No. 2006-5059

IN THE 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 93-CV-763
(Judge Lawrence M. Baskir)

BRIEF OF THE UNITED STATES (CORRECTED)

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STATEMENT OF RELATED CASES

Three other appeals have arisen out of the same proceeding in the Court of Federal Claims.The appellant in *Navajo Nation v. Leisse*, No. 96-5118 (Fed. Cir. filed July 12, 1996), voluntarily dismissed its appeal before it was submitted to a panel. Judges Newman, Schall, and Linn decided the appeal in *Navajo Nation v. United States*, No. 00-5072, on March 29, 2001. Judges Newman, Schall, and Linn decided the appeal in *Navajo Nation v. United States*, No. 00-5086, on August 10, 2001. *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001) (*Navajo II*); *rev'd*, 537 U.S. 488 (2003). The same panel subsequently issued another decision in the same appeal, on remand from the Supreme Court, on October 24, 2003. *Navajo Nation v. United States*, 347 F.3d 1327 (Fed. Cir. 2003) (*Navajo IV*).

This Court's decision in the instant appeal may directly affect two cases known to counsel that are currently pending in other courts: *Hopi Tribe v. United States*, No. 00-CV-217 (Ct. Fed. Cl. filed April 18, 2000), and *Navajo Nation v. Peabody Holding Co.*, No. CA-99-0469-EGS (D.D.C. filed Feb. 25, 1999). In its brief, the Navajo Nation certifies that the Court's decision in the instant appeal will directly affect *Navajo Nation v. Peabody Coal Co.*, No. 93-CV-2342 (D. Ariz. filed Dec. 13, 1993). Tribe Br. xvii. The United States lacks sufficient information about that case to determine whether the instant appeal might affect it.

STATEMENT OF JURISDICTION

The Navajo Nation ("Tribe"), a federally recognized Indian tribe, brought this action in the United States Court of Federal Claims (Lawrence M. Baskir, Judge) against the United States, alleging that the Secretary of the Interior ("Secretary") violated fiduciary and contractual duties by approving amendments to a lease to mine coal on the Tribe's lands pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g. J.A. 32-42. The Tribe invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, and the "Indian Tucker Act," 28 U.S.C. § 1505. J.A. 32. The Court of Federal Claims lacked jurisdiction over the Tribe's claims because the Tribe failed to state a claim within the jurisdiction of the Tucker Act and Indian Tucker Act.[1]

The Court of Federal Claims issued its final decision on December 20, 2005, reaffirming its original judgment of dismissal for lack of jurisdiction. J.A. 1-11. The Tribe filed a timely notice of appeal on February 14, 2006. J.A. 4364; *see* Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction to review the Court of Federal Claims' final decision rests on 28 U.S.C. § 1295(a)(3).

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1. This Court sometimes has characterized a failure to state a claim within this Court's jurisdiction as a failure to state a cognizable claim rather than a lack of subject-matter jurisdiction. *See Pawnee v. United States*, 830 F.2d 187, 192 n.7 (Fed. Cir. 1987). In *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005) (en banc), however, the Court clarified that the appropriate disposition of such cases is a dismissal for lack of jurisdiction. *Id.* at 1173.

STATEMENT OF THE ISSUES

I. Whether the Tribe waived its argument that a "network" of statutes and regulations other than IMLA imposed fiduciary duties that supported a claim for money damages by failing to raise such an argument in its previous appeal from the Court of Federal Claims' judgment.

II. Whether the Court of Federal Claims correctly held that, with respect to an existing lease of coal on Indian lands, the Tribe's asserted "network" of statutes and regulations, which cannot include IMLA, does not impose specific fiduciary duties on the Secretary in approving amendments to Indian mineral lease pursuant to IMLA.

STATEMENT OF THE CASE

This case arises out of the Secretary's approval of amendments to a lease by which the Peabody Coal Company ("Peabody") mines the Tribe's coal resources. The Tribe claims that the Secretary committed a breach of trust by encouraging the Tribe to continue negotiating with Peabody, and by approving the lease amendments that the Tribe and Peabody then negotiated and asked the Secretary to approve. According to the Tribe, the Secretary instead should have exercised his discretion under the lease to adjust the lease's royalty rate unilaterally, even though the negotiated lease amendments contained many beneficial provisions that would not have been obtained through an adjustment of the royalty rate. On

review of the Tribe's first appeal in this case, the Supreme Court held that neither IMLA, the Indian Mineral Development Act ("IMDA"), 25 U.S.C. §§ 2101-2108, nor 25 U.S.C. § 399 imposed any relevant fiduciary duties enforceable in an action for money damages. *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo III*). On remand, the Court of Federal Claims further held that none of the other statutes and regulations subsequently invoked by the Tribe impose any relevant fiduciary duties.

STATEMENT OF FACTS

The United States, through the Secretary, regulates certain aspects of mineral leasing on Indian tribal lands pursuant to IMLA. IMLA authorizes an Indian tribe, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes. 25 U.S.C. § 396a. IMLA also provides for the Secretary to promulgate rules and regulations governing mineral "operations." 25 U.S.C. § 396d. The Secretary has promulgated regulations pursuant to this authority. The regulations in effect during the events at issue in this case provided that "Indian tribes . . . may, with the approval of the Secretary . . . or his authorized representative, lease their lands for mining purposes." 25 C.F.R. § 211.2 (1985). The regulations also established minimum royalty rates for minerals subject to leasing, including, for coal, "not less than 10 cents per ton of 2,000 pounds." 25 C.F.R. § 211.15(c) (1985).

A. Factual Background

The Tribe occupies the largest Indian reservation in the United States. The Tribe's reservation comprises more than 25,000 square miles, and spans parts of northeast Arizona, northwest New Mexico, and southeast Utah. Over the past century, large deposits of minerals -- including coal, oil, and gas -- have been discovered on the Tribe's reservation lands, which the United States holds in trust for the Tribe. Each year, the Tribe receives tens of millions of dollars in royalty payments pursuant to its mineral leases. J.A. 2255-62.

Peabody mines coal on the Tribe's lands pursuant to leases covered by IMLA. In 1964, the Tribe and Peabody (through its predecessor in interest, the Sentry Royalty Company) executed Lease 8580, which the Secretary approved. J.A. 278-301. The lease established a royalty rate of 37.5 cents per ton of coal, but provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. J.A. 281, 284. In 1966, Peabody (through Sentry Royalty Company) entered into two other coal leases, Lease 9910 and Lease 5743. J.A. 2183-234. Those leases contained somewhat higher royalty rates than Lease 8580, but did not contain a provision subjecting the rates to reasonable adjustment by the Secretary. J.A. 2186-88, 2212-14.

In March 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary and asked him to adjust the royalty rate under Lease 8580, in accordance with the term of that lease allowing a "reasonable adjustment" by the Secretary after 20 years.[2] J.A. 375-376. The Chairman claimed that an increase substantially in excess of 12½ percent was warranted in light of the quality of the coal, but that "simple equity" indicated that the royalty rate should not be less than 12½ percent. J.A. 375. The Chairman also sought the Secretary's "assistance and support in securing the voluntary adjustment" in the royalty rates under mineral leases that did not contain an adjustment clause like Lease 8580's but that, in the Chairman's view, contained rates that were "unfair and inequitable." J.A. 376.

In June 1984, the Area Director of the Bureau of Indian Affairs for the Tribe Area, Donald Dodge, acting pursuant to the Tribe's request, unilaterally adjusted the royalty on Lease 8580 from 37.5 cents per ton to 20 percent of gross proceeds. J.A. 438.

Peabody appealed the Area Director's decision pursuant to 25 C.F.R. § 211.2 (1985), challenging, among other things, the Area Director's failure to consult Peabody before reaching his decision. J.A. 2288-2315. The appeal was

2. As the 20-year anniversary of Lease 8580 approached, the royalty rate established by that lease of 37.5 cents per ton was equivalent to about 2 percent of gross proceeds on the lease. J.A. 375.

taken under consideration by the Acting Assistant Secretary of the Interior for Indian Affairs, John Fritz.

