United States v. Jicarilla Apache Nation: The Executive Branch's Latest Effort to Repudiate Federal Trust Duties to Indians

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Photo: Petroglyph, Crow Canyon, New Mexico. By Lawrence R. Baca.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation.
– President Richard Nixon, Special Message to Congress on Indian Affairs (1970).

Federal officials often speak publicly about respect for their fiduciary relationship with Indians.[1] However, when called to account for failing to fulfill those trust duties, the executive branch often seeks to avoid responsibility.[2] For example, in 2007, when Congress sought to settle the long-running *Cobell* litigation concerning individual Indian trust accounts, the executive branch proposed to settle those claims if legislation also eliminated future tribal trust management liability claims. *Oversight Hearing on Indian Trust Fund Litigation*, S. Hrg. Rep. No. 110-71 at 176–78 (March 29, 2007) (letter by the U.S. Secretary of the Interior and the U.S. Attorney General with enclosure). Congress did not adopt that proposal, *see id.* at 3 (opening statement by Senator Dorgan), but the executive branch now seeks to accomplish some of the same result through a decision by the U.S. Supreme Court.

In the context of an assertion of the fiduciary exception to the attorney-client privilege in the pending Supreme Court case of *United States v. Jicarilla Apache Nation*, No. 10-382, the executive branch asserts that there are no enforceable federal trust duties to Indians beyond those expressly stated in statutes and regulations. The executive branch makes this assertion for funds that statutes expressly provide are "held in trust" by the United States as "trustee of various Indian tribes" and managed in "the best interest of the Indians" and in spite of two centuries of history, congressional policy, governing Supreme Court decisions, and the implicitly contrary public statements made by executive branch officials. This article reviews how these issues came to be before the U.S. Supreme Court and examines the arguments presented thus far in this case.

Historical, Statutory, and Litigation Background

Federal management of Indian trust assets is deeply rooted in U.S. history. In general, the federal-tribal trust relationship arose from treaties and agreements under which Indians "surrendered claims to vast tracts of land" and the United States undertook "solemn obligations" that "continue[] to carry immense moral and legal force."[3] The federal government thus began adopting policies on tribal trust funds in the early 1800s. *See, e.g.*, Misplaced Trust, *supra* note 2, at 6 (citing 1820 policy); Act of June 14, 1836, 4 Stat. 36 (rates of return); Act of Jan. 9, 1837, 5 Stat. 135 (interest on land proceeds). In 1880, Congress authorized the secretary of the interior, "as … trustee of various Indian tribes," to deposit in the U.S. Treasury and to pay interest on sums and securities "belonging to the Indian trust fund" when that is in "the best interests of the Indians[.]" 25 U.S.C. § 161. In 1938, Congress authorized the Department of the Interior (DOI) to deposit with banks or invest in public or private guaranteed obligations "funds of any Indian tribe … held in trust by the United States," depending on "the best interest of the Indians[.]" *Id.* § 162a(a). Through this history and various laws, the United States has come to manage 56 million acres of lands and billions of dollars in tribal assets, collecting hundreds of millions of dollars annually on behalf of tribes from leases as well as from royalties paid for timber and mineral found on those lands. *Jicarilla Apache Nation v. United States* (*Jicarilla III*), 88 Fed. Cl. 1, 5 (2009) (citing authorities), *aff'd sub nom. In re United States*, 590 F.3d 1305 (Fed. Cir. 2009), *cert. granted*, 131 S. Ct. 856 (2011).

"Scores of reports over the years by the Interior Department's inspector general, the U.S. Government Accountability Office, the Office of Management and Budget, and others have documented significant, habitual problems in [the U.S. Bureau of Indian Affairs'] ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the [Indian] trust funds." Misplaced Trust, *supra* note 2 at 2. In particular, after several years of oversight hearings culminating in the *Misplaced Trust* report, Congress enacted the 1994 Indian Trust Fund Management Reform Act, Pub. L. 103-412, 108 Stat. 4240 (codified at 25 U.S.C. §§ 161a(b),

162a(d), 4001–4061). Among other things, that act provides that "proper discharge of the trust responsibilities of the United States shall include (but are not limited to)" eight specific enumerated matters: natural resource management; trust fund accounting and reporting systems; receipt and disbursement controls; preparation and provision of information for account holders; and management policies, procedures, staffing, supervision, and training. 25 U.S.C. § 162a(d).

In 2002, the Jicarilla Apache Nation—like many other tribes before and since—sued the United States in the U.S. Court of Federal Claims for damages arising from breaches of fiduciary duties concerning its trust funds and other assets. *Jicarilla III*, 88 Fed. Cl. at 3. Per the agreement by the parties, the case was divided into phases—the first of which concerns only certain trust accounts from 1972 to 1992—and the parties participated in alternative dispute resolution (ADR) proceedings from 2002 to 2008. During the ADR proceedings, the United States produced many thousands of documents but withheld a large number based on various privilege claims.[4] Pursuant to a joint motion by the parties, the trial court also entered an ADR Confidentiality Agreement and Protective Order (CAPO), which authorized the parties to produce documents to each other within the ADR proceedings in addition to or in lieu of preparing privilege logs and redacting documents, with all privilege claims preserved and not waived. ADR CAPO, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. April 4, 2005) (Dkt. No. 100). In 2008, the case was restored to the court's active docket, further discovery ensued, and the Jicarilla Apache Nation moved to compel production of the documents that had been withheld. *Jicarilla III*, 88 Fed. Cl. at 3–4.

In July 2009, following an in camera review, the trial court ordered the production of 67 documents based solely on the fiduciary exception to the attorney-client privilege. *See id*. at 22–35 (table of documents with rulings); *cf. id*. at 15 n.19 (also noting waiver for five additional documents). Among other things, the trial court noted that three prior federal court decisions from 2002 and 2005 had held that the fiduciary exception applies in Indian trust cases, and that these decisions "discredit many of the apparently well-rehearsed arguments that defendant raises here." *Id*. at 11 (citing decisions). The documents ordered to be produced all directly or indirectly implicated the Jicarilla Apache Nation's trust funds and included three memoranda to the Department of Treasury dealing with tribal trust fund investments and guarantees and 64 documents containing requests for or provision of advice between the DOI and its Solicitor's Office on tribal trust fund investments, duties, procedures, pooling, and other administration practices. *Id*. at 13–19, 22–35.

