No. 2006-5059

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NAVAJO NATION,

Plaintiff-Appellant,

v.

UNITED STATED OF AMERICA,

Defendant-Appellee.

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

REPLY BRIEF FOR APPELLANT, THE NAVAJO NATION

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

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

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

Attorneys for Appellant

August 28, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

II. STATUTES

III. REGULATIONS

IV. OTHER AUTHORITIES

INTRODUCTION

The Navajo Nation established, the Government conceded, and state and federal courts have found that the United States controls and supervises virtually every aspect of Navajo coal leasing and development, and unrebutted evidence shows that the Department of the Interior drafted and approved the lease at issue (the "8580 Lease") under the Navajo and Hopi Rehabilitation Act of 1950.[1] The Rehabilitation Act directs the Secretary to implement a development program for Navajo resources, including coal. 25 U.S.C. §§ 631, 635. The Court of Federal Claims ("CFC") found unequivocally that the Department violated trust duties of care, candor, and loyalty to the Nation by secretly colluding with the lessee Peabody to scuttle a well-founded royalty adjustment, intentionally misleading the Nation, subverting the Nation's bargaining position, and approving lease amendments that the Department knew were unfair to the Nation. Navajo Nation, 46 Fed. Cl. at 219, 226-27. This malfeasance resulted in royalty rates for extraordinarily valuable Navajo coal less than the minimum royalty rate that the Government demands for its own.[2]

---

[1] Peabody Coal Co. v. State, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988), cert. denied, 490 U.S. 1051 (1989); Austin v. Andrus, 638 F.2d 113, 114 (9th Cir. 1981); JA2108, 2986, 3575 (Udall Decl.), 4262; Brief for Appellant at 17-46.

[2] JA2058, 2064 (unrebutted proposed findings nos. 315, 350); JA3673-74; see Brief for Appellant at 8 & n.4.

Because federal control and supervision of the Nation's coal is pervasive and expressly intended to provide revenue to the Nation, the statutory and regulatory scheme has all the hallmarks of a conventional fiduciary relationship. Even if considered independently, several of the governing authorities mandate compliance with basic trust duties. The Rehabilitation Act by clear implication imposes federal responsibility and liability. Compare 25 U.S.C. § 635(a) with id. §§ 635(b)-(c). Both the Rehabilitation Act and 30 U.S.C. § 1300(e) impose duties of loyalty and candor. These authorities, together with the regulation governing lease negotiations, the lease itself, and binding Departmental policies requiring that tribal coal royalties meet or exceed the federal minimum, impose duties of care. Under United States v. Mitchell ("Mitchell II"), 463 U.S. 206 (1983), United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), and this Court's precedents, the governing authorities support a fair inference that Congress intended a monetary remedy for breaches of the duties they impose.

The Government responds that the Nation waived its "network" claim but asserts the wrong standard of review and misconstrues the term "claim." Next, although the Government emphatically conceded jurisdiction here, Brief of United States, No. 00-5086 (Fed. Cir. Nov. 2, 2000) at 2, it now contests both jurisdiction and liability, relying principally on contentions rejected in White Mountain and

Mitchell II. It relies on a misleading factual recitation, repeatedly mischaracterizes the Nation's network theory, misstates the governing standards, and overlooks specific duties expressly imposed by individual statutes. Moreover, the record shows that the features of the deal the Government touts harmed the Nation.

As shown below, the CFC did not abuse its discretion in ruling that the Nation did not waive its network claim, and, under governing precedent, federal supervision and control over all aspects of Navajo coal leasing, negotiations, lease administration, development, royalties, and reclamation impose money-mandating trust management duties, in addition to money-mandating duties expressly set forth in the Rehabilitation Act, 30 U.S.C. § 1300(e), and binding Departmental policies. No remand is required to determine liability because the facts are undisputed, the CFC's findings are uncontested, and such remand would cause unnecessary delay and expense.

STATEMENT OF FACTS

THE GOVERNMENT'S FACT STATEMENT REQUIRES CORRECTION.

The Government is economical with the truth. The Government does not just regulate "certain aspects" of Navajo coal leasing and development, Gov.Br. at 3; it controls everything "from the creation of its leases to the reclamation of land." Peabody Coal Co., 761 P.2d at 1099; supra n.1. The CFC received unrebutted evidence, notably the Udall Declaration, showing that the Department approved the

8580 Lease not under the 1938 Indian Mineral Leasing Act ("IMLA") but as the centerpiece of the Rehabilitation Act development program. JA3575; Navajo Nation, 68 Fed. Cl. at 812-13.

The Government suggests that the royalty rate was inequitable only "in the [Navajo] Chairman's view." Gov.Br. at 5. In fact, federal officials had recognized its inequity as early as 1978. JA351-54. Thus, the BIA Area Director was not simply "acting pursuant to the Tribe's request" in adjusting the rate in 1984, Gov.Br. at 5, but was fulfilling an acknowledged responsibility to rectify the inequity as trustee. JA379. The BIA Area Director, after considering federal studies, JA406-38, "unilaterally" adjusted the rate, Gov.Br. at 5, because the lease called for that, JA284. The Area Director did not consult Peabody before doing so, Gov.Br. at 5, because the Area Director was not Peabody's trustee, see Joint Board of Control v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988). Similarly, there is no basis for the unsupported contention, Gov.Br. at 48, that the Secretary could have properly balanced Peabody's interests against the Nation's, see Navajo Nation, 263 F.3d at 1332.

