

# Case at a Glance

The United States is asking the Court to clarify the nature of statutory or regulatory language that is sufficient to create a full-fledged fiduciary relationship with an Indian tribe, such that the United States may be liable in money damages for breaching its duties as a trustee over Native American natural resources.



## When May a Tribe Seek Damages from the Government for Breach of Trust?

by Gregory C. Sisk

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The stage for this case was set by accusations that Native American mineral assets were being exploited by a coal industry giant at inequitably low royalty rates. These royalty rates were said to have been effectively imposed on the Navajo Nation through a bungled coal mining lease adopted after a corporate lobbyist and the Secretary of the Interior entered into a clandestine arrangement to withhold an administrative adjustment of the royalty rate in the tribe's favor.

The Navajo Nation alleges it has lost \$600 million in royalties because the United States breached duties of loyalty, candor, and stewardship as trustee of tribal natural resources. The United States contends the pertinent statutes provide for tribal self-determination and place primary responsibility for negotiating coal leases with the tribe.

The Supreme Court's decision will turn on a meticulous study of detailed language in federal Indian, mineral, and environmental statutes

and regulations to determine whether the government assumed judicially enforceable fiduciary responsibilities as a trustee over the coal resources on the Navajo Reservation.

### ISSUES

Is the court of appeals' holding that the United States breached fiduciary duties in connection with Navajo coal lease amendments foreclosed by the Supreme Court's previous ruling in *United States v. Navajo Nation*, 537 U.S. 488 (2003)?

Did the court of appeals properly hold that the United States is liable to the Navajo Nation for the actions of the Secretary of Interior in connection with his approval of amendments to an Indian coal lease based on a series of statutes and regulations that do not specifically address royalty rates in tribal mineral leases but that do confer other supervisory, management, and resource development duties on the government?

### FACTS

The Navajo Nation is the largest group of indigenous peoples in the

*UNITED STATES v. NAVAJO NATION*  
DOCKET No. 07-1410

ARGUMENT DATE:  
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FROM: THE FEDERAL CIRCUIT

United States and occupies the largest Indian reservation. Spanning parts of Arizona, New Mexico, and Utah, the Navajo Reservation contains extensive and valuable coal deposits.

In 1964, with the approval of the Secretary of the Interior, the Navajo Nation entered into a lease with the predecessor of the Peabody Coal Company to mine coal on tribal lands. The original lease provided for a very low royalty payment of about 2 percent of gross proceeds to the tribe, which was a small fraction of the 12.5 percent rate later set by statute in 1977 as the minimum permissible royalty figure. Under the terms of the lease, the Secretary of Interior was empowered to adjust the rate after 20 years. In 1984, upon request by the Navajo Nation, the area director of the Bureau of Indian Affairs within the department issued a decision adjusting the lease rate to 20 percent. Peabody filed an administrative appeal.

While the parties were awaiting a decision on the appeal, a secret meeting was held between Interior Secretary Donald Hodel and a lobbyist for Peabody Coal who was a close friend of and former aide to Secretary Hodel. Secretary Hodel then issued an internal department memorandum, drafted by Peabody lawyers, directing that a decision on the administrative appeal be delayed and instructing that the parties be encouraged to negotiate their own arrangement. The tribe was not informed of the meeting or that the secretary had intervened to forestall a Department decision. The government and amicus Peabody maintain that no regulation prohibited such an ex parte meeting, and that the Navajo Nation also communicated with Interior officials without notice to Peabody. The Navajo Nation further alleges that department officials concealed the fact

that before the secretary's personal intervention, the department had been ready to issue an appellate ruling in the tribe's favor on the royalty rate.

Being told that the appeal would not be acted on until the tribe attempted to work out its differences with Peabody, the Navajo Nation returned to the bargaining table. Left in the dark about Peabody's influence with the secretary and facing severe economic pressure as the negligible coal royalty rate remained in effect, the tribe complains that it had considerably reduced bargaining power. Eventually the parties set the royalty rate for coal extraction at the federal minimum of 12.5 percent. In 1987, Secretary Hodel approved the new coal lease.

After the ex parte communications between Peabody and the secretary were discovered, the Navajo Nation filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, claiming that the secretary of the Interior breached the government's trust obligations by approving the amendments to the lease. The trial court agreed that the secretary by "deal[ing] in secret with a third party to his beneficiary's detriment" had transgressed "common law fiduciary responsibilities." *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000). Nonetheless, the Court of Federal Claims concluded that the tribe had not alleged a breach of a specific trust duty under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, that could be redressed through an award of damages.

