No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 590 F.3d 1305. The opinion of the Court of Federal Claims (Pet. 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 (Pet. 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), and the petition was filed the next day. The petition for a writ of certiorari was granted on January

7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-5a.

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 duties under treaties, Executive Orders, statutes, regulations, and contracts. Pet. App. 98a-120a. According to the Tribe's complaint, the Tribe occupies a 900,000-acre reservation in New Mexico that was set aside by Executive Order. The land contains timber, gravel, and oil and gas resources, development of which is governed by statutes administered by the Department of the Interior. *Id.* at 102a-104a; 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—as well as from Indian Claims Commission judgments are held by the United States in trust for the Tribe. Pet. App. 104a-105a. The Tribe alleges that the Interior Department has failed to render an accurate accounting of the trust funds and other assets and has mismanaged those assets.[1] The Tribe seeks,

[1] The Secretary of the Interior (Secretary) is statutorily authorized to invest funds held in trust for Indian tribes. 25 U.S.C. 162a(a). To a lesser extent, the Tribe's allegations also implicate the Secretary of the Treasury, who invests such funds at the Interior Department's direction. 25 U.S.C. 161a(a).

inter alia, a complete accounting of all assets held in trust for the Tribe since 1946 and $300 million in damages. *Id.* at 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 1974 to 1992.[2] Pet. 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. *Id.* at 25a-26a. The documents withheld include memoranda, concerning administration of assets held in trust, that were exchanged between attorneys in the Interior Department's Office of the Solicitor[3] and various agency personnel from Interior, including the Bureau of Indian Affairs, and also similar documents from the Department of Justice and the Department of the Treasury. *Id.* at 50a-52a, 71a-84a.

2. The Tribe moved to compel production of the documents that had been withheld as privileged, arguing that they fell within an asserted "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. Pet. App. 24a-90a.

The CFC explained that a "fiduciary exception" to the attorney-client privilege, as applied in other con-

[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.

texts, precludes a trustee from withholding from the beneficiary communications between the trustee and attorneys retained by the trustee that relate to trust management. Pet. 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 relationship with Indian tribes that makes the fiduciary exception inapplicable. *Id.* at 44a-46a. The CFC stated that "basic trust principles are readily transferrable to the Indian trust context" (*id.* at 45a), notwithstanding that statutes rather than the common law establish the government's duties (*id.* at 31a) and that the government uses its own funds (not tribal trust funds) to pay for its legal advice (*id.* at 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—at least some of which the CFC had found were otherwise covered by the attorney-client privilege. Pet. App. 50a-63a, 69a, 71a-84a.[4]

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[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. Pet. App. 47a-48a. Accordingly, the CFC did not compel the government to produce documents that constituted attorney work product or did not relate to management of trust assets and thus fell outside the fiduciary exception the court recognized. *Id.* at 54a-63a, 69a.

An earlier CFC decision, however, reached the contrary conclusion, holding that a 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.

3. The United States petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. The Federal Circuit granted a temporary stay but then denied the mandamus petition in a published opinion. Pet. 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." Pet. App. 1a-2a. The court relied on two rationales articulated by the CFC: First, the trustee is not the attorney's exclusive client because the trustee acts for the beneficiary; under that justification, the court explained, a fiduciary exception is just a logical extension of the client's control of the attorney-client privilege. Second, 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 duty to disclose. *Id.* at 13a-14a, 41a-42a.

a. As to the first rationale, the Federal Circuit concluded that the Interior Department "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes." Pet. 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 ap-

plication of a fiduciary exception in this case was thus "straightforward." *Id.* at 16a-17a.

The court rejected three counter-arguments to this rationale 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. Pet. 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 to the attorney-client privilege applies— dismissed as unhelpful the fact that the government pays for its own legal advice, on the ground that the government (unlike, the court believed, a private trustee) has imposed the trust on the tribal beneficiary. *Id.* at 19a-20a. Third, the court found "not relevant" the government's concern that abrogation of the privilege would impair the Interior Department'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. *Id.* at 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 to an Indian tribe information related to trust management, "including legal advice on how to manage trust funds." Pet. 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 re-

quired the Interior Department to provide to tribes negates any general common-law obligation to disclose such communications. The court stated that "the government has other trust responsibilities not enumerated" by statute, *ibid.* (quoting *Cobell* v. *Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)), including, the court held, a common-law duty to disclose to the beneficiary all trust-related information, *ibid.*

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 of the Federal Circuit's decision. 91 Fed. Cl. 489. The government thereafter complied, producing the documents under a protective order that prevents disclosure to third parties until the case is resolved by this Court. Pet. App. 93a-97a.[5]

SUMMARY OF ARGUMENT

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 concerning the performance of governmental functions with respect to tribal property. That holding, which abrogates the government's attorney-client privilege based on common-law rules governing private trustees at common law, is based on two fundamentally flawed premises.

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[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 at trial. Cf. *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 606-607 (2009).

