

10-382 SEP 20 2010

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 590 F.3d 1305. The opinion of the Court of Federal Claims (App. 24a-90a) is reported at 88 Fed. Cl. 1.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. A petition for rehearing was denied on April 22, 2010 (App. 91a-92a). On July 7, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August

20, 2010. On August 10, 2010, the Chief Justice further extended the time to and including September 19, 2010 (Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition. App. 139a-141a.

STATEMENT

1. In 2002, the Jicarilla Apache Nation (Tribe), a federally-recognized Indian tribe, sued the United States in the Court of Federal Claims (CFC) for an alleged breach of fiduciary duties. App. 98a-120a. According to the Tribe's complaint, the United States holds about 900,000 acres of reservation land in trust for the Tribe. The land contains timber, gravel, and oil and gas resources, development of which is governed by statutes administered by the Department of the Interior (Interior). App. 102a-103a; see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982) (citing Indian Mining Leasing Act of 1938, 25 U.S.C. 396a *et seq.*). Funds derived from those natural resources—*e.g.*, mineral leasing royalties and timber sale proceeds—are held in trust for the Tribe. App. 104a-105a. The Tribe alleges that Interior has failed to render an accurate accounting of the trust funds and other assets and has mismanaged those assets.¹ The Tribe seeks, *inter alia*, a complete

¹ The Secretary of the Interior (Secretary) is statutorily authorized to invest funds held in trust for Indian tribes. See 25 U.S.C. 162a(a). To a lesser extent, the Tribe's allegations also implicate the Secretary

accounting of all assets held in trust for the Tribe since 1946 and \$300 million in damages. App. 115a-119a.

The current phase of the litigation covers the Tribe's claims relating to the government's actions with respect to certain trust-fund accounts from 1972 to 1992.² App. 26a. Over the course of more than five years, the United States produced to the Tribe many thousands of documents but identified (through multiple privilege logs) 155 potentially relevant documents that had been withheld on the basis of the attorney-client privilege and attorney work-product protection. App. 25a-26a. The documents withheld include memoranda concerning tribal trust administration exchanged between attorneys in Interior's Office of the Solicitor and various agency personnel from Interior, including the Bureau of Indian Affairs, and from the Department of the Treasury. App. 50a-52a, 71a-84a.³

2. The Tribe moved to compel production of the documents that had been withheld as privileged, arguing that they fell within a "fiduciary exception" to the attorney-client privilege that has been recognized by some courts in the context of private, common-law trusts. The CFC granted, in relevant part, the Tribe's motion to compel. App. 24a-90a.

The CFC explained that the "fiduciary exception" to the attorney-client privilege, as applied in other contexts, precludes a trustee from withholding from the

of the Treasury, who invests such funds at Interior's direction. See 25 U.S.C. 161a(a).

² The Tribe's claims relating to the management of non-monetary assets held in trust for the Tribe are to be evaluated in future phases of the case.

³ Pursuant to 43 U.S.C. 1455, the Solicitor supervises and directs the legal work of the Department of the Interior.

beneficiary communications between the trustee and attorneys retained by the trustee that relate to trust management. App. 41a-44a. Relying on several CFC and district court opinions, the CFC concluded that there is nothing about the government's sovereign status or its trust relationship with Indian tribes that makes the fiduciary exception inapplicable. App. 44a-46a. It stated that "basic trust principles are readily transferrable to the Indian trust context" (App. 45a), notwithstanding that statutes establish the government's duties (App. 31a) and that the government uses its own funds (not tribal trust funds) to pay for its legal advice (App. 46a).

Applying the fiduciary exception it recognized to the documents at issue, the CFC ordered the government to produce to the Tribe approximately 75 documents that the CFC had found were otherwise covered by the attorney-client privilege. App. 50a-63a, 69a, 71a-84a.⁴

3. The United States petitioned the Federal Circuit for a writ of mandamus directing the CFC to vacate its

⁴ The CFC, in agreement with most courts, held in this case that no corollary "fiduciary exception" applies to the attorney work-product doctrine. It reasoned that the mutuality of interest between the fiduciary and the beneficiary no longer exists once there is sufficient anticipation of litigation to trigger work-product protection. App. 47a-48a. Accordingly, the CFC did not compel the government to produce documents that constituted attorney work product or did not relate to trust management and thus fell outside the fiduciary exception the court recognized. App. 54a-63a, 69a.

An earlier CFC decision, however, reached the contrary conclusion, holding that the fiduciary exception does apply to the attorney work-product doctrine. See *Osage Nation and/or Tribe of Indians v. United States*, 66 Fed. Cl. 244, 252 (2005). The Federal Circuit did not address the applicability of the fiduciary exception to work-product claims, and that issue therefore remains unresolved at the appellate level.

production order. The Federal Circuit granted a temporary stay but then denied the mandamus petition in a published opinion. App. 1a-23a.

The Federal Circuit held that the government cannot deny a tribe's discovery request for attorney-client communications "when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." App. 1a-2a. The court relied on two rationales articulated by the CFC: (a) The trustee is not the attorney's exclusive client because the trustee acts as proxy for the beneficiary; under that justification, the court explained, the fiduciary exception is just a logical extension of the client's control of the attorney-client privilege; and (b) the trustee has a duty to disclose to the beneficiary all information concerning trust management; under that justification, the court explained, the attorney-client privilege gives way to the trustee's competing duty to disclose. App. 13a-14a, 41a-42a.

a. As to the first rationale, the Federal Circuit concluded that Interior "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes." App. 15a. The court stated that the Tribe's "status as the 'real client' stems from its trust relationship with the United States." *Ibid.* The court noted that, in light of what it termed the "general trust relationship" between the United States and Indian tribes, "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets," and that application of a fiduciary exception in this case was thus "straightforward." App. 16a-17a.

