No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Federal Circuit has held the United States liable as a matter of law for up to $600 million based on a breach-of-trust claim (App. 36a), notwithstanding this Court's prior decision in this very case, which reversed the Federal Circuit by "hold[ing] that the Tribe's claim for compensation from the Federal Government fails." *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003). This Court's 2003 decision—which squarely rejected the Tribe's reliance on the same "network" of statutes and regulations on which the Federal Circuit relied below—foreclosed revival of the Tribe's claim on remand, and, for that reason alone, review and summary reversal are warranted. Pet. 16-19.

Even if *Navajo* did not completely bar further litigation on the Tribe's claim, the Federal Circuit's decision contravenes this Court's prior precedents, reaffirmed in the Court's decision in this very case, establishing a carefully delineated two-step process for evaluating Indian Tucker

Act claims. Those decisions require (at step one) that the plaintiff identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the Government has allegedly violated. *Navajo*, 537 U.S. at 506; see Pet. 21-22. The Federal Circuit's decision now departs even more significantly from those decisions than its earlier ruling that justified review and reversal in *Navajo*. Pet. 20-33. Review is thus, regrettably, again required. Respondent's submission that this Court should deny review is unavailing.

A. This Court's Prior Decision In This Case Foreclosed Further Litigation On The Tribe's Breach-Of-Trust Claim

This Court's 2003 decision in this case resolved the Tribe's breach-of-trust claim and foreclosed its revitalization on remand. The Tribe concedes (at 18) that it based its argument in this Court on the "network" of statutes and regulations beyond the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, that the Federal Circuit relied upon on remand. Indeed, the Tribe's lead argument in its merits brief—after an introductory discussion of general principles concerning the Indian Tucker Act's waiver of sovereign immunity—was that those statutes and regulations govern every aspect of coal leasing and bring this case under *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), where the Court found liability, rather than *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). See *Navajo* Resp. Br. 20-29. This Court squarely rejected the Tribe's contentions, finding "no warrant from *any relevant* statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," 537 U.S. at 514 (emphasis added); "[c]oncluding that the controversy here falls within *Mitchell I*'s domain," *id.* at 493; and "hold[ing] that

the Tribe's claim for compensation from the Federal Government fails," *ibid.* See Pet. 16-19.

The Tribe incorrectly contends (at 17-19) that *Navajo* did not resolve whether its breach-of-trust claim could have been supported by the non-IMLA provisions discussed in the Tribe's merits brief because the question presented in *Navajo* prevented that inquiry, and *Navajo* focused only on IMLA. First, the question presented in *Navajo* asked whether the Federal Circuit "properly held that the United States is *liable* to the Navajo Nation * * * for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, *without finding* that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA." 01-1375 Pet. I (emphasis added). This Court answered that question by concluding that some violation of a "liability- imposing provision of the IMLA"—the only statute addressing the approval of the economic terms of the lease—was necessary to hold the United States liable; and, finding no such violation, it "h[e]ld that the Tribe's claim for compensation"—not just an argument supporting that claim—"fails." 537 U.S. at 493.

While the Federal Circuit's 2001 decision did not address every provision in the Tribe's purported "network," App. 88a-117a, the Tribe pressed its network theory prior to and during this Court's review. App. 18a, 55a. The Tribe was therefore entitled to rely in this Court on "grounds that were raised below" even if "these alternative grounds were not reached" by the court of appeals, *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997), and it did so. The Court ultimately found "no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty" that might support the Tribe's claim. 537 U.S. at 514.

Of course, *Navajo* did not specifically address by name each and every statute in the Tribe's "network," but that simply reflects the fact that the provisions arguably relevant to the Secretary's actions surrounding his approval of the Tribe's coal-lease royalty terms under IMLA did not include the ones left unmentioned, such as the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C.631 *et seq.*, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, on which respondents rely. See Pet. 18; *id.* at 13, 28-31. Indeed, *Navajo* expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" beyond IMLA, and it specifically ruled that two such statutes—25 U.S.C. 399 (which "is not part of the IMLA") and the Indian Mineral Development Act of 1982—did not establish duties relevant here. 537 U.S. at 509.

