No. 2009-M908

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE UNITED STATES,
Petitioner.

Petition for Mandamus Concerning Order
Compelling Document Production in
Jicarilla Apache Nation v. United States,
Court of Federal Claims, No. 02-25L
Hon. Francis M. Allegra

NAVAJO NATION'S AND PUEBLO OF LAGUNA'S AMICUS CURIAE BRIEF SUPPORTING JICARILLA APACHE NATION AND OPPOSING COMBINED PETITION FOR REHEARING

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April 13, 2010

CERTIFICATE OF INTEREST

1. The full name of every amicus represented.

   Navajo Nation; Pueblo of Laguna.

2. The name of the real party in interest if the party named in the caption is not the real party in interest.

   None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae.

   None.

4. The names of all law firms and the partners and associates that have appeared for amici in the lower court or are expected to appear for amici in this court.

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AMICI CURIAE IDENTITY, INTEREST, AND AUTHORITY

Amici Curiae are the Navajo Nation and the Pueblo of Laguna ("Amici"). Amici have funds and other assets held by the United States in trust for their benefit. Also, Amici are plaintiffs in separate tribal trust mismanagement cases pending before the same trial judge as this case, which are directly affected by the mandamus decision here. Amici have an interest in obtaining discovery in their cases and ensuring that the United States does not either disregard or misrepresent rulings in prior cases involving them or relitigate issues in an unwarranted effort to eviscerate its solemn and long-standing trust duties. The source of Amici's authority to file this brief is their inherent sovereign status. All parties have consented to this filing.

ARGUMENT

The combined petition for rehearing should be denied because the panel decision in this case does not overlook or misapprehend any point of law or fact, does not conflict with any of the court's other decisions, and does not involve a question of exceptional importance. Instead, the panel decision that the fiduciary exception to the attorney-client privilege applies in tribal trust cases follows naturally from the undisputed existence of general and identified specific trust relationships between the United States and Indian tribes. Also, it is settled law that the United States acts as a fiduciary when laws require it to manage Indian trust assets and those trust duties are judged by the "most exacting fiduciary standards." Moreover, only application of

the fiduciary exception here will fulfill the purposes of the attorney-client privilege to promote the observance of law, the administration of justice, and effective representation of the true clients—Indian beneficiaries. Given all this, the rehearing claims about a purported chilling effect, application of common-law trust duties, and the real client for Indian trust fund management are completely meritless. The petition should be categorically denied in the strongest terms with whatever additional explanation is appropriate to limit any further abuse of the judicial process and gross disregard for two centuries of American history and basic federal Indian law.

I. There is No Question of Exceptional Importance Here Because the Panel Decision Promotes Federal Attorney-Client Communication for Tribal Trust Matters and Does Not Conflict with Other Appellate Decisions.

The combined petition for rehearing asserts that the panel decision here "has exceptional important adverse consequences" for federal management of Indian trust assets because it is causing federal attorneys to limit the manner and type of advice they provide, which could be obtained by tribes in discovery, thereby compromising the ability of program personnel to receive full and candid advice. Pet. at 5-6. This hyperbolic assertion cannot establish that this proceeding involves "a question of exceptional importance" for *en banc* rehearing under Federal Rule of Appellate Procedure 35(a)(2) or 35(b)(1)(B) because it lacks any basis in law, fact, or logic.

First, the assertion of a significant chilling effect from the panel decision contravenes relevant precedent. As the Supreme Court recently recognized, "[o]ne

reason for the lack of a discernable 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 . . . ." *Mohawk Indus., Inc. v. Carpenter*, 130 S.Ct. 599, 607 (2009). Furthermore, the fiduciary exception is well-established, it has been previously applied in three other Indian trust cases, the panel decision does not conflict with any other decision, and the traditional rationales for the fiduciary exception apply. *In re United States*, 590 F.3d 1305, 1311-14 (Fed. Cir. 2009) (citing cases); *Jicarilla Apache Nation v. United States*, 91 Fed. Cl. 489, 492 (2010) (also denying stay for further review). Therefore, the asserted concern that disclosure to tribes will chill federal legal advice on management of Indian trust assets is not legally tenable, much less a question of exceptional importance.

Second, the blanket assertion of a chilling effect from the panel decision lacks any factual specificity or foundation that provides any credibility or avoids being inadmissible hearsay. *See* Fed. R. Evid. 802, 806. Indeed, regardless of the panel decision here, Amici have previously obtained a number of the subject documents, including two from publicly available records of the National Archives in College Park. All those records suggest that the only reason why the United States fears their disclosure here is because they reveal the actual historic facts which are materially different from and which undermine its post-hoc litigating positions.