The court rejected three counter-arguments advanced by the United States. First, the court deemed “not relevant” this Court’s instruction in *Nevada v. United States*, 463 U.S. 110 (1983), that “[t]he government cannot follow the fastidious standards of a private fiduciary,” on the ground that the government had not articulated a “specific competing interest” (such as a conflicting statutory duty) that was considered when the communications were made. App. 17a-19a (quoting *Nevada*, 463 U.S. at 128). Second, the court, while acknowledging that the source of payment for the legal advice has been regarded by common-law courts as an important factor in determining whether a fiduciary exception applies, dismissed as unhelpful the fact that the government pays for its own legal advice, on the ground that—unlike a private trustee—the government has imposed the trust on the tribal beneficiary. App. 19a-20a. Third, the court found “not relevant” the government’s concern that application of the fiduciary exception would impair Interior’s ability to seek confidential legal advice, on the ground that the concern could be raised by any trustee and that no assets other than funds were at issue. App. 20a.

b. As to the second rationale, the Federal Circuit concluded that as a “general trustee,” the United States has a “common law duty” to disclose information related to trust management to an Indian tribe, “including legal advice on how to manage trust funds.” App. 21a-22a. The court rejected the government’s argument that Congress’s omission of attorney-client communications from the type of information Congress has required Interior to provide to tribes negates any general common-law obligation to disclose such communications. It stated that “the government has other trust responsibilities not

enumerated” by statute, including, the court held, a common-law duty to disclose to the beneficiary all trust-related information. *Ibid.* (quoting *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)).

4. After the Federal Circuit denied the mandamus petition and lifted its stay of the CFC’s order, the CFC set a new production deadline. The CFC denied the government’s motion for a stay pending a decision to seek further review. 91 Fed. Cl. 489. The government thereafter complied, producing the documents under a protective order that prevents disclosure to third parties until a petition for a writ of certiorari is either denied or, if granted, until the case is resolved by this Court. App. 93a-97a.⁵

REASONS FOR GRANTING THE PETITION

For the first time in more than a century of litigation between Indians and the United States, a court of appeals has held that the United States must disclose to an Indian tribe confidential communications between the government and its attorneys concerning the performance of governmental functions with respect to tribal property. That holding, which abrogates the government’s attorney-client privilege based on rules governing private trustees at common law, cannot be reconciled with this Court’s longstanding precedents distinguishing the United States, as a sovereign, from a common-law trustee or with the established understanding of the role

⁵ The government’s compliance with the production order, especially in light of the protective order, does not affect this Court’s review. The Court may still provide effective relief by ordering the documents to be returned and excluded from evidence. Cf. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606-607 (2009).

of government lawyers representing the United States in Indian affairs.

The Federal Circuit's extension of a "fiduciary exception" to the attorney-client privilege to the United States is based on two fundamentally flawed premises. First, the Federal Circuit erred in treating the Tribe as the "real client" of the government attorneys. Unlike a common-law trustee, the government's obligations to tribes and individual Indians are not derivative of the beneficiary's property interest. Rather, the government's administration of laws concerning tribal trust property is a distinctly sovereign function. That is a bedrock principle of this Court's Indian law jurisprudence. See, *e.g.*, *Nevada v. United States*, 463 U.S. 110, 128 (1983); *United States v. Candelaria*, 271 U.S. 432, 443-444 (1926); *United States v. Minnesota*, 270 U.S. 181, 194 (1926). Government attorneys represent only the government, whose sovereign interests include (but are not necessarily limited to) carrying out any responsibilities that are imposed by statute or regulation with respect to property held for Indians. The notion that a tribe is the "real client" of government attorneys when those attorneys give legal advice also conflicts with the Executive Branch's longstanding understanding, as reflected in the Attorney General's 1979 guidance, that "the Attorney General is attorney for the United States in these cases, not a particular tribe." App. 123a. That conclusion also is underscored by the fact that government attorneys are paid from the government's own funds, not from a trust corpus, and that the records and information generated in administering the governing statutes belong outright to the United States, not to the trust corpus or to the tribe.

Second, the Federal Circuit erred in relying on what it identified as a broad common-law duty of a trustee to disclose information, including confidential attorney-client communications, to the beneficiary. To reach that result, the Federal Circuit invoked a “general trust relationship” between the United States and Indian tribes that it believed was “sufficiently similar to a private trust” to impose such a duty. App. 14a, 16a. But the Court’s recent decisions in *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo Nation I*), and *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) (*Navajo Nation II*)—which the Federal Circuit did not even mention—reject reliance on a “general trust relationship” between the United States and tribes to impose common-law trust duties on the government. The *Navajo Nation* decisions instead establish that the government’s legal obligations to tribes must be based on statutes and regulations, and no statute or regulation requires the government to disclose attorney-client communications to a tribe whenever they implicate the government’s duties with respect to property held in trust for Indians. To the contrary, the Indian Claims Limitation Act of 1982 expressly limited the government’s disclosure obligation to Indians to non-privileged information. § 5(b), 96 Stat. 1978.

