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P R O C E E D I N G S

(10:04 a.m.)

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

General Kneedler.

ORAL ARGUMENT OF GEN. EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

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

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

The Court found no warrant in any relevant statute or regulation to impose liability on the United States. In particular, the Court concluded that the approval of the royalty rates in the tribe's lease was 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 GENERAL 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 statutes 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, matters that may  
8 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 --

16 JUSTICE KENNEDY: Well, what I was asking  
17 was whether there's 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 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 the Secretary has trust responsibilities. But



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

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

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

25           CHIEF JUSTICE ROBERTS: I -- this may be a

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

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

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

23 JUSTICE ALITO: Under both IMLA and the  
24 Rehabilitation Act, leases have to be approved by the  
25 Secretary. Doesn't that impose a duty on the Secretary?

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

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

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

24           JUSTICE ALITO: The Secretary has to apply  
25 some standard, presumably. What is it?

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

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

1 judgment that that going lower, maybe because of  
2 geological conditions or whatever, is in the best  
3 interest of the Indians. And that is -- that is borne  
4 out --

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

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

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

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

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

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

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

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

10 But the textual dispositive point is this  
11 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 -- under  
24 the Rehab Act, this lease would have had to expire in  
25 1999, and yet it was amended at that time and continues

1 in effect 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 forms of the lease,  
8 if I'm --

9 JUSTICE SCALIA: With the forms?

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

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

25 Also, the other significant thing is that



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

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

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

1 part of it was to have programs -- excuse me -- studies  
2 to determine what the tribe's coal resources were, and  
3 that was done, and this lease grew out of that. But  
4 that doesn't mean that it was in any way governed by the  
5 Rehabilitation Act.

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

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

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

1 some sort of -- some sort of factual control.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, General.

18 Mr. Phillips.

19 ORAL ARGUMENT OF CARTER G. PHILLIPS

20 ON BEHALF OF THE RESPONDENT

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

23 I think I would like to start with Justice  
24 Alito's question because he said: Doesn't section 5 of  
25 the Rehabilitation Act specifically require the

1 Secretary to approve this lease? And Mr. Kneedler  
2 conceded that it does. And so then the question is:  
3 Doesn't that create some kind of a duty? And it seems  
4 to me clearly it does, just as the Court I think  
5 implicitly said in Navajo 1, the difference between  
6 Navajo 1 and Navajo 2 being that this Court then went on  
7 to examine IMLA, the Indian Mineral Leasing Act, and  
8 concluded that IMLA very specifically for the entirety  
9 of Native Americans and for the entirety of Indian  
10 mineral leasing had a preference to ensure that the  
11 Indian tribes themselves would -- would attain a certain  
12 self sufficiency; that it essentially abdicated the  
13 responsibility of having to deal with individual  
14 negotiations and allowed it for the tribes to take over.

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

21 MR. PHILLIPS: Oh, I would -- I would never  
22 assume that, Justice Ginsburg. I -- I think -- I think  
23 the operative term here is "relevant." And that is that  
24 the Court for purposes of analyzing the question  
25 presented and disposing of it evaluated not only IMLA,

1 but the other two provisions that the -- that the --  
2 that the Court felt needed to be disposed of at that  
3 point.

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

9 JUSTICE SCALIA: I don't understand your  
10 answer. You say that those were not relevant and,  
11 therefore, they were not covered by this.

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

19 Our argument here is that section 5 of the  
20 Rehabilitation Act provides a wholly independent basis  
21 on which there is a duty imposed, but that duty is then  
22 implemented through the regulations that are identified  
23 in the -- in the Secretary's --

24 JUSTICE SCALIA: In the Rehabilitation Act,  
25 is the requirements for approval of lease, is -- is that

1 applicable to mineral leases?

2 MR. PHILLIPS: Is that applicable to mineral  
3 leases?

4 JUSTICE SCALIA: Yes.

5 MR. PHILLIPS: Absolutely, it's applicable  
6 to mineral leases. The -- the language of the statute  
7 is "business leases, including those for the development  
8 of mineral resources." So clearly it applies to mineral  
9 leases, but it does not include the Indian Mineral  
10 Leasing Act.

11 CHIEF JUSTICE ROBERTS: I'm sorry. Where is  
12 the specific reference to mineral leases, mineral  
13 resources, I guess?

14 MR. PHILLIPS: Mineral resources.

15 CHIEF JUSTICE ROBERTS: I mean, it says  
16 "resources." I don't remember it saying "mineral  
17 resources."

18 MR. PHILLIPS: Yes, "the development of the  
19 resources of the Navajo and Hopi Indian."

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

22 MR. PHILLIPS: I'm sorry. "The development  
23 or utilization of natural resources."

24 But the basic point there is that, at least  
25 as I read section 5, what it's saying is that it grants

1 broad leasing authority. The Solicitor General is  
2 absolutely right about that. But that authority extends  
3 to certain kinds of mineral leasing.