Rather than obtain a certificate of appealability and file an interlocutory appeal under 28 U.S.C. §§ 1292(b)–(c) (perhaps because the published trial court decision made such a certificate unlikely), the United States petitioned the U.S. Court of Appeals for the Federal Circuit for a writ of mandamus to vacate the trial court's production order. The Federal Circuit initially issued a temporary stay but ultimately denied the petition and lifted the stay in December 2009. In its analysis, the Federal Circuit first noted that privileges are interpreted on a case-by-case basis according to "principles of the common law" per Federal Rule of Evidence 501. The Federal Circuit observed that the common-law fiduciary exception to the attorney-client privilege is well established, dating back to 1855, and has been recognized by at least five federal circuit courts, as well as in the three prior Indian trust cases noted by the trial court here. Also, courts have based the fiduciary exception on two justifications: "First, the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary. … Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary." *See, generally, In re United States*, 590 F.3d at 1309–13, 1317.

With this background in mind, the Federal Circuit held as follows:

> The United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception. Therefore, we hold that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege 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. … Accordingly, we adopt the fiduciary exception in tribal trust cases.

Id. at 1313.

In explaining this holding, the Federal Circuit found that both general justifications for the fiduciary exception support its application here. First, Indian tribes are the "real client" of federal legal advice sought about tribal trust fund management. This characterization applies unless the United States is considering an actual specific competing interest to balance fiduciary duties with other statutory duties, which the United States was not doing for the trust funds at issue. Moreover, even though federal attorneys are paid from congressional appropriations, the United States itself imposed this trust on Indian tribes, and applying the fiduciary exception here would not impair the DOI's ability to obtain confidential legal advice. Second, the United States has a fiduciary duty to disclose trust management information to Indian tribes, including legal advice about trust management. Although the United States asserted that it was required to provide only specific types of information to Indian tribes, the Federal Circuit found that "the United States' arguments in this regard are completely without merit." *See generally id*. at 1313–17. The Federal Circuit subsequently denied en banc review without comment.

Following the Federal Circuit panel's decision, the trial court again ordered production of the documents, and the United States moved for an indefinite further stay pending potential appellate proceedings, but the trial court denied the motion. Among other things, the trial court noted that

not a single case supported the federal government's view that its relationship with Indian tribes precluded application of the fiduciary exception and that the traditional rationales for that exception "fit the circumstances of this case like a glove." The trial court also noted that the potential injury from production of the disputed documents was "remote" because there already was a CAPO for all document production in the case. Also, the trial court could easily preclude waiving any privilege pursuant to the recently enacted Federal Rule of Evidence 502. Moreover, the United States' failure to resist fiduciary exception production orders in prior Indian trust cases gave its claims of potential harm from disclosure here a "hollow ring." *Jicarilla Apache Nation v. United States (Jicarilla IV)*, 91 Fed. Cl. at 492–494.

The United States then moved unopposed and the trial court entered an order pending final review of the Federal Circuit's ruling providing for production of all fiduciary exception documents in the case per Rule 502(d), so that such production would not waive privilege in the case or any other federal or state proceeding. Protective Order, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. filed Feb. 19, 2010) (Dkt. No. 239). The trial court subsequently entered and published an additional, stipulated protective order for the duration of the case, providing for production of more than a million images of documents from the American Indian Records Repository (in Lenexa, Kansas) not at issue in the prior privilege ruling, with nonwaiver of attorney-client privilege and work product protection for all those documents per Rule 502(d). *Jicarilla Apache Nation v. United States (Jicarilla V)*, 93 Fed. Cl. 219 (2010).

Arguments Thus Far in *United States v. Jicarilla Apache Nation*

The question presented in the executive branch's certiorari petition for this case is "[w]hether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of trust statutes pertaining to property held in trust for the tribe." Certiorari was granted in January 2001. The opening brief on the merits was due in late February 2011, the response brief and supporting amici briefs (including one planned by the Federal Bar Association's Indian Law Section) are due in late March 2011, and oral argument has been scheduled for April 20, 2011. Because this article has been prepared in advance of the briefs on the merits, the executive branch arguments that are discussed in this article are based on those stated in its certiorari briefs.

Regarding mandamus, the executive branch asserts that compliance with the production order in light of the subsequent, unpublished protective order does not affect the Supreme Court's review, and that this case warrants immediate review because it presents an important issue of law with significant adverse consequences. On the merits, the executive branch argues that the Federal Circuit's ruling abrogates the government's attorney-client privilege in matters concerning Indian property and cannot be squared with Supreme Court precedents or "the Executive Branch's established understanding of the role of its attorneys." For this, the executive branch asserts that the government is the only "real client" of government attorneys, and the government does not have a common-law duty to disclose attorney-client privileged communications to Indian tribes. The executive branch also asserts that the Federal Circuit's decision affects more than 90 pending cases seeking billions of dollars from the government and will chill consultation on tribal trust issues. *See, generally,* Petition for Writ of Certiorari, *United States v. Jicarilla Apache Nation*, No. 10-382 (Sept. 20, 2010) (Petition); Reply Brief for the United States, *United States v. Jicarilla Apache Nation*, No. 10-382 (Dec. 12, 2010) (Reply).

Mandamus and Federal Rule of Evidence 502

As suggested by the arguments above, one must consider the mandamus posture of this case before addressing the merits of the fiduciary exception. "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation" of the "extraordinary remedy of mandamus." *Cheney v. U.S. Dist. Ct.,* 542 U.S. 367, 380 (2004) (citations and quotations omitted). For this, three conditions must be satisfied:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and undisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 380–81 (citations, quotations, and brackets omitted).

In light of the above, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege" absent "a particularly injurious or novel privilege ruling." *Mohawk Indus., Inc. v. Carpenter* (*Mohawk*), 130 S. Ct. 599, 606, 607 (2009). For example, interlocutory appellate review is unavailable through mandamus or otherwise for discovery orders absent overly broad and burdensome discovery requests that disrupt the functioning of the executive branch at its highest level seeking to protect constitutional prerogatives. *See Cheney,* 542 U.S. at 381–89. Also, because issuance of the writ is vested in the discretion of the court to which the original writ petition is made, *id.* at 391, the Supreme Court will issue the writ of mandamus directly to a trial court "'only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken.'" *Hollingsworth v. Perry*, 130 S. Ct. 705, 710 (2010) (citation omitted) (concerning Internet broadcast of a high-profile trial).

