United States Senate Committee on Indian Affairs

Oversight Hearing on Fulfilling the Trust Responsibility: The Foundation of the Government-to-Government Relationship

Statement of Daniel I.S.J. Rey-Bear, May 17, 2012

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on this important topic. I am a partner in Albuquerque, New Mexico, at Nordhaus Law Firm, LLP, one of the oldest law firms in the country that is dedicated to representing Indian tribes. I also am an Adjunct Professor at University of New Mexico Law School, and have been certified as a Specialist in Federal Indian Law by the New Mexico Board of Legal Specialization.

Over the last fifteen years, I and others at my law firm have represented several tribes with substantial breach of trust claims against the United States government. For a dozen years, I served as co-counsel in the $600 million Navajo coal lease approval case that was decided twice by the Supreme Court. *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000), *rev'd*, 263 F.3d 1325 (Fed Cir. 2001), *rev'd*, 537 U.S. 488 (2003), *on remand*, 347 F.3d 1327 (Fed. Cir. 2003), *on remand*, 68 Fed. Cl. 805 (2005), *rev'd*, 501 F.3d 1327 (Fed. Cir. 2007), *rev'd*, 129 S.Ct. 1547 (2009). In addition, since 2002, I have served as co-counsel in three of the largest still-pending tribal breach of trust cases, respectively brought by the Jicarilla Apache Nation (until 2008), the Pueblo of Laguna (to the present), and the Navajo Nation (since 2006).

All these cases have presented issues relevant to today's hearing. For example, in these cases, the Executive Branch has argued among other things that the presiding court does not have authority to require the United States to preserve relevant evidence, contrary to positions it took in two prior cases. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135-37 (2004). It also has argued for an absolute privilege against tribes regarding their own mineral development information despite statutory language, prior loss on the issue, and a contrary prior position. *Jicarilla Apache Nation v. United States* ("*Jicarilla II*"), 60 Fed. Cl. 611, 613-14 (2004). It also has argued that delay of discovery in Indian trust mismanagement cases will not harm tribes. *Jicarilla Apache Nation v. United States* ("*Jicarilla V*"), 91 Fed. Cl. 489, 495-96 (2010). And perhaps most relevant here, the Executive Branch has argued that the United States has no duty to tribes beyond those expressly stated in statutes or regulations—an argument that previously had been expressly rejected by federal courts at least six times—and that the United States has no duty to even attempt to maximize income for Indian trust funds, contrary to express terms of the 1994 Indian Trust Fund Management Reform Act, the Department of the Interior's own mandatory Department Manual, and governing court decisions. *Jicarilla Apache Nation v. United States* ("*Jicarilla VIII*"), 100 Fed. Cl. 726, 731-38 (2011). Further discussion of the Supreme Court decisions in the Jicarilla and Navajo coal cases will be provided below.

This hearing essentially poses three questions: What is the federal trust responsibility to Indian tribes, what is the Executive Branch doing regarding fulfilling that responsibility which warrants congressional oversight, and what, if anything, should Congress do about the latter to respect the former. I will address each of these in turn. Also, substantial citations are provided here to confirm the bases for all statements made.

The Basis, Nature, and Scope of the Trust Responsibility

Over the last two centuries, much has been written by Congress, the Supreme Court, academics, and others regarding the history, scope, and nature of the federal trust responsibility to Indian tribes. In all this, some principles warrant general acknowledgement.

First, the relationship of Indian tribes to the United States is founded on "the settled doctrine of the law of nations" that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government. *Worcester v. Georgia*, 31 U.S. 515, 551-56, 560-61 (1832); *see also United States v. Candelaria*, 271 U.S. 432, 442 (1926) (Congress "was but continuing the policy which prior governments had deemed essential to the protection of such Indians."); *United States v. Kagama*, 118 U.S. 375, 884 (1886) ("From their very weakness . . . there arises the duty of protection, and with it the power. This has always been recognized . . . ."). Indeed, because of this background, the federal trust responsibility necessarily constitutes a foundational basis for, not merely a function of, congressional legislation regarding Indians. *See, e.g.*, Felix S. Cohen, Handbook of Federal Indian Law XI, XIII (1941) ("the theory of American law governing Indian affairs has always been that the Government owed a duty of protection to the Indian in his relations with non-Indians"; "the entire body of federal legislation on Indian affairs . . . . may be viewed in its entirety as the concrete content of the abstract principle of federal protection of the Indian"). In addition, the federal-tribal trust responsibility may even constitute an inherent limit on the Indian Commerce Clause and exercise of the Treaty Clause regarding Indians, just as "limitations on the commerce power are inherent in the very language of the [Interstate] Commerce Clause, *United States v. Lopez*, 514 U.S. 549, 553 (1995); *see United States v. Morrison*, 529 U.S. 598, 608 & n.3 (2000) (quoting *Lopez*, 514 U.S. at 556-557), or as an inherent "presupposition of our constitutional structure[,]" such as under the Eleventh Amendment, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *see Seminole Tribe v. Florida v. Florida*, 517 U.S. 44, 54 (quoting same). *See generally Marbury v. Madison*, 1 U.S. 137, 176 (1803) ("The powers of the legislature are defined and limited . . . and those limits may not be mistaken, or forgotten[.]").