The Tribe's assertion (at 20) that *Navajo* followed the same "course" as *Mitchell I* also lacks merit. *Navajo* itself noted that *Mitchell I* limited its ruling to a single statute and expressly "left open" the possibility that "other sources of law might support the plaintiffs' claims." *Navajo*, 537 U.S. at 504 (citing *Mitchell I*, 455 U.S. at 546 & n.7). The course followed in *Navajo* was quite different: The Court unqualifiedly "h[e]ld that the Tribe's *claim* for compensation from the Federal Government fails." *Id.* at 493 (emphasis added). That holding was not subject to reopening by the Federal Circuit based on a renewed analysis of the same statutory and regulatory provisions that the Tribe relied upon in this Court.

Respondent cannot avoid that result by pointing (at 19-20) to the Court's disposition of "remand[ing] for further proceedings consistent with [its] opinion," 537 U.S. at 514. Such dispositions have "the effect of making the opinion a part of the mandate" and, as such, may only permit the per-

formance of "ministerial dut[ies]" on remand. *Gulf Ref. Co.* v. *United States*, 269 U.S. 125, 135-136 (1925). That was the case here. Summary reversal would therefore be appropriate.

B. The Federal Circuit's Ruling Is Flatly Inconsistent With *Navajo* And This Court's Decisions Reaffirmed in *Navajo*

Under *Navajo* and its predecessors, damage claims under the Indian Tucker Act are actionable only if they allege (1) the violation of "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that (2) may be fairly read as mandating a remedy in money damages. 537 U.S. at 506. The court of appeals plainly erred at the first stage of the analysis in concluding that Indian Tucker Act claims may be based on violations of common-law trust principles divorced from violations of *specific* rights-creating or duty-imposing statutory or regulatory provisions, based on generalized notions of "control" derived from statutes governing matters *other than* mineral-lease approvals and royalty rates. Pet. 22-28; see App. 24a-38a.

1. The Tribe asserts (at 20-21) that the Federal Circuit grounded its decision in specific rights-creating or duty-imposing statutes and regulations, but it tellingly does not identify any such provisions or explain how any statutory or regulatory text imposes such duties. It instead asserts (at 25-26) that federal law provides the vague "contours" of unspecified "management duties" and that "general trust law helps to determine their nature and scope" by requiring that the government meet "common-law trust * * * standards of care, loyalty, and candor in its administration of Navajo coal." The dispositive point, however, is that the Secretary did not "manage" or control the Tribe's coal *leasing decision* in this case. IMLA governs *that* decision, and

Navajo itself held that "Secretarial control over leasing" here would be "directly at odds with" IMLA, which "giv[es] Tribes, not the Government, the lead role in negotiating mining leases." 537 U.S. at 508. "[I]mposing fiduciary duties on the Government here" would thus contravene one of IMLA's "principal purposes." *Ibid.*

The Tribe's reliance (at 21-24) on *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *Mitchell II* is misplaced. *Navajo* emphasized that *Mitchell II* found the statutes and regulations before it "clearly g[a]ve the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*" and that those provisions and the government's actual "daily supervision" over timber harvesting and management "combined" to place "[v]irtually every stage of the process" under exclusive "federal control." 537 U.S. at 505 (emphasis added). Such statutes and regulations, the Court explained, "establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Ibid.* Thus, as *Mitchell II* shows, each of the plaintiffs' claims tracked specific duty-creating provisions in statutes and regulations governing federal timber management. See Pet. 25; 463 U.S. at 210 (describing claims); *id.* at 209, 211, 219-223 & nn.23-28 (discussing statutes and regulations). In this case, however, as *Navajo* held, the governing statute (IMLA) gives the *Tribe* authority to negotiate the terms of its coal leases and does not impose supervening trust duties upon the Secretary. See Pet. 26-27.