A. First, the Federal Circuit erred in treating the Tribe as the "real client" of the government attorneys.

1. Unlike a common-law trustee, the government's obligations to tribes and individual Indians are not derivative of the beneficiary's property interest. Rather, it is a bedrock principle of this Court's Indian law jurisprudence that the government's administration of laws concerning trust and other Indian property is a distinctly sovereign function. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437-438 (1912). Government attorneys therefore represent only the government, whose sovereign interests include (but are not necessarily limited to) carrying out any responsibilities that are imposed by statute, regulation, treaty, or executive order with respect to property held for Indians.

2. 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." Pet. App. 123a. Unlike in other contexts, no statute or regulation displaces that understanding by creating an attorney-client relationship between government attorneys and tribes in the present context. To the contrary, the regulatory scheme does not contemplate direct or personal representation of Indians by the Justice Department in tribal trust matters.

3. The Federal Circuit's "real client" rationale raises professional responsibility and other practical concerns for government attorneys. In particular, treating tribes (and not just the government) as the client of govern-

ment attorneys creates potential conflicts of interest for those attorneys, who encounter the competing interests of multiple tribes, federal agencies, and statutes across different matters and issues. At the same time, the Interior Department, as a government agency, is limited in its ability to hire outside counsel to avoid such conflicts.

4. The government's status as the sole client is underscored by the fact that government attorneys are paid from the government's own funds, not from a trust corpus, see *Riggs National Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976), and the fact 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, *e.g.*, 25 C.F.R. 115.1000(a)(2).

B. 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.

1. 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. Pet. App. 14a, 16a. But the Court's recent decisions in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009)—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 and are defined exclusively by statutes and regulations.

2. No statute or regulation, however, requires the government to disclose attorney-client communications to a tribe whenever those communications implicate the government's duties with respect to property held in trust for Indians. To the contrary, the American Indian Trust Fund Management Reform Act of 1994 provides a comprehensive list of specific disclosure obligations omitting any duty to disclose privileged communications to Indians, 25 U.S.C. 162a(d), and the Indian Claims Limitation Act of 1982 expressly limits the government's disclosure duty to nonprivileged information, Pub. L. No. 97-394, § 5(b), 96 Stat. 1978. If Indian tribes seek records beyond those the government provides pursuant to statute or regulation, they (like everyone else) must rely on the Freedom of Information Act for access, and are subject to the government's invocation of Exemption 5, 5 U.S.C. 552(b)(5), based on the attorney-client privilege.

3. The Interior Department generally must balance multiple responsibilities that might be in tension with maximization of tribal trust assets, such that the government need not "follow the fastidious standards of a private fiduciary." *Nevada* v. *United States*, 463 U.S. 110, 128 (1983). Competing interests arise not only with respect to management of natural resources but also in the management of trust funds, as demonstrated by one of the documents at issue in this case. Pet. App. 74a (Doc. No. 37). In any event, determining the applicability of the attorney-client privilege on a communication-by-communication basis would be unworkable and would unnecessarily chill the seeking of legal advice critical to the government's effective management of tribal trust issues.

ARGUMENT

THE FEDERAL CIRCUIT ERRED IN ABROGATING THE GOVERNMENT'S ATTORNEY-CLIENT PRIVILEGE IN MATTERS CONCERNING INDIAN PROPERTY

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, *e.g.*, *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 the Law Governing Lawyers § 74, at 573 (2000) ("[T]he attorney-client privilege extends to a communication of a governmental organization."); *Confidentiality of the Attorney General's Communications 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."); cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154-155 (1975) (noting applicability of attorney work-product protection to government attorneys). 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." 1 Restatement (Third) of the Law Governing Lawyers § 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 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.").

Case law under the Freedom of Information Act (FOIA) further demonstrates the availability of the attorney-client privilege to the government in civil proceedings. Under Exemption 5 of FOIA, "inter-agency or 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 governmental context, the 'client' may be the agency and the attorney may be an agency lawyer."). Indeed, as this Court has recognized, the legislative history of FOIA expressly confirms the applicability of the attorney-client privilege to government agencies. See *Sears, Roebuck & Co.*, 421 U.S. at 154 (quoting 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 deny FOIA requests for documents concerning tribal assets from Indian tribes, alleging a violation of the government's "trust responsibility," 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 *3, *14 n.8 (D.D.C. Mar. 26, 2007) (attorney-client privilege); *Shinnecock Indian Nation* v. *Kempthorne*, 652 F.

Supp. 2d 345, 352, 362-363 (E.D.N.Y. 2009) (attorney work- product protection).

The Federal Circuit nonetheless advanced two rationales to deny the protection of the attorney-client privilege in this case: (1) the Tribe is the government attorneys' "real client" (Pet. App. 15a-20a); and (2) the United States is like a private, common-law trustee operating under a general "common law duty to disclose" information, including information protected by the attorney-client privilege, to Indian beneficiaries (Pet. App. 21a-22a). Both rationales are inconsistent with the United States' unique status as a sovereign, whose officers and employees administer statutes that exclusively define the government's duties. That status has been recognized in both this Court's precedents and the Executive Branch's considered guidance, and it fundamentally distinguishes the United States from a private, common-law trustee.

