Supreme Court of the United States.
UNITED STATES OF AMERICA, Petitioner,
v.
NAVAJO NATION.
No. 07-1410.
May 13, 2008.

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

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations authorize **Indian Tribes**, with the approval of the Secretary of the Interior, to lease tribal lands for mining purposes. In a previous decision in this case, *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*), this Court held that the Secretary's actions in connection with Indian mineral lease amendments containing increased royalty rates negotiated by the Navajo Nation did not breach a fiduciary duty found in IMLA or other relevant statutes or regulations. The court of appeals held on remand that the Secretary's conduct breached duties linked to sources of law that had been briefed to this Court but not expressly discussed in *Navajo*. The questions presented are:

1. Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *Navajo*.

2. If *Navajo* did not foreclose the question, whether the court of appeals properly held that the United States is liable as a mater of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation.

***III** TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

***1** The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. 1a-43a, 72a-87a, 88a-117a) are reported at 501 F.3d 1327, 347 F.3d 1327, and 263 F.3d 1325. The opinions of the Court of Federal Claims (App. 44a-69a, 118a-166a) are reported at 68 Fed. Cl. 805 and 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2007. A petition for rehearing was denied on January 14, 2008 (App. 70a-71a). On April 9, 2008, the Chief Justice extended the time within which to file ***2** a petition for a writ of certiorari to and including May 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App. 167a-175a).

STATEMENT

This case concerns the potential liability of the United States for up to $600 million in damages for an alleged breach of trust connected to the Secretary of the Interior's approval of mineral lease amendments containing new royalty rates agreed to by the Navajo Nation (Tribe) and a private lessee. This Court previously reversed the Federal Circuit's decision finding the United States liable in this very case, holding that the Acts of Congress addressing mineral leasing imposed no specific fiduciary or other duties enforceable in a suit for money damages. *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo*). The Federal Circuit has now reinstated its prior finding of liability for the same conduct based on several statutes having nothing to do with royalty rates for mineral leases and common-law trust principles not embodied in any statute or regulation.

1. a. The United States, through the Secretary of the Interior, regulates the leasing of mineral resources on Indian lands under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations issued thereunder. IMLA authorizes **Indian Tribes**, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes. 25 U.S.C. 396a. Unlike prior statutes governing mineral leases, IMLA is "designed to advance tribal independence, empowers ***3** Tribes to negotiate

mining leases themselves, and, as to coal leases, assigns primarily an approval role to the Secretary." *Navajo*, 537 U.S. at 494, 508.

b. The Secretary also administers the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, which the court of appeals found relevant to this case. SMCRA "establish[es] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a), 1251(b), 1291(23); cf. 30 U.S.C. 1253-1254. SMCRA imposes permitting and other requirements that set performance standards for on-going surface coal mining operations and requires plans for post-mining reclamation. See, *e.g.*, 30 U.S.C. 1257-1260, 1265.

SMCRA's Indian lands provision, 30 U.S.C. 1300, specifies that "all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed" by pertinent provisions of the Act, and that "the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands." 30 U.S.C. 1300(d); cf. 30 U.S.C. 1273(a), 1291(9). In addition to those mandatory lease requirements, the Act provides that Secretary shall also, for "leases issued after August 3, 1977, *** include and enforce terms and conditions *** as may be requested by the **Indian tribe** in such leases." 30 U.S.C. 1300(e); see 25 C.F.R. 200.11(b) (implementing regulation providing for inclusion of lease terms "related to" SMCRA requested by lessor Tribe).

The Office of Surface Mining Reclamation and Enforcement (OSM) has regulatory authority over Indian lands under SMCRA, and OSM routinely consults with the Bureau of Indian Affairs (BIA) before ***4** exercising that authority. See 30 U.S.C. 1211; 30 C.F.R. 750.6(a)(1)-(4). The BIA, in turn, is responsible for consulting directly with affected Tribes and making recommendations to OSM concerning OSM's regulatory actions "relating to surface coal mining and reclamation operations on Indian lands." 30 C.F.R. 750.6(d)(1)-(2).

2. a. The Navajo Nation occupies the largest Indian reservation in the United States. Over the past century, large deposits of coal have been discovered on the Tribe's lands, which are held for it in trust by the United States. *Navajo*, 537 U.S. at 495.

In the Navajo-Hopi Rehabilitation Act of 1950 (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, which the court of appeals also found to be relevant in this case, Congress authorized the Secretary to undertake, "within the limits of the funds *** appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25 U.S.C. 631. The program included education, road, soil and water conservation, irrigation, telecommunications, and business development projects, as well as "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." *Ibid.* Congress initially authorized approximately $89 million for the program, including $500,000 for surveys and studies, *ibid.*; and directed the Secretary to complete the program, so far as practicable, within a 10-year period. 25 U.S.C. 632; cf. H.R. Rep. No. 2455, 85th Cong., 2d Sess. 4, 7 (1958). After Congress authorized an additional $20 million for essential roads in 1958, *ibid.*; 25 U.S.C. 631(7), road construction ended around 1964, and the Secretary completed the program authorized***5** by the Act at that time. S. Rep. No. 11, 93d Cong., 1st Sess. 1 (1973).

Today, the Tribe receives millions of dollars in royalty payments pursuant to mineral leases with private companies. The lease at issue in this case, Lease 8580, was executed by the Tribe and a predecessor to the Peabody Coal Company (Peabody) and took effect in 1964 upon approval by the Secretary. It provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary *** or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. *Navajo*, 537 U.S. at 495.

