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Ubi Jus Incertum, Ibi Jus Nullum: Where the Right Is Uncertain, There Is No Right: United States v. Navajo Nation

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Case Note

Ubi Jus Incertum, Ibi Jus Nullum:
Where the Right Is Uncertain, There Is No Right:
United States v. Navajo Nation

Jason Stone*

I. INTRODUCTION	149
II. HISTORICAL BACKGROUND	150
III. THE FACTS OF <i>UNITED STATES V. NAVAJO NATION</i>	153
IV. PROCEDURAL HISTORY	156
V. THE SUPREME COURT MAJORITY HOLDING	158
VI. DISCUSSION OF CONTROLLING LAW.....	159
A. <i>Mitchell I</i>	159
B. <i>Mitchell II</i>	161
VII. ANALYSIS AND SUPPORT OF THE MAJORITY HOLDING	163
VIII. CONCLUSION	165

I. INTRODUCTION

*United States v. Navajo Nation*¹ concerns the role of the Secretary of the Interior in the management of Indian natural resources under the Indian Mineral Leasing Act of 1938 (IMLA)². Conflicts and issues associated with Indian sovereignty and United States trust obligations in resource management are nuanced with history, statutory construction, and legislative intent. Disparate interpretations have led these conflicts to the courtroom. *United States v. Navajo Nation* deals particularly with the issue of whether a tribe can recover money damages from the United States under the IMLA for an alleged breach of trust relating to coal leases negotiated between an Indian tribe and a private lessee.³ This case note will examine the legal history and the specific facts to evaluate the United States Supreme Court's interpretation and application of the governing law to the facts in *United States v. Navajo Nation*.

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1. *U.S. v. Navajo Nation*, 537 U.S. 488 (2003).

2. 25 U.S.C. § 396(a)-(g) (2000).

3. 537 U.S. at 493.

II. HISTORICAL BACKGROUND

The Indian Reorganization Act of 1934 (IRA) officially marked the end to the allotment era.⁴ Congress intended the IRA to foster both Indian economic development and parity between Indians and whites by encouraging Indian self-government and reducing tribal dependence on services and benefits traditionally supplied by state governments.⁵ After passing the IRA, Congress legislated and made policy for the Indian tribes, but left the individual Indian in the care of the tribe.⁶ This was a significant policy reversal in the face of over half a century of legislation and treaties aimed specifically at assimilating Indians into western society and culture.

The IRA was intended to promote tribal self-government. It authorized tribes to organize for their common welfare and adopt appropriate constitutions and bylaws. These articles became effective upon ratification by majority vote of each tribe and upon approval by the Secretary of the Interior.⁷ Once incorporated under the IRA, a tribe was authorized to manage and dispose of tribal property with certain limitations.⁸ Tribes that organized governments under the IRA were vested with powers to prevent the lease of tribal lands and assets without the consent of the tribe and could negotiate with Federal, State, and local governments.⁹

Under the IRA, however, tribal self-government was subject to broad powers granted to the Secretary of the Interior. The Secretary of the Interior controlled the organization of tribes incorporated under the IRA. The Secretary approved tribal constitutions and bylaws, established the electoral process, called elections, and certified tribal election results.¹⁰ The Secretary had authority to approve exchanges of land when the exchange was, in the Secretary's judgment, expedient and beneficial.¹¹ The Secretary was also given authority to acquire interests in land, water rights, or surface rights to provide land and resources for Indians.¹² Congress directed the Secretary to establish regulations to manage Indian forestry units and livestock ranges.¹³ The IRA authorized the Secretary to restore subsurface

4. The allotment era began in 1887 when Congress enacted the General Allotment Act codified at 25 U.S.C. §§ 331-358 (2000). The allotment era came to a close with the passage of the Indian Reorganization Act codified at 25 U.S.C. §§ 461-479 (2000). See Judith v. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L.J. 541, 557 (1994).

5. *Blackfeet Tribe v. Mont.*, 729 F.2d 1192 (9th Cir. 1984) (hereinafter, *Blackfeet Tribe*).

6. *U.S. v. St. Tax Comm. of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976).

7. 25 U.S.C. § 476(a)(1) (2000). "The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, that such charter shall not become operative until ratified by the governing body of such tribe." 25 U.S.C. § 477 (2000).

8. In 1990, § 477 was amended limiting leases to "twenty-five years of any trust or restricted lands" instead of ten years. *Id.*

9. 25 U.S.C. § 476(e) (2000).

10. 25 U.S.C. § 476(a)-(d) (2000).

11. 25 U.S.C. §§ 463(e), 464(c) (2000).

12. 25 U.S.C. § 465 (2005).

13. 25 U.S.C. § 466 (2005).

rights in mineral strip lands to tribal ownership regardless of whether an entry of a claim had been made or mining operations had begun.¹⁴

Initially, the Trade and Nonintercourse Act of 1834 (TNIA) protected Indian mineral resources from non-Indian mining. TNIA required all purchases, grants, leases, or other conveyance of property rights to be done by treaty or convention.¹⁵ Under TNIA, Indians could not authorize the alienation of their land or resources.¹⁶ TNIA required explicit Congressional approval for non-Indians to conduct mining operations on any lands held or claimed by Indians.¹⁷ Third parties who negotiated a lease directly with Indian tribes were fined.¹⁸ The United States used the threat of military force to prevent settlers from trespassing and mining on Indian lands. In 1874 the United States Army was dispatched to the Black Hills of South Dakota to prevent prospectors and settlers from trespassing on Indian lands.¹⁹

During the allotment era, however, Congress passed a series of mineral leasing acts that relaxed TNIA Congressional oversight of Indian land transactions. These acts allowed alienation of minerals located in Indian lands without Congressional sanction. The Act of February 28, 1891 allowed mining on allotted lands bought and paid for by Indians "upon such terms and conditions as the agent in charge may recommend."²⁰ These leases were subject to approval by the Secretary of the Interior and could be assigned only to lands not needed for farming or other agricultural purposes.²¹

In the following years, Congress passed a series of acts that expanded federal control. After allowing mineral leases on allotted lands upon the approval of the Secretary,²² Congress expanded mineral leasing to unallotted lands²³ within Indian reservations in the western United States.²⁴ Con-

14. *Rundle v. Udall*, 379 F.2d 112 (D.C. Cir. 1967).

