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Tribal Self-Determination in Natural Resources: Management, Control, and Trust Responsibilities or the Lack Thereof in *Navajo Nation v. United States*, 129 S. Ct. 1547 (2009)

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Note*

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TABLE OF CONTENTS

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I. INTRODUCTION

Determining the contours of the United States' trust responsibilities to the various Indian tribes has been a path marked with inconsistencies, inequities, and enough complex legal reasoning to make one's head spin. While it might have been hoped that *United States v. Navajo Nation* (*Navajo II*)[1] would clear up some of the inconsistencies, it should be clear by this time that no such help is forthcoming. Rather this case continues in the tradition of a "malleability that has allowed the doctrine [of federal trust responsibility] to be repeatedly transformed over the years, leaving a conflicted legacy for tribes and their members."[2] On this analysis, the future decisions of the Supreme Court rest less on precedent and more on the individual actors involved and the social and historical contexts in which they act.[3] This Note will attempt to add to the already large body of scholarly work[4] examining the controversy at various stages of decision and argue that the case represents a continuation of principles iterated in the dissenting opinion of *United States v. Mitchell* (*Mitchell II*).[5]

In 1993, the Navajo Nation filed a lawsuit—*Navajo Nation v. United States*[6]—alleging breach of fiduciary duties for actions taken by the Secretary of the Interior during the approval process for coal lease amendment negotiations between the tribe and Peabody Holding Company. A protracted legal battle began, ultimately requiring two

1. 129 S. Ct. 1547 (2009).
2. Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 309 (2009).
3. *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 8 (1997) (arguing for the applicability of "critical legal theory" to analysis of the Supreme Court's jurisprudence in tribal matters).
4. *See, e.g.*, Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and 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); 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 (2003); Jesse Cook, Note, Navajo Nation v. United States: *Determining When Native American Tribes Can Sue the United States Within a Trust Relationship*, 7 GREAT PLAINS NAT. RESOURCES J. 233 (2002); Kimberly C. Perdue, Note, *The Changing Scope of the United States' Trust Duties to American Indian Tribes:* Navajo Nation v. United States, 80 U. COLO. L. REV. 487 (2009); Jason Stone, Note, Ubi Jus Incertum, Ibi Jus Nullum: *Where the Right is Uncertain, There Is No Right:* United States v. Navajo Nation, 27 PUB. LAND & RESOURCES L. REV. 149 (2006).
5. 463 U.S. 206 (1983).
6. 46 Fed. Cl. 217 (2000).

Supreme Court opinions to finally resolve that the tribe's claims for monetary relief lacked jurisdiction under statutory and case law provided by the Indian Tucker Act,[7] *United States v. Navajo Nation* (*Navajo I*), *United States v. Mitchell* (*Mitchell I*),[8] and *Mitchell II*.[9] In one sense the Supreme Court's original decision in 2003 in *Navajo I*[10] "left no room" for a decision in favor of the tribe on remand.[11] However, in another sense the Court's decision failed to adequately address the importance (or even possibility) of government control over the tribe's natural resources due to the Secretary of the Interior's approval role in the lease amendment process unless the majority's contention that control over tribal coal does not matter is taken seriously.[12] If this is indeed the case, and control of tribal resources does not matter in claims alleging government mismanagement of tribal resources, then claims in the *Mitchell II* vein will be limited to those claims addressing the government's management of tribal resources. These claims will be further restricted by the current trends in legislative and bureaucratic enactments purporting to enhance tribal self-determination while still leaving the government in a powerful approval role with respect to those resources.[13]

This Note examines the Supreme Court's decision in *Navajo II* and evaluates the Court's opinion in light of the previous "path-marking precedents"[14] in *Mitchell I* and *II*. Part II provides background on the Indian Tucker Act, *Mitchell I* and *II*, and the entirety of the procedural and decisional history of *Navajo II*. Part III argues that the Court's opinion in *Navajo II* represents at least a partial rejection of the reasoning of *Mitchell II* and shares some commonalities with the dissenting opinion in that case. Part III also addresses the possibility of government control of tribal resources through the Secretary of Interior's approval role in lease amendments of this type, and it also discusses whether *Mitchell II* represents for this Court a decision that only extensive management of tribal resources can support Indian Tucker Act jurisdiction. Part IV concludes by arguing that once the case is placed in context, the decision represents a continuation of the judiciary's conflicting holdings regarding tribal resources. However,

7. 28 U.S.C. § 1505 (2006) (originally enacted as the Indian Claims Commission Act of 1946, ch. 959, § 24, 60 Stat. 1055, 1057).
8. 445 U.S. 535 (1980).
9. 463 U.S. 206 (1983).
10. 537 U.S. 488 (2003).
11. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547, 1555 (2009).
12. *Id.* at 1557–58.
13. *See, e.g.*, Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1077–98 (2008) (discussing recent legislation that increases tribal self-governance while purporting to require less secretarial approval, yet conditions this minimal approval on meeting many statutory conditions).
14. *Navajo I*, 537 U.S. at 503.

these holdings amount to little more than political choices clothed in legal reasoning, and due to the large amount of money at stake, both for the government and for energy consumers in the region, the Court chose to turn a blind eye to the actual control inherent in an "approval only" role assumed by the government.[15]

II. BACKGROUND

A. The Indian Tucker Act

Although *Navajo II* examines a complicated array of statutes and regulations, at its heart the case is strictly about jurisdiction. Since the Navajo were suing the United States, the first order of business is the same as in any other suit against the federal government—finding out whether the government has waived its sovereign immunity. In the case of most claimants, waiver of sovereign immunity is accomplished through the Tucker Act[16] and allows the United States to be sued in the United States Court of Federal Claims for any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[17] The purpose of the Tucker Act was to relieve the growing burden placed on Congress to provide individualized relief to persons harmed by government action through private bills by granting jurisdiction to the Court of Federal Claims.[18]

The Indian Tucker Act,[19] as it is colloquially known, serves to accomplish the same ends as the Tucker Act with respect to suits by Indian tribes. The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States

15. Several scholars have agreed that the legal reasoning in *Navajo I* is correct. *See, e.g.*, Cook, *supra* note 4, at 240–43 (arguing that "a fiduciary relationship . . . does not mean that every claim against the United States is valid"); Stone, *supra* note 4, at 163–65 (arguing that *Navajo I* was decided correctly). This is also true of *Navajo II*, but in some sense this forgets that there is no "right answer" in legal reasoning. Since "[t]he uncertainties and imperfections in law force judges to choose what the law ought to mean" there is a strong argument that the law "ought" to have found a money-mandating duty in this case because of the blatantly unfair actions of the executive. LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 9 (7th ed. 2005).