Apache addressed a unique, single-sentence statute that allowed the government to occupy and use the premises for its *own* (not the tribe's) purposes and at the same time "expressly and without qualification" employed the term "trust" as "a term of art," thereby establishing "fiduciary obligations" on the government as "caretaker" in its own

"daily occupation" and "direct use of portions of the trust corpus." *Apache*, 537 U.S. at 480 (Ginsburg, J., concurring). Those unique features of the applicable statute and the government's distinctive role are wholly absent here, and *Apache* therefore has no bearing on this case, which is—necessarily—controlled by *Navajo*. *Ibid.* Indeed, both *Navajo* and *Apache* were decided on the same day, and Justice Ginsburg, who authored *Navajo*, joined *Apache*—a 5-4 decision—based on her understanding that *Apache* "is not inconsistent" with *Navajo* for these reasons. *Id.* at 479-480; see Pet. 23-24.

The Federal Circuit therefore clearly erred in holding that "specific control of coal leasing is not a prerequisite for a breach of trust claim in this case" and that liability could be based on statutes addressing other subjects. App. 31a-32a; see Pet. 13, 27-28. Respondent makes no effort to defend that deeply flawed conclusion and simply tries to dismiss it in a footnote (at 25 n.11) as "dicta." The Tribe nonetheless continues to cite *non-leasing* provisions to justify the Federal Circuit's imposition of trust duties even though IMLA, the Act of Congress that controls, imposed none.

2. The Tribe (at 8-9, 31), like the court of appeals (App. 39a-40a, 41a), asserts that a provision of SMCRA, 30 U.S.C. 1300(e), and an implementing regulation that simply reiterated the text of Section 1300(e) required the Secretary to include whatever royalty terms the Tribe requested in the lease amendment. Those provisions, however, manifestly apply only to environmental provisions and have nothing to do with royalties. Pet. 30-31.

The Tribe also contends (at 25, 27-30) that the Rehabilitation Act creates duties that the Secretary breached. But the Act's provision for informing the tribal council about certain matters, on which the court of appeals relied, App. 38a, applied to the "*program authorized* by [the Act],"

25 U.S.C. 638 (emphasis added), which ended around 1964. See Pet. 28-29. Although Lease 8580 may have been a product of coal "[s]urveys and studies" performed earlier under the program, 25 U.S.C. 631(3), and, in that limited sense, might be said to be a "centerpiece" of the Act's resource-development goal, C.A. App. 3575; App. 62a, nothing suggests that the terms or negotiation of the lease itself were in any way *governed* by the Rehabilitation Act. Cf. *Navajo*, 537 U.S. at 493, 495 (Tribe's coal-mining leases are "covered by the IMLA"). Moreover, the Tribe's newly found position (at 27, 30; cf. Pet. 31) that Lease 8580 "was drafted and approved by the Department of Interior under" Section 635 of the Act, 25 U.S.C. 635(a), was not endorsed by the court of appeals, and the Tribe in fact conceded long ago in this case that the lease amendments on which it bases its claim "are governed only by the IMLA." Pet. 31.

In any event, it is clear that Lease 8580 was issued in 1964 under IMLA, and could not have been issued under Section 635, which addresses leasing for purposes other than mining. See n.1, *infra*. IMLA provides that tribal mineral leases may be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities," 25 U.S.C. 396a, and Lease 8580 tracks that language nearly verbatim. C.A. App. 278-279 (establishing "term of ten (10) years from the date [of Lease 8580] and for so long thereafter as the substances produced are being mined by the Lessee * * * in paying quantities"). The lease thus extends indefinitely as long as paying mining operations continue and "until the resources are depleted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135, 145 n.10 (1982). In contrast, "[a]ll leases" under Section 635 "shall be for a term of not to exceed twenty-five years," with an optional "renewal for an additional term of not to

exceed twenty-five years." 25 U.S.C. 635(a). Given the latter limitation, Section 635 could not have authorized the open-ended term of Lease 8580. And, in fact, Lease 8580 expressly requires compliance with *IMLA*'s implementing regulations (then 25 C.F.R. Pt. 171) not those for Section 635 (then 25 C.F.R. Pt. 131). C.A. App. 288.[1]

3. The Tribe's assertions and the Federal Circuit's finding of liability as a matter of law for up to $600 million on provisions of the Rehabilitation Act and SMCRA having nothing to do with approval of the mineral-lease royalty rates at issue here underscores the serious adverse consequences of that court's profound errors in disregarding the need to train on a "violation of a specific rights-creating or

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[1] IMLA's regulations were codified in Part 186 from 1938-1957, moved to Part 171 from 1957-1982, and now are in Part 211. Regulations governing leasing under Section 635 for non-mining purposes were codified at Part 171 until 1957, moved to Part 131 from 1957-1982, and are now codified in Part 162. See 22 Fed. Reg. 10,588 (1957); 47 Fed. Reg. 13,327 (1982).