The Federal Circuit’s decision substantially departs from settled principles and, if allowed to stand, would have significant and damaging consequences for the government. There are over 90 pending trust cases brought by Indian tribes in which the question presented could arise. App. 126a-138a. More than half of those cases are pending in the CFC, where the Federal Circuit’s decision is controlling and where the government’s potential monetary liability is greatest. In this case alone, the

Tribe seeks \$300 million (App. 119a), and, collectively, the tribal trust cases expose the government to billions of dollars in liability. The pendency of these cases, and the prospect of future cases by tribes and individual Indians, strongly counsel in favor of this Court's immediate review.

More broadly, the Federal Circuit's decision upends settled expectations regarding the professional responsibilities of government attorneys in providing legal advice on a wide range of matters implicating day-to-day administration of statutes pertaining to Indian property. Indeed, abrogation of the attorney-client privilege would seriously undermine the ability of government decision-makers, including the Secretary, to solicit such advice—to the detriment of the government, the tribes, and individual Indians concerned.

A. The Federal Circuit's Abrogation Of The Government's Attorney-Client Privilege In Matters Concerning Indian Property Cannot Be Squared With This Court's Precedents Or With The Executive Branch's Established Understanding Of The Role Of Its Attorneys

It is well recognized that the United States, like other litigants, may invoke the attorney-client privilege in civil litigation to protect confidential communications between government officials and government attorneys. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154-155 (1975) (noting applicability of attorney work-product protection to government attorneys); *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam) (“Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts.”), cert. denied, 525 U.S. 996 (1998); 1 Restatement (Third) of Law Governing Lawyers § 74,

at 573 (2000) (Restatement) (“[T]he attorney-client privilege extends to a communication of a governmental organization.”); *Confidentiality of the Att’y General’s Commc’ns in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982) (“[T]he privilege also functions to protect communications between government attorneys and client agencies or departments.”).⁶ That is because “[t]he objectives of the attorney-client privilege * * * apply in general to governmental clients. The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture.” Restatement § 74 cmt. b at 573-574; see *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (“[T]he government is dealing with its attorneys as would any private party

⁶ Case law in the Freedom of Information Act (FOIA) context demonstrates the availability of the attorney-client privilege to the government in civil proceedings. Under Exemption 5 of FOIA, “intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” are exempt from mandatory disclosure. 5 U.S.C. 552(b)(5). Courts have long recognized that “Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege.” *Coastal States Gas Corp.*, 617 F.2d at 862; see, e.g., *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (“In the government context, the ‘client’ may be the agency and the attorney may be an agency lawyer.”); see also S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (including within Exemption 5 “documents which would come within the attorney-client privilege if applied to private parties”). Notably, lower courts have applied Exemption 5 to FOIA requests from Indian tribes based on the government’s assertion of the attorney-client privilege and attorney work-product protection. See, e.g., *Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-cv-00339, 2007 WL 915211, at *14 n.8 (D.D.C. 2007) (attorney-client privilege); *Shinnecock Indian Nation v. Kempthorne*, 652 F. Supp. 2d 345, 362-363 (E.D.N.Y. 2009) (attorney work-product protection).

seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors.”).

The Federal Circuit nonetheless advanced two rationales to deny availability of the attorney-client privilege in this case: (1) the Tribe is the government attorneys’ “real client” (App. 15a-20a); and (2) the United States is like a private trustee operating under a general “common law duty to disclose” information, including information protected by the attorney-client privilege, to Indian beneficiaries (App. 21a-22a). Both rationales are inconsistent with the government’s unique status as a sovereign, as distinguished from a private common-law trustee—a status recognized in both this Court’s precedents and the Executive Branch’s considered guidance.

1. The government, not the Tribe, is the “real client” of government attorneys

The Federal Circuit’s conclusion that Interior “was not the government attorneys’ exclusive client, but rather acted as a proxy for the beneficiary Indian tribes” (App. 15a), is incorrect and departs from several of this Court’s decisions and the settled Executive Branch position on the issue.

a. This Court has long recognized that the United States has distinctly sovereign interests in administration of property held in trust for tribes, and its interests are not derivative of those of a beneficiary as at common law. See, *e.g.*, *Candelaria*, 271 U.S. at 443-444; *Minnesota*, 270 U.S. at 194; *Heckman v. United States*, 224 U.S. 413, 437 (1912). Consistent with that basic premise, the Court has deemed the United States the real party in interest when it acts to protect tribal interests. See

ibid.; see also *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 6 n.1 (2001) (the government is “not technically acting as [the Tribe’s] attorney”) (citation omitted). It follows that the United States is the only “real client” of government attorneys who provide legal advice to those responsible for carrying out the United States’ duties with respect to Indians.

In *Minnesota*, the Court, in a suit by the United States seeking relief against a State that had erroneously conveyed lands that ought to have been reserved for Indians, held that the government—not the Indians—was the real party in interest. 270 U.S. at 193-194. In so doing, the Court concluded that the government’s interest in its guardianship over the Indians “is one which is vested in it *as a sovereign*.” *Id.* at 194 (emphasis added).

Candelaria reinforces the conclusion that government attorneys acting in furtherance of the United States’ sovereign responsibilities in Indian affairs represent the United States. In *Candelaria*, the Court held that *res judicata* did not prohibit the United States from suing to quiet title to lands on behalf of an Indian tribe, even though the tribe had unsuccessfully brought the same suit twice before without the United States’ involvement. 271 U.S. at 438, 443. The Court stated that the United States had an independent interest in enforcing a restriction on alienation of the tribe’s lands, and that such interest could not be affected by a judgment in suits the United States had not joined. See *id.* at 443-444. If the tribe had been the “real client” of the government attorneys in *Candelaria*, then *res judicata* would have barred the action. See Restatement (First) of Judgments § 85(2), at 402-403 (1942) (“Where a per-

son is bound by * * * the rules of res judicata because of a judgment for or against him with reference to a particular subject matter, such rules apply in a subsequent action brought or defended by another on his account.”); see also 1 Restatement (Second) of Judgments § 41(1)(a) and (d) at 393 (1982).

