THE CHANGING SCOPE OF THE UNITED STATES' TRUST DUTIES TO AMERICAN INDIAN TRIBES: *NAVAJO NATION V. UNITED STATES*

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The mineral wealth beneath Native American lands has been an enduring source of controversy with respect to treaty relations between Indian Tribes and the United States government and the contours of the United States' trust duties to the Tribes. Whereas in past years the process by which minerals like coal have been converted to capital amounted to blatant exploitation of America's indigenous populations, Indian governments have acquired more control over the extraction of their minerals throughout the twentieth century. That this control remains severely limited both by federal regulations and the United States government's complicity with powerful representatives of the mineral industry is exemplified by the Navajo Nation's longstanding struggle to obtain a market rate for its coal resources.

This Note examines the Navajo Nation's claim that the United States breached its trust duties of care, candor, and loyalty by intervening to the Navajo's detriment in the negotiation of a mining lease between the Navajo and Peabody Coal, the world's largest private sector coal company. This litigation has stretched on for decades, but today the case is set to be heard, for the second time, by the United States Supreme Court. This Note seeks to examine the previous iterations of Navajo Nation v. United States *in the context of the Federal-Tribal trust doctrine and in light of recent trends in the Supreme Court's dispositions of cases implicating federal Indian law. Ultimately, it concludes that the Supreme Court's current approach to the trust doctrine is inconsistent with controlling precedent and inimical to tribal sovereignty and self-determination.*

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INTRODUCTION

For over forty years, the Navajo Nation has struggled to obtain a market rate for its coal resources.[1] Until 1938, the Department of the Interior had exclusive authority to lease to private companies the right to develop natural resources on Indian land, even over Tribes' objections.[2] The Indian Mineral Leasing Act ("IMLA"), enacted in 1938, provided that Tribes may negotiate the terms of their own mineral leases, albeit under the Secretary of the Interior's supervision, and subject to his approval.[3] Nevertheless, the IMLA did little to prevent private companies from exploiting Tribes' weak bargaining position, which resulted from their dire economic circumstances and their lack of adequate representation, among other factors.[4]

In 1964, the Navajo Nation ("the Nation"),[5] with the Secretary of the Interior's approval, entered into Lease 8580 with Sentry Royalty Company—later succeeded in interest by Peabody Coal.[6] Lease 8580 provided that the Nation would receive the below-market royalty rate of thirty-seven and one-half cents per ton of coal extracted, subject to adjustment after twenty years.[7] Pursuant to these terms, the Nation asked the Department of the Interior to revalue its coal resources and to recommend a higher royalty rate in 1984.[8] Initially, the De-

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1. See Part II of this Note for a more in-depth discussion of the events leading up to the Navajo Nation's action against the United States.

2. Gregory C. Sisk, *The Indian Trust Doctrine After the 2002–2003 Supreme Court Term: Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313, 322 (2003).

3. *Id.*; Indian Mineral Leasing Act of 1938 § 396, 25 U.S.C. § 396 (2000).

4. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 77 (5th ed. 2005).

5. I abbreviate "the Navajo Nation" as "the Nation" because that is the Navajos' own word for their political entity and because most federal courts deciding *Navajo Nation v. United States* have used this designation. To avoid confusing "the Nation" with the United States, the United States shall be referred to only as "the government" or "the United States."

6. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 221 (Fed. Cl. 2000). For a more in-depth discussion of the case's facts and procedural history, see Part II.A, *infra*.

7. *Id*. at 221–22 ("The cents-per-ton basis of determining royalties under the original 1964 lease was, by any measure, an inequitable deal for the mineral owner."). The coal deposits in question were of extraordinary value, far exceeding the Lease's tonnage rate. *See* Charles F. Wilkinson, *Home Dance, the Hopi and Black Mesa Coal*, 1996 BYU L. REV. 449, 475 (1996) ("[The coal leased to Peabody was] maybe the best deposit in the country, maybe in the world . . . .").

8. *Navajo I*, 46 Fed. Cl. at 222.

partment of the Interior estimated that the Nation's coal was worth twenty percent of Peabody's revenue from its operations on Navajo land.[9] However, at Peabody's request, then Secretary of the Interior Donald Hodel delayed the renegotiation process.[10] This delay forced the Nation, which faced extreme economic pressure, to accept a royalty rate of twelve and one-half percent—the minimum that Congress permitted the United States to charge for mineral leases on federal land.[11] Without conducting an analysis of the new rate's likely impact on the Nation's economic condition, Secretary Hodel granted his approval.[12]

The Nation filed suit against the United States on December 14, 1993, claiming that the United States had breached a fiduciary duty to maximize the Nation's mineral lease revenues.[13] After fourteen years of litigation in federal courts, the Nation enjoyed a significant victory on September 13, 2007, when the Federal Circuit held that the government is liable for up to $600 million in damages for breaching its fiduciary duty to the Nation.[14] Nevertheless, this victory does not ensure that the Nation will be made whole. The Supreme Court granted the United States' petition for certiorari on October 1, 2008,[15] leaving the case's ultimate outcome, and the scope of the federal government's fiduciary duties to Indian Tribes, more uncertain than ever.

Navajo Nation v. United States was argued before the Court of Federal Claims ("CFC") in 2000 (*Navajo I*),[16] before the Federal Circuit in 2001 (*Navajo II*),[17] and before the United States Supreme Court in 2003 (*Navajo III*).[18] From there, it

9. *Id*. at 223 (The Department of the Interior recommended replacing the Nation's previous tonnage-based rate with one based on a percentage of Peabody's profit.).

10. *Id*.

11. *Id*. at 222.

12. *See id*. at 224.

13. *Id*. at 225.

14. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1359 (Fed. Cir. 2007). The $600 million figure is based on the amount the Nation claimed it was damaged by the United States' breach in the Nation's complaint filed pursuant to *Navajo I*. First Amended Complaint ¶¶ 24, 28, Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217 (Fed. Cl. 2000) (No. 93-763L).

15. United States v. Navajo Nation, 129 S.Ct. 30 (2008).

16. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217 (Fed. Cl. 2000).

17. Navajo Nation v. United States (*Navajo II*), 263 F.3d 1325 (Fed. Cir. 2001).

18. Navajo Nation v. United States (*Navajo III*), 537 U.S. 488 (2003).

was remanded to the Federal Circuit (*Navajo IV*),[19] remanded again to the CFC in 2005 (*Navajo V*),[20] and appealed to the Federal Circuit in 2007 (*Navajo VI*).[21] It will ultimately reach the Supreme Court again in late 2008 or 2009. In its most recent decisions concerning Indian law, the Supreme Court has ruled almost uniformly against the interests of Indian Tribes.[22]

The complexity of the law governing *Navajo Nation v. United States* and its lengthy and complex procedural history make it impossible, however, to predict the case's future outcome with any certainty. In part, the interstitial law that the Supreme Court has established to address Indian Tribes' breach of trust claims[23] bears numerous and unexplained inconsistencies. Moreover, the methods of statutory interpretation that the Federal Circuit employed in *Navajo II* and *VI* were substantially different from those that the CFC employed in *Navajo I* and *V* and that the Supreme Court employed in *Navajo III*.

Although legal scholars have written extensively on the Supreme Court's disposition of *Navajo III*,[24] no scholarship has

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19. Navajo Nation v. United States (*Navajo IV*), 347 F.3d 1327 (Fed. Cir. 2003).

20. Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (Fed. Cl. 2005).

21. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327 (Fed. Cir. 2007).

22. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (holding that a tribal court lacks jurisdiction over an Indian business's discriminatory lending claim against a non-Indian bank); Sarah Krakoff, *Indian Law at a Crossroads: The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 798–99 (2006) ("[T]he Court's recent role in Indian law has been to divest tribes of powers over non-tribal members and to allow increasing state regulation of tribal affairs. The Indian law canons of construction, first coalesced by Felix Cohen, have been seldom employed in these cases. . . . [I]n most matters the Court now applies its own balancing tests and categorical rules . . . ."). *But see* United States v. White Mountain Apache Tribe (*Apache*), 537 U.S. 465 (2003).

23. Indian Tribes' claims against the United States for breach of trust are governed by the Tucker Act, 28 U.S.C. § 1491 (2000), which waives the United States' sovereign immunity for claims brought under the Act and mandates that the CFC shall have exclusive jurisdiction over claims for monetary damages, and the Indian Tucker Act, 28 U.S.C. § 1505 (2000), which establishes jurisdiction for Indian tribes' claims on the same basis as all other claims brought under the Tucker Act. See Part II, *infra*, for a more in-depth discussion of the Tucker Act and the Indian Tucker Act as applied to the Nation's claim.

24. *See, e.g.*, Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land Resources*, 83 DENV. U. L. REV. 1069 (2006); Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291 (2005); Sisk, *supra* note 2; Jason Stone, Note, Ubi Jus Incertum, Ibi Jus Nullum: *Where the*

yet examined all six iterations of *Navajo Nation v. United States* in comparison with one another and with other breach of trust claims brought by American Indian Tribes. Part I of this Note summarizes the federal statutory and common law governing the Nation's claim for monetary damages for breach of trust. Part II tells the story of *Navajo Nation v. United States* from the origin of the Nation's claim to the Federal Circuit's 2007 ruling in *Navajo VI*.[25] Part III focuses on the divergent methods of statutory interpretation that the CFC, the Federal Circuit, and the Supreme Court have employed as they deliberated over this case's many stages, comparing *Navajo III*'s holding to that of its companion case, *United States v. White Mountain Apache Tribe*.[26] Part IV considers the possible impact of these divergent analyses upon the future outcome of *Navajo Nation v. United States* and other tribal breach of trust cases before the Supreme Court. This Note concludes by discussing the significance of *Navajo Nation v. United States* in Indian country.

I. FEDERAL STATUTORY AND COMMON LAW GOVERNING INDIAN TRIBES' BREACH OF TRUST CLAIMS

The Tucker Act[27] and the Indian Tucker Act[28] govern tribal claims for monetary damages against the United States. They provide that where an Indian Tribe states a claim for monetary damages, the CFC shall have jurisdiction over the claim, and the United States shall be assumed to have waived its sovereign immunity. However, subsequent interpretations of the (Indian) Tucker Act have raised the threshold for whether a Tribe has successfully stated a claim for monetary damages.

Right is Uncertain, There Is No Right, United States v. Navajo Nation, 27 PUB. LAND & RESOURCES L. REV. 149 (2006).

25. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327 (Fed. Cir. 2007).

26. 537 U.S. 465 (2003). *United States v. White Mountain Apache Tribe* concerned the White Mountain Apache Tribe's claim for breach of trust. The Supreme Court handed down its decisions on *Apache* and *Navajo III* on the same day, affirming the White Mountain Apache Tribe's breach of trust claim but holding for the United States in *Navajo III*. *See* Part III, *infra*.

27. 28 U.S.C. § 1491 (2000).

28. 28 U.S.C. § 1505 (2000). I refer to the Tucker Act and the Indian Tucker Act together as the (Indian) Tucker Act to indicate the Acts' cumulative effect upon tribal causes of action.