The Government omits any mention of the briefing on Peabody's appeal and the additional federal studies performed for Assistant Secretary John Fritz, the appellate decision maker. Peabody urged that a reasonable royalty rate was about

6%. See JA611. Any reviewing court would have had to reject that given the 12½% statutory minimum for federal coal and the additional studies validating the 20% rate. JA610-15, 649-714. These later studies are significant both because they validated the 20% rate, and because the Government improperly withheld them from the Nation. See JA1284 (Fritz testimony); 1643-44 (testimony of Director, Office of Trust Responsibilities ("OTR")); 4215-19. Astonishingly, the Government does not mention that a decision upholding the 20% adjustment was prepared as final for the Department and only awaited Fritz' signature. JA722, 1245.

The Department leaked the pending decision to Peabody. JA746, 1089-90. The Government highlights Peabody's attempt to camouflage this fact, Gov.Br. at 6, but the record shows that the Nation did not know of any pending decision, e.g., JA4214-19.

After the Department leaked the pending decision, Peabody hired Stanley Hulett to induce Secretary Hodel to intervene. But the resulting memorandum that Hodel sent to Fritz was not "the Secretary's memorandum." Gov.Br. at 7. It was composed by Peabody's attorneys in the appeal. JA746-49, 764. Nor did this memorandum to Fritz actually "assure[ ]," Gov.Br. at 7, that it was not a determination of the merits of the appeal. The contrary message to subordinates was clear. As the OTR Director testified:

> I believe that this sends a pretty strong message. I mean, you would have to be brain dead not to understand what this is telling you. . . . It seems to me that the message was, we're not going to decide anything around here until you guys negotiate an answer that Peabody's going to like and that you [the Nation] can live with. . . . I think the issue was decided when the Secretary sent that memo to John [Fritz] and told him to hold off and let [them] keep negotiating forever.

JA1648, 1671; Tr. 118 (May 4, 1999) (Government concession). The Secretary "assured" only that the Nation would continue to receive negligible royalties for its most valuable resource while the lessee held out indefinitely for the terms it desired. See, e.g., 263 F.3d at 1328; JA1565-66.

The Associate Solicitor warned of the consequences if the Nation learned of the Secretary's actions. JA771. He was silenced, instructed to mislead the Nation, and did so. JA2880-81, 773; 46 Fed. Cl. at 223; 537 U.S. at 520 (Souter, J., dissenting). Without knowing of the new studies validating the 20% rate or the decision that would have affirmed it, the Nation interpreted the Associate Solicitor's letter as an indication that the 20% rate was vulnerable on its merits. JA1569; see JA4214-19. The CFC found that the Nation could not possibly have negotiated on an even footing with Peabody, 46 Fed. Cl. at 227, and the Government does not contend otherwise.

ALL SIGNIFICANT FEATURES OF THE DEAL HARMED THE NATION.

The Government suggests that the overall lease amendment package benefitted the Nation. Gov.Br. at 8-9. Each major feature harmed the Nation, however.

Royalty Rates. The lease amendments established a facial royalty rate of 12½%, and a true royalty rate less than that, not the recommended 20%. That cost the Nation $347,500,000 for just one of Peabody's two customers. JA736, 1525, 2064 (PPF 349). The royalty rate for identical coal under Lease 9910 was also set at the facial 12½%, also damaging the Nation. Had the Department not secretly colluded with Peabody, the 20% royalty would have applied to that coal, too, JA743, 1521-23, 1072-73; Peabody Coal Co., 155 IBLA 83, 94 (2001), retroactively to 1984, id. at 94-95 & n.12; JA453. The Nation had already negotiated royalty increases to 12½% for inferior coal, even though those leases had no adjustment feature. See BHP Minerals Int'l, Inc., 139 IBLA 269, 279-81 (1997); JA4221-22. The Government touts royalty increases under a lease no. 5743, Gov.Br. at 4, 8, but that concerns Hopi coal, 46 Fed. Cl. at 233; JA874, 2209, 2678.

Royalty-Tax Cap. Before the Department approved the 1987 amendments, the Nation had substantial flexibility to tax coal dedicated to one of Peabody's two customers. See JA788; Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upholding 30% coal severance tax). The amendments capped all Navajo taxes at

8%. Gov.Br. at 8. Contrary to the contention that the royalty-tax cap "permitt[ed] the Tribe to realize as much as 20.5 percent yield in royalties and taxes combined," id., the Nation cannot tax coal dedicated to the second generating station, under that station's plant site lease, JA1972-76, 2055 (PPF 299). According to the Government's expert, the amendments were not in the Nation's best interest for this reason alone. JA1006.