In this case, it is unclear how the executive branch can credibly assert that the Federal Circuit's ruling on

privilege is particularly injurious or that it has no other adequate means to attain the relief it desires, given that Federal Rule of Evidence 502(d) expressly provides the following: "A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding." Consistent with that rule, more than three years before ADR efforts ended and the Jicarilla Apache Nation moved to compel in this case, the parties jointly moved for, and the trial court entered, an ADR CAPO that expressly provided for the parties to produce documents without privilege review and preserved privilege claims. ADR CAPO, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. April 4, 2005) (Dkt. No. 100). Moreover, after the fiduciary exception rulings, the trial court specifically noted that "[i]f defendant truly is concerned that the production here would occasion a waiver of the privilege in other cases, it can easily remedy that matter by formally seeking relief under this rule. But, to date, it has skirted this issue." *Jicarilla IV*, 91 Fed. Cl. at 494. And since that ruling, the executive branch has twice sought relief under Rule 502 in this case (once unopposed and once stipulated), and the trial court has entered those proposed orders, one of which will apply for the duration of the case regardless of this appeal and concerns over a million pages of documents that are not subject to the pending appeal. *Jicarilla V*, 93 Fed. Cl. at 219–20. Thus, the executive branch already has availed itself of adequate means to attain the desired relief of preserving privilege claims as stated in the question presented three times in this case.

Furthermore, there appears to be no novel privilege ruling here, because the fiduciary exception is very well established at common law and among numerous federal appellate courts, and this case presents the fourth time in nine years that federal courts have applied the fiduciary exception to an Indian trust case. *See In re United States*, 590 F.3d at 1310–13 (discussing prior cases). Indeed, the executive branch's lack of resistance to fiduciary exception production orders in two of the prior Indian trust cases "give[s] its claims of dire circumstances here a somewhat hollow ring." *Jicarilla IV*, 91 Fed. Cl. at 494. In addition, there is and could be no allegation of overly broad discovery requests here, because all the disputed documents concern Indian trust fund management and implicate management of the Jicarilla Apache Nation's trust funds. *See Jicarilla III*, 88 Fed. Cl. at 13–19. Also, the stated concern that application of the fiduciary exception "would seriously undermine the ability of government decision-makers, including the Secretary [of the Interior], to solicit such [legal] advice[,]" Pet. at 10, is logically unfounded because "the basic concern could be stated by any trustee." *In re United States*, 590 F.3d at 1316. Instead, a legitimate concern might be related to "the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege … have become prohibitive[,]" Fed. R. Evid. 502 explanatory note, but that is one of the two specific reasons why Congress enacted Rule 502, and so can be and has been "easily" addressed by the three Rule 502 orders already entered in this case. In sum, without reaching the merits of the privilege issue, consideration of Rule 502 alone may warrant summary affirmance or dismissal of certiorari, as the Supreme Court has done in some prior Indian law cases.[5] Of course, it remains to be seen how the parties and the Supreme Court will ultimately address this issue.

The Fiduciary "Exception" and Federal Rule of Evidence 501

Assuming that the merits of the fiduciary exception issue are reached, the analysis should begin with Federal Rule of Evidence 501. Unlike all other federal court rules that are prescribed through rulemaking under 28 U.S.C. §§ 2072, 2073, 2074(a), "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *Id.* § 2074(b). Only two such congressionally enacted rules exist, Rules 501 and 502. Rule 502 is addressed above, and Rule 501 provides in relevant part as follows: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Pub. L. 93-595, § 1, 88 Stat. 1933 (1975) (codified at Fed. R. Evid. 501). Therefore, because there are no contrary governing constitutional provisions, statutes, or rules here, Congress requires the application of the fiduciary exception to be governed by common-law principles.

For this, the executive branch does not dispute the general existence of a common-law fiduciary exception to the common-law attorney-client privilege, which dates to 1855 and "has been applied in a panoply of fiduciary settings, including cases involving shareholders, bank depositors, and union members," *Jicarilla III*, 88 Fed. Cl. at 11, as well as other fiduciary relationships, such as those under the Employee Retirement Income Security Act, *In re United States*, 590 F.3d at 1311 (citing cases). The executive branch also does not dispute the two general rationales for the fiduciary exception—namely, "the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary" and "the fiduciary has a duty to disclose all information related to trust management to the beneficiary." *Id.* at 1312 (citing authorities). Instead, the dispute here is whether those rationales and hence the exception apply when the federal government acts as a trustee over tribal trust funds.

The possible application of these rationales to the federal-tribal trust context is discussed further below. However, four points on common-law application of the attorney-client privilege under Rule 501 warrant initial discussion. First, the executive branch argues that common-law trust principles do not generally apply to the United States when it acts as trustee over tribal assets and that there can be no requirement here to disclose government legal communications to Indian tribes given the lack of a specific statute or regulation requiring such disclosure. Pet. at

21–25. Yet that position overlooks the express congressional mandate enacted in Rule 501 that "the privilege of a … government … shall be governed by the principles of the common law[.]" Under that statute, the executive branch is entitled to an evidentiary privilege only if that is mandated by common law, and any such privilege is subject to all the limits provided for at common law.

Second, wheras the executive branch characterizes the rulings below as "abrogating" the attorney-client privilege, Pet. at 7, 10; Reply at 1, the common law recognizes that "the fiduciary exception is not an 'exception' to the attorney-client privilege at all." *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). "Rather, it merely reflects the fact that," for trust administration advice, a trustee "never enjoyed the privilege in the first place" against the beneficiary. *Id.*; *Osage Nation v. United States*, 66 Fed. Cl. 244, 248 (2005) (quoting same). In this sense, the fiduciary "exception" is like the joint client or community of interest doctrine, which provides that "[w]hen the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege." *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (concerning patent attorneys). Under that doctrine, as under the fiduciary exception, "communications between a client and the attorney may be privileged as to outsiders, [but] they are not privileged *inter sese*[,]" that is, between or among those with a common legal interest.[6] Thus, the inherent doctrinal scope of the attorney-client privilege at common law must be considered as such.

Third, because the attorney-client privilege interferes with "'the truth seeking mission of the legal process,'" it must be narrowly construed. *Under Seal*, 415 F.3d at 338 (citation omitted); *Evans*, 113 F.3d at 1487; *see Wachtel*, 482 F.3d at 231 (quoting Wigmore). Also, the privilege should be recognized "'only to the very limited extent that … excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Under Seal*, 415 F.3d at 338 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Consequently, the burden of proving application of the attorney-client privilege lies with those asserting it. *Under Seal*, 415 F.3d at 338–39; *United States v. Legal Servs. for N.Y.C.* (*Legal Services*), 249 F.3d 1077, 1081 (D.C. Cir. 2001); *Evans*, 113 F.3d at 1487. In addition, that burden requires proving all its essential elements, *Evans*, 113 F.3d at 1487, and showing that the privilege applies to each communication for which it is asserted, *Legal Services*, 249 F.3d at 1082.