A. Federal Court Jurisdiction over Tribal Claims for Breach of Trust

The federal government's trust relationship with American Indian Tribes is one of the most basic principles of federal Indian law.[29] The trust relationship was established by the Marshall Trilogy[30]—early Supreme Court decisions seminal to Indian law and federal Indian policy—and was founded on an assumption of Tribes' dependence upon the United States.[31] The relationship was conceived of as analogous to a guardian's duty to its ward.[32] More recently the trust relationship has been understood to be analogous to the relationship between a trustee and its beneficiary; the United States has a trust duty to further tribal interests in its actions.[33] Although federal law unquestionably establishes the United States' trust relationship with the Tribes, whether Tribes may recover monetary compensation for the government's breach of its trust duties is more uncertain.[34]

Section 1331 of Title 28 of the U.S. Code, which provides for federal jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States," establishes federal courts' general jurisdiction over actions arising from the many federal statutes and treaties concerning Indian Tribes

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29. NELL JESSUP NEWTON et al., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a] (2006 ed.).

30. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

31. *Cherokee Nation,* 30 U.S. at 17.

32. *Id.*

33. NEWTON, *supra* note 29, § 5.04[4][a] (citing 25 U.S.C. § 458(c) (noting that the Secretary of the Interior shall enter into funding agreements with Tribes "consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people"); 25 U.S.C. § 3101 ("[T]he United States has a trust responsibility toward forest lands."); 25 U.S.C. § 3701 ("[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes."); 25 U.S.C. § 4043 (2000) ("Special Trustee for American Indians must . . . ensure proper and efficient discharge of . . . trust responsibilities to Indian tribes . . . ."); 20 U.S.C. § 7401 ("[I]t is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people . . . .")).

34. NEWTON, *supra* note 29, § 7.04[1][a]; *accord* Berkey, *supra* note 24, at 1070 ("Although it is now 'undisputed' that there is a 'general trust relationship between the United States and the Indian people,' the specific contours of the trust obligation of the United States have been difficult for courts to define." (quoting United States v. Mitchell, 463 U.S. 206, 255 (1983))).

and Indian affairs.[35] Jurisdiction derived from § 1331 is often referred to as "federal question jurisdiction" or "arising under jurisdiction."[36] Federal question jurisdiction likewise applies to cases brought under federal common law, such as claims to aboriginal title, challenges to states' jurisdiction over Indian country, and breach of trust claims that Tribes bring against the United States.[37]

Any party seeking to sue the United States for monetary damages, however, must demonstrate as a threshold matter that its claim arises under federal law and that the claim is not barred by the United States' sovereign immunity.[38] The Tucker Act,[39] enacted in 1948, vests in the CFC exclusive jurisdiction over claims against the United States for monetary damages so long as those claims meet the "arising under requirements" of 28 U.S.C. § 1331. The Tucker Act also waives the United States' sovereign immunity for claims that are encompassed within the Act's jurisdictional grant.[40] Although the Tucker Act does not specifically address claims that Indian Tribes bring,[41] the Indian Tucker Act of 1949 provides that the Tucker Act applies equally to Tribes' claims against the government for monetary damages.[42]

Under the (Indian) Tucker Act,[43] "[b]reach of trust claims for money damages interweave . . . three jurisdictional predicates": subject matter jurisdiction vested in the CFC; a waiver of sovereign immunity; and the requirement that the claim must arise under the Constitution, federal statutes, or federal common law.[44] Thus, if the CFC or an appellate court finds

35. 28 U.S.C. § 1331 (2000).

36. NEWTON, *supra* note 29, § 7.04[1][a].

37. *Id.* ("Federal question jurisdiction under § 1331 serves as the basis for numerous federal court actions involving Indian law because of the large number of federal laws and treaties concerning Indian matters.").

38. *E.g.* United States v. Sherwood, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . .") (citations omitted).

39. 28 U.S.C. § 1491 (2000).

40. *Id.*; *see also* NEWTON, *supra* note 29, § 5.05[1][b].

41. *See* 28 U.S.C. § 1491 (2000).

42. *Id.* § 1505 ("The United States Court of Federal Claims shall have jurisdiction of any claim against the United States . . . in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.").

43. *See supra* note 28.

44. NEWTON, *supra* note 29, § 5.05[1][b].

that a claimant has failed to state a claim that a federal statute or the Constitution supports, that claim is barred by sovereign immunity and a lack of subject matter jurisdiction.[45] In theory, the Tucker Act applies equally to Indian and non-Indian claimants, but in practice, courts have relied on the trust relationship between the United States and Tribes to inform their decisions as to whether a Tribe's claim is supported by federal statutory provisions.[46] However, more recent Supreme Court decisions indicate that the Court is becoming less willing to infer a claim arising under federal laws or the Constitution from the federal-tribal trust relationship.[47]

B. The Supreme Court's Rule Governing (Indian) Tucker Act Claims: Mitchell v. United States

Under the (Indian) Tucker Act, to survive a motion to dismiss for failure to state a claim, a "claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for damage sustained.' "[48] In other words, the claim must arise under a trust duty set forth in a federal law or the Constitution, and the federal law or Constitutional provision must mandate that the government is liable for monetary damages should it breach that trust duty.[49]

A pair of cases that the Quinault Tribe brought during the 1980s, both titled *Mitchell v. United States* (*Mitchell I* and *Mitchell II*), set forth the federal common law interpreting whether a statute establishes the United States' liability, in monetary damages, to Indian Tribes.[50] *Mitchell I* and *II* heightened the (Indian) Tucker Act's threshold for whether a

45. *Id.*

46. *E.g.* Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 225 (1983) ("[T]he undisputed existence of a general trust relationship between the United States and the Indian people" held to reinforce an inference that a tribe's claim was based on a federal statute.)

47. *See infra* notes 255, 256, and 262.

48. *Mitchell II*, 463 U.S. at 216–17 (quoting United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))).

49. The cases discussed in this Note are based on federal treaties or statutes, not Constitutional provisions; therefore, this Note will focus *infra* on statutory, not Constitutional, provisions.

50. Navajo Nation v. United States (*Navajo III*), 537 U.S. 488, 493 (2003) ("This Court's decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) . . . , and *United States v. Mitchell*, 463 U.S. 206 (1983) . . . control this case.").

claimant may recover monetary damages. These cases required the Tribes to prove more than the government's breach of its common law trust duties of care, candor, and loyalty—duties that the Supreme Court determined were owed to Tribes in *Seminole Nation v. United States*.[51] After *Mitchell I* and *II*, a Tribe must prove that a statute or constitutional provision establishes that the government owes the Tribe a fiduciary duty, and that the source of law establishing that duty is "reasonably amenable to the reading that it mandates a right of recovery in damages."[52] The Nation's claim before the CFC, and subsequent appeals, therefore hinged upon whether the Nation could point not only to a statute setting forth a trust duty pertaining specifically to Indian mineral leases, but also to statutory language creating an inference that, should the government breach that duty, it would be liable in monetary damages.

Mitchell I and *II* also set forth a "control or supervision" test for whether a Tribe has stated a claim for monetary damages.[53] The test asks whether the statute in question assigns the government a level of control or supervision over a Tribe's trust assets sufficient to justify a finding that, first, a specific fiduciary duty exists and, second, that the government should be liable in monetary damages should it breach that duty.[54] According to Justice Thurgood Marshall, who wrote for the majority in *Mitchell II*, "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . ."[55] In subsequent cases, including the many iterations of *Navajo Nation v. United States*, this control or supervision test has "proven to be exceedingly difficult to meet."[56]

The Quinault Tribe's first claim failed the control and supervision test.[57] The claim arose from the government's alleged mismanagement of timber resources within the Quinault

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51. 316 U.S. 286 (1942); GETCHES, WILKINSON, & WILLIAMS, *supra* note 4, at 343.

52. United States v. White Mountain Apache Tribe (*Apache*), 537 U.S. 465, 473 (2003).

53. Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 224 (1983).

54. *Id*.

55. *Id*. at 225 (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980) (regarding the Navajo Nation's demand for an accounting of the sales of timber on tribal lands; this case is unrelated to the subject of this Note)).

56. Berkey, *supra* note 24, at 1070.

57. Mitchell v. United States (*Mitchell I*), 445 U.S. 535, 546 (1980).

reservation.[58] The Tribe claimed that the government failed to obtain a market value for the timber harvested on tribal members' allotments, failed to harvest timber based on sustained-yield practices, failed to properly rehabilitate the logged land, and improperly charged individual tribal members for road construction.[59] The Quinault Tribe argued that the General Allotment Act ("GAA") of 1887,[60] as well as several other statutes and regulations, entitled the Tribe to monetary compensation for these failures.[61] The GAA provides that the United States shall hold allotted land in trust for the benefit of the Indian allottees.[62] The CFC held that this language created an express trust, entailing a fiduciary duty to manage the Tribe's timber resources and a claim for monetary damages to compensate for mismanagement.[63]

The Supreme Court, however, disagreed with the CFC.[64] Writing for the majority, Justice Marshall concluded that the GAA established a "limited" trust that did not create a right to recover monetary damages.[65] He stated that the GAA did not assign the government statutory authority to manage the allotments it held in trust.[66] To the contrary, the Act's legislative history indicated that the Act's trust language was intended to prevent alienation and to exempt the allotments from state taxation.[67]

Although the Quinault had argued that several statutes in addition to the GAA directed the Secretary of the Interior to manage the Tribe's timber, the Court limited its deliberations to the question of whether the GAA, by itself, established a specific fiduciary duty.[68] When the case came before the Court

58. *Id.* at 537.
59. *Id.*
60. General Allotment Act, 25 U.S.C. § 348 (2000) (specifying that the United States would hold allotted land in trust for twenty-five years). The Indian Reorganization Act of 1934 extended the trust period indefinitely. 25 U.S.C. § 462 (2000).
61. *Mitchell I*, 445 U.S. at 537.
62. General Allotment Act, 25 U.S.C. § 348 (2000).
63. *Mitchell I*, 445 U.S. at 538.
64. *Id.*
65. *Id.* at 543.
66. *Id.*
67. *Id.* at 543–44.
68. *Id.* at 537 n.1 ("Current statutes relevant to the Secretary's responsibilities with respect to Indian timber resources include 25 U.S.C. § 162a (investment of funds of tribe and individual allottee); 25 U.S.C. §§ 318a, 323–25 (roads and rights-of-way); . . . 25 U.S.C. §§ 406, 407 (sale of timber); 25 U.S.C. § 413 (collec-

again in *Mitchell II*, the Tribe renewed its claim that the several statutes not addressed in *Mitchell I* collectively assigned to the government control or supervision over the Tribe's timber resources, and that this control entailed a specific fiduciary duty enforceable in monetary damages.[69] This time, the Supreme Court agreed, finding that statutes granting the Department of the Interior control over the harvest and sale of Indian timber and the authority to deduct administrative fees for its services from the Tribes' timber revenues amounted to comprehensive control over Indian timber resources.[70]

Vesting those responsibilities in the Secretary likewise established a "pattern of pervasive federal control" over the management of Indian timber. [71] The Court explained:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection.[72]

Thus, although the statutes in question did not expressly state that the United States had a specific fiduciary duty to manage the Quinault's timber, the Court reasoned that the government's pervasive control over the Tribe's timber combined with "the undisputed existence of a general trust relationship between the United States and the Indian people" created an inference that a specific fiduciary duty existed.[73] The court defined this specific fiduciary duty as the Secretary of the Interior's responsibility to consider "the needs and best interests of the Indian owner and his heirs"[74] and to "obtain the greatest revenue for the Indians."[75]

Having first determined that the government's pervasive *statutory* control over Indian timber created a fair inference of

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tion of administrative expenses incurred on behalf of Indians); 25 U.S.C. § 466 (sustained-yield management of forests).").

69. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 209 (1983).