Finally, the asserted concern about a chilling effect lacks any logical basis

because, as the panel correctly recognized, "the basic concern could be stated by any trustee." *In re United States*, 590 F.3d at 1316. In particular, the legal advice here was obtained by federal officials "as . . . trustee of various Indian tribes," 25 U.S.C. § 161, either in or for "the best interest of the Indians," *id.* §§ 161, 162a(a). Such advice is necessarily obtained for the benefit of Indian tribes, so possible disclosure of that advice to them necessarily would encourage rather than compromise full and candid advice, and improve rather than impair trust fund management.

II. The Common-Law Trust Duty to Disclose Supports the Fiduciary Exception Here Because Precedent Holds that Common-Law Duties Govern Federal Management of Indian Trust Assets.

The combined petition next complains that the panel decision improperly relies on the common-law duty of disclosure to apply the fiduciary exception because that duty is "wholly untethered to any statute or regulation," common-law trust duties are not enforceable and cannot abrogate privilege, and the United States manages Indian trusts as a "sovereign" function. Pet. at 6-11. These arguments misrepresent and disregard precedent, including a core principle of federal Indian law for 180 years.

First, the United States improperly conflates existence of a fiduciary relationship which supports application of the fiduciary exception in <u>any</u> court, with the Indian Tucker Act's jurisdictional requirements for the Court of Federal Claims. *Compare In re United States*, 590 F.3d at 1311-12 (noting at least five circuits' adoption of exception) *with United States v. Navajo Nation* ("*Navajo III*"), 537 U.S.

488, 502-03 (2003); *United States v. Navajo Nation* ("*Navajo VII*"), 129 S.Ct. 1547, 1551-52 (2009). The United States thus ignores "'the undisputed existence of a general trust relationship between the United States and the Indian people.'" *United States v. White Mountain Apache Tribe* ("*Apache*"), 537 U.S. 465, 474 n.3 (2003) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983)); *In re United States*, 590 F.3d at 1313 (quoting same and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). This alone warrants denial of the petition for rehearing.

Second, even if the standard for the fiduciary exception were the same as for Indian Tucker Act jurisdiction, the United States misrepresents *Navajo III* and *Navajo VII*. Those decisions only state the unremarkable points that the general trust relationship "alone is insufficient to support jurisdiction under the Indian Tucker Act[,]" *Navajo III*, 537 U.S. at 506, and that common-law trust duties do not play a role in inferring compensable federal duties where there is no specific rights-creating or duty-imposing statute or regulation, *Navajo VII*, 129 S.Ct. at 1558. Otherwise, Indian Tucker Act jurisdiction exists where statutes and regulations give the federal government "'full responsibility to manage Indian resources and land for the benefit of the Indians.'" *Id.* at 1553-54 (quoting *Mitchell II*, 463 U.S. at 224).

For example, this applies where statutes authorize use or disposition of Indian trust assets in "'the best interests of the Indian owner[,]'" *id.* at 1554 (quoting 25 U.S.C. § 406(a) and citing *Mitchell II*, 463 U.S. at 219-224), or where a statute

"expressly defines a fiduciary relationship[.]" *Apache*, 537 U.S. at 474. Therefore, even if Indian Tucker Act jurisdiction were required to apply the fiduciary exception, that exists here because the Indian trust fund statutes quoted above impose specific enforceable fiduciary duties. *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004); *Short v. United States*, 50 F.3d 994, 998-99 (Fed. Cir. 1995); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1393-94 (Ct. Cl. 1975).

Third, the assertion that the United States is only subject to duties expressly stated in statutes and regulations is wholly untenable. It is illogical because if the United States were only subject to codified duties, the trust relationship would be nonexistent or a mere gratuity. That is not possible because a fiduciary relationship necessarily arose when the United States by statute assumed control over Indian trust assets, *Mitchell II*, 463 U.S. at 225, and as consideration for dispossession of aboriginal Indian lands, *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *see Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979); *Cherokee Nation*, 30 U.S. at 48. In addition, *Navajo VII*, *Apache*, and other cases confirm that where the United States acts as a fiduciary—as it necessarily does for Indian trust funds—common-law trust duties apply, *Navajo VII*, 129 S.Ct. at 1558; *Apache*, 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[,]" even when acting pursuant to a tribal council request. *Seminole Nation*

v. United States, 316 U.S. 286, 297 (1942); *see also Shoshone Indian Tribe*, 364 F.3d at 1348; *Banner v. United States*, 238 F.3d 1348, 1352 (Fed. Cir. 2001); *Short*, 50 F.3d at 999; *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981); *Navajo Tribe v. United States*, 624 F.2d 981, 990 (Ct. Cl. 1980). Having been expressly rejected at least six times previously over the last thirty years by appellate precedent—including a binding decision by this court's predecessor involving the Navajo Nation—it is long-past due that this frivolous federal argument be expressly laid to rest forever.[1]