15. 25 U.S.C. § 177 (2000).

16. *U.S. v. Cook*, 86 U.S. 591, 592-93 (1873).

17. *Cayuga Indian Nation of N.Y. v. Cuomo*, 667 F.Supp. 938, 944 (N.D.N.Y. 1987) (citing *Oneida Indian Nation of N.Y. v. Oneida County*, 434 F.Supp. 527 (N.D.N.Y. 1977)).

18. 25 U.S.C. § 177 (2000).

19. The Black Hills were reserved to the Sioux by the terms of the Fort Laramie Treaty. The United States Army was obligated to prevent prospectors and settlers from trespassing and mining gold on lands reserved to the Indians.

"[I]n September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry. . . directing him to use force to prevent companies of prospectors from trespassing on the Sioux Reservation. At the same time, Sheridan let it be known that he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians." *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 377-78 (1980) (citations omitted).

20. 25 U.S.C. § 397 (2000).

21. *Id.*

22. 25 U.S.C. § 396 (2000) (first enacted in 1909).

23. The General Allotment Act, ch. 119, 24 Stat. 388 (1887), was enacted to break up Indian lands reserved by treaty into private ownership. The allotted lands were held in trust with the intention that they would then be patented in fee. Unallotted lands are those lands reserved under treaty to Indian tribes, but not allotted under the General Allotment Act. See *Royster*, *supra* n. 4, at 549.

gress extended lease terms from ten years to twenty, and outlined preferential rights in terms of mining locations and lease renewals. Congress also eliminated the tribal consent requirement for leasing in a 1919 Act and authorized the Secretary of the Interior to lease any part of unallotted Indian reservation lands in western states.²⁵

Later amendments empowered the Secretary of the Interior to lease tribal oil and gas. This flurry of Congressional activity, in some instances, resulted in non-Indians acquiring significant Indian mineral resources.²⁶

The Indian Mineral Leasing Act of 1938 (IMLA) was passed, in part, to advance tribal independence and to establish tribal control over mineral leasing.²⁷ Congress cited three purposes for enacting IMLA: (1) to achieve uniformity in tribal leasing matters; (2) to increase Indian authority in granting leases; and (3) to protect Indians' economic return on their property.²⁸ Passage of the IMLA was consistent with the IRA because, while it involved tribal governments in the leasing process, it brought all leasing activities under the supervision of the Secretary of the Interior. The IMLA required Indians to authorize the lease of unallotted tribal land within the reservation for mining and required the Secretary of the Interior to approve the lease.²⁹ A lease could not become effective under IMLA without both the tribe's authorization and the Secretary's approval of the lease.³⁰

The IMLA and administrative regulations required that leases be offered for sale to the highest responsible qualified bidder at public auction or on sealed bids, following proper notice and advertisement. The Secretary of the Interior had the right to reject all bids when it would be in the interest of the Indians to do so. In the event that no satisfactory bid was received, or if the Secretary of the Interior determined that to accept the highest bid would not be in the best interest of the Indians, the Secretary could re-advertise such lease for sale.³¹ The IMLA and associated regulations established uniformity in the leasing process by outlining procedures and requirements for awarding and negotiating the sale of leases.³² Although the provisions of the IMLA and the administrative regulations required an Indian tribe's approval to grant any right to mine on Indian reservation land, the Secretary

24. 25 U.S.C. § 396(a) (2000) (first enacted in 1938).

25. The Secretary of the Interior could lease any part of the unallotted lands on any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. 25 U.S.C. § 399 (2000) (first enacted in 1919).

26. *Royster*, *supra* n. 4, at 550.

27. 25 U.S.C. § 396(a)-(g) (2000).

28. *Blackfeet Tribe*, 729 F.2d at 1199 (citing Sen. Rpt. 75-985 at 2 (July 22, 1937)); *accord* H.R. Rpt. 75-1872 at 1-2 (Mar. 3, 1938).

29. 25 U.S.C. § 396(a) (2000).

30. 25 C.F.R. § 211.20 (2004).

31. 25 U.S.C. § 396(b) (2000). Although the public auction and bidding requirements in § 396(b) only reference leases for oil and gas, similar bidding practices have been extended to mineral leases through administrative regulations. 25 C.F.R. § 211.20 (2004); *see also* 25 C.F.R. § 211.2 (1985).