While its appeal was pending, Peabody wrote to Department of the Interior officials, asking them to postpone a decision on its appeal to allow for a negotiated settlement with respect to a full range of issues, including the royalty rate adjustment to Lease 8580. J.A. 451. On July 5, 1985, a Peabody Vice President wrote to Secretary of the Interior Donald Hodel, reporting that, following Peabody's appeal of the Area Director's decision, the Tribe continued to negotiate with Peabody toward an agreement providing for a royalty rate of 12½ percent. The Peabody Vice President stated, however, that the Tribe apparently had received word of an imminent decision in the Tribe's favor in the pending administrative appeal, and that the Tribe was suspending negotiations until the Department of the Interior ruled on the appeal. The Peabody Vice President asked the Secretary to assume jurisdiction of its appeal and either postpone a decision in the appeal to allow a negotiated resolution or rule in Peabody's favor. J.A. 728-29. A copy of that letter was sent to the Tribe. J.A. 729.

In response, the Chairman of the Tribe wrote to the Secretary, stating that negotiations had become stalled over such issues as Peabody's request to mine additional coal and "very difficult" other matters, and expressing the view that,

contrary to Peabody's assertion, he was "not confident" that a voluntary agreement could be reached on the royalty rate adjustment and other lease terms. J.A. 766-67. The Chairman urged the Secretary to reject Peabody's request and see to it that the Department issued a decision on the appeal in the Tribe's favor. J.A. 767.

Peabody retained Stanley Hulett, a former aide and friend of Secretary Hodel, and sought a meeting with the Secretary. The record indicates that Hulett and Peabody representatives met with Secretary Hodel in July 1985. J.A. 746. On July 17, 1985, Secretary Hodel sent a memorandum to Acting Assistant Secretary Fritz, which Peabody had provided to the Secretary, "suggest[ing]" that he inform the parties "that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." J.A. 764. The Secretary's memorandum reasoned that "[a]ny royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. J.A. 764. The Secretary assured the Acting Assistant Secretary, however, "that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." J.A. 764.

In late August 1985, the Tribe and Peabody renewed their negotiations, and soon thereafter reached a tentative agreement over a package of amendments, not

only to Lease 8580, but also concerning the other existing leases between the parties. J.A. 2439-2481. In particular, "[i]n consideration of the benefits associated with these lease amendments," the parties agreed to move jointly to vacate the Area Director's July 1985 decision imposing a royalty rate adjustment under Lease 8580 to 20 percent. J.A. 2446. Instead, the parties agreed to adjust the royalty rate under Lease 8580 from 37.5 cents per ton to 12½ percent of the monthly gross proceeds. J.A. 2443. Peabody further agreed to pay royalties at the new 12½ percent rate on all coal mined under the lease since February 1, 1984, more than a year and a half earlier. J.A. 2447. Peabody also agreed to increase the royalty rates with respect to Leases 9910 and 5743, even though those leases, unlike Lease 8580, did not contain any provision for the adjustment of the royalty rate during the lease. J.A. 2678, 2692.

The negotiated package also amended Lease 8580 to acknowledge the validity of tribal taxation of coal production, and to recognize the Tribe's agreement to waive certain back tribal taxes. J.A. 2453, 2455-57. The tax rate was to be capped at eight percent, thus permitting the Tribe to realize as much as 20.5 percent yield in royalties and taxes combined. J.A. 2456. Peabody further agreed to pay the Tribe $1.5 million when the amendments became effective, and $7.5 million when it began mining additional coal agreed to by the parties as part of the lease amendments. J.A. 2450-51. The agreement also addressed other matters such

as future royalty adjustments, arbitration procedures, rights-of-way, a tribal scholarship fund, back royalties, bonuses, and water payments. J.A. 2443-63.

Although the Tribe asserts that "any economic analysis of these lease amendments would have shown their unfairness," Tribe Br. 9, in fact the Tribe's own experts concluded that a settlement package with a 12½ percent royalty rate was reasonable and carried significant advantages over the unilateral adjustment to 20 percent the Tribe originally requested. For example, in August 1984, the Director of the Tribe's Minerals Department prepared a memorandum for the Tribe's Attorney General comparing a unilateral adjustment of the royalty rate to 20 percent versus a negotiated settlement with a royalty rate of 12½ percent. J.A. 3864-66. The memo concluded that the negotiated royalty rate of 12½ percent was "reasonable," for several reasons. The unilaterally adjusted royalty rate of 20 percent was vulnerable to challenge on litigation, particularly if any retroactive application were attempted. J.A. 3864-65. Unlike the unilateral adjustment, the negotiated settlement both increased the royalty rate and changed other beneficial provisions of the lease "concerning taxes, water rates, scholarship fund, etc." J.A. 3865. The Minerals Director expressed concern that Peabody would be able to refute the Tribe's and Department of the Interior's studies supporting the unilateral adjustment by showing that the studies relied on erroneous assumptions, such as that the coal was not taxed by the Tribe. J.A. 3865. The Minerals Director

concluded that "[i]nsisting on the 20% royalty rate will result in prolonged litigation and the final decision cannot be guaranteed in our favor." J.A. 3865.

In a similar September 6, 1985, letter to the Tribe's Chairman, the Chief Advisor for Economic Affairs at the Council of Energy Resource Tribes recommended the Tribe adopt a settlement package for Lease 8580 that included a royalty rate of 12½ percent and advised the Chairman, "I am confident that this package will provide a 'reasonable' return to the Navajo Nation for its coal developed by the Peabody Coal Company." J.A. 3862-63.

In August 1987, the Tribe's Tribal Council approved the lease amendments, finding that they were in "the best interest of the [Tribe]." J.A. 2432-33. The parties signed a final agreement in November 1987. The parties then asked Secretary Hodel to approve their agreement. The Secretary formally approved the lease amendments on December 14, 1987. J.A. 913-14. Shortly thereafter, and in accordance with the agreement between the Tribe and Peabody, the Area Director's June 1984 decision adopting a 20 percent royalty rate was vacated. J.A. 916-17.

B. Procedural History

In 1993, the Tribe sued the United States in the Court of Federal Claims, alleging that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody constituted a breach of trust and a breach of contract. The

Tribe did not seek to invalidate the lease amendments approved by the Secretary, but instead sought $600 million in damages while keeping the amendments to all three leases in effect. On cross-motions for summary judgment, the Court of Federal Claims granted judgment for the United States. *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000) (*Navajo I*).

The Court of Federal Claims found that the United States had entered into a general fiduciary relationship with the Tribe by virtue of its relationship with Indian tribes and the fact that the United States holds tribal lands in trust. *Id.* at 225. The court explained, however, that the relationship between Indians and the United States "is not necessarily described by the common law of trusts," and that, "to succeed in litigation in this Court, [the Tribe] must show that IMLA imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages." *Id.* at 225, 227. In determining whether the Tribe had made that showing, the court reviewed IMLA and the Secretary's implementing regulations in the light of the Supreme Court's decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). 46 Fed. Cl. at 228-34.

The court observed "that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity." *Id.* at 228.

But, after reviewing IMLA and the Secretary's implementing regulations, the court concluded that the United States's "responsibility as it relates to coal royalties does not rise above a generalized trust obligation." *Id.* at 232. And this does not suffice under the *Mitchell* decisions to create a duty that, if breached, would require the government to pay damages. *Id.*; *see also id.* at 233 ("[N]either IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal."). The court further concluded that, although the Tribe's complaint "[a]lleg[ed] breaches of general fiduciary duties, [it] . . . failed to link any breach to a specific money-mandating statutory or regulatory provision." *Id.* at 233. The court emphasized that the Tribe "cites no provision *with respect to royalty-setting* that demonstrates federal control over that process." *Id.* at 233.

This Court reversed. *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001) (*Navajo II*). The Court analogized this case to *Mitchell II*, where the Supreme Court held that the tribe was entitled to damages for the alleged breach of trust with respect to Indian timber management. The Court believed that the degree of federal involvement in this case with respect to mineral leasing on Indian lands was comparable to the degree of federal involvement in Indian timber management under the governing statutes and regulations in *Mitchell II*. *Id.* at 1330. Pointing to 25 U.S.C. § 399 (which is not part of IMLA), the Court also

concluded that "the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes." *Id.* at 1330-31. With that understanding, the Court concluded that the Court of Federal Claims had erred in finding that IMLA could not give rise to a claim for money damages for breach of trust in this case. *Id.* at 1332.

The Court further held that the Secretary's actions with respect to Peabody's administrative appeal concerning the adjustment of the royalty rate under Lease 8580 violated both the common law duties on which the Court of Federal Claims had relied, as well as what the court of appeals described as a statutory duty "to obtain for the Indians the maximum return for their minerals." *Id.* at 1332. The court did not, however, identify what specific provision of IMLA or the Secretary's implementing regulations had imposed such a duty on, or had been violated by, the Secretary.