16. 28 U.S.C. § 1491(a)(1) (2006) (originally enacted as Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505, 505).

17. *Id.*

18. The Court of Federal Claims originally heard cases and prepared draft private bills. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612–14. The Tucker Act was a "comprehensive measure by which claims against the United States [could] be heard and determined" without the need for the private bill process. H.R. REP. NO. 49-1077, at 1 (1886).

19. 28 U.S.C. § 1505 (2006).

for money damages."[20] Individual claimants under the Tucker Act must therefore find a substantive right in some other source of law.[21] Since the Indian Tucker Act provides "jurisdiction [over] any claim . . . which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group,"[22] the analysis is the same for the Tucker Act and the Indian Tucker Act.

B. The "Path-marking Precedents"

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

United States v. Mitchell (*Mitchell I*)[23] concerned the liability of the United States for alleged mismanagement of timber on allotted and tribal land, with an attempt to tie a money-mandating duty on the government to the General Allotment Act of 1887.[24] However, after a lengthy discussion of the purpose and intent of the General Allotment Act, the Court determined that the Act was not meant to impose money-mandating trust duties on the government, even though the Act expressly provided that the allotments were to be held "for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made."[25]

In the main, the Court determined that money damages were not appropriate in light of the legislative history and purpose of the express trust language in the General Allotment Act. Since most of the discussion relating to the trust language in the General Allotment Act focused on the need to provide a safeguard against state taxation or premature sale of allotted lands,[26] the Court found that the trust language only created a limited trust relationship with respect to the allottees and the tribe and did not impose any obligations with respect to the management of timber resources.[27] Additionally, the Court found support for this view in the subsequent acts of Congress "authorizing the harvesting and sale of timber on specific reservations."[28] In the last footnote of the majority opinion, however, the Court referred to the unresolved issue of whether there was merit to the claim

20. United States v. Testan, 424 U.S. 392, 398 (1976).
21. United States v. Mitchell *(Mitchell I)*, 445 U.S. 535, 538 (1980).
22. 28 U.S.C. § 1505 (2006).
23. 445 U.S. 535 (1980).
24. Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C. starting at § 331).
25. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348 (2006)). Under § 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 984 (codified as amended at 25 U.S.C. § 462 (2006)), the United States held title to allotment lands indefinitely, *Mitchell I*, 463 U.S. at 541, so the express trust language arguably continued up to the time of the controversy.
26. *Mitchell I*, 445 U.S. at 543–44.
27. *Id.* at 541–45.
28. *Id.* at 545.

that a network of other statutes mandated money damages.[29] The Court explicitly mentioned that those statutes could be considered on remand, but it did not seem to either require or approve the lower court's consideration of those statutes.[30]

The three-Justice dissent in *Mitchell I*, authored by Justice White, argued that the General Allotment Act should be interpreted as mandating compensation.[31] Of primary importance, the dissent would not have looked beyond the text to the statutory purpose and history of the Act, because the Act expressly used trust language, and principles of construction giving words their ordinary meaning should control.[32] Furthermore, even after considering the legislative history, the dissent viewed the policy embodied in the General Allotment Act to represent a continuation of "the trust status of Indian lands."[33] Therefore, the dissent thought it appropriate to apply the "hornbook law" of trusts to find a damages remedy for the claimants.[34]

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

On remand, the Court of Federal Claims did consider the network of other statutes and regulations that the Supreme Court did not consider in *Mitchell I*, and, finding in favor of the tribe and its members, the Court of Federal Claims concluded that the network imposed specific fiduciary duties that could fairly be interpreted as mandating money damages for their breach.[35] Relying on a network of statutes pertaining to timber management, road building and rights of way, government fees for management of Indian funds, and the regulations promulgated under those statutes, the Court of Federal Claims held that the threshold requirements of both the specificity of the United States' consent to suit and the propriety of money damages had been met.[36] In a 6–3 decision, the Supreme Court affirmed with Justice Marshall again writing the majority opinion.[37]

a. *Majority Opinion*

After describing the contours of the Indian Tucker Act in relation to the case, the Court proceeded to discuss the case as one analytical problem. Essentially, since the plaintiffs had presented specific statutes imposing duties on the United States, the only question remain-

29. *Id.* at 546 n.7.
30. *Id.*
31. *Id.* at 546–47 (White, J., dissenting).
32. *Id.* at 547–48.
33. *Id.* at 548 (emphasis omitted) (quoting Mattz v. Arnett, 412 U.S. 481, 496 (1973)).
34. *Id.* at 550.
35. Mitchell v. United States, 664 F.2d 265 (Cl. Ct. 1981), *aff'd*, 463 U.S. 206 (1983).
36. *Id.*
37. Mitchell v. United States, 463 U.S. 206 (1983).

ing was whether the statutes cited could "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[38] In developing this line of reasoning, the Court first discussed the level of management and control that the statutes and regulations provided, and it found them to be sufficiently comprehensive and elaborate such that a fiduciary relationship necessarily arose.[39] Once the Court was satisfied that fiduciary duties had attached, the task of fairly interpreting the statutes as mandating money damages was relatively easy. The Court's analysis essentially boiled down to the statement that "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."[40]

b. Dissenting Opinion

Justice Powell's dissent attacked the majority opinion head on and was explicitly concerned that the Court had overruled its previous decisions in *Mitchell I* and *United States v. Testan*.[41] Interestingly, both opinions focused on the proper interpretation of just how a court was to interpret a statute as mandating money damages, with Justice Powell contending that money damages are proper if the statute "'*in itself* . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[42] Although not expressly brought out in his opinion, Justice Powell understood the logic of the statement quite differently than the majority did with his inclusion of the condition that the statute "in itself" must mandate money damages. This reading led Justice Powell to agree with the dissent in the lower court that "[t]he federal power over Indian lands is so different in nature and origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of Scott on Trusts to impose liability on claims where assent is not unequivocally expressed."[43] In reading the statutes facially only, Justice Powell was unable to conclude that the statutes at issue fairly mandated monetary damages.[44]

38. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 217 (1983) (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

39. *Id.* at 224–25.