The United States Court of Appeals for the Federal Circuit reversed, finding that "a trust relationship indeed existed and exists with the

Navajo Nation, and monetary damages are an available remedy for breach of this trust." *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001).

In 2003, the Supreme Court reversed the Federal Circuit and held that the Indian Mineral Leasing Act did not impose "detailed fiduciary responsibilities" sufficient to support a claim for monetary relief for breach of trust under the *Indian Tucker Act*. *United States v. Navajo Nation*, 537 U.S. 488 (2003). By the Court's reading of the statute, the statute included no "substantive prescriptions" regarding the secretary's approval power over leases that would "circumscrib[e] the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee." Moreover, because "[t]he IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties," the congressional purpose would be defeated by "[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands." However "one might appraise the Secretary's intervention in this case," the Court held, no specific statutory or regulatory provision imposed any formal procedural constraints on the Interior Department's evaluation of the matter.

On remand from the Supreme Court, the Navajo Nation continued to press its breach of trust claim, arguing that, beyond the Indian Mineral Leasing Act of 1938 examined by the Supreme Court, a network of other statutes and regulations establish fiduciary obligations by the government in favor of the tribe. The Court of Federal Claims found that these other statutes and regulations failed "to establish a money-mandating trust in the area of royalty rates." *Navajo Nation v. United States*, 68 Fed. Cl. 805 (2005).

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On appeal, the Federal Circuit again ruled in favor of the tribe. *Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007). Rejecting the government’s argument that only the Indian Mineral Leasing Act was relevant to the case, the Federal Circuit ruled that an array of interacting treaties and statutes prescribed specific trust duties that could fairly be interpreted as mandating compensation for the damages caused by the government’s breach of its fiduciary duties.

The United States filed a petition for a writ of certiorari on May 13, 2008, and the Court granted the petition on October 1, 2008. Oral argument is scheduled for February 23, 2009.

## CASE ANALYSIS

### *The (Indian) Tucker Act and the Government-Indian Trust Relationship*

For more than 130 years, the Tucker Act, 28 U.S.C. § 1491, has allowed persons to seek money in court from the federal government for claims other than those sounding in tort (that is, for claims other than for personal injury or property damage). Prominent among those claims falling under the purview of the Tucker Act (and its statutory cousin, the Indian Tucker Act) are allegations by Indian tribes of a breach of trust by the United States in its fiduciary responsibilities, typically involving the government’s stewardship of Native American natural resources.

Enacted shortly after the Civil War, the Tucker Act was one of the first statutes waiving the sovereign immunity of the United States and thus granting permission to bring lawsuits against the federal government. The Tucker Act gives jurisdiction over non-tort money claims above \$10,000 to the United States Court of Federal Claims. Claims by Indian tribes were originally exclud-

ed from the jurisdiction of what was then called the Court of Claims. In 1946, Congress enacted the Indian Tucker Act, 28 U.S.C. § 1505, to allow “any tribe, band, or other identifiable group of American Indians” to bring money claims against the federal government that arise under the Constitution, federal statutes, federal treaties, or presidential orders. See generally Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L. Rev. 313 (2003).

Importantly, the Tucker Act itself creates no substantive rights. The Tucker Act and the Indian Tucker Act open the doors of the courthouse, but the claimant must find another vehicle to carry them through those doors. By the terms of the Tucker Act, the claimant must look to other federal statutes or administrative regulations to find a cause of action. The most frequently contested question under the Act is whether that other source of law is sufficiently clear in stating that money is the expected remedy for a violation. To use the term of art in Tucker Act case-law, whether the substantive statute or regulation is “money-mandating” or not is the pivot point upon which many cases rise or fall.

In the special context of Indian breach of trust claims, however, the “money-mandating” question is framed somewhat differently. For other money claimants against the government, before a Tucker Act suit may go forward the courts tend to require rather explicit references to money or compensation as the expected remedy in the right-giving statute or regulation. But when an Indian tribe has established that the United States had fiduciary responsibilities to manage and protect Native American resources, a presumption arises that monetary relief

is available to remedy a breach of those duties.

In *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), the Supreme Court confirmed that, once another statutory source “provide[s] focus for the trust relationship” by confirming a full-fledged fiduciary obligation on the part of the government, “general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation.”