Second, the federal-tribal trust responsibility is also founded on treaties and agreements securing peace with and land cessions by Indian tribes, which provided legal consideration for the ongoing performance of federal trust duties:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation.

Morton v. Mancari, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)); *see also Worcester*, 31 U.S. at 548-54 (discussing treaties securing and preserving friendship and land cessions, and noting that the stipulation acknowledging tribes to be "under the protection of the United States" "is found in Indian treaties generally").

Given this, the federal-tribal trust relationship is not a gratuity, but arose and remains legally enforceable because "the government 'has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements,' in exchange for which 'Indians . . . have often surrendered claims to vast tracts of land.'" Br. for Federal Petitioners, *Salazar v. Patchak*, No. 11-247 (U.S. Feb. 7, 2012), at 22 (citation omitted); *see also* Misplaced Trust: The BIA's Mismgmt. of the Indian Trust Fund, H. Rep. 102-499, at 6 (1992) ("The system of trusteeship . . . is deeply rooted in Indian-US. history."); Stmt. on Signing Exec. Order on Consultation & Coord. with Indian Tribal Govts. (Nov. 6, 2000), Pub. Papers of U.S. Presidents: William Clinton, 2000, at 2806 ("Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security . . . ."); Special Msg. on Indian Affairs (July 8, 1970), Public Papers of U.S. Presidents: Richard Nixon, 1970, at 565-66 (stating same as brief and this relationship "continues to carry immense . . . legal force"); Am. Indian Policy Review Comm'n, Final Report Submitted to Congress 5 (May 17, 1977) ("AIPRC Report") (noting same). Accordingly, historic federal-tribal relations established "obligations to the fulfillment of which the national honor has been committed[,]" *Heckman v. United States*, 224 U.S. 413, 437 (1912), and "the people as a whole benefit when the Executive Branch . . . protects Indian property rights recognized in treaty commitments ratified[] by a coordinate branch." Letter from Attorney General Griffin Bell to Secretary of the Interior Cecil Andrus 3 (May 31, 1979). Moreover, Indians' justifiable expectations and legitimate reliance on those commitments and the long passage of time since the United States and all Americans have continuously reaped the benefits of Indian land cessions and peace preclude any current assertion that the federal government does not owe ongoing, enforceable fiduciary duties to Indian tribes. *See City of Sherill v. Oneida Indian Nation*, 544 U.S. 197, 215-17 (2005); *United States v. Minnesota*, 270 U.S. 181, 201, 202 (1926) ("[C]ourts can no more go behind [a treaty] for the purpose of annulling it in whole or in part than they can go behind an act of Congress." "The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made 70 years after the treaty . . . ."). Likewise, the fact that "the Government has often structured the trust relationship to pursue its own policy goals[,]" *United States v. Jicarilla Apache Nation* ("*Jicarilla VII*"), 131 S.Ct. 2313, 2324 (2011), such that the relationship has been often violated and at times terminated, can no more disprove the existence of enforceable fiduciary duties than the fact of people killing others can establish that murder and genocide are not crimes.

Third, given the distinctive trust obligation that has long dominated federal dealings with Indians, enforceable fiduciary duties "necessarily arise[]" when the Government assumes control or supervision over tribal trust assets unless Congress has specified otherwise, even though nothing is said expressly in the governing statutes or regulations. *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983); *see also United States v. Navajo Nation*, 129 S.Ct. 1547, 1553-54 (2009) (enforceable fiduciary duties apply where statutes and regulations give the federal government "'full responsibility to manage Indian resources and land for the benefit of the Indians'") (quoting *Mitchell II*, 463 U.S. at 224). Therefore, the federal-tribal trust relationship is enforceable even when "'[t]here is not a word in . . . the only [governing] substantive source of law . . . that suggests the existence of such a mandate.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476-77 (2003) (citation omitted). Moreover, once statutes or regulations establish enforceable fiduciary obligations, courts "look[] to common-law principles to inform . . . interpretation of statutes and to determine the scope of liability that

Congress has imposed." *Jicarilla VII*, 131 S.Ct. at 2325; *see* 25 U.S.C. § 162a(d) (recognizing that trust responsibilities "are not limited to" those enumerated). In addition, "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent [regarding Indians] by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Nevada v. United States*, 463 U.S. 110, 128 (1983); *see also id.* at 135 n.15.

Fourth, while the federal-tribal relationship both initially and recently has been described as resembling a guardianship, *e.g., Jicarilla VII*, 131 S.Ct. at 2325; *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), that characterization is not legally accurate and does not undermine fiduciary duties. The analogy is not apt because unlike a true guardianship, Indian tribes do not lack legal capacity and the United States holds title to most Indian assets in trust, it was not appointed to that position by a court, and its powers and duties are not merely fixed by statutes. *Compare* Restatement of Trusts (Second), § 7, cmt. a ("A trustee . . . has title to the trust property; a guardian of property does not . . . ."; "a guardian is appointed only when and for so long as the ward is lacking in legal capacity"; "A guardian is appointed by a court[.]"); *id.* § 7, cmt. b ("The powers and duties of a guardian are fixed by statutes; the powers and duties of a trustee are determined by the terms of the trust and by the rules stated in the Restatement . . . as they may be modified by statute.") *with* U.S. Const., art. I, § 8, cl. 3 (Commerce Clause); 25 U.S.C. § 462 (continuing periods of trust on Indian lands); *Jicarilla VII*, 131 S.Ct. at 2325 (recognizing application of common-law). In addition, characterization of the federal-tribal relationship as a guardianship does not preclude or limit application of enforceable fiduciary duties, because "[t[]he relation between a guardian and ward, like the relation between a trustee and a beneficiary, is a fiduciary relation." Restatement of Trusts (Second), § 7, cmt. a.