4 And that's -- and that's an authority, and  
5 it's important to recognize this because, while it is  
6 true for the run-of-the-mill Native Americans who are --  
7 who are engaged in mineral leasing it may make sense to  
8 say: Look, we -- we are going to take a hands-off  
9 approach for the most part. We are going to set a  
10 minimum ceiling or a minimum floor and above that you  
11 negotiate as hard as you want.

12 But the Navajo were in a fundamentally  
13 different position in 1950 when this legislation was  
14 enacted. The -- the median education on that -- on that  
15 reservation was less than one year of education.

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

23 JUSTICE ALITO: Is it your position -- is it  
24 your position that it would be -- that it -- it is not  
25 lawful for coal on the Navajo Reservation to be leased

1 under IMLA; a lease would have to be solely under  
2 section 5 of the Rehabilitation Act.-

3 MR. PHILLIPS: No, I don't think it has to  
4 be solely under it. I -- I think that's a -- a false  
5 dichotomy. I don't think this is an either/or  
6 proposition. I think there are parts of IMLA that can  
7 reasonably be applied here, and -- and section 5  
8 specifically says no authority from other statutes,  
9 which would include IMLA, is meant to be superseded by  
10 the passage of section 5. So I think there is a rule.

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

15 This is a mix and match between some  
16 provisions, it seems to me, that clearly provide  
17 additional protection for the Navajo and other  
18 provisions that --

19 JUSTICE ALITO: But the lease -- the lease  
20 doesn't follow the -- the requirements of section 5 of  
21 the Rehabilitation Act in -- in respect to its term.  
22 But what is your -- is it your position that in entering  
23 into a lease the tribe has the authority to decide, we  
24 want this to be under IMLA, we want this to be under the  
25 Rehabilitation Act? When it comes up to the Secretary



1 for approval, does the Secretary have the authority to  
2 say, I'm going to approve this under IMLA; I'm going to  
3 approve it under --

4 MR. PHILLIPS: I think the Secretary has to  
5 approve it under both of those provisions. It is just  
6 that IMLA in this particular context would simply impose  
7 a 10-cent minimum per ton.

8 JUSTICE SCALIA: What do you do about the  
9 fact that the term of this lease would -- would not be  
10 permitted under the Rehabilitation Act?

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

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

1                   And yet I -- I thought you were saying a  
2 little bit earlier that the Rehab Act applies to all  
3 mineral leasing, because that would be the development  
4 of a natural resource. And if that is so, then there  
5 seems to be a pretty clear conflict, even on your own  
6 argument, between the term provisions in the Rehab Act  
7 and the term provisions of IMLA with respect to -- to  
8 mineral leases. How do -- how do we get out of that  
9 problem for you?

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

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

20                   JUSTICE SOUTER: But it's a special  
21 protection and special duty that applies to every one of  
22 the mineral leases, including this one, that the Navajo  
23 may be involved in.

24                   MR. PHILLIPS: Correct.

25                   JUSTICE SOUTER: So I -- what -- maybe --

1 maybe I missed the point, but would you go back to  
2 justice Scalia's question: How is it that there is not  
3 a conflict here between this lease and the Rehab Act?

4 MR. PHILLIPS: Because the last section of  
5 section 5 says that, notwithstanding anything else, this  
6 provision doesn't preclude -- doesn't -- doesn't limit  
7 authority that would otherwise exist.

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

13 JUSTICE SCALIA: Which is all that the  
14 Rehabilitation Act --

15 MR. PHILLIPS: Oh, no. I'm sorry. It's  
16 because this provision applies to a lot of other leases,  
17 too. Are you asking when the 20 or 10 and 10.

18 JUSTICE SOUTER: With respect -- my point is  
19 with respect to every mineral lease of the Hopi and the  
20 Navajo --

21 MR. PHILLIPS: Right.

22 JUSTICE SOUTER: -- you are saying the term  
23 provision never applies. Isn't that correct --

24 MR. PHILLIPS: No, I understand. Right. I  
25 have the answer your question, which is this provision

1 in section 5 applies not just to mineral leasing, it  
2 applies to all business site leasing.

3 JUSTICE SOUTER: But it only applies to  
4 those two tribes. And there is something very, very  
5 strange, it seems to me, in saying that the -- that the  
6 kind of -- the saving sentence at the end of section 5  
7 reads its very term limit provisions out of every -- out  
8 of every possible application for mineral lease by these  
9 two tribes. And that's what you are saying.

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

13 JUSTICE SOUTER: I realize that.

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

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

24 MR. PHILLIPS: I need a haircut.

25 JUSTICE SOUTER: -- on -- on trivial

1 contracts, trivial lease contracts, there are term  
2 limits, but on the ones that really count, where the  
3 real money is, it doesn't apply at all.

4 MR. PHILLIPS: There is a --

5 JUSTICE SOUTER: That's pretty strange.

6 MR. PHILLIPS: -- Raytheon has an entire  
7 defense plant on the Navajo tribe -- on the Navajo  
8 Reservation right now, that would obviously be subject  
9 to precisely these same limitations. So it's not just  
10 trivial. It's all business lease citing that is covered  
11 by that.