40. *Id.* at 226.

41. *Id.* at 229, 231–32 (Powell, J., dissenting).

42. *Id.* at 229 (emphasis added) (quoting *Testan*, 424 U.S. at 402).

43. *Id.* at 234 (quoting Mitchell v. United States, 664 F.2d 265, 283 (1981) (Nichols, J., concurring in part and dissenting in part)).

44. *Id.* at 236.

C. United States v. Navajo Nation (*Navajo I*), 537 U.S. 488 (2003)

1. Facts and Procedural History

In February of 1964, the Navajo Nation entered into a coal lease with the Sentry Royalty Company for the mining of certain coal on tribal lands.[45] While the original lease provided a very low royalty rate, this rate was subject to revision under article VI of the lease by the Secretary of the Interior or his delegate on the twentieth anniversary of the lease.[46] However, the Secretary, never exercised this power, and instead, in December of 1987, the Secretary approved amendments to the lease that were negotiated by the parties.[47] This rate increase was arguably not the fair price for the Navajo Nation's coal, and in anticipation of the twentieth anniversary of the lease, the tribe had started proceedings in the Department of the Interior (DOI) to exercise the Secretary's powers under article VI.[48] In the first level of review in the DOI, an initial decision was made to change the royalty rates to a percentage basis and that a rate of 20% was fair under the circumstances.[49] Peabody Coal Company appealed this decision, but by the summer of 1985 it was generally known that the DOI planned to deny Peabody's appeal and uphold the 20% royalty.[50]

This possibility of an increase in the cost of coal led to concern among the area's utilities companies and resulted in several attempts at ex parte communications with then-Secretary William P. Clark, who flatly rejected all such meetings.[51] By the time a decision on the matter was imminent, Donald P. Hodel had taken over as Secretary of the DOI, and Peabody Coal Company sent Secretary Hodel a letter in July of 1985 urging him to postpone the decision to increase the royalty rate and to force the Navajo to return to the bargaining table.[52] During the same month, Peabody retained Stanley Hulett, a former high-level DOI employee and close friend of Hodel.[53] The Court of Federal Claims concluded that there was "little doubt" that Hulett made ex parte contact with Hodel by using his personal connections and that shortly thereafter Hodel signed a memorandum prepared by

45. Navajo Nation v. United States, 46 Fed. Cl. 217, 221 (2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

46. *Id.* The original royalty rate was set at $0.375 per ton of coal produced. *Id.*

47. *Id.* The new royalty rate was set at 12.5%, which was the going rate for such leases of federal lands generally. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Peabody Coal Company was the successor in interest of the lease at issue. *Id.*

51. *Id.* at 222.

52. *Id.*

53. *Id.*

Peabody, instructing John Fritz, Acting Assistant Secretary of the Interior for Indian Affairs, not to issue a decision in the royalty appeal.[54]

A short time later, and apparently to the confusion of the Federal Court of Claims, the Navajo returned to the bargaining table and negotiated a lease amendment setting royalty rates at 12.5%.[55] Although the amendments first failed to garner approval from the Tribal Council, political changes in the Council eventually led to the acceptance of the negotiated agreement without change.[56] The negotiated agreement did not simply lower the royalty rate to 12.5%. It also affirmed the power of the tribe to tax and raised royalty rates to 12.5% on two other coal leases that were not subject to revision by their terms.[57] Since the negotiated agreement also rested on subsequent approval of the same rate on a joint coal lease with the Hopi, production resumed at the 12.5% rate for two years before the joint lease was approved and the amendments to the lease were ripe for review by the Secretary. Finally, at the end of 1987, the amendments were officially forwarded to the DOI.[58] The approval of these amendments was conducted under the Indian Mineral Leasing Act of 1938 (IMLA)[59] and was concluded during a relatively short time over Thanksgiving of 1987.[60] The Navajo filed their action alleging breach of fiduciary duties on December 14, 1993, the sixth anniversary of the formal approval of the lease amendments by the DOI.[61]

The government initially claimed that the action was barred by the statute of limitations, since the improper actions all occurred in 1985. However, the Court of Federal Claims found the action timely, because the cause of action did not accrue until the course of conduct culminating in the approval of the lease amendments was complete, and further, because the Navajo Nation "was unaware, through no fault of its own, of the July 1985 events."[62] It then remained for the Court of Federal Claims to decide the motions for summary judgment

54. *Id.* at 222–23. This memorandum, described as "march or die" orders, was opposed by Mr. Fritz, who made no secret of his sympathies for the tribe. Mr. Fritz resigned the same summer pursuant to an earlier decision. *Id.* at 223.

55. *Id.* at 223 (stating that "[t]he abrupt abandonment of their effort to have DOI set a high royalty rate at the moment of its apparent success, and the Navajo Nation's return to negotiations they had broken off and had steadfastly refused to resume, defy explanation on this record").

56. *Id.*

57. *Id.* at 224. The recognition of the tribe's power of taxation was arguably not a concession of any kind, however, as the right had recently been established in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

58. *Navajo Nation*, 46 Fed. Cl. at 224.

59. 25 U.S.C. § 396(a)–(g) (2006).

60. *Navajo Nation*, 46 Fed. Cl. at 224.

