No. 01-1375

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 held that the United States may be liable to the Navajo Nation (Tribe) for up to $600 million in damages for breach of trust in connection with a mineral lease agreed to by the Tribe and a private company, without finding that the government violated any specific statutory or regulatory duty. The Tribe defends that result largely by seeking to recast this Court's *Mitchell* decisions,[1] and to equate the potential liability of the United States for breach of trust with that of a common law trustee. The Court should grant certiorari and, together with *United States* v. *White Mountain Apache Tribe*, cert. granted, No. 01-1067 (Apr. 22, 2002), clarify when the United States may be subject to money damages for breach of an alleged fiduciary obligation owed to an Indian Tribe.[2]

[1] *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

[2] In its statement of the case (Br. in Opp. 2-8), the Tribe seeks to describe various disputed events in the light most favorable to it. But for purposes of determining whether the court of appeals properly concluded that the United States breached a fiduciary duty to the Tribe, Pet. App. 13a, the record at this summary judgment stage must be viewed in the light most favorable to the government. See *Howlett* v. *Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994). Moreover, many of the events discussed by the Tribe have no relation to the basis on which the court of appeals found a

1. Because the Tribe seeks to recharacterize the case before this Court, we begin by restating what the court of appeals held. After concluding that the Indian Mineral Leasing Act (IMLA) and its implementing regulations give the Secretary "control of Indian mineral leasing activities," Pet. App. 10a, the court of appeals found that the Secretary violated a fiduciary duty by "suppressing and concealing" a draft decision by the Deputy Assistant Secretary for Indian Affairs in connection with Peabody's administrative appeal of the BIA Area Director's unilateral setting of a 20% royalty rate under the lease. *Id.* at 11a-12a. The court further held that the government is subject to money damages for that breach. *Id.* at 13a. As Judge Schall emphasized in his separate opinion, however, the court "fail[ed] to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship" under the IMLA. *Id.* at 26a; see *id.* at 28a.[3]

2. The Tribe contends that the court of appeals' decision in this case "faithfully applies" the *Mitchell* decisions. Br. in Opp. 30; see *id.* at 9. As explained in the petition (at 20-25), however, the court of appeals' reasoning is fundamentally incompatible with both *Mitchell I* and *Mitchell II*.

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fiduciary breach. In any event, the question presented does not require the Court to resolve any disputed facts concerning an alleged breach of trust on the part of the government. It instead calls for the Court to decide only whether the court of appeals properly held that the United States may be liable in damages for the alleged breach, even though the court did not identify the violation of any specific statutory or regulatory duty on the government's part.

[3] The Court of Federal Claims reached the opposite conclusion. See Pet. 9-11. That court reasoned that, even though the Tribe had shown "that the Secretary did not act as a proper trustee" under the common law, the Tribe's claim for damages failed because "the [Tribe] fail[ed] to demonstrate a 'breach of a *specific* duty that the [statute or] regulations squarely place on the Secretary." Pet. App. 66a; see *id.* at 75a.

a. The Tribe argues (Br. in Opp. 10-12) that the existence of federal control over an Indian resource is itself sufficient under *Mitchell II* to support a damages claim against the United States for mismanagement of that resource. See Pet. App. 5a. In *Mitchell II*, however, the Court did not look to the existence of federal control in the abstract. Instead, the Court looked to whether the particular statutes and regulations on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose." 463 U.S. at 219. In other words, even though the Court found the existence of extensive federal control with respect to the management of the Indian resources at issue, it still required the Indian plaintiffs to show the violation of a *specific* statutory or regulatory duty in exercising such control. That requirement follows directly from the text of the Tucker Act itself, which, as relevant here, provides that a claim for money damages against the United States must be founded upon an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491.