Finally, analysis of the attorney-client privilege must keep in mind the well-established policy behind it of encouraging "'full and frank'" disclosures to attorneys and "candid advice and effective representation" in furtherance of "'broader public interests in the observance of law and administration of justice.'" *Mohawk*, 130 S. Ct. at 606 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Thus, the privilege "applies only where necessary to achieve its purpose[,]" *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "[w]here this purpose ends, so too does the protection of the privilege." *Wacthel*, 482 F.3d. at 231. The question here therefore is whether the executive branch has met its burden of proving as a categorical matter that providing Indian tribes with legal communications related to the government's trust fund management is never consistent with the purpose of the attorney-client privilege or effective representation for trust fund administration.

The "Real Clients" and the Government's Duty of Loyalty

Considering the first rationale for applying the fiduciary exception, the executive branch asserts that Indian tribes cannot constitute the "real clients" of government attorneys to whom they owe a duty of loyalty, because the executive branch undertakes Indian trust asset management as "a distinctly sovereign function[,]" per *Nevada v. United States*, 463 U.S. 110 (1983), *United States v. Candelaria*, 271 U.S. 432 (1926), *United States v. Minnesota*, 270 U.S. 181 (1926), and *Heckman v. United States*, 224 U.S. 413 (1912). In addition, the executive branch claims that its attorneys are paid from the government's own funds rather than from a trust corpus, and that trust management records belong to the United States. The executive branch also asserts that "the government balances a host of statutory and other sovereign obligations when managing trust funds[,]" including obligations regarding public lands, endangered species, and other natural resources. Pet. at 27, 29. As discussed below, none of these claims appear to support the weight placed on them.

First, *Nevada* recognizes that "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Nevada*, 463 U.S. at 128; *see id.* at 135 n.15. Instead, in such situations, federal "'actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.'"[7] Moreover, any such "claimed conflict of interest" must be "actual" to affect the performance of federal trust duties. *Arizona v. California*, 460 U.S. 605, 628 (1983). Moreover, if the government violates its tribal trust duties, such as regarding the water rights at issue in *Nevada*, the tribe can pursue a claim against the government. *Nevada*, 463 U.S. at 144 n.16; *see id.* at 135 n.14 (noting an $8 million award). Also, *Nevada* recognizes that "where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Id.* at 142.

The last point made in *Nevada* aptly describes the situation here, where the only matter at issue is federal management of funds owned, held, and managed exclusively in trust for Indian tribes, such that the executive branch is effectively just acting as a bank. Given this, the bald assertion that the executive branch must contend with a "host" of other potential conflicting mandates—such as those involving public lands and endangered species—has

no basis whatsoever in law or in fact. Instead, the Federal Circuit aptly concluded that this phase of the case only concerns funds and "the government does not argue … that it in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here[,]" so "'potential privilege claims for unspecified documents regarding other types of trust assets based on other statutory regimes are beyond the scope of the petition.'" *In re United States*, 590 F.3d at 1315 (citation omitted). Also, even if there were some other statutory duties considered, "privileged communication on *non*-fiduciary matters does not defeat the fiduciary exception … on fiduciary matters." *In re Long Island Lighting Co.*, 129 F.3d 268, (2nd Cir. 1997).

Second, the sovereign nature of the federal trust relationship with Indians augments rather than limits trust duties. *Candelaria* upheld a federal quiet title suit on behalf of an Indian tribe despite two prior title decrees involving the tribe because of "'the governmental rights of the United States arising from its obligation to a dependent people. …'" 271 U.S. at 437–38, 443–44 (citation omitted). Similarly, *Minnesota* upheld a federal suit to protect the interest of Indians even though the 11th Amendment prevented them from doing so, because the United States had a "sovereign" interest to fulfill its obligations as guardian over Indians. 270 U.S. at 192, 194–95. In addition, consistent with President Nixon's comment almost 60 years later, *see supra* text accompanying note 3—*Heckman* recognized that "[o]ut of the peculiar relation to these dependent people sprang obligations to the fulfillment of which the national honor has been committed." *Heckman*, 224 U.S. at 437. Thus, protection of Indian interests is a "national interest" that is not "limited to … the holding of a technical title of trust." *Id.*

Third, given the above and the historical fact that the United States imposed the trust relationship on Indians through treaties and statutes, the federal payment for Indian trust fund legal advice cannot preclude trust duties. S*ee In re United States*, 590 F.3d at 1315; *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975). Also, those duties necessarily arose from federal dispossession of aboriginal Indian lands. *Washington*, 443 U.S. at 680; *Mancari*, 417 U.S. at 552; *Heckman*, 224 U.S. at 437; *Cherokee Nation*, 30 U.S. at 48. Thus, the executive branch's current view of its trust duties to Indians as somehow an annual appropriation gratuity contravenes the actual history recognized by the judicial branch and the executive branch. *See id.*; Nixon Message, *supra* note 3, at 565 (recognizing that the trust responsibility is not a unilateral "act of generosity"). Indian tribes fully paid in advance for the permanent performance of federal trust duties regarding reserved and resulting trust assets, which now may only be terminated by Congress pursuant to its constitutional authority.

Finally, the fact of government ownership of records cannot preclude application of the fiduciary exception, since entire chapters of DOI's departmental manual are devoted to principles for carrying out its trust responsibility in managing Indian trust assets and to "identify[ing], manag[ing], protect[ing], and control[ing] Indian fiduciary trust records." 303 *Dep't of Interior Manual*, chapters 2, 6. Also, other trustees may own the records in other circumstances where the fiduciary exception applies. *See, e.g., In re United States*, 590 F.3d at 1311 (noting exception application to corporations, banks, unions, and ERISA plan administrators); *Jicarilla III*, 88 Fed. Cl. at 11 & n.13 (corporations, banks, and unions). The example of a bank is most useful, since that is essentially how Congress has directed the DOI to manage Indian trust funds since 1880, under 25 U.S.C. § 161. Even though banks have their own account management records, banks nonetheless act in a fiduciary capacity and are subject to the fiduciary exception where they act as trustees.