Finally, application of the principle that guardianships apply "only when and for so long as the ward is lacking in legal capacity[,]" *id.*, supports tribal governmental self-determination. Such retained governmental jurisdiction that is not limited to a tribe's members alone was surely contemplated by tribes when they entered into treaties with the United States. AIPRC Report, *supra*, at 5. Also, recognizing that the federal trust responsibility includes a duty to promote tribal self-determination, and a lack of conflict between the two, is consistent with repeated Congressional recognition and Executive policy for more than 40 years. *See, e.g.*, 25 U.S.C. §§ 450(a) (Indian Self-Determination Act findings), 2103(e) (continuing obligations regarding Indian mineral development agreements), 4021 (providing for withdrawal of tribal trust funds "consistent with the trust responsibilities of the United States and the principles of self-determination"); Exec. Order 13,175, § 2, 3 C.F.R. 304, 305 (2000) (recognizing both as "Fundamental Principles"); Nixon Message, *supra*, at 565-55. In particular, Congress has consistently preserved the trust relationship even with self-determination. *E.g.*, 25 U.S.C. § 450*l*(c) at model self-determination agreement section (d). This recognition also is consistent with the settled law on which the trust responsibility was based, as well as current international law. *See, e.g., Worcester*, 31 U.S. at 560-61; U.N. Charter art. 73 (UN members with non-self-governing territories have trust obligations of "protection against abuse" and "to develop self-government"); International Covenant on Civil and Political Rights art. 1, ¶ 1 (1966) ("All peoples have the right of self-determination."); U.N. Decl. on the Rights of Indigenous Peoples arts. 3, 8.2(a)-(b), 18-19, 27-28, 32 (2007) (concerning self-determination, state mechanisms for prevention and redress, decision-making, consultation, and use or development of resources).

The Executive's Extended Efforts to Eviscerate the Trust Responsibility

Notwithstanding the established law and policy of the Self-Determination Era and many positive efforts by presidential administrations of both political parties over the last four decades, the Executive Branch over this period also has repeatedly sought to avoid and repudiate the federal-tribal trust responsibility rather than fulfill the foundational principles outlined above. Most broadly, the Executive Branch has repeatedly misrepresented relevant facts and law in Indian trust litigation in an effort to limit federal liability, as part of a broader effort to protect the public fisc and prevail in litigation, and consistent with admitted misrepresentations before the Supreme Court. *See generally California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754 (1997), *rev'd sub nom. on other grounds, Suess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008) (concerning *Winstar* savings and loan cases: "Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic."); Neal Katyal, Acting Solicitor General, Confessions of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011) (admitting failure to disclose key intelligence report that undermined rationale in *Korematsu v. United States*, 323 U.S. 214 (1944)); Neal Katyal, Acting Solicitor General, Presentation to Fed. Bar Ass'n 36th Annual Indian Law Conf. (April 8, 2011) (apologizing for material misrepresentations in *United States v. Sandoval*, 231 U.S. 28 (1913), and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)); U.S. Dept. of Justice, Envt. & Natural Resources Division ("ENRD"), FY2013 Performance Budget Congressional Submission 2 (noting "Strategic Objective 2.6: Protect the federal fisc"), 11 ("The effectiveness of our defensive litigation" concerning tribal trust litigation is measured in part by "savings to the federal fisc."); *Entergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 744 n.4 (2010) ("In its response, the Government quotes this text but carefully omits the patently relevant portion . . . . To note that the Court is highly dismayed with Defendant's brief in this regard is an understatement. It flatly will not countenance any such misbehavior in the future."); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1355-57 (Fed. Cir. 2003) (affirming federal attorney sanction for misquoted judicial opinions in brief to conceal adverse authority, "'which intentionally or negligently misled the court'").

For example, a number of federal courts have either imposed sanctions for or strongly rejected unfounded federal assertions in Indian breach of trust cases. *See, e.g., Osage Tribe v. United States*, 93 Fed. Cl. 1, 6-7 (2010) (rejecting assertion that the United States is not bound by prior rulings in case on breach of trust duties, noting that "[t]he court is dismayed by defendant's approach to the resolution of plaintiff's claims"); *Osage Tribe v. United States*, 75 Fed. Cl. 462, 468 69, 480 81 (2007) (rejecting argument previously rejected six times by the Supreme Court and the Federal Circuit, noting that "Defendant's argument would . . . 'reward the government for inaction that violates the government's fiduciary duties to collect funds and accrue interest.'"); *Jicarilla II*, 60 Fed. Cl. at 613-14 (rejecting opposition to disclosure of tribes' own information); *Pueblo of Laguna*, 60 Fed. Cl. at 135-37 ("Contrary to defendant's importunings, this court plainly has the authority to issue such orders" to require preservation of relevant evidence); *Mescal v. United States*, 161 F.R.D. 450, 454-55 (D.N.M. 1997) (sanctioning federal attorney sua sponte for factual misrepresentations); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 21 CI.Ct. 176, 192 (1990) ("Such an assertion [by the United States], we find, is shocking, insofar as it is a gross misstatement of the law."); *Assiniboine &*

Sioux Tribes of Fort Peck Reservation v. United States, 16 Cl. Ct. 158, 164-65 (1989) (imposing sanction for federal factual misrepresentation).