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

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

1 JUSTICE SOUTER: Let's assume that, and I --  
2 I -- I think your argument is well taken. But assuming  
3 that, don't we also have to assume that the stress in  
4 IMLA on placing primary responsibility on the tribes,  
5 not on the Secretary, should in fact also be imported to  
6 the application of the Rehab Act as you say it should be  
7 applied?

8 MR. PHILLIPS: Right. But you see, I don't  
9 think that's an authority. I would say -- I would not  
10 read --

11 JUSTICE SOUTER: What's not an authority?

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

15 JUSTICE SOUTER: Okay. You made a good  
16 argument a few moments ago for the fact that it would  
17 have been at least at one time inappropriate to thrust  
18 that responsibility on the Navajo, but there was no  
19 Navajo exception in IMLA. That responsibility was  
20 thrust on the Navajo --

21 MR. PHILLIPS: To be sure, there isn't --

22 JUSTICE SOUTER: -- and this Court  
23 recognized that.

24 MR. PHILLIPS: Right. But that's exactly  
25 why I think the Navajo Rehabilitation Act of 1950 does

1 modify IMLA.

2 JUSTICE GINSBURG: With respect to that --

3 JUSTICE SCALIA: It expired --

4 MR. PHILLIPS: I'm sorry?

5 JUSTICE GINSBURG: -- the opinion in the  
6 last time around not only contained the statement that I  
7 read before, that is, "any relevant statute," but in the  
8 very beginning it says, "We hold the tribe's claim for  
9 compensation from the Federal Government fails," and  
10 there is a well-known distinction between a claim and an  
11 issue and attributing to the Court that kind of  
12 carelessness for saying that the claim is barred as  
13 distinguished from an issue, the issue being IMLA -- I  
14 think the Court was conscious of that distinction when  
15 it used the words that the "claim" fails, not just the  
16 issue.

17 MR. PHILLIPS: Obviously, Justice Ginsburg,  
18 you are in a much better position to judge what was  
19 intended here. On the other hand, my experience with  
20 the Court generally is that when you analyze a case you  
21 analyze it in terms of the specific question that is  
22 presented, and if you are proposing to go beyond the  
23 question presented you say so expressly, not simply by  
24 the use of the word "claim" or "argument."

25 So while I recognize that the Court -- that

1 the government has an argument to be made that this has  
2 pre-decided that, I think, frankly, one, the Court  
3 didn't decide this issue; and two, the Court should  
4 decide the question that we've presented here as to the  
5 scope of section 5, because it's obviously of  
6 extraordinary importance to not only section 5 but also  
7 section 8 as well.

8 JUSTICE SCALIA: Mr. Phillips, the  
9 government says that by the time this lease was executed  
10 the Rehabilitation Act was a dead letter, that it was  
11 meant to stimulate economic activity on the Navajo  
12 Reservation, and there were funds appropriated for that  
13 purpose, and that had all been played out by the time  
14 this lease was -- was entered into.

15 Is there something wrong with that?

16 MR. PHILLIPS: Yeah, the government's wrong  
17 about that. I believe -- the program itself is for the  
18 overall rehabilitation of the Navajo and the Hopi.  
19 There are a series of projects that the -- where the  
20 statute says "Such program shall include the following  
21 projects." It doesn't say it's limited to the following  
22 projects, and those projects have been set out with a  
23 set of times.

24 But the program itself is not -- is not  
25 limited that way and more fundamentally, it is



1 completely inconsistent with that kind of time  
2 limitation on the statute overall that Congress would  
3 have repealed certain sections of this act, sections 9  
4 and 10, after the 10-year period that expired if the  
5 statute didn't have any continuing implication.

6           It also would have meant that the leasing  
7 protections in section 5 had expired after 10 years,  
8 which seems to me quite inconsistent with the overall  
9 purpose here to accomplish that. So I think the  
10 temporal argument doesn't get the government  
11 particularly far.

12           I would like to take a second to talk about  
13 sort what I think is an important distinction between  
14 635 and other provisions, which is that 635(a) imposes a  
15 duty that, as the Secretary's brief I think elegantly  
16 sets out, that duty means that you have to make sure  
17 there is fair market value, that these are reasonable  
18 rates, and that was not done. So that's the violation  
19 that took place.

20           Then the question is, is there a  
21 money-generating, money-mandating obligation imposed  
22 here. And there it seems to me the distinction between  
23 635(a), which says nothing about liability, and 635(b)  
24 and (c), which expressly -- expressly excludes the  
25 possibility of liability, suggests clearly why 635(a)

1 ought to be viewed by this Court as a sufficient -- as  
2 creating a fair inference, is what the Court said in  
3 Mitchell 2, a fair inference under these -- under these  
4 particular circumstances.

