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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 01-1375

NAVAJO NATION. :

- - - - -X

Washington, D.C.

Monday, December 2, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

PAUL E. FRYE, ESQ., Albuquerque, New Mexico; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 JUSTICE STEVENS: The Court will hear argument
4 in the case of the United States against the Navajo Nation
5 now.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONER

9 MR. KNEEDLER: Justice Stevens, and may it
10 please the Court:

11 In 1987, the Secretary of the Interior, at the
12 request of the Navajo Nation and Peabody Coal Company,
13 approved a package of lease amendments to two outstanding
14 leases between the parties. With respect to the lease
15 principally at issue here, Lease number 8580, the
16 amendments increased the royalty to be paid by Peabody
17 from 37-and-a-half cents per ton to 12-and-a-half percent
18 of the value of the coal, a more than six-fold increase in
19 the amount of the royalty. That new royalty level was the
20 same as the standard royalty on Federal coal leases, and
21 it was well in excess of the then regulatory minimum that
22 the Secretary had prescribed for what a tribe and a coal
23 company could agree to, which was then only 10 cents per
24 ton.

25 The package of lease amendments also contained

1 numerous other provisions that were of benefit to the
2 tribe, including amendments to the other lease, that
3 more -- that approximately doubled the amount of the
4 royalty and a substantial increase in payments for water
5 use at the mines.

6 The Secretary's approval of the lease package in
7 1987 fully complied with the Mineral Leasing Act and the
8 regulations that the Secretary has prescribed to govern
9 her approval of lease agreements under that act.

10 Because there was no violation of any act of
11 Congress or regulation of an executive department, much
12 less one that could fairly be interpreted as mandating the
13 payment of damages by the Government, there is no cause of
14 action in this case under the Tucker Act.

15 The Court --

16 QUESTION: Is there some other possible cause of
17 action? Certainly it was unfortunate, to say the least,
18 that the Secretary of the Interior at the time apparently
19 had private conversations that -- with representatives of
20 Peabody Coal to try to discourage the approval of the
21 20-dollar rate.

22 MR. KNEEDLER: It was unfortunate, Justice
23 O'Connor.

24 QUESTION: And is there any other remedy for the
25 tribe potentially for this action?

1 MR. KNEEDLER: I think there -- it -- first of
2 all, I --

3 QUESTION: Is there a lawsuit now pending --

4 MR. KNEEDLER: Not -- not on that basis.

5 QUESTION: -- to cover something else?

6 MR. KNEEDLER: There's a -- there's a suit by
7 the tribe against Peabody, but -- but the -- as a remedy
8 against the United States, the only suit would be
9 conceivably an APA action.

10 I -- I should point out that there was no
11 regulation or statute that barred that communication at
12 the time.

13 QUESTION: It's the APA action. I mean, is
14 this -- is this a proceeding -- was the proceeding
15 supposed to be a proceeding required by statute to be
16 decided on a record?

17 MR. KNEEDLER: No. No, it was not.

18 QUESTION: Well, then that's an informal
19 adjudication.

20 MR. KNEEDLER: Right. I'm -- I'm not --

21 QUESTION: Ex parte communications take place
22 all the time in those situations. So what's unfortunate
23 about it? Maybe it was unfortunate politically, but I
24 mean, legally --

25 MR. KNEEDLER: Right.

1 QUESTION: -- is there any -- is there any rule,
2 regulation, or anything in the APA that forbids an
3 ex parte communication --

4 MR. KNEEDLER: There was not and there was --

5 QUESTION: -- in this circumstance?

6 MR. KNEEDLER: There was not and there was not
7 in the Secretary's regulations at the time. I did not
8 mean to imply --

9 QUESTION: Would there be now?

10 MR. KNEEDLER: No.

11 QUESTION: I mean, I don't know any agency --

12 MR. KNEEDLER: No. There's --

13 QUESTION: -- that ever forbids of something
14 like that, but I might be wrong. I want to find out about
15 it.

16 MR. KNEEDLER: No. No, there's -- there's not.
17 And -- and I didn't mean to imply that an APA suit would
18 be successful. All I meant to say is that that would be
19 the avenue in which to test that because an argument that
20 that was a -- that that was a violation would be
21 essentially --

22 QUESTION: Violation of what?

23 MR. KNEEDLER: Of -- of some -- some standard of
24 procedure of fairness -- procedural fairness I suppose
25 that a court would impose. Again, we don't think that a

1 court could do that. I -- I simply wanted to say that
2 if --

3 QUESTION: There are some D.C. Circuit cases
4 that suggest when there's a contest between a valuable
5 privilege, that ex parte communications are not -- not to
6 be permitted.

7 MR. KNEEDLER: But that is -- that is not
8 something, first of all, that -- that appears in a statute
9 or regulation, and under Vermont Yankee, which I think
10 came after those D.C. Circuit decisions, it wouldn't be
11 proper for a court to impose that on a -- onto an agency.

12 In any event, there was no restriction here.

13 QUESTION: The D.C. Circuit used to create its
14 own APA before -- before --

15 (Laughter.)

16 QUESTION: -- before Vermont Yankee.

17 MR. KNEEDLER: That's -- that's correct. And
18 we --

19 (Laughter.)

20 MR. KNEEDLER: We don't think there's any legal
21 standard, but even if there were, that sort of thing is
22 not something that would mandate the payment of -- of
23 damages for a violation.

24 QUESTION: The APA suit that you're -- you're
25 envisioning as a potential -- that doesn't have any

1 dollars attached to it. That would be for declaratory
2 injunction?

3 MR. KNEEDLER: To -- or to set aside the -- the
4 Secretary's subsequent approval of the lease or -- or
5 something of that nature.

6 QUESTION: Well, the lease is now expired, I
7 take it.

8 MR. KNEEDLER: The lease --

9 QUESTION: We're not still operating under that
10 same lease, or are we?

11 MR. KNEEDLER: We -- we are. The -- the tribe
12 and the -- and the Peabody are still operating under that
13 same lease. It was amended in 1987. This was 3 years
14 after the -- the communication that -- that you're
15 referring to.

16 QUESTION: And there's been no application to
17 set aside the lease.

18 MR. KNEEDLER: There has not. And -- and as
19 I -- as I pointed out, there are numerous aspects of the
20 lease package that was approved in -- in 1987 that are
21 advantageous to the -- to the tribe.

22 QUESTION: And since the events, has the tribe
23 obtained the authority to impose taxes that was not
24 previously --

25 MR. KNEEDLER: It -- well, the -- this Court in

1 1985 in the Kerr-McGee case upheld the right of the Navajo
2 tribe to impose taxes, but that's without the Secretary's
3 approval. And these lease agreement -- the lease
4 amendments in 1987 were negotiated and arrived at in -- in
5 the context of that decision.

6 Now, the -- the tribe has waived its right to
7 collect taxes with respect to coal that goes to the -- a
8 generating station in -- in Arizona. The rest of the
9 coal, though, is subject to the -- to the tax. There's an
10 overall cap on that.

11 QUESTION: Mr. Kneedler, just -- could I just go
12 back for a second to the Secretary's private
13 communications with the -- the coal company? Is it your
14 position that did not breach any fiduciary obligation
15 whatsoever?