In sum, absent a specific conflicting statutory duty such as for water rights in *Nevada*, it is well-established that the executive branch has a duty of loyalty regarding Indian trust asset management. *See Navajo Tribe v. United States*, 364 F.2d 320, 324 (Ct. Cl. 1966) (en banc). That duty certainly applies to trust fund management, for which the executive branch did not assert any actual conflicts below, and for which the executive branch does not establish any actual conflicts here. The duty of loyalty thus supports application of the fiduciary exception here.

The Executive Branch's Views of the Role of Its Attorneys

The executive branch also asserts that Indian beneficiaries cannot be clients of the federal government because its attorneys exclusively represent the federal government under the executive branch's long-standing understanding of the role of its attorneys. Pet. at 14–17. This asserted "long-standing position" that Indians are not the government's clients is essentially bootstrapping, unsupported by the specific policy letter on which it relies, and ignores the actual relevant history before and after that letter. The executive branch's asserted position on this comes from a statement in a 1979 letter from the attorney general to the secretary of the interior that "the Attorney General is attorney for the United States in these cases, not a particular tribe." *See* Letter from Griffin B. Bell, Attorney General, to Ceil D. Andrus, Secretary of the Interior 3 (May 31, 1979) ("Bell Letter"). But that statement was made to emphasize that the attorney general "is not obligated 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. …" *Id.* That point is uncontroversial because, absent an adjudicated repudiation or breach of a trust relationship, no trustee could be compelled to take a litigation position merely espoused by a beneficiary. *Cf. Shoshone Indian Tribe*, 364 F.3d at 1348. The statement relied on by the executive branch also is irrelevant to the issues before the Supreme Court because it concerns litigation, and the trial court here ruled that there is no fiduciary exception to the work-production doctrine, *Jicarilla III*, 88 Fed. Cl. at 12, and that issue has not been pursued in the appellate courts.

Moreover, the 1979 Bell Letter undermines several arguments made by the executive branch in this case addressed

above. For example, the letter recognizes that "[t]he Executive Branch and the Judicial Branch have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures." Bell Letter, at 2. Also, when the executive branch brings a case to protect Indian property rights, it "vindicates *not only* the property interest of the tribe or individual Indian, … *but also* the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective." *Id.* (emphases added). Thus, "[t]here is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people of the Nation," because "the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian properties rights recognized … by a coordinate branch." *Id.* at 2–3. Indeed, the people as a whole already have long benefited from "surrendered claims to vast tracts of land[.]" Nixon Message, *supra* note 3, at 565. Finally, even when other statutory obligations are imposed in a case aside from those affecting Indians, the executive branch must take into account the firmly established rule of construction favoring the "special relationship and special responsibilities of the government toward the Indians." Bell Letter, *supra*, at 3–4.

Furthermore, both before and after the 1979 Bell Letter, the executive branch has recognized that Indians are the real clients of federal attorneys regarding Indian trust asset management and minimized conflicts regarding Indian trust resources, which supports application of the fiduciary exception for trust fund management, where there are no cognizable conflicts of interest. In 1970, President Nixon issued a Special Message to Congress on Indian Affairs. Nixon Message, *supra* note 3 at 565. Among other things, President Nixon recognized that the federal government acts "as a legal trustee … for American Indians" and that the executive branch has difficulty fulfilling that high duty as stated in the epigraph at the outset here regarding land and water rights because of "an inherent conflict of interest" of the sort addressed 13 years later in *Nevada*. *Id.* at 573. President Nixon proposed the legislative establishment of an Indian Trust Counsel Authority to address these concerns. *Id.* at 573–74; Richard Nixon, *Recommendations for Indian Policy*, H.R. Doc. No. 91-363, at 9–10 (1970). Notably, President Nixon did not recognize any conflicts of interest regarding Indian trust fund management.

Legislation was considered to address the concern about natural resources held in trust, for example, S. 2035 (1971); S. 1012 (1973); S. 1339 (1973), but was not enacted. The executive branch in the early 1970s therefore sought to address this concern even without legislation by filing what became known as "split briefs," wherein the DOI argued its position in a case on behalf of Indians separate from the Justice Department's view against Indians six times and won each time.[8] However, the 1979 Bell Letter confirmed the end of this practice, so that there would be "a single position of the United States" in Indian trust resource litigation. Bell Letter, *supra*, at 4. Congress continued to consider legislation to enact President Nixon's proposal—*see, e.g.,* S. 2451 (1990)—but no such legislation was enacted, perhaps because the executive branch viewed the proposal as a means by which it "would simply be relieved of any trust responsibility[.]" 1990 Hearing Report, *supra* note 8, at 10 (statement by Sen. McCain); *see* Hearings on S. 2035, a Bill to Provide for Creation of the Indian Trust Counsel Authority, 92nd Cong., 1st Sess., (Nov. 22-23, 1971), at 12 (Deputy Attorney General letter). In the end, the executive branch shared the goal "to ensure that every policy decision of the Interior and other Federal agencies and bureaus with an impact on the trust obligation of this Government has fully measured that decision in respect to carrying out its trust obligation[,]" but the executive branch specifically opposed the legislation as "not … necessary to accomplish this goal[,]" and instead explored "accomplishing and institutionalizing this goal" within the DOI. *Id.* at 11, 12, 65 (testimony by the assistant secretary for Indian affairs). In light of all this, the 1979 letter from the attorney general is unremarkable and supports applying the fiduciary exception here, consistent with prior and subsequent views of the executive branch.

Potential Conflicts in and Chilling Effects of the Disputed Documents

Apart from the above, the executive branch makes several more empirical and policy arguments. For example, the executive branch asserts that one of the documents at issue here—which remains subject to a ban against being paraphrased, quoted, or filed per the governing order under Rule 502—is evidence of an actual conflict of interest. Pet. at 29. In addition, according to the executive branch, disclosure in this case "upends settled expectations regarding the professional responsibilities of government attorneys[,]" chills attorney-client communications, and "significantly disrupt[s] the day-to-day administration of statutes affecting tribal trust resources—to the detriment of both the United States and Indians." *Id.* at 10, 30–33.

