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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first today in Case 07-1410, United States v.
5 Navajo Nation.

6 General Kneedler.

7 ORAL ARGUMENT OF GEN. EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONER

9 GEN. KNEEDLER: Mr. Chief Justice and may it
10 please the Court:

11 Six years ago this Court rejected the Navajo
12 Nation's claim for damages in connection with the same
13 action that is before the Court here, the Secretary's
14 approval of amendments to the tribe's mineral lease in
15 the mid-1980s. The Court held there that in order for
16 the United States to be held liable under the Tucker Act
17 or the Indian Tucker Act, the claimant must specify at
18 the threshold a specific rights-creating or
19 duty-imposing statutory or regulatory prescription that
20 the government has allegedly violated.

21 The Court found no warrant in any relevant
22 statute or regulation to impose liability on the United
23 States. In particular, the Court concluded that the
24 approval of the royalty rates in the tribe's lease was
25 governed by the Indian Mineral Leasing Act of 1938, or

1 IMLA. Looking at IMLA's framework, the Court held that
2 there was no, quote, "textual basis," close quote, in
3 any pertinent statutory or regulatory provision that
4 required the Secretary to insist that the tribe
5 negotiate for a higher rate.

6 CHIEF JUSTICE ROBERTS: Well, it said
7 "pertinent or relevant," but surely that's limited to
8 the statutory provisions that we examined in the case.

9 GEN. KNEEDLER: But I think the way to look
10 at it is what the Court said, that it found no warrant
11 in any relevant statute or regulation, and it discussed
12 not just IMLA but several other statutes which -- which
13 did have to do with the economic -- excuse me -- the
14 economic terms of leases, but --

15 JUSTICE GINSBURG: But the question --

16 GEN. KNEEDLER: -- didn't govern.

17 JUSTICE GINSBURG: But the question
18 presented, General Kneedler, was limited to IMLA, to the
19 Mineral Leasing Act.

20 GEN. KNEEDLER: Well --

21 JUSTICE GINSBURG: That was the government's
22 question presented.

23 GEN. KNEEDLER: Two things about that. The
24 government's question presented was that the Court could
25 not find the United States liable or -- was whether the

1 Court could find the United States liable without
2 finding a violation of IMLA. And therefore, the premise
3 of the question was, without finding a violation of
4 IMLA, the United States could not be liable, and the
5 Court found no violation of IMLA.

6 But beyond that, the tribe's principal
7 submission in this Court was that the United States had
8 control through a network of statutes, including the
9 ones they rely on here. But the Court also itself on
10 page 30 of its brief in that case identified the
11 relevant statute as being IMLA and the other two that
12 this Court discussed and the general introduction to the
13 Rehabilitation Act.

14 So I think the structure of the Court's
15 opinion, looking at the way the tribe serves it up, the
16 Court said there has to be a specific violation of a --
17 of a statutory regulatory prescription. The Court found
18 that the relevant one was IMLA, and it found no
19 violation. And therefore -- and the Court also said the
20 tribe's claim, not simply arguments made in favor of the
21 claim, must fail.

22 But if the Court concludes that its prior
23 decision did not absolutely foreclose the litigation, we
24 think it's clear that the framework that this Court
25 announced in -- or reaffirmed in Navajo 1 itself does

1 foreclose the claim here. As I said, the Court
2 concluded that IMLA is the statute that governs the
3 approval of royalty terms in coal leases.

4 On remand, the Federal Circuit relied on two
5 other statutes addressing other subjects, the Surface
6 Mining Reclamation and Control Act, which has to do with
7 the regulation of environmental issues and matters that
8 may arise in connection with a coal lease, and the
9 Hopi-Navajo Rehabilitation Act of 1950, which set in
10 motion a general governmental program to rehabilitate
11 and improve the economic life of the Navajo and Hopi
12 Indians.

13 But neither of those statutes had anything
14 to do with the approval of the economic terms of coal
15 leases. That was governed by IMLA. So the fact that
16 the Federal Circuit on remand held the United States
17 liable on the basis of two statutes that have nothing to
18 do with coal leasing, minus the statute that did have
19 something to do with coal leasing, in our view shows how
20 far the Federal Circuit has strayed from this Court's
21 teachings.

22 But beyond that, we think it's a fortiori
23 that the court of appeals erred in its alternative
24 holding, which was that the United States could be held
25 liable on the basis of general common law principles.

1 The Tucker Act and the Indian Tucker Act provide that
2 the United States may be liable only for a violation of
3 an act of Congress or a regulation. And it was for that
4 reason that this Court stated in Navajo -- in the Navajo
5 1 case that there has to be a violation of a specific
6 statutory or regulatory provision.

7 Even as a general matter, under this Court's
8 jurisprudence, there is only a very limited role for
9 Federal common law, but that is especially so when what
10 we are talking about here is liability for damages under
11 a waiver of sovereign immunity, and the usual sovereign
12 immunity principles have to cast considerable doubt on
13 that. Only an act of Congress or a regulation adopted
14 pursuant to congressionally conferred authority can
15 provide for the payment of money out of the Federal
16 Treasury under our Constitution.

17 JUSTICE KENNEDY: Are there cases in the
18 courts of appeals where Indian tribes litigate with the
19 Secretary and claim an abuse of discretion for the way
20 in which the Secretary performs the duties with respect
21 to Indian lands?

22 GEN. KNEEDLER: Under the Administrative
23 Procedure Act, there could be -- there could be claims
24 brought, but those would not be for money damages.
25 They're --

1 JUSTICE KENNEDY: I -- I recognize that, but
2 I want to know, is there a body of law in the Federal
3 Circuit that generally recognizes that the -- that the
4 Secretary has a fiduciary obligation that's enforceable
5 as a matter of administrative law?

6 GEN. KNEEDLER: Not in the Federal Circuit,
7 to my knowledge, because -- because the Administrative
8 Procedure Act --

9 JUSTICE KENNEDY: I meant all of the
10 circuits.

11 GEN. KNEEDLER: Yes. No -- in the -- under
12 the Administrative Procedure Act -- I'm not -- just like
13 any party could claim -- could challenge what was done
14 by the Department taking particular administrative
15 action. And I think there -- I think that was what --

16 JUSTICE KENNEDY: Well, what I was asking
17 was whether there was some doctrine that the -- that the
18 trustee -- that the Secretary acts in a capacity, a
19 fiduciary capacity as a trustee. If that doctrine were
20 out there, then that might be the basis for saying that
21 it's a sufficient foundation for a money damages. I was
22 just asking, is that doctrine there?

23 GEN. KNEEDLER: No, not -- not in the way
24 you put it. But there are cases that certainly talk
25 about this, that the Secretary has trust

1 responsibilities. But there are a lot of ways in which
2 that concept can be used. It can be used in a political
3 sense in that the United States Government, through
4 treaties or a general sense of moral responsibility,
5 should look out for the Indians, and in the day-to-day
6 administration of Indian affairs, to contemplate a trust
7 responsibility is simply to mean that the United States
8 has a special relationship and should deal in that
9 manner.

10 And under the Administrative Procedure Act,
11 if there is -- if there is an action the United States
12 takes under a statute that governs Indian affairs, that
13 would be -- that would be subject to judicial review
14 under the general principles, is it arbitrary and
15 capricious under normal principles, does substantial
16 evidence sustain the determination?

17 But, particularly in a suit for money
18 damages under the -- under the Tucker Act and where
19 Congress has said there has to be a violation of a
20 money-mandating statute or regulation, general common
21 law principles do not suffice. As I said, for money
22 damages, only Congress or an executive agency under --
23 acting pursuant to congressional authority under the
24 Constitution can provide for the payment of -- of money
25 out of the Federal Treasury.

