



## THE NAVAJO NATION

OFFICE OF THE PRESIDENT & VICE PRESIDENT

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# Navajo President Joe Shirley, Jr., to attend U.S. Supreme Court to hear arguments in Nation's \$600 million Peabody Coal case

**WINDOW ROCK, Ariz.** – Navajo Nation President Joe Shirley, Jr., will join Attorney General Louis Denetsosie and the Nation's outside attorneys, Paul Frye and Carter Phillips, for oral arguments before the U.S. Supreme Court on Monday in the Navajo Nation's \$600 million breach of trust case.

This will be the second time the 10-year-old case, Navajo Nation v. United States, goes before the Supreme Court. In March 2003, the court ruled 6-3 against the Nation, saying it did not prove a breach of trust under the Indian Mineral Leasing Act, which gives tribes control over their trust assets.

However, after further litigation on remand, the U.S. Court of Appeals for the federal circuit entered summary judgment in favor of the Navajo Nation against the United States, ruling that the Nation established its case based on a network of statutes and regulations other than the IMLA.

Among other arguments, the Navajo Nation will argue that the Navajo-Hopi Rehabilitation Act of 1950, which addresses the leasing of tribal land, specifically requires the federal government to consult with and keep its Native American beneficiaries informed in dealing with their mineral resources. That provision is in keeping with tribal self-determination.

The Navajo-Hopi Rehabilitation Act of 1950 was based on the Report on the Navajo that found conditions on the Navajo Nation in the 1930s and 1940s so deplorable as to require immediate federal action.

The Rehabilitation Act encouraged the development of Navajo natural resources such as coal and to provide

federal funds to build roads, schools and other infrastructure to promote self-sustaining Navajo communities, prosperity for the Navajo people, and to fulfill provisions of the Navajo Treaty of 1868.

*"The Interior Department's actions undermined one of the key components of the Navajo-Hopi Rehabilitation Act and deprived the Navajo of hundreds of millions of dollars that should have been used to finance further development and economic growth on the Navajo and Hopi Reservations."*

– Amicus Brief by former Interior secretaries  
Cecil D. Andrus, Bruce Babbitt, Manuel Lujan, Jr., and Stewart L. Udall

In September 2007, the appeals court reversed a federal claims court decision and found that the U.S. Interior Dept. breached its trust responsibility by not disclosing critical information to the Navajo Nation regarding coal royalty negotiations with the Peabody Coal in 1987.

The appeals court found the Navajo Nation had a "money-mandating claim" against the federal government and upheld its assertion that there is a substantial network of laws and regulations to establish specific trust responsibilities.

It said those regulations could be interpreted to require compensation for damages sustained as a result of a breach of those duties, and ordered the case back to the

U.S. Court of Federal Claims to reconsider the Navajo Nation's claim for \$600 million in damages.

"We conclude that the (Navajo) Nation has alleged and, based on the undisputed factual findings of the Court of Federal Claims in 'Navajo I,' has demonstrated that the government violated its common law trust duties of care, candor, and loyalty," the appeals court opinion stated in entering judgment for the Nation.

Among those who filed friend of the court briefs with the U.S. Supreme Court in support of the Navajo Nation's case are:

- Four former Interior secretaries – Cecil D. Andrus, Bruce Babbitt, Manuel Lujan, Jr., and Stewart L. Udall.
- New Mexico Attorney General Gary King, Arizona Attorney General Terry Goddard and Utah Attorney General Mark Shurtleff.
- Eight law professors who specialize in Native American law, including Professors Richard B. Collins and Charles F. Wilkinson of the University of Colorado Law School and Professor Alex Tallchief Skibine of the S.J. Quinney College of Law at the University of Utah.

In their brief, the former Interior secretaries wrote that they sought to ensure that the U.S. honored its trust obligations to the Navajo Nation and other Native Americans, and that the Interior Department has had that responsibility since it was created in 1849.