32. *Royster*, *supra* n. 4, at 560.

of the Interior, as trustee for the Indians, retained extensive authority over the leasing process including the authority to cancel issued permits.³³

Despite the controlling authority of the Government over Indian lands and affairs, there was little recourse for Indian tribes in the event of mismanagement by the Secretary. The United States cannot be sued without its consent.³⁴ However, in 1887, Congress passed the Tucker Act which allowed non-Indian parties to assert claims against the Government founded upon the Constitution, any Act of Congress, or any administrative regulation. It also included claims based upon contracts with the United States.³⁵ It was not until the passage of the Indian Claims Commission Act in 1946 that the United States waived immunity for similar claims made by Indians.³⁶ The Indian Claims Commission Act is commonly referred to as the Indian Tucker Act because it established for Indians the same opportunities provided in the Tucker Act. After the passage of the Indian Claims Act, it was no longer necessary for Congress to pass special jurisdictional acts for Indians to secure a court's judicial determination on any misappropriation of Indian funds or property by federal officials.³⁷

While Congress intended to encourage tribal self-government, the law has sometimes failed to support that goal. Although some decisions on the judicial battlefield have resulted in recognition of tribal rights to sue the Secretary of the Interior for damages for breach of trust duties,³⁸ other decisions have denied breach of trust claims based upon fine distinctions.³⁹ These seemingly contradictory decisions demonstrate the need to sharpen the boundaries between tribal rights and the fiduciary responsibilities of the United States.

III. THE FACTS OF *UNITED STATES V. NAVAJO NATION*

The Navajo Nation occupies the largest Indian reservation in the United States, encompassing over 25,000 square miles of land.⁴⁰ The reservation itself is larger than ten of the fifty United States, extending into parts of Utah, Arizona, and New Mexico. There is significant mineral, oil, and

33. In *NRG Co. v. U.S.*, the United States Claims Court held that although tribal approval is necessary for a lease of Indian land, the tribe was deemed to have given its approval for the ultimate grant of a lease when it signed and issued prospecting permits. Cancellation of the permits was exclusively within the authority of the Secretary of the Interior. *NRG Co. v. U.S.*, 24 Ct. Cl. 51 (1991).

34. *U.S. v. Navajo Nation*, 537 U.S. at 502 (citing *U.S. v. Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*)).

35. 28 U.S.C. § 1491(a)(1) (2000).

36. 28 U.S.C. § 1505 (2000).

37. Although the Indian Tucker Act confers jurisdiction, it is not a source for substantive rights. *Mitchell II*, 463 U.S. at 214; *U.S. v. Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*). See also 92 Cong. Rec. 5313 (1946).

38. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); see also *Mitchell II*, 463 U.S. 206; *Glidden Co. v. Zdanok*, 370 U.S. 530, 553 (1962); 28 U.S.C. § 1491 (2000).

39. See generally e.g. *Mitchell I*, 445 U.S. 535.

40. *Petr.'s Br.* at 4 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

natural gas wealth on Navajo reservation.⁴¹ It is reported that coal mined upon the reservation is of exceptional quality and economic value due to high BTU content, low sulfur content, and a favorable mass ratio of coal mine to waste removed.⁴² Each year, the Navajo Nation receives tens of millions of dollars in royalty payments. The Tribe relies heavily upon this revenue to provide basic services, to build up badly needed reservation infrastructure, and support a self-sustaining economy.⁴³

The United States supervises mineral leasing on the reservation under the IMLA and the regulations promulgated under the Act.⁴⁴ Peabody Coal Company (Peabody) mined coal on the reservation under leases covered by the IMLA.⁴⁵ Lease 8580 was negotiated between the Tribe and Peabody⁴⁶ and approved by the Secretary of the Interior in 1964.⁴⁷ At the time of the lease, the administrative rules established minimum royalty rates at ten cents per ton.⁴⁸ Lease 8580 established the royalty rate payable to the Navajo Tribe at thirty-seven and a half cents per ton.⁴⁹ Further, the lease provided that "the royalty provisions of [Lease 8580] are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative."⁵⁰ Any adjustment was to occur upon the twenty-year anniversary of the lease. Further adjustments could be made every ten years thereafter.⁵¹

In 1975, Congress established a minimum rate for coal mined on federal lands.⁵² This rate differed materially from those set by the Secretary of the Interior. The Federal Coal Leasing Amendments Act of 1975 (FCLA) set minimum rates as percentages of the gross proceeds and thus provided for market and economic fluctuations.⁵³ Meanwhile, the minimum rates for mineral leases on Indian lands remained static and inflexible. A side-by-side comparison of the flexible federal land minimum rates with the rigid and static Indian land rates revealed significant inequity. In particular, near

41. *Id.*

42. Resp't's Br. at 2 (Oct. 9, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

43. *Id.*

44. See also 25 U.S.C. §396(a)-(g) (2000); Petr.'s Br. at 2-3 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

45. Peabody entered into three coalmining leases with the Navajo Nation. Two of these leases, Lease 9910 and Lease 5743, contained higher royalty rates than the lease at issue in this case, however neither had a provision for royalty rate review. See Petr.'s Br. at 4 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

46. Peabody executed the lease through its predecessor in interest, the Sentry Royalty Company. Petr.'s Br. at 4 (Aug. 19, 2002), *Navajo Nation*, 537 U.S. 488.

47. Petr.'s Br. at 4 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488; Resp't's Br. at 2 (Oct. 9, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

48. 25 C.F.R. § 211.15(c) (1985).

49. Petr.'s Br. at 4 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488; Resp't's Br. at 2 (Oct. 9, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

50. Petr.'s Br. at 4 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

51. *Id.*

52. 30 U.S.C. 207(a) (2000).

