

**STATEMENT OF THE NAVAJO NATION DEPARTMENT OF JUSTICE  
TO THE OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS-  
UNIVERSAL PERIODIC REVIEW OF UNITED STATES OF AMERICA**

1. Stakeholder. The Navajo Nation is the largest indigenous nation in the United States of America (“United States”). The Navajo Nation has existed since time immemorial and was recognized as a sovereign nation by the United States pursuant to bi-lateral treaties in 1850 and 1868.<sup>1</sup> The Navajo Nation governs its territory, its citizens, and others who fall within Navajo jurisdiction.<sup>2</sup> It struggles to provide basic services and infrastructure to a distinct people whose basic needs have been largely ignored by the United States, which has used the Navajo Nation as its energy colony.<sup>3</sup> Under 2 Navajo Nation Code § 1964(A), the Navajo Nation Attorney General is the Chief Legal Officer of the Navajo Nation with authority over all legal matters in which the Navajo Nation government has an interest, and submits this Statement in that capacity.

2. Executive Summary. The United States has deprived and continues to deprive the Navajo Nation and other indigenous peoples’ rights to equal protection under law, to an effective remedy for acts violating fundamental rights granted by the United States Constitution and statutes, and to enjoy property, in violation of Articles 2, 7, 8, and 17 of the Universal Declaration of Human Rights. In the United States, only indigenous peoples are subject to a system where the Government controls, as a matter of fact and under laws of the United States, mineral and other resources and may exercise that control in a manner that harms the owners’ interests without any accountability. The United States characterizes this legal regime as a “trust,” but the relationship bears little resemblance to a true trust relationship. In reality, the “trust” label serves to camouflage the fact that the United States’ laws and policies result in the continuing colonization of the Navajo Nation and other indigenous peoples.

3. Past Assurances Made by the United States to the International Community. In prior submissions to international bodies, the United States has represented that indigenous peoples “retain considerable control” over their natural resources, that the United States gives “added protection” to indigenous peoples “through the establishment of a trust,” that the United States’ courts require it to “manage the land for the benefit of the Indian owners and with the same care and skill that a person of ordinary prudence would exercise,” that the trust relationship “creates an overriding duty to deal fairly with all Indians,” and, most significantly, “[i]f Indians believe the government is not acting in accordance with its trust responsibilities, they may seek injunctive relief from the courts to compel the government to perform its duties or, if damage has already occurred, they may obtain damages through a breach of trust action.” United States Report to United Nations Human Rights Comm. (July 29, 1994) (“Report”), ¶¶ 54-55 (citations omitted).

4. These Assurances Are False. As this Statement will demonstrate, the Navajo Nation was, and it and other indigenous peoples will continue to be, denied a remedy for the loss of a generation’s worth of wealth caused by intentional violations of the most basic trust duties of care, candor and loyalty by the Secretary of the Interior. In a recent decision involving the Navajo Nation, the un rebutted facts showed that the United States conveyed the Nation’s most valuable coal resource in favor of a politically connected coal company, the Peabody Coal Company, for royalty rates substantially less than all federal studies had determined to be proper, as the trial court unequivocally found.<sup>4</sup> Nonetheless, the United States Supreme Court reversed a decision by the Court of Appeals in the Navajo Nation’s favor by ruling that “neither the Government’s ‘control’ over [Navajo] coal nor common-law trust principles matter.” *United States v. Navajo Nation*, 129 S. Ct. 1547, 1558 (2009).

5. Discriminatory Impact. The only people in the United States subjected to this debilitating regime are indigenous peoples. The United States of America is, as a matter of its laws and practice, a systemic abuser of indigenous rights to equal protection, enjoyment of property, and a judicial remedy for acknowledged wrongs.

6. The Land; Congress' Express Trust. The existing Navajo Nation's lands and resources are all within the aboriginal land base of the Navajo people as determined by the Indian Claims Commission. The Navajo lands were reserved for Navajo use by Executive Order and statute,<sup>5</sup> and Congress confirmed in 1974 that Navajo land (including the land leased to Peabody) "shall be held in trust by the United States exclusively for the Navajo Tribe."<sup>6</sup>

7. Conditions on the Navajo Reservation. While Navajo resources are exploited to provide electricity, water and power to distant non-Indian communities, the Navajo Nation continues to survive as a third-world country, with a multi-billion dollar infrastructure deficit compared to similar nearby non-Indian areas, 50% unemployment, crippling poverty, and a shocking lack of basic utilities (potable water, electricity, and natural gas) and governmental services, in violation of Article 25(1) of the Universal Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>7</sup> Other indigenous nations within the United States are similarly situated.