Tax Waivers. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), upheld Navajo taxes on mineral companies. Thus, Peabody's acknowledgment of Navajo taxing authority in 1987, Gov.Br. at 8, provided no value. The amendments also required the Nation to confirm old tax waivers and provide new ones. JA805-12. Worse yet, they required the Nation to waive $33 million in valid back taxes. JA787, 809. The Department knew that the Navajo "gave up something for nothing" here. JA2865.

Bonuses. The Government touts the bonuses. Gov.Br. at 8. But those bonuses are "considerably below" that demanded by the Government for its own coal. JA3674; 1857; see JA1551. Here, "the Navajo Nation actually suffered a substantial up-front loss rather than a bonus, never to be offset by a higher royalty rate or scheduled future bonuses." JA3674.

Additional Coal. The amendments leased an additional 90 million tons of 8580 coal and 180 million tons of jointly-owned coal at the facial 12½% rate, not the 20% rate determined appropriate. JA795-96. At $20/ton, see JA566, the difference for just the 8580 coal is $135,000,000.

Arbitration Provisions. The Government states that the amendments also "addressed . . . arbitration procedures." Gov.Br. at 8-9. More accurately, the amendments substituted third-party arbitration for the trustee's adjustment authority. The Government has never ceded that authority for its own leases. JA1299. The Government's expert admitted that this authority was "extremely valuable," JA988, and this abrogation of trustee authority was another fundamental breach of trust, according to the OTR Director, JA1637-39.

Avoidance of Litigation. The Government highlights avoidance of litigation. Gov.Br. at 9-10. However, "careful analysis of relevant factors takes precedence over avoiding a lawsuit" in the Indian trust context. Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583, 590 (10th Cir. 1992), cert. denied, 507 U.S. 1003 (1993). Here, the Nation urged the Secretary to ignore Peabody's oblique threat. JA751.

Departmental officials knew that Hodel's actions would provide significant benefits "[t]o everybody other than the Navajo Nation," JA1263-64, and they did, JA779, 786-88.

ARGUMENT

I. THE CFC CORRECTLY RULED THAT THE NATION DID NOT WAIVE ITS NETWORK CLAIM.

This Court directed the CFC to see if the Nation "waived a claim with respect to 'a network of other statutes and regulations.'" 347 F.3d at 1332. The CFC ruled that the Nation properly preserved the claim, noting that the Nation has always pursued that claim. 68 Fed. Cl. at 808.

Contrary to the Government's assertion that this review is de novo, Gov.Br. at 20, this Court reviews waiver decisions for abuse of discretion. United States v. Ziegler Bolt & Parts Co., 111 F.3d 878, 882-83 (Fed. Cir. 1997); Vargas v. United States, 124 Fed. Appx. 658, 659 (Fed. Cir. 2005). Moreover, the Government had the burden of showing waiver. See Mooney v. City of New York, 219 F.3d 123, 131 (2d Cir. 2000), cert. denied, 531 U.S. 1145 (2001). But it expressly conceded below that no waiver had occurred.

> **The Court**: And so the proper response to the remand would be no waiver but asked and answered and rejected.
>
> **Mr. Rogers** [Government counsel]: Yes, Your Honor. That's precisely our position.

Tr. 32-33 (May 18, 2004); id. at 34.

The Government resurrects its waiver contention, arguing that the Navajo Nation had waived its network claim by failing to support it with arguments expressly disclaiming reliance on IMLA. That position is based on a misunderstanding of the term "claim."

A claim is the set of operative facts asserted to support relief, and is defined by the facts, not legal theories. Johns-Manville Corp. v. United States, 855 F.2d 1556, 1562 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Bethesda Lutheran Homes and Services, Inc. v. Born, 238 F.3d 853, 857 (7th Cir. 2001) (distinguishing claim from argument or ground). The Nation's claim is that the Government breached trust duties and statutory requirements by colluding with Peabody to minimize revenues for extraordinarily valuable Navajo coal below even that demanded by the Government for any of its own. One theory supporting the claim is that when the Government supervises or controls a tribal resource, Government mismanagement is compensable under familiar trust law standards. Several arguments support that theory, including the argument that a network of treaties, statutes, and regulations establishes sufficient supervision or control to raise a fair inference of compensable trust management duties. When the focus is on the Nation's claim, even the Government's principal brief below conceded that the Nation's claim predicated on a network of statutes and regulations was properly preserved: "Plaintiff raised the

issue of a comprehensive federal scheme governing Indian mineral leasing and coal development on the motions for summary judgment. . . . Clearly, the [CFC] heard . . . Plaintiff's claim with regard to a network of statutes and regulations." Gov. Resp. Br. (Dec. 10, 2004) at 15, 17.

Preservation of a claim "'does not demand the incantation of particular words; rather, it requires that the lower court be put on notice as to the substance of the issue.'" Consolidation Coal Co. v. United States, 351 F.3d 1374, 1378 (Fed. Cir. 2003) (citation omitted). Thus, a complaint alleging breach of trust need only put the trustee on notice of the alternative theories for breach of fiduciary duties that could be raised. Planmatics, Inc. v. Showers, 137 F. Supp. 2d 616, 625 (D. Md. 2001), aff'd, 30 Fed. Appx. 117 (4th Cir. 2002).