As the 20-year anniversary of Lease 8580 approached, its royalty rate of 37.5 cents per ton yielded a royalty of approximately 2% of gross proceeds. That rate was above the minimum rate of 10 cents per ton established by then-applicable IMLA regulations, 25 C.F.R. 211.15(c) (1985), but was substantially below the minimum royalty rate of 12.5% established in 1976 for coal mined on federal lands under the Mineral Leasing Act, 30 U.S.C. 207(a). 537 U.S. at 495-496.

b. In March 1984, the Chairman of the Tribe wrote to the Secretary asking him to exercise his authority under Lease 8580 to adjust the royalty rate. In June 1984, the Director of the BIA Navajo Area Office, acting pursuant to authority delegated by the Secretary, issued an opinion letter adjusting the royalty rate to 20% of gross proceeds. 537 U.S. at 496.

Peabody filed an administrative appeal of the Area Director's decision in July 1984, pursuant to 25 C.F.R. 211.2 (1985). That informal appeal process was "largely unconstrained by formal requirements," including any prohibition on *ex parte* communications. ***6**537 U.S. at 513.[FN1] The appeal was referred to the Deputy Assistant Secretary for Indian Affairs, John Fritz, acting as both Commissioner of Indian Affairs and Assistant Secretary for Indian Affairs. After 30 days had elapsed from the parties' final pleading deadline without a decision by Fritz, the Tribe and Peabody each were entitled under regulations then in effect to have the matter transferred to the Board of Indian Appeals (Board) for a more formalized appeal process in which *ex parte* communications would have been prohibited. *Id.* at 496 & n.3, 513. Neither invoked that right and, by June 1985, the parties anticipated that a decision favorable to the Tribe was imminent. *Id.* at 496. Such a decision would have been subject to further review and modification by the Secretary. *Id.* at 498 n.4, 513-514.

> FN1. The Tribe availed itself on multiple occasions of the opportunity to contact Interior officials while Peabody's appeal was pending without notifying Peabody. See C.A. App. A468 ("confidential" communication from Tribe to Secretary regarding Peabody's appeal in November 1984); Gov't Fed. Cl. Supp. Br. in Resp. on Remand App. 11 (internal Tribal memorandum documenting May 1985 communications with Interior Department officials concerning Peabody's appeal).

On July 5, 1985, a Peabody Vice President wrote to the Secretary with a copy to the Tribe urging him either to rule in Peabody's favor or to postpone a decision to allow for a negotiated settlement. The Tribe responded by letter to the Secretary requesting a prompt decision in its favor. Peabody representatives then met privately with then-Secretary Donald Hodel in July 1985. No representative of the Tribe was either present at or received notice of that meeting. 537 U.S. at 497.

On July 17, 1985, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz " 'suggest[ing]' that Fritz 'inform the involved parties that a decision on ***7** th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.' " 537 U.S. at 497. " 'Any royalty adjustment which is imposed on the parties without their concurrence,' the memorandum stated, 'will almost certainly be the subject of protracted and costly appeals,' and 'could well impair the future of the contractual relationship' between the parties." *Ibid.* The Tribe has asserted that it was not told of the Secretary's memorandum, but it did learn that "someone from Washington" urged a return to negotiations. *Id.* at 498.[FN2]

> FN2. In fact, documents drafted by the Tribe's Attorney General explain that the Chairman of the Navajo Tribal Council met with Fritz in 1985, and that Fritz "explicitly" advised him "that he would not decide Peabody's appeal until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." Gov't Fed. Cl. Supp. Br. in Resp. on

Remand App. 1, 5; see *id.* at 9 (Tribal minutes dated July 1986 stating that "the Secretary had asked Peabody and the Navajo Nation to sit down and try to work out their differences" regarding Peabody's appeal and "has indicated an unwillingness to act on this until we have given it one last shot.").

In late August 1985, the Tribe resumed negotiations with Peabody. On September 23, 1985, the parties reached tentative agreement on a package of amendments that, among other things, increased the royalty rate for Lease 8580 to 12.5%, the then-standard royalty rate for federal-coal leases. The amendments also included many other provisions benefitting the Tribe, including retroactive application of the increased royalty rate, increased royalties on a separate lease that did not provide for royalty-rate adjustments by the Secretary, and payment to the Tribe of cash bonuses and then-disputed tribal taxes. 537 U.S. at 498-500 & nn.5, 7. After the Navajo Tribal Council approved the lease amendments and the parties signed a final agreement in November***8** 1987, Secretary Hodel approved the amendments on December 14, 1987. Pursuant to the parties' stipulation, the Area Director's decision was vacated, terminating Peabody's administrative appeal. *Id.* at 500.

3. a. In 1993, the Tribe sued the United States in the Court of Federal Claims for $600 million in damages under the Indian Tucker Act, 28 U.S.C. 1505, alleging that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody constituted a breach of trust. The court granted the government's motion for summary judgment. App. 118a-166a. It concluded that the United States owed general fiduciary duties to the Tribe, and that the Secretary had violated common-law duties of care, loyalty, and candor by meeting secretly with Peabody representatives and acting in its best interests rather than the Tribe's. App. 135a-136a; 537 U.S. at 501. But the court concluded that the Tribe failed to state a claim for damages under the Indian Tucker Act because it failed to link any breach of common-law duties to a specific statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government's fiduciary wrongs under this Court's decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and 463 U.S. 206 (1983) (*Mitchell II*). App. 140a-155a.