The Supreme Court granted certiorari. *United States v. Navajo Nation*, 535 U.S. 1111 (2002). On March 4, 2003, the Supreme Court reversed this Court and held that IMLA does not impose a fiduciary responsibility on the Secretary to manage coal resources on Indian lands for the benefit of the Indian mineral owners. *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo III*). The Court held that, to state a claim cognizable under the Indian Tucker Act, a Tribe (1) "must identify a substantive source of law that establishes specific fiduciary or

other duties," (2) "allege that the Government has failed faithfully to perform those duties," and (3) show that "the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]." *Id.* at 506 (quoting *Mitchell II*, 463 U.S. at 219) (alterations in original). The Court further noted that the analysis of these requirements must look for "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.*

Applying this framework to the Tribe's claims, the Court found that IMLA did not give the Secretary the responsibility to manage Indian coal resources on behalf of Tribes and that the Secretary's authority to approve Indian coal leases does not obligate him to ensure that a Tribe seeking approval of a lease obtains the highest possible return. *Id.* at 506-09. The Court further held that neither 25 U.S.C. § 399 nor IMDA could support the Tribe's claims, because those provisions do not govern the Secretary's authority to approve mineral leases under IMLA. 537 U.S. at 509. Finally, the Court concluded that "we have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514.

On remand to this Court, the Tribe suggested that further proceedings in the Court of Federal Claims were necessary. According to the Tribe, the Supreme Court's decision addressed only the viability of the Tribe's arguments under

IMLA and left unresolved the question of whether a "network" of statutes provided an independent basis for the Tribe's breach-of-trust claim. On October 24, 2003, this Court held that the Supreme Court's mandate governed only the viability of Plaintiff's arguments under the three statutes specifically discussed in the Court's decision: IMLA, IMDA, and section 399. *Navajo Nation v. United States*, 347 F.3d 1327 (Fed. Cir. 2003) (*Navajo IV*). The Court remanded the case to the Court of Federal Claims to determine whether the Tribe waived its argument that other statutes independently supported its breach-of-trust claim, and if such an argument was not waived, to determine its merits. *Id.* at 1332.

On remand from this Court, the Court of Federal Claims held that the Tribe had not waived its "network" argument, but that the "network" of statutes and regulations invoked by the Tribe "does not suffice to establish a money-mandating trust in the area of royalty rates." *Navajo Nation v. United States*, 68 Fed. Cl. 805, 815 (2005) (*Navajo V*). The court began its analysis of the "network" argument by noting that, "to be judicially enforceable, the trust obligation must be directly related to the alleged breach." *Id.* at 811. And on this the Tribe's "network" theory fell short: "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." *Id.*; *see also id.* ("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."). Accordingly, the Court of Federal Claims declined to revise its original judgment in favor of the United States. *Id.* at 815.

SUMMARY OF ARGUMENT

I. Although the district court correctly ruled that it lacked jurisdiction because the Tribe's "network" argument did not state a claim within the ambit of the Tucker Act or Indian Tucker Act, it incorrectly first held that the Tribe had not waived its "network" argument. The Tribe waived its "network" argument by failing to argue, in its first appeal from the Court of Federal Claims' judgment, that a "network" of statutes and regulations independent of IMLA established jurisdiction over the Tribe's breach-of-trust claim. This Court's precedent is clear that an appellant's failure to raise an issue that is within the scope of a judgment waives the issue for subsequent appeals in the same case. Here, there is no question (1) that the original judgment, which dismissed the Tribe's claims in their entirety, encompassed the argument the Tribe now raises in its second appeal: that a "network" of statutes and regulations independent of IMLA established jurisdiction; and (2) that the Tribe never advanced such an argument in its first appeal. Accordingly, that argument was waived.

II. Even if the Tribe did not waive its "network" argument, the Court of Federal Claims correctly held that the Tribe's asserted "network" does not support

jurisdiction under the Tucker Act or Indian Tucker Act. The Tribe's "network" argument fails for two independent reasons: the Tribe's "network" purports to satisfy a "general federal control or supervision" test for Indian Tucker Act jurisdiction that does not exist, and the "network" does not even demonstrate "general federal control or supervision" over Navajo coal leasing.

The Tribe premises its "network" argument on the erroneous theory that it can state a claim within the Court of Federal Claims' jurisdiction under the Tucker Act or Indian Tucker Act ("Tucker Acts") without alleging a violation of a specific rights-creating or duty-imposing statute or regulation. Instead, the Tribe believes that it merely needs to show "general federal control or supervision" over Navajo coal leasing, at which point, the Tribe asserts, the United States would be liable in money damages for any actions inconsistent with the common law standards for a private fiduciary. Controlling precedent of the Supreme Court and this Court, including the Supreme Court's decision in this case, forecloses such a theory and requires the jurisdictional analysis to allege violations of specific fiduciary duties imposed by statute or regulation. Thus, the Tribe's "network" argument fails first because it purports to satisfy a "general federal control and supervision" test that does not exist in the law.

Moreover, the Tribe has not satisfied even its erroneous "general federal control or supervision" test. Although the Tribe repeatedly asserts that its

"network" establishes the Secretary's control over "all aspects" of Navajo coal leasing, this is demonstrably false. In particular, none of the statutes, regulations, and other sources the Tribe cites as its "network" governs the aspects of Navajo coal leasing at issue in this case -- that is, setting royalty rates under IMLA and the Secretary's approval of IMLA coal leases. In fact, the Supreme Court quite clearly held in its decision *in this case* that the statute that does govern those aspects of Navajo coal leasing -- IMLA -- gives tribes, not the Secretary, control over coal leasing. Thus, as the Court of Federal Claims correctly held, the Tribe's "network" argument fails because the Tribe has not linked any of the elements of its "network" to the Secretary's actions at issue in this case. In addition, the Tribe's "network" does not even establish "general federal control and supervision" over Navajo coal leasing overall. Mere federal involvement in Navajo coal leasing, much of it in the form of regulatory standards in furtherance of the general public interest, does not equate to managerial control.

If, however, this Court were to conclude that the Court of Federal Claims erred and that the Tribe's "network" argument stated a claim within the jurisdiction of the Tucker Acts, it should remand for the Court of Federal Claims to consider whether the Tribe has proved a violation of any fiduciary duties the "network" imposes. Since the Court of Federal Claims held that it lacked jurisdiction over the Tribe's claims, it never reached this issue, and remand would

be appropriate to allow the trial court to decide this issue in the first instance. If the Court were to proceed to decide that issue in the first instance, the Tribe has not shown violations of any duties that would mandate the payment of damages by the United States if breached. The Tribe's allegations of breach focus on the Secretary's handling of Peabody's administrative appeal and the Secretary's subsequent approval of the lease amendments the Tribe negotiated with Peabody. The Secretary's handling of Peabody's administrative appeal could not have breached any fiduciary duties, because the standards and procedures for such appeals are established by the APA and Interior Department regulations of general applicability, neither of which imposes any fiduciary duties. Moreover, it is well established that procedural duties do not give rise to a damages claim under the Tucker Act. The Secretary's approval of the negotiated package of lease amendments also could not have breached any fiduciary duties. Among other things, the Tribe's own experts repeatedly concluded that the lease amendments were reasonable.

Finally, the Tribe's recurrent reliance on the common law of trusts is misplaced. Whatever relevance the common law responsibilities of a private fiduciary may have by way of analogy to the federal government's trust relationship with Indian tribes, the common law does not itself supply a right to recover damages against the United States under the Tucker Act. The Supreme

Court has made clear that the federal government's role in its relations with Indian tribes differs substantially from that of a private trustee. Moreover, the Tucker Act and Indian Tucker Act support jurisdiction for violations of statutes and regulations, not common law standards.

STANDARD OF REVIEW

The issues presented are legal. This Court reviews de novo the trial court's legal conclusions. *See, e.g., Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1298 (Fed. Cir. 2001).