8. United States' Control of Indian Resources. A. The United States controls all aspects of development of natural resources owned by indigenous peoples and held in "trust" by the United States. Federal law has controlled the sale or lease of tribal property generally since the first Congress of the United States.<sup>8</sup> 25 U.S.C. § 177 (1790 Trade and Intercourse Act). A 1938 statute provided general authority for mineral leasing on Indian lands and required that any such lease be approved by the Secretary of the Interior ("Secretary") in order for that lease have legal effect.<sup>9</sup> In 1950, Congress recognized the appalling conditions on the Navajo Reservation, caused in large part by the United States' violations of treaty commitments, and provided for a program of development to be implemented by the Secretary under the Navajo and Hopi Rehabilitation Act of 1950 ("Rehabilitation Act")<sup>10</sup>, which encouraged the exploitation of coal and other natural resources.<sup>11</sup> The Peabody coal leases are a central part of this development program.<sup>12</sup> The Rehabilitation Act also encouraged the Navajo Nation to adopt its own constitution, which was to "authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary,"<sup>13</sup> but the Secretary *rejected* the constitution adopted by the Navajo people largely because it recognized the right of the Navajos to control their own minerals.<sup>14</sup>

B. At all relevant times, the United States, through its laws and regulations, has controlled all aspects of planning, negotiations, leasing, easements, development, royalties, and reclamation related to Navajo coal resources. The United States controlled mineral lease negotiations.<sup>15</sup> It has controlled the size, shape and duration of leases, royalty rates, and, by requiring use of the Department of the Interior's ("Department") form lease, all other material terms of a coal lease.<sup>16</sup> Coal resource planning is controlled by the Department under the Rehabilitation Act and coal exploration is controlled by 25 C.F.R. part 216 subpart A.<sup>17</sup>

C. The United States has controlled all aspects of Navajo coal royalty setting, reporting payments, accounting and auditing.<sup>18</sup> The Mineral Management Service ("MMS") has comprehensively regulated Indian coal royalty accounting, auditing, and financial systems under rules

set forth in 30 C.F.R. parts 212, 216, and 218.

D. The United States added to its control over the terms of Indian coal leases in the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”).<sup>19</sup> Federal regulations promulgated under that law comprehensively control coal mine planning, exploration, leasing, operations, extraction methods, reclamation, and other land use decisions.<sup>20</sup> Those regulations have denied the Navajo Nation any authority to regulate coal surface mining activities, because “[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain with BIA [United States Bureau of Indian Affairs].”<sup>21</sup>

E. Finally, SMCRA and the federal Indian Right-of-Way Act provide federal control over all rights-of-way associated with coal mining on the Navajo Reservation and other Indian land.<sup>22</sup> In short, everything about developing and exploiting indigenous coal and other resources is controlled by the United States.

9. Illustrative Facts. The following facts are taken from the un rebutted record, sworn depositions of federal officials, and factual findings of the Court of Federal Claims in *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).

A. The Department of the Interior (“DOI”) drafted and approved the Peabody coal lease in 1964. It called for royalty rates from \$0.20 to \$0.375 per ton, but also provided that the Secretary could raise the royalty rate to a reasonable level in 1984. While the United States established a minimum royalty rate of 12 ½ % in 1976 for all federal surface-mined coal and often demanded more than that for its better deposits,<sup>23</sup> from 1976 through 1984, the Navajo Nation received royalties of less than 2% for perhaps the most valuable coal deposit in the United States.

B. In 1984 the Navajo Nation requested the Secretary to raise the royalty rate. The Secretary delegated this responsibility to a BIA Area Director. The Area Director sought studies from the Department’s experts. They recommended royalty rates of 20% to 24.4%. The Area Director found the 20% figure to be better supported, and notified Peabody of that adjustment.

C. Peabody and its two major customers appealed the 20% royalty rate. All parties filed briefs and technical studies with the deciding official, Acting Assistant Secretary John Fritz. Fritz commissioned additional studies from the United States Bureau of Mines and the BIA’s own expert, Vijai Rai, Ph.D. All expert federal studies unequivocally supported the 20% rate. Thus, Fritz and his staff prepared a final Department decision affirming the 20% rate on Department letterhead, copied and checkmarked that final decision for distribution, and awaited only the signature of Fritz, who was away on military reserve duty. But while Fritz was away, the Department’s Solicitor’s Office secretly leaked the decision to Peabody. The Navajo Nation was not informed of the decision document or the federal studies supporting it.