A. The Government, Not The Tribe, Is The "Real Client" Of Government Attorneys

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

1. This Court's precedents establish that the United States acts distinctly as a sovereign, not as a common-law trustee, in matters affecting Indian assets

This Court has long recognized that the United States has distinctly sovereign interests in the administration of Acts of Congress concerning tribal property,

including property it holds in trust for tribes, and that the United States' interests are not derivative of those of a beneficiary as at common law. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437-438 (1912). Consistent with that basic principle, 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 the government attorneys who provide legal advice to the federal officers responsible for carrying out statutory duties with respect to Indians.

Heckman involved a suit by the United States to cancel certain conveyances of allotted lands by members of an Indian tribe on the ground that the conveyances violated restrictions on alienation imposed by Congress. 224 U.S. at 415-416. In permitting the suit to go forward, the Court referred to the unique sovereign interest of the United States with respect to Indian affairs as distinct from any property or common-law trust interest: "While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is *distinctly an interest of the United States* * * * not to be expressed in terms of property, or to be limited * * * to the holding of a technical title in trust." *Id.* at 437 (emphasis added).

In *Minnesota*, which involved a suit by the United States seeking relief against a State that had errone-

ously conveyed lands that ought to have been reserved for Indians, the Court held that the United States—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 only 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 person 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).

Those cases affirm that the United States acts as a sovereign—and the government's attorneys represent the sovereign—with respect to Indian affairs. Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148

(1982) ("[S]overeign power, even when unexercised, is an enduring presence * * * and will remain intact unless surrendered in unmistakable terms."). In none of those cases did the Court's conclusion depend, as the Federal Circuit suggested (Pet. 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 the duties of government officials. The Federal Circuit's conclusion that the Tribe is the "real client" of government attorneys thus cannot be squared with this Court's decisions.

2. *Executive Branch guidance makes clear that government attorneys represent the United States, not a particular Indian tribe, in tribal trust matters*

The Federal Circuit's conclusion that Indian tribes are the "real clients" of government attorneys also cannot be squared with those attorneys' role in assisting Executive Branch officials to fulfill the constitutional mandate to "take Care that the Laws be faithfully Executed." U.S. Const. Art. II, § 3. In furtherance of that mandate, the Attorney General is charged with representing the interests of the United States and its agencies in court, 28 U.S.C. 516, 519, including the interests of the United States concerning Indians and Indian tribes. Similarly, the Solicitor supervises and directs the legal work of the Department of the Interior pursuant to 43 U.S.C. 1455. In carrying out those statutory responsibilities, attorneys in the Justice and Interior Departments, like other Executive Branch personnel, have a duty of loyalty to the United States Government in the performance of their duties.[6] These statutory and

[6] *E.g.*, 5 C.F.R. 2635.101(a); 43 C.F.R. 20.501; see Office of Attorney Recruitment and Management, Dep't of Justice, *Reminder of Gov't*

regulatory roles in litigation on behalf of and counseling the Executive Branch of the United States Government are materially different from the work of a private attorney representing a private, common-law trustee.

In 1979, in a letter to the Secretary of the Interior, Attorney General Bell set forth the legal principles governing the institutional role of the Department of Justice in representing the United States in litigation involving Indian 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.

Pet. App. 123a-124a.

Att'y Ethical Obligations to Client (Nov. 2006), http://www.justice.gov/usao/ias/Employment/OARM_9.pdf ("Department of Justice attorney[s] * * * have an obligation to safeguard information and documents relating to the representation of your client," which is, "in most circumstances, the Executive branch of the United States or the Department.").

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 longstanding interpretation of the Attorney General of his statutory duties in representing the United States in litigation and the agency's long prevailing view of the role of its own attorneys. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984); 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 Attorneys' Manual* (*USAM*) has referred to that letter as guidance for government attorneys conducting litigation affecting Indians.[7]

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, described above at pp. 13-15, *su-*

[7] See *USAM* § 5-14.130, http://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). Officials of the Justice Department's Environment and Natural Resources Division (ENRD)—which represents the United States in litigation, both affirmatively and defensively, concerning Indians—have reiterated the same view. See Letter from Lois J. Schiffer, Acting Assistant Att'y Gen., United States 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 Assistant Att'y Gen., ENRD, United States 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.").

pra. The Attorney General's conclusion also is consistent with decisions of this Court that followed it. In particular, in *Nevada* v. *United States*, 463 U.S. 110 (1983), the Court recognized that the government acts in matters affecting Indian tribes in its capacity as a sovereign. The fact that the United States may face competing interests when acting in furtherance of interests affecting tribal property therefore does not pose a disabling conflict for the government, *id.* at 128, or, *a fortiori*, for the 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 & Persons on Whose Behalf the United States Brings Suits Under the Fair Housing Act*, 19 Op. Off. Legal Counsel 1, 2-4 (1995) (1995 OLC Op.) (Fair Housing Act complainant is not the Attorney 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).[8]

[8] Although settled since at least 1979, the Executive Branch's view on how to reconcile the potentially competing interests of the United States with respect to Indian property rights differed for a brief period in the early 1970s. Believing that the government faced an "inherent" conflict in some such situations, President Nixon requested legislation to create an Indian Trust Counsel Authority within the Executive Branch "to assure independent legal representation for the Indians' natural resource rights." *Special Message to Congress on Indian Affairs*, Pub. Papers 564, 573 (1970); see S. 2035, 92d Cong., 1st. Sess.