The asserted conflict in one document regarding whether to enforce a tribal court judgment against a tribal member in favor of a tribe is illusory, since such judgment enforcement involves no conflict and even prior representation of a tribal member in litigation has not precluded the executive branch from later siding with a tribe in the same case. *See* 1989 Hearing Report, *supra* note 8, at 459–60 (discussing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976)). In turn, the assertions of chilling and disruptive effects of producing disputed documents seem to suggest the executive branch's apparent underlying motivation for withholding documents. In particular, the executive branch maintains that documents should be privileged because they "could be used against the government," Pet. at 31, or "may … increase the government's exposure in these cases." Reply at 6. Yet those assertions would impermissibly make any evidence favorable to an Indian tribe privileged, contrary to the established scope of discovery, which includes "any nonprivileged matter that is relevant to any party's claim or defense" under Federal Rule of Civil Procedure 26(b)(1) and its analog in the Rules of the Court of Federal Claims. Also, the only relevant settled profes-

sional responsibility of government attorneys that could be upended here is that they have enforceable Indian trust fund management duties beyond the express terms of statutes and regulations. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Navajo Tribe v. United States*, 624 F.2d 981, 987-88 (Ct. Cl. 1980); *Cheyenne-Arapaho Tribes*, 512 F.2d at 1392, 1394, 1396.

Moreover, of the 67 documents that were ordered to be produced by the trial court solely based on the fiduciary exception, at least 17 were already in tribes' possession, thereby waiving any otherwise applicable privilege absent production pursuant to the ADR CAPO in the case. *See Jicarilla III*, 88 Fed. Cl. at 15 n.19 (noting waiver for five additional documents). All but two of those documents were produced pursuant to the CAPO in the case rather than the ADR CAPO (that is, without any privilege reservation) and so cannot have any ongoing claim of privilege. Five of the documents also were publicly filed as trial or summary judgment exhibits in *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390 (Ct. Cl. 1975) and all are expressly so labeled (Docs. 42, 55, 70, 72) except for one that is a formal numbered M-opinion (Doc. 65); therefore, those documents could not be privileged in any circumstance. Two additional documents produced without privilege preservation were duplicates of documents that were independently found in tribal repositories (Docs. 9, 16, and 44), presumably from having been disclosed well in advance of the litigation. Finally, two additional documents produced without privilege preservation and one document produced with privilege preservation are duplicates of documents either found in National Archives facilities by a tribal historian or obtained from a third party (Docs. 38–39, 189), and so also could have no privilege applied. *See See Jicarilla III*, 88 Fed. Cl. at 18 (noting no privilege for additional "publicly available" archived document).

Apart from waiver, review of all the previously produced documents sheds light on the nature of a quarter of the documents that are in dispute in the absence of the executive branch providing the required document-specific privilege review. For example, one document opposes allowing tribal trust funds to be managed by private fiduciaries. Several documents discuss the use of public-debt securities. Other documents discuss the use of a broker, classification of receipts, trust fund duties, collateral pledges, pooling, interest ownership, IRS levies, fund disposition, use of independent judgment, self-determination contracting, and application of *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983). Nothing in any of these documents evidences any conflict of interest or any information that the executive branch should be worried about Indian tribes possessing, much less anything that would disrupt trust fund administration to the detriment of Indian tribes in any way. To the contrary, these documents contain information the United States should want tribes to have, because the documents demonstrate contemporaneous regard by federal officials for their fiduciary duties. Moreover, these documents—like Interior's departmental manual and governing court decisions—contradict the executive branch's current litigating position that it is only subject to duties expressly stated in statutes and regulations. Accordingly, an actual review of disputed documents consistent with the recognized importance of in camera review for resolving privilege claims, *see Jicarilla III*, 88 Fed. Cl. at 4 n.2 (citing Supreme Court decisions) reveals no conflict of interest or disruptive or chilling reasons why any documents should be withheld.

In sum, significant issues have been presented regarding whether the executive branch will be able to meet its burden of showing that Indian tribes are not the "the real client" or a "co-client" of federal attorneys in cases involving trust fund management, so that the executive branch does not have a duty of loyalty to them. Congress has expressly authorized the executive branch to hold funds in "trust" for Indian tribes and to manage them in the tribes' "best interests." Congress also has directed that application of the attorney-client privilege be determined in accordance with common law. Given this and repeated executive branch and judicial branch recognition of substantial trust duties for tribal trust fund management, it appears that only production of the disputed documents here would comport with the "'broader public interests in the observance of law and administration of justice.'" *Mohawk*, 130 S. Ct. at 606 (quoting *Upjohn*, 449 U.S. at 389) given executive branch officials' repeated public recognition of their trust relationship with Indians. Thus, it remains to be seen for whom the executive branch manages tribal trust funds if not for Indian tribes.

Application of a Common-Law Fiduciary Duty to Disclose

The final argument the executive branch makes is that it has no broad common-law trust duties to Indian tribes—including, without limitation, a duty to disclosure—except as expressly stated in statutes and regulations. As noted above, this argument may well be precluded generally by Rule 501's express invocation of the common law for determining privileges. But even if that is not sufficient to resolve this issue, it may be easily resolved under relevant Indian law decisions.

First, the executive branch devotes much of its argument to addressing case law for determining compliance with the Indian Tucker Act's jurisdictional requirements for breach of trust claims in the Court of Federal Claims. But this argument ignores that the fiduciary exception is not a statutory jurisdictional requirement for seeking damages and, instead, is a common-law doctrine required to be addressed under Rule 501 to determine privilege in any federal question case. Moreover, the executive branch seems to ignore "'the undisputed existence of a general trust relationship between the United States and the Indian people.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003) (quoting *Mitchell II*, 463 U.S. at 225 (1983)). This alone may warrant summary affirmance or dismissal of certiorari for failure to establish either the attorney-client privilege, *see Under Seal*, 415 F.3d at 338–39; *Legal Services*, 249 F.3d at 1081, or clear and undisputable entitlement to mandamus relief, *see In re Seagate Tech., Inc.*, 497 F.3d 1360, 1367 (Fed. Cir. 2007).

Even if the standard for applying the fiduciary exception were the same as for Tucker Act jurisdiction, the United States appears to misrepresent two of the most recent cases involving the Tucker Act. *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003), and *United States v. Navajo Nation* (*Navajo II*), 129 S. Ct. 1547, 1558 (2009), only reiterate the unremarkable point under *Mitchell II* that common-law trust duties do not play a role in inferring that federal duties are enforceable by damages when there is no specific statute or regulation that creates rights or imposes duties. Otherwise, enforceable trust duties apply in cases in which statutes and regulations give the federal government "'full responsibility to manage" Indian land assets "for the benefit of the Indians.'" *Id.* at 1553–54 (quoting *Mitchell II*, 463 U.S. at 224); *see Navajo I*, 537 U.S. at 503 (recognizing *Mitchell II* as "pathmarking precedent").