b. The Tribe argues (at 12-20) that the federal government has assumed just as much control over Indian mineral leasing as it has over Indian timber management. See Br. in Opp. 13-16. But as explained in the petition (at 20), and as the Court of Federal Claims specifically found, the regulatory scheme at issue in this case "falls far short of [creating] the detailed fiduciary responsibilities of *Mitchell II*." Pet. App. 68a. That is particularly true when it comes to management by the Secretary. Whereas the statutes and regulations at issue in *Mitchell II* gave the federal government "*full* responsibility to manage Indian resources and land for the benefit of the Indians," 463 U.S. at 224 (emphasis added), the IMLA and its implementing regulations give *to the Tribes* the authority to lease mineral resources as they see fit, and assign to the Secretary only a general oversight role in approving such leases. See 25 U.S.C. 396a; Pet. App. 67a

("The Navajo Nation cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process."). Indeed, as explained in the petition (at 17-18), one of the primary purposes of the IMLA was to transfer control over Indian mineral leasing decisions *from* the federal government *to* Indian mineral owners.[4]

In any event, regardless of the difference between the degree of federal control in this case and in *Mitchell II*, this case fundamentally differs from *Mitchell II* in that the court of appeals failed to link the Tribe's damages claims to the violation of any specific duty established by the regulatory scheme. The damages claims in *Mitchell II* were carefully predicated on the violation of specific statutory and regulatory duties. The Indian plaintiffs in *Mitchell II* alleged, *inter alia*, that the Secretary "failed to obtain a fair market value for timber sold"; "failed to manage timber on a sustained-yield basis"; "failed to obtain any payment at all for some merchantable timber"; and "exacted excessive administrative fees from allottees." 463 U.S. at 210. Each of those claims tracked specific statutory and regulatory duties.[5] By contrast, as Judge Schall explained below, the court of

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[4] The government did not, as the Tribe contends (Br. in Opp. 12), "concede[]" that it exercises the type of control with respect to Indian minerals that it does with respect to Indian timber. Rather, the government noted below that to the extent that the IMLA regulations may be extensive in specific aspects (such as rights-of-way and surface exploration), they are *not* with respect to others, in order to underscore the dearth of requirements governing the specific aspect of Indian mineral leasing at issue in this case—*i.e.*, the approval of leases and lease amendments. C.A. App. 2108, 2986.

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

appeals in this case "fail[ed] to find a breach of a specific fiduciary responsibility" assumed by the government in a statute or regulation, much less one that mandates the payment of damages for a violation. Pet. App. 26a. That clear departure from the analytical framework of *Mitchell II* warrants this Court's review.

Furthermore, the court of appeals made no effort to tie the alleged breaches of trust even to *general* duties imposed by the IMLA and its implementing regulations. In finding the breach of a fiduciary duty that would support a claim for damages, the court of appeals focused on the Secretary's actions in connection with Peabody's administrative appeal in 1984 of a decision the parties later agreed to vacate (see Pet. 7-8), rather than the reasonableness of the royalty rate and the full package of lease amendments that were actually agreed to by the parties and approved by the Secretary in 1987. The Secretary's actions with respect to the pending administrative appeal were governed by the Department's general procedural rules and the Administrative Procedure Act, which plainly do not authorize the payment of damages for a violation (if indeed there were any violation in this case), and not by the IMLA provision (25 U.S.C. 396a) governing approval of Indian mineral leases or amendments. See Pet. 23-24. Moreover, the Tribe itself does not seek to set aside the lease amendments to which they agreed in 1987 because, as the Tribe recognized below, "there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation." Pet. App. 50a.

c. Although the court of appeals did not believe that it was necessary to tie the Tribe's damages claims to a violation of a specific statutory or regulatory duty, the Tribe attempts to do so, but fails. The Tribe asserts (Br. in Opp. 17) that "both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians." The statutory language in 25 U.S.C. 396b on which the Tribe relies, however, governs the circumstances in which the Secretary may *reject* the highest bid for *oil and gas* leases; the statute governing the *approval* of *coal* leases (25 U.S.C. 396a) does not contain any comparable language. And the version of the regulation cited by the Tribe (25 C.F.R. 211 (2001)) was not promulgated until 1996, more than a decade *after* the events at issue in this case. See Pet. 22. Moreover, whereas that regulation now obligates the Secretary to find that a lease is "in the best interest of the Indian mineral owner" when it has a royalty rate *less* than the minimum rate for leases of federal coal, the regulation notably does not require the Secretary to make such a finding before approving a lease—like the one at issue here—with a rate equal to or more than the minimum federal rate. 25 C.F.R. 211.43(b) (2001). The governing regulations thus refute the notion that the Secretary is obligated by the IMLA to ensure that every proposed lease agreed to by a Tribe will maximize the return to the Tribe. See *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989); Pet. 16-19.[6]