16 MR. KNEEDLER: No --

17 QUESTION: They did not have a fiduciary
18 obligation to the tribes?

19 MR. KNEEDLER: It did not -- it did not breach a
20 legal fiduciary obligation. There is a -- there is a
21 sense in which everything that the Secretary of the
22 Interior does or, for that matter, everything the United
23 States Government does with respect to Indians is -- is of
24 a fiduciary nature in a moral sense. In a political
25 sense --

1 QUESTION: So at least in that respect, it's
2 different from the Vermont Yankee situation.

3 MR. KNEEDLER: Well, but -- but it's important
4 to look at the context in which this communication
5 occurred. The -- what -- what the -- what the Secretary
6 was being asked to do or -- or what -- what the Interior
7 Department was being asked to do was to make an adjustment
8 under an existing -- a term of the existing lease that
9 said that the royalty amount that was then prescribed,
10 which was 37-and-a-half percent, was subject to a
11 reasonable adjustment by the Secretary after the 20-year
12 anniversary of the lease.

13 QUESTION: Well, isn't it -- isn't it -- maybe I
14 misunderstand the facts. But wasn't it fairly clear that
15 had this conversation not taken place, that the adjustment
16 would have been put into effect that the tribe wanted?

17 MR. KNEEDLER: I don't think that's clear at all
18 because the -- Peabody Coal Company -- aside from this
19 communication, Peabody Coal Company sent the letter to the
20 Secretary of the Interior in early July of 1985 in -- in
21 which the representative of Peabody said, it appears that
22 the tribe believes that there's an imminent decision in
23 its favor on appeal from the local BIA area directors
24 setting the 20 percent rate.

25 QUESTION: Which was true, wasn't it?

1 MR. KNEEDLER: Well, yes. That was -- that was
2 true. But that's a subordinate official in the Interior
3 Department. The Secretary of the Interior -- as a matter
4 of constitutional law, and as a matter of the regulations
5 in effect at the time, the Secretary of the Interior had
6 the authority to take control of any matter that was then
7 pending in the Department.

8 But my important -- the important point is that
9 in that letter, Peabody Coal Company requested the
10 Secretary to assume jurisdiction over the matter, and to
11 either rule in its favor or, failing that, to -- to send
12 the parties -- request the parties to negotiate further,
13 which is exactly what happened.

14 QUESTION: And that letter --

15 MR. KNEEDLER: That letter -- that letter was --
16 a copy of that letter was sent to the Navajo Nation. And
17 it -- it subsequently is clear that -- deposition
18 testimony of Mr. Nelson, which is in the joint appendix in
19 this case, makes it clear that he understood. He was --
20 he was a special assistant to the chairman of the Navajo
21 Nation at the time. It makes it clear that -- that the
22 Navajo Nation had understood that the Secretary preferred
23 for them to go back to negotiate, which was a -- a
24 perfectly reasonable response by the Secretary of the
25 Interior in that situation.

1 The -- the increase of the royalty rate from --
2 from approximately 1 percent or a little over 1 percent to
3 20 percent was unilateral by the area director. It --
4 there was not a -- input by -- by Peabody at that time,
5 even though the area director communicated with --

6 QUESTION: Did both the tribe and Peabody
7 understand what was being considered, the increase that
8 had been recommended by the junior people in the
9 Department?

10 MR. KNEEDLER: Yes. That -- that -- the -- the
11 area director's increase of -- to 20 percent, an
12 adjustment of 20 percent, was appealed by -- was appealed
13 by Peabody and the utilities that -- that are served by
14 Peabody. And that appeal was briefed to the Assistant
15 Secretary, and it was pending. And then in -- in July
16 that was -- that area director's decision was in 1984.
17 The briefing was, I think, about 6 months later, and then
18 in July of 1985, the -- is -- is when the Secretary
19 requested the Assistant Secretary to put off deciding this
20 and have the parties negotiate. And they reached a
21 tentative agreement within -- within a month. It was --

22 QUESTION: If -- if Fritz, the Assistant
23 Secretary, had signed off on the 20 percent, would there
24 have been a further -- further recourse by --

25 MR. KNEEDLER: The -- the Secretary could have

1 overruled that. The -- the Secretary under the -- under
2 the governing regulations that we quote in our brief the
3 Secretary retained the authority to overrule any decision
4 by -- by the Assistant Secretary.

5 QUESTION: Mr. -- I'm sorry.

6 QUESTION: There was -- you mentioned in your
7 brief another route, appellate route, that could have been
8 taken in this case which would have rendered a final
9 decision, one not subject to the Secretary's --

10 MR. KNEEDLER: No. I believe that could have
11 still been subject to the Secretary's determination.
12 What -- what the Navajo Nation could have done, if it did
13 not want to continue with negotiations, was to request
14 that the matter be transferred from this informal appeals
15 process to the Assistant Secretary to a formal appeals
16 process which goes to the Interior Board of Indian
17 Appeals.

18 QUESTION: Well, I think --

19 MR. KNEEDLER: At that point the Secretary could
20 have assumed jurisdiction of the matter from the IBIA
21 under the same regulation I referred to. The Secretary
22 always had it within his power to -- to take -- take
23 cognizance of a case and not leave it with the -- with the
24 board.

25 QUESTION: Even if the court --

1 MR. KNEEDLER: There was a prohibition against
2 ex parte contacts in that formal adjudication, but
3 otherwise the Secretary retained the authority to -- to
4 take the case.

5 QUESTION: Mr. -- Mr. Kneedler, did the -- was
6 the Secretary's approval required on the contract that
7 included, or the -- the revision that included the
8 12-and-a-half percent royalty rate?

9 MR. KNEEDLER: Well, there were two leases, and
10 the Secretary's approval was required. But the reason was
11 different for the two. In the -- under the lease
12 principally at issue here, 8580 --

13 QUESTION: Let's just take that one.

14 MR. KNEEDLER: -- the -- the lease itself had a
15 clause that said that the royalty was subject to a
16 reasonable adjustment

17 QUESTION: Right.

18 MR. KNEEDLER: -- by the Secretary.

19 QUESTION: Right.

20 MR. KNEEDLER: As to that, we believe that there
21 could be no claim under the Tucker Act for the -- for the
22 fundamental reason that that is not a -- a duty that is
23 prescribed by an act of Congress, or a regulation under
24 the Tucker Act.

25 QUESTION: No, no. I -- I understand. Wasn't

1 that also subject to the general statutory requirement
2 that these leases be approved by the Secretary? They --
3 you know, it would be negotiated by the tribes, but
4 ultimately didn't it require the Secretary's approval?

5 MR. KNEEDLER: It -- it may well have and that
6 was not -- that was not addressed. The basis of the claim
7 here was --

8 QUESTION: Well --

9 MR. KNEEDLER: -- that the Secretary had -- had
10 a duty under the lease.

11 QUESTION: -- let -- let me just assume and --
12 and maybe I shouldn't do this, but you just briefly at
13 least assume that the Secretary's approval was required as
14 a -- a matter of statute. Would that approval
15 responsibility -- in your judgment -- carry any duty
16 toward the tribe, anything comparable to a fiduciary duty
17 toward the tribe not to approve an amendment if that
18 amendment was not as good as the -- in the Secretary's
19 judgment, the tribe could have gotten?

20 MR. KNEEDLER: No. There's -- in -- in our view
21 there is no duty under this statute to maximize returns to
22 the tribe.

23 QUESTION: What -- Tell -- let me ask you --
24 maybe it would be easier if I asked you kind of the
25 converse question. What responsibility does the approval

1 responsibility include? In other words, is it merely
2 ministerial, or does it imply any duty at all toward the
3 tribe?

4 MR. KNEEDLER: I don't know that I would call it
5 ministerial, but -- but the statute is -- is rather bare
6 in its terms. It just says that the -- that the tribe,
7 through its council -- and this is -- this is a statute of
8 general application -- may -- with the approval of the
9 Secretary -- lease its land for coal purposes. What
10 the -- what the preconditions for the Secretary to give
11 his approval are then and now is a matter for the
12 Secretary to flesh out by regulations.