70. *Id.*

71. *Id.* at 225 n.29.

72. *Id.* at 225 (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980)).

73. *Id.*

74. *Id.* at 224 (quoting 25 U.S.C. § 406(a) (2000)).

75. *Id.* at 209 (quoting U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)).

a specific fiduciary duty, the Court next relied on common law trust doctrine, which provides that "a trustee is accountable in damages for breaches of trust,"[76] to infer the United States' liability for monetary damages.[77] The Court reasoned that if a statute assigns to the Secretary of the Interior the duty to generate proceeds for Indians from the management of Indian resources, it logically follows that Indians retain a right to the value of those resources when the Secretary does not perform his or her duty.[78]

It is important to clarify the Court's distinction between the requirement that a statute establish a specific trust relationship and fiduciary duty, even if only by inference, as opposed to the common-law trust doctrine that serves as the basis for monetary relief. The threshold question is whether a statute contains a textual basis—for example, a provision assigning pervasive control to the government over the resource in question—for concluding that it mandates a specific fiduciary duty.[79] If a statute contains a textual basis for inferring a specific fiduciary duty and a court finds that the government has breached that duty, common-law trust principles dictate that a Tribe is entitled to monetary damages as compensation for the breach.[80]

Mitchell II suggested to Indian Tribes and Indian law practitioners that the United States' trust responsibility to Tribes could

> become an enduring source of authority to enforce the obligation of the federal government to protect tribal natural resources. . . . [H]owever, the efficacy of the trust doctrine . . . has steadily weakened since then, a trend that perhaps mirrors the lamentable state of Indian law in the federal courts generally.[81]

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76. *Id.* at 226 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205–12 (1959); G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 862 (2d ed. 1965); A. SCOTT, LAW OF TRUSTS § 205 (3d ed. 1967)).

77. *Id.*

78. *Id*. at 226–27.

79. *See id*. at 218.

80. *Id.* at 226.

81. Berkey, *supra* note 24, at 1072 (citing North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980)); *see also* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 211–12 (1995).

As subsequent cases evaluating tribal claims under the (Indian) Tucker Act have revealed, federal courts have applied the control or supervision test more inconsistently. For example, in the Nation's case the courts required that the claim establish an *express* textual basis for a specific fiduciary duty, refusing to infer that duty from the statutes' apparent intent or practical effects.

C. *Twenty Years Later:* United States v. White Mountain Apache Tribe *and* Navajo III

A generation after *Mitchell II*, the Supreme Court revisited the issue of tribal claims under the (Indian) Tucker Act in *Navajo III*[82] and *United States v. White Mountain Apache Tribe*.[83] The Court handed down its decisions on *Navajo III* and *Apache* on the same day but reached opposite conclusions. The Court held that the White Mountain Apache were entitled to recover for the government's mismanagement of Fort Apache, a historic site located on the White Mountain Apache reservation,[84] but that the Navajo Nation could not recover for the Department of the Interior's actions undermining the Nation's negotiations with Peabody Coal.[85]

Professor Sisk reconciles these disparate holdings by referring to *Mitchell II*'s control or supervision standard: "When the United States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the duty of the United States is lessened appropriately."[86] According to Professor Sisk's analysis, the difference between the claims articulated in *Apache* and *Navajo III* was the degree of control assigned to the United States by the statutes upon which the Tribes based their claims.[87] Since the statute establishing the United States' duty to the White Mountain Apache Tribe granted to the government discretionary authority to make direct use of Fort Apache and provided for the govern-

82. Navajo Nation v. United States (*Navajo III*), 537 U.S. 488 (2003).

83. United States v. White Mountain Apache Tribe (*Apache*) 537 U.S. 465 (2003).

84. *Id.* at 469.

85. *Navajo III*, 537 U.S. at 492.

86. Sisk, *supra* note 2, at 325 (quoting Navajo Nation v. United States (*Navajo II*), 263 F.3d 1325, 1329 (Fed. Cir. 2001)).

87. *See id.*

ment's daily supervision and occupation,[88] the Supreme Court found that the government had a fiduciary duty to maintain the fort.[89] Because the government had approval authority but not direct control or supervision over the negotiation of the Nation's mineral leases, it had no comparable duty in *Navajo III*.[90]

Although the statute in question in *Apache* did not expressly assign to the government duties of management and conservation, the Court followed Justice Marhsall's logic in *Mitchell II*, inferring a duty from basic trust law that "confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[91] The Court further stated:

> It is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right to recover in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do.[92]

One scholar interprets this language to suggest that the Supreme Court modified the *Mitchell II* control or supervision standard, lowering the threshold to establish that a statute mandates the United States' liability for the breach of a specific fiduciary duty.[93] However, if the Supreme Court made its control or supervision standard less stringent in *Apache,* it infused the standard with renewed vigor when it decided *Navajo III*, declining to read any mandate for governmental control or supervision into the statutes governing Indian coal leasing, on which the Nation based its claim.

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88. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (codified at 25 U.S.C. § 277 (2000)).

89. *Apache*, 537 U.S. at 474–75.

90. Sisk, *supra* note 2, at 327.

91. *Apache*, 537 U.S. at 475.

92. *Id.* at 473 (citation omitted).

93. Berkey, *supra* note 24, at 1070–71 n.13.

II. *NAVAJO NATION V. UNITED STATES*: FROM THE COURT OF FEDERAL CLAIMS TO THE SUPREME COURT AND BACK AGAIN

This Part describes in detail the events leading up to the Nation's lawsuit against the federal government and *Navajo Nation v. United States*' complex procedural history.

A. Background and Facts of the Case

The Secretary of the Interior's collusion with Peabody Coal, to the detriment of the Nation's coal revenues, is undisputed.[94] The Nation's claim arose from then-Secretary Donald Hodel's activities during the renegotiation of Lease 8580, which authorized Peabody to strip-mine coal on the Nation's trust lands.[95] Approved by the Secretary in 1964, Lease 8580 provided that, after twenty years, the parties could renegotiate to increase the Nation's royalty from thirty-seven and one-half cents per ton to a "reasonable" level.[96]

Anticipating the expiration of this twenty-year period, the Nation asked the Department of the Interior to recommend a reasonable royalty on a percentage rather than a tonnage basis.[97] In June 1984, the Bureau of Indian Affairs' Navajo Area Director concluded that the appropriate royalty rate for the Nation's coal was twenty percent.[98] Peabody promptly appealed the proposed rate, and the Nation terminated negotiations before the Department decided whether to accept the appeal.[99]

Peabody justifiably feared that its appeal would be unsuccessful.[100] The Supreme Court had recently upheld the Nation's authority to tax companies engaged in business on Navajo land and stated that the Nation was entitled to maximum

94. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1330 (Fed. Cir. 2007) ("The facts of this case are undisputed and have been detailed by the Court of Federal Claims in *Navajo Nation v. United States* ('*Navajo I*').").

95. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 220 (Fed. Cl. 2000).

96. *Id.* at 221.

97. *Id.* The Department of the Interior was involved in the renegotiation of the royalty rate because of the Department's policy of providing Indian tribes assistance to insure that they received a fair monetary return for the development of coal resources. *Id.*

98. *Id.* at 222.

99. *Id.*

100. *Id.*

revenues from its mineral leases.[101] Assistant Secretary of the Interior for Indian Affairs John Fritz, charged with ruling on Peabody's appeal, also had indicated to Peabody that he leaned toward deciding in the Nation's favor.[102] In June 1985, Assistant Secretary Fritz was said to have a letter denying the appeal ready for his signature.[103]

Peabody, however, redoubled its efforts to convince the Department to lower its twenty percent recommendation, and retained Stanley Hulett as a lobbyist.[104] Hulett was a close personal friend of Secretary Hodel and a former high-level Department of Interior official.[105] Hulett and Secretary Hodel met on or around July 17, 1985, without informing the Nation of the meeting.[106] Shortly thereafter, Secretary Hodel addressed a memorandum to Assistant Secretary Fritz instructing him—per Peabody's request as tendered through Hulett—not to deny Peabody's appeal, but instead to encourage the parties to resume negotiations.[107] Evidence on record indicates that Peabody's attorneys drafted this memorandum.[108] Assistant Secretary Fritz publicly expressed his disapproval of Secretary Hodel's action and resigned in protest in August 1985.[109]

The Nation was not informed of Secretary Hodel's directive to resume negotiations; instead it received a letter from Tim Vollman, Associate Solicitor for Indian Affairs, on August 29, 1985 (mis)informing the Nation that "a decision on the appeal is currently being considered by the Deputy Assistant Secretary—Indian Affairs and his staff."[110] The Nation resumed its negotiations with Peabody and, within a month, the parties

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101. *Id*. (citing Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985)).

102. *Id*.

103. *Id*.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 222–23; *see also id*. at 238 ("I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences." (quoting Memorandum from Donald Paul Hodel, Secretary of the Interior, to John Fritz, Assistant Secretary of the Interior for Indian Affairs (July 17, 1985))).

108. *Id*. at 223.

109. *Id.*

110. *Id.* Contrary to Vollman's letter, the Department had decided to delay considering the appeal and to instead encourage the parties to return to the bargaining table, per Peabody's request. *See supra* note 107.

tentatively agreed on a twelve and one-half percent royalty rate.[111]

Initially, the Navajo Tribal Council refused to approve the proposed rate, but later that year Peter MacDonald, who had been involved in negotiations with Peabody dating back to 1979, was elected Chairman of the Tribal Council.[112] By late 1987, the Tribal Council, under MacDonald, formally accepted the twelve and one-half percent rate and asked the Department of the Interior to approve the revisions to Lease 8580.[113] The only explanation on record for the Nation's sudden reversal of position and return to the bargaining table in August 1985 was the financial pressure on the Nation to increase revenue from its coal resources, making a prolonged negotiation period economically infeasible.[114]

Ultimately, the revisions to Lease 8580 submitted for the Secretary's approval provided for a twelve and one-half percent royalty rate; the Nation's forfeiture of $33 million in back taxes, which the Supreme Court's *Kerr-McGee* decision authorized the Nation to collect;[115] and $56 million in back royalties.[116] Although the revised lease affirmed the Nation's authority to tax Peabody for coal extraction, future tax increases were capped at eight percent.[117] Overall, the combination of the twelve and one-half percent royalty rate and tax revenue agreed upon in the revised Lease 8580 amounted to the equivalent of a twenty and one-half percent royalty rate for the Nation.[118] This was a healthy increase in coal royalties, but it remained far less than the Nation would have received had it been able to collect twenty percent in royalties—the coal's probable value[119]—in addition to tax revenue.

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111. *Navajo I*, 46 Fed. Cl. at 223.

112. *Id.* In 1989, Mr. MacDonald was removed from his office due to allegations that he had accepted bribes from contractors doing business with the Navajo Nation. *See In re* Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rptr. 6086 (Navajo 1989).

113. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 223 (Fed. Cl. 2000).

114. *See, e.g.,* Navajo v. United States (*Navajo III*), 537 U.S. 488, 498 (2003) ("Facing 'severe economic pressure,' the [Nation] resumed negotiations with Peabody in August 1985." (citations omitted)).

115. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

116. *Navajo I*, 46 Fed. Cl. at 224.

117. *Id.*

118. *Id.*

119. *See* Wilkinson, *supra* note 7, at 475.

