policies and procedures established by the United States in governing such Indian affairs as the protection and promotion of their resources. *Navajo I*, 46 Fed.Cl. at 221, 225–26. But that gets us only so far. As we have found with IMLA, a statute or regulatory provision must do more than provide in general terms for the Secretary to maximize revenues. As before, we believe the statute or regulation must "impose specific duties regarding the Secretary's adjustment of royalty rates for coal." *Navajo I*, 46 Fed.Cl. at 233.

Not unexpectedly, however, the Navajo Nation does not provide statutes and regulations that impose specific duties in this area. Instead, it cites the Indian Rights–of–Way Statute, 25 U.S.C. §§ 323–328, and its implementing regulations found at 25 C.F.R. 169, in order to demonstrate the supervision and control element of *Mitchell II*. The statute and its regulations were described by the Supreme Court in the *Mitchell II* case as follows:

> The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U.S.C. § 323, provided he obtains the consent of the tribal or individual Indian landowner, § 324, and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 C.F.R. Part 169 (1983). For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for the distribution to Indian landowners. *See* 25 C.F.R. §§ 169.12, 169.14 (1983).

Mitchell II, 463 U.S. at 223, 103 S.Ct. 2961.

There is no doubt that this statute demonstrates Government control over access to Indian lands, generally. However, we fail to see the necessary implications of the law for royalties under a mineral leasing scheme which has its goal increased tribal authority in determining royalty rates. Plaintiff's position is expressed with the following *non sequitur*: "The Government's exclusive authority to grant rights-of-way on Navajo land enhances Federal control over the Navajo coal resources at issue here, and has reinforced the Government's acknowledged responsibility to provide fair coal royalties to the Navajo Nation." Pl. Remand Br. at 16. There is no question that the United States exerts substantial control in Indian affairs, in general, and also in certain aspects of coal mining operations as well as coal lease administration. But this statute provides no further evidence that the Government has assumed control over the adjustment of royalty rates prescribed by the leases.

Plaintiff invokes another statute it previously relied upon primarily for background purposes, *see* Pl. Remand Br. at 33—the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–640. The statute is argued with renewed vigor now. It does not explicitly govern mineral leasing, however. Plaintiff maintains that IMLA and the Rehabilitation Act must be applied and construed as a "harmonious whole." Pl. Remand Br. at 20–21. According to the Plaintiff, "[t]he meaning of IMLA must be shaped and focused by the more specific policies and provisions of the Rehabilitation Act, and these policies must control the construction of IMLA even though IMLA was not expressly amended." Pl. Remand Br. at 21.

The broader purpose of the statute was to promote a self-supporting economy and self-reliant communities among the Navajo and Hopi tribes. The law was passed as a response to conditions such as poverty, illiteracy, and poor public health services within these two tribes. We understand that coal-leasing was one means of attaining the goals of rehabilitation. *See* Declaration of Stewart L. Udall, former Secretary of Interior ("Coal leasing and related development was the centerpiece of the resources development pro-

gram under the Navajo and Hopi Rehabilitation Act of 1950."), Pl. Remand Br. at A1. Yet this part of Plaintiff's network does nothing to change our views on the nature of the trust duties respecting the administration of coal leases. The Rehabilitation Act is consistent with the basic principles of IMLA, and with the general trust relationship that has been recognized throughout these proceedings; the statute adds no more substance to the Secretary's duties respecting royalties.

The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300 (and implementing regs 25 C.F.R. 216, subpart B, and 30 C.F.R. pts. 750 and 955) is, according to Plaintiff's counsel "a statute that we've relied on in the past throughout these proceedings." Status Conf., Tr. at 13. Although relied upon in the initial proceedings, this statute was never given more than cursory treatment. It was cited to support the generally agreed upon thesis that the Federal Government exerts substantial control over coal mining operations. In the original briefing, the SMCRA regulations were included among the other regulatory provisions of Plaintiff's network in a string cite within a footnote. Pl. Sumin. Judgment Br. at 34 n. 3. Indeed, we acknowledged that "the regulations and statutory provisions cited by the Navajo cover a range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties." *Navajo I*, 46 Fed.Cl. at 232.

In contrast to its original briefing, here on remand, the Navajo Nation relies on this authority as an integral part of its network. *See, e.g.*, Pl. Remand Br. at 23 (SMCRA "establishes yet more federal control over all surface coal mining activities on Indian lands, and it confirms Secretarial control and duties regarding the terms of Indian coal leases and lease amendments."); *see also*, Pl. Remand Br. at 15, 23–25, 31–32, 39–40, 42–43. It develops the statute—primarily an environmental statute—by analogizing it to the sustained yield statute in *Mitchell II*. Plaintiff maintains SMCRA "reinforces the Secretary's control of lease terms and independently establishes a duty of loyalty in including lease terms desired by Indian tribes." Pl. Remand Br. at 17. Of course, as with many of the Plaintiff's assertions, there is no explanation of how the statute does this.