Before Section 635 was enacted in 1950, tribes were authorized to lease trust land for non-mining business purposes for terms of five years or less. 25 C.F.R. 171.2, 171.9 (1949). Because that restriction—which did not apply to IMLA mineral leases, 25 U.S.C. 396a (1946)—discouraged investments of "outside capital," Section 635 was adopted to increase the maximum lease terms. *Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a Subcomm. on Indian Affairs of the House Comm. on Public Lands*, 81st Cong., 1st Sess. 72, 183 (1949). Section 635 thus authorized "long-term leases of lands needed for such purposes as public airports, churches, mission schools, recreational resorts, service stations, factories, warehouses, stockyards and the like," H.R. Rep. No. 1474, 81st Cong., 2d Sess. 5 (1950), including the "development or utilization of natural resources in connection with [such] operations." 25 U.S.C. 635(a); see 21 Fed. Reg. 2562-2563 (1956) (revising 25 C.F.R. 171.6 to reflect enactment of "25 U.S.C. * * * 635"). Leases for mining operations, both before and after the Rehabilitation Act, have been governed by different statutory and regulatory authority.

duty-imposing statute or regulation" governing royalty rates. App. 36a. Indeed, that decision—and the Tribe's attempt to now recast Lease 8580 as actually having been issued under one of the grab bag of statutes in the Tribe's asserted "network"—vividly illustrate the temptations created by such an open-ended regime to search post hoc for principles that some earlier decision might have violated.

The Federal Circuit's approach, if allowed to stand, would also introduce grave uncertainty into the government's daily administration of Indian affairs. Pet. 32-33. Although the Tribe (at 32) finds it "silly" to conclude that uncertainty will result, its assertion that no one could "plausibly claim" that the Secretary might have permissibly taken action favorable to Peabody after meeting with Peabody officials *ex parte* confirms that conclusion. The Interior Department regulations governing its informal approval process imposed no such limitation (see Pet. 5-6); the Tribe itself had similar contacts (Pet. 6-7 & nn.1 and 2); and Members of this Court observed at oral argument in this case that "[e]x parte communications take place all the time" in similar informal adjudications, where one would expect the Secretary to "act fairly" and not simply adopt the position that benefits the Tribe. 01-1375 Oral Argument Tr. at 5-6, 38-40.[2]

The 2005 energy-development legislation and 2006 amendment to SMCRA (30 U.S.C. 1300(j)) that the Tribe cites (at 31) do not counsel against review. No tribe has sought SMCRA regulatory authority under the 2006 legis-

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[2] Contrary to the Tribe's assertion, the summary judgment record does not show that the Department intentionally deceived the Tribe. Compare Br. in Opp. 12, 32 with, *e.g.*, C.A. App. 1447, 1450-1451, 1789 (No. 00-5086). The Tribe's evidence on this and other points was previously before this Court in *Navajo* and, in any event, are not material to the Federal Circuit's legal errors that warrant review.

lation; only one (non-Navajo) tribe has initiated the process of seeking authority under the 2005 legislation, cf. 73 Fed. Reg. 12,808 (2008); and it is speculative whether the Secretary will approve future tribal applications. More fundamentally, review is warranted because the Federal Circuit's analytical *approach* to breach-of-trust claims, which will govern pending and future cases in the Court of Federal Claims (see Pet. 32-33), is fundamentally inconsistent with this Court's decision in this very case and the body of precedent on which it rests, and because the court has held the United States liable as a matter of law on a claim involving up to $600 million in liability. Review is again warranted now that the Federal Circuit has departed even further than it did before from controlling legal principles.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal of the judgment below.

Respectfully submitted.

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