Among these cases, three notable examples warrant further discussion here. First, at least six times over the last 32 years, the Supreme Court and federal appellate courts have rejected Executive Branch arguments that there is essentially no enforceable federal-tribal fiduciary relationship because the United States is not subject to any duty that is not expressly spelled out in statutes or regulations. *See, e.g.*, *Jicarilla VII*, 131 S.Ct. at 2325 ("We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed."); *White Mountain Apache*, 537 U.S. at 476-77 (affirming trust duty even though there was not a word in the only relevant law that suggested such a mandate); *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 principles 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 v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . .").

Notwithstanding these decisions, including just last year by the Supreme Court, the Executive Branch has reasserted this argument on remand from the Supreme Court. The conclusion of the resulting most recent rejection of this repeated argument warrants restatement:

> [The United States] would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics.
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> That routine would commence with a full jurisprudential gainer—a twisting, backwards maneuver that would allow the court to ignore cases like *White Mountain Apache* and *Mitchell II* that have relied upon the common law to map the scope of enforceable fiduciary duties established by statutes and regulations. The court would then need to vault over *Cheyenne-Arapaho* and a soaring pyramid of other precedents, all of which have found defendant's argument wanting. Next, the court would be called upon to handspring to the conclusion that Congress' repeated legislative efforts to ensure the safe investment of tribal funds were mostly for naught—because, if defendant is correct, the provisions enacted were generally not perspicuous enough to create enforceable duties and, even where specific enough to do so, left interstices in which defendant could range freely. Indeed, while egging the court on, defendant never quite comes to grip with the fact that if the government's fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really "fiduciary" duties at all. *See Varity Corp. v. Howe*, 516 U.S. 489, 504 . . .

> (1996) ("[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose"). Taken to its logical dismount, defendant's view of the controlling statutes would not only defeat the twin claims at issue, but virtually all the investment claims found in the tribal trust cases, few of which invoke *haec verba* specific language in a statute or regulation. Were the court convinced even to attempt this tumbling run, it almost certainly would end up flat on its back and thereby garner from the three judges reviewing its efforts a combined score of "zero"—not coincidentally, precisely the number of decisions that have adopted defendant's position.
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> This court will not be the first to blunder down this path.

Jicarilla VIII, 100 Fed. Cl. at 738. Notwithstanding that decision and the "phalanx of . . . precedent" on which it is based, *id.*, the Executive Branch still disputes this point, and it can be expected to continue to press its position following a trial ruling expected later this year in the first phase of the case. *See, e.g.*, U.S.'s Mem. of Contentions of Fact & Conc. of Law (Phase 1 Trial) ("Pre-Trial Brief"), *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Oct. 28, 2011), ECF No. 350, at 3; U.S.'s Post-Trial Brief, *Jicarilla Apache Nation v. United States*, No. 02-025 (Fed. Cl. Jan. 23, 2012), ECF No. 380, at 55 n.1. Similar issues apply to the Executive Branch assertion that its management of Indian trust assets should be subject to an arbitrary and capricious administrative standard of review, rather than a strict fiduciary standard of care, contrary to fifteen prior decisions by the Supreme Court and lower federal courts. *See, e.g.*, *Jicarilla VIII*, 100 Fed. Cl. at 739 (quoting, citing, and discussing prior decisions); *Jicarilla Apache Nation v. United States* ("*Jicarilla III*"), 88 Fed. Cl. 1, 20 & n.28 (2009) (same, noting, "it is often observed that the duty of care owed by the United States 'is not mere reasonableness, but the highest fiduciary standards'") (citation omitted), *mandamus denied on other ground sub. nom*, *In re United States*, No. 09-908 (Fed. Cir. Aug. 3, 2011), ECF No. 318; *see especially Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (The Government's conduct in dealings with Indians "should therefore be judged by the most exacting fiduciary standards.").

Next, notwithstanding a heightened duty of candor because of the "special credence" that the Supreme Court gives to the Solicitor General, *see Hirabayashi v. United States*, 828 F.2d 591, 602 & n.10 (9th Cir. 1987) (discussing *Korematsu* misrepresentation), the Department of Justice has not been either candid with the Supreme Court or consistent with prior Department of the Interior policy in either of two recent Supreme Court Indian trust responsibility cases that it won. In *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Supreme Court ruled that neither the Indian Mineral Leasing Act ("IMLA") nor its regulations established enforceable fiduciary duties that precluded the Secretary of the Interior from secretly colluding with a mining company to force extended unsupervised tribal lease negotiations under severe economic pressure, not disclosing support for a higher royalty, and then approving the resulting lease without assessing the merits of the royalty. *See id.* at 497-500, 506-08, 512. In this, the Supreme Court emphasized a purported distinction under the IMLA and its regulations between oil and gas and coal leasing, *id.* at 495-96, that the IMLA aims to enhance tribal self-determination by giving Tribes the lead role in negotiating mining leases, *id.* at 508, and that it was not until later that a regulation first required consideration of Indians' best interests in administrative decisions,

id. at 508 n.12. However, the Executive Branch did not admit there that during the relevant period the governing regulations provided the following:

> No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with [25 C.F.R.] § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner [of Indian Affairs] grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids.