13 QUESTION: So --

14 QUESTION: Well, is -- does the United States,
15 though, have some general duty of trust to the tribe?

16 MR. KNEEDLER: I think it would be fair to say
17 that -- that there is -- that there is a -- as I said, a
18 general moral and political duty.

19 QUESTION: Sure. And so when the Secretary has
20 to approve a lease, should that general duty be kept in
21 mind as part of that process?

22 MR. KNEEDLER: Surely. Surely, and again we're
23 not -- we're -- we quite agree that as -- that as a matter
24 of what -- what judgment should -- should inform the
25 Secretary in her approval of the lease.

1 QUESTION: No. But suppose the Government has a
2 general moral and political duty to the entire citizenry
3 not to lease Government land at -- at bandit rates I
4 assume.

5 MR. KNEEDLER: Well --

6 QUESTION: But that -- but that doesn't --

7 MR. KNEEDLER: Yes, but I meant --

8 QUESTION: That doesn't give rise to a cause of
9 action.

10 MR. KNEEDLER: That -- that's true. Here there
11 is --

12 QUESTION: Nor -- nor is there any specific
13 statute, is there? I mean, I -- I think the -- the point
14 that Justice O'Connor is -- is raising is -- is my point.
15 Once you get a specific statutory obligation, assuming
16 that approval carries some obligation of care, inquiry,
17 whatever, doesn't that carry with it some of the duty that
18 we normally have in mind when we talk about the trust
19 duty, and doesn't that take it out of the sphere of the
20 merely moral and the merely political into the legal?

21 MR. KNEEDLER: Well, that -- let me answer it
22 this way. The Secretary -- as I said, I believe it's up
23 to the Secretary to decide how to flesh out the regime for
24 her approval of leases and she has done this in the
25 regulations including, importantly, now and at the time

1 this lease was -- lease amendments were approved, a
2 minimum royalty amount. At the time, it was just 10 cents
3 per ton. Now, it's 12-and-a-half percent, which is the
4 standard rate of --

5 QUESTION: But a minimum -- a minimum is a
6 minimum.

7 MR. KNEEDLER: No.

8 QUESTION: So there's still something to argue
9 about there, I would --

10 MR. KNEEDLER: Well, no. And it's important to
11 understand why -- why I -- I think that's not correct the
12 way the Secretary's regulations are written.

13 This act has a number of goals, one of which is
14 revenue for the tribe, but another is tribal self-
15 determination, and this is clear from the legislative
16 history of the Indian Mineral Leasing Act as described in
17 1938 and described by this Court in its Cotton Petroleum
18 decision. So the -- the point is that it is up to the
19 tribe to enter into agreements subject to approval by the
20 Secretary.

21 QUESTION: Well, then I -- I think the
22 implication of your argument is that the approval is
23 purely ministerial. In other words, if the tribe is the
24 responsible party, then the Government is not.

25 MR. KNEEDLER: Well, the -- the -- it's actually

1 something of a hybrid I -- I believe. And what the
2 Secretary has chosen to impose on herself, which is not
3 the same thing as to whether it's -- it's legally
4 enforceable, is a set of regulations that would govern the
5 way in which she approves a lease. And with respect to --
6 again, with respect to royalty, there is a specific
7 regulation that says 12-and-a-half percent.

8 What -- the way the Secretary has -- has
9 accommodated these competing goals is that there is a -- a
10 minimum set of standards to which any agreement between a
11 tribe and a lessee enter into, any -- a set of standards
12 that must be satisfied. Beyond that -- beyond those --
13 satisfaction of those standards, it is up to the tribe and
14 the -- and the lessee --

15 QUESTION: Well, all right. That's, I take it,
16 their argument -- as I understand their argument, or part
17 of it anyway, is that if you put -- we hold property in
18 trust for the tribe. That by itself doesn't do much for
19 them. That's Mitchell I.

20 MR. KNEEDLER: Right.

21 QUESTION: But when you get a whole lot of very
22 detailed rules and regulations about how the Government
23 needs to behave, well, then, you find that there is a
24 specific duty for the Government even if it isn't quite in
25 those rules and regulations to behave like a trustee of a

1 trust, i.e., use prudent care, reasonable care, whatever
2 the standards are.

3 So they're saying whatever the details of the
4 regs are here, there certainly was a highly detailed set
5 of something that governed how the Government would behave
6 in this particular lease complexity, a very complicated
7 situation. And therefore, regardless of what they said,
8 there was also, because of that complexity, an obligation
9 for the Government to use reasonable, prudent care no
10 matter what the regs said.

11 MR. KNEEDLER: Well --

12 QUESTION: And that's what they didn't do here.
13 You see, it's just like Mitchell II.

14 MR. KNEEDLER: But it's -- it's not just like
15 Mitchell II.

16 QUESTION: All right. Now, what's your response
17 to that?

18 MR. KNEEDLER: And I -- and I think the
19 important difference is in Mitchell II the Court recited a
20 number of specific statutory duties -- statutory and
21 regulatory duties that were directed at assuring a
22 particular amount of income for the tribe under the
23 circumstances. Fair market value for a right-of-way.
24 Sustained yield management of -- of timber harvest.
25 Specific statutory directives to take into account the

1 financial needs of the beneficiaries whose allotments were
2 going to be logged off.

3 QUESTION: I see where you're going. I see
4 where you're going with that. But that reads Mitchell II
5 very narrowly. And it is as if in that forest filled with
6 Government foresters that the tribe members had to stay
7 out of, one day a forester working for the Government
8 introduces some termites into the trees, and lo and
9 behold, there doesn't happen to be a particular anti-
10 termite regulation. I think you'd read Mitchell II as
11 even though there's no anti-termite regulation, still
12 there was a duty of care there for the Government not to
13 behave that way.

14 MR. KNEEDLER: I -- I -- I don't think so. I
15 mean, again, there may be -- there may be a tort action.
16 The -- the Tucker Act does not cover the entire
17 universe --

18 QUESTION: So if I think --

19 QUESTION: Termites are good for trees.

20 (Laughter.)

21 QUESTION: You know, they're -- they're not good
22 for houses, but they're good for trees.

23 (Laughter.)

24 QUESTION: No. These are bad anti-tree
25 termites.

1 (Laughter.)

2 MR. KNEEDLER: But the --

3 QUESTION: If -- if I read Mitchell II somewhat
4 more broadly and thought that there was an obligation
5 there to behave like a trustee even if I couldn't pin it
6 to a particular reg, this particular action, would I then
7 have to decide against you here?

8 MR. KNEEDLER: Well, no, because we -- we think
9 that there was -- that the Secretary's approval of the --
10 of the lease amendments in 1987 satisfied a duty of
11 reasonable prudence. The standard that was articulated in
12 the documents presented to the Secretary for approval
13 was -- was whether the lease package could be regarded as
14 a reasonable exercise of -- of business judgment. This
15 was set forward --

16 QUESTION: Well, but that -- that argument sort
17 of takes the lease terms simply in the context of the --
18 the 12-and-a-half percent minimum that the Secretary had
19 taken. But it seems to me that they have a stronger
20 argument and it is closer to the termite argument. And
21 the stronger argument is whatever your obligations as a
22 trustee may be under the approval responsibility, you at
23 least have an obligation not to skew the bargaining
24 process in a way that hurts us when you know that is what
25 it will do.

1 And as I understand the argument about the
2 ex parte communication, it's not that the ex parte
3 communication was per se unlawful. It -- it clearly
4 wasn't. The argument is that the ex parte communication
5 resulted in action by the Secretary that, in effect,
6 induced the tribe to take a different negotiating posture
7 from the one it would have taken. And therefore, their
8 argument is like the termite argument: You're not
9 supposed to introduce bad termites into the forest, and
10 you're not supposed to take action as a minimum that hurts
11 us as negotiators.