There is no reason to distinguish for present purposes between the Attorney General (and other Justice Department attorneys) and those in the Interior Department's Office of the Solicitor. Both provide confidential legal advice to agency personnel with respect to the administration of Acts of Congress affecting Indian property. The Solicitor represents the Interior Department's interests (including but not limited to interests in matters concerning Indian tribes and individuals), just

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(1971); H.R. 6106, 6374, 6494, 93d Cong., 1st Sess. (1973). Although that proposal was never enacted, the Department of Justice under Presidents Nixon and Ford filed briefs on several occasions accompanied by a separate statement or letter from the Secretary of the Interior when the Secretary disagreed with the Justice Department's views on Indian law issues. See, *e.g.*, *United States* v. *Winnebago Tribe*, 542 F.2d 1002, 1005 n.5 (8th Cir. 1976); *United States* v. *Critzer*, 498 F.2d 1160, 1161-1162 (4th Cir. 1974); *Stevens* v. *Commissioner*, 452 F.2d 741, 745 & n.10 (9th Cir. 1971); see also Memorandum for United States at 4, 9-15 (Appx. B), *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976) (including the Interior Department's separate views where the Justice Department had represented individual Indian against the tribe pursuant to 25 U.S.C. 175); U.S. Br. 14, *United States* v. *Mason*, 412 U.S. 391 (1973) (No. 72-654) (noting the government's "clear conflict of interest" in a case concerning taxation of an Indian decedent's estate). Subsequent Administrations rejected President Nixon's view, however, because it was inconsistent with the Executive Branch's responsibility to speak with a unitary voice. The government therefore returned to the pre-Nixon Administration approach. That renewed position is articulated in Attorney General Bell's 1979 letter, to which the Executive Branch has adhered ever since. See *Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. Pt. 1, at 43 (1989) (statement of Bradley H. Patterson, Jr., Executive Assistant to Leonard Garment, Special Counsel to President Nixon); cf. *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) (explaining that judicial deference to an agency's position is not diminished merely because the position has changed).

as the Attorney General represents the interests of the United States. 43 U.S.C. 1455; Pet. App. 123a-124a.[9]

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. With some exceptions, Congress has made it punishable as a felony with up to five years imprisonment and a $250,000 fine for a federal employee willfully to act as an attorney for anyone before a federal agency or court in connection with a particular matter in which the United States has a direct and substantial interest. See 18 U.S.C. 205, 216(a)(2); see also 18 U.S.C. 3571(b)(3). Although that criminal prohibition is subject to an exception when the employee is acting "in the proper discharge of his official duties," 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, *e.g.*, 10 U.S.C. 827 (judge advocate serving as military defense counsel); 18 U.S.C. 3006A(g)(2)(A) (federal public 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

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[9] 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 (Pet. App. 80a (Doc. No. 217)); and a 1966 memorandum from the Office of Legal Counsel to the Treasury Department about whether trust funds may be invested in obligations of federal land banks and the Banks for Cooperatives (Pet. App. 75a (Doc. No. 63)).

attorneys and an Indian tribe with respect to the administration of a federal statute affecting Indian property, and the Federal Circuit did not point to any statute or regulation suggesting that either has. To the contrary, Interior Department regulations confirm that in "ordinary circumstances," legal services concerning trust resources are provided either by a tribe's private counsel or by "the United States as trustee through the Office of the Solicitor and/or the Department of Justice." 25 C.F.R. 89.40. As discussed above (pp. 17-19, *supra*), the Justice Department's provision of legal counsel in matters concerning Indian property is pursuant solely to its representation of the United States rather than the tribe. Moreover, the Interior Department's general policy is "not to use federally appropriated funds to pay for private counsel to represent Indian tribes." 25 C.F.R. 89.40. One exception (among others) is when government counsel disagrees with the tribe on legal issues implicating the tribe's trust-related interests. 25 C.F.R. 89.42(d). That the government is free to depart from the tribe's preferred course of legal action further demonstrates that the government is acting as a sovereign, not a common-law trustee, in this context. The regulations clearly do not contemplate government attorneys representing Indians directly or in their personal capacity; rather, their only client is the United States.[10]

[10] Although 25 U.S.C. 175 states that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity"—and although that provision allows selected direct representation of Indians in certain circumstances—it does not affect representation on behalf of the United States in its sovereign capacity as discussed in Attorney General Bell's 1979 letter. Pet. App. 123a ("[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or