1 CHIEF JUSTICE ROBERTS: I -- this may be a
2 purely academic distinction, but you talked in terms of
3 liability. Are you suggesting that the trust principles
4 do not set a standard to which the Secretary is bound,
5 or simply that they don't constitute a waiver of
6 sovereign immunity?

7 GEN. KNEEDLER: I think it's really both.
8 The general trust principles, at least -- at least again
9 under Tucker Act jurisprudence, general trust principles
10 are not what establish the Secretary's duties. It's the
11 acts of Congress that impose duties on the Secretary in
12 this area as in any other, or regulations the Secretary
13 has prescribed under it.

14 Now under this Court's jurisprudence, the
15 Court has said that the notion of trust is relevant at
16 the second stage of the analysis. The first stage is
17 the threshold requirement that there be a specific
18 statute or regulation that imposes duties or rights. If
19 the Court finds that, then at the second stage, as this
20 Court has held in Mitchell 2 and indicated in Navajo as
21 well, that may be relevant to determine whether those
22 specific duty-imposing statutes in turn also impose
23 monetary liability on the United States for violation.

24 JUSTICE ALITO: Under both IMLA and the
25 Rehabilitation Act, leases have to be approved by the

1 Secretary. Doesn't that impose a duty on the Secretary?

2 GEN. KNEEDLER: Well, what the Court said in
3 Navajo specifically with respect to IMLA, the Secretary,
4 yes, does have to approve it, but the Court specifically
5 rejected the proposition that there was any basis for
6 liability stemming from the Secretary's approval of the
7 lease.

8 JUSTICE ALITO: Well, under the
9 Rehabilitation Act, if it applied to this lease, what
10 would the Secretary's duty be?

11 GEN. KNEEDLER: Section 5 of the
12 Rehabilitation Act for approval of leases is essentially
13 the same as IMLA. It provides for the Secretary to
14 approve the lease. But, as this Court held in IMLA --
15 or in Navajo 1, the theory of IMLA is not to have the
16 Secretary be responsible or to take the lead in leasing
17 tribal lands for coal purposes. It's the tribe, subject
18 to the approval, and the Court concluded it would be
19 inconsistent with that arrangement for the Secretary to
20 second-guess the determinations that the secretary had
21 made. And the Court -- the argument was made there and
22 expressly rejected that the Secretary was required to
23 insist that the tribe negotiate a higher amount when it
24 renegotiated the lease.

25 JUSTICE ALITO: The Secretary has to apply

1 some standard, presumably. What is it?

2 GEN. KNEEDLER: What -- what the secretary
3 has adopted -- has done is by regulation, is to say that
4 -- that there is a minimum that the tribe cannot go
5 below. At the time -- at the time of the renegotiation
6 of this lease in 1987, from 1984 to 1987, there was a
7 minimum of 10 percent or 10 cents per ton. The tribe
8 was getting 37.5 cents per ton. This lease was
9 renegotiated in connection with a clause in the lease
10 that allowed adjustments for reasonable rates, which is
11 not the same thing as maximizing the tribe's -- the
12 tribe's revenues, so the Secretary had a regulation at
13 the time of 10 cents per ton. The Secretary now has a
14 regulation that says the minimum royalty rate will be
15 12.5 percent, which, as Court pointed out in Navajo 1,
16 is the standard royalty rate for Federal and tribal
17 leases throughout the United States.

18 Now, what is significant, in further
19 response to your question, is that regulation states
20 that that minimum rate is 12.5 percent unless the
21 Secretary determines that a lower rate would be in the
22 best interest of the Indians. So the way this works
23 then, the way the Secretary has implemented it, it's
24 basically up to the tribe to negotiate something at or
25 above the minimum. If it's below the minimum that the

1 Secretary's prescribed, the Secretary has to make a
2 judgment that that going lower, maybe because of a
3 geological conditions or whatever, is in the best
4 interest of the Indians. And that is -- that is borne
5 out --

6 JUSTICE SCALIA: Is that in IMLA or is that
7 in the Rehabilitation Act?

8 GEN. KNEEDLER: That's in IMLA. That's an
9 IMLA regulation. The general regulations that implement
10 the Rehabilitation Act have a similar provision. They
11 don't talk about royalties, which I think is telling
12 because royalties have to do with coal leases. They
13 talk about -- they require it be a fair rental for
14 property, not a maximum rental but a fair rental. And
15 then it has the same sort of thing, that if it's going
16 to be below the fair market value it has to be in the
17 best interest of the Indians.

18 And I think it's instructive that I know
19 there's been an argument that this lease is governed by
20 -- by the Rehabilitation Act rather than IMLA, and
21 notwithstanding what this Court held in Navajo 1 six
22 years ago, but in 1999 when Secretary Babbitt, who
23 joined the brief arguing this is covered by the
24 Rehabilitation Act, approved the amendments to the lease
25 in 1999, he approved it under the IMLA regulations and

1 he specifically said that because the minimum royalty
2 rate is 12.5 percent -- he is quoting the applicable
3 regulation -- "I do not have to decide whether the
4 royalty rate is in the best interest of the Indians."
5 He went on to say: "But I think it is."

6 So secretary Babbitt's approval of those
7 amendments really explains the way the Secretary has
8 implemented the statutory scheme, and we think that's
9 certainly well within the Secretary's discretion under a
10 statute that did not impose any limitations. With
11 respect to the Rehabilitation Act, the general leasing
12 provision of that act, as we've explained in our brief,
13 does not apply to mineral leases. That continued to be
14 governed by IMLA after 1950. But even if it did, there
15 is nothing in section 5 that imposes any more specific
16 duties with respect to royalty terms or any other terms
17 than IMLA itself. Section 5 has to do with surface --
18 leases for surface users, business purposes basically.
19 And that was put in there because at the time there was
20 no provision for long-term leases if somebody wanted to
21 bring a surface commercial venture onto a reservation.

22 But the last sentence of section 5 of the --
23 of the act on page 171a of the petition appendix says
24 that: "Nothing contained in section 5 shall affect the
25 authority" -- "shall be construed to repeal or affect

1 the authority under any other act of Congress." So
2 section -- and the other act of Congress here is IMLA.

3 I think it's also -- I think it's also
4 instructive to point out not only did this Court hold
5 the last time around that the lease was governed by
6 IMLA, that was the tribe's position in this case. Its
7 proposed findings of fact indeed in the Court of Federal
8 Claims, pages 524 and 525 of the joint appendix, said
9 the lease was governed by IMLA.

10 But the textual dispositive point is that
11 the lease couldn't have been entered into under the
12 Rehabilitation Act. The lease in this case provided
13 that the lease would be for a term of 10 years and then
14 subject to a further extension for as long as minerals
15 are produced in paying quantities. That precise
16 language is repeated in the lease, which shows that it
17 was under IMLA.

18 Under section 5 of the Rehabilitation Act,
19 the lease could only be for an initial term of 25 years
20 and then a further term of 25 more years. It wouldn't
21 have allowed for this sort of lease here and indeed,
22 because the initial lease term here was 10 years and
23 then could have only been 25 more years under the Rehab
24 Act, this lease would have had to expire in 1999, and
25 yet it was amended at that time and continues in effect

1 and mining continues under it.

2 JUSTICE SCALIA: The other side says that
3 certain standard provisions in the IMLA leases did not
4 exist in this lease. Is that accurate?