In neither *Minnesota* nor *Candelaria* did the Court’s conclusion depend, as the Federal Circuit suggested here (App. 19a), on whether the United States had considered a “specific competing interest” in carrying out its responsibilities or on the effect of any such competing interest on a duty of loyalty owed a tribe. Regardless whether a competing interest exists in a particular instance, the United States is always acting as a sovereign—and the government’s attorneys represent the sovereign—with respect to Indian affairs. The Federal Circuit’s conclusion that the Tribe is the “real client” of government attorneys cannot be squared with those decisions.

b. The Federal Circuit’s conclusion that Indian tribes are the “real clients” of government attorneys is also at odds with the Executive Branch’s established view. That view recognizes that the Attorney General, who is charged with representing the interests of the United States and its agencies (28 U.S.C. 516), is situated differently from a private attorney representing a common-law trustee.

In 1979, in a letter to the Secretary of the Interior, Attorney General Bell set forth the legal principles governing the Justice Department’s role in representing the United States in litigation involving Indian trust property. Among other things, the Attorney General emphasized:

[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as “trustee,” not the “beneficiary.” He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

App. 123a-124a.

That letter, which rejects the contention that the tribe (rather than the United States) is the Attorney General’s client, is entitled to significant deference because it reflects the government’s prevailing view of the role of its own attorneys. Cf. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009) (according deference to agency decision to follow past practice). Indeed, for over 25 years, the *United States Attorney’s Manual (USAM)* has referred to that letter as guidance for government attorneys conducting litigation affecting Indians. See *USAM* § 5-14.130, www.justice.gov/usao/eousa/foia_reading_room/usam/title5/14menv.htm#5-14.130 (referencing *id.*, ENRD Resource Manual, No. 59, www.justice.gov/usao/eousa/foia_reading_room/usam/title5/env00059.htm). And officials of the Justice Department’s Environment and Natural Resources Division (ENRD) have reiter-

ated the same view. See Letter from Lois J. Schiffer, Acting Asst. Att’y Gen., U.S. Dep’t of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School & Charles W. Wolfram, Professor, Cornell Law School 2 (June 16, 1994) (“The Department * * * represents the United States and not particular Indian tribes.”); James Simon, Deputy Asst. Att’y Gen., ENRD, U.S. Dep’t of Justice, Ethics: Conflicts of Interest and the Role of the Trustee, Remarks at Fed. Bar Ass’n 21st Annual Indian Law Conference 1 (Apr. 12, 1996) (“In brief, there is no conflict of interest when Department of Justice represents the United States in its capacity as a trustee for Indians and tribes.”).

The substance of the Attorney General’s conclusion is consistent with the understanding of the government’s sovereign interests reflected in the Court’s Indian law cases that preceded it (see pp. 12-14, *supra*) as well as those that followed it. In particular, in *Nevada*, the Court recognized that the government acts on behalf of tribes in its capacity as a sovereign. The fact that the United States may face competing interests when acting in furtherance of tribal trust responsibilities therefore does not pose a disabling conflict for the government, 463 U.S. at 128, or, *a fortiori*, for the government attorneys representing the government. The Attorney General’s letter is also consistent with legal opinions of the Office of Legal Counsel that the Attorney General’s role in analogous contexts is to represent the overall interests of the United States rather than those of a particular private or governmental entity. See *Relationship Between Dep’t of Justice Att’ys & Person on Whose Behalf the United States Brings Suits under the Fair Hous. Act*, 19 Op. Off. Legal Counsel 1, 2-4 (1995) (1995 OLC Op.) (Fair Housing Act complainant is not the At-

torney General's client even when the Attorney General brings suit "on behalf of" the complainant); *Attorney General's Role as Chief Litigator for the United States*, 6 Op. Off. Legal Counsel 47, 54 (1982) (1982 OLC Op.) (Attorney General represents interests of the Executive Branch rather than those of a "client" agency when litigating on its behalf).

There is no reason to distinguish, in the context of this case, between the Attorney General (and other attorneys in the Justice Department) and those in Interior's Office of the Solicitor. Both provide legal advice to agency personnel on tribal trust administration. The Solicitor represents Interior's interests (including but not limited to its responsibilities to Indian tribes and individuals), just as the Attorney General represents the interests of the United States. 43 U.S.C. 1455; App. 123a-124a.⁷

c. Nor is there any statutory or regulatory basis in this context that could justify a departure from the settled rule that the government is the sole client of government attorneys. In the few situations in which Congress or the Executive has created an attorney-client relationship between government attorneys and a party other than the government, its intent has been manifest. See 10 U.S.C. 827 (judge advocate serving as military defense counsel); 18 U.S.C. 3006A(g)(2)(A) (federal pub-

⁷ Two of the documents ordered to be produced in this case were prepared by the Department of Justice: a 1966 letter from the Attorney General to the Secretary of the Treasury about whether certain instruments issued by the Federal National Mortgage Association give rise to a general obligation of the United States backed by its full faith and credit (App. 80a (Doc. No. 217)); and a 1966 memorandum from the Office of Legal Counsel to the Department of the Treasury about whether trust funds may be invested in obligations of federal land banks and the Banks for Cooperatives (App. 75a (Doc. No. 63)).