For example, fiduciary duties apply where statutes authorize use or disposition of Indian trust assets in "'the best interests of the Indian owner[.]'" *Navajo II*, 129 S. Ct. at 1554 (quoting 25 U.S.C. § 406(a) and citing *Mitchell II*, 463 U.S. at 219-224). Enforceable trust duties also apply when a statute "expressly defines a fiduciary relationship[.] *White Mountain*, 537 U.S. at 474. In that case, "'[a]ll of the necessary elements of a common-law trust'" are provided, *id.* at 474 n.3 (quoting *Mitchell II*, 263 U.S. at 225), so courts "must infer that Congress intended to impose on trustees traditional fiduciary duties[,]" *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981), and common-law trust duties apply, *White Mountain*, 537 U.S. at 475; *Mitchell II*, 263 U.S. at 226; *United States v. Mason*, 412 U.S. 391, 398 (1973). This includes "the most exacting fiduciary standards[,]" for tribal trust fund management, even when acting pursuant to a specific tribal council request. *Seminole Nation*, 316 U.S. at 297.

Therefore, even if Indian Tucker Act jurisdiction were required to apply the fiduciary exception, then that court jurisdiction exists here for the trust fund administration at issue. Governing statutes require that the United States hold Indian trust funds either "as … trustee of various Indian tribes" on deposit with interest in the U.S. Treasury when that is "in the best interests of the Indians," 25 U.S.C. § 161, "bearing interest[,]" 25 U.S.C. §§ 161a(a), 161b, or on deposit with banks or invested in guaranteed obligations when that is "for the best interest of the Indians," U.S.C. § 162a(a). These statutes impose enforceable fiduciary duties not limited to the express language of statutes and regulations. *See Shoshone Indian Tribe*, 364 F.3d at 1350, 1353–1354; *Short v. United States*, 50 F.3d 994, 998–99 (Fed. Cir. 1995); *Navajo Tribe*, 624 F.2d at 987-88; *Cheyenne-Arapaho Tribes*, 512 F.2d at 1393–94.

Indeed, notwithstanding the apparently settled nature of this point under *White Mountain*, *Mitchell II*, and *Seminole*, as well as the executive branch's repeated public recognitions of trust duties, *see supra* note 1, the executive branch's assertion in this case is perhaps the most relitigated and rejected argument in Indian trust cases. It has been rejected numerous times by the Supreme Court, the Federal Circuit, its predecessor, and the D.C. Circuit.[9] On this point, the trial court summed up the executive branch's position succinctly when it stated that the government "has not pointed to a single decision … adopting its position … [n]or has it cited a single case taking its view that its relationship to the tribes somehow brings it outside the well-recognized fiduciary exception. And there is good reason for silence on these counts—as there are no such cases." *Jicarilla V*, 91 Fed. Cl. at 492.

Conclusion

This article is not intended to be exhaustive; however, it provides a broad sense of the issues presented in this important pending Indian law case. After reviewing applicable statutes—including applicable Rules of Federal of Evidence—as well as relevant and governing case law, this case will present notable issues for the U.S. Supreme Court to address. The arguments to be presented by the parties and the decision to be issued by the Court should be instructive regarding both the scope of applicable privileges as well as trust duties between the United States and Indian tribes. While Congress, the judicial branch, and the executive branch previously and publicly have recognized a true, enforceable fiduciary relationship between the federal government and Indian tribes, it remains to be seen whether the executive branch's current actions in court will match its words, in accordance with the standard that the President expects his administration to be held to.[10] **TFL**

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Endnotes

[1]*See, e.g*, Remarks by the President, White House Tribal Nations Conference (Dec. 16, 2010) (characterizing recent Indian trust and water rights settlements as "a

reminder of the importance of not glossing over the past … , even as we work together to forge a brighter future"); U.S. Department of the Interior, Fiscal Year 2012 Interior Budget in Brief DH-66 (Feb. 14, 2011) (quoting Secretary of the Interior Ken Salazar on Nov. 15, 2010: "Once land is in trust, Indian Country deserves responsive and responsible business practices from Interior that will help to manage the land and comply with the obligations of a trustee."); U.S. Secretary of the Interior, Order No. 3292, § 2 (Dec. 8, 2009) ("The proper management and administration of the Individual Indian Money (IIM) accounts and trust assets … are among the Department's most significant fiduciary duties."); Remarks by Assistant Attorney General Ignacia Moreno on 2011 Priorities for Env't & Natural Res. Div., U.S. Dep't of Justice (Jan. 13, 2011) ("I could not be more committed to fulfilling the Division's core mission[,]" including "[c]areful and respectful management of the United States' trust obligations to Native Americans" and noting that the division "will continue to seek to resolve in a fair and expeditious manner the tribal trust litigations").

[2]*See, e.g.*, *Osage Tribe v. United States*, 93 Fed. Cl. 1, 6–7 (2010) (rejecting the argument that the government is not bound by prior rulings on trust duties); *Jicarilla Apache Nation v. United States* (*Jicarilla IV*), 91 Fed. Cl. 489, 495–96 (2010) (rejecting the argument that further delay of tribal trust mismanagement discovery would not be harmful); *Ak-Chin Indian Comty. v. United States*, 85 Fed. Cl. 397, 399–401 (2009), *reconsid. denied*, 85 Fed. Cl. 636 (2009) (rejecting effort to require tribes to search substantially rearranged, commingled, and unindexed trust records); *Osage Tribe v. United States*, 75 Fed. Cl. 462, 481 (2007) ("Defendant's argument would, in effect, 'reward the government for inaction that violates the government's fiduciary duties to collect funds and accrue interest.'"); *Jicarilla Apache Nation v. United States* (*Jicarilla I*), 60 Fed. Cl. 611, 613–14 (2004) (rejecting asserted absolute privilege for disclosure to tribes of their own mineral development information); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135–37 (2004) (rejecting the argument that the court has no authority to require the United States to preserve relevant evidence); *see generally Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund* (Misplaced Trust), H.R. Rep. No. 102-499, at 5 (April 22, 1992) ("To the extent the Bureau has made any progress in this area, it appears that … continuing oversight hearings have been virtually the only reason.").

[3]President Richard M. Nixon, Special Message on Indian Affairs, 1970 Pub. Papers 564, 565 (July 8, 1970) (Nixon Message); *see Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831).