5 GEN. KNEEDLER: No. Well, they said -- I
6 think -- the only thing I think they say along those
7 lines is that -- has to do with the form of the lease.

8 JUSTICE SCALIA: With the forms?

9 GEN. KNEEDLER: The form on which the lease
10 is used. I think what they said is there were several
11 provisions that appear in regulations under general
12 statutes that are related to leases. One has to do with
13 the property can't be used for unlawful purposes, and
14 I'm forgetting what the second one was. But it wouldn't
15 be unusual that the Secretary might borrow or a tribe
16 might borrow provisions from other leases and put them
17 in this lease.

18 This is -- again, IMLA provides for
19 negotiation. So the parties are free to put in
20 particular provisions of lease. So that the fact that
21 there might be things that would parallel what were in
22 the other leases we don't think is really dispositive.

23 Also, the other significant thing is that
24 the lease itself incorporates or refers to by reference
25 the IMLA regulations. So even if somehow the lease were

1 thought to be governed by Section 5, even though that
2 wasn't what it was issued under, the IMLA regulations
3 would control, and this Court already held in Navajo 1
4 that those IMLA regulations, which are in the lease, do
5 not impose any -- did not impose any -- did not impose
6 any duty on the Secretary with respect to the approval,
7 approval of the lease.

8 I should also point out that when the -- we
9 cite this in our briefs, that at the time the lease
10 amendments were approved in 1987 the Solicitor's Office
11 did a legal review of the propriety of the lease
12 amendments and that legal review expressly says that the
13 lease was entered into under IMLA.

14 So I think the circumstances are really
15 overwhelming that it was entered into under IMLA and
16 that the Rehabilitation Act lease provision does not
17 have anything to do with this lease. And the more
18 general emanation from the Rehabilitation Act that the
19 tribe seeks to rely on here are too general and short.
20 The Rehabilitation Act was enacted in 1950 in
21 recognition that the plight of the Navajo and Hopi was
22 very serious, and Congress undertook to study resources
23 and put in the infrastructure and that sort of thing,
24 and part of it was to have programs -- excuse me --
25 studies to determine what the tribe's coal resources

1 were, and that was done, and this lease grew out of
2 that. But that doesn't mean that it was in any way
3 governed by the Rehabilitation Act.

4 JUSTICE GINSBURG: General Kneedler, the
5 last time -- the last time around, we remanded for
6 further proceedings consistent with our opinion. Would
7 you advocate a different bottom line this time?

8 GEN. KNEEDLER: Yes. I would -- I would
9 suggest that this case be reversed. I mean this -- this
10 concerns a -- outright and with directions to dismiss
11 the complaint. This -- this controversy arose in the
12 mid-1980's. The litigation has been going on since
13 1993, and it's been -- this is now the second time that
14 it's been -- that it's been to this Court.

15 And we think in doing so that the -- that
16 the Court should reiterate the analytical framework that
17 it put forward in -- in its decision the last time
18 around so that there will be no mistaking the way these
19 cases are to be handled in the Federal circuit in the
20 future by requiring that the threshold, a -- as I said,
21 a specific statutory or regulatory provision that
22 imposes duties and not in particular looking at general
23 notions of common law that -- that might arise out of --
24 out of some sort of -- some sort of factual control.

25 The last thing I wanted to say is that the

1 Federal circuit also relied on the Surface Mining
2 Reclamation and Control Act. And that -- and that, as I
3 said, has to do with environmental issues in connection
4 with -- with Indian leases. The Federal circuit relied
5 on a provision that says that the -- that the Secretary
6 should include in any Indian leases additional
7 provisions that were proposed by the tribe. But that's
8 additional provisions in addition to other environmental
9 provisions extending from the statute that had to be in
10 the lease. It was -- it was just quite a stretch for
11 the -- for the court to conclude that that somehow
12 controlled the economic terms of the leases.

13 If there are no further questions, I will
14 reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, General.
16 Mr. Phillips.

17 ORAL ARGUMENT OF CARTER G. PHILLIPS

18 ON BEHALF OF THE RESPONDENT

19 MR. PHILLIPS: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 I think I would like to start with Justice
22 Alito's question because he said: Doesn't Section 5 of
23 the Rehabilitation Act specifically require the
24 Secretary to approve this lease? And Mr. Kneedler
25 conceded that it does. And so then the question is:

1 Doesn't that create some kind of a duty? And it seems
2 to me clearly it does, just as the Court I think
3 implicitly said in Navajo 1, the difference between
4 Navajo 1 and Navajo 2 being that this Court then went on
5 to examine IMLA, the Indian Mineral Leasing Act.

6 It concluded that IMLA very specifically for
7 the entirety of native Americans and for the entirety of
8 Indian mineral leasing had a preference to ensure that
9 the Indian tribes themselves would -- would attain a
10 certain self sufficiency. And it essentially advocated
11 the responsibility of having to deal with individual
12 negotiations and allowed it for the tribes to take over.

13 JUSTICE GINSBURG: But, Mr. Phillips, I'm
14 looking at the last paragraph, and it says: We have no
15 warrant from any relevant statute or regulation, et
16 cetera. So it wasn't limited to IMLA. Do you think
17 that was just carelessness on the Court's part?

18 MR. PHILLIPS: Oh, I would -- I would never
19 assume that, Justice Ginsburg. I -- I think -- I think
20 the operative term here is "relevant." And that is that
21 the Court for purposes of analyzing the question
22 presented and disposing of it evaluated not only IMLA
23 but the other two provisions that the -- that the
24 government and the Court felt needed to be disposed of
25 at that point.

1 The Court didn't address the alternative
2 arguments under either Macrow or the Rehabilitation Act.
3 To be sure, they were argued. But I -- I have seen many
4 instances in which alternative arguments were made, and
5 --

6 JUSTICE SCALIA: I don't understand your
7 answer. If you say that those were not relevant and,
8 therefore, they were not covered --

9 MR. PHILLIPS: Not relevant to the question
10 presented, which is the proper interpretation of the --
11 the Indian Mineral Leasing Act. And, indeed, if you
12 look at the other two provisions, the opinion of the
13 Court analyzing them through the -- through the prism of
14 the Indian Mineral Leasing Act, it says those don't add
15 to the Indian Mineral Leasing Act.

16 Our argument here is that Section 5 of the
17 Rehabilitation Act provides a wholly independent basis
18 on which there is a duty imposed, but that duty is then
19 implemented in the regulations that are identified in
20 the -- in the Secretary's --

21 JUSTICE SCALIA: In the Rehabilitation Act,
22 the requirements for approval of lease, is -- is that
23 applicable to mineral leases?

24 MR. PHILLIPS: Is that applicable to mineral
25 leases?

1 JUSTICE SCALIA: Yes.

2 MR. PHILLIPS: Absolutely, it's applicable
3 to mineral leases. The -- the language of the statute
4 is "business leases, including those for the development
5 of mineral resources." So clearly it applies to Indian
6 mineral leases, but --

7 CHIEF JUSTICE ROBERTS: I'm sorry. Where is
8 the specific reference to mineral leases, mineral
9 resources?

10 MR. PHILLIPS: Mineral resources.

11 CHIEF JUSTICE ROBERTS: It says "resources."
12 I don't remember it saying "mineral resources."

13 MR. PHILLIPS: Yes, the development of the
14 "resources" for the Navajo and Hopi Indians.

15 CHIEF JUSTICE ROBERTS: That's a big
16 difference, don't you think?

17 MR. PHILLIPS: I'm sorry. The development
18 for utilization of natural resources.

19 But the basic point there is, at least as I
20 read section 5, what it's saying is that it grants broad
21 leasing authority. The Solicitor General is absolutely
22 right about that. But that authority extends to certain
23 kinds of mineral leasing.