lic defenders representing criminal defendants); 28 C.F.R. 50.15(a) (Justice Department’s formal representation of individual government employees); see also 1995 OLC Op. 3-4. Neither Congress nor the Executive has provided for an attorney-client relationship between government attorneys and an Indian tribe in the tribal trust context, and the Federal Circuit did not point to any statute or regulation suggesting otherwise.⁸

d. Moreover, government attorneys, even when they provide advice concerning the performance of statutory functions with respect to the property of a particular tribe, are paid from separate government funds rather than tribal trust funds. That established arrangement

⁸ Although 25 U.S.C. 175 states that “the United States attorney shall represent [allotted Indians] in all suits at law and in equity”—and although that provision allows select representation of Indians in their personal capacity—it does not affect representation on behalf of the United States in its sovereign trust capacity as discussed in Attorney General Bell’s 1979 letter. App. 123a (“[T]he Attorney General is attorney for the United States in [tribal trust] cases, not a particular tribe or individual Indian.”). Moreover, the statute does not compel the United States to represent or bring suit on behalf of Indians. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (per curiam) (25 U.S.C. 175 “impose[s] only a discretionary duty of representation”), cert. denied, 420 U.S. 962 (1975); *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972) (25 U.S.C. 175 is “not mandatory”). And, on its face, the statute addresses only litigation—not the type of non-litigation, trust-administration advice at issue in this context.

In 25 C.F.R. 1200.40(a), Interior notes that it will make its legal expertise “fully available to advise tribes in developing, implementing, and managing investment plans.” In implementing Section 1200.40(a), Interior provides information about applicable law but refers any request for actual legal advice—applying the law to a factual situation—to tribal or individual counsel. That regulation, as interpreted by Interior, thus does not provide the basis for an attorney-client relationship with tribes even when it applies.

reinforces the conclusion that the government, not the tribe, is the client. Courts, including in the “leading American case” (App. 11a), have considered whether legal expenses are paid from the trust corpus as an important factor in determining who is the actual owner of the information and thus possesses the right to control it. See *Riggs Nat’l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) (“[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is itself a strong indication of precisely who the real clients were.”); see also *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) (“[W]hen a fiduciary obtains legal advice using its own funds, the payment scheme is an indicator (albeit only an indicator) that the fiduciary is the client, not a representative.”).

Here, the legal advice was rendered by government attorneys whose salaries are paid out of congressional appropriations, not the trust corpus. See, *e.g.*, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, Div. E, Tit. I, 123 Stat. 718. The Federal Circuit dismissed that fact as unhelpful because, in “contrast to a private trust case,” the United States “imposes the trust on the beneficiaries” in the case of property held for Indians. App. 19a-20a. But that point is of no moment because it is commonplace for even a private trust to be created without the consent of the beneficiaries. 1 Restatement (Second) of Trusts § 36, at 100 (1959) (Restatement of Trusts). And in any event, the United States’ distinct role under statutes governing the creation or administration of a trust held for the benefit of Indians simply underscores the uniquely sovereign character of the

United States' functions and the impropriety of subjecting it to rules fashioned at common law. See *Cobell v. Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) (“[B]ecause ‘Congress was, after all, mandating an activity to be funded entirely at the taxpayers’ expense,’ we held that the [statute] did not ‘grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee’ to order ‘the best imaginable accounting without regard to cost.’”) (quoting *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005), cert. dismissed, 130 S. Ct. 3497 (2010)).

In addition, both the Federal Records Act of 1950 and Interior Department regulations establish that the government owns the records produced when agency personnel solicit legal advice from government attorneys regarding tribal-trust management. See 44 U.S.C. 2901(1), 3301 (defining “record” as “all * * * documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them”); 25 C.F.R. 115.1000(a)(2) (“Records are property of the United States if they * * * [e]vidence the organization, function, policies, decision, procedures, operations or other activities undertaken in the performance of a federal trust function under this part.”). The government’s ownership confirms the view that it, not the Tribe, controls access to and assertion of any privilege over those records.

2. *The government does not have a common-law duty to disclose attorney-client privileged communications to Indian tribes*

The Federal Circuit also erred by relying on a private trustee's common-law duty to disclose certain information to a beneficiary. A common-law fiduciary "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." Restatement of Trusts § 173 cmt. d at 379. Given that no statute or regulation imposes such a generalized duty on the government, there is no basis to extend a fiduciary exception to the tribal trust context that is premised on the existence of such a duty.

a. As discussed above (pp. 12-18, *supra*), in contrast to a private trustee, the government acts in its sovereign capacity when it conducts Indian affairs. That unique status precludes importation of broad common-law trust concepts, especially where those obligations would undermine the government's execution of its sovereign functions. Requiring the government to disclose to tribes otherwise privileged communications between the government and government attorneys would do just that.