ARGUMENT

I. THE TRIBE WAIVED ITS "NETWORK" ARGUMENT.

For cases involving successive appeals, an issue that was within the scope of the initial judgment of the district court and was not appealed in a first appeal is waived for subsequent appeals. *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1348 (Fed. Cir. 2001); *see also Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997) (noting "many cases where an appellant was held to have waived issues for purposes of a second appeal that it could have raised in its own first appeal"). The Court of Federal Claims held that the Tribe did not waive its "network" argument, even though the court found that, prior to remand from the Supreme Court, the Tribe had never argued that a "network" of statutes and regulations other than

IMLA imposed fiduciary duties that supported a claim for money damages. *Navajo V*, 68 Fed. Cl. at 810-11. In fact, the court acknowledged, to the extent the Tribe ever previously presented a "network" argument, the Tribe "always featured IMLA in a central position," "while other statutory and regulatory authorities [which the Tribe now asserts as its "network"] were relegated to a string citation." *Id.* at 810. The court nevertheless held that the Tribe had not waived its "network" argument because, prior to the Supreme Court's decision, there was "no reason why the Plaintiff should advocate this theory without reference to IMLA." *Id.*

The Court of Federal Claims was mistaken. When the Tribe appealed from the Court of Federal Claims' judgment in 2000, the Tribe was obligated to come forward with all arguments pertaining to issues within the scope of the judgment being appealed; any issues that fell within the scope of the judgment and were not raised on appeal were waived for future appeals. *Tronzo*, 236 F.3d at 1348. And, since the 2000 judgment dismissed all of the Tribe's claims, the Tribe's "network" argument necessarily fell within the scope of that judgment. Moreover, since the Court of Federal Claims specifically held in *Navajo I* that IMLA did not support a claim under the Tucker Acts, the Tribe also had every reason to argue on appeal from that decision that, in the alternative, a "network" of statutes and regulations other than IMLA supported its claim. But, as the Court of Federal Claims noted, the Tribe did not make any such argument until after the Supreme Court ruled. The

only thing that changed between the Tribe's first appeal and this appeal is that now the Supreme Court has affirmed the Court of Federal Claims' ruling that IMLA does not support the Tribe's claim. But the Tribe, whose IMLA argument was rejected in *Navajo I*, was not entitled to wait for the Supreme Court's decision -- which at that point was just a theoretical possibility -- before raising its alternative "network" argument (without IMLA) for the first time.

The Court of Federal Claims also opined that the Tribe could not waive its "network" argument because the viability of that argument raises a jurisdictional issue. *Navajo V*, 68 Fed. Cl. at 810-11 (citing *Consolidated Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003)). This, too, was incorrect. It is true that an argument that a court *lacks* jurisdiction can be raised at any stage in the proceedings. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). But, where a trial court holds that it lacks jurisdiction, as the Court of Federal Claims did in *Navajo V*, the plaintiff must challenge that determination on appeal or waive it. *See, e.g., Ledford v. United States*, 297 F.3d 1378, 1381 (Fed. Cir. 2002) (noting that the Court "would normally consider Mr. Ledford to have waived any arguments asserting jurisdiction under statutes other than the habeas statute" because he failed to raise such arguments on appeal, but declining to apply the rule because the plaintiff was proceeding *pro se*); *Schaffer v. Clinton*, 240 F.3d 878, 880 n.1 (10th Cir. 2001) ("The other appellants in this case, who were dismissed for lack of standing,

waived their arguments on appeal by failing to address the district court's ruling regarding their standing."). Thus, the Tribe waived its "network" argument by failing to raise it in its appeal from the Court of Federal Claims' decision in *Navajo I*; although the Tribe did cite a "network" of statutory and regulatory authorities in its first appeal, it "featured IMLA in a central position" of this "network" and never argued that a "network" of statutes other than IMLA supported jurisdiction. *Navajo V*, 68 Fed. Cl. at 810.

II. THE TRIBE'S ASSERTED "NETWORK" OF STATUTES AND REGULATIONS DOES NOT SUPPORT JURISDICTION.

A. To State a Claim Within the Court of Federal Claims' Jurisdiction, the Tribe Must Allege a Violation of a Specific Rights-Creating or Duty-Imposing Statute or Regulation.

To state a cognizable claim for money damages against the United States under the Tucker Act or the Indian Tucker Act, a plaintiff "must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) ("*Mitchell II*") (internal quotation marks omitted). When the claimant is an Indian tribe or individual asserting that the United States has breached its trust responsibility over an Indian resource, the claimant must identify a statute, treaty, or regulation that imposes a specific

fiduciary duty on the United States. *United States v. Mitchell*, 445 U.S. 535, 542-43 (1980) ("*Mitchell I*").

The United States has a general trust relationship with Indian tribes, but "that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo III*, 537 U.S. at 506. "Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.*; *see also Mitchell II*, 463 U.S. at 219 (tribe must show that statutes or regulations at issue can "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose"); *Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (" '[t]he scope and extent of the fiduciary relationship' alleged to have been breached 'is established by the regulation[s]' that control this type of leasing") (quoting *Pawnee v. United States*, 830 F.2d 187, 192 (Fed. Cir. 1987)); *id.* ("where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail").

Thus, to sustain its action for money damages against the United States, the Tribe must show that the federal government's actions in this case breached a specific fiduciary duty as defined in a statute or regulation. As the Court of Federal Claims correctly found, *Navajo V*, 68 Fed. Cl. at 814-15, the Tribe has failed to satisfy this standard.

The Tribe, however, argues that it can state a claim for breach of trust without alleging a violation of "particular statutory or regulatory provisions," by instead showing "general federal control or supervision." Tribe Br. 16, 17; *see generally* Tribe Br. 13-17. The Tribe further argues that it can satisfy this "general federal control or supervision" test by showing some level of federal involvement in the Tribe's coal leasing in general, without reference to the specific aspects of coal leasing at issue here: setting of royalty rates and amendments of IMLA leases. Tribe Br. 15. The Tribe accordingly asserts that it can satisfy its proposed "general federal control or supervision" test by showing federal involvement in aspects of coal leasing that have nothing to do with the events at issue in this case, such as the payment of performance bonds, Tribe Br. 26 (referencing 25 C.F.R. § 216.8 (1985)); environmental protection standards, Tribe Br. 27 (citing 30 U.S.C. § 1300); and certification of blasting, Tribe Br. 30 (referencing 30 C.F.R. § 750.19 (1985)).

Controlling precedent precludes the Tribe's "general federal control or supervision" test. The Tucker Acts require a plaintiff to point to the violation of an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. § 1491(a)(1). Accordingly, Supreme Court precedent requires a claim under the Tucker Acts to allege a violation of a specific duty imposed by a statute or regulation. *See supra* page 24 (quoting cases). The Tribe's "general federal control

or supervision test" thus fails for the same reason the Supreme Court rejected the Tribe's IMLA argument: the Tribe's proposed test improperly "assume[s] substantive prescriptions not found in [the statutes]." *Navajo III*, 537 U.S. at 510.

The Tribe, which almost wholly avoids addressing the Supreme Court's decision in this case, claims that other Supreme Court decisions, and in particular *Mitchell II* and *United States v. White Mountain Apache*, 537 U.S. 465 (2003), support its "general federal control or supervision" test. Tribe Br. 17; *see also* Tribe Br. 40-43, 46. Those cases, however, must be read consistently with the Tucker Act's language, which in pertinent part limits claims to "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491(a)(1).[3] And both *Mitchell II* and *White Mountain Apache* reflect this limitation.

Mitchell II did not, as the Tribe suggests, uphold the claim in that case simply on the ground that "general federal control or supervision" surpassed some requisite level. Instead, the Supreme Court analyzed the duties imposed by specific statutory or regulatory requirements, requiring the plaintiffs to base their claims on "Acts of Congress and executive department regulations . . . [that] can fairly be interpreted as mandating compensation for damages sustained *as a result of a*

3. The Tucker Act also allows certain contract claims, 28 U.S.C. § 1491, but no such claims are at issue here.

breach of the duties they impose." 463 U.S. at 219 (emphasis added). Moreover, *Mitchell II* carefully tied the Secretary's fiduciary obligations to specific statutory and regulatory requirements. *Id.* at 224; *see also id.* at 220-23. And this is how the Court subsequently read *Mitchell II* in *White Mountain Apache* and in *Navajo*. *See Navajo III*, 537 U.S. at 506 ("To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* thus instruct, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties."); *White Mountain Apache*, 537 U.S. at 473-74 ("*Mitchell II* . . . found that statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by those statutes and regulations were enforceable by damages.").

White Mountain Apache also found jurisdiction based on a specific statutory provision that explicitly addressed the United States' fiduciary obligations. 537 U.S. at 474 ("The statutory language, of course, expressly defines a fiduciary relationship . . . ."). Moreover, Justice Ginsburg, who wrote the Court's opinion in *Navajo III*, reiterated in her concurring opinion in *White Mountain Apache* that *Mitchell I* and *Mitchell II* require an Indian Tucker Act plaintiff to " 'identify a substantive source of law that establishes specific fiduciary or other duties,' " and

that, "[i]n this case, the threshold set by the *Mitchell* cases is met." *Id.* at 479, 480 (Ginsburg, J., concurring).