24 And that says -- and that's an authority and
25 it's important to recognize this. Because while it is

1 true for the run-of-the-mill Native Americans who are --
2 who are engaged in mineral leasing it may make sense to
3 say: Look, we -- we are going to take a hands-off
4 approach for the most part. We are going to set a
5 minimum ceiling or a minimum floor and above that you
6 negotiate as hard as you want.

7 But the -- but the Navajo were in a
8 fundamentally different position in 1950 when this
9 legislation was enacted. The -- the median education on
10 that -- on that reservation was less than one year of
11 education.

12 The resources were \$400 per year annual
13 income. This was a tribe in horrible condition. And so
14 it would make perfect sense for Congress to say: Look,
15 for -- for most tribes we want to go ahead and have the
16 approval be based with the -- with the Secretary taking
17 a hands-off approach above a certain minimum, but when
18 you deal with the Navajo --

19 JUSTICE ALITO: Is it your -- is it your
20 position that it would be -- that it -- it is not lawful
21 for coal on the Navajo Reservation to be leased under
22 IMLA, that the lease would have to be solely under
23 section 5 of the Rehabilitation --

24 MR. PHILLIPS: No, I don't think it would
25 have to be solely under it. I -- I think that's a -- a

1 false dichotomy. I don't think this is an either/or
2 proposition. I think there are parts of IMLA that can
3 reasonably be applied here, and -- and section 5
4 specifically says no authority from other statutes,
5 which would include IMLA, is meant to be superseded by
6 the passage of section 5. So I think there is a rule.

7 And I think that the lease -- if you read the
8 lease on its face -- Justice Scalia asked the question:
9 Does this lease conform to the form lease that you get
10 under IMLA? The answer is clearly not.

11 This is a mix and match between some
12 provisions, it seems to me, that clearly provides
13 additional protection for the Navajo and other
14 provisions that --

15 JUSTICE ALITO: But the lease -- the lease
16 doesn't follow the -- the requirements of section 5 of
17 the Rehabilitation Act in -- in respect to its term.
18 But what is your -- is it your position that in entering
19 into a lease the tribe has the authority to decide that
20 we want this to be under IMLA; we want this to be under
21 the Rehabilitation Act? When it comes up to the
22 Secretary for approval, does the Secretary have the
23 authority to say, I'm going to approve this under IMLA;
24 I'm going to approve it under section 5?

25 MR. PHILLIPS: I think the Secretary has to

1 approve it under both of those provisions. It is just
2 that IMLA in this particular context would impose a
3 10-cent minimum over time.

4 JUSTICE SCALIA: What do you do about the
5 fact that the term of this lease would -- would not be
6 permitted under the Rehabilitation Act?

7 MR. PHILLIPS: I think it would be permitted
8 under the Rehabilitation Act because the last sentence
9 of section 5 specifically says that this is not meant to
10 limit any other authority provided under any other
11 statute. And since IMLA provides additional time and
12 durational protections for the tribes under these
13 circumstances, that provision would definitely allow you
14 to use IMLA's time limits rather than the Rehabilitation
15 Act.

16 JUSTICE SOUTER: Okay. Explain to me the --
17 the relevant scope of IMLA and the Rehab Act. The --
18 the argument that you made, that you just made, makes
19 perfect sense if the Rehab Act applies to some kinds of
20 -- of leases or contracts that the -- that the IMLA does
21 not.

22 And yet I -- I thought you were saying a
23 little bit earlier that the Rehab Act applies to all
24 mineral leasing, because that would be the development
25 of the natural resource. And if that is so, then there

1 seems to be a pretty clear conflict, even on your own
2 argument, between the term provisions in the Rehab Act
3 and the term provisions of IMLA with respect to -- to
4 mineral leases. How do -- how do we get out of that
5 problem for you?

6 MR. PHILLIPS: Yes. I think the -- the key
7 distinction is to look at the -- at who is being
8 regulated, and under the Rehabilitation act it's the
9 Navajo and the Hopi. And -- and Congress said, look, we
10 are going to take special care to protect and to try to
11 put them into a position where they can even just catch
12 up to other Native Americans.

13 And so it seems to me that there is --
14 that's a special protection with a special duty, and
15 that duty is enforced through the 162 regulations.

16 JUSTICE SOUTER: But it's a special
17 protection and special duty that applies to every one of
18 the mineral leases, including this one, that the Navajo
19 may be involved in.

20 MR. PHILLIPS: Correct.

21 JUSTICE SOUTER: So I -- what -- maybe --
22 maybe I missed the point, but would you go back to
23 justice Scalia's question: How is it that there is not
24 a conflict here between this lease and the Rehab Act?

25 MR. PHILLIPS: Because the last section

1 under section 5 says that, notwithstanding anything
2 else, this provision doesn't preclude -- doesn't --
3 doesn't limit the authority that would otherwise exist.

4 JUSTICE SOUTER: But that, in effect -- but
5 that, in effect, is saying this -- this provision will
6 never apply to a mineral lease with the Navajo or the
7 Hopi. I mean, you are reading it right out of the act
8 with respect to these two tribes.

9 JUSTICE SCALIA: Which is all that the
10 Rehabilitation Act -- I'm sorry.

11 MR. PHILLIPS: I'm sorry, it's because the
12 provision applies to a lot of other leases, too. Are
13 you asking when the 20 or 10 and 10.

14 JUSTICE SOUTER: With respect -- my point is
15 with respect to every mineral lease of the Hopi and the
16 Navajo, you are saying the term provision never applies.
17 Am I correct --

18 MR. PHILLIPS: No, I understand. Right. I
19 have the answer your question which is this provision in
20 section 5 applies not just to mineral lease, it applies
21 to all business site leasing.

22 JUSTICE SOUTER: But it only applies to
23 those two tribes. And there is something very, very
24 strange, it seems to me, in saying that the -- that the
25 kind of -- the saving sentence at the end of section 5

1 reads its very term limit provisions out of every -- out
2 of every possible application for mineral lease by these
3 two tribes. And that's what you are saying.

4 MR. PHILLIPS: But -- but -- but the
5 important distinction -- and I hope I can articulate
6 this -- is that section 5 applies beyond mineral leases.

7 JUSTICE SOUTER: I realize that.

8 MR. PHILLIPS: So that all -- so the time
9 limitation of 10 years and 10 years, if you bring a
10 barber shop, you want to build a barber shop on those
11 lands, you want to lease the space in order to do that,
12 you would be subject to the section 5 time limitations,
13 unless for some reason there is another authorization
14 somewhere.

15 JUSTICE SOUTER: Okay. But that, in effect,
16 means that -- and I don't want to overdo your barber
17 shop analysis or example, but that, in effect, says --

18 MR. PHILLIPS: I need a haircut.

19 JUSTICE SOUTER: -- on -- on trivial lease
20 contracts there are term limits, but on the ones that
21 really count, where the real money is, doesn't apply at
22 all.

23 MR. PHILLIPS: There is a -- way beyond that
24 there is an entire defense plant on the Navajo tribe --
25 on the Navajo reservation right now that would obviously

1 be subject to precisely these same limitations. So it's
2 not just trivial, it's all business lease citing that is
3 covered why that.

4 So it seems to me not at all unreasonable to
5 think that Congress, in its -- in its very protective
6 effort here under section 5 would say, here are all the
7 leases that you are allowed to enter into. You have
8 broad leasing authority, we are going to protect you
9 against overreaching by restricting how long you can go,
10 but if there are other provisions of law that allow
11 these to be modified in a particular area, we will allow
12 those to be modified in that way.