[4]The parties also litigated an order requiring the United States to preserve relevant evidence, *see Pueblo of Laguna v. United States*, 60 Fed. Cl. at 134 (noting *Jicarilla* motion), and a Confidentiality Agreement and Protective Order to govern document production, *Jicarilla Apache Nation v. United States* (*Jicarilla II*), 60 Fed. Cl. 413 (2004), including an order to produce Jicarilla's own mineral records for which the United States had asserted a privilege, *Jicarilla I*, 60 Fed. Cl. at 613–14.

[5]*Compare Mandel v. Bradley*, 432 U.S. 173, 176 (1997) (summary affirmance and dismissal leave judgment undisturbed without addressing its reasoning); *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183 (1959) (certiorari dismissed as improvidently granted in light of circumstances not fully apprehended at the time certiorari was granted) *with Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988) (mem.), *affirming*, 819 F.2d 895 (9th Cir. 1987) (state severance tax on tribal coal pre-empted); *Pino v. Dist Ct. of Second Jud. Dist.'s Children's Ct.*, 472 U.S. 1001 (1985) (mem.) (dismissing appeal from jurisdictional challenge to state court Indian adoption following successful collateral challenge in *In re Adoption of Baby Child*, 102 N.M. 735, 736–38, 700 P.2d 198, 199–201 (Ct. App. 1985)); *Apache County v. United States*, 429 U.S. 876 (1976) (mem.), *affirming sub nom. Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) (ruling that the statute granting reservation Indians citizenship is not unconstitutional).

[6]*Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007); *see also In re Grand Jury Subpoena: Under Seal* (*Under Seal*), 415 F.3d 333, 341 (4th Cir. 2005) (discussing "joint defense privilege, an extension of the attorney-client privilege"); *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) ("Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.").

[7]*Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001) (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.* (*Supron*), 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir.1986), *supplemented*, 793 F.2d 1171 (10th Cir. 1986)).

[8]Federal Government's Relationship with American Indians, S. Hrg. No. 101-126, Pt. 1, at 41–42, 53, 66–67, 458–60 (1989) (1989 Hearing Report) (discussing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974); *Stevens v. Comm'r*, 452 F.2d 741 (9th Cir. 1972); *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Ore. 1977)); Trust Counsel for Indian Affairs in the Dep't of the Interior, S. Hrg. No. 101-1011, at 58–62 (1990) (1990 Hearing Report) (executive branch's correspondence documenting the split brief practice and also discussing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) as an additional example).

[9]*See White Mountain Apache*, 537 U.S. at 476–477 (affirming trust duty even though there was no word in the relevant law that suggested such a mandate); *Navajo Nation v. United States*, 501 F.3d 1327, 1345–46 (Fed. Cir. 2007) ("the Supreme

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[16]Chew and Kelley, *Myth of the Color-Blind Judge, supra* note 3, at 1117, 1141 (citation omitted).

[17]*Id*. at 1156.

[18]Kevin K. Washburn, *Keynote Address: The Next Great Generation of American Indian Law Judges*, 81 U. Colo. L. Rev. 959 (Fall 2010) ("The central challenge in Indian law is ensuring that Indian law and Indian tribes are not some alien concept, but are a regular part of the cultural and governmental background in the United States.").

[19]*Id*. at 963. In particular, Dean Washburn points to the increased understanding of federal Indian law as demonstrated by the decisions of U.S. Supreme Court Chief Justice John Marshall, Justice Stevens, Justice O'Connor, and Justice Ginsberg.

[20]*Id*.

[21]*Heather Kendall-Miller Noted for Ninth Circuit Spot* (July 26, 2010); available at turtletalk.wordpress.com.

[22]National Congress of American Indians, *Support for the Nomination and Confirmation of Heather Kendall-Miller to the United States Court of Appeals for the Ninth Circuit*, Resolution #ABQ-10-019 (Nov. 14–19, 2010). In notable part, the resolution indicates that the National Congress of American Indians supports Heather Kendall-Miller's nomination and confirmation because "over the course of U.S. history the federal judiciary has established principles of respect for tribal self-government and deference to the political branches and intergovernmental comity in determining the course of the federal-tribal relationship and the scope of recognized tribal authority; and … the federal judiciary is regularly tasked with making decisions that have a lasting impact on tribal communities and the daily lives of Indian people, including decisions regarding tribal sovereignty, public safety and health on Indian reservations, tribal economic development, generation of tax revenue, and protection of tribal cultures and religions; and … the U.S. has never appointed a Native American to the federal appellate bench or the Supreme Court, and out of the total 866 federal judgeships, not one is currently occupied by and American Indian or Alaska Native…."

[23]*Keith Harper for the Tenth Circuit Drawing Intense Opposition* (May 23, 2010); available at turtletalk.wordpress.com.

[24]*Id*.

[25]Cherokee Nation, *Council Passes Resolution to Support Harper for U.S. Appeals Court* (June 30, 2010); available at www.cherokee.org/NewsRoom/FullStory/3266/Page/Default.aspx.

[26]Executive Office of the President, Office of the Press Secretary, *President Obama Names Two to the United States District Court* (Feb. 2, 2011); available at www.whitehouse.gov/the-press-office/2011/02/02/president-obama-names-two-united-states-district-court.

[27]*Id*.

[28]Chris Casteel, *President Nominates Federal Prosecutor to be U.S. Judge in Tulsa*, NewsOK.com (Feb. 3, 2011); available at newsok.com/president-nominates-federal-prosecutor-to-be-u.s.-judge-in-tulsaarticle/3537611#ixzz1D1KCYYfi.

[29]*Id*.

[30]Vargas, *Only Skin Deep?, supra* note 3, at 1423, 1430.

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supra note 6, at 691.

[11]*See* Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 Geo. Mason L. Rev. 357 (2009).

[12]David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 280–81 (2001) ("Tribal interests have lost about 77 percent of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82 percent of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58 percent of their Supreme Court cases.") (footnotes omitted).

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Court heard, considered, and rejected these arguments by the government in [*White Mountain*] *Apache*"), *rev'd on other grounds*, 129 S. Ct. 1547 (2009); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain Apache*, "once a statutory obligation is identified, the court may look to common law trust principals to particularize that obligation"); *Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001) (per *Mitchell II*, "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law"); *Duncan v. United States*, 667 F.2d 36, 42–43 (Ct. Cl. 1981) (rejecting that "a federal trust must spell out specifically all the trust duties of the Government"); *Navajo Tribe*, 624 F.2d at 988 ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute. …").

[10]*See* Remarks by President at White House Tribal Nations Conference (Dec. 16, 2010) ("I want to be clear: What matters far more than words … are actions to match those words. … That's the standard I expect my administration to be held to.").