b. The Federal Circuit reversed. App. 88a-117a. It held that, under *Mitchell I* and *Mitchell II*, the United States is liable in damages for a breach of fiduciary duties with respect to Indian resources on land that the United States holds in trust if the government "controls" the resources under the law, because such a "level of control" "giv[es] rise to a full fiduciary duty." App. 91a-92a. Finding "pervasive control by the United States of the manner in which mineral leases are sought, ***9** negotiated, conditioned, and paid" under IMLA and its regulations, App. 96a-97a, the Court held that the Tribe stated a claim for damages for breach of "common law fiduciary duties" of care, loyalty, and candor, and a statutory duty to "obtain for the Indians the maximum return for their minerals." App. 98a-100a.

c. This Court granted the government's certiorari petition. The Tribe's merits brief in this Court defended the Federal Circuit's theory of liability stemming from "control," arguing that the Federal Circuit correctly held that the United States had (and breached) fiduciary "trust duties" because, just as in *Mitchell II*, the government holds the Tribe's lands in trust and "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations, including IMLA, SMCRA, the Rehabilitation Act, the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.*, and 25 U.S.C. 399. See Resp. Br. 1, 14-15, 23, 27, 30, 43 (No. 01-1375); see *id.* at 20-38. In light of that network of provisions, the Tribe argued that the Secretary had "a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit." *Id.* at 15.

This Court reversed, concluding 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." 537 U.S. at 514. The court explained that its decisions in *Mitchell I* and *Mitchell II* "control this case," and that, despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain." *Id.* at 493, 507.

***10** The *Mitchell* cases, the Court explained, reflect a two-step process for determining whether a damages claim is cognizable under the Indian Tucker Act: First, as a threshold matter, a plaintiff must both 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." 537 U.S. at 506. That threshold "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Ibid.* Second, "[i]f that threshold is passed," the rights conferred by those provisions are enforceable in a suit for damages only if "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 imposes.' " *Ibid.* (brackets and citation omitted).

While *Mitchell II* held that a damages action was available under the Indian Tucker Act based on specific "statutes and regulations, which clearly require [d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," 537 U.S. at 505-506, the Court found this case aligned with *Mitchell I* because, while IMLA governed coal leasing on Indian lands, neither IMLA nor its regulations gave "the Federal Government full responsibility to manage Indian resources … for the benefit of the Indians." *Id.* at 507. Indeed, the Court concluded, to impose fiduciary duties on the Secretary regarding coal leasing would be "out of line" with one of IMLA's principal purposes - to "enhance tribal self-determination by giving the Tribes, not the Government, the lead role in negotiating mining leases with third parties" - because the "ideal of Indian self-determination is directly at odds with Secretarial control over leasing." *Id.* at 508. The Court further concluded***11** that the Tribe failed to identify any "substantive prescriptions" in a "specific statutory or regulatory provision" that the Secretary allegedly violated, either in failing to insist upon a higher royalty rate or in his actions during the administrative appeal. *Id.* at 510-511, 513. The Court accordingly reversed and remanded for further proceedings consistent with its opinion. *Id.* at 514.

4. On remand, the Federal Circuit construed this Court's decision as limited to only the three statutes specifically discussed by the Court from among the "network" of provisions on which the Tribe had relied: IMLA, IMDA, and 25 U.S.C. 399. See App. 72a-87a. While the Tribe conceded that it had argued to this Court that its asserted " 'network' of relevant statutes, treaties, and regulations" (including SMCRA and the Rehabilitation Act) gave rise to fiduciary duties enforceable in a damages action, it argued that the question presented for which certiorari was granted "was directed only at the IMLA." App. 78a. The Tribe likewise argued that this Court's decision in this case was analogous to *Mitchell I*, which expressly left open for consideration on remand arguments based on statutes not addressed in its opinion. *Ibid.*; cf. *Mitchell I*, 445 U.S. at 546 n.7. The Federal Circuit agreed and remanded to the Court of Federal Claims. App. 80a-81a.

5. The Court of Federal Claims again entered summary judgment for the United States. App. 44a-69a. The court explained that a "statute or regulation must 'impose specific duties regarding the Secretary's adjustment of royalty rates for coal' " for the Tribe to recover damages under the Indian Tucker Act, and the Tribe again failed to "tie specific laws or regulatory provisions to the issue at hand" - "approval of the royalty rate for ***12** the Navajo's coal." App. 58a-59a, 60a, 69a. The "elements of the

[Tribe's] 'network,' " the court concluded, "all concern implementation of coal leasing" and do not involve "the formation of coal leases, much less the establishment of royalty rates." App. 58a; see App. 59a-67a (surveying network). That conclusion, it explained, followed from this Court's "rationale for aligning the Navajo's claim with *Mitchell I* as opposed to *Mitchell II*" and this Court's conclusion that "[t]he ideal of Indian self-determination [reflected in IMLA] is directly at odds with Secretarial control over leasing." App. 67a-68a (quoting 537 U.S. at 508).

6. The Federal Circuit again reversed, App. 1a-43a, holding that "the Nation is entitled to judgment as a matter of law" for two independent reasons. App. 36a.

a. The court first rejected the government's argument that the Tribe must "allege a violation of a specific rights-creating or duty-imposing statute or regulation," because, in its view, the government's violation of "common-law trust duties" may form the basis of an Indian Tucker Act claim under this Court's decisions in *Mitchell II* and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*). App. 36a-38a. The court concluded that such common-law trust duties could be judicially fashioned and enforced here based on what it characterized as the government's "comprehensive control of the [Tribe's] coal" resulting from a "network of statutes and regulations." App. 26a, 31a. The court first noted that the government held the Tribe's reservation lands in trust and that, because the Tribe's "coal [is] located on that land," it too is held in trust. App. 26a. The court then discussed three statutes that gave the Secretary responsibility for certain discrete matters pertaining to the Tribe's coal, noting that the ***13** government had (1) "assumed coal resource planning responsibilities" under the Rehabilitation Act, App. 27a; (2) "assumed comprehensive control of coal mining operations" under SMCRA regulations that set environmental standards for third-party operators of tribally owned mines and vested various responsibilities under SMCRA in different components of the Interior Department, App. 27a-29a; and (3) "assumed comprehensive control of the management and collection of royalties from coal mining" under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.*, App. 29a-31a.