13 And in this context, what that last sentence
14 would, in my mind, say is there is no reason to try
15 and -- to say that IMLA or the Rehabilitation Act. It
16 seems to me much more sensible to say that Congress
17 would have intended multiple protections for the Navajo.

18 JUSTICE SOUTER: Let's assume that, and I --
19 I -- I think your argument is well taken. But assuming
20 that, don't we also have to assume that the stress in
21 IMLA on placing primary responsibility on the tribes,
22 not on the Secretary should, in fact, also be imported
23 to the application of the Rehab Act as you say it should
24 be applied.

25 MR. PHILLIPS: Right. But you see I don't

1 think that's an authority. I would say -- I would not
2 read --

3 JUSTICE SOUTER: What's not an authority?

4 MR. PHILLIPS: The notion that the Navajo
5 tribe would be in a position to better -- to better --
6 to -- I'm sorry, to achieve self-sufficiency.

7 JUSTICE SOUTER: Okay. You made a good
8 argument a few moments ago for the fact that it would
9 have been at least at one time inappropriate to thrust
10 that responsibility on the Navajo, but there was no
11 Navajo exception in IMLA. That responsibility was
12 thrust on the Navajo --

13 MR. PHILLIPS: I'm sure there isn't --

14 JUSTICE SOUTER: -- and this Court
15 recognized that.

16 MR. PHILLIPS: Right. But that's exactly
17 why the Navajo Rehabilitation Act of 1950 does modify
18 IMLA.

19 JUSTICE GINSBURG: With respect to that --

20 JUSTICE SCALIA: Expired --

21 MR. PHILLIPS: I'm sorry?

22 JUSTICE GINSBURG: -- the opinion in the
23 last time around not only contained the statement that I
24 read before, that is, any relevant statute, but in the
25 very beginning it says, "We hold the tribe's claim for

1 compensation from the federal government failed," and
2 there is a well known distinction between a claim at
3 issue and attributing to the Court that kind of
4 carelessness for saying that the claim is barred as
5 distinguished from an issue, the issue being IMLA. I
6 think the Court was conscious of that distinction when
7 it used the word that the claim failed, not just the
8 issue.

9 MR. PHILLIPS: Obviously, Justice Ginsburg,
10 you are in a much better position to judge what was
11 intended here. On the other hand, my experience with
12 the Court generally is that when you analyze a case,
13 that you analyze it in terms of the specific question
14 that is presented, and if you are posing to go beyond
15 the question presented, you say so expressly, not simply
16 by the use of the word "claim" or "argument."

17 So while I recognize that the Court -- that
18 the government has an argument to be made that has
19 pre-decided that, I think, frankly, one, the Court
20 didn't decide this issue; and two, the Court should
21 decide the question that was presented here as to the
22 scope of section 5, because it's obviously of
23 extraordinary importance to not only section 5 but also
24 to section 8 as well.

25 JUSTICE SCALIA: Mr. Phillips, the

1 government says that by the time this lease was
2 executed, the Rehabilitation Act was a dead letter.
3 That it was meant to stimulate economic activity on the
4 Navajo reservation, and there were funds appropriated
5 for that purpose and that all had been played out by the
6 time this lease was entered into.

7 Is there something wrong with that?

8 MR. PHILLIPS: Yeah, the government's wrong
9 about that. I believe -- the program itself is for the
10 overall rehabilitation of the Navajo and the Hopi.
11 There are a series of projects that the -- where the
12 statute says such programs shall include the following
13 projects. It doesn't say it's limited to the following
14 projects, and those projects have been set out over
15 time.

16 But the program itself is not limited that
17 way and more fundamentally, it is completely
18 inconsistent with that kind of time limitation on the
19 statute overall. Congress would have repealed certain
20 sections of this act, sections 9 and 10 after the
21 10-year period that expired if the statute didn't have
22 any continuing implication.

23 It also would have meant that the leasing
24 protections in section 5 had expired after 10 years,
25 which seems to me quite inconsistent with the overall

1 purpose here to accomplish that. So I think the
2 temporal argument doesn't get the government
3 particularly far.

4 I would like to take a second to talk about
5 sort what I think is an important distinction between
6 635 and other provisions, which is that 634(a) imposes a
7 duty that the Secretary's brief, I think, evidently sets
8 out, that duty means that you have to make sure there is
9 fair market value, that those are reasonable rates, and
10 that was not done. So that's the violation that took
11 place.

12 Then the question is, is there a
13 money-generating, money-mandating obligation imposed
14 here. And there it seems to be the distinction between
15 635(a), which said nothing about liability, and 635(b)
16 and (c), which expressly -- expressly excludes the
17 possibility of liability, suggests clearly why 635(a)
18 ought to be viewed by this Court as a sufficient -- as
19 creating a fair inference, is what the Court said in
20 Mitchell two, a fair inference under these particular
21 circumstances.

22 The other issue that we have put on the
23 table that the government didn't actually address in its
24 opening, although I have to suspect --

25 JUSTICE BREYER: So you are saying that

1 635(a) creates an inference that 635(c) creates a
2 fiduciary duty?

3 MR. PHILLIPS: No, 635(a) creates the
4 fiduciary duties. The juxtaposition of (a) to (b) and
5 (c) demonstrates that that duty is a money-mandating or
6 rights-creating duty that's enforceable under the Indian
7 Tucker Act, Justice Breyer.

8 The other duty, it seems to me, that the
9 Secretary breached there is the duty embedded in section
10 8 of this statute, which requires him to make
11 disclosures as part of this program. And the one thing
12 that is absolutely clear that the Court of Federal
13 Claims --

14 JUSTICE BREYER: That's the part that I'm
15 not getting. You are saying -- the question, I guess,
16 basically is, does the language of 635(a) that says with
17 the approval of the Secretary, the Indians can, among
18 other things, for business purposes lease the land.
19 Right? That's what it says?

20 MR. PHILLIPS: Right. And then --

21 JUSTICE BREYER: And that doesn't seem much
22 different from the IMLA, to tell you the truth, to me.
23 It doesn't seem different at all. But now you are
24 saying, no, it's really different because look at (b)
25 and (c), that's your basic argument?

1 MR. PHILLIPS: Right.

2 JUSTICE BREYER: I look at (b) and (c) and
3 it says -- when you lease something under (b) and (c)
4 which is not (a) -- (b) and (c) -- you have to have this
5 all supervision, and so forth, or it has to be at a fair
6 value, something like that; is that right?

7 MR. PHILLIPS: Well, it doesn't -- it
8 doesn't --

9 JUSTICE BREYER: (B) and (c) say that land is
10 owned in fee but, let's see -- what is -- sorry, I don't
11 want to delay you on this. I thought that (b) and (c),
12 you were saying, create an obligation -- create more of
13 a trust obligation.

14 MR. PHILLIPS: No, just to read (b) which
15 unfortunately isn't reproduced I don't think in any of
16 the papers, but it says notwithstanding any other
17 provision of law, land owned in fee simple by the Navajo
18 may be leased, sold or otherwise disposed of by the sole
19 authority of the tribal council in any manner that a
20 similar land in this State is situated may be leased,
21 sold or otherwise disposed of by other private land
22 owners, and the -- such disposition shall create no
23 liability on the part of the United States.

24 JUSTICE BREYER: So why does that -- why
25 does that mean that this Act creates a trust

1 relationship?