12 What is your response to that?

13 MR. KNEEDLER: Well, several things. The -- the
14 termite example is different, first of all, in that it has
15 an immediate physical impact on the -- on the trees -- the
16 substance of the trust. What you're describing is a
17 procedural -- is -- is at bottom a procedural --

18 QUESTION: It makes trees less valuable. This
19 makes coal less valuable under the contract. They get
20 hurt.

21 MR. KNEEDLER: Well, the -- the -- secondly,
22 the -- there is no indication that the substance of the
23 communications was any different from the -- from what the
24 tribe knew anyway, which was that Peabody had requested
25 the Secretary not to act and to allow the parties to

1 return to negotiations. But beyond that, when they --
2 then the -- this -- this -- these are all things that
3 happened in 1984 and 1985. That was superseded by the
4 parties' lease agreement in 1987.

5 In 1987, as part of the lease agreement that was
6 submitted to the Secretary and that the Navajo Nation
7 requested that the Secretary approve, the area director's
8 decision that initially established a 20 percent rate
9 unilaterally was vacated and Peabody's appeal was
10 dismissed. That wiped the slate clean for everything that
11 happened up until then.

12 The question then is what is -- was the 1987
13 lease amendment package proper? And under Mitchell, as we
14 see it, unless there is a violation of a specific
15 statutory or regulatory provision in the approval of the
16 lease, there cannot be a claim for money damages under the
17 Tucker Act. And --

18 QUESTION: Mr. Kneedler, you had started to
19 explain that the -- the responsibility, or the authority
20 came out of the lease itself with respect to -- to the
21 main lease --

22 MR. KNEEDLER: Right.

23 QUESTION: -- that we're talking about. But
24 then you said that there was also Secretary approval
25 involved in the one where it wasn't a term of the lease.

1 I think you started to say that.

2 MR. KNEEDLER: Yes. In -- in 1987, what the
3 parties presented to the Secretary was not a proposal to
4 adjust the royalty under the -- Article VI of the existing
5 lease. It was a set of new amendments that, among other
6 things, superseded that clause of the lease and put in
7 place another dispute resolution mechanism for adjusting
8 the royalties in the future. As part of that, the -- the
9 controversy with respect to the 1985 -- 1984 to 1985
10 adjustment was -- was eliminated.

11 But that 1987 package provided well in excess of
12 the minimum royalty rate both for the 8580 lease and also
13 the other lease with -- for the Navajo with respect to
14 coal it owned jointly with the Hopi Tribe. And that
15 satisfied the specific regulatory standard that the
16 Secretary had prescribed for deciding when she would
17 approve lease agreements.

18 QUESTION: What I can't quite understand with
19 reference to your position as to the correct reading of
20 Mitchell II is this: It seems to me you say that even if
21 there's a breach of a fiduciary duty, there still has to
22 be some specific statute or regulation which we violate,
23 and that specific statute or regulation must imply that
24 there is a cause of action for damages. That makes the
25 fiduciary component quite irrelevant. Either there's a

1 specific statute, or there isn't.

2 MR. KNEEDLER: No, I don't think it does because
3 it -- the fiduciary -- the important discussion in
4 Mitchell II of the fiduciary responsibility had to do with
5 whether the specific statutory or regulatory duty -- which
6 is prong one -- could in turn be fairly interpreted to
7 requirement -- require the payment of compensation.
8 That's where the fiduciary obligation comes in.

9 But this case fails at the first step because
10 there is no specific statutory or regulatory provision
11 that was violated. There's no need to get to the second
12 step in the analysis on that theory.

13 And this specificity requirement was reflected
14 in Testan and Sheehan, both of which were decided prior
15 to -- to Mitchell. Both say that there has to be a right
16 granted with specificity.

17 It's also confirmed by things that have happened
18 since then. That's the way the Federal Circuit in the
19 Brown and Pawnee decisions that we -- that were cited in
20 the decision below looked at Mitchell -- Mitchell II.
21 There had to be a specific provision that was violated.

22 And that's also entirely consistent with last
23 year's decision in the Gonzaga case under -- under the
24 very parallel situation of 1983 where the Court said there
25 has to be a -- a right granted with specificity -- an

1 entitlement granted with specificity -- where the question
2 is whether a -- a -- another Federal statute gives rise to
3 a cause of action under a general cause of action creating
4 a statute, in that case 1983. But we think the analysis
5 is directly parallel.

6 If I may, I'd like to reserve the balance of my
7 time for rebuttal.

8 QUESTION: Mr. Frye.

9 ORAL ARGUMENT OF PAUL E. FRYE

10 ON BEHALF OF THE RESPONDENT

11 MR. FRYE: In listening -- Mr. -- Justice
12 Stevens, and may it please the Court:

13 In listening to the Government, it's clear that
14 the Government has not come to terms yet with the basic
15 principle established in Mitchell II, that where Congress
16 gives the Federal Government control of Indian property,
17 that control necessarily implicates trust duties. And
18 violations of trust duties, when the Government is
19 exercising responsibilities, within the contours of those
20 statutes and regulations, gives rise to a claim for money
21 damages in the Court of Federal Claims. That's what's
22 missing.

23 QUESTION: Mr. Frye, the Government has stressed
24 that this is not a control situation like Mitchell II.
25 Rather, like Mitchell I, one of the objectives of this

1 legislation of IMLA was to give the tribe the management
2 and control authority, and the Government had just a
3 secondary role of approving at the end of the road. But
4 unlike the -- the United States was running the timber
5 operation. Here, it's the tribe that's negotiating the
6 lease. It seems to me that's quite different.

7 MR. FRYE: That's a two-part question. One,
8 after the Navajo tribe signed the coal lease in 1964, it
9 had absolutely no control over anything. I'd like to read
10 you one -- just one regulation, one operating regulation,
11 that the Secretary has. It empowers -- and this is at
12 page 44 of our lodging. This is BLM's responsibility, not
13 even BIA who has the principal responsibility. BLM has
14 the responsibility to, quote, oversee exploration,
15 development, production, resource recovery and protection,
16 diligent development, continued operation, preparation,
17 handling, product verification, and abandonment
18 operations.

19 QUESTION: Oversee. What does oversee mean?
20 Did it do that or oversee it? I mean --

21 MR. FRYE: Oh, the Secretary doesn't mine coal
22 anymore than the BIA cuts timber, but BIA sells timber to
23 private timber companies to do the timber-cutting. The
24 BIA oversees that timber production in the same way it
25 oversees the coal operation.

1 QUESTION: I'm not sure that that's anything
2 more specific than the general trust responsibility that
3 the United States has. It has to oversee the disposition
4 of all the lands that it holds in trust, but I'm not sure
5 that that's the kind of control that -- that we were
6 talking about in Mitchell II.

7 MR. FRYE: Well, Mitchell II control is
8 absolutely parallel. The same --

9 QUESTION: What -- what about --

10 MR. FRYE: Yes, the second part of your
11 question.

12 QUESTION: The purpose of IMLA was to help the
13 Indians exercise their own sovereignty.

14 MR. FRYE: IMLA has come before this Court
15 several times. In the first case, in the Poafpybitty case
16 in 1968, the Government looked at IMLA and said this
17 statute imposes trust responsibilities and trust duties on
18 the Government. It said that three times in that
19 decision.

20 QUESTION: Does it waive sovereign immunity in
21 the statute for purposes of monetary damages against the
22 Government? It doesn't do so expressly.