Accordingly, in the Indian breach of trust context the crucial question is the extent and depth of the federal government’s trust responsibilities to the tribe. As outlined by Dean Nell Jessup Newton, the Court’s decisions have suggested three species of trust relationships, only one of which gives rise to a viable money claim for breach of trust under the Indian Tucker Act. First, the “general trust” relationship that historically has existed between Indian tribes and the United States gives rise to no enforceable duties. Second, a “limited trust” is one that applies only to particular purposes and thus is not enforceable beyond its restricted terms. Third, a “full fiduciary relationship” is one that places more general and judicially enforceable responsibilities upon the federal government in managing Indian assets. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753 (1992).

### *Whether a Fiduciary Relationship Is Created by the Pertinent Statutes and Regulations*

On this second visit to the Supreme Court, the United States contends that, with respect to the negotiating and setting of royalties for coal mining leases, the governing statute conferred primary authority to the tribes, thereby restoring greater

autonomy and independence to the tribes over their own natural resources. Under the government's view, the residual government role with respect to approval of royalty rates in tribal mineral leases was very limited, and the government should not have been expected to intervene to second-guess tribal decisions. Nor did other statutes prescribing other administrative duties by the government outside of setting royalty rates give rise to an enforceable fiduciary obligation in this case.

The Navajo Nation contends both that the United States had specific statutory and regulatory duties that it violated in this case and that the government had reserved comprehensive and pervasive control over natural resources on the Navajo Reservation that gave rise to general duties of trusteeship. In particular, the tribe asserts, the government was obliged to keep the tribe fully informed and not conceal material information, to maintain loyalty to the tribe and not prefer another party's interests, to consult with and provide representation for the tribe, to include and enforce lease terms requested by the tribe, and to exercise due care in stewardship of tribal mineral resources.

The United States insists that the Navajo Nation's claims are foreclosed by the Supreme Court's prior *Navajo Nation* decision in 2003, which held that that Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, did not create fiduciary rights on behalf of the tribe nor fiduciary obligations on the part of the government. Because specific statutory rules governing royalty rates in mineral leases with Indian tribes are located in the Indian Mineral Leasing Act, this statute—and this statute alone—speaks to the government's specific duties with respect to such matters. As Peabody argues as

amicus, the “IMLA is the beginning and the end of the inquiry.” The United States concludes that the Court on its prior review presumably had examined all of the statutes and regulations cited by the tribe, thus precluding the Navajo Nation's revived theory that other statutes and regulations create liability for the same conduct.

In response, the Navajo Nation says that the Court's 2003 opinion was “expressly cabined” to address only the Indian Mineral Leasing Act and to narrowly examine the role that statute assigned to the Secretary of Interior with respect to coal leases. *United States v. Navajo Nation*, 537 U.S. 488, 507 n.11 (2003) (“We rule only on the Government's role in the coal leasing process under the IMLA.”). The sole question presented in the government's certiorari petition and thus the sole matter resolved in 2003 was the effect of the Indian Mineral Leasing Act. Moreover, under the Court's precedents, each breach of trust case turns on the provisions of the particular treaties, statutes, or regulations presented. Indeed, according to the Navajo Nation, the Court “followed this precise path” in another breach of trust context thirty years ago, when the Court rejected a breach of trust claim by Indians for mismanagement of timber resources under a particular statute in its first decision, *United States v. Mitchell*, 445 U.S. 535 (1980), but subsequently confirmed a fiduciary relationship to manage the productive use of Indian timber resources under other statutes, *United States v. Mitchell*, 463 U.S. 206 (1983).

The Navajo Nation contends that, beyond the Indian Mineral Leasing Act, other federal statutes and implementing regulations created a full fiduciary relationship and imposed specific duties violated by the government in this case.

First, because conditions of abject poverty persisted on the Navajo Reservation after enactment of the Indian Mineral Leasing Act of 1938, Congress enacted the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631-638. Through this statute, the Navajo Nation asserts, the United States assumed a “more robust role” in managing coal resources on the Navajo Reservation. Under the Rehabilitation Act, the secretary was authorized to approve long-term leases of Navajo lands and was obliged to keep the tribal council informed about mineral development plans. As characterized by the Navajo Nation, “[t]hese specific duties of disclosure, communication and participation dovetail with the federal policy of increased tribal involvement in the mineral leasing process.” The Navajo Nation asserts that the Peabody coal lease was governed by the Rehabilitation Act.

Second, under the Indian Lands Section of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1300, the government assumed additional management responsibilities, including the power to incorporate environmental terms and conditions into coal leases, as well as the duty to enforce other terms and conditions requested by the tribes.