The court emphasized that, in its view, "specific control over coal leasing" is not a prerequisite for a breach of trust claim in this case, App. 31a, even though the asserted breach concerned coal leasing and the royalty rate on the lease amendments the Secretary approved. The court instead found it sufficient that the Secretary exercised control over *other* matters affecting the Tribe's coal in the three areas just discussed. App. 31a-32a. The court recognized that this Court had explained that IMLA specifically governed mineral leasing and Lease 8580 and that IMLA "aims to enhance tribal self-determination" in a manner directly at odds with Secretarial control over coal leasing, 537 U.S. at 508. App. 35a-36a. But the court declined to follow that ruling because, in its view, the Court had addressed the government's duties only under IMLA, IMDA, and 25 U.S.C. 399, and did not specifically discuss the other statutes in the Tribe's "asserted network." App. 35a-36a. Having found a basis for imposing common-law trust duties on the Secretary with respect to coal leasing based on a theory of "control" exercised under those other statutes, the court held that the Secretary's actions had breached those duties. App. 38a.

***14** b. The court of appeals alternatively held that the United States was liable under the Indian Tucker Act for violating three duties (distinct from general common-law trust duties) that it derived from the Tribe's "network of statutes and regulations." App. 36a, 38a-42a.

First, the court noted that the Rehabilitation Act required that the Secretary keep the Tribe "informed" of "plans pertaining to the program [that was] authorized" by that Act in 1950 (which included surveys and studies of coal resources), 25 U.S.C. 631(3) and 638, and held that the Secretary's ac-

tions in 1985 and 1987 concerning Lease 8580 violated that obligation. App. 38a-39a.

Second, the court observed that SMCRA regulations, in allocating responsibilities within the Interior Department, specify that the BIA will "provid[e] representation for Indian mineral owners *** in matters relating to surface coal mining and reclamation operations" regulated by SMCRA.. 30 C.F.R. 750.6(d), and held that the Secretary's actions violated that regulation. App. 38a-39a.

Third, the court concluded that SMCRA requires the Secretary to "include and enforce terms and conditions" in "leases issued after August 3, 1977" as requested by an **Indian Tribe**, 30 U.S.C. 1300(e), and that the Secretary violated that obligation by refusing to increase Lease 8580's royalty rate to 20% as the Tribe has requested. App. 38a-39a. The court acknowledged that SMCRA "focuses on environmental protections, not royalty rates." App. 41a. But the court concluded that Section 1300(e) and its companion regulation did not "contain[] any subject matter limitation," and that they applied***15** to the Tribe's request concerning Lease 8580 even though that lease was issued before 1977. App. 41a-42a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision once again holds that the United States is liable for up to $600 million in damages for breach of trust in connection with the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody, despite this Court's conclusion in *Navajo* that that very approval did *not* violate "any relevant statute or regulation," 537 U.S. at 514, including the statute directly governing the Indian mineral lease in this case or its implementing regulations. The decision therefore is simply foreclosed by this Court's earlier ruling. Review and indeed summary reversal are warranted on that ground alone.

Even if *Navajo* did not preclude further litigation based on the statutes the Tribe had previously invoked, the Federal Circuit's decision contravenes this Court's precedents, reaffirmed and reemphasized in *Navajo*, establishing what a claimant must prove to render the United States liable in damages. The Federal Circuit's decision - and in particular its vast expansion of *Apache* while disregarding the framework of this Court's decision rendered on the same day in this very case - demonstrates the need for this Court's review to make clear the proper application of the important sovereign immunity principles set forth in the *Mitchell* decisions and reaffirmed in *Navajo*. The Federal Circuit's most recent decision now departs from those principles even more dramatically than did its prior decision. Because the Court granted review of that prior decision, *a fortiori* it should do so here.

***16** A. This Court's Decision In This Case Foreclosed The Basis For Liability Adopted By The Federal Circuit

This Court's 2003 decision in this case foreclosed the theories of liability advanced by the Tribe and adopted by the Federal Circuit on remand. The Tribe previously argued to this Court that a "network" of statutes and regulations both gave the Government comprehensive "control" over coal mining and demonstrated that this case was governed by *Mitchell II*, not *Mitchell I*. The Court rejected those contentions. The Federal Circuit was foreclosed from subsequently relying on those same statutes and regulations to hold the United States liable.

In 2003, this Court granted certiorari to resolve whether the Federal Circuit had "properly held that the United States is liable *** for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA." Pet. I (No. 01-1375). The premise for the question presented thus was that liability could not properly be imposed under the Indian Tucker Act "without" finding a violation of a "specific statutory or regulatory duty established pursuant to the

IMLA."

The Tribe's merits brief argued that the government's duties were not limited to "specific statutory and regulatory commands" under IMLA or other statutes and, instead, included duties governed by "familiar trust law standards." Resp. Br. 30, 35 (No. 01-1375); see *id.* at 30-38. It argued that *Mitchell II* stood for the proposition that, "when governing statutes and regulations, like those here, impose on the United States 'full responsibility to manage Indian resources and land for the benefit of Indians,' " the government's conduct is governed ***17** by "common law trust standards." *Id.* at 33 (quoting *Mitchell II*, 463 U.S. at 224). The Tribe accordingly argued the government "exercises comprehensive control and supervision over virtually every stage of [coal] resource development" under a network of statutes and regulations. *Id.* at 14-15; see *id.* at 1, 20-38.