These principles defeat the Government's contention that the Nation waived its claim by failing to carve out an argument early in the case that a network of all regulations and statutes, but excluding IMLA, established jurisdiction. As the CFC observed, "[t]here was, of course, no reason why the Plaintiff should advocate this [network] theory without reference to IMLA" before this Court "took IMLA 'off the table.'" 68 Fed. Cl. at 810. A contrary ruling would require a complaint and briefs by counsel relying on five statutes, for example, to allege and argue that if statute A is inapplicable, then statutes B, C, D, and E comprise the relevant matrix; and if A

and B are both inapplicable, then C, D, and E would suffice – and so forth. That nonsensical position contravenes settled law. See, Yee v. City of Escondido, 503 U.S. 519, 534 (1992); Consolidation Coal, supra.

Finally, if the Government were correct, there would have been no Mitchell II. Those plaintiffs relied from the beginning on the General Allotment Act ("GAA") and timber management and right-of-way statutes. They did not split their statutory network into the GAA on the one hand and the remaining statutes on the other. See JA 4144-99. Under the Government's theory, the Supreme Court's holding that the GAA provided only a bare trust in United States v. Mitchell ("Mitchell I"), 445 U.S. 535 (1980), would have ended the case, but it did not. See Mitchell II, 463 U.S. at 210-11.

The Government's authorities are inapposite. In Tronzo v. Biomet, Inc., 236 F.3d 1342 (Fed. Cir.), cert. denied, 534 U.S. 1035 (2001), the appellant chose not to contest the relevant trial court ruling in a prior appeal. Id. at 1349. By contrast, the Nation relied extensively on the network in its prior appeal. Brief for Appellant, No. 00-5086 (Aug. 25, 2000) at 29-44. The other two cases cited by the Government are similarly distinguishable.

II. FEDERAL CONTROL OR SUPERVISION OF TRIBAL PROPERTY ESTABLISHES ENFORCEABLE TRUST MANAGEMENT DUTIES.

The Government seeks to avoid jurisdiction and liability by contending that only trust duties explicitly set forth in a statute or regulation are enforceable, by mischaracterizing the governing control or supervision test, and by urging that common law trust duties are not enforceable because Indians may only assert the same claims as non-Indians. All these arguments have been consistently rejected by this Court and the Supreme Court and should be rejected here.

A. The Indian Tucker Act Confers Jurisdiction Over Claims for Breach of Trust.

In 1863, Congress prohibited Indian tribes from suing the Government. Mitchell II, 463 U.S. at 214. Consequently, Congress was repeatedly asked to pass special jurisdictional statutes. Id. Recognizing the contributions of Indian people in World War II, 92 Cong. Rec. H. 5320 (1946), Congress enacted the Indian Tucker Act, 28 U.S.C. § 1505, to permit Indians "'access to the courts when . . . fiduciary duties have been violated.'" Mitchell II, 463 U.S. at 215 (quoting H.R. Rep. No. 79-1466 at 5 (1945)).

The House bill provided that the old Indian Claims Commission "should apply to the United States the same principles of law as would be applied to an ordinary fiduciary." See 92 Cong. Rec. H. 10,402 (1946). The Senate struck that provision

and the conferees agreed to its elimination "because it is now well settled that without express language the United States owes a very high degree of fiduciary duty to Indian Tribes, and the bill, by section 24 [the Indian Tucker Act section], provides 'That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.'" Id. The "well settled" principles in 1946 included the imposition of strict fiduciary standards on the Government in its dealings with tribes, with special emphasis on the duty of loyalty. Seminole Nation v. United States, 316 U.S. 286, 296-97 & n.12 (1942). The Indian Tucker Act proviso was intended "to make clear that the [Indian Tucker Act does] not . . . cancel any fiduciary obligations of the United States . . . ." Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483, 490 (1966). Codifiers later omitted that proviso from the codified Indian Tucker Act "'since the provision conferring jurisdiction cannot in any view alter the relationship of the Government with its Indians.'" Id. at 490 n.3 (quoting 2 U.S. Cong. Serv. 1269 (1949)).

The Indian Tucker Act expressly authorizes suit by tribes "arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505 (emphases added). Clearly,

tribes are not restricted to bringing only claims that a non-Indian might bring under the Tucker Act, and the jurisdictional grant for claims arising under federal "laws" includes claims arising under federal common law such as that developed concerning Indian trust property. See Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). The broader Indian Tucker Act simply reflects Congress' recognition of the unique federal/tribal relationship. Because of the broad consent to suit in the Indian Tucker Act, the relevant statutes and regulations should not be narrowly construed. White Mountain, 537 U.S. at 472-73; Mitchell II, 463 U.S. at 218-19. That would defeat the central purpose of the statute. Accord Dolan v. Postal Service, 126 S.Ct. 1252, 1260 (2006) (FTCA); Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).