5 The other issue that we have put on the  
6 table that the government didn't actually address in its  
7 opening, although I suspect --

8 JUSTICE BREYER: So you are saying that  
9 635(a) creates an inference that 635(c) creates the  
10 fiduciary duty?

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

16 The other duty, it seems to me, that the --  
17 that the Secretary breached there is the duty embedded  
18 in section 8 of this statute, which requires him to make  
19 disclosures as part of this program. And the one thing  
20 that is absolutely clear that the Court of Federal  
21 Claims judged --

22 JUSTICE BREYER: That's the part I'm not  
23 getting. You are saying -- the question, I guess,  
24 basically is, does the language of 635(a) which says  
25 "with the approval of the Secretary" --

1 MR. PHILLIPES: Right.

2 JUSTICE BREYER: -- the Indians can, among  
3 other things, for business purposes lease the land.  
4 Right? That's what it says.

5 MR. PHILLIPS: Right. And then --

6 JUSTICE BREYER: And that doesn't seem much  
7 different from the IMLA, to tell you the truth, to me.  
8 It doesn't seem different at all. So now you are  
9 saying, no, it's really different because look at (b)  
10 and (c). That's your basic argument?

11 MR. PHILLIPS: Right.

12 JUSTICE BREYER: So I look at (b) and (c)  
13 and it says, well, when you lease something under (b)  
14 and (c), which is not (a) -- it's (b) and (c) -- you  
15 have to have all this supervision and so forth, or it  
16 has to be at a fair value, something like that; is that  
17 right?

18 MR. PHILLIPS: Well, it doesn't -- it  
19 doesn't --

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

25 MR. PHILLIPS: No, just to read (b), which

1 unfortunately isn't reproduced I don't think in any of  
2 the papers, but it says: "Notwithstanding any other  
3 provision of law, land owned in fee simple by the Navajo  
4 may be leased, sold or otherwise disposed of by the sole  
5 authority of the tribal council in any manner that  
6 similar land in the State it's situated may be leased,  
7 sold or otherwise disposed of by private landowners, and  
8 the -- such disposition shall create no liability on the  
9 part of the United States."

10 JUSTICE BREYER: So why does that -- why  
11 does that mean that this act creates a trust  
12 relationship?

13 MR. PHILLIPS: No, that -- the -- the trust  
14 relationship doesn't come out of the (b) and (c). The  
15 money-creating component of it it seems to me comes out  
16 of (b) and (c). The trust relationship comes from the  
17 fact that the entirety of the statute was enacted to  
18 implement the treaties, that these are all lands that  
19 are held in trust, and that -- and that there is a  
20 specific duty embedded in (a) that requires that the  
21 Secretary approve what is otherwise basically controlled  
22 as a trust arrangement, and that that is then  
23 implemented through regulations that require the  
24 Secretary to do this under a fair market value standard.

25 JUSTICE KENNEDY: Well, give me an -- and

1 incidentally, the statute is in opposition brief, or the  
2 orange brief, at page 5. Give me an example of why the  
3 last clause, "and such disposition shall create no  
4 liability on the part of the United States" -- what  
5 contingency was that directed to if not the one that is  
6 before us?

7 MR. PHILLIPS: Well, that's for the sale of  
8 fee simple lands, so it's dealing with a very different  
9 set of -- of circumstances, which is talking about --  
10 it's aimed clearly at a different set of properties that  
11 are being held and therefore they said, when you engage  
12 in leases for that kind of property there is no  
13 liability.

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

18 MR. PHILLIPS: A fair inference I think is  
19 all that I have to demonstrate.

20 JUSTICE BREYER: Thank you, but now what of  
21 course is at the back of my mind is I'm trying to see,  
22 is this -- is this statute stronger for you than the  
23 statute we already considered? And I start with some  
24 suspicion, because I think if it was a stronger statute  
25 for you, you would have argued it the last time. So I

1 wonder why you didn't.

2 MR. PHILLIPS: I wasn't here the last time.

3 JUSTICE BREYER: So somebody thought maybe  
4 it was a weaker statute, so -- but I will put that  
5 suspicion aside.

6 MR. PHILLIPS: Can I answer --

7 JUSTICE BREYER: So that's the fundamental  
8 question in my mind. I look at the language and so  
9 forth. The language doesn't seem any stronger for you,  
10 at least at first blush.

11 MR. PHILLIPS: Right. There's two -- there  
12 are two answers; I was being facetious as to why we  
13 didn't push this argument the last time. It was largely  
14 because the Federal Circuit the last time concluded  
15 based on IMLA alone that there was in fact a sufficient  
16 rights-creating provision. And therefore we defended  
17 that part of the judgment.

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

22 MR. PHILLIPS: I don't know if those were  
23 from the brief. I know there was a statement of  
24 undisputed facts in the first round of the litigation.  
25 But there is no question that the Court -- if we are

1 right, that the Court remanded to -- for consideration  
2 consistent with this. We then went down upon remand  
3 from the Federal Circuit. We took additional discovery  
4 and we obtained the information that we got. And also,  
5 remember, the United States' brief in the Ninth Circuit  
6 specifically says that this was approved pursuant to the  
7 Rehabilitation Act and the trust responsibilities.