The Department of the Interior approved the proposed revisions in a matter of days,[120] although one Department official refused to sign off, stating that to do so "would be participating in a breach of trust."[121]

B. Navajo I—*The Court of Federal Claims (2000)*

The Nation filed suit against the United States in 1993, claiming that Secretary Hodel had breached a fiduciary duty to maximize the Nation's financial return from its mineral leases.[122] The Nation based its claim on a "network" of statutes and regulations that the Nation argued afforded the Secretary of the Interior comprehensive control over the Nation's coal leases and established the Secretary's fiduciary duty to advocate for the Nation's economic benefit.[123] Initially, the Nation was unaware of Secretary Hodel's *ex parte* meeting with Peabody's lobbyist, but upon learning of it during discovery, the Nation amended its complaint to allege that the meeting compounded the Secretary's breach of trust.[124]

The "network" was comprised of the following:[125] IMLA, which required the Department of the Interior to approve mineral leases between Indian Tribes and third-party corporations and directed the Secretary of the Interior to promulgate regulations governing those leases;[126] the IMLA's implementing regulations, which required written permission from the Secretary before Indian mineral owners could commence negotiations with third parties[127] and required the Secretary to consider the best interests of Indian Tribes when taking any action that

120. *Navajo I*, 46 Fed. Cl. at 224. The Secretary of the Interior formally approved the lease amendments on December 14, 1987. *Id*.

121. *Id*. (quoting Deposition of Frank Ryan, Nov. 7, 1995; III Pl. App. at 1510).

122. *Id*. at 220, 224.

123. *See* Plaintiff's First Amended Complaint ¶¶ 7–10, Navajo Nation v. United States, 46 Fed. Cl. 217 (Fed. Cl. 2000) (No. 93-763L).

124. *See Navajo I*, 46 Fed. Cl. at 225.

125. This is not a complete list of the dozens of elements of the network that appeared throughout the case's litigation; rather, it lists those elements that formed the basis of the Court of Federal Claims' and the Federal Circuit's holdings on the merits of the network argument in *Navajo V* and *Navajo VI*.

126. Indian Mineral Leasing Act, 25 U.S.C. §§ 396a, 396d (2000) ("[U]nallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or authorized spokesman for such Indians.").

127. 25 C.F.R. § 211.2 (1985), *superseded by* 25 C.F.R. § 211.20(a) (2008).

may affect them;[128] comprehensive Department of Interior regulations governing the valuation of Indian coal for the purpose of calculating royalty payments;[129] the treaties of 1849[130] and 1868[131] between the United States and the Navajo Nation; the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), which was enacted to improve Tribes' ability to collect royalty payments for their mineral resources;[132] the Navajo-Hopi Rehabilitation Act of 1950;[133] and the Indian lands' section of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which governs the implementation of health, safety, and environmental regulations on surface mining of Indian coal.[134]

The government moved for summary judgment in the early stages of *Navajo I*, arguing that the IMLA imposed general, but not specific, fiduciary duties upon the United States.[135] The government's motion for summary judgment only discussed the IMLA, not the other elements of the network as set forth in the Nation's complaint.[136] Thus, like the Quinault Tribe in *Mitchell I*, which based its claim on several statutes and regulations but was forced to focus its argument on the General Allotment Act, the Nation was precluded from addressing all the statutes and regulations in the network and was forced to focus its argument on the IMLA.[137] The CFC agreed with the government that the IMLA, now isolated from the rest of the "network," did not establish a specific fiduciary duty and held that the Nation had failed to state a claim for monetary damages.[138]

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128. 25 C.F.R. §§ 211.3, 211.20 (2008).

129. 30 C.F.R. § 206.450 (2008).

130. Treaty Between the United States of America and the Navajo Tribe of Indians, Sep. 9, 1849, 9 Stat. 974.

131. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667.

132. Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701–57 (2000).

133. Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631–40 (2000).

134. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1300 (2000).

135. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 220 (Fed. Cl. 2000).

136. *See id.* at 227.

137. *See* Navajo Nation's Consolidated Response to Defendant's Cross-Motion for Summary Judgment on Liability Issues and Reply in Support of Plaintiff's Motion for Summary Judgment on the Issue of Liability on its First Claim for Relief at 12–13, *Navajo I*, 46 Fed. Cl. 217 (Fed. Cl. 2000) (No. 93-763L).

138. *Navajo I*, 46 Fed. Cl. at 236.

Although the CFC was unequivocal in its condemnation of Secretary Hodel's role in compromising the Nation's bargaining position relative to Peabody,[139] the court determined that the United States had breached only a *general* fiduciary duty to the Nation.[140] The court explained: "In order to succeed . . . the [Nation] must show that the 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."[141] Had the IMLA assigned to the Secretary "management and control" over Indian Tribes' coal royalties—not only over coal leasing—the CFC might have inferred a specific fiduciary duty to maximize the Tribes' coal revenue.[142] While the CFC noted that other sections of the IMLA did provide for management and control over *oil and gas* royalties, it held that there were no similar IMLA provisions governing royalties for *coal* leases.[143] Moreover, the CFC concluded that Congress intended for the IMLA to foster Indian self-determination because it transferred some of the Secretary of the Interior's authority over mineral leases to Indian Tribes.[144] Therefore, the CFC granted the government's motion for summary judgment, dismissing the Nation's claim.[145]

C. Navajo II—*The United States Court of Appeals for the Federal Circuit*

Appealing the CFC's decision to the Federal Circuit, the Nation renewed its attempt to argue that the network of statutes and regulations, not only the IMLA, established the Na-

139. *Id.* at 226 ("Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events.").

140. The Supreme Court held that the United States' administration of Indian affairs is governed by fiduciary principles in *Seminole Nation v. United States*, 316 U.S. 286 (1942).

141. *Navajo I*, 46 Fed. Cl. at 227 (emphasis added).

142. *See id.* at 227–28.

143. *Id.* at 228.

144. *Id.* at 229–30.

145. *Id.* at 236.

tion's claim for monetary damages.[146] However, since the issue on appeal was the CFC's order granting the government's motion for summary judgment, in which the sole question was whether the IMLA established a specific fiduciary duty, the Federal Circuit likewise evaluated only the IMLA and did not consider the remaining elements of the network. Like the CFC, the Federal Circuit stated that, to recognize the Nation's claim, it would require the claim to be based on a statute establishing a "full" fiduciary duty, rather than merely the "limited trust relationship" that the United States has with all Indian Tribes.[147] The Federal Circuit premised its discussion of the case with the observation that "[t]he difference [between a limited trust relationship and a full fiduciary duty] lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians."[148]

Unlike the CFC, the Federal Circuit concluded that the IMLA did establish the United States' comprehensive control over Indian coal leasing, and likewise established a specific fiduciary duty and the Nation's claim for monetary damages.[149] The Federal Circuit's interpretation of the language contained in section 396a of the IMLA was almost completely opposite the CFC's. According to the CFC, because section 396a assigned to the Secretary approval authority over Indian coal leases but did not state that the Secretary had a specific duty to bargain for maximum royalties, the IMLA fell short of establishing the specific fiduciary duty required by the (Indian) Tucker Act.[150] On the other hand, the Federal Circuit looked to the consequences of section 396a's delegation of approval authority, concluding that the Secretary's lease-approval authority amounted to "final authority on all matters of any significance in the leasing of Indian lands for mineral development."[151] According to the Federal Circuit, the extent of the Secretary's control over Indian coal leases under section 396a permitted the inference that the United States owed a specific fiduciary duty to the Na-

146. Brief for Appellant at 36, Navajo Nation v. United States (*Navajo II*), 263 F.3d 1325 (Fed. Cir. 2001) (No. 00-5086).

147. *See Navajo II*, 263 F.3d 1325, 1328–29 (Fed. Cir. 2001) (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[The Supreme Court] has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.")).

148. *Id.* at 1329.

149. *See id.* at 1330–32.

150. Navajo v. United States (*Navajo I*), 46 Fed. Cl. 217, 228–29 (2000).

151. *Navajo II*, 263 F.3d at 1330.

tion and therefore was liable, based on the common law of trusts, for the breach of that duty.[152] Consequently, the Federal Circuit reversed the CFC's holding and remanded the case for a determination of damages.[153]

D. Navajo III—*The United States Supreme Court*

As the respondents before the Supreme Court, the Nation tried once again to argue that the entire network, not only the IMLA, established the United States' specific fiduciary duty. Yet the Nation again was prevented from introducing this argument because the government had limited the issue before the Supreme Court to the question of

> [w]hether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's approval of an amendment to an existing mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.[154]

The Nation argued in its response brief that the Navajo and Hopi Rehabilitation Act of 1950,[155] the Indian Mineral Development Act of 1982,[156] the Federal Oil and Gas Royalty Management Act,[157] regulations promulgating these statutes and governing BIA administration, and the IMLA created in the government a specific fiduciary duty.[158] Yet it was apparent from the first sentence of Justice Ginsburg's majority opinion that the Supreme Court accepted the government's narrower question presented and considered only whether the IMLA and its regulations established the Nation's claim for relief.[159]

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152. *Id.* at 1332–33.

153. *Id.* at 1333.

154. U.S. Supreme Court Petitioner's Brief at I, Navajo v. United States (*Navajo III*), 537 U.S. 488 (2003) (No. 01-1375) (emphasis added).

155. 25 U.S.C. §§ 631–640 (2000).

156. 25 U.S.C. § 2103(b) (2000).

157. 30 U.S.C. §§ 1701–1757 (2000).

158. U.S. Supreme Court Respondent's Brief at 15–17, Navajo Nation v. United States (*Navajo III*), 537 U.S. 488 (2003) (No. 01-1375).

159. *Navajo III*, 537 U.S. at 493 ("This case concerns the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." (citations

Moreover, the Supreme Court's method of interpreting the IMLA more closely resembled the CFC's restrictive approach than the Federal Circuit's expansive approach. The Supreme Court declined to infer, as the Federal Circuit had, that the Secretary's authority to approve Indian mineral leases amounted to supervision or control over other aspects of the leasing process.[160] Like the CFC, the Supreme Court interpreted the IMLA as assigning to Indian Tribes, not the Secretary, control over Indian mineral leases, stating in dicta that "the IMLA aimed to foster tribal self-determination by 'giv[ing] Indians a greater say in the use and disposition of the resources found on Indian lands.' "[161] The Court therefore reversed the Federal Circuit's ruling and remanded the case to the Federal Circuit.[162]

E. Navajo IV—*The Court of Appeals for the Federal Circuit*

Before the Federal Circuit again, the Nation asked the court to remand the case to the CFC to resolve the question of whether the network, minus the IMLA—which was now barred by issue preclusion[163]—established the United States' specific fiduciary duty to the Nation.[164]

The Federal Circuit agreed that, in *Navajo III*, the Supreme Court had only considered the IMLA and not the other elements of the network.[165] Therefore, the Federal Circuit granted the Nation's request to remand the case to the CFC, ordering the lower court to determine (1) whether the Nation waived its claim that was based upon the network and (2) if not, whether the network imposed a specific fiduciary duty upon the United States concerning the Nation's lease agreement with Peabody and whether that duty was breached.[166]

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omitted)). The Supreme Court briefly noted that the Indian Mineral Development Act of 1982 (IMDA) likewise did not establish a fiduciary duty concerning Secretarial approval of mineral leases. *Id.* at 509 (citing 25 U.S.C. § 2101 *et seq.* (2000)).

160. *See id.* at 493.

161. *Id.* at 494 (quoting BHP Minerals Int'l Inc., 139 I.B.L.A. 269, 311 (1997)).