2 MR. PHILLIPS: No, that -- the -- the trust
3 relationship doesn't come out of the PNC; the money
4 creating component of it, it seems to me comes, out of
5 PNC. The trust relationship comes from the fact that
6 the entirety of the statute was enacted to implement the
7 treaties, that these are all lands that are held in
8 trust, and that -- and that there is a specific duty
9 embedded in (a) that requires that the Secretary approve
10 what is otherwise basically controlled as a trust
11 arrangement, and that is implemented through regulations
12 that require the Secretary to do this under a fair
13 market value standard.

14 JUSTICE KENNEDY: Well, give me an -- an
15 instance in the statute that is in opposition brief of
16 the orange brief at page 5. Give me an example of why
17 the last clause "and such disposition shall create no
18 liability on the part of the United States," what
19 contingency was that directed to if not the one that is
20 before us?

21 MR. PHILLIPS: Well, that's for the sale of
22 fee simple lands, so you are dealing with a very
23 different set of -- of circumstances. Which is talking
24 about -- it's aimed clearly at a different set of
25 properties that were being held and therefore they said,

1 when you engage in leases for that kind of property,
2 there is no liability.

3 JUSTICE SOUTER: But your -- your argument
4 is that simply because there isn't that kind of an
5 exclusion in (a), there must have been an intent to
6 permit liability.

7 MR. PHILLIPS: A fair inference, I think is
8 all I have to demonstrate --

9 JUSTICE BREYER: Thank you, but now what of
10 course is at the back of my mind is I'm trying to see,
11 if this -- is this statute stronger for you than the
12 statute we already considered? And I start with some
13 suspicion, because I think if it is a stronger statute
14 for you, you would have argued it the last time. So I
15 wonder why you didn't.

16 MR. PHILLIPS: I wasn't here then.

17 JUSTICE BREYER: So somebody thought maybe
18 it was a weaker statute, so -- but I will put that
19 suspicion aside.

20 MR. PHILLIPS: Can I ask you --

21 JUSTICE BREYER: So anyhow that's the
22 fundamental question in my mind. I look at the language
23 and so forth, but the language doesn't seem any stronger
24 for you, at least at first blush.

25 MR. PHILLIPS: Right. There's two -- there

1 are two answers; I was being facetious as to why we
2 didn't push this argument the last time. It was largely
3 because the Federal Circuit concluded the last time
4 based on IMLA alone that there was in fact a sufficient
5 right-creating provision. And therefore we depended --

6 JUSTICE GINSBURG: So did you, Mr. Phillips.
7 Last time around you acknowledged that the Peabody lease
8 was governed only by IMLA. That -- those words were
9 from your brief last time around.

10 MR. PHILLIPS: I don't know if those were
11 from the brief. I know there was a statement of
12 undisputed facts in the first round of litigation. But
13 there is no question in the Court -- if we are right,
14 that the Court remanded to -- from consideration
15 consistent with this. We then went down upon remand
16 from the Federal Circuit; we took additional discovery;
17 and we obtained the information that we got. And also,
18 remember, the United States' brief in the Ninth Circuit
19 specifically says that this was approved pursuant to the
20 Rehabilitation Act --

21 JUSTICE GINSBURG: But I thought -- you are
22 really saying that you were wrong in make that
23 concession.

24 MR. PHILLIPS: That was an overstatement,
25 there's no question. Based on what we knew at the time,

1 we thought it was in fact an IMLA lease, but in truth --

2 JUSTICE GINSBURG: In -- IMLA --

3 MR. PHILLIPS: -- is it's not IMLA, anyway.

4 JUSTICE GINSBURG: But it is the statute
5 that seems most closely on point, because it's the only
6 one that talks about mineral leases exclusively.

7 MR. PHILLIPS: Yes, but this is the only one
8 that deals specifically with the Navajo Reservation and
9 deals with leasing for business purposes for the
10 development of resources. And so while I -- I agree
11 with you in one sense, the other one has a -- some
12 superficial closeness here. It seems to me that the
13 closer one is actually the provision that deals with
14 this specific reservation and this specific type of a
15 lease arrangement.

16 CHIEF JUSTICE ROBERTS: But you knew all of
17 that -- that's not -- that's not something you
18 discovered on remand. You knew all that before.

19 MR. PHILLIPS: Well, we -- we obtained
20 additional information, certainly, you know. We have
21 the Udall declaration that specifically said that when
22 he negotiated this lease he negotiated it as the
23 centerpiece of the Navajo-Hopi Rehabilitation Act of
24 1950.

25 CHIEF JUSTICE ROBERTS: And that affidavit

1 was before or after our decision the first time around?

2 MR. PHILLIPS: It was after the first time
3 around. I mean, there is no question that if we had won
4 the first time around, we would have stood by that
5 statement, but having lost it --

6 (Laughter.)

7 MR. PHILLIPS: -- there is a tendency to
8 focus the mind elsewhere, and we did. But the reality
9 is that if you look at the parties, the -- Secretary
10 Udall specifically says this was adopted pursuant to the
11 Rehabilitation Act. Peabody Coal Company in briefing in
12 the Arizona courts has specifically said that this was
13 approved under the Rehabilitation Act, and the United
14 States Government itself in briefing in other courts has
15 said that this was approved pursuant to the --

16 JUSTICE SCALIA: You bring in Federal
17 officials to testify years after the fact as to what
18 basis they acted earlier? That's very strange to me. I
19 don't know what -- what motive Secretary Udall has today
20 that might induce him to say that.

21 MR. PHILLIPS: Obviously --

22 JUSTICE SCALIA: If there was some statement
23 at the time, I could understand it, but bringing him in
24 how many years after -- 40 years after?

25 MR. PHILLIPS: He has a good memory,

1 Justice Scalia.

2 (Laughter.)

3 MR. PHILLIPS: No, Justice Scalia, I
4 understand that, but the -- the bottom line here is, the
5 question is, is this, you know -- is it absolutely clear
6 that this is exclusively an IMLA lease? And the answer
7 to that is there is a lot of evidence that suggests no.
8 It's not in the form of IMLA; there are a lot from other
9 statements that say yes, and more fundamentally it seems
10 to me is the Court should not view it as an either/or
11 proposition. It could be adopted under IMLA or it could
12 be adopted separately. So the section 8 argument --

13 JUSTICE ALITO: I thought that your argument
14 earlier was that all leases of mineral rights on the
15 Navajo-Hopi land are governed by the Rehabilitation Act,
16 and it's not a factual question as to which statute
17 anybody chose at the time of the negotiation of the
18 lease. But recently, in the last few minutes, you seem
19 to be arguing that it was a factual issue that was --
20 that was unearthed only through later discovery.

21 MR. PHILLIPS: Well, I don't know that it's
22 a factual question; it is that candidly, we obviously
23 focused more on IMLA because the Federal Circuit --
24 first of all, the Court of Federal Claims in the first
25 go-around adopted IMLA as the test and just said you

1 lose because you don't have an IMLA lease here; and we
2 had argued here that it's not just an IMLA lease. Then
3 we went to the Federal Circuit and we won on the grounds
4 that it was an IMLA controlled error and we should
5 prevail on that basis. When it was sent back down and
6 we obviously didn't have IMLA available, since the
7 Federal Circuit specifically precluded us from any
8 further reliance on IMLA, we looked at the other
9 provisions; we tried to understand their context, and
10 then that -- all I'm trying to do is explain why it is
11 that we would suddenly focus more on the Navajo act, not
12 to say that you couldn't read the statute and say it
13 would necessarily apply in that circumstance.