25 C.F.R. § 211.2 (1958-1996). The governing regulations thus only treated coal leasing differently by allowing limited negotiations subject to strict federal oversight and supervening control, which the Executive Branch failed to provide. Moreover, the Executive Branch did not acknowledge before the Supreme Court that the subsequent regulation requiring consideration of Indians' best interests in all federal actions under the IMLA, 25 C.F.R. § 211.3, merely "settle[d] the issue of whether the Secretary is limited to technical functions or considerations[,]" to be "consistent with the United States' trust responsibility as defined by statute[.]" 56 Fed. Reg. 58734, 58735 (Nov. 21, 1991) (proposed rule). The Executive Branch also failed to acknowledge that in the lower court it had expressly conceded that the IMLA required it to "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands," *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982), and that the later regulation merely codified the preexisting statutory requirement, *see* 61 Fed. Reg. 35,634, 35640 (July 8, 1996) (final rule).

More recently, in *Jicarilla VII*, the Supreme Court ruled that the fiduciary exception to the attorney-client privilege does not apply to the federal-tribal trust relationship, including for tribal trust fund management. In addition to misrepresenting that no common-law fiduciary duties apply at all, as discussed above, the Executive Branch argued there that the United States does not represent tribal interests and does not have duties of loyalty or disclosure in managing Indian trust assets, that the performance of federal trust administration is essentially a gratuity not paid for by tribes, and that disclosure there would cause ethics problems and chill critical legal advice. *See generally* Br. for the United States, *United States v. Jicarilla Apache Nation*, No. 10-382, at 13-16, 28, 31-41 (U.S. Feb. 22, 2011). However, the Executive Branch failed to acknowledge any of the foundational history and principles discussed above. It also failed to disclose that all Executive Branch employees have a duty of "loyalty to the Constitution, laws and ethical principles" as a "[b]asic obligation of public service[,]" 5 C.F.R. § 2635.101(a), that Department of the Interior employees must "[c]omply with any lawful regulations, orders, or policies[,]" and that failure to comply with such policies warrants disciplinary action including removal, 43 C.F.R. § 20.502. In particular, the Department of the Interior Manual ("DM") prescribes such mandatory policies, 011 DM 1.2, and requires that employees "discharge . . . the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty[,]"

"[c]ommunicate with beneficial owners regarding the management and administration of Indian trust assets[,]" and "[a]ssure that any management of Indian trust assets . . . promotes the interest of the beneficial owner[s.]" 303 DM 2.7, 2.7B, 2.7L. Moreover, the DM defines "Indian Fiduciary Trust Records" as including all documents that are used in the management of Indian trust assets. 303 DM 6, app. (decision trees); *cf.* 303 DM 2.7I (recordkeeping duty); Dept. of the Interior, Comprehensive Trust Mgmt. Plan 1 n.1 (March 28, 2003) (defining "fiduciary trust" as concerning trust asset management, as distinguished from the "general trust" regarding appropriated program funds). Furthermore, the Secretarial Order that provided the basis for 303 DM 2 (i.e., its regulatory history) recognized that understanding the Department's nonexhaustive trust responsibilities includes looking to guidance in legal advice by the Solicitor's Office. Sec. Order No. 3215 § 2 (April 28, 2000). Thus, required communication with Indian beneficiaries about trust asset management necessarily includes disclosing supporting legal advice.

In addition, the Executive Branch failed to acknowledge before the Supreme Court that its claims of potential harm from disclosure had "a somewhat hollow ring" because it had "simply complied" with several similar prior disclosure orders over nine years. *See Jicarilla V*, 91 Fed. Cl. at 494 & n.8; *Jicarilla III*, 88 Fed. Cl at 11. Indeed, the Executive Branch previously had disclosed almost half the disputed documents—some even in prior litigation several decades ago—all without any identifiable ill effects. Finally, the Executive Branch failed to disclose that the attorney-client privilege "applies only where necessary to achieve its purpose[,]" *Fisher v. United States*, 425 U.S. 391, 403 (1976), which "serves 'broader public interests in the observance of law and administration of justice,'" *Mohawk Industries v. Carpenter*, 130 S.Ct. 599, 606 (2009) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)), and that disclosure there—like allowing tribal damage claims—would "deter federal officials from violating their trust duties," *Mitchell II*, 463 U.S. at 227. For further information on these issues, see the attached PowerPoint Ethics Presentation.

In sum, it appears that the Executive Branch response to prior Congressional oversight and rejection of its trust repudiation legislation proposal has been to continue to proclaim fealty to the trust responsibility as a toothless moral platitude while seeking to avoid full responsibility before the Supreme Court. *Compare* U.S. Dept. of the Interior, Fiscal Year 2012 Interior Budget in Brief DH-66 (Feb. 14, 2011) (quoting Secretary of the Interior: "Indian Country deserves responsive and responsible business practices from Interior that will . . . comply with the obligations of a trustee."); Remarks by Assistant Attorney General Ignacia Moreno on 2011 Priorities for ENRD, U.S. Dept. 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") *with supra* discussion; Oversight Hearing on Indian Trust Fund Litigation Before U.S. Senate Committee on Indian Affairs, S. Hrg. 110-71 (2007); Misplaced Trust, *supra*, at 2-5, 8-28 (discussing prior reports and oversight hearings and BIA's failure to comply with congressional directives); Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010) ("What matters far more than words . . . are actions to match those words. . . .That's the standard I expect my administration to be held to.").