162. *Id.* at 514.

163. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1339 (Fed. Cir. 2007).

164. Navajo Nation v. United States (*Navajo IV*), 347 F.3d 1327, 1330 (Fed. Cir. 2003).

165. *Id.* at 1331.

166. *Id.* at 1332.

F. Navajo V—*The Court of Federal Claims*

The CFC held that, although the Nation's IMLA-based claim had failed, the Nation had preserved its ability to argue that the remaining statutes and regulations in the network established the government's fiduciary duty.[167] Therefore, the Nation was finally permitted to argue that the statutes and regulations comprising the network, absent the IMLA, provided a basis for the Nation's claim for monetary relief.[168]

When the CFC evaluated the network, however, it found "no reason to revise [its] previous rejection of [the network] as . . . expressed [in *Navajo I*]."[169] In fact, the CFC seemed to impose an even stricter standard to evaluate whether the statutes comprising the network established a specific fiduciary duty than it had when considering the IMLA. To recognize that the Nation had stated a claim, the CFC would have required the Nation to prove not only that the network established a specific fiduciary duty regarding the content of Indian Tribes' coal leases (not simply mineral leases in general) but also that that duty pertained to the setting of royalty rates during the negotiation of those coal leases.[170] Just as the CFC found that section 396a of the IMLA did not establish any Secretarial duty pertaining to setting royalty rates for Indian coal leases in *Navajo I*,[171] the *Navajo V* court concluded that the network only established the Secretary's duty to implement coal leases and not any duty to adjust royalty rates.[172]

The Nation argued that the United States assumed trust duties by promising, in the 1849 treaty between the United States and the Nation, to "legislate and act as to secure [the Nation's] permanent prosperity and happiness" and by establishing the Navajo homeland in the 1868 treaty.[173] Although the CFC acknowledged that the principles of the treaties established a general duty on the part of the Secretary of the Inte-

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167. Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805, 810 (Fed. Cl. 2005).

168. *See id.* at 810–11.

169. *Id.* at 811.

170. *Id.* at 812.

171. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 228 (Fed. Cl. 2000).

172. *Navajo V*, 68 Fed. Cl. at 811.

173. Brief of the Navajo Nation on Remand from the Federal Circuit at 17–18, Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (Fed. Cl. 2005) (No. 93-763L) (citing 9 Stat. 974; 15 Stat. 667).

rior to maximize the Nation's mineral revenues, the court disagreed that the treaties established a specific duty to do so.[174] According to the Supreme Court's standard set forth in *Mitchell I* and *II*, a specific fiduciary duty is a threshold requirement for a Tribe to state a claim under the (Indian) Tucker Act.[175]

The Nation next argued that because the stated goal of the Navajo and Hopi Rehabilitation Act ("the Rehabilitation Act") was the enhancement of the Nation's self-sufficiency, the Rehabilitation Act implicitly imposed trust duties upon the United States.[176] Like the IMLA, the Rehabilitation Act permitted the Nation to lease land to third parties for mineral development in order to improve their economic condition (subject to the Secretary of the Interior's approval and the Department's regulations).[177] According to the Nation, the Rehabilitation Act required the United States to inform the Nation of its actions and to consider the recommendations of the Navajo tribal council.[178] The CFC agreed that the Rehabilitation Act's purpose was to support the Nation's economy, but it did not recognize that the Act prescribed a specific duty to do so. Instead, the CFC held that the Rehabilitation Act did no more than reinforce the general trust relationship between the Nation and the United States.[179] As discussed in Part II.B, a breach of this general trust relationship was not enough to establish the Nation's claim for monetary damages.[180]

Next, the Nation argued that regulations promulgated under the Indian Lands section of the SMCRA assigned substantial duties to the Secretary of the Interior concerning exploration and mining plans, governmental inspections by a federal mining supervisor, and Interior Department review of appeals regarding these duties.[181] Other regulations developed pursu-

174. *Navajo V*, 68 Fed. Cl. at 812. As established in *Mitchell II*, a general duty is insufficient to establish a Tribe's claim for monetary damages under the (Indian) Tucker Act. *See* Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 211 (1983).

175. *See supra* text accompanying note 53.

176. *Navajo V*, 68 Fed. Cl. at 812.

177. 25 U.S.C. § 635(a) (2000).

178. Brief of the Navajo Nation on Remand from the Federal Circuit at 22, Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (Fed. Cl. 2005) (No. 93-763L) (citing 25 U.S.C. § 638 (2000)).

179. *Navajo V*, 68 Fed. Cl. at 812–13.

180. *Id.* at 815.

181. Brief of the Navajo Nation on Remand from the Federal Circuit at 23–24, Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (Fed. Cl. 2005) (No.

ant to the SMCRA granted regulatory authority to the Office of Surface Mining Reclamation and Enforcement and the BIA over mining permits, inspections, and environmental compliance and prohibited the Secretary from delegating the regulation of surface coal mining operations to Indian Tribes.[182] The Nation claimed that "[t]hese numerous . . . SMCRA regulations were expressly promulgated to satisfy 'the trust responsibilities the Department has to tribes regarding lands subject to regulation' under the Indian Lands section of SMCRA and to honor the 'special relationship between the U.S. Government and the Indian Tribes.' "[183] Although the CFC acknowledged that the SMCRA and its promulgating regulations established comprehensive Secretarial control over coal mining activities, it did not agree that the Nation had "demonstrat[ed] how royalty rates are subject to the Secretary's control."[184] To reach this conclusion, the court distinguished between general regulatory authority and specific authority over the negotiation of mineral royalties:

> The simple fact of the matter is that there is necessarily substantial [federal] control [over Indian coal leases]—the strict regulation is justified by labor issues, occupational safety, and environmental conservation. We would not expect the Tribes would hold any veto power over these matters. The critical inquiry in this case is whether the SMCRA restricts the Navajo in a meaningful way concerning economic matters such as the negotiation of royalties.[185]

Having considered and rejected each element of the network in turn, the CFC held that the Nation had failed to establish that the Secretary had a specific fiduciary duty to maximize the Nation's royalty rate during the negotiation of coal leases and dismissed the Nation's claim for the second time.[186]

93-763L) (citing 30 U.S.C. § 1300; 25 C.F.R. §§ 216 (A)–(B); 30 C.F.R. §§ 750.6(b), 750.6(d)(3), 750.11(c)(3), 750.12(d)(1), 750.18(c)).

182. *Id.* at 24–25 (citing 49 Fed. Reg. 38462 (1984) (amending 30 C.F.R. Parts 700, 701, and 710, and promulgating 30 C.F.R. Parts 750 and 755); 49 Fed. Reg. 38469; 30 C.F.R. §§ 750.6(a), 750.6(a)(1), 750.6(b–d)).

183. *Id.* at 25–26 (quoting 49 Fed. Reg. 38462, 38464 (1984) (citation omitted)).

184. *Navajo V*, 68 Fed. Cl. at 813 (emphasis added).

185. *Id.* at 813–14.

186. *Id.* at 815.

G. Navajo VI—*The United States Circuit Court of Appeals for the Federal Circuit*

In its brief to the Federal Circuit, the Nation argued that the CFC had erred in holding that the Nation must base its claim for monetary damages on a statute or regulation expressly assigning to the United States the duty to negotiate, or renegotiate, royalty rates for the Nation's coal leases.[187] Rather, the Nation reasoned, "enforceable trust duties are created even when the applicable statutes and regulations do not expressly impose the duties alleged to have been breached."[188]

The Federal Circuit agreed with the Nation's reasoning.[189] Significantly, the Federal Circuit did not evaluate the rights-creating properties of each element of the network individually, as had the CFC; instead it considered the network's elements in the aggregate, looking to their purposes rather than to their texts.[190] When the Federal Circuit considered the extent of the implied authority that the network as a whole assigned to the Department of the Interior, it concluded that the network created an inference that the United States has supervision and control over the Nation's coal leases, and therefore a specific fiduciary duty to manage them to the Nation's economic benefit.[191]

Unlike the CFC, which held that the treaties of 1849 and 1868 merely acknowledged a general trust relationship between the United States and the Nation, the Federal Circuit concluded the treaties established that the United States holds the Nation's coal in trust, having never expressly or implicitly severed coal from the land held in trust.[192] The Federal Circuit likewise held that the Rehabilitation Act[193] amounted to a mandate that the United States regulate the Nation's coal for the purposes of the Nation's economic development, and that this mandate established a specific fiduciary duty.[194] The Na-

187. Brief for Appellant, the Navajo Nation at 15, Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327 (Fed. Cir. 2007) (No. 2006-5059).

188. *Id.* at 15–16.

189. *See Navajo VI*, 501 F.3d at 1349.

190. *See id.* at 1345 ("[T]he purposes of the asserted network of statutes and regulations support finding a fiduciary relationship between the government and the Nation that is money-mandating under the Indian Tucker Act.").

191. *Id.* at 1349.

192. *Id.* at 1341.

193. 25 U.S.C. § 631 (2000).

194. *Navajo VI*, 501 F.3d at 1341.

tion's arguments concerning the SMCRA's promulgating regulations were likewise successful before the Federal Circuit, which agreed that the regulations' establishment of specific standards for managing the Nation's coal mining, combined with the BIA's duty to represent Indian mineral owners, conferred on the United States the duty to " 'represent[ ] . . . Indian mineral owners . . . in matters relating to surface coal mining . . . operations on Indian lands.' "[195] Finally, the court concluded that FOGRMA established a specific fiduciary duty because FOGRMA's regulations set forth procedures for the valuation of the Nation's coal, and therefore actual control over the Nation's royalty rate.[196]

Ultimately, the Federal Circuit held that the network's purpose was to establish the government's comprehensive control over the Nation's mineral resource extraction activities, with the goal of facilitating the Nation's economic development.[197] Unlike the CFC, which placed upon the Nation the burden of proving that a statute or regulation dealt specifically with the government's authority to regulate the Nation's royalty rate in coal leases,[198] the Federal Circuit burdened the government with proving that Interior's comprehensive control over the Nation's surface coal mining operations excluded control over the Nation's coal leases and the royalty rate therein.[199] Thus, the Federal Circuit concluded that the aggregate network enumerated a specific fiduciary duty owed by the United States to the Nation with respect to the management of the Nation's coal resources, including the negotiation of royalty rates.[200]

Once the Nation had established that the network amounted to " 'specific rights-creating or duty-imposing statutory or regulatory prescriptions,' "[201] the Federal Circuit reasoned that " 'general trust law [i]s considered in drawing the inference that Congress intended damages to remedy a breach of obliga-

195. *Id.* at 1342 (quoting 30 C.F.R. § 750.6(d) (1987)).
196. *Id.* at 1342–43.
197. *See id.* at 1344–45.
198. See Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (Fed. Cl. 2005).
199. *Navajo VI*, 501 F.3d at 1343.
200. *Id.*
201. *Id.* at 1346 (quoting Navajo Nation v. United States (*Navajo III*), 537 U.S. 488, 506 (2003)).

tion.' "[202] The court held that common law trust duties of care, candor, and loyalty—which the CFC found the United States to have breached in *Navajo I*—considered in concert with the specific duties articulated by the network, established a fair inference[203] that Congress intended to make the United States liable in monetary damages for breaching its trust duties to the Nation.[204] Therefore, the Federal Circuit reversed the CFC's holding, and once again remanded the case for a determination of damages.[205]

III. THREE COURTS, TWO OUTCOMES FOR *NAVAJO NATION V. UNITED STATES*

Justice Ginsburg, who wrote for the majority in *Navajo III*, wrote a separate concurring opinion in *Apache* to state that both cases were consistent with the *Mitchell* standard.[206] This part argues that the results were not consistent; rather, the Court permitted a statute's purpose to inform its evaluation of whether the statutes in question established a specific fiduciary duty in *Apache*, while it ignored the purposes of the statutes comprising the network in *Navajo III*. This part contrasts the Federal Circuit's manner of interpreting the statutes in question with the CFC's and the Supreme Court's approach. Whereas the Federal Circuit interpreted the network expansively, permitting an inference of fiduciary duty based on the network's elements' text in concert with their purposes, the Supreme Court and the CFC interpreted the network restrictively, evaluating each statute and regulation in the network in isolation, and limiting their meanings to the express terms of their text. Whereas the Federal Circuit considered the network as an aggregate, examining the purposes and effects of each of its elements in concert with one another, the CFC and the Su-

202. *Id.* (quoting United States v. White Mountain Apache Tribe (*Apache*), 537 U.S. 465, 477 (2003)).