61. *Id.*

62. *Id.* at 225.

brought by both sides with respect to claims for breach of trust.[63] The Court of Federal Claims was quite clear that it viewed the ex parte contacts between Hodel and Hulett as breaches of basic fiduciary duties owed to the tribe.[64] Even though the actions of Hodel were improper and might have tainted the entire approval process, these breaches "[did] not themselves confer jurisdiction on [the] Court, nor entitle plaintiff to money damages."[65] Rather, the recovery of money damages was contingent on the conferral of jurisdiction by the Indian Tucker Act[66] and required the imposition of specific fiduciary duties by some other substantive source of law, coupled with a violation of those specific duties which Congress intended to remedy with a damages award.[67]

The IMLA could not, by its terms, "serve as a basis for jurisdiction, [since] the trust responsibility must mandate particular monetary relief upon the basis of statute, treaty, or assumption by the government of the task of managing economic assets."[68] Furthermore, a limited trust duty, and even its breach, had been held not to impose monetary damages standing on its own.[69] The Court of Federal Claims then examined whether the level of management and control of coal leases under the IMLA would still support a claim for money damages under *Mitchell II* and a continuum of cases between it and *Mitchell I*.[70] Drawing from this continuum of cases,[71] the Court of Federal Claims held that the IMLA and regulations pursuant to it did not come within the level of control or management that would grant the federal courts jurisdiction to provide monetary relief.[72]

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63. *Id.*

64. *Id.* at 226 ("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.").

65. *Id.* at 226–27.

66. 28 U.S.C. § 1505 (2006).

67. *Navajo Nation*, 46 Fed. Cl. at 227.

68. *Id.* at 228.

69. *Id.* (citing United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980)).

70. *Navajo Nation*, 46 Fed. Cl. at 228, 230.

71. Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996); Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Wright v. United States, 32 Fed. Cl. 54 (1994).

72. *Navajo Nation*, 46 Fed. Cl. at 233–34 ("We find that the Secretary's role in the Navajo's coal leasing—that is, his control *or* supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other.").

On appeal, the Court of Appeals for the Federal Circuit reversed,[73] mainly taking issue with the conclusion of Court of Federal Claims regarding the level of control exercised by the government under the IMLA.[74] This finding of control had its origin in the language of the statute itself, which provided that "unallotted lands . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians."[75] Essentially the Federal Circuit reasoned that since a lease could not be entered without the consent of the Secretary, the Secretary had the final authority over mineral leases, and therefore the Secretary had the requisite level of control necessary to satisfy *Mitchell II*.[76] Since the Court of Federal Claims clearly found a breach of fiduciary duties, the Federal Circuit held that the jurisdiction of the federal courts had been established under the Indian Tucker Act.[77] The concurrence in the case essentially agreed with the majority opinion but felt that the majority failed to properly analyze the breach of specific fiduciary duties imposed by the IMLA.[78] Further, since the breach of specific fiduciary duties could only relate to the approval of the lease, rather than the improper ex parte contact, the concurrence suggested that only the damages suffered by the tribe by a failure to carry out an economic analysis in the approval process should have been awarded.[79] The United States appealed the decision of the Federal Circuit, and certiorari was granted.[80]

2. Majority Opinion

The Supreme Court reversed the Federal Circuit's decision, holding that the tribe's claim rested within the domain of *Mitchell I*, and that since the IMLA did not create any rights or duties that would subject the federal government to monetary damages, the Indian Tucker Act did not confer jurisdiction on the federal courts.[81] The Court analyzed both the IMLA and the Indian Mineral Development

73. Navajo Nation v. United States, 263 F.3d 1325, 1333 (Fed. Cir. 2001) *rev'd*, 537 U.S. 488 (2003), *remanded to* 68 Fed. Cl. 805 (2005), *rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'd*, 129 S. Ct. 1547 (2009).
74. *Id.* at 1331 ("Throughout the statute and its implementing regulations is seen the pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect the interests of the Indian tribes.").
75. 25 U.S.C. § 396(a) (2006).
76. *Navajo Nation*, 263 F.3d at 1330–31.
77. *Id.* at 1333.
78. *Id.* at 1339 (Schall, J., concurring in part and dissenting in part).
79. *Id.* at 1340.
80. United States v. Navajo Nation, 535 U.S. 1111 (2002) (mem.).
81. United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 493 (2003), *remanded to* 68 Fed. Cl. 805 (2005), *rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'd*, 129 S. Ct. 1547 (2009).

Act of 1982 (IMDA)[82] but found that the IMDA did not apply because it only applied to activities related to development of resources rather than the leasing of those resources.[83] The majority noted that *Mitchell I* and *Mitchell II* were the "path-marking precedents on the question of whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.'"[84]

In determining whether the Indian Tucker Act conferred jurisdiction through the IMLA, the Court focused on "whether the IMLA and its implementing regulations [could] fairly be interpreted as mandating compensation" rather than on the specific fiduciary duties imposed or the breach of those duties.[85] Since the IMLA did not impose the level of detailed fiduciary duties that was found in *Mitchell II*, the Court determined that monetary damages were not appropriate and that "[t]he endeavor to align this case with *Mitchell II* rather than *Mitchell I*, however valiant, [fell] short of the mark."[86] The Court also found the argument that the IMLA more closely resembled the General Allotment Act (GAA) in *Mitchell I* persuasive, in that the purpose found in the GAA was to enhance tribal self-determination, which was also the purpose behind giving the Secretary a limited approval role in the leasing of tribal coal.[87] The Court also explicitly rejected the view of the concurrence in the Federal Circuit that the approval function implied any duty to conduct an economic analysis in conjunction with the approval of the lease amendments.[88]

3. Dissenting Opinion

The three-Justice dissent, authored by Justice Souter, chose to understand the approval role of the Secretary under the IMLA in a more historical context and drew on case law supporting the view that the approval role of the Secretary was "supposed to satisfy the National Government's trust responsibility to the Indians."[89] Justice Souter thought that trust duties were imposed on the Secretary, even in his approval role, and pointed out that the IMLA's scheme was "reminiscent of the old allotment legislation," where the responsibilities of