D. In turn, Peabody informed its customers of the decision document, and one of them directed Peabody to retain Stanley Hulett to influence Secretary of the Interior Don Hodel. (Hulett was a close friend and former aide to Hodel.) Peabody did so, its lawyers in the administrative appeal prepped Hulett for meetings with Hodel and Fritz, and Hulett met directly with Hodel, without notice to the Navajo Nation or an opportunity by the Nation to be heard. Hodel immediately agreed to sign instructions – drafted *in toto* by Peabody’s attorneys – directing Fritz to scuttle the decision, mislead

the Navajo Nation about the events, and direct the Navajo Nation to recommence negotiations, all in violation of Interior regulations and well established trust principles.

E. According to Frank Ryan, Director of the federal Office of Trust Responsibilities, Fritz and his staff followed those instructions, knowing that the Navajo Nation would get “beat up” in the negotiations. Peabody was informed of every detail of these events; the Navajo Nation was left in the dark. The Navajo Nation resumed long-dormant negotiations with the industry powers in August 1985, and – facing enormous needs of Navajo people and still receiving less than 2% for its most valuable mineral resource – ultimately capitulated to Peabody’s demands. The final deal, approved by Hodel in December 1987 without any consideration of the Navajo Nation’s interests, imposed an effective royalty rate *less* than the federal minimum royalty rate of 12½ %, caused the loss to the Navajo of an additional \$88 million in back royalties and taxes, and imposed other damaging terms and conditions. Federal regulations requiring the Department to conduct an economic analysis of the proposed leases to “ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable remuneration,” *see* 52 Fed. Reg. 31,916-31,933, were temporarily rescinded immediately prior to the Secretary’s approval of the deal, 52 Fed. Reg. 39,322 (1987), under the guidance of the lawyer in the Interior Department’s Solicitor’s Office who “assisted Peabody in shepherding the amended leases throughout the Department . . . for Secretarial approval.” Because Ryan felt that he would be participating in a breach of trust, he refused to recommend the deal to Hodel. Hodel approved it anyway. The total loss to the Navajo Nation, comparing the final deal approved in 1987 to the aborted decision to increase royalties to 20%, is in excess of \$1 billion in present dollars (U.S.).<sup>24</sup>

10. Judicially Determined Facts. The factual findings of the CFC were forceful and unequivocal.<sup>25</sup> The CFC found, for examples, that:

A. Hulett met with Hodel with no notice to the Navajo, and Hodel immediately agreed to sign the Peabody-drafted memo directing Fritz not to affirm the increased royalty rate.

B. At Hodel’s instruction, the Interior Department “misinformed” the Navajo Nation about the status of the royalty rate appeal.

C. “[T]he Secretary and members of the Department engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship.”

D. Following more than two years of negotiations after the Hulett/Hodel episode and after the Navajo Nation finally capitulated to Peabody’s principal demands, Hodel “approved lease amendments with royalty rates well below the rate that had been previously determined appropriate by those agencies responsible for monitoring the federal government’s relations with Native Americans.”

E. “[T]he Navajo entered the [negotiating] process unarmed with critical knowledge. Unaware that the Secretary had already promised their opponents he would not decide the [royalty appeal], the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody . . .”

F. “The Court finds that the United States violated the most fundamental fiduciary duties of care, loyalty and candor.”

G. “Let there be no mistake. . . . we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties’ desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events.”

H. “Were this a court of equitable jurisdiction, considering a private trust, [the Navajo Nation] might easily qualify for remedies typically afforded wronged beneficiaries.” No court has ever determined otherwise.

11. Subsequent Proceedings. A. The Court of Federal Claims (“CFC”) held that it had no jurisdiction to afford relief, holding that the United States’ duties under the Indian Mineral Leasing Act of 1938 “are not ‘money-mandating,’”<sup>26</sup> After a series of court decisions addressing the United States’ duties under just that one statute,<sup>27</sup> the Court of Appeals for the Federal Circuit held that the entire network of federal laws, regulations and treaties conferred such comprehensive federal control over Navajo coal that the trust was a compensable one, given the clear purpose of these legal authorities to benefit the Nation economically. It also held that the Interior Department’s actions violated specific compensable provisions of the Rehabilitation Act and SMCRA.<sup>28</sup>

B. The Government appealed. The Supreme Court reversed. Its cursory opinion stated without elaboration that “neither the Government’s ‘control’ over [Navajo] coal nor common-law trust principles matter.” *United States v. Navajo Nation*, 129 S. Ct. 1547, 1558 (2009). The Court made sure that the Nation would have no further recourse in the United States courts. “This case is at an end. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to affirm the Court of Federal Claims’ dismissal of the Tribe’s complaint.” *Id.*, 129 S.Ct. at 1558.