In a subsequent portion of the brief, Plaintiff addresses regulations promulgated under the Indian Lands section of SMCRA. *See generally*, Pl. Remand Br. at 23–26. The brief describes how the regulatory scheme reflects a conscious decision by Congress on several occasions (3 sets of regulations—1969, 1977 and 1984), to retain authority over surface mining activities in the Interior Department's Bureau of Indian Affairs. *See* Pl. Remand Br. at 24 ("These regulations deny the Secretary authority to delegate to tribes duties regarding the regulation of surface coal mining operations, stating that '[t]he Federal–Indian Trust responsibilities for land use decisions and other matters relating to surface coal mining and reclamation operations on Indian lands remain with the BIA.'")(quoting 49 Fed.Reg. 38,469 (1984)).

However, the Navajo's argument still suffers from the same infirmities that led to our original conclusion. It does not demonstrate how royalty rates are subject to the Secretary's control. Instead, Plaintiff cites the litany of areas that are covered in the 1977 regulations—an admittedly comprehensive list of regulated activities such as signage and markers, post-mining use of land, backfilling and grading, disposal of soil and waste materials, preservation of topsoil, protection of hydrolic systems, dams and impoundments, and revegetation. Pl. Remand Br. at 24. Then Plaintiff traces how the 1984 regulations set up the Office of Surface Mining Reclamation and Enforcement as the "regulatory authority on Indian lands." As Plaintiff details in its brief, these provisions give the OSMRE extensive powers over permitting, inspections, and ensuring compliance with environmental laws. Pl. Remand Br. at 25.

Obviously, Plaintiff can demonstrate comprehensive management as well as Federal supervision and control—but this is no different than the list of items cited in the original IMLA argument. The simple fact of the matter is that there is necessarily substantial control in these areas—the strict regulation is justified by labor issues, occupational safety, and environmental conservation. We

would not expect the Tribes would hold any veto power over these matters. The critical inquiry in this case is whether the SMCRA restricts the Navajo in a meaningful way concerning economic matters such as the negotiation of royalties.

When the Navajo's remand brief does finally shift focus to royalties it provides mere citations without expounding upon them. At most, Plaintiff credits the regulations for establishing the Bureau of Land Management and the Minerals Management Service as the Federal agency arms responsible for enforcing certain coal lease terms and collecting and accounting for royalties and other income from Indian mineral agreements. *See* 30 C.F.R. § 750.6(c)-(d); Pl. Remand Br. at 25. If there was a case to be made that these provisions established trust duties with respect to establishing royalty rates, the Navajo failed to make the connection. At most, these regulations implicate duties of care in collection and accounting of royalties. There is no apparent issue with regard to those aspects of the Navajo-Peabody lease. Unlike other Indian trust cases, here the allegations of breach do not involve the Secretary's auditing and accounting functions. The Navajo's Complaint involves a breach of lease approval function, and by extension, the approval of amendments such as the royalty rate "negotiated" by the Tribe and Peabody.

Finally, the remand brief presents once again the FOGRMA. In granting summary judgment several years ago, we had occasion to comment on this particular statute. But we did so not because Plaintiff relied extensively upon the statute (FOGRMA merited no more than a mere citation in Plaintiff's Complaint), but in order to distinguish the Government's regulation of royalties under oil and gas lease from that in the coal-mining context.

The statute and pertinent regulations were considered by the Court strictly in the context of distinguishing the *Pawnee* case, which found a trust based upon the royalty provisions that apply to oil and gas leases under FOGRMA. *Navajo I*, 46 Fed.Cl. at 232 ("One of the statutes relied upon by the Pawnee is entirely dedicated to management of oil and gas royalties. The two statutes—the Indian Long-Term Leasing Act, 25 U.S.C. § 396 (1988) and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 (1988)—and a large body of regulations gave the Secretary broad authority in leasing property and in collecting royalties on behalf of the Indians. In sum, those authorities clearly demonstrated that 'the United States has exercised its supervisory authority over oil and gas leases in considerable detail.' *Pawnee*, 830 F.2d at 190 (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968)).")

When FOGRMA was urged upon us again in Navajo Nation's Rule 59 motion, we rejected it as a basis for Tucker Act jurisdiction under *Mitchell II* in summary fashion. We asserted our familiarity with the arguments, particularly those respecting the controlling effect of *Pawnee*. As we indicated then: "the Navajo Nation had ample opportunity to persuade the Court that the jurisdictional prerequisites were met. It was unsuccessful." *Navajo II* at 3.