203. Justice Souter, writing for the majority in *Apache*, held "[i]t is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. . . . a fair inference will do." *Apache*, 537 U.S. at 473; *accord Navajo III*, 537 U.S. at 506 ("[Statutory or regulatory] prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred.").

204. *Navajo VI*, 501 F.3d at 1346–48.

205. *Id.* at 1349.

206. *Apache*, 537 U.S. at 479 ("I join the Court's opinion, satisfied that it is not inconsistent with the opinion I wrote for the Court in *United States v. Navajo Nation*, *ante*, 537 U.S. 488 . . . (2003).").

preme Court divided the network's elements and disposed of each statute or regulation individually. This part concludes by proposing that the Court's more liberal standard in *Apache* controlled the outcome of *Navajo VI*.

A. Interpreting Statutes' Texts vs. Interpreting Statutes' Purposes and Effects

Although the IMLA was no longer part of the Nation's claim after *Navajo III*, the CFC's and the Federal Circuit's interpretations of its primary provision in *Navajo I* and *II* are excellent examples of these courts' approach to other elements of the network. Section 396a of the IMLA provides:

> [U]nallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesman for such Indians . . . .[207]

The CFC interpreted this provision as an expression of Congress's reticence to assign control over Indian coal leasing to the Secretary of the Interior.[208] Because the statute's text focused on the tribal council's or spokesperson's role in lease negotiations, the CFC minimized the Secretary's approval function.[209] In contrast, the Federal Circuit gave considerably greater weight to the approval function, interpreting section 396a to mandate that "no mining lease may be entered unless approved by the Secretary of the Interior."[210]

The CFC acknowledged that some IMLA provisions governing oil and gas leases did assign control over lease negotiations to the Secretary, but it dismissed the remaining provisions, stating: "The remainder of the Act is very general . . . ."[211] Conversely, the Federal Circuit maintained that the remainder of the IMLA and its implementing regulations "g[a]ve the Secretary the final authority on all matters of

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207. Indian Mineral Leasing Act of 1938 § 396a, 25 U.S.C. § 396a (2000).

208. Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 228–30 (Fed. Cl. 2000).

209. *See id.*

210. Navajo Nation v. United States (*Navajo II*), 263 F.3d 1325, 1330 (Fed. Cir. 2001).

211. *Navajo I*, 46 Fed. Cl. at 228.

any significance in the leasing of Indian lands for mineral development" and "explicitly require[d] that the Secretary . . . act in the best interests of the Indian tribes."[212] Thus, the two federal courts, considering identical statutory text, arrived at opposite conclusions.

The Supreme Court echoed the CFC in taking a restrictive, text-based approach to interpreting the IMLA. Justice Ginsburg stated that "[t]he IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective, and authorizes the Secretary generally to promulgate regulations governing mining operations."[213] Thus, the Court "perceive[d] no basis for infusing the Secretary's approval function under § 396a with substantive standards that might be derived from his adjustment authority under [Lease 8580]."[214] Moreover, the Court did not share the CFC's and the Federal Circuit's condemnation of Secretary Hodel's ex parte meeting with Peabody's lobbyist since "[n]othing in [the IMLA or its implementing regulations] proscribed the ex parte communications."[215] Ultimately, the Supreme Court declined to apply the Federal Circuit's effects-based interpretation: if it had, it would likely have concluded that lease approval authority encompassed adjustment pursuant to the terms of mineral leases.

The CFC's and the Federal's Circuit's reasoning diverged in a similar manner when the courts evaluated the SMCRA,[216] which assigns to the Secretary broad regulatory authority to "study the question of the regulation of surface mining on Indian lands."[217] SMCRA mandates:

> [A]ll surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by . . . this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands. . . .[218] [T]he Secre-

212. *Navajo II*, 263 F.3d at 1330–31.
213. Navajo Nation v. United States (*Navajo III*), 537 U.S. 488, 507 (2003) (citations omitted).
214. *Id.* at 510 n.13.
215. *Id.* at 513 (citing 25 CFR § 2.20 (1985)).
216. 30 U.S.C. § 1300 (2000).
217. *Id.* § 1300(a).
218. *Id.*

> tary shall include and enforce terms and conditions . . . as may be requested by the Indian tribe . . . .[219]

In *Navajo V*, the CFC acknowledged that the SMCRA "demonstrate[d] comprehensive management as well as Federal supervision and control," but maintained that "[t]he critical inquiry in this case is whether the SMCRA restricts the [Nation] in a meaningful way concerning economic matters such as the negotiation of royalties."[220] Finding no such restriction in the SMCRA's text, the CFC concluded that "[a]t most, [the SMCRA's] regulations implicate duties of care *in collection and accounting of royalties*," and declined to extend those duties to "the *approval* of . . . the royalty rate."[221]

The Federal Circuit, however, was willing to infer that the broad regulatory authority the SMCRA assigned to the Secretary encompassed control over the Nation's royalty rate.[222] The SMCRA's provision that "the Secretary shall include and enforce terms and conditions . . . as may be requested by the Indian tribe"[223] established, according to the Federal Circuit, that the Secretary had a specific fiduciary duty to adjust Lease 8580's royalty provisions in accordance with the "terms and conditions requested by the Nation."[224] Although the government argued that the SMCRA's scope was limited to environmental protection standards and that the statute did not contemplate an Indian Tribe's request for royalty rate adjustments, the Federal Circuit disagreed.[225] The Federal Circuit reasoned, "[i]t is true that the [SMCRA] focuses on environmental protection, not royalty rates. Neither § 1300(e) nor its companion regulation, however, contains any subject matter limitation."[226] The CFC had held that because the SMCRA lacked express language concerning a Secretarial duty to enforce terms and conditions pertaining specifically to royalty rates in Indian coal leases, the Secretary had no such duty.[227]

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219. *Id.* § 1300(e).

220. Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805, 813–14 (Fed. Cl. 2005).

221. *Id.* at 814 (emphasis added).

222. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1344 (Fed. Cir. 2007).

223. 30 U.S.C. § 1300(e) (2000).

224. *Navajo VI*, 501 F.3d at 1347.

225. *Id.* at 1348.

226. *Id.*

227. *Navajo V*, 68 Fed. Cl. at 813–14 ("Obviously, Plaintiff can demonstrate comprehensive management as well as Federal supervision and control . . . [but

In contrast, the Federal Circuit, adhering to the canons of construction governing statutory interpretations affecting Indian Tribes,[228] decided that the SMCRA's lack of subject matter limitation extended the Secretary's trust duties to the negotiation of royalty rates.[229]

Another issue before the Federal Circuit was whether the IMLA governed Lease 8580 to the exclusion of other statutes. The Federal Circuit's disposition of this question also exemplifies the Federal Circuit's adherence to the canon of construction that suggests statutes should be interpreted liberally in favor of the Indians.[230] In *Navajo VI*, the government attempted to persuade the Federal Circuit that no elements of the network other than the IMLA were applicable to the Nation's case.[231] The government asserted that Lease 8580 was "an IMLA lease, and the Secretary's approval occurred pursuant to IMLA, not any of the provisions upon which the [Nation] now relies for its 'network.' "[232] Yet, the Federal Circuit concluded that "[n]othing within the IMLA of 1938 suggests . . . that it governs particular leases to the exclusion of all other statutes."[233] Similar to the Federal Circuit's conclusion that the SMCRA may apply to royalty rates because its text did not expressly limit its applicability to environmental regulations, the Federal Circuit permitted the absence of exclusionary language in the IMLA to control its interpretation of the statute.

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t]he critical inquiry in this case is whether the SMCRA restricts the Navajo in a meaningful way concerning economic matters such as the negotiation of royalties. . . . [The SMCRA] implicate[s] duties of care in collection and accounting of royalties. . . . The Navajo's Complaint involves a breach of lease approval function . . . .").

228. NEWTON, *supra* note 29, § 2.02[1] ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians."); s*ee also* McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973).

229. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1348 (Fed. Cir. 2007).

230. NEWTON, *supra* note 29, § 2.02[1].

231. *Navajo VI*, 501 F.3d at 1347.

232. *Id.* at 1337 (quoting Brief of the United States at 34, Navajo Nation v. United States (*Navajo VI*), 501 F.3d. 1337 (Fed. Cir. 2007) (No. 2006-5059)).

233. *Id.*

B. Interpreting the Network as an Aggregate or as No More Than the Sum of Its Parts

Just as the outcome of the Nation's case depended on the various courts' method of statutory interpretation, so too did the outcome depend on the courts' willingness to view the network as an interconnected system. Throughout the litigation of *Navajo Nation v. United States*, when the courts examined the network as an interconnected and aggregate source of law, the Nation prevailed. Yet when the courts considered the network as merely a group of statutes and regulations operating independently of one another, the Nation's claim failed.

The CFC evaluated the elements of the network individually and concluded that each element failed to establish a specific duty on the part of the Secretary of the Interior pertaining to the negotiation of royalty rates in Indian coal leases.[234] The court's standard for inferring such a duty was so narrow that the court found no specific fiduciary duty even where statutes provided for the Secretary's duty to maximize Indian Tribes' revenues from mineral leases. The court based this decision on its view that those statutes did not specifically articulate Secretarial duties pertaining to the adjustment of royalty rates in coal leases.[235]

In contrast, the Federal Circuit evaluated the network as an aggregate, considering the manner in which the network's elements worked together to assign to the Secretary of the Interior control over coal resource planning, coal mining operations, the management and collection of coal mining royalties, and coal leasing.[236] Unlike the CFC, the Federal Circuit did not require each element of the network to pertain specifically to the negotiation of royalty rates.[237] Instead, the Federal Cir-

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234. Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805, 811–17 (Fed. Cl. 2005).

235. *Id*. at 812. ("As we have found with the IMLA, a statute or regulatory provision must do more than provide in general terms for the Secretary to maximize revenues. As before, we believe the statute or regulation must 'impose specific duties regarding the Secretary's adjustment of royalty rates for coal.' " (discussing the 1849 and 1868 treaties between the United States and the Navajo Nation) (quoting Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 233 (Fed. Cl. 2000))).

236. *Navajo VI*, 501 F.3d at 1340–49.