53. 30 U.S.C. 207(a) (established the minimum rates on coal mine on federal lands at twelve and half percent (12.5%) of the gross proceeds).

the twenty-year anniversary of Lease 8580, the lease royalty rate was the equivalent of two percent of the gross proceeds on the lease, as opposed to the twelve and a half percent minimum set by the FCLA.⁵⁴

The tribe made efforts to renegotiate existing mineral leases with Peabody and others.⁵⁵ Lease 8580 provided for reasonable adjustment of the contractual royalty rate by the Secretary of the Interior.⁵⁶ In March of 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary of the Interior and asked him to adjust the royalty rate of Lease 8580 under his contractually conferred authority.⁵⁷ Three months later, in an opinion letter dated June 18, 1984, Donald Dodge, Director of the Bureau of Indian Affairs for the Navajo Area, notified Peabody that the royalty rate would be raised to twenty percent (20%) of the gross proceeds.⁵⁸

In July 1984, Peabody filed an administrative appeal contesting the rate determination. While the appeal was pending, Peabody's Vice President wrote to Interior Secretary Donald Hodel and asked him to either postpone the decision to allow the parties to seek a negotiated settlement or rule in Peabody's favor.⁵⁹ The Tribe reacted by urging Secretary Hodel to reject the request made by Peabody and release an immediate decision in favor of the royalty rate increase.⁶⁰

In July 1985, Peabody representatives met privately with Secretary Hodel. No notice of the meeting was given to the tribe.⁶¹ Secretary Hodel issued a memorandum on July 17, 1985 informing the parties that a decision was not imminent and instructing his Deputy Assistant, John Fritz, to urge the parties to continue with negotiations. In the memo he wrote that it "was not intended as determination of the merits of the arguments of the parties to the appeal."⁶² Secretary Hodel feared that any royalty adjustment without the agreement of the parties would be costly in terms of appeals and would ultimately injure the relationship between the parties.⁶³

On September 23, 1985, Peabody and the Navajo Nation reached a tentative agreement on amendments to Lease 8580. The amendments raised the royalty rates to match those that were customary on other Indian and federal

54. Petr.'s Br. at 5 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488, (Lease 8580 royalties on mined coal was seventeen and a half (17.5) cents more per ton than the regulatory minimum and still resulted in an amount of about two percent (2%) of gross proceeds).

55. *U.S. v. Navajo Nation*, 537 U.S. at 496.

56. *Id.* at 495.

57. *Id.* at 496; Petr.'s Br. at 5 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488, (The Chairman maintained that simple equity required that the royalty rate should not be less than the twelve and a half percent (12.5%) provided for under federal coal leases. The Chairman also sought the Secretary's assistance in securing a voluntary adjustment of the mineral royalties of Leases 9910 and 5743).

58. *U.S. v. Navajo Nation*, 537 U.S. at 496; Petr.'s Br. at 6 (Aug. 19, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

59. *Id.* at 496.

60. *Id.* at 497.

61. *Id.*

62. *Id.* at 498.

63. *Id.* at 497.

lands and recognized the legitimacy of tribal taxation of coal productions. Taxes were capped by stipulation at eight percent. Peabody pledged additional compensation to the Navajo Nation upon amendment approval. Other matters including provisions for future royalty adjustments, payment of back royalties, arbitration procedures, and the establishment of a tribal scholarship fund were also addressed in the agreement.⁶⁴ As part of the agreement, the parties moved jointly to vacate the June 1984 decision that raised the royalty rate to twenty percent.⁶⁵

The Navajo Tribal Council approved the amendments in August 1987. In November 1987 the Navajo Nation and Peabody signed the final agreement and on November 26, 1987 the agreement was officially forwarded to the Department of the Interior for its review and approval as required by IMLA.⁶⁶ Although Lease 8580 had undergone a long negotiation process and resulted in significantly updated lease terms, the review process was completed quickly over the Thanksgiving holiday. Secretary Hodel formally approved the lease amendments on December 14, 1987. On December 18, the royalty adjustment of twenty percent, dating back to June 18, 1984, was formally vacated.⁶⁷

Although the parties reached an agreement regarding the lease, the negotiation process and the actions of the Department of the Interior acting as trustee for the Navajo Nation warrant examination. The Navajo Nation brought a claim against the Government alleging that Secretary Hodel compromised his trust obligations to the tribe when the Secretary met secretly with parties having interests adverse to their trust beneficiary and then misled the beneficiary concerning those events and interests. The Navajo Nation posed that question before the Court of Federal Claims.⁶⁸

IV. PROCEDURAL HISTORY

In 1993, the Navajo Nation filed a complaint alleging that the Secretary's approval of the amendments to Lease 8580 constituted a breach of trust.⁶⁹ The Government and the Navajo Nation both filed motions for summary judgment.⁷⁰

The United States argued that the Navajo Nation lacked standing because the Government owed neither a contractual nor fiduciary duty to the Navajo Nation that could be judicially enforced.⁷¹ The Federal Claims Court could not justify compensation for the Government's fiduciary wrongs. The

64. *Navajo Nation v. U.S.*, 46 Fed.Cl. 217, 223-24 (2000).

65. *U.S. v. Navajo Nation*, 537 U.S. at 500.

66. *Id.*

67. *Navajo Nation v. U.S.*, 46 Fed. Cl. at 224.

68. Respt.'s Br. 13 (Oct. 9, 2002), *U.S. v. Navajo Nation*, 537 U.S. 488.

69. *U.S. v. Navajo Nation*, 537 U.S. at 500.

70. *Navajo Nation v. U.S.*, 46 Fed. Cl. at 219.

71. *Id.* at 220.