Thus, Supreme Court precedent belies the Tribe's argument that there are two alternative tests for establishing Tucker Act jurisdiction, a specific statute or regulation test and an alternative "general federal control or supervision" test. To the contrary, the Supreme Court consistently has required plaintiffs seeking money damages for a breach of trust under the Indian Tucker Act to base their claim on "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo III*, 537 U.S. at 506. Nor would there be any use for two alternative tests, if the Tribe's "general federal control or supervision" test were legitimate. If the Tribe's argument were correct, then courts would never need to look for "specific rights-creating or duty-imposing statutory or regulatory prescriptions," because mere federal involvement would suffice.[4]

The Tribe contends that the Court of Federal Claims, in rejecting the Tribe's "general federal control or supervision" test, erroneously cited *Wright v. United States*, 32 Fed. Cl. 54, 56 (1994), which held that the Indian Tucker Act requires "that the United States has undertaken full fiduciary responsibilities as to the particular aspect of the relationship complained of." Tribe Br. 38-39; *see also*

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4. Indeed, under the Tribe's theory, any federal involvement above a "minimal level" suffices. Tribe Br. 15.

Navajo V, 68 Fed. Cl. at 815 (quoting *Wright*); *Navajo I*, 46 Fed. Cl. at 233 (same).[5] According to the Tribe, this Court's decision in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), implicitly overruled *Wright*. *Brown*, however, states *Wright*'s principle even more directly: "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail." *Id.* at 1563; *see also id.* (plaintiff must "allege[] the breach of a specific duty that the regulations squarely place on the Secretary").

The Tribe argues that *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987); and *Brown v. United States*, *supra*, support Indian Tucker Act jurisdiction under the Tribe's "general control and supervision test." Tribe Br. 43-45. As we have just explained, however, *Brown* quite specifically contradicts the Tribe's argument that "general federal control or supervision" can establish Indian Tucker Act jurisdiction, and requires the plaintiff to allege violation of a "specific statutory requirement or regulation." 86 F.3d at 1563.[6] And *Pawnee* affirmed the

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5. The Tribe's argument suggests that the Court of Federal Claims' rejection of the Tribe's "general federal control or supervision" test relied exclusively on *Wright*. Tribe Br. 38 (asserting that the Court of Federal Claims "ultimately relied" on *Wright*). In fact, however, the court primarily based its reasoning on the Supreme Court's decision in *Navajo III*. *Navajo V*, 68 Fed. Cl. at 811-15.

6. Moreover, since the Tribe tries to analogize its claims to those asserted in *Brown*, it is worth noting that this Court later stated, "We think it questionable the (continued...)

dismissal of claims that would have required the Secretary to "go beyond" the requirements of the governing statutes and regulations. 830 F.2d at 192.

The Tribe argues that *Coast Indian Community v. United States*, 550 F.2d 639 (Ct. Cl. 1977); and *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), support its "general control and supervision test." Tribe Br. 52-54. In both those cases, however, a statute or regulation specifically imposed the duty the court found was breached. In *Coast Indian Community*, the court found a breach of trust because the government's appraisal of a right-of-way incompetently determined the fair market value of the conveyance, 550 F.2d at 653-54, where a regulation required the government to obtain "fair market value" for rights-of-way, 25 C.F.R. § 161.12 (1966). In *Duncan*, the court found a breach of trust because the government failed to provide sufficient water supplies to the rancheria, 667 F.2d at 45, as specifically required by statute, 72 Stat. 619, 620 (1958). The Tribe's claim, which does not allege a violation of a statute or regulation, thus does not resemble the claims upheld in *Coast Indian Community* and *Duncan*.

The Tribe avers that a statute or regulation need not "expressly establish the trust" in order to be money-mandating. Tribe Br. 16; *see also* Tribe Br. 39. But this argument misstates the deficiency in the Tribe's claim. The Court of Federal

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6. (...continued)
United States owed any of the duties asserted by Brown in this instance." *Brown v. United States*, 195 F.3d 1334, 1338 (Fed. Cir. 2000).

Claims held that the "network" of statutes and regulations cited by the Tribe did not impose any specific duties that would apply to the Secretary's conduct here; the court therefore did not reach the question whether any duties, if they existed, would give rise to a money damages claim. As Justice Ginsburg observed in her concurring opinion in *White Mountain Apache*, where she distinguished the Supreme Court's decision in this case from *White Mountain Apache*, the defect in the Tribe's claim in this case has always been its failure to identify statutes or regulations "impos[ing] any concrete substantive obligations, fiduciary or otherwise, on the Government," that the Secretary might have violated. 537 U.S. at 480. Since the Tribe has failed to identify any violations of "concrete substantive obligations" imposed by statute or regulation, the issue of whether such obligations would be money-mandating need not be reached.

B. The Tribe Has Not Satisfied Even Its Erroneous "General Federal Control or Supervision" Test.

Even if the Tribe were correct that it could state a breach-of-trust claim within the Court of Federal Claims' jurisdiction merely by establishing "general federal control or supervision" over Navajo coal leasing, the Tribe could not satisfy that standard for two reasons: (1) its "network" does not apply to the areas of Indian coal leasing at issue in this case; and (2) its "network" does not even

establish "general federal control or supervision" over Navajo coal leasing generally.

1. The Tribe's "network" does not apply to the areas of Indian coal leasing at issue in this case.

According to the Tribe, its "network" establishes the Secretary's control over "all aspects of leasing and lease administration." Tribe Br. 51. This allegation is the cornerstone of the Tribe's entire "network" argument and is repeated throughout its brief. *See* Tribe Br. 10, 11, 17, 22, 35, 43, 55, 56, 57, 61. But this assertion directly conflicts with the Supreme Court's decision in *Navajo III*. As the Tribe has conceded,[7] the Secretary's action at issue in this case were undertaken pursuant to his authority and responsibilities under IMLA. The Supreme Court held that "IMLA and its regulations do not assign to the Secretary managerial control over coal leasing." *Navajo III*, 537 U.S. at 508. Rather, the Court noted, "IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Id.* The Secretary's involvement in IMLA coal leasing is a "more limited *approval* role." *Id.* at 509. Thus, the Tribe's "network" argument that the Secretary controls "all aspects of leasing and lease administration" necessarily fails in the face of the

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7. *See* J.A. 1995 (Tribe's Proposed Findings of Uncontroverted Fact) ("The original 8580 Lease and the 1987 amendments to the 8580 Lease were approved under the Indian Mineral Leasing Act of 1938").

Supreme Court's express ruling that the Secretary does not control IMLA coal leasing.

Moreover, nothing in any of the elements of the Tribe's "network" can supplant the Supreme Court's ruling that, when the Secretary approves a lease or lease amendments under IMLA, as the Tribe concedes he did here, no fiduciary duty attaches. Whether or not the statutes and regulations in the Tribe's "network" assign the Secretary any trust responsibilities with respect to other aspects of coal leasing, they do not impose any such responsibilities with respect to the Secretary's approval of amendments to a coal lease under IMLA, because they do not govern the Secretary's approval of amendments to a coal lease under IMLA. There is, in essence, a gaping hole in the Tribe's "network" directly over the aspects of coal leasing at issue in this case, and the Tribe's citations to statutes and regulations that address other aspects of coal mining -- for example, environmental protection standards -- cannot cover this hole. Indeed, if the statutes and regulations in the Tribe's "network" did make the Secretary responsible for coal leasing under IMLA, this would undermine IMLA's objective of "enhanc[ing] tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Navajo III*, 537 U.S. at 508; *see also id.* (" '[t]he ideal of Indian self-determination is directly at odds with Secretarial control over leasing' ") (quoting *Navajo I*, 46 Fed. Cl. at 230).

Thus, as the Court of Federal Claims observed, none of the elements of the Tribe's "network" implicate the Secretary's approval of the royalty rate for Lease 8580. 68 Fed. Cl. at 811.[8] This makes sense, since Lease 8580 is an IMLA lease, and the Secretary's approval occurred pursuant to IMLA, not any of the provisions upon which the Tribe now relies for its "network." *See supra* note 7. Since the Supreme Court held that IMLA did not impose any fiduciary obligations with respect to the Secretary's approval of coal leases pursuant to IMLA, it follows that other statutes also do not.