This Executive Branch approach impermissibly ignores foundational American history and commitments, as well as Congress' express constitutional authority and repeated directives. It also materially undermines federal-tribal government-to-government relationships, as well as

federal and tribal positions that should be aligned in transactions and litigation with third parties. *See, e.g.*, Daniel I.S.J. Rey-Bear and Timothy H. McLaughlin, United States v. Jicarilla Apache Nation: *The Executive Branch's Latest Effort to Repudiate Federal Trust Duties to Indians*, The Federal Lawyer, March/April 2011, at 48, 54 & n.8 (discussing proposed Indian Trust Counsel Authority and successful split-briefing practice in the 1970s). Thus, if the Executive Branch does not take the federal trust responsibility seriously, why should anyone else?

Congress Should Help Executive Officials Respect the Trust Responsibility

The fact that some Indian trust litigation remains pending cannot preclude meaningful congressional oversight here. *See, e.g.*, H.R. Rep. No. 110-187, at 80 (2007); S. Hrg. 110-71 (2007); H. R. Conf. Rep. 108-330, at 117 (2003). Also, the current pending Secretarial Commission on Indian Trust Administration and Reform may have substantial suggestions that address these matters, just like the American Indian Policy Review Commission, which submitted its Final Report to Congress exactly 35 years ago today. Accordingly, while others more qualified and experienced have offered and will offer more, and tribes themselves must be directly consulted, I offer some preliminary suggestions for Congressional action:

1. Direct the Executive Branch to complete prompt and fair settlement of pending tribal trust claims and stop making unfounded arguments in litigation to repudiate or undermine the trust responsibility as established by history and confirmed by Congress;

2. Make clear that federal management of Indian trust assets is subject to strict "fiduciary trust" duties consistent with historical commitments and governing legislation, not merely arbitrary and capricious review;

3. Reiterate that support for tribal governmental self-determination is consistent with and does not undermine enforceable federal trust responsibilities to tribes; and

4. Require the Executive Branch to reinstitute the practice of split-briefing, so that the Department of the Interior at least can continue to respect acknowledged federal trust duties to Indian tribes.

Conclusion

I do not suggest that the Executive Branch should merely accede to Indian demands in trust administration or litigation. Indeed, one problem is the Department of Justice assertion that the United States may act as mere broker rather than exercise the duty of independent judgment required by governing statutes, regulations, case law, and Department of the Interior policies. Instead, I ask that Congress help ensure that the Executive Branch brings the same honor to fulfilling and defending its trust responsibility that it had when this commitment was first made so many years ago as the foundation of the government-to-government relationship. As stated by Peterson Zah, first elected President of the Navajo Nation and a member the current Secretarial Commission on Indian Trust Administration and Reform, "We need protection from our protectors." Thank you again for the opportunity to provide this testimony. I would be happy to answer any questions that the Committee may have regarding these important issues.

Ethics Issues in *United States v. Jicarilla Apache Nation* (2011)

Dan Rey-Bear

Nordhaus Law Firm, LLP

Apply ABA Model Rules of Professional Conduct

(and cases and commentary)

DOJ attorney ethics obligations are set by state bar rules "in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State[,]" 28 U.S.C. § 530B, and where they are licensed, U.S. DOJ, Reminder of Gov't Attorney Ethical Obligations to Client (Nov. 2006), available at http://www.justice.gov/oarm/oarm9.pdf (also noting state bar rules analogous to ABA Model Rules).

ABA Formal Opinion 280 states that directly adverse authority concerns "any proposition of law on which the lawyer expressly relies . . ." and that any doubt about whether an authority is sufficiently adverse "should obviously be resolved in favor of disclosure."

ABA Model Rules
part 1, client-lawyer relationship

- **ABA Model Rule 1.2, Scope of Representation and Allocation of Authority**

  (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **ABA Model Rule 1.6, Confidentiality of Information**

  (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

  (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

  . . . .

  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

  . . . .

  (6) to comply with other law or a court order.

- **ABA Model Rule 1.7, Conflicts of Interest: Current Clients**

  (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

ABA Model Rules
part 3, advocate

- **ABA Model Rule 3.1, Meritorious Contentions**

  A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

- **ABA Model Rule 3.3, Candor Toward the Tribunal**

  (a) A lawyer shall not knowingly:

  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

  . . . .

  (c) The duties stated in paragraphs (a) and (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

- **ABA Model Rule 3.4, Fairness to Opposing Party and Counsel**

  A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
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HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20240

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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TABLE OF AUTHORITIES

US Assertions

- "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" US Brief at 13 (Arg. § A.1).

- "Executive branch guidance makes clear that government attorneys represent the United States, not a particular Indian tribe, in tribal trust matters." US Brief at 16 (Arg. § A.2).

- "That government attorneys are paid from government funds, not tribal trust funds, reinforces the conclusion that the government is the client." US Brief at 28 (Arg. § A.4).