Court found the lack of a trust relationship dispositive.⁷² Granting the United States' motion for summary judgment, The United States Court of Federal Claims concluded:

The facts of this case show that the Secretary acted in the best interests of [Peabody] and not in the interests of the beneficiary to whom he owed a fiduciary duty—a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. [The United States] has thus established its right to judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication.⁷³

The Federal Circuit Court of Appeals reversed the Federal Claims Court. It held that although the United States has only a limited trust relationship with the Indian tribes who occupy reservation lands, a fiduciary duty toward the Indians may arise from both specific laws and the level of control exercised by the United States in managing land and resources for the benefit of the Indians.⁷⁴ The Court determined that the statutes and regulations that require the Secretary of the Interior to authorize and supervise leasing activities, as a matter of law, assign to the Secretary control of Indian mineral leasing activities. The court observed that no significant authority remained in the hands of the Indian tribes. All leasing procedures and responsibilities were prescribed by Act of Congress and in the regulations promulgated by the Secretary of the Interior.⁷⁵

The Appellate Court concluded that, as a matter of law, the United States had fiduciary obligations to the Navajo Nation in connection with the coal leases and that a claim for damages for the breach of those obligations was within the jurisdiction of the Court of Federal Claims. The court held that summary judgment in favor of the United States based upon the Navajo Nation's lack of standing was improper and that the Navajo Nation was

72. The court concluded, "[T]he defendant, acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation. Regrettably, we also conclude that the trust relationship necessary for our jurisdiction does not exist, and these violations do not mandate monetary relief, both as required by our jurisdictional precedents. We also conclude that the government owed no contractual duty to the plaintiff. We are thus compelled to deny plaintiff's motion for summary judgment and to grant the government's cross-motion." *Id.* at 219.

73. *Navajo Nation v. U.S.*, 46 Fed.Cl. at 236.

74. *Navajo Nation v. U.S.*, 263 F.3d 1325, 1329 (2001) (The Court pointed out that the difference 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. "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").

75. *Navajo Nation v. U.S.*, 263 F.3d at 1331.

entitled to a determination of damages.⁷⁶ The Court of appeals denied a rehearing and a rehearing en banc. The United States Supreme Court granted certiorari and reversed.⁷⁷

V. THE SUPREME COURT MAJORITY HOLDING

The issue upon appeal to the United States Supreme Court was whether the Navajo Nation had stated a claim against the United States that was judicially enforceable. The Court recognized that for the United States Federal Claims Court to have jurisdiction, the claim must arise under the Constitution, the laws or treaties of the United States, Executive Orders of the President, or would have to be otherwise cognizable in the Federal Claims Court regardless of whether the claimant was an Indian Tribe, band, or group.⁷⁸

For the courts to recognize a claim as judicially enforceable, mere jurisdiction and the general trust relationship between the United States and the tribes are not enough. To have standing, the plaintiffs must invoke a rights-creating source of substantive law that "can fairly be interpreted as mandating compensation by the federal government for the damages sustained."⁷⁹ The Indian Tucker Act alone is insufficient,⁸⁰ although it does provide the necessary waiver of sovereign immunity.⁸¹ The Court ruled that tribes must identify a source of law that established specific fiduciary or other duties, and must allege that the government failed to perform those duties.⁸² Once a source of law is identified, the Court must determine whether, as a matter of law, it can be "fairly interpreted as mandating compensation for damages."⁸³ Analysis of the Court must follow specific rights-creating or duty-imposing statutory or regulatory prescriptions.⁸⁴

Within this rule construct, the question of whether the Navajo Nation had stated a claim against the United States that was judicially enforceable turned on whether the IMLA and the regulations promulgated by the Secretary of the Interior could be fairly interpreted as mandating compensation for the Government's alleged breach of trust regarding Lease 8580. The Court held that they could not.⁸⁵

76. *Id.* at 1333.

77. *U.S. v. Navajo Nation*, 537 U.S. at 502.

78. The United States may not be sued without its consent. The existence of consent is a prerequisite for jurisdiction. *Id.* at 502-503. See also *Claims Commission Act*, 28 U.S.C. § 1505 (2000).

79. *U.S. v. Navajo Nation*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218).

80. *Supra* n. 38.

81. *U.S. v. Navajo Nation*, 537 U.S. at 503; *Mitchell II*, 463 U.S. at 215; see also 92 Cong. Rec. 5313 (1946); *Mitchell I*, 445 U.S., at 538.

82. *U.S. v. Navajo Nation*, 537 U.S. at 506.

83. *Id.*

84. *Id.*; see *Mitchell II*, 463 U.S. at 217 (The court noted that although the requirements call for rights-creating or duty-imposing statutes or regulations, money damages may be inferred from such prescriptions and need not be provided for expressly).

85. *U.S. v. Navajo Nation*, 537 U.S. at 506.