We find nothing new in Plaintiff's arguments on remand. The Tribe persists in arguing that we wrongly distinguished the *Pawnee* case, and that we erred in finding that regulation of royalties for coal leases is less extensive than that for oil and gas royalties. *See* Pl. Remand Br. at 35–36 ("[F]ederal management and control over Indian coal resources is at least equal to, and in many cases much more extensive and pervasive than that concerning Indian oil and gas resource development.") Indeed the Plaintiff characterized ours as a "novel view," Reply Br. for Appellant (Dec. 1, 2000) at 9. This aspect of our opinion has not been specifically addressed by the Court of Appeals, although the Supreme Court recognized that IMLA and its regulations treat coal leases and oil and gas leases differently. *See Navajo V*, 537 U.S. at 494, 507 n. 11, 123 S.Ct. 1079.

The Navajo Nation continues to fault what it characterizes as our "myopic" approach in requiring the Tribe to link the violations it complains of to established fiduciary duties which could be fairly interpreted as mandating compensation. *See e.g.*, Tr. at 4; Reply

Br. of the Navajo Nation on Remand at 4. The Supreme Court implicitly approved of our reasoning, however. *See Navajo IV*, 537 U.S. at 513, 123 S.Ct. 1079 (Turning to the *ex parte* contact allegations, the Court observed, "Here again, as the Court of Federal Claims ultimately determined, see *supra*, at 1088, the Tribe's assertions are not grounded in a specific statutory or regulatory provision that can be fairly be interpreted as mandating money damages"); *but see, United States v White Mountain Apache*, 537 U.S. 465, 477, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003) (considered in tandem with the *Navajo Nation* case) and Pl. Remand Br. at 34 (arguing that *White Mountain* relaxed the test for Tucker Act jurisdiction). To the extent Plaintiff's arguments on remand merely attack these earlier conclusions of ours, we necessarily reject those arguments.

We have followed the Court of Appeals instruction to ignore IMLA in our consideration of other statutes and regulations that may establish compensable trust duties. But pivotal to the Supreme Court's holding in this case, and its rationale for aligning the Navajo's claim with *Mitchell I* as opposed to *Mitchell II*, is the Court's interpretation of IMLA's statutory purpose:

> Moreover, as in *Mitchell I*, imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes. The [General Allotment Act] was designed so that "the allottee, and not the United States, .. [would] manage the land." Imposing upon the Government a fiduciary duty to oversee the management of allotted lands would not have served that purpose. So too here. The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties. As the Court of Federal Claims recognized, "[t]he ideal of Indian self-determination is directly at odds with Secretarial control over leasing."

Navajo IV, 537 U.S. at 508, 123 S.Ct. 1079 (internal citations omitted).

CONCLUSION

In deciding this case we rejected the network theory:

> In *Pawnee* the Court cited a litany of regulatory provision dealing specifically with aspects of the management of royalties, the very item of which those plaintiffs complained. In our case, the regulations and statutory provisions cited by the Navajo cover a wide range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties. See Pl. Br. at 34 (citing 25 C.F.R. Part 211 (1985); 25 C.F.R. Part 169 (1985); 25 C.F.R. Part 200 (1993); and 25 C.F.R. Part 216 (1985)).

Navajo I, 46 Fed.Cl at 232.

Although Plaintiff marshaled voluminous catalogues of regulatory provisions, it never joined the ultimate issue. As we pointed out then, the Government "concedes that the Secretary owes some measure of trust responsibility, but argues that the responsibility as it relates to coal royalties does not rise above a generalized trust obligation." *Id.* It is that added step—to demonstrate unambiguously under the statutes and regulations "that the United States has undertaken full fiduciary responsibilities *as to the particular aspect of the relationship complained of*"—that Plaintiff could not satisfy. *See Navajo I*, 46 Fed.Cl. at 233 (citing *Wright*, 32 Fed.Cl. at 56) (internal quotations omitted).

Here on remand, the Tribe continues to rely on this asserted trust relationship, without defining the particular trust obligation in a manner which would lead us to conclude that the breach is actionable in this Court.

We have already found that Plaintiff's statutory and regulatory framework with IMLA does not suffice to establish a money-mandating trust in the area of royalty rates. On remand, *a fortiori*, those same statutes and regulations, apart from IMLA, fail to establish a compensable trust.

Since we do not have occasion to revise our original judgment of dismissal, we need not address the conditional aspects of the Circuit Court's remand.

IT IS SO ORDERED.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant Navajo Nation has been served upon the following counsel on this 7th day of June, 2006, by email and Federal Express, next-day delivery, and addressed as follows:

Todd S. Aagaard
Environment & Natural Resources Division
Department of Justice
601 D. Street NW, Room 8701
Washington, D.C. 20004

Paul E. Frye

CERTIFICATE OF COMPLIANCE

I, Paul E. Frye, hereby certify pursuant to FRAP 32(a)(7)(B) and (C) that the foregoing "Brief for Appellant, the Navajo Nation" complies with the type-volume limitation of FRAP 32(a)(7)(B). The Brief contains 13,987 words according to the Corel Word Perfect 10.0 program.

Paul E. Frye