12. Conclusion. Contrary to the United States’ assurances to the international community, indigenous peoples do not have “considerable control” over their natural resources and may *not* “obtain damages through a breach of trust action” when the United States violates its trust duties. *Cf.* Report at 1, *supra*. In the Navajo case, the United States controlled and continues to control all aspects of Navajo coal leasing and development, the federal trust is used to perpetuate the role of the Navajo Nation as a federal energy colony, the United States demands for its worst quality surface-mined coal more than it has required for the Nation’s premier coal resource, and the United States Supreme Court has denied a remedy for judicially-acknowledged breaches of basic trust duties of care, candor and loyalty.<sup>29</sup> The deprivation of a generation’s worth of Navajo mineral wealth by a corrupted cabinet official is the unremedied product of a racially discriminatory property system that has resulted in the colonization of the Navajo Nation and other native peoples.

The only people in the United States subjected to this scheme of paternalistic external control and non-accountability are Native Americans; no other people in the United States would tolerate such a system. Only in the Indian “trust” regime are common law trust principles<sup>30</sup> and smothering control by the trustee irrelevant. The regime governing indigenous peoples’ mineral resources denies them of their right of inherent self-determination and the rights to enjoyment of property, equal protection of the law, and an effective remedy by national tribunals for rights recognized in the United States Constitution and federal law.

## ANNEX OF REFERENCES

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1. *Treaty with the Navajo Tribe of Indians*, 9 Stat. 974 (1850); *Treaty with the Navajo Tribe of Indians*, 15 Stat. 667 (1868).
  2. *See Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985)
  3. United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975).
  4. *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).
  5. Executive order (May 17, 1884), Charles J. Kappler, *Indian Affairs, Laws and Treaties* 876 (1904); Act of June 14, 1934, Ch. 521, 48 Stat. 960.
  6. 25 U.S.C. § 640d-9(a).
  7. *See The Navajo Nation: An American Colony*, *supra* n.2, at 40-42.
  8. 25 U.S.C. § 177 (1790 Trade and Intercourse Act).
  9. Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396.
  10. 25 U.S.C. §§ 631-640.
  11. *See* 25 U.S.C. §§ 631, 635(a).
  12. *See Austin v. Andrus*, 638 F.2d 113 (9th Cir. 1981).
  13. 25 U.S.C. § 636.
  14. *Proposed Constitution for Navajo Tribe*, 2 Opinions of the Solicitor, Department of Interior, 1641 (1954).
  15. 25 C.F.R. § 211.2. Unless otherwise noted, all references to the United States' Code of Federal Regulations ("C.F.R.") are to the 1987 version, when the actions occurred giving rise to the 2009 decision of the United States Supreme Court in *United States v. Navajo Nation*, 129 U.S. 1547.
  16. 25 C.F.R. §§ 211.8-.10, 211.15(c), 211.30.
  17. *See* 25 U.S.C. §§ 216.2(a), 216.6; *see also id.* §§ 216.7, 216.9-.10, 216.12 (requiring approval of surface mining plans by United States Geological Service and permitting USGS to enter tribal lands and cancel leases for noncompliance with the plans).
  18. *See Peabody Coal Co.*, 53 IBLA 261 (1981); *Peabody Coal Co.*, 72 IBLA 337 (1983). "IBLA" refers to the United States Department of the Interior's Board of Land Appeals, which decides matters for the Secretary of the Interior.

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19. 30 U.S.C. § 1201, *et seq.*; *see id.* § 1300(c), (d).
20. *See, e.g.*, 25 C.F.R. part 216, subpart B; 30 C.F.R. parts 750, 755.
21. 49 Fed. Reg. 38,462, 38,469 (1984).
22. 25 U.S.C. §§ 323-28; 25 C.F.R. part 169; 30 C.F.R. §§ 700.5, 700.11(a); *Hopi Tribe v. Office of Surface Mining*, 109 IBLA 374 (1989) (Peabody access road).
23. *See* 30 U.S.C. § 207(a).
24. *See Navajo Nation v. United States*, 46 Fed. Cl. at 226-27 (“the Secretary approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government’s relations with Native Americans.”).
25. The findings and quotes that appear in this section 10 are found at *Navajo Nation v. United States*, 46 Fed. Cl. at 222-28.
26. 46 Fed. Cl. at 220-21.
27. *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001); *rev’d*, 537 U.S. 488 (2003); *on remand*, 347 F.3d 1327 (Fed. Cir. 2003), *adhering to former opinion*, 68 Fed. Cl. 805 (2005).
28. *Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007).
29. *Cf. Navajo Nation v. United States*, 46 Fed. Cl. at 227 (in non-Indian trust context, the Navajo Nation “might easily qualify for remedies typically afforded a wronged beneficiary”).
30. *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996) (in non-Indian trust context, Court observes that “[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.”).