Indeed, the Supreme Court rejected the Tribe's arguments under 25 U.S.C. § 399 and IMDA, on the ground that they did not address the Secretary's approval of IMLA coal leases. *Navajo III*, 537 U.S. at 509 ("But [§ 399] describes the Secretary's *leasing* authority under § 399; it does not bear on the Secretary's more limited *approval* role under the IMLA.); *id.* ("[IMDA] does not establish standards governing the Secretary's approval of mining *leases* negotiated by a Tribe and a third party."). The Tribe's "network" argument fails for the same reason: the

8. The Tribe selectively quotes from the Court of Federal Claims' decision to make it appear that the court found the Secretary exerted comprehensive control and supervision over the Tribe's coal leasing in general. Tribe Br. 38. In fact, the court held that the Tribe could demonstrate federal control or supervision over "labor issues, occupational safety, and environmental conservation," but not over the area of coal leasing that matters in this case: royalty rates. *Navajo V*, 68 Fed. Cl. at 813.

"network" does not address the Secretary's approval of IMLA leases which is, as one would expect, governed by IMLA.

2. The Tribe's "network" does not establish "general federal control or supervision" over Navajo coal leasing.

In support of its argument that the federal government exerts "general federal control or supervision" over Navajo coal leasing, the Tribe cites a litany of sources that comprise its "network." Tribe Br. 18-37.[9] But none of these sources establishes "general federal control or supervision" over Navajo coal leasing.

The Tribe first argues that the Nonintercourse Act, the United States' treaties with the Tribe, an 1884 Executive Order, and a 1934 statute together

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9. The Tribe's "network" apparently consists of (1) the Indian Nonintercourse Act, 25 U.S.C. § 177, *see* Tribe Br. 18; (2) the Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974 (1849) (the "1849 Treaty"), *see* Tribe Br. 19; (3) the Treaty Between the United States and the Navajo Tribe of Indians, 15 Stat. 667 (1868) ("1868 Treaty"), *see* Tribe Br. 19; (4) a May 17, 1884, Executive Order, *see* Tribe Br. 19; (5) an Act of June 14, 1934, ch. 521, 48 Stat. 960, *see* Tribe Br. 19; (6) the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638, *see* Tribe Br. 20-22; (7) IMLA regulations, 25 C.F.R. Part 211 (1985), *see* Tribe Br. 22-25; (8) Department of the Interior policies, *see* Tribe Br. 25-26, 32-33; (9) Department of the Interior regulations addressing environmental impacts from mining, 25 C.F.R. Part 216 (1985), *see* Tribe Br. 26; (10) the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1231-1243, 1251-1279, 1281, 1291-1309b, 1311-1316, 1321-1328, *see* Tribe Br. 27-30; (11) provisions of Lease 8580, *see* Tribe Br. 31-32; (12) regulations promulgated pursuant to the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1758, and set forth at 30 C.F.R. Parts 212, 216, 218, and § 206.250, *see* Tribe Br. 34-36; and (13) the Indian Right-of-Way Act of 1948, 25 U.S.C. §§ 323-28, and regulations promulgated thereunder, 25 C.F.R. Part 169 (1985), *see* Tribe Br. 36-37.

support the Tribe's claim because they establish that "the coal at issue is held in trust." Tribe Br. 19. It is well-established, however, that the existence of a general trust relationship "is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo III*, 537 U.S. at 506-07. Indeed, the Supreme Court's decision in this case noted that the United States holds the coal in trust, *id.* at 495, but nevertheless rejected the Tribe's claim.

The Tribe next invokes the Rehabilitation Act. Tribe Br. 20-22. That statute instructs the Secretary of the Interior

> to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations.

25 U.S.C. § 631. This "program of basic improvements" included educational facilities, hospitals and medical facilities, roads, soil conservation, irrigation, and off-reservation employment and resettlement. *Id.* The Act's only reference to mineral leasing is an appropriation of $500,000 for "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." *Id.* § 631(3). The Act instructs the Secretary, in implementing the program of improvements, to consider the recommendations of the Navajo and Hopi tribal councils and follow

such recommendations where appropriate. *Id.* § 638.[10] Thus, the Rehabilitation Act does not give the Secretary increased control or supervision over coal leasing and does not change the structure of IMLA coal leasing. Indeed, the Secretary has not promulgated any regulations under the Rehabilitation Act to govern coal leasing, and regulations the Secretary has issued pursuant to the Rehabilitation Act (in addition to other statutes) expressly provide that they do not apply to mineral leases, *see* 25 C.F.R. § 162.103(a).[11] The Rehabilitation Act therefore does not

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10. The Tribe, seizing on this provision, contends that it required the Secretary to rule in the Tribe's favor on Peabody's administrative appeal and to adjust the royalty rate on Lease 8580 to 20 percent, because that is what the Tribe requested. Tribe Br. 21, 32, 48. But the Rehabilitation Act's consultation provision does not require the Secretary to do the Tribe's bidding on all matters. Rather, the consultation provision explicitly limits its scope to the "administration of the program" of improvements undertaken by the federal government under the Rehabilitation Act, where such a directive makes sense because the Tribe is uniquely situated to express the needs of its members. *See* 25 U.S.C. § 638. The Rehabilitation Act's consultation provision thus does not cover all the other areas in which the United States takes actions that affect the Tribe, such as the adjudication of Peabody's administrative appeal and approval of the negotiated lease amendments.

11. The Tribe cites the decision of the Interior Board of Indian Appeals ("IBIA") in *First Mesa Consolidated Villages v. Phoenix Area Director*, 26 IBIA 18, 27-28 & n.14 (1994), for the proposition that the Rehabilitation Act supports its "network" argument. Tribe Br. 21. In fact, however, the IBIA's decision in *First Mesa* cites the Rehabilitation Act as an example of a statute that "vest[s] leasing authority in the tribes, not the Secretary of the Interior." *Id.* at n.14. This observation undermines the Tribe's assertion that the Rehabilitation Act somehow gives the Secretary control and supervision over the Tribe's mineral leases. Indeed, to the extent *First Mesa* discusses the ramifications for lease approval of the United States' general trust relationship with Indian tribes, it is to emphasize

(continued...)

support the Tribe's argument that a "network" of statutes and regulations gives the Secretary "general federal control or supervision" over the Tribe's coal leasing despite IMLA's contrary scheme.

The Tribe next cites IMLA regulations, codified at 25 C.F.R. Part 211. Tribe Br. 22-25; *see also* Tribe Br. 27, 42, 43, 45, 54, 55, 58, 61. The Supreme Court already held in *Navajo III* that IMLA regulations did not "implicate[] a duty enforceable in an action for damages under the Indian Tucker Act." 537 U.S. at 514. This Court so noted in its remand decision and directed the Court of Federal Claims to exclude IMLA from its consideration of the Tribe's "network." 347 F.3d at 1331, 1332. The Tribe attempts to revisit these rulings by arguing that IMLA regulations must be reinterpreted in light of the Rehabilitation Act, Tribe Br. 22, but the Supreme Court's decision and this Court's remand decision appropriately precluded the Court of Federal Claims from reconsidering whether IMLA regulations support the Tribe's claim.[12]

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11. (...continued)
the Bureau of Indian Affairs' responsibility "to ensure that a tribe's governing body has given its approval to a lease" -- an endorsement of tribal self-determination, not federal control. *Id.* at 28.

12. Even if the Tribe were not precluded from raising IMLA regulations as part of its "network," the Tribe's attempt to invoke IMLA regulations to support its "network" argument would fail for two additional reasons.

First, the Tribe relies heavily on regulations that were not in effect at the time of the events at issue in this case. *See* Tribe Br. 9, 24-25, 42 (discussing 25

(continued...)

The Tribe cites Department of the Interior policies. Tribe Br. 25-26, 32-33. The Supreme Court already rejected the Tribe's argument that these policies imposed any fiduciary obligations that could have been violated here. *Navajo III*, 537 U.S. at 498-99 n.6, 511. Moreover, even if the Supreme Court had not already rejected reliance on the policies, the Secretary acted consistently with them.[13] In any event, the policies are for internal agency guidance only, are not published in the Federal Register, and do not have the force of a regulation. *Cf. Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

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12. (...continued)
C.F.R. § 211.1(a), which was not adopted until 1996, and a proposed 25 C.F.R. § 211.34(b) that never went into effect). The Supreme Court squarely rejected the Tribe's attempts to rely on IMLA regulations adopted after the events at issue in this case, including some of the same regulations the Tribe now cites. *Navajo III*, 537 U.S. at 508 n.12.