The Government thus misinterprets the Indian Tucker Act in contending that Indians may only assert the same claims as non-Indians. E.g., Gov.Br. at 50. It asserted that same defense in White Mountain, Brief of United States at 13, 15, 29, 40-41, No. 01-1067, yet its dogged advocacy on this point merited not one word in the Court's opinions. Rather, the right of tribes under the Indian Tucker Act shared with non-Indians under the Tucker Act is the "same right to sue" in the CFC. Klamath, 174 Ct. Cl. at 489.

B. The Control or Supervision Test is Well Established, and the Government's Mischaracterization of the Nation's Argument Should Be Disregarded.

In Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980), the Government argued, as here, that "no fiduciary obligation can arise unless there is an express provision of a treaty, executive order or statute creating such trust relationship, and the trust relationship is limited by the precise terms of the document." The court rejected that contention and established the test for liability for breach of trust involving tribal property. "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." Id. Contrary to the Government's position, "the court [is not] required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute (or other fundamental document). The general law of fiduciary relationships can be utilized to the extent appropriate." Id. at 988. Thus, where the Government controls or supervises trust property, the "Government's actions 'must normally be judged according to the standard applicable to a trustee engaged in the management of trust property.'" Id. at 989 (citation omitted).

Especially where federal actions are intended to partially fulfill treaty obligations, as here, see 25 U.S.C. § 631, the Government's actions are "'judged by the most exacting fiduciary standards.'" Navajo Tribe, 624 F.2d at 990 (quoting Seminole Nation, 316 U.S. at 296-97).

After the Supreme Court remanded in Mitchell I, the Court of Claims based federal liability on these principles, quoting the "control or supervision" passage of Navajo Tribe. Mitchell, 664 F.2d at 270. The Supreme Court affirmed, and it also quoted the "control or supervision" passage of Navajo Tribe with approval. 463 U.S. at 225. That test is still the law of this Circuit. See, e.g., White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1375-76 (Fed. Cir. 2001), aff'd, 537 U.S. 465 (2003); Brown v. United States, 86 F.3d 1554, 1560 (Fed. Cir. 1996). The Nation described it as the "general supervision and control test." Brief for Appellant at 17. In that phrase "general" means "widely recognized"[3] and it modifies "test."

This Court should disregard the Government's repeated mischaracterization of that phrase and the test for establishing compensable trust duties. The Government drops the word "test," then repeatedly disputes the Nation's supposed position that "general control or supervision" is the new touchstone, and ultimately reduces that to "mere federal involvement," or "some level of federal involvement." Gov.Br. at

[3] Black's Law Dictionary 706 (8th ed. 2004).

18, 25, 28. The Nation relies on the test announced in Navajo Tribe, embraced in Mitchell II, and applied in this Court's Brown and White Mountain decisions, not the Government's mutations of it. That said, "[n]early complete control, while more than sufficient to create an enforceable trust duty, is not necessary." Brown, 86 F.3d at 1560; White Mountain, 249 F.3d at 1376.

C. The Government's Principal Positions Were Rejected in Mitchell II and White Mountain.

The Government argues that the Nation "must show that the federal government's actions in this case breached a specific fiduciary duty as defined in a statute or regulation." Gov.Br. at 24; id. at 18, 20, 25, 33, 34, 51. It also contends that the United States may not be held "liable for damages based on application of common law trust principles." Id. at 51. Both of these arguments were rejected in Mitchell II and White Mountain.

In White Mountain, this Court held the Government liable for breach of its trustee duty to preserve trust property. 249 F.3d at 1378. Although the statute at issue did not specify that duty, this Court reasoned that "[o]nce 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 . . . for assistance in defining the nature of that obligation." Id. at 1377. The Government disagreed,

contending in the Supreme Court that "an Indian plaintiff must still point to a source of positive law that imposes specific duties on the United States and provides for the payment of compensation by the United States if those duties are not performed." Gov. Reply Brief at 18, No. 01-1067.

The Supreme Court rejected the Government's present arguments. It recognized that the statute in that case did "not, like the statutes cited in [Mitchell II], expressly subject the Government to duties of management and conservation." White Mountain, 537 U.S. at 475. But the Court found that actual federal control of a tribal resource "supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee," relying on "elementary trust law." Id. And when the federal government controls or supervises a tribal resource, "general trust law [is] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." Id. at 477.

Similarly, in Mitchell II, no statute or regulation required the Government to seek fair value for Indian timber or to establish a system of roads to permit profitable exploitation, but this Court's predecessor held that those duties were fairly inferred from the management role that the Government had undertaken, see Mitchell, 664 F.2d at 267, 273, and the Supreme Court affirmed, 463 U.S. at 228.