Indeed, in stark contrast to the particular statutory and regulatory provisions at issue in *Mitchell II*, see 463 U.S. at 222, neither the IMLA nor its implementing regulations establish any specific duties governing the Secretary's approval of a lease or lease amendment, except to the extent that they establish a minimum royalty rate for coal leases (now set at the minimum rate for federal coal leases). 25

[6] Even if the IMLA did impose a duty on the part of the Secretary to act in the best interests of Indian mineral lease owners, that would not automatically lead to the conclusion that a breach of such a vague and generalized duty would give rise to a claim for money damages. As discussed in the petition (at 17, 19), in *Mitchell I* this Court held that the Indian plaintiffs failed to state a claim for money damages even though the statute in that case expressly obligated the United States to hold allotments "in trust for the sole use and benefit of [Indian allotees]." 445 U.S. at 541. The Tribe's brief in opposition all but ignores *Mitchell I*. Although *Mitchell II* added to the foundation laid by *Mitchell I*, it in no way overrides *Mitchell I*.

C.F.R. 211.15(c) (1985 & 1987); 25 C.F.R. 211.43(b) (2001); see Pet. 3 & n.1. The lease amendment at issue in this case met the minimum rate. See Pet. 22 n.10. There is no requirement that the Secretary insist that parties to a proposed Indian mineral lease agree to a higher rate under particular circumstances, and such a requirement would be inconsistent with the central aim of the IMLA—to allow *Indian mineral owners* to negotiate their *own* lease terms, subject only to a backstop protection of approval by the Secretary. See Pet. App. 68a.[7]

The Tribe asserts (Br. in Opp. 6) that "[t]he process required by IMLA for Secretarial approval * * * requires an economic analysis [of a mineral lease] to determine if it were in the Tribe's best interest." But the Tribe does not cite any statute or regulation requiring such an analysis. Moreover, while the Secretary may choose to conduct her own economic analysis in deciding whether to approve a lease, judicial imposition of an economic-analysis requirement would be inconsistent with the statute's focus on permitting Indian mineral owners to negotiate their own rates, subject to the minimum federal rate. Requiring the Secretary to conduct her own economic analysis of every Indian mineral lease submitted for her approval would always require the Secretary to substitute her own judgment for that of the Indian mineral owner, and all but render the lease negotiations

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[7] The Tribe asserts (Br. in Opp. 20) that the Secretary also violated 25 C.F.R. 211.2 (1985). In pertinent part, that provision authorizes the negotiation of Indian mineral leases, and reserves to the Secretary the right "to direct that negotiated leases be rejected." *Ibid.* It also provides that negotiated leases shall be filed with the Indian agency after 30 days, unless that time is extended by the Area Director. The court of appeals did not rely on, much less find a violation of, Section 211.2. Moreover, as *Mitchell II* makes clear, in order to support a claim for money damages, a statute or regulation must "fairly be interpreted as mandating compensation for damages sustained." 463 U.S. at 219. Nothing about Section 211.2 lends itself to such an interpretation.

between the Indian mineral owner and private parties a technical formality.

d. The Tribe argues that it need not identify any violations of particular statutory or regulatory duties because, "[w]hile the general contours of the government's obligations may be defined by statute, the interstices are filled in through general trust law." Br. in Opp. 12. That argument is directly contradicted by the text of the Tucker Act and by *Mitchell II*, which focus on whether the statutes or regulations at issue "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added). Holding that the United States may be liable in damages for the violation of any duty discoverable in the "interstices" of the law of trusts would vastly expand the potential liability of the United States for breach of trust, not to mention conflict with bedrock principles of sovereign immunity. See Pet. 14-15. And it would leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid the imposition of damages claims.