Second, the Tribe's attempt to use the Rehabilitation Act to reinterpret IMLA regulations would make no sense in application. IMLA regulations apply generally to mineral leasing by any tribe, but the Rehabilitation Act applies only to the Navajo and Hopi Tribes. Thus, if the Tribe were correct that the Rehabilitation Act should affect how courts interpret the IMLA regulations, this could be true only apply for applications of the IMLA regulations to the Navajo and Hopi. The Tribe's theory therefore would interpret the same regulatory provisions differently depending on which tribe was involved.

13. The policies called for a minimum royalty rate of 12½ percent, which was the royalty rate in the lease amendments the Tribe negotiated with Peabody and the Secretary approved. It is also "the customary royalty rate for coal leases on Indian lands issues or readjusted after 1976." *Navajo III*, 537 U.S. at 498-99 n.6; *see also id.* at 511 ("the customary rate for coal leases on Indian lands issued or readjusted after 1976 did not exceed 12½ percent").

As such, they could not provide the basis for a claim founded on an Act of Congress or implementing regulation, as required by the Tucker Act.[14]

The Tribe cites Department of the Interior regulations, codified at 25 C.F.R. Part 216, addressing environmental impacts from mining. Tribe Br. 26. At least as applied to Navajo coal leasing under Lease 8580, however, these are IMLA regulations,[15] which cannot be part of the Tribe's "network." *See supra* page 38. Moreover, the regulations set forth measures to be taken "to avoid, minimize, or correct damage to the environment--land, water, and air--and to avoid, minimize, or correct hazards to the public health and safety." 25 C.F.R. § 216.1 (1985). They were issued to benefit "Indian owners and the public at large." *Id.* Such general public health and safety regulations do not support jurisdiction under the Tucker Acts.

The Tribe cites 30 U.S.C. § 1300, a provision of SMCRA, and regulations promulgated thereunder. Tribe Br. 27-30, 36. These provisions establish environmental protection standards for surface mining on Indian lands that are similar to those that apply under SMCRA to non-Indian lands. *See* 49 Fed. Reg.

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14. *Farrell v. Department of the Interior*, 314 F.3d 584 (Fed. Cir. 2002), is not to the contrary. Tribe Br. 33. *Farrell* reviewed an order of the Merit Systems Protection Board. No claim for money damages under the Tucker Act was involved or discussed.

15. *See* 25 C.F.R. Part 216 (statutory authority) (noting that the regulations were issued pursuant to IMLA, the APA, and statutes that would not apply here).

38,462 (Sept. 28, 1984) (interim standards for Indian lands "differ little from those applicable to non-Indian lands," and "[t]he content and organization of the [permanent] Federal program for Indian lands follows the permanent program regulations" that apply to non-Indian lands); 42 Fed. Reg. 63,394 (Dec. 16, 1977) (standards for Indian lands are "nearly identical" to those for non-Indian lands).[16] Moreover, although the Tribe notes that both SMCRA and its implementing regulations require the Secretary to include lease terms and conditions requested in writing by the Indian tribe whose interest is affected by the lease, *see* Tribe Br. 28 (citing 30 U.S.C. § 1300(e), 30 C.F.R. § 750.20(b) (1987)), that requirement increases tribes' control over leasing, not the Secretary's. *See also* 49 Fed. Reg. at 38,462 (standards for Indian lands "provide for tribal involvement in the process").[17] Because SMCRA imposes regulatory requirements for surface mining on Indian lands that are similar to those for surface mining on non-Indian lands,

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16. Indeed, most of the SMCRA regulations the Tribe cites to show "federal control" of Indian coal leasing merely incorporate by reference regulations that govern surface mining on non-Indian lands. Tribe Br. 30 (citing 30 C.F.R. §§ 750.14, 750.15, 750.16, 750.17, 750.19 (1985)).

17. The Tribe erroneously alleges that 30 U.S.C. § 1300(e) imposed an "express statutory duty" on the Secretary to adjust the royalty rate under Lease 8580 to 20 percent. Tribe Br. 32; *see also* Tribe Br. 42, 48-49, 58. That provision of SMCRA instructs the Secretary to include environmental protection standards requested by Tribes in surface mining leases issued after August 3, 1977. 30 U.S.C. § 1300(e). But Lease 8580 did not issue after August 3, 1977, and royalty rates are not environmental protection standards.

and SMCRA regulation of surface mining on non-Indian lands does not impose fiduciary duties on the Secretary, it follows that SMCRA regulation of surface mining on Indian lands does not give rise to fiduciary duties either.

The Tribe contends that the provisions of Lease 8580 authorizing the Secretary to adjust the royalty rate support its "network" argument. Tribe Br. 31-32. But the lease cannot be part of a "network" that establishes Tucker Act jurisdiction because it is not an Act of Congress or implementing regulation, as required by the Tucker Act. And the Supreme Court specifically rejected the lease as the basis of a claim here. The Court held, with respect to "standards that might be derived from [the Secretary's] adjustment authority under the Lease," that there was "certainly no basis for concluding that an alleged 'breach' of those standards is cognizable in an action for money damages under the Indian Tucker Act." *Navajo III*, 537 U.S. at 510 n.13.

The Tribe invokes FOGRMA regulations, 30 C.F.R. Parts 212, 216, 218, and § 206.250. Tribe Br. 34-36. These regulations improved the system for auditing and accounting royalties from mineral leases on federal lands and Indian lands, but they did not increase federal control over such leasing. Moreover, the regulation on which the Tribe relies most heavily, 30 C.F.R. § 206.250, was not promulgated until 1989, after the events at issue in this case. Tribe Br. 35. Although the 1989 regulation "largely continue[d] past practice," 54 Fed. Reg.

1492, 1493 (Jan. 13, 1989), until 1989 the regulation was just that -- a practice -- and therefore irrelevant to Tucker Act jurisdiction. *Cf. Navajo III*, 537 U.S. at 508 n.12 (regulatory provisions adopted after the events at issue could not support Tribe's claim).[18]

Finally, the Tribe cites the Indian Right-of-Way Act of 1948, 25 U.S.C. §§ 323-28, and regulations promulgated thereunder, 25 C.F.R. Part 169. Tribe Br. 36-37. The regulations specifically require the consent of the tribe before the Secretary can grant a right-of-way across tribal lands. 25 C.F.R. § 169.3(a) (1985) ("No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."). And the Secretary does not, as the Tribe alleges, "reserve[] the right to circumvent" this requirement. Tribe Br. 37. The House Report to which the Tribe cites notes that in 1967 the Secretary proposed to change its regulations to remove the tribal consent requirement, but in 1968 decided to retain the requirement without modification. H.R. Rep. No. 91-78, at 3

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18. *Pawnee v. United States*, *supra*, and *Coast Indian Community v. United States*, *supra*, are not to the contrary. Tribe. Br. 35. Nothing in *Pawnee* indicates that the Court intended to apply regulations to events that occurred before the regulations issued; the Court applied "current regulations" to allegations of ongoing breach of trust. 830 F.2d at 190. *Coast Indian Community* looked to a subsequently issued regulation to interpret a predecessor regulation, and only because the newer regulation was explicitly promulgated "solely to clarify the predecessor provisions." 550 F.2d at 650.

(1969); *see also id.* at 8 n.7 (noting that, in both of the cases mentioned in the report in which the Secretary granted a right-of-way over the Tribe's lands, "consent was obtained"). Thus, the Indian Right-of-Way Act does not increase the Secretary's control over Navajo coal leasing.

In sum, the Tribe's "network" does not establish "general federal control or supervision" over Navajo coal leasing. The Tribe's "network" is consistent with the Supreme Court's observation that coal leasing under IMLA "giv[es] Tribes, not the Government, the lead role." *Navajo III*, 537 U.S. at 508. Moreover, the existence of federal regulations to protect public health and safety do not establish any fiduciary duties to the Tribe.

C. The Tribe Has Not Shown Violations of Any Duties That Would Mandate the Payment of Damages by the United States If Breached.