3. The Federal Circuit's rule would present professional ethics problems and significant practical concerns

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

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individual Indian."); see Office of Legal Counsel, *Memorandum for the Attorney General re: Representation of Indian Tribes* at n.3 (Aug. 11, 1977) ("The statute is of limited significance for present purposes, however, because the Department generally represents the United States in matters relating to the trust relationship arising out of statutes or treaties affecting a particular tribe."); Floyd L. France, *Recent Developments in Indian Litigation*, 13 Land & Nat. Resources Div. J. 73, 78 (1975) ("Where the United States is the moving party, the action can and should be brought in the name of the United States and there is no need whatever for considering the applicability of section 175."). Moreover, Section 175 does not compel the United States attorney to represent or bring suit on behalf of Indians. See, *e.g.*, *Pyramid Lake Paiute Tribe* 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 advice at issue in this context concerning the Interior Department's administration of statutes affecting Indian property. The Federal Circuit nevertheless proceeded as if a statute like Section 175 operates to create an attorney-client relationship whenever government attorneys render advice to Executive Branch officials on such matters. No such statute exists.

In 25 C.F.R. 1200.40(a), the Interior Department notes that it will make its legal expertise "fully available to advise tribes in developing, implementing, and managing investment plans." This Office has been informed that in implementing Section 1200.40(a), the Interior Department 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 the Interior Department, thus does not provide a basis for an attorney-client relationship with tribes even when it applies.

an Indian tribe or individual Indians, the decision below creates significant practical concerns. 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, under the Federal Circuit's reasoning, 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. Other questions for government attorneys advising government officials on matters affecting trust and other Indian property might include whether the relevant tribal interests would be "directly adverse" to the attorney's representation in another matter; whether there is a "significant risk" that protecting tribal interests would be "materially limited" by the government's responsibilities in another matter; 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).

Accordingly, under the "real client" rationale, the Justice Department's representation of another federal agency—for instance, in an environmental enforcement action against a tribally-owned entity—could create concerns in light of the Solicitor's role in advising Interior Department personnel on the administration of statutes governing certain tribal property interests. Moreover,

the Interior Department itself must sometimes render decisions adverse to an Indian tribe as part of its duties under various statutes—such as under the Indian Reorganization Act's provisions authorizing the Secretary to acquire land in trust on behalf of Indian tribes, whereby the Interior Department exercises discretion in granting or denying a tribe's application to take land into trust. See 25 U.S.C. 465; 25 C.F.R. Pt. 151.

Relatedly, a *particular* tribe cannot be the "real client" of the government's counsel, because the interests of different tribes are sometimes incompatible. If a particular tribe were the government attorneys' "real client," they could not act with respect to *other* tribes where representation of the former was "materially limited by the [government] lawyer's responsibilities" to the latter—absent informed consent and a reasonable belief that the tribes' interests could be protected.[11] Model Rules of Prof'l Conduct R. 1.7(b). A number of past inter-tribal conflicts make this concern more than hypothetical. See, *e.g.*, *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937) (breach-of-treaty suit where Shoshone Tribe was permanently excluded from possession of half of its tribal lands by Northern Arapahos under United States military escort); *Sekaquaptewa* v. *MacDonald*, 619 F.2d 801 (9th Cir.) (quiet-title action in long-running land dispute between the Hopi Tribe and Navajo Nation), cert. denied, 449 U.S. 1010 (1980); *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*,

[11] Waiver would not only be logistically difficult to accomplish with all the tribes whose interests might be affected, but might also be subject to judicial second-guessing as to whether the government lawyer could have "reasonably believe[d]" that the representation of a particular tribe would not be adversely affected. Model Rules of Prof'l Conduct R. 1.7(b).

531 F.2d 495 (Ct. Cl.) (suit by individual members of Western Shoshone identifiable group to stay takings claim by the federally-recognized tribal organization), cert. denied, 429 U.S. 885 (1976).

Although private attorneys may face similar questions on occasion (albeit to a lesser degree), their clients (*e.g.*, private fiduciaries) have the option of retaining other counsel to avoid potential conflicts or other problems. That is not so for the Interior Department and most other federal 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"). And unlike the government, tribes and individual Indians may retain their own private counsel, including in limited instances at the government's expense, thereby further shattering any illusion that government attorneys serve as their personal lawyer. See, *e.g.*, 25 U.S.C. 81a, 81b; 25 C.F.R. 89.41; see also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 372 (1968). Indeed, some Indian tribes employ their own Attorney General or in-house counsel—underscoring the conclusion that the government's attorneys do not fulfill that function.[12]

Additionally, the Federal Circuit's decision creates a risk that tribes, once in possession of privileged documents or information, might unilaterally attempt to waive the privilege by disclosing the documents to third parties—a potential problem of particular concern to the

[12] See, *e.g.*, Tohono O'odham Code, Tit. 20, Ch. 1, http://www.tolc-nsn.org/docs/Title20Ch1.pdf (1991); Ho-Chunk Nation Code, Tit. 1, § 8, http://www.ho-chunknation.com/UserFiles/1HCC_Sec.8_Justice_2.3.09.pdf (2009).

government given its competing sovereign obligations. The Second Circuit has described private fiduciaries and their beneficiaries as "joint clients" on matters of trust administration. See *In re Long Island Lighting Co.*, 129 F.3d 268, 273 (1997). Even in that situation, one "client" should not be permitted, unilaterally, to waive the privilege as to the other joint client's communications with the attorney. See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) (citing 1 Restatement (Third) of the Law Governing Lawyers § 75(2) cmt. e at 581-582). Both the Restatement (in a Reporter's Note) and the Third Circuit, however, note that "the caselaw on this point is not as uniform as one would hope." *Id.* at 363 n.17.