"Interior Department regulations specifically require the Department to act in the Navajos' best interest," they wrote. "The Interior Department's conduct in this case fell far short of the standards that Department officials normally observe. As the Court of Federal Claims observed, the Department has 'no plausible defense' for the actions at issue in this case."

The Navajo Nation began to lease land on Black Mesa to Peabody Coal and its predecessor in 1964 with approval by the U.S. Interior Dept. The lease established a schedule of royalty payments not greater than 37.5 cents per ton with a provision for a "reasonable adjustment" by the Interior secretary in 20 years – 1984. That rate was deemed an "inequitable deal," and "substantially lower"

than the 12.5 percent minimum royalty set by Congress in 1977 for coal mined on federal land.

In 1984, the Navajo Nation asked Interior Secretary William Clark to adjust the royalty payment. Approximately three months later, Navajo Area Director Donald Dodge adjusted the rate to 20 percent.

However, in July 1985 Peabody Coal Co. requested Interior Secretary Donald Hodel, who succeeded Mr. Clark, to postpone the decision on the 20 percent or rule against it.

The undisputed facts of the case state that Peabody also retained former Interior Department executive Stanley Hulett, who was a former aide and friend of Secretary Hodel's, to represent the company before him.

The court found that Mr. Hulett met with the Secretary without the Navajo Nation being present, and that shortly afterward Secretary Hodel signed a memorandum prepared by Peabody Coal on Interior Department letterhead that directed the company and the Nation to return to the bargaining table. The Nation, facing the alternative of receiving unadjusted flat royalties of \$.375 per ton, was compelled to agree to the 12.5 percent royalty rate.

"As a result of these actions," the former Interior secretaries write in their brief, "Peabody Coal was able to reduce its royalty payments by nearly 50 percent ... Thus, the Navajo were deprived of hundreds of millions of dollars over the course of the lease."

The secretaries added that the Interior Department not only violated its duty of candor to be truthful but also failed to communicate facts that its beneficiary – the Navajo Nation – needed to know for its protection in dealing with third parties.

"This conduct is indefensible," they write. "The Interior Department's actions undermined one of the key components of the Navajo-Hopi Rehabilitation Act and deprived the Navajo of hundreds of millions of dollars that should have been used to finance further development and economic growth on the Navajo and Hopi Reservations."

In the brief by the three state attorneys general, they write that the U.S. Civil Rights Commission has found that the Navajo Nation faced a daunting \$3.7 billion infrastructure deficit. When the Interior department fails to require developers to pay reasonable royalties on the Nation, they said, the burden on the states is subsequently increased.

"The states have forged meaningful government-to-government relationships with the Navajo Nation and recognize Navajo self-determination," the AGs write. "Here the Department controlled and supervised all aspects of Navajo coal development, 'from the creation of leases to the reclamation of land.' As the lower courts have found, the Department abused that control."

The law professors write in their brief that the nation's highest official with control over tribal land violated his trust duties and abused his absolute discretionary power in order to help a friend who represented an interest directly opposed to the tribal trust beneficiary.

As a result, financial losses from such a fraudulent act that abuse total control over tribal conveyances of property should be compensable, they state.

"The power of the United States over tribes and their property is unique and extraordinary in a democracy," the professors write. "The Secretary of the Interior, the nation's highest official exercising federal control over tribal lands, breached two duties in his exercise of unfettered power over conveyance of Navajo coal."

"After the Navajos gave in to Peabody's lower rate, he approved the deal, fully aware that he had misled the tribe in crucial ways," they write. "These were fraudulent acts respecting the absolute control of the United States over conveyance of tribal property. Losses from direct abuse of total control over tribal conveyances should be compensable."

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For more information and copies of briefs filed in the case go to:

[http://www.scotuswiki.com/index.php?title=United\\_States\\_v.\\_Navajo\\_Nation](http://www.scotuswiki.com/index.php?title=United_States_v._Navajo_Nation)