Most fundamentally, the Federal Circuit's imposition on the government of a "common law duty to disclose information" (App. 22a) to the Tribe cannot be reconciled with the Court's *Navajo Nation* decisions, which reject the notion that common-law trust principles can create judicially enforceable obligations in the government; only a specific statutory or regulatory mandate can do so. In *Navajo Nation I*, this Court reversed a decision by the Federal Circuit that the level of control

the Secretary exercised over mineral leases was sufficient to demonstrate a money-mandating fiduciary obligation cognizable under the Indian Tucker Act, 28 U.S.C. 1505. 537 U.S. at 501. The Court held that Interior’s legal obligations must be based on specific statutes and regulations, and that those at issue did not provide the requisite “substantive law” that mandated federal compensation if breached. *Id.* at 507 (quoting *United States v. Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*)). In so holding, the Court applied a two-step test for assessing Indian Tucker Act jurisdiction: *first*, a tribe must “identify a substantive source of law that establishes specific fiduciary or other duties” and allege a failure to perform those duties; *second*, if that threshold is met, then the tribe must show that the substantive law “can fairly be interpreted as mandating compensation” for damages caused by a breach. *Id.* at 506 (quoting *Mitchell II*, 463 U.S. at 216-217, 219). Reference to a general trust relationship alone is “insufficient to support jurisdiction under the Indian Tucker Act;” rather, the court must look to the relevant statutes or regulations. *Ibid.*

In 2009, in *Navajo Nation II*, this Court again reversed the Federal Circuit’s judgment that the tribe had properly invoked Indian Tucker Act jurisdiction. 129 S. Ct. at 1558. The Federal Circuit had suggested, on remand from *Navajo Nation I*, that the government’s “comprehensive control” over coal leasing on tribal lands could give rise to fiduciary duties based on common-law trust principles that are enforceable in court. *Id.* at 1557. Reiterating the two-step test applied in *Navajo Nation I*, this Court rejected that notion. *Id.* at 1558. The Court explained that, absent a clear statutory duty, “neither the Government’s ‘control’ over

coal nor common-law trust principles matter.” *Ibid.* (emphasis added).

The Federal Circuit’s premise in this case that “common law trust principles should generally apply to the United States when it acts as trustee over tribal assets” (App. 16a) cannot be reconciled with the Court’s *Navajo Nation* decisions. In those decisions, the Court has twice rejected that mode of analysis in the Indian Tucker Act context, and the Federal Circuit’s attempt to resurrect that reasoning in this case for a third time—without any citation, let alone discussion, of either *Navajo Nation* decision—is no more defensible. Other courts of appeals have recognized the unique nature of the government’s functions in the administration of Indian affairs as a justification for not importing common-law trust duties into this context. See *Cobell v. Salazar*, 573 F.3d at 811 (“Because of the unique nature of this [tribal] trust, we held that ‘the common law of trusts doesn’t offer a clear path for resolving’ the ‘ambiguities’ involved in setting the parameters of an accounting.”) (quoting *Cobell v. Norton*, 428 F.3d at 1074); see also *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (“Whatever duty exists at law today must be expressly set forth in statutes or treaties.”), cert. denied, 552 U.S. 824 (2007). As the court of appeals that adjudicates the majority of tribal trust cases, the Federal Circuit’s continued failure to accept and apply this fundamental principle should not escape this Court’s review.

The limited and general statutory mandate for the government to hold tribal funds “in trust” (*e.g.*, 25 U.S.C. 161a(a), 162a(a), 4011(a)) is an insufficient hook for importing broad common-law trust duties such as a generalized duty to disclose all information related to

administration of statutes governing property held in trust. Where this Court has construed a statute to require the United States to “hold the land” allotted for individual Indians “in trust for the sole use and benefit” of those Indians, the Court did not automatically import common-law trust principles even with respect to the property itself, much less the separate issue of disclosure of government records and information. *United States v. Mitchell*, 445 U.S. 535, 541 (1980) (*Mitchell I*) (quoting Indian General Allotment Act, 25 U.S.C. 348 (1976)). Instead, the Court interpreted that statute *not* to impose a trust duty to manage allotted forest lands. *Id.* at 546. The statute, at most, created a “bare trust” requiring only limited trust responsibilities. *Mitchell II*, 463 U.S. at 224.

The Federal Circuit’s reliance (App. 16a-17a) on *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), was misplaced. In *White Mountain*, the Court interpreted a federal statute as requiring the government, *inter alia*, to preserve tribal property that the statute authorized the government to use for its own purposes. *Id.* at 475; see *id.* at 479-480 (Ginsburg, J., concurring). The government’s duties thus arose not from a “general trust relationship” or generic “common-law trust principles,” but rather from the unique statute at issue in that case.⁹

⁹ *White Mountain* was decided the same day as *Navajo Nation I*, and Justice Ginsburg, who authored the latter opinion, joined the Court’s opinion in *White Mountain* (a 5-4 decision) based on the express understanding that it was “not inconsistent” with *Navajo Nation I*. *White Mountain*, 537 U.S. at 479 (Ginsburg, J. concurring). Justice Souter, who authored *White Mountain*, acknowledged in dissent in *Navajo Nation I* that the second stage of the inquiry occurs only “once a statutory or regulatory provision is found to create a specific fiduciary obligation.” *Navajo Nation I*, 537 U.S. at 514 (Souter, J., dissenting).

b. In light of the Court's emphasis in *Navajo Nation I* and *II* on statutory duties, the absence of any statutory or regulatory duty that Interior disclose confidential communications between the Secretary and government attorneys about tribal trust administration is dispositive and precludes importation of such an obligation based on generic common-law principles. There is no common-law right of access to the government's records or documents, and none of Interior's governing statutes or regulations suggests that the type of material at issue must be made available to Indian tribes.