For all the above reasons, the Federal Circuit's conclusion that an Indian tribe is the government attorney's "real client" on matters involving trust property of the tribe cannot be true without creating potentially intractable conflicts of interest and other practical problems. And to the extent the Federal Circuit used the term "real client" in some less formal sense (see Br. in Opp. 15-17), the concept would no longer support the Federal Circuit's proffered rationale for its "fiduciary exception" to the attorney-client privilege, *i.e.*, that the Tribe controls the privilege as the client. See Pet. App. 13a ("Under this justification, the fiduciary exception is but a logical extension of the client's control of the attorney-client privilege.").

4. That government attorneys are paid from government funds, not tribal trust funds, reinforces the conclusion that the government is the client

Government attorneys, even when they provide advice concerning the performance of statutory functions with respect to the property of a particular tribe or indi-

vidual Indian, are paid from government funds rather than from funds held in trust for the tribe or from income derived from other property of the tribe or individual. That established arrangement reinforces the conclusion that the government, not the tribe, is the government attorneys' client. Even in cases involving private fiduciaries, courts, including in what the Federal Circuit acknowledges to be the "leading American case" (Pet. 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 in 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.*, Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Div. E, Tit. I, 123 Stat. 718 (Interior Department); Pub. L. No. 111-8, Div. B, Tit. II, 123 Stat. 569 (Justice Department). The Federal Circuit dismissed that statutory arrangement as unhelpful because, it posited, in "contrast to a private trust case," the United States "imposes the trust on the beneficiaries" in the case of property held for Indians. Pet. App. 19a-20a. But establishment

of a trust by the United States is of no moment. It is commonplace for even a private trust to be created by a settlor without the consent of the beneficiaries. 1 Restatement (Second) of Trusts § 36, at 100 (1959); see also 1 Restatement (Third) of Trusts § 14, at 216 (2003). In any event, the United States' distinct role under statutes, treaties, and Executive Orders governing the creation or administration of a trust held for the benefit of Indians, or otherwise setting aside or supervising transactions affecting their property, simply underscores the uniquely sovereign character of the United States' functions and the impropriety of imposing judicially fashioned common-law rules and concepts on the United States and its officers and employees. 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 itself owns the records produced when agency personnel solicit legal advice from government attorneys regarding the administration of statutes affecting trust and other Indian property. 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) (trust fund records "are the property of the United States if they * * * [e]vidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part."); see also, *e.g.*, 25 C.F.R. 15.502, 162.111, 166.1000 (providing for the government's ownership of probate, leasing, and grazing records associated with the government's tribal trust function). The government's ownership of all records under controlling statutes and regulations confirms the conclusion that it, not the Tribe, controls access to and assertion of any privilege over those records.

B. 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. According to the Federal Circuit, "[a]s a general trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds." Pet. App. 21a (citing Restatement (Third) of Trusts § 82(2); Restatement (Second) of Trusts § 173)). Contrary to the Federal Circuit's view, however, the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law. No statute or regulation imposes the sort of generalized duty of disclosure the Federal

Circuit posited, much less a duty to disclose information protected by the attorney-client privilege. And given that the government has no generalized common-law-type duty of disclosure, there is no basis to import into this government context a common-law fiduciary exception to the attorney-client privilege that is premised on the existence of such a duty.

1. This Court's **Navajo Nation** *decisions preclude the Federal Circuit's imposition of a freestanding common-law duty*

As established above, in contrast to a private trustee, the government acts in its sovereign capacity in the administration of statutes in the area of Indian affairs. That sovereign status, and the statutory and regulatory framework for governing the Interior Department's duties with respect to Indian affairs, preclude importation of broad common-law trust concepts. That is especially so 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.

a. Most fundamentally, the Federal Circuit's imposition on the government of a "common law duty to disclose information" (Pet. App. 22a) to the Tribe cannot be reconciled with the Court's 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)*. Those decisions 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 control inherent in the Secre-

tary's approval of 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 the Interior Department's legal obligations must be based on specific statutes and regulations, and that those at issue did not provide the requisite "substantive law" that could, in turn, mandate 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: *first*, the tribe or individual Indian 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 or individual must show that the substantive law "can fairly be interpreted as mandating compensation" for injury 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 *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" (Pet. 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 [Indian] 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).