82. 25 U.S.C. §§ 2101–2108 (2006).
83. *Navajo I*, 537 U.S. at 509.
84. *Id.* at 503 (quoting United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 218 (1983)).
85. *Id.* at 506.
86. *Id.* at 507.
87. *Id.* at 508.
88. *Id.* at 511; *see also supra* notes 78–79 and accompanying text (explaining the concurring opinion in the Federal Circuit).
89. *Navajo I*, 537 U.S. at 515 (Souter, J., dissenting) (citing Sunderland v. United States, 266 U.S. 226, 233 (1924); Tiger v. W. Inv. Co., 221 U.S. 286, 310–11 (1911)).

leasing were divided between the tribe and the government, and the only significant difference between the two was that negotiating responsibilities had been shifted to the tribe.[90]

Taking issue with the majority opinion, the dissent pointed out that the "Secretary's own IMLA regulations (now in effect) provide that administrative actions, including lease approvals, are to be taken '[i]n the best interest of the Indian mineral owner.'"[91] Although the dissent recognized that the regulations were not in effect at the time the improper actions were taken, they helped to reveal the context of the IMLA and added weight to a similar internal policy that was in effect at all relevant times.[92] The dissent also made clear that the opinion only involved whether the claim was allowed to go forward under the Indian Tucker Act; thus, it did not seek to establish the proper balance between the competing purposes of the IMLA—to maximize tribal revenues and further tribal self-determination—or to determine what ultimate damages should have been awarded.[93]

D. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547 (2009)

1. Procedural History on Remand

Since the Supreme Court in *Navajo I* found "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,"[94] the possibility of any further action seemed slight. In order to defeat an outright dismissal, the Navajo tribe was left to argue that, although the Supreme Court's opinion foreclosed the possibility of any liability resulting from the IMLA or IMDA, the opinion did not decide whether the tribe's claims were cognizable under the Indian Tucker Act because of a "network" of other statutes that were not discussed in previous appeals.[95] For its part, the government argued both that the decision in *Navajo I* foreclosed any further consideration of the matter and, if it did not, that the tribe had waived any subsequent consideration of the network theory.[96] The Federal Circuit decided that the language seeming to end the case in *Navajo I* should have been read in the context of the decision, which was most concerned with the effect of the IMLA, and also involved

90. *Id.* at 516.
91. *Id.* (quoting 25 C.F.R. § 211.3 (2002)); *see also id.* at 508 n.12 (majority opinion) (disagreeing with the applicability of 25 C.F.R. § 211.3, since the regulation had not yet been promulgated at times relevant to this case).
92. *Id.* at 517 & n.1 (Souter, J., dissenting).
93. *Id.* at 517–18.
94. *Id.* at 514 (majority opinion).
95. Navajo Nation v. United States, 347 F.3d 1327, 1330 (Fed. Cir. 2003).
96. *Id.*

consideration of the IMDA and 25 U.S.C. § 399 but did not consider other statutes and regulations.[97] The Federal Circuit was therefore satisfied to remand to the Court of Federal Claims the issue of waiver and any subsequent consideration of the network theory.[98] Rather than dissenting from the decision to remand for further proceedings, the dissent instead argued that consideration of the IMLA would be appropriate in the network theory and strongly foreshadowed the eventual Federal Circuit opinion that sought to align the case more closely with *Mitchell II*, both in reasoning and in posture.[99]

On remand, the Court of Federal Claims held that the tribe did not waive consideration of the network theory, both because the Court had considered and rejected the argument in the original case, and because the theory was a question of law, which mitigated the policy of refusing to decide issues not raised in the first instance.[100] Furthermore, since the decision addressed the Indian Tucker Act, a jurisdictional statute, the Court held that it would have been free on its own motion to examine the network theory, since under the federal rules a court can inquire into its jurisdiction at any time.[101] Of course, the decision that the tribe had not waived the network argument did not defeat the fact that the Court of Federal Claims had already considered that argument—with the IMLA as its main centerpiece.[102] Accordingly, the Court of Federal claims found the network theory even less persuasive when consideration of the IMLA was removed.[103]

Once again, the Court of Federal Claims was overturned on appeal to the Federal Circuit.[104] The opinion went to great lengths to square the case with *Mitchell II*, even without the inclusion of the IMLA, and held the government to have exercised such comprehensive control that a denial of liability would "allow the government to have it both ways."[105] The Federal Circuit first disposed of a few elements of the "network"[106] of statutes and regulations relied on by the tribe as not

97. *Id.* at 1331.
98. *Id.* at 1332.
99. *Id.* at 1332–34 (Newman, J., dissenting in part).
100. Navajo Nation v. United States, 68 Fed. Cl. 805, 808 (2005), *rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'd*, 129 S. Ct. 1547 (2009).
101. *Id.* at 810–11.
102. *Id.* at 811.
103. *Id.* at 815.
104. Navajo Nation v. United States, 501 F.3d 1327, 1349 (Fed. Cir. 2007), *rev'd*, 129 S. Ct. 1547 (2009).
105. *Id.* at 1336.
106. The network of statutes and regulations presented to the Federal Circuit is perhaps the most complete account of the tribe's claims on remand. These sources included: "(i) the Treaty with the Navajo ('Treaty of 1849'), Sept. 9, 1849, 9 Stat. 974; (ii) the Treaty Between the United States of America and the Navajo Tribe of Indians ('Treaty of 1868'), Aug. 12, 1868, 15 Stat. 667; (iii) Exec. Order of May 17,

providing any substantive law which would support jurisdiction.[107] The remaining statutes and regulations were found to support jurisdiction under the Indian Tucker Act in five subparts of the opinion.[108] Apparently satisfied that it had "train[ed] on specific rights-creating or duty-imposing statutory or regulatory prescriptions," the Federal Circuit announced both a breach of the specific duties contained in the network and breaches of common law duties of care, candor, and loyalty.[109] Once again, the Supreme Court granted certiorari.[110]

2. Majority and Concurring Opinions

As a threshold matter, the Court considered the propriety of the actions taken by the lower courts on remand and found that the previous decision did not completely nullify the possibility of another statute or regulation granting jurisdiction under the Indian Tucker Act.[111] However, the Court made it quite clear that it believed it had decided the case correctly the first time by stating that *Navajo I* "left no room for that result based on the sources of law that the Court of

