No. 10-382

# 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*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

For the first time in the history 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 implicating the administration of statutes pertaining to tribal trust property. That holding, which abrogates the government's attorney-client privilege by importing 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 of government lawyers representing the United States in Indian affairs. As the certiorari petition explains, this Court's review is needed to protect the government's interests in the more than 90 pending tribal trust cases and to avoid undermining the ability of agency personnel to solicit, and government attorneys to provide, legal ad-

vice—to the detriment of the government, and of tribes and individual Indians generally.

### A. The Federal Circuit's Decision Is Fundamentally Flawed

As explained in the petition, the Federal Circuit erred in concluding that the Tribe was the "real client" of government attorneys (Pet. 12-20) and that the government had a broad common-law trust duty to disclose information, including attorney-client privileged information, to Indian tribes (Pet. 21-30). The Tribe essentially reads the former issue out of the Federal Circuit's opinion and gives short shrift to this Court's precedents on the latter issue.

1. The Federal Circuit ignored the Executive Branch's longstanding view of who constitutes the "real client" in government litigation involving Indian interests, and it incorrectly deemed irrelevant the source of payment of the government's legal advice for purposes of identifying the client in the tribal trust context. Pet. 14-20. The Tribe attempts to mask those serious flaws by arguing that no "formal" attorney-client relationship need be found for a tribe to be the "real client." Opp. 15-17. That tactic does not solve the significant problems posed by the Federal Circuit's decision.

As explained in the petition (Pet. 12-14, 18-20), the Federal Circuit's "real client" rationale cannot be squared with: (1) the Court's established precedents underscoring the distinct sovereign function of the United States in the Indian trust setting, or (2) the fact that government attorneys are paid from the Treasury to further those sovereign functions (which, contrary to the Tribe's contention, are not solely "to aid the trust beneficiary," Opp. 17). And taking the Tribe's argument to its logical conclusion essentially eviscerates any distinction between the Federal Circuit's "real client" rationale and its "common-law duty to dis-

close" rationale (discussed next), since the Tribe's explanation of the former is based on the "policy of full disclosure in the trustee-beneficiary relationship." Opp. 16.

2. The Tribe contends that the government is subject to a general common-law trust duty to disclose all material information—including attorney-client privileged communications—to a tribe. Opp. 17-23. The Tribe concedes (Opp. 17) that the government owns outright all records concerning its administration of statutes affecting Indian property, and the United States exercises complete control over those records pursuant to federal statutes and regulations governing their maintenance and control. There is no common-law right of access to such material. See Pet. 25-27.

The Tribe all but ignores (Opp. 15 n.3) the Court's decisions in *United States* v. *Candelaria*, 271 U.S. 432 (1926), and *United States* v. *Minnesota*, 270 U.S. 181 (1926), establishing that the government's administration of laws concerning tribal trust property is a distinctly sovereign function. Pet. 13-14. Even more striking is the Tribe's passing treatment (Opp. 18-19) of *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009)—two decisions of this Court that the Federal Circuit did not even mention. The Tribe's discussion is limited to the contention that the *Navajo Nation* decisions involve jurisdictional prerequisites that "have no place in the analysis here." Opp. 19. Even that cramped interpretation cannot help the Tribe. Although the *Navajo Nation* decisions concern jurisdiction, the limited role that the common law played in that inquiry (Pet. 21-23) vitiates the very premise of the Federal Circuit's decision—*i.e.*, that the United States is a "general trustee" that owes a "common law duty to disclose information" to Indian tribes. Pet. App. 21a, 22a. Given that this Court twice reversed the

Federal Circuit for erroneously relying on a "general trust relationship," the Federal Circuit's decision below repeating that error for a third time commands this Court's review.[1]

The Tribe's citation (Opp. 14, 19-20) to plainly distinguishable pre-*Navajo Nation* decisions[2] cannot avoid the Court's recent instruction that, absent a clear statutory duty, "common-law trust principles [do not] matter" in this context. *Navajo Nation*, 129 S. Ct. at 1558. The Tribe's resort to the *Handbook of Federal Indian Law* is no more availing (Opp. 13): the treatise refers to the duties owed Indian tribes by the government as those "guaranteed by treaty and federal statute," not a body of general common law. Felix S. Cohen, *Handbook of Federal Indian Law* § 14.02[2][d], at 912 (2005).

Finally, contrary to the Tribe's contention (Opp. 21-22), the government has never argued that common-law trust

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[1] The Tribe reads *Nevada* v. *United States*, 463 U.S. 110 (1983), in an exceedingly narrow fashion and argues that even where the government does consider a "specific competing interest," the "rationale for the fiduciary exception would not be undermined." Opp. 14-15 n.2. As explained in our petition (Pet. 31-32), the Federal Circuit's reservation of that question "introduces substantial uncertainty into the privilege's application," *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998), and the Tribe's argument only exacerbates that uncertainty. Moreover, the Tribe ignores the actual competing interest exemplified by one of the documents at issue. See Pet. 29; Pet. App. 74a (Doc. No. 37).