The Court found that the IMLA does not contain, within its provisions or implementing regulations, substantive law that mandates compensation because neither the Act nor the regulations impose fiduciary obligations. The Court found that, although the IMLA requires the Secretary to approve coal-mining leases negotiated between tribes and third parties before such leases become effective, this does not impute full responsibility to manage Indian resources for the Indians' benefit.⁸⁶ The Court determined that the IMLA does no more than establish a bare minimum royalty and cannot be construed as requiring the Secretary to conduct an independent economic analysis of a royalty mutually agreed upon through negotiations between the tribe and a third party.⁸⁷

In regard to Secretary Hodel's intervention as it related to the negotiation of Lease 8580, the Court held that it could not, absent a relevant statute or regulation, conclude that his conduct constituted a breach of a duty for which damages are an appropriate remedy.⁸⁸

VI. DISCUSSION OF CONTROLLING LAW

The decisions of the Supreme Court in *Mitchell I* and *Mitchell II* regarding Government management of Indian resources constitute the controlling law in *United States v. Navajo Nation*.⁸⁹ They are the "pathmarking precedents" on the questions of whether statutes or regulations can be interpreted as mandating compensations by the federal government.⁹⁰

A. *Mitchell I*

Mitchell I addressed alleged mismanagement of timber resources under the General Allotment Act of 1887 (GAA).⁹¹ The GAA authorized the President to allot specified acreage of agricultural and grazing land within a reservation to each Indian residing on that reservation. Title to allotted lands was kept by the United States, and the land was held in trust⁹² for the benefit of the allottees.⁹³

The plaintiffs in *Mitchell I* were descendants of the Indians of several tribes who originally occupied the Pacific coastal region north of the Co-

86. "The Secretary is neither assigned a comprehensive managerial role nor . . . expressly invested with responsibility to secure the 'needs and best interests of the Indian owner and his heirs.'" *Id.* at 507 (quoting *Mitchell II*, 463 U.S. at 224 (quoting 25 U.S.C. § 406(a))).

87. *U.S. v. Navajo Nation*, 537 U.S. at 511.

88. *Id.* at 514.

89. *Id.* at 493.

90. *Id.* at 503.

91. *Id.* at 503-504; *General Allotment Act of 1887*, 25 U.S.C. § 331 et seq. (1976 ed.) (as amended); *Mitchell I*, 445 U.S. at 536-37.

92. Senator Dawes made an amendment to the GAA in 1882 to include the provision that the United States would hold the allotted lands in trust so that the land would be protected from state taxation. *Mitchell I*, 445 U.S. at 543-44.

93. *Mitchell I*, 445 U.S. at 536-37, 540-41.

lumbia River. In 1859, the Government ratified the Treaty of Olympia,⁹⁴ in which some 200,000 acres within the Quinalt's territory was reserved to the tribe. Because the reservation land was heavily forested, none of the non-Quinalt Indians moved to the reservation.⁹⁵

Pursuant to the Treaty of Olympia, an Executive Order, and the GAA, the Government began, in 1905, to allot land within the reservation in trust to individual Indians, including Indians who relocated to the reservation. By 1933, the reservation had been completely allotted. Each allottee received a deed stating that the United States would hold the allotted land in trust for twenty-five years for the sole use and benefit of the Indian and his heirs.⁹⁶ Although it was intended that allottees would reside on their allotments and farm or raise livestock, it was practically impossible to do so because the land was so heavily forested. The allotted land was largely useless, except for timber resources.⁹⁷

The allottees brought claims against the United States to recover damages for alleged mismanagement of timber resources found on the reservation. The Indian claimants asserted standing based upon the jurisdictional rule found in the Indian Claims Commission Act which requires that claims arise under the Constitution, laws, treaties, or Executive orders of the President⁹⁸ for substantive rights enforceable against the United States for money damages.⁹⁹ The Court of Claims held that the GAA created a fiduciary duty on the part of the United States to manage the timber resources properly. The Court of Claims assumed jurisdiction and recognized the Indian claimants' standing.¹⁰⁰

Upon appeal, however, the Supreme Court determined that two facts conclusively established that the GAA did not create a fiduciary duty. First, the Act indicated that the Indian allottee, and not a United States representative, was responsible for using and managing the land.¹⁰¹ Second, the Act contained no provisions directing the Secretary how to manage Indian resources.¹⁰²

The Court announced that the GAA does not unambiguously provide that the United States has undertaken full fiduciary responsibilities regarding the management of allotted lands. It determined the GAA indicated the Indian

94. Respt. Br. at 2 (Sept. 24, 1979), *Mitchell I*, 445 U.S. 535.

95. *Id.* at 3.

96. *Id.* at 3.

97. *Id.* at 4.

98. *Indian Claims Commission Act*, 28 U.S.C. § 1505 (2000).

99. In *U.S. v. Testan*, 424 U.S. 392, 398 (1976), the Court stated that "[T]he Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists" (citing *Eastport S.S. Corp. v. U.S.*, 372 F.2d 1002, 1007-1009 (1967)).

100. *Mitchell I*, 445 U.S. at 537-38.

101. *Id.* at 542-43.

102. *Id.* at 545.

allottee would occupy the land as a homestead for his personal use in agriculture and grazing. The allotments were selected by the individual Indians to secure the improvements made by the individual Indian to their land allotment. Consequently, the Court held that the Indian allottee, and not a representative of the Government, was responsible for the use and disposition of the allotted land.¹⁰³

With regard to the United States' policy of holding Indian lands in trust, the Court pointed to the congressional record and determined that Congress's intent was merely to prevent alienation of the Indian lands and immunize the land from state taxation. Congress did not intend to have the Government control use of the land and be subject to money damages for breach of fiduciary duty. The Court noted that subsequent legislation, and not the GAA, empowered the Secretary of the Interior to sell timber on unallotted lands and apply all net proceeds to the benefit of the Indians, and authorized the Secretary to consent to the sale of timber sales by the owner of Indian land held in trust.¹⁰⁴

Because the GAA lacked express provisions indicating that the United States was to manage Indian resources, the Supreme Court reversed the Court of Claims. In conclusion, the court wrote, "[a]ny right of the [Indians] to recover money damages for Government mismanagement must be found in some source other than the Act."¹⁰⁵

B. *Mitchell II*

Three years later, a source of substantive rights other than the GAA was found in *Mitchell II*.¹⁰⁶ The Court concluded that timber management statutes and regulations were sufficient to establish comprehensive Government responsibilities in managing and harvesting Indian timber.¹⁰⁷ The Court also recognized fiduciary responsibilities arising from Government control and management relating to rights-of-way.¹⁰⁸

Statutes and regulations outlined the Secretary's responsibilities in regard to timber management.¹⁰⁹ Because Congress recognized that timber was often the only valuable part of an allotment and the only source of revenue from the allotment for the support of the Indian, Congress empowered the Secretary of the Interior to sell the timber on Indian lands.¹¹⁰

The Department of the Interior promulgated regulations that detailed the Department's management responsibilities and control over Indian for-

103. *Id.* at 542-43.