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1884 ('Executive Order of 1884'); (iv) the Act of June 14, 1934 ('Act of 1934'), ch. 521, 48 Stat. 960; (v) the Act of April 17, 1950 ('Navajo-Hopi Rehabilitation Act of 1950'), ch. 92, 64 Stat. 44, 25 U.S.C. §§ 631–40; (vi) the Indian lands section, 30 U.S.C. § 1300, of the Act of August 3, 1977 ('Surface Mining Control and Reclamation Act of 1977'), Pub. L. No. 95–87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.); (vii) the regulations, 25 C.F.R. Part 216 Subpart B (1987) and 30 C.F.R. Part 750 (1987), promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977; and (viii) the Act of January 12, 1983 ('Federal Oil and Gas Royalty Management Act of 1983'), 30 U.S.C. §§ 1701–57, and its implementing regulations, 30 C.F.R. Parts 212, 216, and 218 (1987), and 30 C.F.R. Part 206 Subpart F (1989)" as well as "(ix) the policies of the Department of the Interior; (x) the provisions of Lease 8580; (xi) the Act of February 5, 1948 ('Indian Lands Rights-of-Way Act of 1948'), 25 U.S.C. §§ 323–28, and its implementing regulations, 25 C.F.R. Part 169 (1987); and (xii) the IMLA of 1938 and its implementing regulations." *Id.* at 1336–37 (footnote omitted).

107. *Id.* at 1338–40 (disposing of elements (ix) through (xii), *supra* note 106).

108. *See id.* at 1340–45. For the sake of brevity, it is unnecessary to go into much detail with respect to these subparts. Elements (i) through (iv), *supra* note 106, are discussed as providing the necessary trust relationship and language in subpart 1; element (v), *supra* note 106, shows the level of control over coal resource planning in subpart 2; elements (vi) and (vii), *supra* note 106, show the control of coal mining operations in subpart 3; element (viii), *supra* note 106, shows the control of the management and collection of coal royalties in subpart 4; finally, the level of actual control over coal leasing is discussed in subpart 5 by the Federal Circuit, which found that the government cited "no authority for the proposition that control over the greater (e.g., coal resources) does not imply control over the lesser (e.g., leasing of such coal) in the Indian Tucker Act context." *Id.* at 1343.

109. *Id.* at 1346.

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

111. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547, 1555 (2009).

Appeals relied upon."[112] After rather summarily dismissing some of the specific statutory provisions relied upon by the Federal Circuit to find jurisdiction,[113] the Court turned to the issue of the government's comprehensive control over coal and found that the Federal Circuit should not have gotten to this point in the analysis.[114] Instead, the Court described that "[*i*]*f* a

plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship,' *then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'"[115] The concurring opinion, at only two sentences, adds little more than regret that *Navajo I* turned out the way it did.[116]

III. ANALYSIS

Navajo II foreclosed the possibility of finding jurisdiction in this case, and in many respects it implicitly rejected the reasoning of *Mitchell II*. The simple fact that the network theory of jurisdiction did not include consideration of the IMLA along with the other statutes that could make a specific trust duty requiring compensation meant that *Navajo II* was not so subject to the reasoning of *Mitchell II*. The Court's opinion, however, shows that the level of specificity required to invoke jurisdiction under the Indian Tucker Act requires something more than a limited trust relationship coupled with any level of control over Indian resources. At the very least, the Court's mandate in *Navajo I* to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"[117] was at odds with the chain of reasoning in *Mitchell II* and was more in line with the dissent in that case.

A. Legal Reasoning

Without the help of the IMLA to add some weight to the argument that any of the statutes examined in *Navajo II* were rights-creating or duty-imposing in nature, the Court disposed of each statute at issue with very little fanfare. The relevancy of § 635(a) of the Navajo–Hopi Rehabilitation Act of 1950 was of no help for the simple fact that the terms of the lease at issue conformed with the language of the IMLA,

112. *Id.*
113. *Id.* at 1555–57; *see also infra* Part III (discussing the Court's dismissal of the specific statutory sections in more detail).
114. *Navajo II*, 129 S. Ct. at 1558.
115. *Id.* (citation omitted) (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 473, 477 (2003)).
116. *Id.* at 1558 (Souter, J., concurring).
117. United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 506 (2003).

rather than the Rehabilitation Act.[118] However, the Court rejected this argument on almost purely technical grounds, because § 635(a) only provided for a lease renewal of twenty-five years, while the lease provided for renewals as long as minerals were produced in paying quantities.[119] The Court might have been better served by focusing on the reasoning in *Navajo I* with respect to the IMLA and by pointing out that § 635(a) created the same limited approval role for the Secretary.[120] Be that as it may, under either line of reasoning, § 635(a) would not provide a specific right or duty.

The Court disposed of § 638 of the Navajo–Hopi Rehabilitation Act because the statute, although imposing duties on the Secretary, applied to surveys and studies of Indian mineral wealth rather than leases of that wealth.[121] The Court's reasoning on this point is sound. Since the only acts complained of were the Secretary's actions in approving amendments to the lease, duties arising with respect to surveys and studies of Indian coal are clearly inapplicable. Finally, the Court examined the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[122] and concluded that the SMCRA did not apply, since by its terms the Act only applied to leases "issued after August 3, 1977,"[123] and, in any case, a fair interpretation of the Act only imposed a duty on the Secretary to enforce amendments pertaining to environmental protection if requested by the tribe.[124]

Following the denial of any enforceable duties under the statutes just mentioned, the Court proceeded to discuss the role, if any, that comprehensive control over Indian resources might play. It was at this point that the Court implicitly rejected the reasoning of the majority in *Mitchell II* and instead provided an analysis more in line with the dissent in that case. While the majority in *Mitchell II* was satisfied to point out that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians,"[125] the majority decision in *Navajo II* instead held that "neither the Government's 'control' over coal nor common-law trust principles matter."[126] Indeed, this statement should have come as a surprise to anyone following this case, since the posture of the