[2] See Pet. 24 (discussing *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983), as establishing the necessity of statutes and regulations to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities"); *Morton* v. *Ruiz*, 415 U.S. 199, 205 n.7, 237 (1974) (interpreting Snyder Act, 25 U.S.C. 13, not imposing freestanding common-law trust duties); *Cramer* v. *United States*, 261 U.S. 219, 230 (1923) (relying on property law rules rather than imposing any general fiduciary duty).

duties, *independent of statutory or regulatory requirements*, apply to the government's relationship with tribes. In *Department of the Interior* v. *Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the government, arguing that correspondence between a tribe and the government was exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, cited one aspect of "traditional trust doctrine"—a trustee's duty of confidentiality when disclosure is harmful to a beneficiary's interests (Gov't Br. 17, 34, 36, *Klamath*, *supra* (No. 99-1871))—in support of its argument that "compelled release * * * would impair the [government's] performance of the functions assigned to it." *Id.* at 36. The "functions assigned to" the government were those assigned *by statute and agency directive* (see *id.* at 5-7)—including a requirement that the government deem information received from tribes "confidential * * * if disclosure would negatively impact upon a trust resource," *id.* at 7. By contrast, as explained in the petition (Pet. 25-27), no such statutes or agency directives exist to support the disclosure obligation that the Tribe seeks to impose here.

**B. The Question Presented Warrants Immediate Review**

1. The Tribe is wrong in contending (Opp. 6-10) that review should be denied because this case is in an interlocutory posture.

a. Although this Court generally awaits a final judgment of the court of appeals before granting review, that practice is by no means absolute. The Court has done so on numerous occasions in various contexts—especially where, as here, the case presents an important issue of law with immediate consequences for the petitioner. See Eugene Gressman et al., *Supreme Court Practice* 281-283 (9th ed. 2007) (collecting cases).

As explained in the petition (Pet. 30-33), there are compelling reasons here for the Court to grant review in this case now notwithstanding its interlocutory posture. The Federal Circuit's decision will be binding precedent in all pending and future cases in the Court of Federal Claims (CFC), where the majority of tribal trust claims have been brought. Pet. App. 126a-138a. That ruling may not only increase the government's exposure in these cases seeking billions of dollars (Pet. 30), but, more urgently, it threatens to undermine the day-to-day administration by agency personnel of the statutory and regulatory duties governing those trusts—both by chilling their seeking of legal advice and by creating ethical concerns for government attorneys who advise those personnel (Pet. 31-33).

The Tribe has offered no persuasive rebuttal to those significant practical consequences. In response to the chilling concern—one recognized by this Court in other contexts and confirmed by the agencies directly affected by the Federal Circuit's decision in this context (Pet. 31-32) —the Tribe relies on a law-journal note to argue that the attorney-client privilege is "already uncertain, due to various open government provisions and political and media pressures." Opp. 10 (quoting Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163, 198 (2007) (*Survey Note*)). The note is based on anecdotal interviews with state and municipal (not federal) government lawyers (*Survey Note* 181 n.112), and, in any event, the attorney-client privilege would not merely be "uncertain" without this Court's review of the Federal Circuit's decision: it would be *inapplicable* in the context of the United States' administration of statues governing funds held in trust for Indians.

With respect to the professional responsibility concerns, the Tribe offers no direct response at all. Instead, as noted above (p. 2, *supra*), the Tribe attempts to mitigate the import of the Federal Circuit's determination that the Tribe is the "real client" of government attorneys in the tribal trust context by arguing that the decision does not turn on the existence of a "formal" attorney-client relationship. Opp. 16. But that is little comfort to government attorneys who are regulated by the bars of the various States, not all of which might share the Tribe's current view of the Federal Circuit's decision. Although the Tribe asserts that there is no reason why the chilling effect on the government would be different than that on any private trustee (Opp. 9-10), the Tribe fails to acknowledge that private trustees are differently situated because, unlike the government, they can employ other counsel. See Pet. 33.

b. The Tribe's reliance on the Court's recent decision in *Mohawk Industries, Inc.* v. *Carpenter*, 130 S. Ct. 599 (2009), is misplaced. As an initial matter, the government's position in this case comports fully with its position in *Mohawk*. The government argued in *Mohawk* that ordinary rulings requiring production of material over which a party asserts the attorney-client privilege—a potentially large class of orders—should not be appealable as of right under the "collateral order" doctrine. The government emphasized, however, that mandamus remained an available remedy for reviewing such orders in extraordinary circumstances. Gov't Br. 6, 15, 26, 27, *Mohawk*, *supra* (No. 08-678). Consistent with that position, as endorsed by the Court's decision (*Mohawk*, 130 S. Ct. at 607-608), the government sought mandamus review of the CFC's order in this case because of the need for "promptly correcting serious errors" (*id.* at 608) as to the applicability of the

attorney-client privilege in the Indian trust context—a legal issue of broad and critical importance. Pet. 31-33.[3]

Because the Federal Circuit's decision is now controlling law in the CFC on the recurring question presented here, the Tribe's suggestion (Opp. 12) that post-judgment appeal would suffice in this case (or any other CFC case) is plainly wrong. Only the Federal Circuit considering the issue *en banc* could reverse the decision below, and it has already refused to do so. Pet. App. 91a.