Congress controls the use of government property under the Property Clause of the Constitution, which gives Congress exceptionally broad power to make rules respecting government property or to confer such power on federal agencies. U.S. Const. Art. IV § 3, Cl. 2; see *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Those agencies, like Interior, are governed by statutes and regulations. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 937 (1986). As a general matter, Interior is authorized to release copies of official records, papers, or documents within the agency's custody only "when not prejudicial to the interests of the Government." 43 U.S.C. 1460. Other statutory provisions require disclosures of specific information to Indian tribes. See, e.g., American Indian Trust Fund Management Reform Act of 1994 (1994 Trust Reform Act), 25 U.S.C. 162a(d), 4011 (enumerating responsibilities to tribes, including provision of quarterly statements of account performance and an annual audit letter); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1715(a), 1732(b)(2) (specifying that royalty accounting information regarding produc-

tion, removal, or sale of oil or gas from leases on Indian lands must be made available to tribes).¹⁰

None of those statutes, however, imposes any general duty to provide tribes the government's confidential communications with its own attorneys, even when those communications relate to management of Indian trust funds. To the contrary, the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, §§ 2-6, 96 Stat. 1976 (28 U.S.C. 2415 note)—which the Federal Circuit failed to address—recognizes that privileges can be asserted to limit a tribe's access to confidential government communications. That Act established a method for final resolution of certain pre-1966 damages suits brought by the government on behalf of tribes. See §§ 3-6, 96 Stat. 1977; see generally *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 241-244 (1985). Congress provided in that Act that “[u]pon the request of any Indian claimant, the Secretary shall, without undue delay, provide to such claimant any *nonprivileged* research materials or evidence gathered by the United States in the documentation of such claim.” § 5(b), 96 Stat. 1978 (emphasis added).

¹⁰ The Federal Circuit described the 1994 Trust Reform Act as “expressly recogniz[ing] the possibility of trust responsibilities outside the statute.” App. 22a. That Act enumerates eight responsibilities (such as the disclosure obligations described in the parenthetical above) pertaining to the Secretary's administration of tribal trust funds, and states that the Secretary's responsibilities include “but are not limited to” those enumerated therein. 25 U.S.C. 162a(d). The latter clause—which is best read to refer to other statutory and regulatory trust requirements—does not license wholesale importation of common-law trust duties, including a generalized duty to disclose a broad range of information (including privileged information) to the beneficiary, that would render superfluous the Act's specific disclosure obligations.

Similarly, while Interior's regulations require it to disclose certain information to tribes, none of those regulations requires disclosure of confidential communications between the government and its attorneys. Interior, acting through the Office of Trust Fund Management (now part of the Office of the Special Trustee), must provide each tribe, *inter alia*, quarterly statements of account performance, 25 C.F.R. 115.801, 115.803, and, upon a Tribe's request, other information about account transactions and balances, 25 C.F.R. 115.802. And, as noted above (p. 20, *supra*), the regulations establish that records related to the government's trust function are the property of the United States. 25 C.F.R. 115.1000(a).

Indian tribes, like anyone else, must rely on the Freedom of Information Act (FOIA) for access to government records that neither pertinent statutes nor regulations otherwise require Interior to disclose. And significantly, as noted above (note 6, *supra*), Exemption 5, 5 U.S.C. 552(b)(5), would protect attorney-client privileged materials pertaining to tribal trusts from disclosure under FOIA.

c. Along with his responsibilities to Indian tribes, the Secretary must comply with a host of other statutory and regulatory mandates concerning, *e.g.*, the public lands, threatened and endangered fish and wildlife species, and other natural resources that implicate tribes, reservations, or tribal sovereignty. See 43 U.S.C. 1457. Those obligations are sometimes in tension with optimal management of tribal trust assets. The Secretary must manage such potentially competing obligations, and, if necessary, at times subordinate some of the beneficiaries' interests to the Secretary's other interests. See *Nevada*, 463 U.S. at 128. In *Nevada*, for example, the

Court (in a *res judicata* decision) determined that the United States, as a sovereign, could litigate water rights on behalf of both Indian and competing non-Indian interests without breaching any fiduciary duty to the tribe. *Id.* at 128, 135-138 & n.15.

The various responsibilities the Secretary must perform are materially different from the duty of a private fiduciary at common law, who, in the event of a conflicting interest, owes complete allegiance to the beneficiary. See Restatement of Trusts § 170(1), at 364; George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, at 217 (rev. 2d ed. 1980); see also 2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 170, at 311 (4th ed. 1987) (fiduciary's duty of loyalty is "to administer the trust *solely* in the interest of the beneficiaries") (emphasis added). Accordingly, as the Court observed in *Nevada*, the government "cannot follow the fastidious standards of a private fiduciary." 463 U.S. at 128.

The Federal Circuit incorrectly dismissed *Nevada* as "not relevant" because the government in this case did not specifically argue that it "in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here." App. 18a. That reflects too narrow a reading of *Nevada* and a flawed understanding of the role of the sovereign. Although the present phase of the litigation concerns trust funds rather than real property or natural resources, the government remains uniquely situated as a sovereign. See 1995 OLC Op. 5 ("The role of the government attorney is somewhat more complicated than that of a private attorney: that is, the government attorney may have a higher obligation to 'do justice' and to correct public or societal

wrongs, rather than simply to advocate the position of the attorney's client.").

While perhaps not as overt as the competing water interests at issue in *Nevada*, the government balances a host of statutory and other sovereign obligations when managing trust funds. For example, if an individual Indian is indebted to a tribe, that tribe may obtain a tribal-court judgment against the individual Indian and attempt to enforce the judgment by attaching the individual's trust account. The Secretary—after taking into account the interests of individual Indian account holders, tribal account holders, and the tribal court system—would then have to decide whether to pay the tribal court judgment from the individual's account. This scenario is not just hypothetical: one of the documents required to be disclosed by the decisions below—a memorandum containing legal advice from the Regional Solicitor to an Assistant Area Director of the Bureau of Indian Affairs—addresses analogous circumstances. App. 74a (Doc. No. 37).