As an independent basis for governmental liability, the Navajo Nation describes a network of statutes and regulations as granting the government comprehensive and pervasive control over Navajo Nation coal resources. In exercising that control, the tribe asserts, the United States assumed the elementary trustee duties of candor, loyalty, and care.

The United States dismisses the other statutes and regulations cited by the Navajo Nation as “having noth-

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ing to do with royalty rates for mineral leases.” In the government’s view, the two statutes principally relied upon by the Navajo Nation do not impose any specific duties relevant to the secretary’s actions in approving a negotiated coal lease in this case. The Navajo-Hopi Rehabilitation Act provided general plans for improvements on the reservation, including surveys and planning regarding natural resources. Although the government was required to keep the tribe informed about such plans, the program expired well before this case arose. In any event, the government contends, the Rehabilitation Act did not encompass mineral leasing, and the Peabody coal lease was entered under the Indian Mineral Leasing Act. Nor, in the government’s view, may a fiduciary duty regarding approval of coal lease royalties be derived from the Surface Mining Control and Reclamation Act of 1977, which addresses environmental protections to be included in Indian coal leases and the operations of coal mining. The United States argues that this statute “has no bearing on the economic terms of coal leases agreed to by the Tribe.”

The government further objects that the court of appeals improperly derived fiduciary duties of candor, loyalty, and care from common-law trust doctrines. When suit is pressed against the federal government, enforceable legal duties must be found in express statutory or regulatory language, not in judge-made common-law standards. “Generalized notions of ‘control,’” the United States contends, do not substitute for statutory language. The government maintains that, unless precise claims of breach are presented that are based upon specific duties separately set forth in a statute or regulation, the Indian Tucker Act does not waive sovereign immunity and provide a money remedy in court.

## SIGNIFICANCE

Assuming the Court does not swiftly dispose of the Navajo Nation’s breach of trust claim as being foreclosed by the previous 2003 decision, the case may have significance well beyond the substantial fiscal impact of a potential judgment for as much as \$600 million against the federal government. In its second *Navajo Nation* decision, the Court may choose to clarify the statutory showing that a claimant must make to hold the United States liable in court for money damages.

After Congress already has waived federal sovereign immunity, does the claimant still face a steep climb toward judgment against the United States, with every word of statutory text being slanted against the claimant? Does such a skeptical attitude toward suits against the United States undermine the legislative promise that the courts will be available to provide relief to those wronged by their government? Or, to uphold the broader public interest, and to protect the federal treasury, should a statute authorizing legal action against the federal government be strictly construed by the courts and narrowly restricted to its precise terms?

Somewhat competing approaches toward suits against the federal government find expression in the Supreme Court’s most recent Indian breach of trust cases. On the one hand, in *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Court directed that the search for a substantive right to relief under the Tucker Act must be “train[ed] on specific rights-creating or duty-imposing statutory or regulatory prescriptions.” On the other hand, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), the Court explained that because the Tucker Act itself provides the necessary sovereign immunity

waiver, a strict construction rule does not apply at the substantive right stage of the analysis. Thus, the Court explained, the pertinent rights-creating or duty-imposing statute need only “be reasonably amenable to the reading that it mandates a right of recovery in damages”—that is, “a fair inference will do.”

In the present case, the United States contends that it may be held liable under the Tucker Act only when it fails to properly carry out a specific duty that is expressly and separately set forth in a statute or regulation. The government thus insists upon a strict reading of particular statutory language to find a precisely defined duty of care that it failed to uphold. Otherwise, the United States worries, the government could be subjected to “a broad and amorphous set of trust principles,” with “grave uncertainty” being introduced into the day-to-day exercise of public responsibilities.

The Navajo Nation asserts that it has indeed identified specific duties that were imposed on the government by statute and regulation. In addition, the tribe argues that a network of statutes and regulations should be read holistically to reveal the pervasive extent of government control over tribal mineral resources. Thus, the Navajo Nation submits that common-law trust principles may fill in the contours of the government’s management duties and impose elementary standards of candor, loyalty, and care. In an amicus brief supporting the Navajo Nation, four former Secretaries of Interior respond to the government’s expressed fears of uncertainty by saying that these basic trust duties “are precise and well understood” within the department.

More than 60 years ago, the Supreme Court described the fidu-



ciary standards of the United States in dealing with the Indian tribes as “something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard.” *Seminole Nation v. United States*, 316 U.S. 286 (1942). The Court’s forthcoming *Navajo Nation* decision may tell us how a statute should be read to find a duty of trust by the government toward indigenous peoples and, accordingly, when fiduciary standards will apply in practice today.

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