118. Section 635(a) dealt with the disposition of lands and allowed for the leasing of Indian land, but only for public, religious, educational, recreational or business purposes. 25 U.S.C. § 635(a) (1950).
119. *Navajo II*, 129 S. Ct. at 1556.
120. Both statutes provided that the relevant groups may execute leases subject to approval by the Secretary.
121. *Navajo II*, 129 S. Ct. at 1557.
122. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 101, 91 Stat. 447 (codified as amended at 30 U.S.C. § 1201 (2006)).
123. 30 U.S.C. § 1300(e) (2006).
124. *Navajo II*, 129 S. Ct. at 1557.
125. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983).
126. *Navajo II*, 129 S. Ct. at 1558.

case made it seem that "whether Congress ha[d] assigned control over an Indian resource"[127] was the major question for resolution of the case and would in turn depend on the interpretation given to the relevant statutes and regulations.[128]

B. Toward the Future

Navajo II does more than confirm suspicions that the Roberts Court would "interpret precedent and statutes governing the federal–state–tribal relationship as narrowly as, or perhaps more narrowly than, the Rehnquist Court."[129] Instead, it shows the Roberts Court construing precedent so narrowly that the language used becomes non-existent. Had the Court held otherwise—that control over an Indian resource and trust principles mattered in the slightest degree—the Court would have been forced to deal with the argument that, since the Secretary of the Interior had the power of approval over the lease amendments, he could have exercised effective control over those resources.

This decision further proves the existence of a "decisional dichotomy for trust claims against the Executive," but modifies the dichotomy to apply exclusively to the management of tribal resources as opposed to any level of control over those resources.[130] To be fair, the decisional dichotomy was in fact expressed in terms of management rather than control of tribal resources,[131] but one wonders whether the upside of dichotomy[132] has any real teeth left. Of course, the downside remains that federal law determines when a duty is present,[133] and this might now be compounded by the simple fact that it is likely easier for the both the legislative branch and the executive branch to exercise control over resources through similar approval arrangements without expressly assuming management duties. Furthermore, with any level of control now regarded as immaterial, the Supreme Court's "increasing willingness to hold the executive accountable" might in fact be beginning to ebb under the Roberts Court.[134]

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127. Perdue, *supra* note 4, at 529; *see also* Sisk, *supra* note 4, at 325 (stating that the level of control over Indian resources determines the level of governmental duties owed) (citing Navajo Nation v. United States, 263 F.3d 1325, 1329 (Fed. Cir. 2001)).

128. Perdue, *supra* note 4, at 529.

129. *Id.* at 527–28.

130. Davies, *supra* note 2, at 315.

131. *Id.* at 315–16.

132. In other words, the upside is that "both tribes and individual Indians may rely on the trust to seek compensation." *Id.* at 316.

133. *Id.*

134. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 40 (3d ed. 1998).

There are, of course, other factual distinctions between these two cases that make each decision supportable in its own right. For example, the network of statutes relied upon in *Mitchell II* was much more comprehensive, and at least a few of the sections dealt with collection and payment of monies to the tribe or individual allottees of timber land and authorized the Secretary to actually sell resources, rather than approve a sale or lease.[135] In contrast, the network of statutes in *Navajo II* gave the Secretary a much more limited approval role, even if the Court had analyzed the IMLA as part of this network. However, the reasoning in *Navajo II* was foreshadowed by the dissent in *Mitchell II*, when Justice Powell reiterated the "general principle that a cause of action for damages against the United States 'cannot be implied but must be unequivocally expressed.'"[136] Rather than focusing on the actual level of control, the opinion claimed that this part of the analysis should not have been reached because the statutes and regulations at issue did not rise to the level of specificity bearing the "hallmarks of a 'conventional fiduciary relationship.'"[137] By using this reasoning, the Court in *Navajo II* was able to neatly sidestep the matter of whether the Secretary's limited approval role amounted to comprehensive control over the lease at issue and instead focus on whether the network theory provided the requisite level of specificity to support jurisdiction for a damages claim.

It is in this sense that the Court implicitly overruled *Mitchell II*, since there was no commentary on the real basis for reversal found by the Federal Circuit. It is quite obvious from a reading of the Federal Circuit's opinion in *Navajo Nation v. United States*[138] that the Federal Circuit was attempting to bring the controversy within the ambit of *Mitchell II*. By beginning with a discussion of a source of limited trust responsibilities, namely the Treaties of 1849[139] and 1868[140] among other statutes, the opinion closely mirrors the limited trust relationship formed by the General Allotment Act in both *Mitchell I* and *Mitchell II*. The Federal Circuit then moved on to a discussion of statutes and regulations that tended to show that the government had been exercising comprehensive control over Navajo coal.[141] All of this

135. Act of June 25, 1910, ch. 431, §§ 7–8, 36 Stat. 857 (codified as amended at 25 U.S.C. §§ 406–407 (2006)).
136. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 228–29 (1983) (Powell, J., dissenting) (quoting United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 538 (1980)).
137. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547, 1558 (2009) (citation omitted).
138. Navajo Nation v. United States, 501 F.3d 1327 (Fed. Cir. 2007).
139. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo Tribe, Sept. 9, 1849, 9 Stat. 974.
140. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo Tribe, June 1, 1868, 15 Stat. 667.
141. *Navajo Nation*, 501 F.3d at 1341–45.

was meant to show the elaborate nature of the government's role in approving the lease and thereby "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."[142]

It may be accurate to say that trends identified in the 1980s that would "leave Indian tribes in the unhappy position they were in during the six decades before the trust law victories"[143] have finally come to fruition. *Navajo II* lends support to the proposition that "the same standard of statutory explicitness [will] be used to delineate the nature and scope of *any* alleged trust obligation of the federal government."[144] This is so because the Court was unwilling to hold in both *Navajo I* and *II* that even a limited trust relationship was created by the statutes at issue,[145] showing the intent of the Court to interpret statutes narrowly with respect to the *creation* of a trust duty. This could indeed have serious effects on tribal claimants seeking even equitable relief from alleged wrongdoings, and it could result in "the government manag[ing] most of their assets and resources, often without explicit statutory authorization, yet [not being] held strictly accountable for mismanagement, either through legal or equitable remedies."[146]