14 JUSTICE BREYER: That isn't really my
15 question, because I've tried to erase from my mind any
16 suspicion about why you did or didn't argue it last
17 time; and looking at it straight afresh, I think when
18 the Court of Claims got this back, as any judge would,
19 the first thing they do is look at the words of the old
20 statute, look at the words of the new statute, and try
21 to figure out if the new statute that you cited is
22 somehow more supportive of your claim than the old one
23 was.

24 MR. PHILLIPS: Right.

25 JUSTICE BREYER: Okay. So what have we got

1 here in that respect? What we seem to have is two later
2 provisions that say the government shall have no
3 liability when it enters into leases. I mean, maybe
4 that helps you, but at the moment, I am slightly
5 escaping it. And then I guess there is some regs that
6 were promulgated after the lease was entered into and
7 seem on their face to deal with other matters. Okay,
8 now, what am I missing?

9 MR. PHILLIPS: I'm not sure I understand the
10 last part about --

11 JUSTICE BREYER: Well the regs you didn't
12 emphasize, so forget them. If you don't want to rely on
13 them we won't.

14 The -- but I've looked for everything I
15 could find that would support you on this basis --

16 MR. PHILLIPS: Right.

17 JUSTICE BREYER: -- and there you are, so I
18 want to you add something to explain --

19 MR. PHILLIPS: Well, I would go back to
20 Justice Alito's first question that was posed to Mr.
21 Kneedler, which was is this provision has a duty --
22 because it has an approval requirement; and the answer
23 is yes, this Court in Navajo I looked further at IMLA,
24 at that specific statute, and concluded that that
25 statute overall had a very significant limitation

1 embedded in that duty; and the question is, is there
2 anything in the Rehabilitation Act that has that same
3 limitation?

4 JUSTICE BREYER: Okay.

5 MR. PHILLIPS: And my answer to that is no,
6 there is nothing in it; and contrary to the overall
7 intent of IMLA, which was to guarantee self-sufficiency,
8 the overall intent of this statute was to allow the
9 Navajo to come somewhere in the area of those standards.
10 In addition to that, I do think there are regulations
11 that do require the Secretary to invoke a fair market
12 value assessment of the rates that are embedded in this
13 lease, and that he did not -- he clearly did not do
14 that.

15 CHIEF JUSTICE ROBERTS: Even if you are
16 right about the duty-creating aspect, what -- talk a
17 little about the money-mandating aspect, the second
18 stage of the analysis under Navajo I.

19 MR. PHILLIPS: Well, I -- I think the key to
20 that is -- is sort of two-fold. One, I think when you
21 -- in the absence of some clear statement in this
22 statute akin to the one that existed in IMLA, that
23 reduces the duty of the United States, that the Court
24 ought to then simply examine this against the background
25 of the trust principles and say you have a duty; you

1 ought to exercise your duty consistent with your role as
2 a trustee; and you ought to -- you ought to be acting in
3 the best interests of the Navajo Nation.

4 CHIEF JUSTICE ROBERTS: Before we find a
5 waiver of sovereign immunity opening up the Treasury of
6 the United States, we usually insist on something a
7 little more specific than general trust principles.

8 MR. PHILLIPS: And then the second -- I
9 mean, if you are not prepared to accept the general
10 trust principles, although, again, they go through the
11 context of a specific imposed duty that -- that 635(a)
12 has in the first instance. But even if you want to go
13 beyond that, then I go to 635(b) and (c), where Congress
14 clearly seems to have in mind the possibility of not
15 having liability imposed in certain circumstances and
16 yet left 635(a) there without a similar protection for
17 the United States, which, again, may not be the
18 compelled inference, but it certainly seems to me to
19 create a fair inference.

20 CHIEF JUSTICE ROBERTS: Well, that's not how
21 the Secretary reads 635. Isn't he entitled to Chevron
22 deference?

23 MR. PHILLIPS: Well, unless you are saying
24 that -- I don't know what context Mr. Chief Justice was
25 talking about. I mean -- but to be sure, lawyers don't

1 want to read it that way because they are in litigation
2 right now. But I don't see anything in the statutory
3 scheme or in the regulatory scheme that would say that.
4 And certainly, if you go back and look at the
5 Secretary's brief, in their analysis of the regulatory
6 scheme, the -- let me see if I can find this -- page 25
7 to 26, where they point out that there was a gap where
8 -- where the Secretary did not exclude mineral leasing
9 from the 635 --

10 JUSTICE SCALIA: What did Secretary Udall
11 think about this?

12 MR. PHILLIPS: He's fully on board, Justice
13 Scalia.

14 (Laughter.)

15 MR. PHILLIPS: It's not in the brief.

16 I'll just conclude with the section (a)
17 argument, which is to recognize that the Secretary did
18 owe a duty of candor and disclosure embedded in section
19 (a). That program did not end. That disclosure
20 responsibility did not end. What the measure of damages
21 for that breach of duty is a question that obviously is
22 still open on remand. But the notion that the Secretary
23 can behave the way the Secretary did in this case, which
24 is to know that he was not going to take personal
25 jurisdiction over the final decision, command that no

1 decision be made, leave the Navajo in a state of
2 distress under those circumstances, force them to
3 negotiate with one hand tied behind their back at a
4 minimum, and then handed up an agreement that was half
5 what the fair market value would have been for the
6 quality of coal is an outrage, and the Court ought to
7 allow the damages action to go forward.

8 If there are no further questions, I urge
9 the Court to affirm.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Phillips.

12 Mr. Kneedler, you have nine minutes
13 remaining.

14 REBUTTAL ARGUMENT OF GEN. EDWIN S. KNEEDLER
15 ON BEHALF OF THE PETITIONER

16 GEN. KNEEDLER: First, Mr. Chief Justice,
17 with respect to the text of section 5, it doesn't -- it
18 doesn't by any means suggest that it covers mineral
19 leases. The pertinent phrase is that they -- that the
20 tribe or members of the tribe "may lease" -- "with the
21 approval of the Secretary, may lease for various
22 religious, recreational, or business purposes, including
23 the development" of utilization -- "or utilization of
24 natural resources in connection with the operations
25 under those leases." It's not a free-standing mineral

1 lease or resource lease provision. It says, "including"
2 and "in connection with operations under such leases,"
3 referring back to business leases or the other things
4 there. So I think, on its face, it doesn't suggest it
5 covers mineral leases.

6 JUSTICE KENNEDY: Well, that --

7 GEN. KNEEDLER: But --

8 JUSTICE KENNEDY: But it says "the
9 development or utilization of natural resources."

10 GEN. KNEEDLER: "In connection with
11 operations under such leases." And -- and what's above,
12 a recitation of things that don't include mineral
13 leases. It's educational, recreational, and business
14 leases. And as we explained, there are specific --

15 JUSTICE KENNEDY: Well, why isn't it a
16 public purpose to develop Indian minerals? That
17 benefits the Indians and whole country.

18 GEN. KNEEDLER: It says "business"
19 purposes," and as such --

20 JUSTICE KENNEDY: No, it says "public."

21 GEN. KNEEDLER: "For public, religious" --
22 "public" would be like for a school, if a State was
23 going to put a school on or something, but -- but the --
24 but as we explain in our brief, there was a specific
25 reason why Congress enacted this. There was a gap in

1 the authority to lease for these types of purposes at
2 the time this was enacted.

3 JUSTICE SOUTER: And why didn't --

4 JUSTICE KENNEDY: Well, even if -- if I may
5 have just one minute, Justice Souter.

6 If you get revenue from the natural
7 resources, why isn't that a public, religious,
8 educational purpose? They get revenue from leasing.