237. *Id*. at 1346–48. *Contra Navajo I*, 46 Fed. Cl. at 22 (The CFC noted that one regulation "designed to prevent overreaching by [third parties] negotiating with Indians and to assure that fair market value is obtained for tribal resources"

cuit concluded that the network collectively established the Secretary of the Interior's comprehensive control over all aspects of the Nation's coal resources, and, according to the doctrine that the greater includes the lesser, likewise established the Secretary's control over the renegotiation of Lease 8580's royalty rate.[238]

To evaluate the network's elements in concert with one another, and to be mindful of their purposes, the Federal Circuit divided the statutes and regulations in the network into four categories, each of which addressed a different aspect of the Secretary's control over the Nation's coal resources.[239] First, the Rehabilitation Act, which directed the government to develop "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians,"[240] was held to establish the Secretary's control over the Nation's resource planning.[241] Second, the SMCRA and its regulations were held to establish the Secretary's control over the Nation's coal mining operations.[242] Third, FOGRMA, which directed the Secretary to "study the question of the adequacy of royalty management for coal, uranium and other . . . minerals on Federal and Indian lands"[243] was held to establish the Secretary's control over the management and collection of coal mining royalties.[244] Fourth, the Federal Circuit held that

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is inapposite to the case because it applies to the negotiation of new leases, not the renegotiation of existing leases.).

238. *See Navajo VI*, 501 F.3d at 1343.

239. *Id.* at 1341–45.

240. 25 U.S.C. § 631 (2000).

241. *Navajo VI*, 501 F.3d at 1341.

242. *Id.* at 1342.

243. Federal Oil and Gas Royalty Management Act of 1982, Pub. L. 97-451(a), § 303 (1983) (this language can be found in the annotations to 30 U.S.C. § 1752, which codified § 302 of the Public Law).

244. *Navajo VI*, 501 F.3d at 1342. The Federal Circuit also accepted the Nation's argument that 30 C.F.R. Part 206 Subpart F (1989), promulgated pursuant to FOGRMA, established Secretarial control over coal mining royalties, despite the government's argument that this regulation was enacted after the events giving rise to the Nation's claim. *Id.* at 1343. The Federal Circuit found the government's argument unpersuasive, reasoning that because the government

> d[id] not dispute that . . . 30 C.F.R. Part 206 Subpart F describe[s] actual practices that existed at the time of the lease amendments. . . . Where the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise.

Id. at 1343 (citing White Mountain Apache v. United States, 537 U.S. 465, 475 (2003) and Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 225 (1983)).

the Indian Lands Section of the SMCRA[245] and the Rehabilitation Act[246] established the Secretary's liability in monetary damages arising from control of the Nation's coal leasing.[247]

Having established the Secretary's control over these four aspects of the Nation's coal resources, the Federal Circuit concluded that these four types of control, taken together, "demonstrate[d] that the government controls the leasing of the Nation's coal resources and that the government is responsible for the liabilities arising thereunder."[248] Unlike the CFC, the Federal Circuit did not require that the network state a textual delegation to the Secretary of control over the renegotiation of the Nation's royalty rate. Rather, the Federal Circuit noted that "[t]he government . . . cites no authority for the proposition that control over the greater (for example, coal resources) does not imply control over the lesser (for example, leasing of such coal) in the Indian Tucker Act context."[249]

C. Navajo III vs. Apache*: How* Apache *Informed the Federal Circuit's Decision in* Navajo VI

When it decided *Navajo III*, the Supreme Court's deliberations seemed to echo those of the CFC. However, the Supreme Court's opinion in *Apache* bears more similarity to the Federal Circuit's rulings in *Navajo II* and *VI*.[250] In fact, the Nation's counsel saw sufficient differences between the Court's rulings in *Navajo III* and *Apache* to argue, on remand to the CFC, that *Apache* relaxed the standards for jurisdiction under the (Indian) Tucker Act.[251]

Writing for the majority in *Navajo III*, Justice Ginsburg stated, "there is no textual basis for concluding that the Secretary's approval function includes a duty, enforceable in an action for money damages, to ensure a higher rate of return for

245. 30 U.S.C. § 1300 (2000).
246. 25 U.S.C. § 635 (2000).
247. *Navajo VI*, 501 F.3d at 1343–45.
248. *Id.* at 1345.
249. *Id*. at 1343–44.
250. *See Navajo III*, 537 U.S. 488, 513 (2003) ("Here again, as the Court of Federal Claims ultimately determined . . . the Tribe's assertions are not grounded in a specific statutory or regulatory provision that can fairly be interpreted as mandating money damages.").
251. *See* Brief on Remand at 34, Navajo Nation v. United States (*Navajo V*), 68 Fed. Cl. 805 (2005) (No. 93-763L).

the Tribe."[252] This language suggests that the Court was looking for statutory text that expressly assigned to the Secretary of the Interior the duty to maximize Indian Tribes' mineral royalties. In contrast, Justice Souter, writing for the majority in *Apache*, reasoned:

> While it is true that the [statute in question] does not . . . expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference than an obligation to preserve the property improvements was incumbent on the United States as trustee.[253]

In sum, the *Apache* court was willing to infer a specific fiduciary duty from an analysis of the applicable statute's effects, while the *Navajo III* court was not.

Justice Ginsburg identified two factors distinguishing *Apache* and *Navajo III*: first, the 1960 Act at issue in *Apache* "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations" while "no provision of the [IMLA] or its regulations contains *any* trust language with respect to coal leasing."[254] Second, the 1960 Act authorized the United States to use and occupy Fort Apache while the IMLA contained no analogous provision for the United States' use or possession of the Nation's coal.[255]

Nevertheless, in *Navajo VI*, the Nation relied on *Apache* to defeat the government's arguments against the network as the source of the United States' specific fiduciary duty. The Federal Circuit explained that, in *Apache*, "the Supreme Court heard, considered, and rejected" the government's argument that "the Nation must allege a violation of a specific rights-

252. 537 U.S. at 492.

253. United States v. White Mountain Apache Tribe (*Apache*), 537 U.S. 465, 475 (2003). The statute in question in *Apache* did provide that the White Mountain Apache Tribe's property should be "held by the United States in trust for the . . . Tribe." *Id.* at 469 (quoting Pub. L. 86-392, 74 Stat. 8 (1960 Act)). This highlights another disparity: whereas the Federal Circuit was willing to interpret the Nation's treaties with the United States as establishing that the United States holds the Nation's control in trust, *see supra* Part II.G, the Supreme Court required express language to that effect.

254. *Apache*, 537 U.S. at 480 (Ginsburg, J., concurring) (comparing majority opinions in *Apache* and *Navajo III*) (emphasis in original).

255. *Apache,* 537 U.S. at 480.

creating or duty-imposing statute or regulation and that the common law of trusts cannot be applied."[256] This directly contradicts Justice Ginsburg's majority opinion for *Navajo III*, where explicit statutory trust language pertaining to specific duties was required before the Court would recognize the government's trust duty.

The second factor Justice Ginsburg pointed out was that, in *Apache*, the government had enjoyed the use and occupancy of the tribal resource in question, while, in *Navajo III*, the government had not. Yet this does not seem truly determinative because that fact would not have controlled the outcomes of *Mitchell I* and *II*. In *Apache*, where the United States enjoyed a right of use and occupancy over the Indian resource in question, that right established a specific fiduciary duty.[257] Yet *Mitchell II* suggests that the United States' right to use or occupy an Indian Tribe's resource is not a prerequisite to inferring such a duty.[258] In *Mitchell I* and *II*, the resource at issue was the Quinault Tribe's timber, over which the United States did not have a right of use and occupancy.[259] Rather, the Quinault's claim was similar to the Nation's: both Tribes alleged that the United States had violated its duty to manage their natural resources according to their best interests.[260] Therefore, although no source of law granted the United States use and occupancy of the Quinault Tribe's land or timber resources, the Supreme Court found that Acts of Congress and regulations promulgated by the Department of the Interior established a duty to manage the Tribe's timber and therefore a claim could be made for monetary damages to compensate for the Department's breach of that duty.[261]

The Supreme Court's holdings in *Mitchell I* and *II* do not adequately support Justice Ginsburg's contention that *Navajo III* and *Apache* are consistent with one another. Therefore, when *Navajo Nation v. United States* reaches the Supreme Court again, it seems likely that either *Apache* or *Navajo III*—but not both—will control the case's outcome.

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256. Navajo Nation v. United States (*Navajo VI*), 501 F.3d 1327, 1345–46 (Fed. Cir. 2007).

257. *Apache*, 537 U.S. at 480.

258. *See generally* 463 U.S. 206 (1983).

259. *See id.*

260. *Compare* Navajo Nation v. United States (*Navajo I*), 46 Fed. Cl. 217, 220 (Fed. Cl. 2000), *and* Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 209–10, 226 (1983).

261. *Mitchell II*, 463 U.S. at 226.

IV. THE FUTURE OF *NAVAJO NATION V. UNITED STATES*

Examining the theories behind the many holdings of each of these cases reveals considerations and contradictions that will likely be addressed in future litigation, and that are also likely to be significant in future claims for breach of trust brought by Indian Tribes. Whether future courts choose to adhere to the canon of construction mandating that courts shall interpret ambiguous statutes in favor of Indian Tribes should have a profound effect on the success of future claims brought under the (Indian) Tucker Act. Likewise, whether future courts follow the doctrine that the greater includes the lesser when interpreting statutes and regulations may be determinative.

A. The Supreme Court May Be an Unfriendly Forum for Indian Tribes

Before the Supreme Court decided *Navajo III* and *Apache*, apprehension that the Supreme Court might use these cases to abrogate the United States' trust duties to Indian Tribes pervaded Indian country.[262] The Rehnquist Court's disposition of *Navajo III* and the Roberts Court's recent decision on another seminal Indian law issue indicate that Indian Tribes have cause for concern about *Navajo VII*'s outcome and its impact on the federal-tribal trust relationship.

During the oral argument of *Navajo III*, the Supreme Court did not condemn Secretary Hodel's *ex parte* meeting with Peabody Coal, as the CFC did in *Navajo I*. The CFC previously stated, "[t]here is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary," acknowledging that the *ex parte* meeting breached the government's basic, if not specific, fiduciary duty.[263] During oral argument before the Supreme Court, Justice O'Connor, who joined Justice Souter's dissent in *Navajo III*, described the *ex parte* meeting as "unfortunate."[264] However, Justice Breyer queried: "*Ex parte* communications take

262. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

263. *Navajo I*, 46 Fed. Cl. at 226.

264. Transcript of Oral Argument at 4, Navajo Nation v. United States (*Navajo III*), 537 U.S. 488 (2003) (No. 01-1375).

place all the time in those situations. So what's unfortunate about it?"[265] This suggests that some members of the Court had implicitly rejected any basic trust duty derived from the federal-tribal relationship. These inconsistent approaches to Secretary Hodel's collusion with Peabody Coal indicate that the Supreme Court remains sharply divided on the scope of the United States' trust duty to Indian Tribes. Reid Peyton Chambers, former Associate Solicitor for Indian Affairs at the Department of the Interior, believes that *Navajo III* and *Apache* were inconsistent and blames that inconsistency on "deep divisions" within the Supreme Court.[266] The current partisan and highly politicized climate at the Court[267] will probably not abate such divisiveness in its future proceedings.