Given the complex and contradictory nature of the various holdings comprising the full procedural history of this case, an attempt to place the decision in context as a political, rather than judicial, decision would seem especially fruitful at this stage.[147] A very important aspect of the case, at least for establishing political resistance to a finding in favor of the tribe, is the simple fact that possible recovery could have been in the vicinity of $600 million.[148] This, however, would not have been the total cost to non-Indians, since the coal mined by Peabody was used to produce electricity throughout the southwestern United States, and any increase in production costs would have resulted in higher electric bills in the region.[149] Furthermore, while not explicitly mentioned in higher levels of review, the negotiation

142. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983).
143. Nell Jessup Newton, *Enforcing the Federal–Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635, 644 (1982).
144. *Id.*
145. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547, 1558 (2009); United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 508 (2003).
146. Newton, *supra* note 143, at 644. Perhaps in the context of this case, "control" should be substituted for "management," but such semantics will make little difference in terms of the possibility of these claimants being granted legal or equitable relief (and "mis-control" just doesn't have the same ring).
147. *See* WILKINS, *supra* note 3, at 8.
148. *Navajo I*, 537 U.S at 500. Little else can be said other than that the sheer amount of money involved could make more conservative judges cringe.
149. In fact, several companies appealed the original rate adjustment, and there was evidence of other attempted ex parte contacts by these companies during the orig-

process following the improper ex parte communications between Hodel and Hulett affirmed the validity of tribal taxation and provided for payment of back royalties.[150]

The mineral wealth on reservations is well known and includes about a "quarter of the readily accessible low sulfur coal" that the United States claims as its own.[151] This has led to the political pressures driving both extensive development and former (and perhaps current) abuses of royalty rate setting and approval.[152] Nothing in the facts of this case would seem to suggest that these pressures are less salient in this dispute than they have historically been in other circumstances. Cynics might argue—perhaps with some merit—that when corporate profits of large electricity providers are at stake, electrical companies may respond by applying pressure to any part of the political system that can be reached.

While from the legal perspective this case could be said to represent yet another instance of "chiseling away at the cornerstones of Indian law,"[153] from a political perspective the process resembles geologic change more than a man-made shaping of rock. The problem is that leaving the determination in the hands of political actors has risks.[154] In deciding this case, the Supreme Court has expanded, rather than contracted, the making of Indian policy by political branches, a system that led to such controversial policies as allotment and termination.[155] As a result, while the "conflicting interests represented in leasing of Indian lands . . . are almost certain to be a continuing subject of dispute,"[156] the balance of power to determine when fiduciary duties arise has shifted to the political branches.

IV. CONCLUSION

Whether the Court's reasoning in *Navajo II* shows an implicit overturning of *Mitchell II* is unclear because the opinion itself fails to rec-

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inal rate adjustment appeals process. Navajo Nation v. United States, 46 Fed. Cl. 217, 222 (2000).

150. *Id.* at 223–24. This could lead to a "no harm, no foul" view in that the tribe, while not getting the explicit rate it desired, nevertheless received more than a bare 12.5% royalty rate in the negotiation process. *See supra* note 57 and accompanying text (describing the tribe's receipt of a lower royalty rate in one instance, higher rates for two other leases, and taxation power as a result of a negotiated agreement).

151. WARD CHURCHILL, PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW 154 (2003).

152. *Id.* at 155.

153. Perdue, *supra* note 4, at 526.

154. 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, 353 (2001).

155. *Id.* at 353–54.

156. CANBY, *supra* note 134, at 365–66.

ognize that the Federal Circuit reversed the decision of the Court of Federal Claims almost exclusively by attempting to fit the network of statutes into the same scheme as *Mitchell II*. Furthermore, the Court made absolutely no mention of how, or whether, the Treaties of 1849 and 1868 affected the existence of even a limited trust relationship between the tribe and the United States with respect to coal leasing, or whether control over Indian resources and trust principals would matter under such a limited trust relationship. What is clear is that this dispute is no longer the vehicle to ask these questions.

As evidenced by the wide array of opinions in *Navajo II*'s procedural history, this area of the law remains full of conflicting statements. While one might not agree with the views of the Federal Circuit or the Supreme Court, both were able to use legal precedent and reasoning to arrive at widely divergent positions. It is exactly in situations of this kind that political pressures, rather than legal reasoning, are able to affect outcomes. It was probable that the Roberts Court would approach this case with an eye toward more narrow interpretations of the law, and it was exactly this view that allowed the Court to avoid the contention that approval can amount to control and in fact did amount to control in this case. By inherently shifting the *Mitchell II* focus to management, both the executive and the legislative branches will be able to more predictably avoid monetary damages arising out of their relationship with native peoples.

Facially, at least, this case came out the way it did because the scheme of statutes and regulations tipped the scales more heavily in favor of tribal self-determination rather than government duties. What would the Navajo say is more important to self-determination: management or control? The Court weighed in essentially to say that only management of tribal resources can show that the regulatory scheme was meant to trump tribal self-determination and impose trust duties on the government, but control by a regulatory scheme poses no hurdle to self-determination. The effectiveness of the ex parte communications that lie at the heart of this dispute shows that control over a resource is just as destructive to tribal self-determination, and the power to deny implies a great deal of control.

While it remains true that one lesson tribal claimants should have learned is to press all aspects of a network theory of trust duties at all stages of litigation,[157] a new caveat should be kept in mind. Although structurally a network can show the extensive nature of the government's control over a resource, and factually that control can be determinative of a given outcome, without a clear statement of government

157. Perdue, *supra* note 4, at 529.

management duties "neither the Government's 'control' over coal nor common-law trust principles matter."[158]

158. United States v. Navajo Nation (*Navajo II*), 129 S. Ct. 1547, 1558 (2009).