Because the Court of Federal Claims held that the Tribe's "network" argument failed to establish a claim under the Tucker Acts, the court never reached the issue of whether the Tribe had proved a breach of any duties that might arise under its "network."[19] Accordingly, were this Court to conclude that

19. The Tribe incorrectly asserts that the Court of Federal Claims "found that the United States breached its most basic trust duties of care, candor, and loyalty." Tribe Br. 2 (citing 46 Fed. Cl. at 226-27); *see also* Tribe Br. 9. The court actually found that the Secretary's actions were inconsistent with the standards of a private trust, 46 Fed. Cl. at 227, but did not violate any fiduciary duties the United States owed to the Tribe, *id.* at 232-34.

the Court of Federal Claims erred and that the Tribe's "network" argument stated a claim under the Tucker Acts, it should remand for the Court of Federal Claims to adjudicate the merits of the Tribe's claim. *See White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1383 (Fed. Cir. 2001) ("We note that the Court of Federal Claims did not reach this argument, and we therefore leave this unanswered question to that court for resolution on remand"), *aff'd*, 537 U.S. 465 (2003). But, if this Court were to hold that the Tribe's "network" satisfies the Supreme Court's test for jurisdiction under the Tucker Acts, and were to decide to reach the merits of the Tribe's claim in the first instance on appeal, it should find that the Tribe has failed to show that the Secretary breached any duties and that a breach of such duties would not give rise to a claim for money damages.

The Tribe's allegations of a breach focus on the Secretary's handling of Peabody's administrative appeal concerning the adjustment of the royalty rate pursuant to a provision in Lease 8580 and the Secretary's subsequent approval of the amendments the Tribe negotiated with Peabody. Tribe Br. 10, 49-56. These allegations do not establish a breach of duties that would give rise to a money damages claim.

Nothing in the Tribe's "network" addresses how the Secretary should handle administrative appeals. Rather, Interior Department regulations of general applicability establish a process for such appeals, *see* 25 C.F.R. Pt. 2, and the

procedural standards governing that process are defined by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, and the Interior Department regulations. The Tribe has not alleged that the Secretary's actions violated the Department's procedural rules or the APA. And, in fact, the Department rules in effect at the time the Secretary acted gave him broad authority over administrative appeals. 43 C.F.R. § 4.5(a)(1)-(2) (1985).

Nor could the Court of Federal Claims or this court override or supplement the procedural rules adopted by the Secretary with its own view of the proper relationship between the Secretary and subordinate officials concerning Peabody's administrative appeal. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Thus, there would be no basis for finding that the Secretary lacked the authority or acted improperly by deciding not to allow his subordinate officer's draft decision on Peabody's administrative appeal to go into effect and instead to encourage the Tribe and Peabody to pursue settlement.

Even if the Secretary had violated some procedural rule in handling Peabody's administrative appeal or approving the lease amendments, that would not entitle the Tribe to damages under the Tucker Acts. Only a statute or regulation that "can fairly be interpreted as mandating compensation" may support a claim for damages under the Tucker Act. *Mitchell II*, 463 U.S. at 216-217. None

of the procedural regulations governing administrative appeals or lease negotiations or approval creates a right to be paid, speaks in terms of money damages or claims, or has any other monetary character at all. *See United States v. Testan*, 424 U.S. 392, 400 (1976); *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting) ("Although not dispositive, the monetary character of a statutory right is a strong indication that a statute 'in itself . . . can fairly be interpreted as mandating compensation.' "); *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (right of action has been recognized under 42 U.S.C. § 1983 when a statute "conferred specific monetary entitlements" or required payment of " 'objective' monetary entitlement").

Rather, procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Tucker Act. *See, e.g., Testan*, 424 U.S. at 403; *United States v. Hopkins*, 427 U.S. 123, 130 (1976). Accordingly, instead of a suit for money damages, any recourse that the Tribe might have had for an alleged violation of a procedural rule in the course of the Secretary's handling of Peabody's administrative appeal or the Secretary's approval of the lease amendments would have been available, if at all, only in an action under the APA to set aside the Secretary's 1987 decision approving the lease amendments, or to challenge the suspension of (or seek the reinstatement of) the administrative appeal proceedings.

The Tribe never brought such an action, however; instead, it brought this action seeking damages for breach of trust while seeking to retain all the benefits of the entire package of lease amendments negotiated by the parties and approved by the Secretary in 1987.

The Tribe's reliance on the Secretary's actions with respect to Peabody's administrative appeal is misplaced for another reason as well. The Tribe posits that the Secretary should have exercised his authority to adjust the royalty rate under Lease 8580 instead of directing the Tribe and Peabody toward further negotiations. As the Supreme Court explained, however, the Secretary's authority to adjust the royalty rate derived from the terms of Lease 8580. *Navajo III*, 537 U.S. at 510 n.13. A breach predicated on the Secretary's adjustment authority under the Lease would not be based on a violation of an Act of Congress or regulation, as the Tucker Acts require. Moreover, the lease authorized, but did not require, the Secretary to make a "reasonable adjustment" in the royalty rate, and what would be a reasonable adjustment under a lease entered into by both the Tribe and Peabody could properly take into account the interests of both parties, not those of the Tribe alone. Thus, the lease provision that authorized the Secretary to adjust the royalty rate under Lease 8580 cannot have required the Secretary to exercise that authority in a manner that maximized revenue to the Tribe.

Nor can the Tribe show a breach of fiduciary duty arising out of the Secretary's approval of the lease amendments the Tribe negotiated with Peabody. To establish a breach of fiduciary duty in approving the lease amendments, the Tribe at a minimum would have to establish that the Secretary could not reasonably have believed that the overall outcome of the negotiated package -- the lease amendments themselves -- was in the Tribe's best interest. The Tribe has made no such claim. In fact, the record shows that the Tribe's own experts repeatedly concluded that the lease amendment package, and the 12½ percent royalty rate in particular, were reasonable. *See supra* pages 9-10. *Cf. Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312-313 (1989); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."). The Tribe's own assessment of the royalty rate in the lease amendments as "reasonable" contradicts what it characterizes as the "central" allegation in this case: that the Secretary "approve[d] a deal with royalty rates the Department knew to be unfair to the Navajo." Tribe Br. 31.

D. The Common Law of Trusts Does Not Supply a Right to Recover Damages Against the United States under the Tucker Act.

The Tribe asserts that, if it could show "general federal control or supervision" over Indian coal leasing overall, then this Court would have to treat the United States as if it were liable in money damages for breach of any of the common law duties that might be applicable to a private trustee. Tribe Br. 11, 50. As explained *supra* pages 23-31, however, both the text of the Tucker Act and Supreme Court precedent require the Tribe to allege violations of a money-mandating statute or regulation. Moreover, the federal government's role in its relations with the Indian tribes differs from that of a private trustee whose conduct is governed by common law standards. *See, e.g., Nevada v. United States*, 463 U.S. 110, 127-128 (1983); *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd, Mitchell II*, 463 U.S. 206. The Tribe's attempt to enforce the standards of a private fiduciary against the United States under the Indian Tucker Act fails for an additional reason as well. The Indian Tucker Act places the claims of Indian plaintiffs on the same footing as the claims of non-Indian plaintiffs. *Mitchell II*, 463 U.S. at 212 n.8; *Mitchell I*, 445 U.S. at 539; *see also* H.R. Rep. No. 79-1466, at 13 (1945) (Indian "claimants are to be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at

law and in equity, . . . as in cases brought [under the Tucker Act] by non-Indians."). The Tribe's argument that the United States is liable for damages based on application of common law trust principles would put the damages claims of Indian plaintiffs in a considerably more advantageous position than the damages claims of non-Indian plaintiffs, which must allege a violation of an "Act of Congress" or "regulation of an executive department." 28 U.S.C. § 1491(a)(1).

The Tribe's argument that the United States may be liable in damages for the violation of any duty discoverable in the interstices of the law of trusts also would interfere with the role of Congress, which has plenary power to legislate in the field of Indian affairs, *United States v. Kagama*, 118 U.S. 375 (1886), and thereby to prescribe the powers and duties of the Secretary with respect to tribal resources. In the circumstances presented here, Congress clearly has spoken, enacting a statute that gives tribal governments control over their mineral leasing decisions. *See Navajo III*, 537 U.S. at 508 (" '[t]he ideal of Indian self-determination [that underlies IMLA] is directly at odds with Secretarial control over leasing' ") (quoting *Navajo I*, 46 Fed. Cl. at 230). In sum, nothing in the Tucker Acts or the controlling precedent would allow this Court to transform the Court of Federal Claims into a court of equity, in which the United States may be found liable in damages for alleged violations of common law duties that have not been assumed by the government in any statute or implementing regulation.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Federal Claims.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 12,891 words.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing brief have been served upon the following counsel on this 28th day of July 2006, by dispatching same via First Class United States Mail addressed to:

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