Relevant Authority

- "Out of its peculiar relation to these dependent people sprang obligations to the fulfillment of which the national obligation has been committed." "The "national interest" in the management of Indian affairs " is not . . . to be limited to the assertion of rights incident to . . . the holding of a technical title in trust." *Heckman v. US*, 224 U.S. 413, 437 (1912).

- The US "vindicates not only the property interests 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." "[T]he people as a whole benefit when the Executive Branch . . . protects Indian property rights " 1979 AG Bell Letter at 2, 3.

- "The special relationship between Indians and the Federal government is the result . . . of solemn obligations" under which "our government has made specific commitments to the Indian people" and "Indians have often surrendered claims to vast tracts of land . . . ." "The Secretary of the Interior and the Attorney General must at the same time advance *both* the national interest . . . *and* the *private* interests of Indians . . . as trustee." 1970 Nixon Message at 565, 573; *see also Mancari, Seber, Winans*; 5 C.F.R. § 2635.101(a); 303 DM 2.7.

US Assertions

- "The Federal Circuit's rule would present professional ethics problems and significant practical concerns." US Brief at 24 (Arg. § A.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." US Brief at 41 (Arg. § B.3).

Relevant Authority

- "There is no disabling conflict between the performance of these [trust] 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 . . . protects Indian property rights . . . ." 1979 AG Bell Letter at 2-3.

- "The 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 v. United States*, 463 U.S. 110, 128 (1983).

- "[W]here 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.

- Any "claimed conflict of interest" must be demonstrated to be "actual" to affect performance of federal trust duties. *Arizona v. California*, 460 U.S. 605, 628 (1983).

Additional Authority on Asserted Ethics Conflicts and Chilling Concerns

- Privilege belongs to the client, not attorneys. *See, e.g., In re Grand Jury Proceedings #5*, 401 F.3d 247, 250 (4th Cir. 2005).

- The attorney-client privilege "serves 'broader public interests in the observance of law and administration of justice,'" *Mohawk Industries v. Carpenter*, 130 S.Ct. 599, 606 (2009) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)), and, like allowing damage claims, requiring disclosure here will "deter federal officials from violating their trust duties," *Mitchell II*, 463 U.S. at 227.

- "One reason for the lack of a discernible chill is that, in deciding how freely to speak, ... clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege's crime-fraud exception." *Mohawk*, 130 S.Ct. at 607.

- *See* FOIA (with case-by-case exemptions).

- Four prior decisions over nine years had applied the fiduciary exception to Indian trust management without any identifiable ill effect.

- *Compare* Amici appendix of 22 of 51 previously disclosed documents *with* US Reply Brief at 9 n.4 ("the United States intends to withdraw its privilege assertion over those [11] documents") (see list on following pages).

- *See, e.g.,* 1983 Vollmann memo (provided to tribal auditor in 1983-84), which confirms duty of independent judgment and maximum productive investment (see first page below).

- *See, e.g.,* 1990 Lavell memo (provided to tribe in early 1990s), which confirms non-delegable trust duties (see first page below).

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JICARILLA APACHE NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS CURIAE BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT

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(continued)

Almost half of the disputed documents had privilege waived by prior disclosure, including some via prior litigation almost 30 years ago.

APPENDIX

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
1	41	10/16/1923	
2	70	4/8/1966	*Cheyenne-Arapaho*, Def.'s Ex. 3
3	217	9/30/1966	
4	63	10/7/1966	
5	64	10/22/1966	
6	66	1/10/1967	
7	65, 100	5/3/1968	*Cheyenne-Arapaho*, Pl.'s Ex. 1
8	69	12/30/1969	
9	68	12/14/1970	*Cheyenne-Arapaho*, Def.'s Ex. OE-1
10	67, 71	10/19/1971	
11	74	2/7/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
12	38, 73	3/6/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101; Pl.'s Ex. 125
13	39	7/17/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
14	48, 50	10/3/1972	*Cheyenne-Arapaho*, Pl.'s Ex. 511
15	72	10/27/1972	*Cheyenne-Arapaho*, Pl.'s Ex. 131
16	103	10/30/1972	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
17	104	11/1/1972	
18	42, 53	11/20/1972	*Cheyenne-Arapaho*, Def.'s Ex. 36
19	49, 51	4/19/1973	
20	94, 155	6/27/1973	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
21	54	10/10/1973	
22	52	4/29/1975	
23	97	5/15/1975	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
24	86	4/26/1976	Tribal Repository
25	186	6/17/1976	
26	184	10/00/1976	Produced under CAPO
27	105	00/00/1977	
28	188	5/1/1979	
29	106	4/14/1980	
30	187	6/9/1980	
31	179	1/7/1981	
32	45	3/5/1982	Produced under CAPO
33	182	8/16/1982	
34	37	11/23/1982	
35	189, 190, 212	7/21/1983	Third Party
36	178	1/16/1984	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
37	9	5/13/1985	Produced under CAPO
38	168, 191	5/13/1985	Produced under CAPO
39	112, 167	10/29/1986	Produced under CAPO
40	62	4/21/1988	
41	80	12/15/1988	Produced under CAPO
42	87	5/24/1989	Tribal Repository
43	61	10/13/1989	
44	77	2/13/1990	Produced under CAPO
45	44, 96	3/21/1990	Tribal Repository
46	60	11/21/1990	
47	110	6/1/1992	
48	116	12/28/1995	
49	35, 81, 177	4/10/1996	
50	56	Undated	
51	202	Undated	

Examples of disputed documents with prior privilege waiver from prior public disclosure.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUL 21 1983

RECEIVED
JUL 29 1983
Department of the Interior
FIELD SOLICITOR
Pawhuska, Oklahoma

Memorandum

To : Assistant Secretary—Indian Affairs

From : Acting Associate Solicitor
Division of Indian Affairs

Subject: United States v. Mitchell, No. 81-1748,
United States Supreme Court, decided June 27, 1983

Attached is a copy of the Supreme Court's decision in this case. As you are aware, the Court held that the United States may be liable in money damages for alleged breaches of trust in connection with the management of timber resources on allotted lands on the Quinault Reservation.