Therefore, when the Government controls or supervises tribal trust assets, the

statutes and regulations need not set forth specifically each duty or prohibition. White Mountain, 537 U.S. at 475; Duncan v. United States, 667 F.2d 36, 42-43 (Ct. Cl. 1981), cert. denied, 463 U.S. 1228 (1983); Mitchell II, 463 U.S. at 224 (such authorities form "contours" of trust duties). The key is whether statutes and regulations establish only a bare trust or whether they give the Government a managerial role. See White Mountain, 537 U.S. at 480-81 (Ginsburg, J., concurring); Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (Fed. Cir. 2005). If the latter, the statutes and regulations impose specific duties required by relevant trust law standards and thus satisfy the requirement of "specific rights-creating or duty imposing statutory or regulatory prescriptions." See Navajo Nation, 537 U.S. at 506.

The Government simply misreads the Tucker Act, claiming that an Indian tribe must allege a "violation of an 'Act of Congress' or 'regulation of an executive department.'" Gov.Br. 51 (emphasis added), 20. Rather, the Tucker Act requires that a claim thereunder be "founded . . . upon" such authorities. 28 U.S.C. § 1491(a)(1). As Mitchell II, White Mountain, and this Court's precedents amply demonstrate, a claim alleging that compensable trust management duties flow from federal control or supervision conferred by statutes or regulations is properly founded upon those statutes or regulations.

III. INDIVIDUAL STATUTES AND REGULATIONS ALSO IMPOSE ENFORCEABLE TRUST DUTIES THAT WERE VIOLATED HERE.

A. The Rehabilitation Act Governs the Lease and Amendments.

After taking IMLA off the table, this Court remanded for "further proceedings." 347 F.3d at 1332. Such remand gave wide latitude to the CFC, see State Indus., Inc. v. Mor-Flo Indus., Inc., 948 F.2d 1573, 1577 (Fed. Cir. 1991), allowing the CFC to receive additional evidence, see id.; Discon, Inc. v. NYNEX Corp., 184 F.3d 111, 113-14 (2d Cir. 1999). The decision to receive additional evidence on remand is addressed to the sound discretion of the trial court. State Indus., supra. The Government does not argue that the CFC abused its discretion when it received the Udall Declaration and permitted the Government to file a Supplemental Brief addressing it and other additional evidence. See Beacon Oil Co. v. O'Leary, 71 F.3d 391, 396 (Fed. Cir. 1995).

The CFC acknowledged that the lease at issue was approved as the centerpiece of the resources development program under the Rehabilitation Act. 68 Fed. Cl. at 812-13. Secretary Udall's testimony is unrebutted, and the amendments expressly preserved all provisions of the original lease. JA817. While the Government contends that the lease was issued under IMLA based on a prior proposed finding of fact, Gov.Br. at 32 n.7, it does not actually dispute the Udall Declaration or case

authority showing that the 8580 Lease was issued under the Rehabilitation Act. See Austin, 638 F.2d at 114. Certainly, this Court is not required to limit its analysis to the IMLA-based theory. See Lockheed Martin Corp. v. Space Systems/Loral, Inc., 324 F.3d 1308, 1310-11 (Fed. Cir. 2003).

B. The Network Has a Distinctly Monetary Character and Imposes Substantial Federal Control and Supervision Over Navajo Coal Leasing and Royalties.

Contrary to the Government's argumentation, each component of the governing network supports jurisdiction and liability here. The overriding justification for allowing Peabody to mine Navajo coal is to provide the Nation with royalties. The Rehabilitation Act is expressly intended to "make available the resources of the[ ] reservation[ ] for use in promoting a self-supporting economy and self-reliant communities." 25 U.S.C. § 631. That can happen only if the Navajo government can address its multi-billion dollar infrastructure deficit. See JA1565-66; U.S. Comm'n on Civil Rights, The Navajo Nation: An American Colony 41-42 (1975). Comprehensive federal regulations seek to ensure that the lessee pays proper royalties for Navajo coal. E.g., 30 C.F.R. Parts 212, 216, 218 (1987); Peabody Coal Co., 72 IBLA 337 (1983).

The Government does not dispute that the United States controlled the setting of royalty rates at all relevant times. See Brief for Appellant at 31-33. The 8580

Lease was drafted by the Government as the centerpiece of the Rehabilitation Act's development program, and the key provision, authorizing the Secretary to adjust the royalty, conferred exclusive federal control over the royalty rate. Although the lease does not provide a basis for liability in a "bare" trust under IMLA, 537 U.S. at 510 n.13, it is a "fundamental document" that must be considered when evaluating the federal trust duties under the Rehabilitation Act and other statutes and regulations conferring management responsibilities on the Government, Pawnee v. United States, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); see Mitchell II, 463 U.S. at 225. Likewise, the lack of contractual duties on the Government under the lease is irrelevant because trust duties are not contractual in nature. See Restatement (Second) of Trusts § 169, cmt. c (1959).

The Government's claim that right-of-way statutes and regulations are irrelevant to federal supervision and control, Gov.Br. at 43-44, would make Mitchell II a wrongly decided case. See 463 U.S. at 223, 225 n.29. Such federal control was used here both to increase Navajo revenues from this lease, JA3640-47, and to solidify federal control over Navajo leasing decisions, Disposal of Rights in Indian Lands without Tribal Consent, H.R. Rep. No. 91-78 (1969) at 7, 13; JA4201-11. Although the Nation ultimately agreed to leases sought by the Government when it threatened to grant them as rights-of-way over Navajo objections, such supervening

federal control is not negated by tribal resignation to it. The contentions that FOGRMA coal regulations came too late and did not increase federal control here, Gov.Br. at 42-43, ignore that Indian coal royalties were closely regulated under FOGRMA by 1986, see Brief for Appellant at 34.