The Tribe not only argued that IMLA governs coal leasing, but also that SMCRA's Indian lands section (30 U.S.C. 1300) and its accompanying regulations (30 C.F.R. Pt. 750) gave the government control over "all stages of Indian coal surface mining" in its role as "trustee of the natural resources of the **Indian tribes**," and similarly argued that the Rehabilitation Act required the Secretary to act in the best interest of the Tribe (25 U.S.C. 631, 635). See Resp. Br. 23, 27, 30, 43 (No. 01-1375). In fact, the Tribe's brief in this Court cited every statutory scheme later relied upon by the Federal Circuit on remand to find the United States liable. Compare, *e.g.*, *id.* at 1, 3 (listing network of statutes and regulations), with App. 16a-17a (listing network relied upon on remand).

This Court, however, concluded that despite the "endeavor to align this case with *Mitchell II* rather than *Mitchell I*," the "controversy here falls within *Mitchell I*'s domain" because the Secretary had "no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages." 537 U.S. at 493, 507. Moreover, the Court agreed with the government that duties established under common-law trust principles could not form a basis for Indian Tucker Act claims, holding that the Tribe must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government ***18** allegedly has failed to fulfill. *Id.* at 506 (emphasis added).

The Court accordingly examined the statutes and regulations cited by the Tribe that were even arguably relevant to the Secretary's conduct concerning approval of lease amendments containing new royalty rates and concluded that they did not establish any "specific fiduciary or other dut[y]" that the Secretary might have violated. 537 U.S. at 506-514. The Court explained that IMLA and its implementing regulations (which specifically govern tribal coal leasing) "do not assign to the Secretary managerial control over coal leasing" and that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes," namely, "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating leases with third parties." *Id.* at 508; see *id.* at 506-508, 510-513. The Court similarly addressed the other components of the Tribe's "network" that addressed coal leasing or similar arrangements for selling Indian coal and concluded that neither 25 U.S.C. 399 nor IMDA governed the lease in this case. 537 U.S. at 509.

To be sure, the Court did not specifically address by name the other statutes and regulations that the Tribe cited as components of its asserted network. But that is no doubt because those other statutes had nothing to do with approval of royalty terms in coal leasing, but rather, as we explain more fully below, concern such disparate subjects as the Secretary's regulation of operators of surface coal mines for environmental purposes and a development program authorizing (among other things) surveys and studies of coal resources that ended decades before the events in this case. But had the

Court believed that the Tribe's arguments based on such ***19** unrelated statutes were unaffected by the Court's disposition of the case, it presumably would have indicated, as did the Court in *Mitchell I*, that issues concerning those statues remained viable for further consideration on remand. Cf. *Mitchell I*, 445 U.S. at 546 n.7. Instead, the Court concluded its opinion in this case by stating that "[h]owever one might appraise the Secretary's intervention in this case, we have no warrant from *any relevant statute or regulation* to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Navajo*, 537 U.S. at 514. That determination renders the statutes in the Tribe's network either insufficient to implicate an enforceable duty or wholly irrelevant. Either way, the Court's disposition fully resolved the Tribe's claims based on the statutes in its proffered "network" and common-law trust duties derived from the government's asserted control over the Tribe's coal, and it thereby foreclosed renewal of those same claims on remand.

The Federal Circuit nevertheless held that the Tribe could re-raise identical trust arguments based on the same statutes presented to this Court - minus the three *most relevant* statutes that this Court found necessary to address by name. That departure from this Court's ruling in this very case is extraordinary, and review should be granted on that ground alone. Indeed, given the starkness of that departure, summary reversal would be appropriate.

***20** B. The Court of Appeals' Ruling, Even If Not Completely Foreclosed By *Navajo*, Is In Any Event Flatly Inconsistent With *Navajo* And This Court's Decisions Forming The Basis For *Navajo*

Even if this Court's mandate did not in itself absolutely foreclose the Federal Circuit's reinstatement of liability, that court's rationale is flatly inconsistent with this Court's decision in *Navajo* and the precedents on which *Navajo* is based. Under this Court's precedents, damage claims under the Indian Tucker Act are actionable only if they allege violations of a specific constitutional, statutory, or regulatory provision that may be fairly read as mandating a remedy in money damages. The court of appeals therefore plainly erred in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles divorced from any specific rights-creating or duty-imposing statutory or regulatory provisions.

a. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo*, 537 U.S. at 502 (quoting *Mitchell II*, 463 U.S. at 212). Moreover, a waiver of sovereign immunity must be "unequivocally expressed in statutory text," *Lane v. Peña*, 518 U.S. 187, 192 (1996), and, where Congress has waived immunity, the "scope" of that waiver must be "strictly construed *** in favor of the sovereign," *ibid.*, and "not 'enlarge[d] … beyond what the language requires.' " *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citation omitted); see *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

The Tucker Act waives the United States' immunity from suit by granting the Court of Federal Claims jurisdiction over -
***21** any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Tucker Act's "companion statute," the Indian Tucker Act, "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an **Indian tribe**."' *Apache*, 537 U.S. at 472 (quoting 28 U.S.C. 1505); see *Navajo*, 537 U.S. at 502-503 & n.10; *Mitchell I*, 445 U.S. at 540 (acts provide "same access" to relief).

While the text of the Tucker and Indian Tucker Acts authorize damage claims "founded *** upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28

U.S.C. 1505) the Constitution or a federal statute or regulation, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizablee" *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant 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.' " *Id.* at 216-217 (citations omitted); accord *Navajo*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U. S. at 218); *Apache*, 537 U.S. at 472.