23 MR. FRYE: It doesn't do so expressly just as
24 the -- the timber statutes didn't do so expressly in
25 Mitchell II. But it has that same overlay of

1 comprehensive Federal control and regulation.

2 QUESTION: That's true, but -- but the
3 Government had a good response to my question, which was
4 that if, in fact, I was agreeing with you for the purposes
5 of interpreting Mitchell II hypothetically, they said, you
6 know, this is a procedure, and it's a procedure that
7 you're complaining was violated. And that's significant
8 for two reasons. First, it would read this trust
9 responsibility as creating procedures in identical
10 circumstances where a party is an Indian tribe that do not
11 exist in respect to anyone else, and secondly, it would be
12 finding a -- money damages, \$600 million in fact, for a
13 violation of this -- one of these procedural regulations.

14 And I cannot even think -- though there may be
15 some, I cannot think of an instance where a private person
16 who really has been badly hurt can recover money damages
17 from the Government where what the Government did was not
18 follow the right procedure. So it's new procedures, plus
19 the money damages, and you'd have to overcome all those
20 hurdles.

21 MR. FRYE: Okay. We are not complaining,
22 Justice Breyer, about any procedural problem. What we are
23 complaining is -- is about the Secretary colluding with
24 Peabody Coal Company to swindle the Navajo Nation. That's
25 what this case is all about.

1 QUESTION: That's -- that's -- tell me a little
2 bit less pejoratively and --

3 MR. FRYE: I will tell you.

4 QUESTION: -- more specifically. Yes.

5 MR. FRYE: Yes. The -- the memorandum that
6 Secretary Hodel hand-delivered to Fritz, every word of
7 that was penned by Peabody's lawyers in -- in the
8 administrative appeal, and that's shown in the joint
9 appendix --

10 QUESTION: Again, that's -- you know, in a
11 particular context, that might be terrible, but when
12 you're talking about administration, it's a very common
13 thing for parties to submit proposed findings, et cetera.
14 So I don't know about this circumstance, but that -- that
15 in and of itself is -- is not obviously it.

16 MR. FRYE: That wasn't my entire answer.

17 Following that, the Secretary of the Interior
18 basically instructed his subordinate to lie to the Navajo
19 Nation so it would not know what went on. The -- and that
20 subordinate was the last person that the Navajo Nation
21 would have expected to deceive it. That person had worked
22 with Navajo Chairman Peterson Zah on the reservation and
23 had named his son Peterson Zah Vollmann.

24 After that, the negotiations were skewed, as
25 Justice Souter mentioned. The Navajo Nation thought,

1 because of these odd communications coming from
2 Washington, that its trustee thought that the 20 percent
3 figure was vulnerable on the merits. We're talking about
4 a breach of trust. And the -- the question is whether
5 the --

6 QUESTION: Maybe he did think it was vulnerable
7 on the merits. I mean, couldn't the Secretary think that?

8 MR. FRYE: The record -- the record shows
9 absolutely no consideration by the Secretary. The
10 standard that was at play here --

11 QUESTION: Well, isn't -- isn't that -- isn't
12 that was -- isn't that the representation that Peabody
13 made to the Secretary, that that was just an enormous
14 increase in the -- in the fee?

15 MR. FRYE: Peabody actually -- the letter that
16 Peabody wrote to Secretary Hodel that was mentioned by my
17 brother Kneedler actually didn't get to Hodel's office.
18 The record shows that that -- that that letter was routed
19 directly to Fritz, code 200 on the document, and that
20 Fritz gave it to his solicitors who were working on his
21 opinion, and those --

22 QUESTION: No. I understand that. But -- but
23 don't you think in the ex parte -- the -- the oral
24 ex parte contact, the same point was made? What --

25 MR. FRYE: We have no idea what was made.

1 QUESTION: Well, what do you guess they made?
2 I mean, why wouldn't they have made the same point that
3 was in their letter? My goodness, all of a sudden,
4 you're -- you're upping our -- our cost 20 times? I mean,
5 you know, that's incredible.

6 MR. FRYE: That's -- that's not the context of
7 this discussion. The -- the royalty rate was upped to
8 20 percent a year before. We had had extensive briefing,
9 studies done by the Department of the Interior, all of
10 which said that 20 percent was the right number. The
11 Secretary of the Interior had no basis for saying it was
12 the wrong number.

13 QUESTION: What is the number today?

14 MR. FRYE: The number today --

15 QUESTION: Today.

16 MR. FRYE: -- is less than the Federal minimum
17 of 12-and-a-half percent. And we proved that, and that's
18 in our proposed finding of fact number 315 that it was --

19 QUESTION: What -- has the tribe asked to set
20 aside this lease?

21 MR. FRYE: We have not. We didn't learn about
22 this until discovery in this case.

23 QUESTION: Well, you know about it now. I mean,
24 does the tribe want out from under this lease?

25 MR. FRYE: We have sued Peabody, and there are

1 aspects of that that deal with reformation of the lease.
2 But we don't have any ability to get past damages from the
3 Government for breach of trust for the time period for
4 which this activity was concealed.

5 QUESTION: I don't -- I don't understand what
6 the breach of trust consists of. Number one, it -- you --
7 you acknowledge it doesn't consist in the -- in the ex
8 parte contract. I -- contact. I assume that any trustee
9 does -- does not have an obligation to call in the -- the
10 cestui que trust whenever -- whenever a lessee wants to
11 talk about something. I'm sure many trustees deal ex
12 parte.

13 MR. FRYE: No -- no trustee has the ability to
14 be disloyal, actively disloyal to the -- to the
15 beneficiary.

16 QUESTION: I'm not -- I'm not talking about
17 actively -- I'm just talking about the ex parte --
18 receiving ex parte presentations --

19 MR. FRYE: The Secretary --

20 QUESTION: -- from somebody who wants -- who
21 wants a lease altered. Can -- can an ordinary trustee do
22 that?

23 MR. FRYE: The -- the Secretary and any ordinary
24 trustee can receive all the communications he wants.

25 QUESTION: Absolutely.

1 MR. FRYE: If the question is what the Secretary
2 did in response to that --

3 QUESTION: All right, and so -- so then you --
4 you're down to what the Secretary did in response. That
5 depends on what the Secretary's obligation is, I -- I
6 presume.

7 MR. FRYE: Yes.

8 QUESTION: And as I read the statute and
9 regulations, the Secretary's only obligation was to assure
10 that a very low minimum was -- was complied with. And
11 after that, the negotiation was up to the tribe. Is that
12 a fair representation of -- of what the statute and regs
13 require?

14 MR. FRYE: The statutes and regulations did
15 require minimum royalty rates, and as this Court held --

16 QUESTION: Which are very low.

17 MR. FRYE: Very low. Absurdly low. I mean,
18 the -- the Government would say to this Court if we had
19 approved -- if we had misled the Navajo Nation so badly
20 that it would have taken 11 cents a ton, we could approve
21 the 11 cents a ton because the minimum royalty rate was
22 10 cents a ton even though we knew it was worth \$4 a ton
23 in royalty.

24 QUESTION: Yes, but -- I'm actually having
25 exactly the same problem.

1 MR. FRYE: Okay.

2 QUESTION: What precisely is it that breached
3 the trust, without any characterization?

4 MR. FRYE: Yes.

5 QUESTION: Who said -- what is the act that's
6 supposed to be the breach of the fiduciary duty? It's
7 not, you're saying now, the procedure of ex parte
8 communication. It is -- and then you said there was a
9 misrepresentation. What was that? I mean, are there
10 other things too?