The Court reasoned that the timber management statutes, 25 U.S.C. §§406, 407, 466, and the regulations promulgated thereunder, 25 CFR Part 163, established the comprehensive responsibility of the Federal Government to manage the harvesting of Indian timber and therefore established a fiduciary relationship and defined the contours of the United States' fiduciary responsibilities. The Court also stated that the right-of-way statutes, 25 U.S.C. §§323-325, 318a, and regulations, 25 CFR Part 169, and a statute relating to Indian funds, 25 U.S.C. §162a, which were also at issue in the case, established the same kind of comprehensive federal control as did the timber management statutes. The Court did not discuss the right-of-way and Indian funds statutes to any degree.

Having found a fiduciary duty to manage, the Court went on to state that it is well established that a trustee is accountable in damages for breaches of trust and so held that the statutes and regulations at issue could fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property.

While it is not possible at this point to identify all BIA functions which might be subject to the Mitchell decision, the analysis used by the Court indicates that the decision may apply not only to BIA's timber management responsibilities and the right-of-way and funds responsibilities specifically mentioned in the opinion, but also to other BIA duties where the Bureau exercises significant control over Indian property or money. These duties may include mineral leasing, range management and general leasing.

04. 05. 90 12:32 PM *BIA *638 PROGRAM OFC P02

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 21 1990

In reply, please address to:
Main Interior, Room 6456

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BUREAU OF INDIAN AFF
TRUST FUNDS MGM

BIA.IA.0975

Memorandum

To: Assistant Secretary - Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: Contractability of Investment of Tribal Trust Funds under Title I of Pub. L. 93-638, the Indian Self-Determination Act

This is in response to your request for an opinion concerning the authority of the Bureau of Indian Affairs (BIA) to contract, upon the request of an Indian tribe, the investment of tribal trust funds to tribal organizations under the provisions of Title I of Pub. L. 93-638, the Indian Self-Determination Act, 25 U.S.C. § 450f.[1] For the following reasons, it is our opinion that although certain statutory obligations of the Secretary relating to the deposit and investment of tribal trust funds are non-delegable trust duties which may not be contracted under Pub. L. 93-638, other portions of the tribal trust funds investment program are contractable under the Act.

Our first inquiry is whether the investment of tribal trust funds is a contractable program under the Indian Self-Determination Act. Section 102 of the Indian Self-Determination Act, 25 U.S.C. § 450f, directs the Secretary of the Interior to enter into contracts with tribal organizations to, inter alia, plan, conduct, and administer programs or portions thereof which he is authorized to administer for the benefit of Indians under the Snyder Act, 25 U.S.C. § 13, and any Act subsequent thereto. There is no question that the Secretary is authorized to administer this program (investment of tribal trust funds) for the benefit of Indians under the Act of June 24, 1938, 52 Stat.

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[1] This opinion only addresses the legality of Pub. L. 93-638 contracts between the BIA and tribal organizations relating to the investment of tribal trust funds. Nothing herein addresses the contractability under Pub. L. 93-638 of other Indian trust funds, such as trust funds of Individual Indians, under the control of the BIA.

US Assertions

- "This Court's *Navajo Nation* decisions preclude the Federal Circuit's imposition of a freestanding common-law duty." US Brief at 31 (Arg. § B.1).

- No statute or regulation requires the United States to disclose to Indian tribes privileged communications between government decisionmakers and their attorneys." US Brief at 37 (Arg. § B.2).

Relevant Authority

- *Mitchell II* and then *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) "thoroughly repudiated defendant's cramped view of its fiduciary obligations." *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 736 (2011). "While *White Mountain Apache* may be the sockdolager here, it is neither the first nor the only case to reject defendant's theory. . . . Subsequent decisions of the Supreme Court, moreover, confirm that *Mitchell II* and *White Mountain Apache* remain good law." *Id.* at 737.

- "Defendant would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic defying feat of legal gymnastics. . . . Were the court convinced even to attempt this tumbling run, it almost certainly would . . . garner from the three judges reviewing its efforts a combined score of 'zero'—not coincidentally, precisely the number of decisions that have adopted defendant's position." *Id.* at 739.

- "The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets: . . . (L) Communicate with beneficial owners regarding the management and administration of Indian trust assets;" 303 DM 2.7; *cf.* 25 U.S.C. 162a(d); 43 C.F.R. 20.502; DOI, Sec. Order 3215 (statutory duties not exhaustive; look to SOL advice).

Conclusions

"Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic." *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754 (1997) (Smith, Chief J.), *rev'd sub nom. on other grounds*, *Suess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008) (concerning *Winstar* savings and loan cases).