Next, these common-law duties necessarily include a duty to disclose, which is directly tied to the text of the governing statute, 25 U.S.C. § 162a(d)(5), which merely reaffirms and clarifies preexisting duties. *In re United States*, 590 F.3d at 1316-17. The current effort to evade the panel ruling that the prior argument on this point was "completely without merit[,]" *id.* at 1317, is impermissibly relegated to a

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[1] *See 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); *Navajo Nation v. United States* ("*Navajo VI*"), 501 F.3d 1327, 1345-46 (Fed. Cir. 2007) ("the Supreme Court heard, considered, and rejected these arguments by the government in *Apache*"), *rev'd on other grounds, Navajo VII*, 129 S.Ct. 1547 (2009); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *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*, 667 F.2d at 42-43 (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 (or other document).").

footnote, Pet. at 9 n.3, unsupported, and meritless, *see Cobell*, 240 F.3d at 1100-01.

Likewise, the assertion that common-law trust duties cannot abrogate the attorney-client privilege, including that referenced in the Indian Claims Limitation Act, Pet. at 8-9, improperly ignores that qualifying trust management information is never considered privileged as to a tribal beneficiary. *See Osage Nation v. United States*, 66 Fed. Cl. 244, 248-49 (2005) (citations omitted). Finally, the fact that "the national honor has been committed" to fulfill the duty to protect Indians as a "national interest [that] is not to be expressed in terms or property" or "limited[,]" augments rather than undermines trust duties to Indian tribes. *Heckman v. United States*, 224 U.S. 413, 437 (1912). The sovereign nature of the congressionally-imposed federal guardianship over Indian trust assets therefore does not preclude application of the fiduciary exception here. *Osage Nation*, 66 Fed. Cl. at 247-48.

III. The Panel's Recognition that Indian Tribes are the Real Clients for Trust Management Legal Advice Comports with Governing Authorities and the Recognized Sovereign Commitment to Protect Indians.

The combined rehearing petition finally complains that Indian tribes cannot be the "real clients" here because federal trust legal advice is paid for with appropriations rather than the trust corpus, and because *United States v. Candelaria*, 271 U.S. 432, 444 (1926), *United States v. Minnesota*, 270 U.S. 181, 194 (1926), and the U.S. Department of Justice recognize that legal representation as being for the United States as sovereign rather than for Indian tribes. Pet. at 12-15. As above, these

arguments present no qualifying question of exceptional importance for rehearing because they all misrepresent and disregard governing legal authority.

The panel correctly held that the payment for federal legal advice for Indians does not preclude trust duties because the United States imposed that relationship. *In re United States*, 590 F.3d at 1315; *See Shoshone*, 364 F.2d at 1348. 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.

In addition, *Candelaria* and *Minnesota* confirm that the sovereign nature of the federal trust relationship to Indians augments rather than eliminates trust duties. *Candelaria* upheld a federal quiet title suit on behalf of the Pueblo of Laguna despite two prior title decrees involving the Pueblo due to "'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). Likewise, *Minnesota* upheld a federal suit to protect the interest of Chippewa Indians because the United States had a "sovereign" interest to fulfill its obligations as guardian over Indians. 270 U.S. at 192, 194.

Finally, the Justice Department's unfounded misapprehension of its proper role regarding Indian tribes is irrelevant. The Supreme Court 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" and 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." *Nevada v. United States*, 463 U.S. 110, 128, 135 n.15, 142 (1983). In that situation, such as for Indian trust funds here, the attorney-client privilege belongs to Indian clients rather than federal attorneys. *In re United States*, 590 F.3d at 1310; *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). Only application of the fiduciary exception here will fulfill the purposes of the privilege to encourage "'full and frank'" attorney-client communication, "candid advice and effective representation[,]" and "'observance of law and administration of justice.'" *Mohawk Indus.*, 130 S.Ct. at 606 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

CONCLUSION

For the foregoing reasons, the combined petition for rehearing must be denied.

Respectfully submitted,

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Dated: April 13, 2010

PROOF OF SERVICE

I hereby certify that copies of the foregoing Navajo Nation's and Pueblo of Laguna's Amicus Curiae Brief Supporting the Jicarilla Apache Nation and Opposing Combined Petition for Rehearing were served on the following counsel on this 13th day of April, 2010, by email and FedEx, next-day delivery, and addressed as follows:

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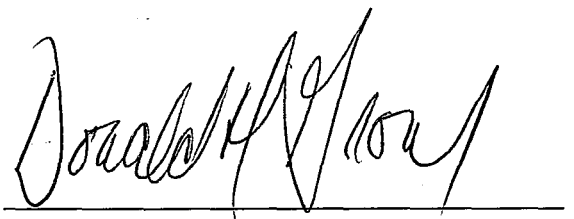

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