104. *Id.* at 545.

105. *Id.* at 546.

106. *Mitchell II*, 463 U.S. at 228.

107. *Id.* at 222 (citing 25 U.S.C. §§ 406-407, 466 (1982); 25 C.F.R. Part 163 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

108. *Id.* at 223.

109. 25 U.S.C. §§ 406-407 (2000) (amended 1964).

110. *Mitchell II*, 463 U.S. at 219-20.

ests.¹¹¹ The regulations addressed nearly every aspect of forest management including the size of sales, contract procedures, advertisements, methods of billing, deposits, bonding requirements, administrative fees and deductions, procedures for sales by minors, allowable heights of tree stumps, rules for marking and scaling trees, allowable tree diameters, and the percentage of trees to be left as a seed source. Secretarial approval of timber sales was expressly conditioned upon compliance with these regulations.¹¹²

Congress expressly directed the Department of the Interior to manage Indian forest resources on the principle of sustained-yield management.¹¹³ This method mandated the proper and permanent management of the Indian forests to "assure that the Indian forests will be permanently productive and will yield continuous revenue to the tribes."¹¹⁴

The regulations promulgated under the 1934 Act were specific and comprehensive to assure that Indians received the benefit of profits realized through the management of the forest. Specifically, the regulations forbade clear-cutting of large contiguous areas, and required timber companies logging Indian forests to develop long-term working plans for major reservations, revegetate timber harvest areas, and mitigate erosion and soil transportation.¹¹⁵

The Court found that the Department of Interior's control over grants of rights-of-way on Indian lands held in trust was indicative of a trust relationship. Congress empowered the Secretary to grant rights-of-way so long as the tribal or individual Indian landowner consented and received appropriate compensation.¹¹⁶ Regulations required applicants for a right-of-way to deposit an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way with the Secretary. The Secretary determined the adequacy of the compensation and kept a special account to hold deposits for distribution to Indian landowners.¹¹⁷

The Court distinguished *Mitchell I* from *Mitchell II*. The Tribal claimants in *Mitchell II* were successful because, unlike the bare trust created by the GAA in *Mitchell I*, the statutes and regulations cited in *Mitchell II* clearly vested the Government with full responsibility to manage Indian resources and Indian land for the benefit of the Indians. The Court explained that a fiduciary relationship arises by necessity when the Government assumes the elaborate control demonstrated above. The Court noted that although the trust relationship between the United States and the Indians is a limited one, in *Mitchell II* "[a]ll necessary elements of a common-

111. *Id.* at 220.

112. *Id.*

113. 25 U.S.C. § 466; *Mitchell II*, 463 U.S. at 221.

114. *Mitchell II*, 463 U.S. at 221, (quoting 78 Cong. Rec. 11730 (1934)).

115. *Id.* at 221-22.

116. *Id.* at 223.

117. *Id.* (citing 25 C.F.R. §§ 169.12, 169.14 (1982)).

law trust [were] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber lands and funds)."¹¹⁸ Based on the regulations and the facts, the Court determined a fiduciary relationship existed.¹¹⁹ These obligations are reinforced by the existence of a general trust obligation between the United States and the Indian People.¹²⁰

The Court held that the statutes and regulations established fiduciary obligations that can fairly be interpreted as mandating compensation. The Court held that because of the trust relationship, the Government should be liable for damages sustained as a result of the breach of its fiduciary duties. In so holding, the Court reinforced that a fundamental right incident to the existence of a trust relationship is the right for the injured beneficiary to sue the trustee for damages resulting from a breach of the trust.¹²¹ The Court asserted that recognizing a remedy of money damages furthers the purposes of the statutes and regulations by deterring trust violations by federal officials and by giving the Indians retrospective recourse for government breaches of trust obligations.¹²²

VII. ANALYSIS AND SUPPORT OF THE MAJORITY HOLDING

The United States Supreme Court decided *United States v. Navajo Nation* correctly. Neither the IMLA nor the associated regulations are substantive sources of law that establish specific fiduciary duties as required by *Mitchell I* and *Mitchell II*.

The Court in *Navajo Nation* was correct when it held that the IMLA and its implementing regulations do not impose obligations of the detailed kind that existed in *Mitchell II*.¹²³ In *Mitchell II*, a network of statutes and regulations imposed judicially enforceable fiduciary duties.¹²⁴ In contrast, the IMLA and its associated statutory scheme, when viewed in its entirety, does not appear to provide any substantive law that creates fiduciary duties. The IMLA states that unallotted lands within any Indian reservation may be leased for mining purposes by authority of the tribal council or other authorized spokesperson. There are three limitations on such leases. First, the Secretary of the Interior must approve the lease. Second, the lease terms cannot exceed ten years. And finally, the lease can be extended only

118. *Id.* at 224-25; see also *Restatement (Second) of the Law of Trusts* § 2 cmt. h (1959); *Restatement (Third) of the Law of Trusts* § 2 cmt. f (2001).