8 JUSTICE GINSBURG: Well, you are really  
9 saying that you were wrong in make that concession.

10 MR. PHILLIPS: That was an overstatement,  
11 there's no question. Based on what we knew at the time,  
12 we thought it was in fact an IMLA lease. But the truth  
13 is --

14 JUSTICE GINSBURG: In -- IMLA --

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

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

19 MR. PHILLIPS: Yes, but this is the only one  
20 that deals specifically with the Navajo Reservation and  
21 deals with leasing for business purposes for the  
22 development of resources. And so while I -- I agree  
23 with you in one sense, the other one has a -- has some  
24 superficial closeness here. It seems to me that the  
25 closer one is actually the provision that deals with

1 this specific reservation and this specific type of a  
2 lease arrangement. I don't think it has to be  
3 either-or.

4 CHIEF JUSTICE ROBERTS: But you knew all of  
5 that. That's not -- that's not something you discovered  
6 on remand. You knew all that before.

7 MR. PHILLIPS: Well, we -- we obtained  
8 additional information, certainly, you know. We have  
9 the Udall declaration that specifically said that when  
10 he negotiated this lease he negotiated it as the  
11 centerpiece of the Navajo-Hopi Rehabilitation Act of  
12 1950.

13 CHIEF JUSTICE ROBERTS: And that affidavit  
14 was before or after our decision the first time around?

15 MR. PHILLIPS: It was after the first time  
16 around. I mean, there is no question that if we had won  
17 the first time around, we would have stood by that  
18 statement. But, having lost it --

19 (Laughter.)

20 MR. PHILLIPS: -- there is a tendency to  
21 focus the mind elsewhere, and we did. But the reality  
22 is that if you look at the parties, the -- Secretary  
23 Udall specifically says this was adopted pursuant to the  
24 Rehabilitation Act. Peabody Coal Company in briefing in  
25 the Arizona courts has specifically said that this was



1 approved under the Rehabilitation Act, and the United  
2 States Government itself in briefing in other courts has  
3 said that this was approved pursuant to the --

4 JUSTICE SCALIA: I don't know that you can  
5 bring in Federal officials to -- to testify years after  
6 the fact as to on what basis they acted earlier. That's  
7 very strange to me. I don't know what -- what motive  
8 Secretary Udall has today that might induce him to say  
9 that.

10 MR. PHILLIPS: Obviously --

11 JUSTICE SCALIA: If there was some statement  
12 at the time, I could understand it. But bringing him in  
13 how many years after, 40 years after?

14 MR. PHILLIPS: He has a good memory,  
15 Justice Scalia.

16 (Laughter.)

17 MR. PHILLIPS: No, Justice Scalia, I  
18 understand that. But the -- the bottom line here is,  
19 the question is, is this, you know -- is it absolutely  
20 clear that this is exclusively an IMLA lease? And the  
21 answer to that is there is a lot of evidence that  
22 suggests no. It's not in the form of IMLA. There are a  
23 lot from other statements that say yes. And more  
24 fundamentally, it seems to me the Court ought not to  
25 view it as an either/or proposition. It could be

1 adopted under IMLA or it could be adopted separately.  
2 So the section 8 argument --

3 JUSTICE ALITO: I thought that your argument  
4 earlier was that all leases of mineral rights on the  
5 Navajo-Hopi land are governed by the Rehabilitation Act,  
6 and it's not a factual question as to which statute  
7 anybody chose at the time of the negotiation of the  
8 lease. But recently, in the last few minutes, you seem  
9 to be arguing that it was a factual issue that was --  
10 that was unearthed only through later discovery.

11 MR. PHILLIPS: Well, I don't know that it's  
12 a factual question. It is that, candidly, we obviously  
13 focused more on IMLA because the Federal Circuit sort of  
14 -- first of all, the Court of Federal Claims in the  
15 first go-around adopted IMLA as the test and just said  
16 you lose because you don't have an IMLA lease here. And  
17 we had argued there that it's not just an IMLA lease.

18 Then we went to the Federal Circuit and we  
19 won on the grounds that it was -- that IMLA controlled  
20 here and we should prevail on that basis. When it was  
21 sent back down and we obviously didn't have IMLA  
22 available, since the Federal Circuit specifically  
23 precluded us from any further reliance on IMLA, and  
24 looked at the other provisions, we tried to understand  
25 their context, and then that -- all I'm trying to do is

1 explain why it is that we would suddenly focus more on  
2 the Navajo act, not to say that you couldn't read the  
3 statute and say it would necessarily apply in that  
4 circumstance.

5 JUSTICE BREYER: But that isn't really my  
6 question, because I've tried to erase from my mind any  
7 suspicion about why you did or didn't argue it last  
8 time. And looking at it straight afresh, I think when  
9 the Court of Claims got this back, as any judge would,  
10 the first thing they do is look at the words of the old  
11 statute, look at the words of the new statute, and try  
12 to figure out if the new statute that you cited is  
13 somehow more supportive of your claim than the old one  
14 was.