A plaintiff asserting a non-contract claim under the Tucker or Indian Tucker Act must therefore satisfy two distinct requirements. First, the plaintiff must assert a claim of right based on a violation of "the Constitution, or any Act of Congress or any [federal] regulation" in ***22** order to fall within the literal terms of Congress's waiver of sovereign immunity. See *Mitchell II*, 463 U.S. at 216 (quoting 28 U.S.C. 1491(a)). That "threshold" showing for non-constitutional claims must identify "*specific* rights-creating or duty-imposing *statutory or regulatory prescriptions*" that establish the "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo*, 537 U.S. at 506 (emphasis added).

Second, "[i]f that threshold is passed," the plaintiff must show that "the relevant source of substantive law" whose violation forms the basis of his claim - here, a statute or regulation - "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo*, 537 U.S. at 506 (brackets and citation omitted); see *United States v. Testan*, 424 U.S. 392, 401-402 (1976).

b. The Federal Circuit fundamentally misapplied this Court's decisions in holding that the Tribe need not "allege a violation of a specific rights-creating or duty-imposing statute or regulation" and may instead base an Indian Tucker Act claim on an alleged violation of "common-law trust duties." App. 36a-37a. Indeed, as we have explained, this Court's decision in this very case reaffirmed that the Indian Tucker Act requires the Tribe, at the "threshold" step, to "identify a substantive source of law that establishes specific fiduciary or other duties" allegedly breached by the government and, for that reason, the proper "analysis must train on specific rights-creating or duty-imposing *statutory or regulatory* prescriptions" establishing those specific duties. *Navajo*, 537 U.S. at 506 (emphasis added).

***23** If that threshold is satisfied, general principles from the common law of trusts can then be relevant at the second step of the analysis under this Court's decisions in determining whether the source of substantive law that imposes specific duties may also fairly be interpreted as mandating monetary relief for its violation. But such common-law principles cannot serve as a substitute for identifying specific statutory or regulatory duties at the *first* step of the analysis.

The Federal Circuit based its contrary conclusion on its belief that this Court "rejected [that reading of the Indian Tucker Act] in *Apache*" and that *Apache* demonstrates that "elaborate" governmental control will itself give rise to common-law trust duties whose violation is actionable under the Act. App. 36a-37a. In so holding, the Federal Circuit fundamentally misapplied this Court's precedents and ignored the controlling framework in this Court's decision *in this very case*, which was decided on the same day as *Apache*.

While the Federal Circuit concluded that *Apache* "found *** that common-law duties helped to define the 'contours of the United States' fiduciary responsibilities,' " App. 37a (quoting *Apache*, 537 U.S. at 474), the quoted text from *Apache*, when read in context, is to the contrary. *Apache* explained that, in *Mitchell II*, the Court 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." *Apache*, 537 U.S. at 473-474 (emphasis added). The Court then

continued that because "the *statutes and regulations* [in *Mitchell II*] gave the United States 'full responsibility to manage Indian resources and land for the ***24** benefit of the Indians,' we held that *they*" - that is, the specific statutes and regulations, not common law principles - "define[d] … [the] contours of the United States' fiduciary responsibilities." *Id.* at 474 (emphasis added). Indeed, *Apache* explained that such a "source of law was needed to provide focus for the trust relationship" in order "[t]o find a specific duty" owed by the government and, only *after* "that focus was provided," should "general trust law [be] considered in drawing the inference that Congress intended damages to remedy a breach of [that] obligation." *Id.* at 477.

The Court in *Apache* confronted a single and unique statute that directed that the former Fort Apache Military Reservation be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *Apache,* 537 U.S. at 469 (quoting Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8). The Court concluded that the 1960 Act employed the term "trust" as a term of art and that, when the Secretary exercised his related authority "to make direct use of portions of the trust corpus" for the government's *own* purposes, the 1960 Act itself imposed a statutory duty to preserve the trust corpus triggered by the "actual use" and "daily occupation" of the government. See *id.* at 475; see also *id.* at 480 (Ginsburg, J., concurring). Thus, the government's duty derived directly from the statute itself, which specifically contemplated the self-interested use of the trust corpus by the Secretary. See *id.* at 479-480 (Ginsburg, J., concurring) ("threshold" requirement of "a substantive source of law that establishes specific fiduciary or other duties" is satisfied by text of 1960 Act (quoting *Navajo,* 537 U.S. at 506)).

***25** As this Court recognized both in *Navajo* and *Apache*, the Court in *Mitchell II* was similarly careful to ground the duties at issue in that case in specific statutory and regulatory prescriptions. Applying the two-step analysis reaffirmed by *Navajo,* 537 U.S. at 506, the Court in Part III.A of its opinion (463 U.S. at 219-223) first examined the "Acts of Congress and executive department regulations" on which the plaintiffs "based their money claims." *Id.* at 219. While those claims were described in aggregate as "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," *id.* at 207, each of the plaintiffs' precise claims tracked a *specific* duty separately set forth in one of the statutes or regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 209, 211, 219-223 & nn.23-28 (discussing governmental duties under statutes and regulations on which the damages claims were predicated).[FN3] Consequently, the Court's discussion of those duties focused on the specific obligations imposed by the statutes and regulations at issue and did not invoke common-law trust principles to define the applicable duties. See *id.* at 219-223.