b. The limited statutory mandates governing tribal funds held "in trust" (*e.g.*, 25 U.S.C. 161a(a), 162a(a), 4011(a); see pp. 35-36, *infra*) are an insufficient hook for importing broad common-law trust duties such as a generalized duty to disclose all information related to administration of property held in trust, especially information subject to the attorney-client privilege. See *Cobell* v. *Norton*, 392 F.3d 461, 471, 472 (D.C. Cir. 2004) (holding that "government's duties must be rooted in

and outlined by the relevant statutes and treaties" and cannot be "abstracted * * * from any statutory basis") (internal quotation marks omitted); Floyd L. France, *Recent Developments in Indian Litigation*, 13 Land & Nat. Resources Div. J. 73, 78 (1975) ("Only those duties exist which are provided in some treaty, agreement, order or statute."). 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 on that basis then import common-law trust principles even with respect to the Indian property itself, much less the distinct 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 duty to manage allotted forest lands. *Id.* at 546. The statute, at most, created a "bare trust" entailing only limited responsibilities. *Mitchell II*, 463 U.S. at 224. As the Court explained, the relevant statutes and regulations must not only establish a trust relationship, but also "define the contours of the United States' fiduciary responsibilities." *Ibid.*

The Federal Circuit's reliance (Pet. App. 16a-17a) on *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), is misplaced. In *White Mountain*, the Court interpreted a federal statute to require 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.[13]

c. The legal relationships between the United States and Indians (and Indian property) do not fall into a single category that can be labeled or characterized generically as a "trust" in the common-law sense. Rather, the precise nature of the relationship depends on a number of variable factors.

First, the United States may have statutory responsibilities applicable to the property of Indian tribes, of individual Indians only, or both. Although this case involves property held in trust for the Tribe alone, the *Cobell* case involved individual indian money (IIM) accounts. *E.g.*, *Cobell*, 392 F.3d at 463. Indeed, Interior has informed this Office that, as of January 31, 2011, there are over 380,000 open IIM accounts. With respect to such accounts, the Federal Circuit's generalized common-law duty of disclosure could require the government to respond to requests for privileged and other information from hundreds of thousands of individual Indians, outside the established framework of statutes and regulations governing the furnishing of information to tribes and individual Indians.

[13] *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 relevant inquiry in Indian Tucker Act cases (concerning whether there is a duty to pay compensation for a violation) 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).

Second, some individual allotments are held by the United States in trust and some are owned in fee by an Indian subject to certain restraints on alienation. See 18 U.S.C. 1151 (defining "Indian country" as including all land within Indian reservations as well as all Indian allotments); *Heckman*, 224 U.S. at 415-416. And allotments held in trust under the Indian General Allotment Act, 25 U.S.C. 348 (1976), are a bare trust that requires no active management on the part of the United States. See p. 34, *supra*; *Mitchell I*, 445 U.S. at 541. *Third*, some tribal land was set aside by Executive Order; some tribal land is held in trust; and some once-aboriginal tribal land is now protected by treaty. See *Merrion*, 455 U.S. at 133-134; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-231 (1985). *Fourth*, some statutory provisions require Interior to approve leases or otherwise exercise some measure of control over Indian property rights, but do not impose specific trust duties on the United States. See pp. 32-33, *supra*; *Navajo I*, 537 U.S. at 507; *Navajo Nation II*, 129 S. Ct. at 1558. And some statutes do impose specific duties, but those duties are not defined by whether the land itself is held in trust. See *Mitchell I*, 445 U.S. at 541.

The Federal Circuit's attempt to impose a single common-law "trust" is incompatible with these widely varying arrangements derived from the Nation's long history in the administration of Indian affairs.

2. No statute or regulation requires the United States to disclose to Indian tribes privileged communications between government decisionmakers and their attorneys

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 the Interior Department dis-

close privileged communications between the Secretary and government attorneys about the administration of statutes applicable to trust and other Indian property 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 generally, and none of the statutes or regulations governing the Interior Department's functions in this area suggests that the type of material at issue in this case must be made available to Indian tribes.

a. 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). The actions of those agencies, like the Interior Department, are governed by federal statutes and regulations, see, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 937 (1986), not state law or judicially-fashioned common law, absent specific Congressional authorization, see, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 180 (1976) ("an authorization of state regulation is found when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous'") (citations and footnotes omitted). As a general matter, the Interior Department is authorized to release copies of official records, papers, or documents within the Department'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 and individual Indians, 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 production, removal, or sale of oil or gas from leases on Indian lands must be made available to tribes).

The Federal Circuit described the 1994 Trust Reform Act, in particular, as "expressly recogniz[ing] the possibility of trust responsibilities outside the statute." Pet. 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 requirements—does not license judicial imposition of common-law trust duties, including a generalized duty to disclose a broad range of information (including privileged information) to the tribe or individual Indian concerned, that would render superfluous the Act's specific disclosure obligations.