2. The Tribe argues that the lack of a conflict among the lower courts on the question presented warrants denial of certiorari. But it is precisely the novelty of the Federal Circuit's decision and its anticipated disruption of the government's settled practices that counsel in favor of immediate review. Pet. 7, 9-10.

Contrary to the Tribe's contention, three prior trial court decisions addressing the applicability of a fiduciary exception in Indian trust cases—two of which were issued by the same CFC judge[4]—do not constitute a "uniform[]" body of case law on the issue (Opp. 7), much less create any "settled expectation" (Opp. 8). Trial court decisions have no precedential effect, even upon the judges of the same court. See *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415,

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[3] The Tribe contends (Opp. 10) that the United States could have sought interlocutory review of the CFC's ruling by requesting certification under 28 U.S.C. 1292(b) (actually, for appeals to the Federal Circuit, 28 U.S.C. 1292(d)(2)). That contention is of questionable relevance, given that the Federal Circuit addressed the government's claim on the merits in the mandamus proceeding. It is also incorrect: Section 1292(d)(2) requires showing that resolution of the question presented would "materially advance the ultimate termination of the litigation"—something neither party has contended in this case.

[4] Pet. App. 85a-90a; *Osage Nation* v. *United States*, 66 Fed. Cl. 244 (2005).

430 n.10 (1996). In any event, any "settled expectation" is undercut by other decisions recognizing the attorney-client privilege when asserted as a basis for withholding documents requested by tribes under FOIA. See Pet. 11 n.6 (citing cases).

Nor is the suitability of this case for certiorari diminished, as the Tribe contends (Opp. 7-8), by the fact that the United States voluntarily dismissed its appeal of a similar issue to the D.C. Circuit in the other case the Tribe cites, *Cobell* v. *Norton*, 212 F.R.D. 24 (D.D.C. 2002). In considering whether to pursue appeal, the United States is "apt to differ from that of a private litigant * * * who generally does not forgo an appeal if he believes that he can prevail." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). In *Cobell*, the United States had case-specific reasons—independent of the issue's merits or importance—for dismissing its appeal of the district court's decision. In that case, the attorney-client privilege issue arose in a deposition being overseen by a special master-monitor, who had the power to issue rulings on objections, terminate the deposition, and recommend sanctions. 212 F.R.D. at 28; *Cobell* v. *Norton*, 213 F.R.D. 48, 57-60 (D.D.C. 2003). Although the Solicitor General authorized the United States to seek appellate review of the district court's order, he later authorized the government to withdraw its appeal after the D.C. Circuit granted the government's request to remove the special master-monitor—thereby resolving a significant source of the government's immediate concerns in that case. See *Cobell* v. *Norton*, 334 F.3d 1128 (2003) (invalidating appointment of special master-monitor).

Relatedly, the Tribe contends that "[n]o emergency has arisen" in the seven years since the government dismissed its "fiduciary exception" appeal in *Cobell* so as to warrant certiorari. Opp. 8-9. The overwhelming majority (82 of 95)

of pending tribal trust cases, however, were filed after 2003. Pet. App. 126a-138a. And, of course, the fact that the Federal Circuit's decision below constitutes a decision binding on all CFC cases dramatically increases the government's need for this Court's review. Pet. 30.

3. The Tribe correctly notes that mandamus is an extraordinary remedy (Opp. 11), but its requirements are "not insuperable" and certainly do not preclude this Court's review here. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004). This Court has sanctioned federal appellate courts to use mandamus to address novel questions of pure law in the discovery context. See, *e.g.*, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110-112 (1964) (order compelling mental and physical examinations); see also *Cheney*, 542 U.S. at 381. Even if the Court ultimately declined to direct the issuance of mandamus relief, its explication of the governing principles could prompt the court of appeals to reconsider its decision. Cf. *In re Cheney*, 406 F.3d 723, 731 (D.C. Cir. 2005).

The Tribe's contention that the United States seeks correction of a "factbound determination" is also incorrect. Opp. 5. A single, purely legal issue is presented: whether the attorney-client privilege entitles the government to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of laws concerning property held in trust for the tribe. Pet. I. Resolution of that question does not turn on the applicability of the privilege to any particular documents; indeed, the CFC concluded that at least some of the documents at issue would otherwise be protected by the privilege if a fiduciary exception did not apply. Pet. App. 50a. And the United States is not challenging the CFC's fact-based determinations regarding whether the documents at issue concern trust management

and therefore fall within the scope of the exception the court fashioned. *Id.* at 50a-51a, 53a-54a.

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This Court's review of the Federal Circuit's fundamentally flawed decision depriving the government of its attorney-client privilege is critical not only in light of the 90 other pending Indian trust cases and any future cases in the CFC, but also to ensure that agency personnel seek and receive the legal advice they need for proper administration of their statutory duties.

Respectfully submitted.

NEAL KUMAR KATYAL
*Acting Solicitor General*

DECEMBER 2010

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