Next, the Government asserts that SMCRA's Indian Lands Section addresses only environmental standards, Gov.Br. at 41 n.17, but the plain language of 30 U.S.C. § 1300(e) refutes that contention. While sections 1300(c) and (d) require compliance with environmental standards and incorporate those standards into leases (again showing that the Government controls terms of Indian coal leases), section 1300(e) requires the Secretary to "include and enforce terms and conditions in addition to those required by subsections (c) and (d) as may be requested by the Indian tribe in such leases." 30 U.S.C. § 1300(e) (emphasis added). As Senator Goldwater stated, this provision "deals specifically with how the Indians will be protected . . . as they negotiate," 123 Cong. Rec. 15,575 (1977), and the corresponding regulation was promulgated to implement the trust responsibility, 49 Fed. Reg. 38,462 (1984).

The Government urges that federal regulations that govern this coal lease are inapplicable because they are "IMLA regulations." E.g., Gov.Br. at 38, 40. This Court should reject the notion that a coal lessee under the Rehabilitation Act operates in a regulatory vacuum. The Secretary was empowered to prescribe regulations

governing the Peabody leases, 25 U.S.C. § 635(a); Austin, 638 F.2d at 114, and the Secretary did so under the very regulations that the Government contends are inapplicable, JA3590-92 (citing, inter alia, 25 C.F.R. Parts 211 and 216). Because those regulations implement the Rehabilitation Act here, they must be interpreted "in light of the entire law and its object and policy . . . consistent with the statutory objective." See Exxon Corp. v. United States, 88 F.3d 968, 975 (Fed. Cir. 1996), cert. denied, 520 U.S. 1119 (1997) (citation omitted). One of those regulations, concededly violated here, closely controlled and supervised lease negotiations to avoid corporate overreaching. 25 C.F.R. § 211.2 (1985); JA839, 1013-14, 1667-68, 1734. Signing a secret order drafted by the lessee and "throw[ing the Navajo Nation] out there and let[ting] them get beat up" over a period of two years, JA1644, cannot constitute proper supervision under this regulation.

Next, the Government does not challenge the Nation's showing that the Coal Leasing Policy on Indian Lands, the Andrus policy setting 12½% as the "absolute minimum," and the BIA Manual applied at all relevant times. Its contention that they were not violated is based solely on dictum in Navajo Nation. Gov.Br. at 39-40 & n.13. However, that dictum only concerns the sub-12½% royalty rate and is not binding here, especially since the Nation has shown that its assumed predicates are

incorrect.[4] See Central Virginia Comm. Coll. v. Katz, 126 S.Ct. 990, 996 (2006). This Circuit's test regarding consideration of unpublished provisions is whether the agency intended them to establish a binding rule, focusing on whether the language is mandatory or precatory. See Hamlet v. United States, 63 F.3d 1097, 1102-05 (Fed. Cir.), cert. denied, 517 U.S. 1155 (1996). Here, both the Coal Leasing Policy and the Andrus policy employ mandatory language. JA331-35. And even if the BIA Manual provisions are not given the same weight as published regulations, they elucidate the agency's own view of its statutory responsibilities. See United States v. New Mexico, 438 U.S. 696, 703 n.7 (1978).

Finally, the Government erroneously suggests that the Nation predicates its claim on the APA and argues that the Nation was required to challenge the Secretary's malfeasance under the APA, rather than sue for damages. That argument contravenes both White Mountain, 537 U.S. at 478-79, and Mitchell II, 463 U.S. at 227-28.

---

[4] The Nation had urged repeatedly and proved in the CFC that the royalty rate here was less than the federal minimum, and the unrebutted evidence demonstrates that the 12½% rate was not the customary royalty rate. See Brief for Appellant at 8 & n.4; JA3673, 4220, 4224.

C. The Governing Authorities Give Rise to a Fair Inference that Congress Intended Compensation for Their Violation.

The language, structure, and purpose of the Rehabilitation Act gives rise to a fair inference that Congress intended that intentional federal mismanagement of Navajo resources would be remediable in damages. Congress provided that leases of Navajo fee lands would "create no liability on the part of the United States." 25 U.S.C. § 635(b). Congress also provided that "the United States shall have no responsibility or liability for . . . the management, use, or disposition of" Navajo trust lands transferred to municipal or tribal corporations. Id. § 635(c). But Congress provided no such exemption for mineral leases of Navajo trust lands. Id. § 635(a). The inference of responsibility and liability here is not only fair, it is compelling. See S.D. Warren Co. v. Maine Bd. of Envir. Prot., 126 S.Ct. 1843, 1853 (2006); Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2765 (2006).