In any event, requiring the government, before it may be entitled to the privilege, to determine on a case-by-case or communication-by-communication basis whether it has balanced or will "balance competing interests" is unworkable. In order to be effective, the privilege must be predictable. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). If government attorneys must engage in such an unpredictable and amorphous inquiry before determining that they and the decisionmakers they advise may rely on the privilege, that is "little better than [permitting] no privilege at all." *Ibid.* Indeed, determining whether any competing obligation

affects a particular trust-related action may be the very point of the attorney-client communication.

B. The Federal Circuit's Decision Threatens Significant Adverse Consequences

1. *The Federal Circuit's rule affects more than 90 pending cases seeking billions of dollars from the government*

There are currently over 90 cases in which the question presented may arise, and a majority of them are pending in the CFC and thus would be controlled by the Federal Circuit's decision. App. 126a-138a. The Federal Circuit's decision will also govern any future cases brought by tribes or any of the hundreds of thousands of individual Indians for whom the United States holds funds in trust. In this case alone, the Tribe seeks \$300 million in damages for the Secretary's alleged breach of fiduciary duties. App. 119a. Collectively, the pending tribal trust cases present billions of dollars in potential liability. This Court has granted review where a case presents "issues of substantial importance concerning the liability of the United States." *Mitchell II*, 463 U.S. at 211 & n.7 ("[T]he damages claimed in this suit alone may amount to \$100 million."). And while the question presented does not directly resolve the merits of the underlying claims in this and other cases, forcing the government to give a tribe confidential attorney-client communications surely would impact how the cases will proceed.

2. *The Federal Circuit's decision will chill consultation on tribal trust issues*

The United States maintains relationships with more than 500 Indian tribes and has responsibilities concern-

ing over 50 million acres of tribal and individual Indian lands and billions of dollars in Indian assets. App. 3a; see U.S. Dep’t of the Interior, *About the Department of the Interior: DOI Quick Facts* (Feb. 6, 2009), www.doi.gov/facts.html. By limiting the government’s invocation of the attorney-client privilege, the Federal Circuit’s decision undermines the ability of government decision-makers to obtain full and frank legal advice concerning those vast resources. Because confidential communications between the agency personnel who administer statutes concerning trust funds and other resources and the government attorneys who advise them could be used against the government, the decision, if allowed to stand, will have a chilling effect on such communications. Given the complex regulatory and other issues involved, the lack of such communications would significantly disrupt the day-to-day administration of statutes affecting tribal trust resources—to the detriment of both the United States and Indians. Cf. *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) (suggesting that an uncertain privilege will result in “trustees shying away from legal advice regarding the performance of their duties,” an outcome which “ultimately hurts beneficiaries”).

That the Federal Circuit’s decision leaves open the question whether the privilege applies where the government has identified a “specific competing interest” implicated by the communications at issue (see pp. 28-29, *supra*) does not diminish the need for the Court’s review. Notwithstanding the reservation, the category of cases directly controlled by the Federal Circuit’s holding is substantial in its own right. Moreover, any potential narrowing effect of that reservation is outweighed by the “substantial uncertainty” it “introduces

* * * into the privilege's application." *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998). What constitutes a "specific competing interest" is not self-evident (especially from the *ex ante* perspective of agency personnel in need of guidance), and to what extent the government would have to show consideration of such an interest in a particular communication is equally uncertain. As this Court has explained, if the purpose of a privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co.*, 449 U.S. at 393. After all, an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Ibid.*

By departing from the Executive Branch's established understanding of the role of its attorneys as representing the United States as a sovereign rather than a particular Indian tribe (pp. 14-17, *supra*), the decision below creates additional uncertainty. Taken to its logical conclusion, the Federal Circuit's denomination of the Tribe as the "real client" raises a plethora of difficult questions pertaining to the professional responsibilities of government attorneys. For example, the attorney's duty to the government might at times conflict with Rule 1.2 of the Model Rules of Professional Conduct, which "requires that a lawyer follow a client's decisions concerning the objectives of representation, mandates that an attorney consult with the client as to means, and requires that the attorney heed a client's decision whether

to accept an offer of settlement.” 1995 OLC Op. 4.¹¹ Although private attorneys may face similar questions, their clients have the option of retaining other counsel to avoid potential conflicts. Not so for Interior and most other agencies, which absent express statutory authorization, are prohibited from retaining outside counsel. See 5 U.S.C. 3106; 1982 OLC Op. 52 (interpreting Section 3106 to “preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions”). The potential practical problems posed by the Federal Circuit’s reasoning are therefore substantial.

Given the sensitive nature of the question presented and its implications for the ongoing functions of attorneys and others responsible for Indian affairs, the huge monetary awards sought in this and other cases, and the novelty of the Federal Circuit’s ruling—as well as that court’s disregard of this Court’s *Navajo Nation* decisions—the Court should grant review.

¹¹ Other questions for government attorneys advising on tribal trust matters might include whether the relevant tribal interests would be “directly adverse” to the representation in another suit; whether there is a “significant risk” that protecting tribal interests would be “materially limited” by the government’s responsibilities in another suit; or whether a purported conflict has been waived through a tribe’s informed consent accompanied by a “reasonabl[e] belie[f]” that the government attorneys could competently protect tribal interests. Model Rules of Prof’l Conduct R. 1.7 (2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2010