11 MR. FRYE: Yes. There are a variety of things
12 that led the tribe to accept Peabody's proposed package
13 of -- of lease concessions from our standpoint, and the --
14 the breach --

15 QUESTION: Well, would you --

16 MR. FRYE: -- the culminating events of the
17 breach --

18 QUESTION: Can I interrupt you, sir? Could --
19 could you specify what the variety is because I want to
20 know the same thing Justice Breyer wants to know.

21 MR. FRYE: Yes. The culminating event was the
22 approval of a lease for a less than 12-and-a-half percent
23 royalty rate where the tribe gives up -- has a negative
24 bonus of \$89 million in back --

25 QUESTION: All right. But that's -- that's a

1 lease that the -- that the tribe at that point had agreed
2 to. Would you specify what the Government did or said,
3 number one, that led the tribe to act differently from the
4 way it would have acted otherwise?

5 MR. FRYE: But for the Secretary's intervention,
6 20 percent would have been slipped in as the new royalty
7 rate.

8 QUESTION: What intervention? Precisely what?

9 MR. FRYE: The -- the memo that Peabody's
10 lawyers wrote that Secretary Hodel signed telling the
11 deciding official to stop action.

12 QUESTION: Well, now wait a minute. When --
13 when the Secretary exercises his authority to approve
14 leases, is it your -- is it your contention that the only
15 obligation -- not to approve leases, but to -- but to --
16 to give effect to that provision of the lease which allows
17 him to increase the lease rates -- that's what we're
18 talking about here. When he -- when he approaches that
19 obligation, is it your contention that his only duty is to
20 the tribe?

21 MR. FRYE: Yes. That -- that is the --

22 QUESTION: He should raise it -- he should raise
23 it 5,000 percent if he can get away with it?

24 MR. FRYE: The --

25 QUESTION: Surely --

1 MR. FRYE: The key modifier is if he can get
2 away with it.

3 QUESTION: -- I just don't read it that way. It
4 seems to me that no -- anybody would be crazy to enter
5 into a lease like that. One would expect that the -- that
6 the Secretary would act fairly. Sure, take into account
7 what's fair for the tribe, but also what's fair for the
8 coal company that entered into a lease at a much lower
9 rate earlier at arm's length. You think he -- you think
10 the Secretary couldn't take into account what's fair for
11 the coal company at all.

12 MR. FRYE: What the Secretary had to take into
13 account is provided by the language of Article VI of the
14 lease. The adjustment had to be reasonable. And to --

15 QUESTION: Okay.

16 MR. FRYE: And to find that out, the
17 Secretary's --

18 QUESTION: And reasonable doesn't mean whatever
19 will give the tribe the most money. It also certainly
20 includes what -- what's fair for the -- for the person
21 who -- on the other side of the lease who -- who is
22 suddenly getting socked with a 20-fold increase. I don't
23 think that's unreasonable at all for the Secretary to take
24 that into account.

25 MR. FRYE: The Secretary can't doff his trust

1 responsibilities by donning the mantel of an
2 administrator. If it's reasonable, that means I think
3 necessarily that the Secretary can't set it so high as to
4 bankrupt the operation and stop the coal mining.

5 QUESTION: But that may be, but there must be a
6 statute -- there must be a statute that turned over to the
7 Secretary or his office the job of interpreting that word
8 reasonable in the lease. What -- what's that statute?

9 MR. FRYE: That would be the Indian Mineral
10 Leasing Act.

11 QUESTION: And it gives the Secretary -- and
12 you're saying that that statute, when it gives the
13 Secretary the power to decide what is or is not reasonable
14 under the lease, means that the Secretary must really just
15 take the Indians' point of view into account?

16 MR. FRYE: Absolutely not. He needs to exercise
17 independent judgment to make sure that whatever the
18 royalty rate that he is going to substitute for the
19 original one is reasonable.

20 QUESTION: Is fair, in other words, to
21 everybody.

22 MR. FRYE: I think fair is not a bad
23 characterization. Fair and reasonable.

24 QUESTION: Okay. Then -- well, but then what's
25 the -- the breach here? He was doing apparently what he

1 thought was fair, I guess. I mean, maybe it was -- maybe
2 he was wrong, but --

3 MR. FRYE: The Secretary was not doing what he
4 thought was fair. The -- Peabody sent his best friend in
5 there with his pocket full of Peabody's money and -- and
6 it was -- and that's in the records. It's \$13,000 for a
7 couple of hours of work. And he says, my clients have
8 learned that there is a decision coming down that's going
9 to hurt them. Put a stop to it. And the Secretary did.
10 There was no independent judgment.

11 QUESTION: That \$13,000 didn't go to the
12 Secretary, did it?

13 MR. FRYE: Oh, there's no -- absolutely --

14 QUESTION: That was -- that was for the
15 lobbyist.

16 MR. FRYE: It was for the lobbyist. And
17 frankly, he was underpaid for this -- this bit of
18 skullduggery.

19 (Laughter.)

20 QUESTION: I agree with you.

21 (Laughter.)

22 MR. FRYE: I'd like to get back to Justice
23 Ginsburg's question about the second purpose of the
24 statute. Here, the Department of the Interior thwarted
25 both purposes of the statute. It thwarted our independent

1 ability to have a -- to exercise our self-determination in
2 an informed way. It disinformed us so that we couldn't
3 exercise informed self-determination. And -- and that's
4 what the judge in the Court of Federal Claims said. He
5 said, a negotiator's weapon is knowledge. And unaware of
6 these things, the Navajo Nation was without critical
7 knowledge, and in fact, the record shows that the
8 Secretary was giving this knowledge and more to the people
9 who were negotiating against us. So we didn't have that
10 ability --

11 QUESTION: May I just interrupt? Mr. Kneedler
12 said that this really was all contained in the letter that
13 was sent to the Secretary with copies to the tribe
14 earlier.

15 MR. FRYE: The -- the request was -- was
16 included in that letter, and -- and the tribe did get a
17 copy of that letter. But we didn't know that the
18 Secretary had acted on Peabody's request. In fact, the
19 Secretary told us the opposite.

20 QUESTION: But didn't you know that at least --
21 didn't you know at least it was a possibility as long as
22 the letter was on the table?

23 MR. FRYE: I guess that -- it certainly would be
24 a possibility.

25 But there -- there was sort of a law of the case

1 that developed in this administrative procedure. Peabody
2 made the same request of Secretary Clark, and
3 Secretary Clark said to his Assistant Secretary Fritz,
4 what should I do with this? So Fritz asked everybody, do
5 you want me to stay this so you can negotiate? The Navajo
6 Nation said no.

7 Fritz then wrote everybody saying, we've gotten
8 your letter. You wanted us to set aside this procedure so
9 you can negotiate. Not everyone wants to negotiate. So
10 we're going to continue. That was kind of the law of the
11 case here.

12 Getting back to Justice Breyer's question, the
13 culminating event was the approval of a lease at
14 sub-12-and-a-half percent rates when every Federal study
15 said the royalty rate ought to be 20 percent. There was
16 no other Federal study. And that was a breach of the duty
17 of care.

18 This Court has said in the Kerr-McGee case that
19 the basic purpose of the Indian Mineral Leasing Act --

20 QUESTION: Excuse me.

21 MR. FRYE: -- was to maximize revenues.

22 QUESTION: It wasn't -- it -- more precisely it
23 wasn't the approval of a lease. It was the approval of --
24 of the -- the raise of the figure that was contained in a
25 lease that had already been concluded.

1 MR. FRYE: That is incorrect, sir.

2 QUESTION: That is incorrect?

3 MR. FRYE: Yes.

4 QUESTION: Why?

5 MR. FRYE: Volume II of the joint appendix in
6 this Court includes both the original lease and these coal
7 lease amendments, and they're virtually totally different
8 documents. There's new tax waivers. There's a new
9 dedication of 90 million tons of coal. There's a -- for
10 the north lease and for the other lease another
11 180 million tons of coal, all without a competitive bid.