The Government does not address this argument, nor inferences based on the comparison of the Rehabilitation Act with mineral leasing statutes that expressly exempt the United States from liability for approval of improvident tribal deals. The Government's only response regarding the requirement that the Secretary include terms requested by tribes in coal leases, such as the 20% rate here, is its misreading of 30 U.S.C. § 1300(e). It simply trivializes the requirements of candor and loyalty

explicitly imposed there and by the Rehabilitation Act. See 25 U.S.C. § 638; JA3575 (Udall Decl.) ("trusteeship was of paramount importance" in the implementation of the Rehabilitation Act).

Nor does the Government address the similarities between this case and Mitchell II, other than contending erroneously that relief in that case was granted only for violations of express and specific statutory provisions. Its treatment of White Mountain in this respect is mere sleight-of-hand, asserting that because the statute there "defined a fiduciary relationship" it therefore "explicitly addressed the United States' fiduciary obligations." Gov.Br. at 27 (emphasis added).

The Government applauds the CFC for basing its decision on the Supreme Court's decision in Navajo Nation, relies heavily on that decision, and criticizes the Nation for not concentrating on it. E.g., Gov.Br. at 26, 29 n.5. However, that decision, and Mitchell I, concern instances where the relevant statute established only a bare trust. Here, by contrast, the Nation is litigating the Government's fiduciary management duties for Navajo coal under several federal laws governing all aspects of Navajo coal leasing, development, and royalties and which independently prescribe numerous specific fiduciary duties, all of which were breached here.

IV. THE GOVERNMENT'S CONSENT-BASED DEFENSES MUST FAIL BECAUSE GOVERNMENT WRONGDOING INFLUENCED THE NATION'S AGREEMENT TO THE LEASE TERMS.

The Rehabilitation Act instituted a program for Navajo resource development to be "undertake[n]" by the "Secretary of the Interior." 25 U.S.C. § 631. That is a federal program. The lease here is the centerpiece of that federal program. Clearly, the Rehabilitation Act cannot be construed as promoting Navajo self-determination in coal leasing. The Rehabilitation Act permitted the Navajo to enact a constitution, 25 U.S.C. § 636, but the Department rejected the one proposed by the Nation in large part because it would have allowed the Navajo to issue mineral leases, Proposed Constitution for Navajo Tribe, II Op. Sol. 1641, 1642 (1954).

The Government suggests that two memoranda commenting on a 1984 conceptual proposal confirm the propriety of the 1987 deal. The Department knew the opposite. The Department had debarred one commenter, the Council of Energy Resources Tribes, because it could not perform, JA2835, and it knew that the Nation's staff was unable to negotiate effectively with Peabody, JA1279-80. Moreover, the same Navajo geologist commenting on the 1984 proposal opposed the final 1987 deal. JA1852-53.

It is unrebutted that the Nation's agreement to the terms of the negotiated deal was influenced significantly by trustee misconduct. See, e.g., 46 Fed. Cl. at 226-27;

JA771, 4214-19. The CFC's findings in this regard are unambiguous and entitled to respect. See United States v. Shoshone Tribe, 304 U.S. 111, 115 (1938). These findings, and the Government's control over all aspects of Navajo coal development, preclude the Government's self-determination defense, in reality a type of consent defense. See, e.g., Mitchell II, 463 U.S. at 237 n.11 (Powell, J., dissenting); Bogert, The Law of Trusts and Trustees § 941 at 511 (1995).

V. THIS COURT SHOULD REMAND FOR A DETERMINATION OF DAMAGES.

The CFC's findings of breach of duties of care, loyalty, and candor are unequivocal and undisputed. 46 Fed. Cl. at 221, 226. This Court adopted them. 263 F.3d at 1328. They are entitled to respect. Shoshone, 304 U.S. at 115. Those duties are clearly within the contours of the governing authorities. Because the CFC has jurisdiction and the Nation established liability, the only remaining task is to determine damages.

The Government urges that any remand require a redetermination of liability. However, the facts are undisputed, and no useful purpose would be served by asking the CFC to tell this Court what it already knows from the record and what the CFC already found. Therefore, no remand for a second liability determination is appropriate. See Consolidated Aluminum Corp. v. Foseco, Int'l Ltd., 910 F.2d 804,

814-15 (Fed. Cir. 1990); SmithKline Diagnostics, Inc. v. Helena Labs. Corp., 859 F.2d 878, 886 n.4, 891 (Fed. Cir. 1988). White Mountain, 249 F.3d at 1383, is inapposite, because the CFC here already rejected the Government's former limitations defense. 46 Fed. Cl. at 224-25.

CONCLUSION

The judgment of the CFC should be reversed and the case remanded for a determination of damages.

Respectfully submitted,

FRYE LAW FIRM, P.C.

Paul E. Frye
10400 Academy Rd. NE #310
Albuquerque, NM 87111
(505) 296-9400

Counsel of Record for the Navajo Nation

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant Navajo Nation has been served upon the following counsel on this 28th day of August, 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 2121
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 6,999 words according to the Corel Word Perfect 10.0 program.

Paul E. Frye