15 MR. PHILLIPS: Right.

16 JUSTICE BREYER: Okay. So what have we got  
17 here in that respect? What we seem to have is two later  
18 provisions that say the government will have no  
19 liability when it enters into leases. I mean, maybe  
20 that helps you, but at the moment I am slightly escaping  
21 it. And then I guess there are some regs that were  
22 promulgated after the lease was entered into and seem on  
23 their face to deal with other matters. Okay, now, what  
24 am I missing?

25 MR. PHILLIPS: I'm not sure I understand the

1 last part about --

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

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

7 MR. PHILLIPS: Right.

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

10 MR. PHILLIPS: Well, I would go back to  
11 Justice Alito's first question to Mr. Kneedler, which  
12 was, this provision has a duty, doesn't it, because it  
13 has an approval requirement? And the answer is yes,  
14 this Court in Navajo 1 looked further at IMLA, at that  
15 specific statute, and concluded that that statute  
16 overall had a very significant limitation embedded in  
17 that duty; and the question is, is there anything in the  
18 Rehabilitation Act that has that same limitation?

19 JUSTICE BREYER: Okay.

20 MR. PHILLIPS: And my answer to that is no,  
21 there is nothing in it; and contrary to the overall  
22 intent of IMLA, which was to guarantee self-sufficiency,  
23 the overall intent of this statute was to allow the  
24 Navajo to come somewhere in the area of the standards.  
25 In addition to that, I do think there are regulations

1 that do require the Secretary to invoke a fair market  
2 value assessment of the rates that are embedded in this  
3 lease, and that he did not -- and he clearly did not do  
4 that.

5 CHIEF JUSTICE ROBERTS: Even if you are  
6 right about the duty-creating aspect, what -- talk a  
7 little about the money-mandating aspect, the second  
8 stage of the analysis under Navajo 1.

9 MR. PHILLIPS: Well, I -- I think the key to  
10 that is -- is sort of two-fold. One, I think when you  
11 -- in the absence of some clear statement in this  
12 statute akin to the one that existed in IMLA that  
13 reduces the duty of the United States, that the Court  
14 ought to then simply examine this against the background  
15 of the trust principles and say you have a duty, you  
16 ought to exercise your duty consistent with your role as  
17 a trustee, and you ought to -- you ought to be acting in  
18 the best interests of the Navajo Nation.

19 CHIEF JUSTICE ROBERTS: Before we find a  
20 waiver of sovereign immunity opening up the Treasury of  
21 the United States, we usually insist on something a  
22 little more specific than general trust principles.

23 MR. PHILLIPS: And then the second -- I  
24 mean, if you are not prepared to accept the general  
25 trust principles, although again they go through the

1 context of a specific imposed duty that -- that 635(a)  
2 has in the first instance. But even if you want to go  
3 beyond that, then I go to 635(b) and (c), where Congress  
4 clearly seems to have in mind the possibility of not  
5 having liability imposed in certain circumstances and  
6 yet left 635(a) there without a similar protection for  
7 the United States, which, again, may not be the  
8 compelled inference, but it certainly seems to me to  
9 create a fair inference.

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

13 MR. PHILLIPS: Well, unless you are saying  
14 that -- I don't know in what context, Mr. Chief Justice,  
15 you're talking about. I mean -- but to be sure, lawyers  
16 don't want to read it that way because they are in  
17 litigation right now. But I don't see anything in the  
18 statutory scheme or in the regulatory scheme that would  
19 say that. And certainly, if you go back and look at the  
20 Secretary's brief, in their analysis of the regulatory  
21 scheme, the -- let me see if I can find this -- page 25  
22 to 26, where they point out that there was a gap where  
23 -- where the Secretary did not exclude mineral leasing  
24 from the 635 --

25 JUSTICE SCALIA: What did Secretary Udall

1 think about this?

2 MR. PHILLIPS: He's totally on board with  
3 us, Justice Scalia.

4 (Laughter.)

5 MR. PHILLIPS: That's out of the brief.

6 I'll just conclude with the section 8  
7 argument, which is to recognize that the Secretary did  
8 owe a duty of candor and disclosure embedded in section  
9 8. That program did not end. That disclosure  
10 responsibility did not end. What the measure of damages  
11 for that breach of duty is a question that obviously is  
12 still open on remand. But the notion that the Secretary  
13 can behave the way the Secretary did in this case, which  
14 is to know that he was not going to take personal  
15 jurisdiction over the final decision, command that no  
16 decision be made, leave the Navajo in a state of  
17 distress under those circumstances, force them to  
18 negotiate with one hand tied behind their back at a  
19 minimum, and then ended up an agreement that was half  
20 what the fair market value would have been for the  
21 quality of coal, is an outrage and the Court ought to  
22 allow the damages action to go forward.

23 If there are no further questions, I urge  
24 the Court to affirm.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Phillips.