12 So we not only didn't get the Federal minimum,
13 we certainly didn't get 20 percent. We didn't get the
14 Federal minimum of 12-and-a-half percent, and we had to
15 pay a bonus to the companies of \$89 million to get what we
16 got.

17 QUESTION: But you got a severance tax as part
18 of the package, and one of the things that the Government
19 suggested is if -- if you take the 12 percent and you add
20 the 8 percent, then you get up to the 20 percent, which
21 was your figure.

22 MR. FRYE: Justice Ginsburg, we had the tax
23 before all of this happened. And as -- as my brother
24 Kneedler mentioned to the Court, we can't tax 60 percent
25 of the coal because it goes to the Navajo generating

1 station which has a tax waiver in the plant site lease.
2 So we're capped at the 12-and-a-half percent royalty level
3 for 60 percent of the coal. And before we entered into
4 these lease amendments, we were not restricted in the
5 amount of taxes that the Navajo Nation could impose.

6 QUESTION: And as I understand it now, it's --
7 what you're saying, it's just as if the trees in Mitchell
8 where the money from the tree was supposed to go to the
9 Indians, if the Government had cut it down and sold it for
10 a half a cent a tree.

11 MR. FRYE: That's correct.

12 QUESTION: All right. And all this other stuff
13 with the procedures is just evidentiary of what was going
14 wrong. But what was going wrong is it's like selling the
15 trees at too low a price, if they were supposed to go to
16 the -- the tribe, if the proceeds had been. That's --
17 that's the -- basically the argument.

18 MR. FRYE: I think that's right. The damage-
19 causing activity finally was the approval of these
20 damaging lease amendments.

21 QUESTION: Was the price above the minimum that
22 the Secretary's regulations provided for?

23 MR. FRYE: Yes.

24 QUESTION: Well, it seems to me the problem then
25 was with the Secretary's regulation, not with what went on

1 here. That regulation was invalid as arbitrary,
2 capricious --

3 MR. FRYE: No. The regulation only set a
4 minimum royalty, and as this Court --

5 QUESTION: But that's -- but that's the point,
6 I mean, in order to leave full negotiating authority to
7 the tribe. And what you're saying is that minimum is so
8 low that it -- it produces, you know, highway robbery. It
9 seems to me that the problem is -- is with the regulation
10 and maybe you can get at it when the regulation is applied
11 this way. I don't know.

12 MR. FRYE: The -- in Mitchell II, for example,
13 there was a claim -- the Mitchell II claims did not track,
14 by the way, specific statutory and regulatory provisions.
15 There was a claim, for example, that was upheld for the
16 failure of the Department of the Interior to -- to develop
17 a system of roads and easements conducive to timber
18 harvesting. There was no statute that required that.
19 There was no regulation that required that. That was part
20 of the trust duty.

21 And there was one other claim that was upheld in
22 Mitchell II, and a statute said, you -- if you're going to
23 deposit these monies into the Federal Treasury, the
24 Federal Government has to get at least 4 percent. It was
25 a minimum 4 percent rate. And the allottees and tribe in

1 the Mitchell case said, just by turning around you could
2 have gotten 8 percent, and the court below said, yes, you
3 can't be satisfied as trustee with the minimum rate. You
4 have to at least strive for the ceiling. And that was
5 upheld. That claim was upheld here.

6 So there were several claims in Mitchell II that
7 were not tracking any specific --

8 QUESTION: There was not in Mitchell II a
9 statute that -- that sought to place the negotiating power
10 in the hands of the Indians rather than in the hands of
11 the Government. I mean, that's what distinguishes this
12 case. You have here a scheme that is meant to -- meant to
13 place the tribe in -- in charge of its own fate, and --
14 and it effectively tells the Secretary, we don't want you
15 to negotiate these leases. That's quite a bit different.

16 MR. FRYE: Actually that's incorrect. The
17 statutory scheme in Mitchell II, section 406(a), said that
18 the -- the Indians could -- or could sell their timber
19 with the consent of the Secretary. It's the exact same
20 structure as we have here. What we have here is the
21 Indians can lease their coal with the approval of the
22 Secretary of the Interior. The approval has a real
23 history.

24 QUESTION: It's certainly not how -- how the
25 Court described it in Mitchell II because the Court spoke

1 about exclusive control, that the United States did all
2 the negotiating, that -- and it made all the arrangements.
3 Now, whatever you -- you say, you have to deal with what
4 is in that opinion, and it does stress the exclusive
5 control of the United States and distinguishes the prior
6 case on the ground that the other case was designed to
7 give the Indians autonomy to deal for themselves.

8 MR. FRYE: The -- the Secretary certainly had
9 exclusive control over whether to approve this
10 transaction, whether to allow the trust asset to be sold
11 or not. He had exclusive control over that, and that is
12 within the contours of the statutes and regulations.

13 And I --

14 QUESTION: I thought that the -- the authority
15 came from the lease from the term that the -- that the
16 tribe agreed to, that the -- the authority to adjust the
17 royalty in this case comes from the lease, not from any
18 statute or regulation. Isn't that true?

19 MR. FRYE: That's correct. Of course, that
20 lease itself was approved by the Secretary of the Interior
21 as trustee of these --

22 QUESTION: Wait. I thought you said some of
23 these were new leases. I mean, that's what confuses me.
24 When I was making that point earlier, you said no, some of
25 them were new leases. Now, the authority to adjust the

1 rate for the new leases certainly didn't exist in the old
2 lease, did it?

3 MR. FRYE: That's not even at issue. There
4 is -- there is no secretarial authority to adjust the rate
5 in the new lease.

6 QUESTION: Well, that -- that's right. So some
7 of your complaint does not rest upon the provision in the
8 original lease that gives the Secretary the power to
9 adjust the rate.

10 MR. FRYE: Yes. I -- I think in response to
11 Justice Breyer, the -- the event that caused the damages
12 here was the improvident approval, without observation
13 of --

14 QUESTION: Of the new leases.

15 MR. FRYE: Of the new leases. That is correct.

16 QUESTION: So that -- and that -- that's --
17 there isn't a -- sort of like a statute that says,
18 Secretary, give an approval or not. What there is is the
19 tribe negotiates something. Then they have the
20 director -- the area director, say, okay, that's all right
21 because the tribe asked him to say. And then somebody
22 approve -- appeals to the Department of the Interior under
23 a regulation of the Interior Department allowing any
24 aggrieved party to go appeal. And then the Secretary
25 intervenes in that, and then they don't tell the tribe.

1 And because they don't tell the tribe, the tribe enters
2 into a different lease. That's really what happened.

3 MR. FRYE: Yes.

4 QUESTION: And it's hard to fit that into the
5 model of the Secretary charging a penny for a tree. The
6 Secretary, in a sense, didn't charge anything for
7 anything.

8 MR. FRYE: The Secretary allowed this trust
9 asset to be conveyed for what he knew to be about half of
10 its value.

11 Now, the approval requirement has a history,
12 going back to the first administration of George
13 Washington. In the Trade and Intercourse Acts, Congress
14 first erected what this Court has called the strong shield
15 of Federal law, to prevent Indians from being despoiled in
16 their property. And Congress, when it legislates,
17 legislates against this rich history, this background in
18 the context of the approval requirement.

19 In the Anicker case in 1987, in a leasing
20 context, the -- the Court said that the -- this strong
21 shield of Federal -- of Federal law was designed to
22 protect the Indians from the designs of those who would
23 take their property for less than fair compensation.
24 That's the -- that's the meat of the approval --

25 QUESTION: Okay. So you're saying the approval

1 was wrong for two reasons, I guess. Number one, the rate
2 approved was less than half fair value.