> FN3. See also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c)(2) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

Mitchell II's discussion of trust principles was instead limited to Part III.B of the opinion ***26**(463 U.S. at 224-228), which addressed whether the relevant statutes and regulations could in turn "fairly be interpreted as mandating compensation for dam-

ages sustained as a result of the breach of the duties they impose" (*id.* at 219). Because a trustee normally is "accountable in damages for breaches of trust," *id.* at 226, the Court concluded that statutes and regulations that give the government "full responsibility" and a "fiduciary obligation[]" to manage and operate the trust corpus (timber, lands, and monetary proceeds) for the sole "benefit of the Indians" in order to "generate proceeds for the Indians" may "fairly be interpreted as mandating compensation" for a breach. *Id.* at 224-227. This limited use of trust principles thus assesses whether statutes or regulations that impose specific fiduciary duties may, *in addition*, be fairly interpreted as money mandating.

c. The Federal Circuit flipped this analysis on its head, concluding that governmental functions concerning tribal coal in other areas justify imposing *new and additional* duties concerning approval of royalty rates based on general common-law trust principles. The Federal Circuit's concept of federal "control" sufficient to impose such duties, moreover, bears no relationship to the actual, managerial control exercised by the government over tribal assets pursuant to the specific statutory and regulatory prescriptions in *Mitchell II*. Those statutes and regulations required that the government directly make decisions regarding the sale, management, and harvesting of tribal timber resources for the sole benefit of the Indian owners with "[v]irtually every stage of the process *** under federal control." *Mitchell II*, 463 U.S. at 222; see *id.* at 220-223 & nn. 23-28. In *Apache*, the government *itself* exclusively occupied and exercised plenary control over land and improvements***27** pursuant to an express statutory trust and used that property for its own purposes. See 537 U.S. at 469; see *id.* at 481 (Ginsburg, J, concurring) (1960 Act conferred "plenary control" on government as "sole manager and trustee"). As this Court explained in *Navajo*, there are no remotely similar provisions vesting the government with actual managerial control over the coal leasing decisions at issue in this case. To the contrary, the thrust of the most relevant statute, IMLA, is to confer control on the Tribes. *Navajo*, 537 U.S. at 508.

The Federal Circuit held that the government exercised "comprehensive control" over coal on the Tribe's land because the government played a role in statutes addressed to three discrete coal-related areas: the government conducted surveys and studies of coal resources on Navajo land under a program that was authorized by the Rehabilitation Act in 1950 and ended by 1964 (see p. 29, *infra*); acted as an environmental *regulator* of third-party operators of tribal surface mines pursuant to SMCRA and its implementing regulations; and collected mineral lease royalties on behalf of Tribes. App. 31a; see App. 27a-31a. Those activities, however, plainly cannot be understood as conferring managerial control over the leasing and royalty-rate decisions at issue in this case. Those decisions were instead governed by IMLA, which, as this Court held in *Navajo*, did not impose any specific duties on the Secretary with respect to the actions challenged in this case.

The Federal Circuit, however, concluded that the asserted governmental "control" of tribal coal supported a "breach of trust claim" even though the government did not exercise "specific control of coal leasing," reasoning that governmental "control over the greater (e.g., coal resources)" implies "control over the lesser (e.g., ***28** the leasing of such coal)." App. 31a-32a. This conclusion not only runs afoul of the normal principle that the specific controls the general, *Morales v. TWA*, 504 U.S. 374, 384 (1992), but it also wrongly looks to *implicit* congressional direction on an issue that Congress addressed *explicitly* in IMLA. Needless to say, the Federal Circuit's analysis cannot be squared with this Court's conclusion *in this case* that the more specific and explicit IMLA, which directly governs Lease 8580, "aims to enhance tribal self-determination by giving the Tribes, *not the Government*, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing" and that, consequently, "imposing fi-

duciary duties on the Government here would be out of line with one of the statute's principal purposes." *Navajo*, 537 U.S. at 508 (emphasis added).

2. The Federal Circuit's alternative holding that the United States is liable for up to $600 million for violations of three statutory or regulatory provisions of the Rehabilitation Act and SMCRA is plainly incorrect. Neither statute applies to the Secretary's actions in his case or imposes money-mandating obligations cognizable under the Indian Tucker Act.

a. The Rehabilitation Act did not impose any obligation to keep the Tribe informed concerning the Secretary's decisions regarding Lease 8580. Cf. App. 38a-39a. That Act provides that the Tribe "shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act]." 25 U.S.C. 638. While the program authorized in 1950 included $500,000 for "surveys and studies" of coal and other resources, 25 U.S.C. 631(3), Congress directed the Secretary to take steps needed to achieve "completion of the program" by 1960, 25 U.S.C. 632; the program's***29** "[s]urveys and studies" were promptly executed, see H.R. Rep. No. 2455, *supra*, at 4, 7; and the entire "Navajo-Hopi rehabilitation program" was completed around 1964, S. Rep. No. 11, *supra*, at 1, decades before the Secretary's actions in this case. Even if the program had been ongoing in 1985, the Act merely required that the Tribe be kept informed of plans pertaining to the program *authorized by the Act.* While plans concerning surveys and studies of coal resources might be covered, the adjustment of coal lease terms plainly are not. As this Court explained in *Navajo*, neither IMLA, which governed approval of lease terms, nor the Department's regulations specifically governing administrative appeals imposed any procedural duty that was violated in this case. Moreover, even if the Secretary had violated a procedural notice obligation in handling Peabody's administrative appeal, that violation would not entitle the Tribe to damages under the Indian Tucker Act. 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 Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States v. Hopkins*, 427 U.S. 123, 130 (1976) (per curiam).