2 Mr. Kneedler, you have nine minutes  
3 remaining.

4 REBUTTAL ARGUMENT OF GEN. EDWIN S. KNEEDLER  
5 ON BEHALF OF THE PETITIONER

6 GEN. KNEEDLER: First, Mr. Chief Justice,  
7 with respect to the text of section 5, it doesn't -- it  
8 doesn't by any means suggest that it covers mineral  
9 leases. The pertinent phrase is that they -- that the  
10 tribe or members of the tribe "may lease" -- "with the  
11 approval of the Secretary, may lease for various  
12 religious, recreational, or business purposes, including  
13 the development" of utilization -- "or utilization of  
14 natural resources in connection with the operations  
15 under those leases." It's not a free-standing mineral  
16 lease or resource lease provision. It says "including"  
17 and "in connection with operations under such leases,"  
18 referring back to business leases or the other -- the  
19 other things there. So I think, on its face, it doesn't  
20 suggest it covers mineral leases.

21 JUSTICE KENNEDY: Well, that --

22 GEN. KNEEDLER: But --

23 JUSTICE KENNEDY: But it says "the  
24 development or utilization of natural resources."

25 GEN. KNEEDLER: "In connection with



1 operations under such leases." And -- and what's above  
2 are a recitation of things that don't include mineral  
3 leases. It's educational, recreational, and business  
4 leases. And as we explained, there are specific --

5 JUSTICE KENNEDY: Well, why isn't it a  
6 public purpose to develop Indian minerals? That  
7 benefits the Indians and the whole public.

8 GEN. KNEEDLER: Well, it says "business"  
9 purposes," and as such --

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

11 GEN. KNEEDLER: "For public, religious" --  
12 "public" would be like for a school, if a State was  
13 going to put a school on or something. But -- but the  
14 -- but as we explain in our brief, there was a specific  
15 reason why Congress enacted this. There was a gap in  
16 the authority to lease for these types of purposes at  
17 the time this was enacted.

18 JUSTICE SOUTER: And why did business  
19 purpose --

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

22 If you get revenue from the natural  
23 resources, why isn't that a public, religious,  
24 educational purpose? They get revenue from leasing.

25 GEN. KNEEDLER: The -- the example would be

1 --

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

4 GEN. KNEEDLER: Well, the example would be,  
5 if you -- for example, if you were going to use water --  
6 this is a Navajo reservation -- if you needed water for  
7 a business and sink a well, you would be utilizing or  
8 developing the natural resources in connection with a  
9 surface lease. But -- but the last section of -- the  
10 last sentence of section 5 says, "Nothing in this  
11 section shall be construed to repeal or affect the  
12 authority under other provisions." And it's the other  
13 provision that is IMLA. The regulations --

14 JUSTICE SOUTER: May I just supplement  
15 Justice Kennedy's question? Why can't the development  
16 of the mineral leases be regarded as an adjunct to a  
17 business enterprise?

18 GEN. KNEEDLER: Well --

19 JUSTICE SOUTER: I mean, business purposes  
20 are included.

21 GEN. KNEEDLER: I -- I suppose they could,  
22 but in -- in the terminology, mineral leasing, as we  
23 explain in our brief -- that the categories of leasing  
24 that are -- have always been handled differently.  
25 "Mineral leasing" is the term that is used for minerals.

1 Business, grazing, farming, we explain this in our  
2 brief, that those are different. The regulations that  
3 were utilized to implement section 5 have never included  
4 specific provisions for mineral leases. They have  
5 always been under other -- other provisions.

6 JUSTICE SOUTER: Do the regs specifically  
7 address the scope of business purposes?

8 GEN. KNEEDLER: They -- they -- not beyond  
9 basically repeating them, but the -- but they, for  
10 example, talk about rental value, which is not the way  
11 you describe mineral leases, which are -- which are  
12 royalties, not rental value.

13 If I could also address the argument about  
14 sections (b) and (c), sections (b) and (c) of this act  
15 provide -- first of all, were enacted after section (a),  
16 so I don't think much of an inference could be drawn.  
17 But they were situations, special types of conveyances  
18 that the tribe was going to make. One was for fee land  
19 that it was -- that it was transferring. There would be  
20 no reason to think the United States should be liable  
21 for that, for what the tribe did with its own fee land,  
22 and Congress just wanted to make sure of that.

23 The other was that the tribe could convey  
24 trust land to municipalities and that sort of thing, and  
25 what the statute says, thereafter the United States

1 won't be liable. The United States was just making sure  
2 it was washing its hands of it.

3 Under section (a), we aren't saying that  
4 there could be no lease under which it could conceivably  
5 be for a business purpose in which the United States  
6 could be liable. If there was a regulation establishing  
7 a minimum floor and the lease terms went below that,  
8 then that might be a circumstance in which liability  
9 could be imposed.

10 But otherwise, Justice Breyer is completely  
11 correct: This statute on its face imposes no more of a  
12 duty on the Secretary with respect to the approval of  
13 whatever leases are covered than IMLA imposed on the  
14 Secretary with respect to -- with respect to mineral  
15 leases.