Prior to the Court's disposition of *Navajo III*, Professor David Getches explained that, " '[t]here is no question that an earlier Supreme Court would have said [the duties implicated in *Apache* and *Navajo III*] would be . . . highly enforceable trust responsibilit[ies]' . . . [but] in recent years the Court has begun 'chiseling away' at the 'cornerstones of Indian law.' "[268] Indeed, Professor Getches wrote, "[t]he Rehnquist Court seems oblivious to the discrete body of Indian law that is based on solid judicial traditions tracing back to the nation's founding."[269]

This statement may hold true for the Roberts Court as well. On June 25, 2008, the Supreme Court decided *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*,[270] reinterpreting another seminal Indian law decision: *Montana v. United States*.[271] *Montana* established that Indian Tribes may not exercise civil jurisdiction over non-Indians' conduct on non-Indian fee land within Indian reservations unless the matter in question concerns a consensual relationship between the non-Indian and a tribal member or threatens or directly affects

265. *Id.* at 5; Oyez, U.S. Supreme Court Media, http://www.oyez.org/cases/2000-2009/2002/2002_01_1375/argument/ (last visited Jan. 22, 2009).

266. *Reach of Supreme Court's Trust Rulings Debated*, INDIANZ.COM, April 14, 2003, http://www.indianz.com/News/show.asp?ID=2003/04/14/scourt.

267. *See generally* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007).

268. Bill McAllister, *Many Eyes on Court for Two Indian Cases*, THE DENVER POST, Nov. 24, 2002, at A35.

269. Getches, *supra* note 262, at 267.

270. 128 S. Ct. 2709 (2008).

271. 450 U.S. 544 (1981).

the Tribe's political and economic integrity or its members' health and welfare.[272]

The issue in *Plains Commerce Bank* was whether the Cheyenne River Sioux Tribe had jurisdiction over a dispute arising from a lending agreement between the Plains Commerce Bank—a non-Indian entity—and a business owned and operated by tribal members.[273] Although a consensual relationship existed, the Supreme Court overruled the Eighth Circuit, holding that the Cheyenne River Sioux Tribe lacked jurisdiction over the dispute.[274] The bank had foreclosed on, and sold, the business's land and, therefore, the land had passed out of Indian ownership.[275] Writing for the majority, Chief Justice Roberts concluded that because "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," the Tribe lacked jurisdiction to regulate the sale or to adjudicate a dispute arising from the sale, although the sale was the penultimate event of the consensual relationship.[276]

This approach significantly limits the impact of the exception for consensual relationships between Indians and non-Indians. Even though the sale of the land was a direct result of the consensual relationship, the Court held that the sale of the land to non-Indians—not the consensual relationship—was determinative of tribal court jurisdiction over the matter.[277] Justice Ginsburg, who dissented, strongly disagreed with this order of analysis. She wrote:

> As the Court of Appeals correctly understood, the Longs' case, at heart, is not about 'the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals,' [but] . . . 'about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.'[278]

Although it concerns a different issue of federal Indian law than *Navajo Nation v. United States*, *Plains Commerce Bank* indicates that the Roberts Court will interpret precedent and

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272. *Id.* at 564–66.
273. *Plains Commerce Bank*, 128 S. Ct. at 2714.
274. *Id.*
275. *Id.* at 2726.
276. *Id.* at 2720 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).
277. *See generally id.*
278. *Id.* at 2727 (Ginsburg, J., dissenting) (quoting Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 491 F.3d 878, 887 (8th Cir. 2007)).

statutes governing the federal-state-tribal relationship as narrowly as, or perhaps more narrowly than, the Rehnquist Court.

Many discussions about the Supreme Court's approach to Indian law concern its decisions on cases implicating tribal sovereignty,[279] like *Oliphant v. Suquamish Indian Tribe*[280] and *Nevada v. Hicks*.[281] One Indian law scholar has posited that the trust doctrine and tribal sovereignty form a dichotomy; where one is strengthened, the other must reciprocally be weakened.[282] Perhaps this is a logical extension of the control or supervision test. Justice Ginsburg's opinion in *Navajo III* seemed to rely on a similar theory; she wrote that where the IMLA was intended to promote tribal sovereignty by providing that Indian Tribes may bargain for terms in their mineral leases rather than accept the terms negotiated on their behalf by the United States, the statute lessened the United States' trust duties pertaining to those mineral leases.[283] Yet, where other Rehnquist Court decisions undermined tribal sovereignty by granting to states increased criminal and civil jurisdiction in Indian country,[284] it should follow, according to this dichotomy, that the government's trust duties were heightened.

Tribal leaders, however, do not agree that their sovereignty is incompatible with enforcing the government's trust duties. Dan Rey-Bear, one of the Nation's attorneys, said that the majority in *Navajo III* "wrongly pitted the federal trust responsibility against tribal self-determination."[285] *Navajo III*'s and *Apache*'s outcomes emphasize the delicacy of Indian Tribes' position in a legal climate where the responsibilities Congress assigns to the federal government may be interpreted in the narrowest possible manner. Ultimately, the question remains

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279. *See, e.g.*, Getches, *supra* note 262; Krakoff, *supra* note 22; TOOBIN, *supra* note 267.

280. 435 U.S. 191 (1978) (concerning Indian tribes' criminal jurisdiction over non-Indians).

281. 533 U.S. 353 (2001) (concerning tribal court jurisdiction over tribal member's civil rights and tort action filed against State officials in their individual capacities).

282. Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 295 (2005) ("The challenge for Indian . . . leaders . . . is recognizing that the future of tribal progress will involve a trade-off between self-determination and the trust duties of the federal government.").

283. Navajo Nation v. United States (*Navajo III*), 537 U.S. 492, 494 (2003).

284. *E.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Nevada v. Hicks, 533 U.S. 353 (2001).

285. *Reach of Supreme Court's Trust Rulings Debated*, INDIANZ.COM, April 14, 2003, http://www.indianz.com/News/show.asp?ID=2003/04/14/scourt.

whether Congress has assigned control over an Indian resource to the United States government, and that question turns on how the courts interpret the statutes and regulations articulating the government's duties and responsibilities.

B. *The Effect of* Navajo Nation v. United States *on Future Tribal Breach-of-Trust Claims*

Ultimately, one lesson that both the *Mitchell* and *Navajo Nation v. United States* cases provide to Indian Tribes that wish to bring claims under the (Indian) Tucker Act is that all sources of law that may establish a specific fiduciary duty should be preserved and argued, whenever possible, at all stages of litigation. Both the Quinault Tribe and the Nation were prevented, at early stages of their cases, from arguing that networks of statutes and regulations established the United States' specific fiduciary duties.[286] In both cases, the Tribes lost on appeal to the Supreme Court when they attempted to prove that a single element of the networks established their claims for relief. It was not until the Supreme Court remanded their cases to lower courts that the Tribes were able to reassert their network arguments. Ultimately, the Supreme Court agreed with the Quinault Tribe; it remains to be seen whether the Nation will enjoy the same success before the Roberts court.

Had the Quinault Tribe argued the merits of its entire network before the Supreme Court in *Mitchell I*, it seems likely that the Court would have held for the Tribe the first time around. Similarly, although the Supreme Court will never hear the Nation's argument concerning the complete network, since its IMLA claim is precluded,[287] it seems reasonable to assume that the Nation's case would have been stronger in *Navajo III* had the Nation been able to introduce its network argument as it appeared in *Navajo VI*. Therefore, American Indian Tribes should be careful to avoid or preempt pretrial efforts by the Department of Justice's attorneys to deconstruct a rights-creating network of statutes and regulations into its individual elements, or to isolate one statute or regulation from the network.

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286. Mitchell v. United States (*Mitchell II*), 463 U.S. 206, 209 (1983).

287. Navajo Nation v. United States (*Navajo IV*), 347 F.3d 1327, 1331 (Fed. Cir. 2003).

CONCLUSION

The events that formed the foundation for the Nation's lawsuit against the United States took place over twenty years ago, but they remain "fresh in the minds of many Navajo leaders, who feel betrayed by their trustee."[288] As evidenced by the amicus briefs filed during *Navajo III* by the Jicarilla Apache Nation, Laguna Pueblo,[289] the Mississippi Band of Choctaw Indians,[290] and the National Congress of American Indians,[291] the question of whether Indian Tribes may rely on the government to fulfill its fiduciary duties concerning mineral leases on Indian land is of enormous significance. Although the Supreme Court did not use *Navajo III* and *Apache* to abrogate the federal government's trust duties to Indian Tribes as many had feared,[292] the Court's denial of the Nation's right to recover damages for the breach of a trust duty that the Nation believed to be indisputably established was "heartbreaking."[293] Keith Harper, an attorney with the Native American Rights Fund, echoed the Nation's feelings about the outcome of *Navajo III* when he said, "[t]he fact that the Supreme Court said you cannot bring an action when there is such a clear duty of loyalty that a trustee is supposed to show a beneficiary should be of grave concern to tribes because of that undermining action a trustee can take."[294] Indeed, as one case note discussing *Navajo Nation v. United States* is titled, "Ubi Jus Incertum, Ibi Jus Nullum: *Where the Right is Uncertain, There Is No Right*."[295]

When the Federal Circuit decided in favor of the Nation in *Navajo VI*, the Nation's leaders began to believe that the Nation might ultimately recover from the economic damage

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288. *Navajo Nation Owed Money for Bungled Lease*, INDIANZ.COM, Sept. 14, 2007, http://www.indianz.com/News/2007/004906.asp.

289. Brief for the Jicarilla Apache Nation and the Pueblo of Laguna as Amici Curiae Supporting Respondent at 3–4, Navajo Nation v. United States (*Navajo III*), 537 U.S. 488 (2003) (No. 01-1375).

290. Brief for the Mississippi Band of Choctaw Indians as Amicus Curiae Supporting Respondent at 1, *Navajo III*, 537 U.S. 488 (No. 01-1375).

291. Brief for the National Congress of American Indians as Amicus Curiae Supporting Respondent at 4, *Navajo III*, 537 U.S. 488 (No. 01-1375).

292. McAllister, *supra* note 268.

293. *Reach of Supreme Court's Trust Rulings Debated*, INDIANZ.COM, Apr. 14, 2006, http://www.indianz.com/News/show.asp?ID=2003/04/14/scourt.

294. *No Easy Victory with Supreme Court Trust Rulings*, INDIANZ.COM, Mar. 5, 2003, http://www.indianz.com/News/show.asp?ID=2003/03/05/trust.

295. Stone, *supra* note 24.

caused by Lease 8580's below-market royalty rate. Former Navajo Nation President Kelsey Begaye said, "It's very good to hear that the [N]ation got what it had coming all this time, being neglected and not getting what it's supposed to get."[296] Likewise, current President Joe Shirley, Jr. explained, "I feel like they've been doing an injustice to us all along, and right now we're beginning to call their hand."[297] Nevertheless, as the Nation awaits the outcome of its case's second trip to the Supreme Court, all Indian Tribes subject to the Secretary of Interior's authority over their mineral leases remain fearful that a narrow construction of the government's trust responsibilities will undermine both their tribal sovereignty and their ability to enforce the government's trust duties.

American Indian Tribes should not have to sacrifice the exercise of sovereignty over their business ventures, development of their natural resources, and general economic progress in order to enjoy the protections of the trust doctrine, a cornerstone of the federal-tribal relationship. Yet the uncertainty that Indian Tribes now face as to whether they may rely on federal courts to enforce the United States' trust duties implicates an even more tenuous position. As long as the potential remains for courts to interpret congressionally-delegated authority over Indian Tribes so narrowly that there remain no specific fiduciary duties pertaining to the *exercise* of that authority, both tribal sovereignty and tribal economic development remain at risk.

296. *Navajo Nation Owed Money for Bungled Lease*, *supra* note 288.
297. *Id.*