None of those statutes, including the 1994 Trust Reform Act, imposes any general duty to provide a tribe with information generally, much less the government's confidential communications with its own attorneys, even when those communications relate to management of Indian property. To the contrary, the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, §§ 2-6, 96 Stat. 1976-1978 (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 confi-

dential government communications. That Act established a method for final resolution of certain pre-1966 damages suits brought by the government on behalf of tribes and individual Indians. See §§ 3-6, 96 Stat. 1977-1978; see generally *Oneida*, 470 U.S. at 241-244. 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).

b. The regulatory regime governing the obligations of federal agencies in administration of statutory trust functions pertaining to Indian assets likewise counsels against a duty to disclose attorney-client privileged communications. Interior Department regulations already require disclosure of certain information to Indian tribes. None of those regulations, however, requires disclosure of confidential communications between the government and its attorneys. The Interior Department, 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 (pp. 29-30, *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). By contrast, for common-law trusts, such records "do not belong to the trustee, but are part of the trust estate." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 961, at 3 (3d ed. 2010) (Bogert). For that reason, inap-

plicable to the government context, common-law "beneficiaries generally are entitled to access to all relevant information concerning the trust," including in some jurisdictions communications concerning trust administration between the trustee and his counsel. Bogert § 962, at 66.

Beyond those specific provisions, Indian tribes, like anyone else, must rely on FOIA for access to government records that neither pertinent statutes nor regulations otherwise require the Interior Department to disclose. And significantly, as noted above (p. 12, *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. It is Congress, pursuant to its exclusive authority over Indian affairs, U.S. Const. Art. I, § 8, Cl. 3, that defines the duties of the Interior Department (and the duties of the Treasury Department to the extent that Department may be involved) when it carries out statutorily-assigned functions relating to property held in trust for tribes. As this Court has stressed, "Congress possesses plenary power over Indian affairs." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This plenary power extends fully to Indian monies, limited only by constitutional protections for recognized property interests. See *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977). Particularly where Congress has legislated comprehensively to address an issue, as it has done in the statutory provisions governing disclosure of government information and authorizing the Interior Department to issue regulation for that purpose, any latitude that courts might otherwise have had to craft common-law rules of decision is eliminated. Cf. *City of Milwaukee* v. *Illinois*, 451 U.S.

304, 315 n.8 (1981) ("the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law"); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)(when an act "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless").

3. Requiring disclosure of attorney-client privileged communications, especially in light of the government's potentially competing obligations, would chill the rendering of critical legal advice

Along with the Secretary's 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 a tribe's envisioned management of tribal trust assets. The fact that the United States, as a sovereign, must often represent varied interests in managing property rights does not eliminate its ability to protect the interests of Indians. See *Arizona* v. *California*, 460 U.S. 605, 626-627 (1983). Yet, in managing such potentially competing obligations, the Secretary must, 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 Secretary's multiple responsibilities, implemented by various bureaus and offices within the Interior Department, heightens the need for agency officials to receive candid and confidential legal advice. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 391 (1981).

The Secretary's various duties are materially different from the duty of a private fiduciary at common law. In the event of a conflicting interest, a common-law trustee owes complete allegiance to the beneficiary. See Restatement (Third) of Trusts § 178; Restatement (Second) of Trusts § 170(1), at 364; Bogert § 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. 1993) (fiduciary's duty of loyalty is "to administer the trust *solely* in the interest of the beneficiaries") (emphasis added). But as the Court observed in *Nevada*, the government "cannot follow the fastidious standards of a private fiduciary" in the Indian law setting. 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." Pet. 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."); cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."). Indeed, the Tribe itself argues (Br. in Opp. 14 n.2) that the same result should obtain regardless of whether a specific competing interest is at issue.

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. Pet. 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*, 449 U.S. at 393. 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. 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 no privilege at all." *Ibid.*; 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"). Indeed, determining whether any competing obligation affects a particular trust-related action may be the very point of the attorney-client communication.

* * * * *

The Federal Circuit's decision, which abrogates the government's attorney-client privilege in the administration of laws affecting Indian property 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, with the Court's precedents holding that the government's duties in this context are based on statutes and regulations not the common law, or with the established understanding of the role of government lawyers representing only the United States in Indian affairs. Reversal of that decision is needed to avoid undermining the ability of agency personnel to solicit, and government attorneys to provide, legal ad-

vice in the performance of their respective duties on behalf of the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2011

APPENDIX

1. 25 U.S.C. 162a provides, in pertinent part:

Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

* * * * *

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

2. 25 U.S.C. 4011 provides:

Responsibility of Secretary to account for the daily and annual balances of Indian trust funds

(a) Requirement to account

The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

(b) Periodic statement of performance

Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) Annual audit

The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title, and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit.

3. 25 C.F.R. 15.502 provides:

Who owns the records associated with this part?

(a) The United States owns the records associated with this part if:

(1) They are evidence of the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part; and

(2) They are either:

(i) Made by or on behalf of the United States; or

(ii) Made or received by a tribe or tribal organization in the conduct of a Federal trust function under this part, including the operation of a trust program under Pub. L. 93-638, as amended, and as codified at 25 U.S.C. 450 *et seq*.

(b) The tribe owns the records associated with this part if they:

(1) Are not covered by paragraph (a) of this section; and

(2) Are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part.

4. 25 C.F.R. 115.1000(a) provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program pursuant to 25 U.S.C. 450f *et seq.*; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

5. 25 C.F.R 162.111 provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under 25 U.S.C. § 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

6. 25 C.F.R. 166.1000 provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under 25 U.S.C. § 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.