3. The Tribe suggests that review at this stage of the case is "unnecessary and premature." Br. in Opp. 30. But the fact that the *amount* of damages has yet to be determined in no way alleviates the need for review, just as it did not in *Mitchell I* or *Mitchell II* or, more recently, in *White Mountain Apache Tribe*, No. 01-1067. Under the court of appeals' decision, the United States may be liable for up to $600 million in damages, nearly six times the amount of damages at issue in *Mitchell II*. See 463 U.S. at 211 n.7. There is no reason for the Court to require lengthy proceedings on damages, including on the historical or present value of the comprehensive package of lease amendments negotiated more than 15 years ago, when a serious question exists as to the court of appeals' threshold liability ruling. And there is no merit to the Tribe's suggestion (Br. in Opp. 30) that the

Court wait to see if the United States "disagrees" with the actual damages award that would be entered, when the United States' position is that the Tribe has not stated a claim for *any* money damages in the first place.

4. Finally, although the Tribe defends the court of appeals' decision, it does not seriously dispute the importance of this case or the basic issues addressed in the *Mitchell* decisions. Whether statutes or regulations governing Indian resources may subject the United States to suits for money damages is a question of recurring and fundamental importance. Indeed, the Hopi Tribe has filed a suit virtually identical to that filed by the Navajo Nation in this case. See *Hopi Tribe* v. *United States*, No. 00-CV-217 (Ct. Fed. Cl. filed Apr. 18, 2000); Pet. 27-28. The Federal Circuit's decision in this case, like its recent decision in *White Mountain Apache Tribe*, fundamentally misconstrues the basic principles established by this Court for determining when the United States may be liable in damages for breach of trust.

The recent grant of certiorari in *White Mountain Apache Tribe*, No. 01-1067, does not alleviate the need for review in this case. Although both cases generally concern the necessary predicate that an Indian Tribe must establish to bring a claim for damages against the United States for breach of fiduciary duty, they present that issue in quite different contexts. In *White Mountain Apache Tribe*, the court of appeals found that the United States may be liable for money damages under a statute that places property into trust for an Indian Tribe, even though the statute reserves *to the government* the right to use the property for government purposes "for as long as" it deems necessary. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. See No. 01-0167 Pet. at 14-16. The instant case, by contrast, involves a statute providing for the Secretary to approve actions taken *by the Tribe*, and presents an opportunity to decide whether the Tribe in such a case is excused from the need to show the violation of a specific statutory or regulatory duty that can be fairly interpreted as mandating compensation.

The Federal Circuit's recent decisions in *White Mountain Apache Tribe* and in this case demonstrate that this Court's guidance is needed on the proper application of the *Mitchell* principles. Granting certiorari in both *White Mountain Apache Tribe* and this case would provide the Court with an opportunity to address those principles in a comprehensive manner. In any event, the recent grant of certiorari in *White Mountain Apache Tribe* does not detract from the importance of, or need for review in, this case, in which the judgment below subjects the United States to a potential liability of up to $600 million.[8]

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2002

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[8] Contrary to the Tribe's suggestion (Br. in Opp. 12-13), the government did not concede that it has waived its sovereign immunity from suit with respect to the damages claims in this case. In the court of appeals, the government stated that the Court of Federal Claims had jurisdiction to determine whether the Tribe stated a claim for relief under the Tucker Acts, but argued that the Tribe "failed to state a claim that would entitle [it] to relief." Gov't C.A. Br. 1-2. That position was consistent with circuit precedent differentiating between a dismissal for lack of jurisdiction and for failure to state a claim under the Tucker Acts. See *Pawnee* v. *United States*, 830 F.2d 187, 192 n.7 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). In *Mitchell II*, this Court held that when a court concludes that a claim does not fall within the scope of the Tucker Acts, the Tucker Acts' waiver of sovereign immunity does not apply, and the claim is barred. 463 U.S. at 218. The United States has consistently maintained in this case that the Tribe has failed to state a claim under the Tucker Acts and, therefore, that the United States is immune from the Tribe's damages claims.