b. The Federal Circuit's conclusion (App. 38a-39a) that the Secretary violated a regulatory duty to "provid[e] representation for Indian mineral owners *** in matters relating to surface coal mining and reclamation operations," 30 C.F.R. 750.6(d)(1), is equally untenable. By its own terms, that provision concerns the "regulation of surface coal mining and reclamation *operations*" by the Department of Interior, 30 C.F.R. 750.1, 750.6(d)(1) (emphasis added), and describes the role of the BIA *within* the Interior Department, not the Secretary as head of the Department, in representing ***30** tribal interests in consultations with the Office of Surface Mining concerning OSM's regulatory actions. 30 C.F.R. 750.6(a)(1)-(2), (d)(1)-(2). The regulation thus merely "describes a procedural arrangement by which the BIA [and] OSM *** coordinate and execute their respective functions and responsibility" under SMCRA; it neither affects "the role of tribes as lessors" nor "the statutory or regulatory prerogatives of the Secretary with respect to Indian lands." 49 Fed. Reg. 38,467 (1984).

c. Finally, the court's conclusion that SMCRA required the Secretary to adjust the royalty rate as requested by the Tribe (App. 39a-40a) is deeply flawed on multiple levels. SMCRA requires that the Secretary incorporate into covered Indian surface coal mining leases the "requirements" of certain SMCRA statutory provisions concerning performance standards and requirements for mining operations. 30 U.S.C. 1300(d). SMCRA further provides that, "in addition to those required" terms and conditions, the Secretary shall "include and enforce terms and conditions as may be requested by the **Indian Tribe**." 30 U.S.C. 1300(e). While SMCRA does not expressly state that the "addition[al]" terms and conditions requested by a Tribe must relate to regulation of mining operations under

SMCRA, that limitation is manifest from the structure and purpose of SMCRA. If there were any doubt on that score, the Secretary has authoritatively construed the requirements of Section 1300(e) as not "encompass[ing] terms and conditions unrelated to SMCRA," 54 Fed. Reg. 22,187 (1989), and has codified that interpretation in regulation, 25 C.F.R. 200.11(b). That interpretation is entitled to deference under ***31***Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984), as a reasonable construction of Section 1300(e).

Indeed, the Tribe has itself conceded that "Lease 8580 and the lease amendments are governed *only* by the IMLA." Resp. Fed. Cl. Mem. in Supp. of Mot. to Alter or Amend J. 11 (filed Feb. 18, 2000) (emphasis added). If the Secretary were required to accept the Tribe's requested royalty rate under Section 1300(e), the entire adjudicatory process of obtaining Secretarial adjustment of the rate at issue in this case under IMLA would have been a meaningless exercise, since the outcome would have been compelled by the Tribe's request.[FN4]

> FN4. The Federal Circuit's interpretation of Section 1300(e) would substantially interfere with IMLA's statutory approval process, 25 U.S.C. 396a, and require that the Secretary "include and enforce" the terms and conditions requested by a Tribe into surface coal mining leases.

In short, the statutory and regulatory provisions that the Federal Circuit found to be violated by the Secretary have no application to lease approvals or royalty rates and furnish no conceivable basis for an Indian Tucker Act claim. IMLA is the specific statute that addresses the matters at the heart of this lawsuit. That is why it was the focus of this Court's earlier decision. The ease with which the Federal Circuit nonetheless held that statutory provisions governing *other* subjects impose duties specifically with respect to lease royalties and procedures for considering lease amendments - imposing liability for up to $600 million - underscores how far the Federal Circuit has strayed from this Court's decision in this very case and the long-settled principles on which it was based.

***32** C. The Court Of Appeals' Decision Threatens Serious Adverse Consequences For The Government

The practical implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $600 million. See also *Hopi Tribe v. United States*, No. 1:00-cv-00217 (Fed. Cl.) (virtually identical lawsuit challenging Secretary Hodel's actions regarding Lease 8580 and its impact on Navajo-Hopi lease negotiations). The decision below will encourage the filing of damages claims against the United States for breach of trust with respect to the Secretary's approval of Indian mineral leases with private entities based on assertions of common-law fiduciary duties that are not tied to any statutory or regulatory prescription. Indeed, the Federal Circuit's reasoning presumably would apply whenever the government has a general trust relationship with a Tribe and (a) has discrete statutory responsibilities with respect to tribal resources or (b) acts in a regulatory capacity to oversee ("control") third-party activities on Indian lands under environmental or other statutes.

The important and recurring nature of the basic question presented by this case is underscored not only by the fact that the Court of Federal Claims has already applied the decision in this case in concluding that statutory trust provisions may be governed "by terms established in the statute *or* by general trust law," *Wolfchild v. United States,* 78 Fed. Cl. 472, 483 & n.15 (2007) (emphasis added), appeal pending, No. 2008-5018 (Fed. Cir.), but also by the existence of 55 other pending lawsuits involving 58 Tribes and thousands of individuals which will likely present similar issues.

Beyond its impact on damage claims that are already pending, the decision below introduces grave uncertainty***33** into the Interior Department's day-to-day activities carried out by thousands of Departmental employees nationwide. The decision

improperly superimposes on the substantive and procedural framework established under applicable statutes and regulations a broad and amorphous set of trust principles whose precise content cannot be known in any particular context in advance.

Under the Tucker Acts, the Federal Circuit is the only court of appeals that has jurisdiction to consider claims against the United States for money damages for violation of a statute or implementing regulation. It is therefore critical for this Court to review the Federal Circuit's renewed departure from this Court's decisions - including its decision in this very case - with respect to the necessary predicate that a Tribe must show to bring a damages claim against the United States under the Tucker Act.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment below.

United States of America v. Navajo Nation
2008 WL 2050789 (U.S.)

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