3 MR. FRYE: Correct.

4 QUESTION: So that, in effect, every -- every
5 lease that was approved at the 12-and-a-half percent was
6 wrongly approved.

7 MR. FRYE: No. This is extraordinarily valuable
8 coal. This is unusual coal.

9 QUESTION: I see. Okay. I --

10 MR. FRYE: This is 12,500 btu coal.

11 QUESTION: I stand corrected.

12 So it was the -- the approval was wrong simply
13 because the -- the particular value of this coal meant
14 that it was being conveyed away for -- for half what it
15 was worth.

16 MR. FRYE: Yes.

17 QUESTION: That's the substance.

18 And then you're also making the argument that it
19 was wrong -- and I think I used the word, the -- the
20 bargaining process was skewed, but you're -- you're making
21 that argument too?

22 MR. FRYE: Yes. The Secretary should have known
23 that the end result was going to be unfair because he had
24 skewed the bargaining.

25 QUESTION: Okay. May -- may I ask you this

1 question as to whether he really did skew it? As I
2 understand what the skewing might be, it would be simply
3 the refusal of the Secretary to allow the administrative
4 process to go forward, as a result of which the tribe
5 ended up negotiating when it might not otherwise have
6 negotiated. It might have held out.

7 My question is this. Didn't someone -- and I
8 forget who it was now -- on behalf of the Secretary come
9 right out and say to the tribe, the Secretary or the
10 Department or the Bureau thinks it would be better if you
11 resolved this by negotiating? And isn't it fair to say
12 that that is practically saying, look, we're not going to
13 decide this thing? You go out and decide it by
14 negotiating. And if that is true, didn't they, in effect,
15 tell them in substance what they were doing?

16 MR. FRYE: Well, the beneficiary of a trust
17 shouldn't have to guess what his trustee is really telling
18 him. If that's what the trustee wanted to say, the
19 trustee should have said, I've met with Peabody. I like
20 their lobbyist. I'm not going to do something that
21 Peabody doesn't like, and -- and we're going to sit on
22 this thing, as his subordinate said, until hell freezes
23 over until you agree that -- with something that Peabody
24 likes and you can live with. If we had been given that
25 information, we would have taken a much different

1 approach. I guarantee you.

2 Now, I think Justice O'Connor made the point
3 that if all we have -- if -- if the trust duty only
4 applies to specific statutory and regulatory violations,
5 then it's meaningless. The trust duty has to be something
6 greater than that. And this Court in the Varsity
7 Corporation case about 6 years ago said precisely that.
8 The trust duty has to be something greater than the sum of
9 these distinct parts.

10 QUESTION: So -- so the mere designation of a
11 trustee in these cases is a waiver of sovereign immunity?

12 MR. FRYE: I would say not, Your Honor. There
13 has to be this overlay of comprehensive Federal control
14 and supervision.

15 And I would note too in the Indian Tucker Act,
16 it doesn't restrict Indian plaintiffs to the same rights
17 and remedies. It gives people -- Indian tribes and Indian
18 people the same access to the court, and it uses a
19 different word. It uses the word laws in the -- in the
20 jurisdictional statute in the Indian Tucker Act. And we
21 know from Illinois versus City of Milwaukee and other
22 cases that laws means Federal common law and the -- and if
23 there's anything that's grounded in the Federal common law
24 tradition, it's the trust duty owed to Indian tribes. And
25 that's what we sue under, the Indian Tucker Act.

1 One month ago yesterday, President George Bush
2 once again issued a presidential proclamation, following
3 those of President Reagan and President Clinton, honoring
4 the Navajos and recognizing their special service to the
5 United States in times of war. And as this Court
6 indicated in the Shoshone case, the Navajo tribe was
7 entitled to a fidelity at least as constant.

8 We respectfully urge affirmance.

9 QUESTION: Thank you, Mr. Frye.

10 Mr. Kneedler, you have 4 minutes left.

11 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE PETITIONER

13 MR. KNEEDLER: Thank you, Justice Stevens.

14 First, with several factual points. The tribe
15 did know the substance of -- of what had happened with
16 respect to Secretary Hodel. As I pointed out earlier,
17 Mr. Nelson's deposition, which is excerpted in the joint
18 appendix, makes clear that the tribe had learned, he said,
19 from Washington that -- that it was requested there that
20 they go back to negotiations.

21 And also I would call the Court's attention to
22 page 2370 of the appendix, which are notes of the
23 negotiating session -- first negotiating session that
24 occurred after that on August 30th, 1985. It's a note in
25 which Chairman Zah of the Nation acknowledges that

1 Secretary Hodel apparently wanted them to go back and try
2 to reach an agreement. So it's clear that the parties
3 entered into these negotiations with a full understanding
4 of -- of what the Secretary's preferred course was.

5 Secondly, I think it's -- it's completely not
6 true that Secretary Hodel directed a subordinate to lie to
7 the Navajo Nation. The -- on page 117 of the joint
8 appendix, there's a copy of the directive that -- or
9 the -- the memorandum that Secretary Hodel sent to the
10 Assistant Secretary about this. And he makes four very
11 significant points entirely reasonable under the
12 circumstances.

13 He -- he referred to the fact that affirming the
14 decision outright unilaterally might lead to prolonged
15 litigation, during which the -- Peabody might well put
16 the -- the royalties into escrow and the tribe wouldn't
17 get them.

18 It would impair the future ongoing contractual
19 relationship between the parties. Peabody has a huge
20 presence on the reservation, and it was obviously
21 beneficial for the parties to resolve this peaceably and
22 not just this isolated royalty increase under this one
23 lease, but a whole host of issues that were -- that were
24 facing the two parties: taxation, payment for water,
25 other -- other leases in which there was a significant

1 increase.

2 And those other leases, by the way, did not have
3 an adjustment clause. So the tribe here got the benefit
4 not only of an increase on this lease, but an increase on
5 a lease that did not have an adjustment clause.

6 And Secretary Hodel then said it would be
7 preferable to allow the parties to negotiate, and then
8 importantly at the end, he said, I haven't reached a final
9 decision on the merits of the appeal. I just think it
10 would be better if the parties went back and negotiated.
11 And since, as Justice Scalia pointed out, this was a lease
12 provision that was -- protected both parties, what is
13 reasonable for both parties, it was certainly an
14 appropriate resolution of that for the Secretary to say --
15 in the normal situation where you have a -- a
16 disagreement, or differing views under a lease, to send
17 the parties back and seek to have them negotiate.

18 Also, I would point out on page 125 of the joint
19 appendix, there's a letter from Mr. Vollmann in which he
20 points out that the Secretary is aware of each party's
21 concerns about the settlement, again making it clear
22 that -- that the Department in Washington was aware of the
23 state of affairs out there.

24 So the only -- the only -- aside from all of
25 that, the claims about the negotiations that preceded the

1 1987 lease amendments are essentially procedural or tort
2 claims, or claims about improper regulation of -- of a
3 negotiating process. They aren't the sort of money-
4 mandating statutory or -- first of all, there's no
5 claim -- no -- no identification of a statutory or
6 regulatory provision that -- that specifically regulates
7 this and was violated. But in any event, just like the
8 Due Process Clause that this Court held in Testan is not
9 money-mandating, the same is true here as well.

10 JUSTICE STEVENS: Thank you, Mr. Kneedler.

11 The case is submitted.

12 (Whereupon, at 12:03 p.m., the case in the
13 above-entitled matter was submitted.)

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