16 And -- and another important point is, as  
17 this Court pointed out in the Cotton Petroleum and  
18 Montana v. Blackfeet Tribe, the IMLA was enacted to  
19 bring uniformity to mineral leasing. And the notion  
20 that Congress would have implicitly wanted to carve the  
21 Navajo and Hopi out of that general authorization and  
22 that preexisting set of regulations and cover it by --  
23 by a provision like this, we think is just not  
24 consistent with the way Congress has dealt with mineral  
25 leases over the -- over the years.

1           I also just wanted to come back to this idea  
2 of -- of imposing liability on the basis of the common  
3 law, because the example of what the Federal Circuit did  
4 in this case, with all respect to that court, we think  
5 strayed so far from what this Court laid down in Navajo  
6 1 that it's important for this Court, however it thinks  
7 it disposed of the case before, to make clear that  
8 liability cannot be imposed unless, as this Court said  
9 in Navajo, there is -- there is a specific  
10 rights-creating or duty-imposing language in the statute  
11 itself. The theory that has been adopted in some lower  
12 court -- Federal Circuit decisions, is you can look at a  
13 hodgepodge of statutes, one dealing with environmental  
14 concerns, one dealing with rights-of-way, one dealing  
15 with this, add them all up and say the United States has  
16 control and, therefore, out of that sort of bucket of  
17 statutes, you can impose trust responsibilities.

18           That's fundamentally inconsistent with the  
19 Tucker Act, which requires that the liability be based  
20 on the statutes themselves, and you have to look at each  
21 statute and each regulation that governs the United  
22 States in Indian affairs in the same way, under the  
23 Tucker Act, you would look at --

24           JUSTICE STEVENS: General Kneedler --

25           GEN. KNEEDLER: -- what governs the United

1 States elsewhere to decide whether there is liability.

2 JUSTICE STEVENS: Can I ask one question? I  
3 probably should have asked earlier. But there is no  
4 dispute as the case comes to us. I know the government  
5 has taken the position that there was no breach of  
6 trust. But do we -- we do have to decide it on the  
7 assumption that there was a breach of trust that caused  
8 all this damage?

9 GEN. KNEEDLER: No, no. I think that's not  
10 at all correct. With respect to the approval of the  
11 lease terms in 1987 -- under a provision that provided  
12 for "reasonable" lease adjustments, the Secretary  
13 approved leases negotiated by the tribe at 12.5 percent.  
14 The tribe entered into two other leases at the very same  
15 time that are not the subject of this case, for 12.5  
16 percent. That's the standard royalty rate. And the  
17 tribe got other benefits from this as a package.

18 With respect to the arguments about what the  
19 Secretary did on -- on appeal, it's even clearer that  
20 all this information about the Secretary meeting with  
21 Peabody's lobbyist was before the Court before, and the  
22 Court found no violation of any statute or regulation.  
23 But it's even clearer on remand, as we point out on page  
24 22 of our reply brief, that the tribe was fully aware  
25 that the Secretary was not going to -- had -- had said

1 the appeal was not going to be acted on and had sent the  
2 parties back to negotiations. In fact, when Chairman  
3 Zah of the tribe opened the negotiations on August 30 of  
4 1985, he said, "It appears that the Secretary wants us  
5 to take another shot at negotiating the lease." He knew  
6 what had happened.

7 CHIEF JUSTICE ROBERTS: I'm not sure that's  
8 responsive to Justice Stevens's question. I mean, you  
9 are arguing the merits, but those haven't been decided.

10 GEN. KNEEDLER: Well, what the -- what the  
11 Court of Federal Claims said along those lines was a  
12 legal conclusion, not a factual conclusion. And the --  
13 the facts as describe were what they were before and the  
14 court found no violation.

15 And -- and as we say, it's clear factually  
16 on remand that the tribe knew. But again, that was just  
17 -- it's not a factual determination that has to be taken  
18 as true. For one thing, it was summary judgment, not  
19 factual findings. But it does -- it was just a legal  
20 conclusion. And at that, it was the sort of legal  
21 conclusion drawn from general notions of fiduciary  
22 responsibility, nothing that has been channeled or  
23 embodied or codified in a statute or regulation.

24 And we think to unleash the common law to  
25 regulate the day-to-day operations of a vast agency like

1 the Interior Department, which has to operate by  
2 statutes and regulations, would be -- under Vermont  
3 Yankee and this Court's other jurisprudence, would be --  
4 would be unwarranted for the courts to do and especially  
5 in a waiver of sovereign immunity under the -- under the  
6 Tucker Act, to impose damages liability for the  
7 violation of a procedural regulation. And, of course,  
8 the Court pointed out the last time that there was no  
9 prohibition against ex parte contacts for this sort of  
10 informal adjudication, as there isn't across -- across  
11 the board for government -- government activities.

12 If there are no further questions --

13 CHIEF JUSTICE ROBERTS: Thank you, General.

14 The case is submitted.

15 (Whereupon, at 11:04 a.m., the case in the  
16 above-entitled matter was submitted.)

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