9 GEN. KNEEDLER: The -- the example would be
10 --

11 JUSTICE KENNEDY: I just -- I just think you
12 give too cramped a reading to section 5.

13 GEN. KNEEDLER: Well, the example would be,
14 if you -- for example, if you were going to use water --
15 this is a Navajo reservation -- if you needed water for
16 a business and sink a well, you would be utilizing or
17 developing the natural resources in connection with a
18 surface lease. But -- but the last section of -- the
19 last sentence of section 5 says, "Nothing in this
20 section shall be construed to repeal or affect the
21 authority under other provisions." And it's the other
22 provision that is IMLA. The regulations --

23 JUSTICE SOUTER: May I just supplement
24 Justice Kennedy's question? Why can't the development
25 of the mineral leases be regarded as an adjunct to a

1 business enterprise?

2 GEN. KNEEDLER: Well --

3 JUSTICE SOUTER: I mean business purposes.

4 I --

5 GEN. KNEEDLER: I -- I suppose they could,

6 but in -- in the terminology, mineral leasing, as we

7 explain in our brief -- that the categories of leasing

8 that are -- have always been handled differently.

9 "Mineral leasing" is the term that is used for minerals.

10 Business, grazing, farming -- we explain this in our

11 brief, that those are different. The regulations that

12 were utilized to implement section 5 had never included

13 specific provisions for mineral leases. They have

14 always been under other -- other provisions.

15 JUSTICE SOUTER: Do the regs specifically

16 address the scope of business purposes?

17 GEN. KNEEDLER: They -- they -- not beyond

18 basically repeating them, but the -- but they, for

19 example, talk about rental value, which is not the way

20 you describe mineral leases, which are -- which are

21 royalties, not rental value.

22 If I could also address the argument about

23 sections (b) and (c), sections (b) and (c) of this Act

24 provide -- first of all, were enacted after section (a),

25 so I don't think much of an inference could be drawn.

1 But there are situations -- special types of conveyances
2 that the tribe was going to make: One was for fee land
3 that it was -- that it was transferring. There would be
4 no reason to think the United States should be liable
5 for that, for what it did with the tribe did with its
6 own fee land, and Congress wanted to make sure of that.
7 The other was that the tribe could convey trust land to
8 municipalities and that sort of thing, and what the
9 statute says thereafter the United States won't be
10 liable. The United States was just making sure it was
11 washing its hands of it.

12 Under section (a), we aren't saying that
13 there could be no lease under which it could conceivably
14 be for a business purpose in which the United States
15 could be liable. If there was a regulation establishing
16 a minimum floor and the lease terms went below that,
17 then that might be a circumstance in which liability
18 could be imposed.

19 But otherwise, Justice Breyer is completely
20 correct: This statute on its face imposes no more of a
21 duty on the Secretary with respect to the approval of
22 whatever leases are covered than IMLA imposed on the
23 Secretary with with respect to -- with respect to
24 mineral leases.

25 And -- and another important point is, as

1 this Court pointed out in the Cotton Petroleum and
2 Montana v. Blackfeet Tribe, the IMLA was enacted to
3 bring uniformity to mineral leasing. And the notion
4 that Congress would have implicitly wanted to
5 specifically carve the Navajo and Hopi out of that
6 general authorization and that preexisting set of
7 regulations and cover it by -- by a provision like this
8 we think is just not consistent with the way Congress
9 has dealt with mineral leases over the -- over the
10 years.

11 I also just wanted to come back to this idea
12 of -- of imposing liability on the basis of the common
13 law, because the example of what the Federal Circuit did
14 in this case, with all respect to that court, we think
15 strayed so far from what this Court laid down in Navajo
16 I, that it's important for this Court, however it thinks
17 it disposed of this case before, to make clear that
18 liability cannot be imposed unless, as this Court said
19 in Navajo, there is -- there is a specific
20 rights-creating or duty-imposing language in the statute
21 itself. The theory that has been adopted in some lower
22 courts -- Federal circuit court decisions, which you can
23 look at -- a hodgepodge of statutes, one dealing with
24 environmental concerns, one dealing with rights-of-way,
25 one dealing with this -- add them all up and say the

1 United States has control and, therefore, out of that
2 sort of bucket of statutes, you can impose trust
3 responsibilities. That's fundamentally inconsistent
4 with the Tucker Act, which requires that the liability
5 be based on the statutes themselves, and you have to
6 look at each statute and each regulation that governs
7 the United States in Indian affairs in the same way,
8 under the Tucker Act, you would look at the --

9 JUSTICE STEVENS: General Kneedler --

10 GEN. KNEEDLER: -- United States elsewhere
11 to decide whether it was --

12 JUSTICE STEVENS: Can I ask one question? I
13 probably should have asked earlier. But there is no
14 dispute as the case comes to us. I know the government
15 has taken the position that there was no breach of
16 trust. But do we -- we do have to decide it on the
17 assumption that there was a breach of trust that caused
18 all this damage?

19 GEN. KNEEDLER: No, no. I think that's not
20 at all correct. With respect to the approval of the
21 lease terms in 1987 -- under a provision that provided
22 for "reasonable" lease adjustments, the Secretary
23 approved leases negotiated by the tribe at 12.5 percent.
24 The tribe entered into two other leases at the very same
25 time, although not the subject of this case, for 12.5

1 percent. That's the standard royalty rate. And the
2 tribe got other benefits from this as a package. With
3 respect to the arguments about what the Secretary did on
4 -- on appeal, it's even clearer that all this
5 information about the Secretary meeting with Peabody's
6 lobbyist, it was before the Court before, and the Court
7 found no violation of any statute or regulation. But
8 it's even clearer on remand, as we point out on page 22
9 of our reply brief, that the tribe was fully aware that
10 the Secretary was not going to -- had -- had said the
11 appeal was not going to be acted on and had sent the
12 parties back to negotiations. In fact, when Chairman
13 Zah of the tribe opened the negotiations on August 30 of
14 1985, he said, "It appears that the Secretary wants us
15 to take another shot at negotiating the lease." He knew
16 what --

17 CHIEF JUSTICE ROBERTS: I'm not sure that's
18 responsive to justice Stevens's question. I mean, you
19 are arguing the merits, but those haven't been decided.

20 GEN. KNEEDLER: Well, what the -- what the
21 Court of Federal Claims said along those lines was a
22 legal conclusion, not a factual conclusion. And the --
23 the facts as described are really what they were before
24 when the Court found no violation.

25 And -- and as we say, it's clear factually

1 on remand that the tribe knew. But again, that was just
2 -- it's not a factual determination that has to be taken
3 as true. For one thing, it was summary judgment, not
4 factual findings. But it does -- it was just a legal
5 conclusion. And at that, it was the sort of legal
6 conclusion drawn from general notions of fiduciary
7 responsibility, nothing that has been channeled or
8 embodied or codified in a statute or regulation.

9 And we think to unleash the law to regulate
10 the day-to-day operations of a vast agency, like the
11 Interior Department, which has to operate by statutes
12 and regulations would be -- under Vermont Yankee and
13 this Court's other jurisprudence, would be -- would be
14 unwarranted for the courts to do and especially in a
15 waiver of sovereign immunity under the -- under the
16 Tucker Act to impose damages liability for the violation
17 of a procedural regulation. And, of course, the Court
18 pointed out the last time that there was no prohibition
19 against ex parte contracts for this sort of informal
20 adjudication, as there isn't across -- across the board
21 for government -- government activities.

22 If there are no further questions --

23 CHIEF JUSTICE ROBERTS: Thank you, general,
24 the case is submitted.

25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)
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