119. "The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship. For example, § 8 of the 1910 Act, as amended, expressly mandates that sales of timber from Indian trust lands be based upon the Secretary's consideration of 'the needs and best interests of the Indian owner and his heirs' and that proceeds from such sales be paid to owners 'or disposed of for their benefit.' 25 U.S.C. § 406(a)." *Mitchell II*, 463 U.S. at 224.

120. *Mitchell II*, 463 U.S. at 225.

121. *Id.* at 226.

122. *Id.* at 226-27.

123. *U.S. v. Navajo Nation*, 537 U.S. at 507.

124. *Id.* at 504-05.

as long as minerals are produced in paying quantities.¹²⁵ The statute is silent on other obligations relating to mineral leasing.

The Tribe cannot rely on the United States Code section that addresses the leasing authority of the Secretary of the Interior to lease unallotted mineral lands withdrawn from entry under mining laws.¹²⁶ Although this section was enacted some twenty years before the IMLA, and has provisions that impose fiduciary responsibilities, Section 399 is not part of the IMLA and does not address the approval authority of the Secretary of the Interior and therefore does not govern Lease 8580. Section 399 addresses leasing authority. The distinction between broad leasing authority and limited approval authority is significant. Leasing authority necessarily establishes a fiduciary responsibility because it assumes complete control on behalf of the Indian or tribe. Approval authority is by nature more limited in scope. It does not carry the same level of responsibility as leasing authority unless legislation or enabling rules to the contrary exist.¹²⁷

Unlike the regulations in *Mitchell II*, which, when viewed with their associated legislation, enunciated a substantive duty, the Department of the Interior regulations governing the implementation of the IMLA does not create a fiduciary duty. The regulations, like the IMLA itself, indicate that an Indian Tribe may lease the land subject only to the Secretary of the Interior's approval of the lease.¹²⁸ Although it should be noted that the Code of Federal Regulations prescribes specific procedures for bids,¹²⁹ these are inapplicable to the negotiated lease at issue in *United States v. Navajo Nation*. In regard to negotiated leases, the code provides only that negotiated leases can be rejected by the Secretary of the Interior and be advertised for bids.¹³⁰ This "up or down" approval authority does not rise to the level of control contemplated by the court in *Mitchell II*.

While it is true that administrative regulations outline the processes and requirements for bonds and the manner of lease payments, these regulations differ materially from those cited in *Mitchell II*. The regulations propagated under the IMLA are not substantive in nature; they are procedural and do not rise to the level creating fiduciary duties. These procedural rules regarding bonds, bidding, and manner of payments do not reflect an affirmative assumption of a fiduciary duty as do the rules in *Mitchell II*. The policy to manage the resources in order to secure the needs and best interests of the Indian owner and his heirs permeated the code regulations in *Mitchell II*.¹³¹ That policy is absent in *United States v. Navajo Nation*. In its place is the policy of tribal self-government.

125. 25 U.S.C. § 396(a) (2000).

126. 25 U.S.C. § 399 (2000).

127. *Mitchell I*, 445 U.S. at 542.

128. 25 C.F.R. § 211.20(a) (1985).

129. See 25 C.F.R. § 211.20 (1985).

130. 25 C.F.R. § 211.20 (1985).

131. *Mitchell II*, 436 U.S. at 224.

The provisions of the IMLA and implementing regulations closely resemble the GAA. Like the GAA in *Mitchell I*, the IMLA does not assign a managerial role over coal leasing to the Secretary of the Interior. Although the reservation land and resources are held in trust, Congress did not intend for the government to manage the mineral resources of the Indians. That authority was left to the tribes in order to promote self-determination and self-government.

The IMLA and associated regulations are not substantive sources of law that establish specific fiduciary duties. Congress was deliberate in limiting the control of the Secretary to approving mineral leases. The Department of Interior regulations are procedural, not substantive. Neither the IMLA nor the regulations meet the threshold requirement of establishing specific fiduciary duties required for the Navajo Nation to state a judicially enforceable claim against the United States.

VIII. CONCLUSION

The United States Supreme Court decision in *United States v. Navajo Nation* was consistent with the rule it announced in *Mitchell I* and reinforced in *Mitchell II*. As the issues surrounding Indian sovereignty regarding Indian resources are raised, the trust relationship between the United States and the Indian nations will become, by necessity, more clearly defined. Certainly, the law is far from settled. *Mitchell I* and *Mitchell II* are indicative of the distinctions made by the Supreme Court in regard to fiduciary duties owed by the Government to the tribes. The historical and loosely defined trust relationship between the United States and Indian Tribes must be balanced in context with statutory construction and legislative intent.

By adopting the legal rule of *Mitchell I* and distinguishing the facts of *Mitchell II*, the Supreme Court appears to require a clear manifestation of intent to create a specific fiduciary relationship between Indian Tribes and the United States on the part of the Government.¹³² It appears that the historical "trust relationship" is insufficient to support a true fiduciary duty. As it relates to the Indian resources, the legal maxim rings true: *Ubi jus incertum, ibi jus nullum*.¹³³

132. See *Restatement (Second) of the Law of Trusts* § 2 cmt. k (1959).

133. "Where the right is uncertain, there is no right." *Black's Law Dictionary* 1695 (Bryan A. Garner ed., 7th ed., West 1999).

