

IN THE SUPREME COURT OF THE UNITED STATES

No. 10A20

UNITED STATES OF AMERICA, APPLICANT

v.

JICARILLA APACHE NATION

APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The Acting Solicitor General, on behalf of the United States, respectfully requests a further extension of time, to and including September 19, 2010, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The court of appeals entered its judgment on December 30, 2009, and denied rehearing and rehearing en banc on April 22, 2010. By order dated July 7, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 20, 2010. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the opinion of the court of appeals, which is reported at 590 F.3d 1305, and the order denying rehearing are attached.

1. This case presents the question whether the United States is entitled to the attorney-client privilege in litigation brought against it by an Indian Tribe alleging breach of duties with respect to property held in trust for the Tribe. In January 2002, respondent Jicarilla Apache Nation sued the United States in the Court of Federal Claims (CFC), alleging that the United States, primarily the Departments of the Interior and Treasury, mismanaged money and natural resources held in trust for respondent's benefit. Respondent also alleged that the United States has failed to provide a full and accurate accounting of the trust assets. Respondent seeks, inter alia, monetary damages in the amount of \$300 million and a complete accounting of all assets held in trust since August 1946. First Am. Compl. 1-3, 15-19.

In July 2009, as the parties were conducting discovery for the first phase of the case (concerning trust accounts from 1972 to 1992), the CFC granted respondent's request to compel the United States to disclose certain documents that the United States had claimed (and, in some instances, the CFC had found) were covered by the attorney-client privilege. The CFC ordered production of those documents on the ground that they concerned management of tribal trust assets, relying on a "fiduciary exception" to the attorney-client privilege that has been recognized by some courts in the context of private, common-law trusts. 88 Fed. Cl. 1, 4-19 (2009).

2. The United States filed a petition for a writ of mandamus. The court of appeals denied the petition, holding 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." Op. 1.

The court of appeals explained that courts that have recognized a fiduciary exception to the attorney-client privilege in cases involving common-law trustees have identified two justifications: (1) that the fiduciary is not the attorney's exclusive client, but acts as proxy for the beneficiary; and (2) that the fiduciary has a duty to disclose to the beneficiary all information concerning trust management. Op. 12. The court concluded that both rationales supported applying such an exception to the United States in this case. The court stated that respondent is the "real client" of the government attorneys, based on respondent's "trust relationship with the United States." Id. at 14. The court further stated that "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets" and that, "[a]s a general trustee, the United States has a fiduciary duty to disclose information related to

trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds." Id. at 15, 19.*

The government sought panel rehearing and rehearing en banc, which the court of appeals denied.

3. The question whether the United States, in litigation arising out of its administration of statutes governing property held in trust for Indians, is entitled to assert the attorney-client privilege is an important and recurring one in cases such as this. See Osage Nation v. United States, 66 Fed. Cl. 244, 247-253 (2005); Cobell v. Norton, 212 F.R.D. 24, 27-29 (D.D.C. 2002). There are over 90 other tribal trust cases pending in the trial courts, a majority of which are in the CFC and thus controlled by the court of appeals' decision below.

The court of appeals' characterization of respondent as the "real client" of government attorneys is inconsistent with the Court's recognition that the management of Indian trust property is a sovereign function. See Nevada v. United States, 463 U.S. 110, 128 (1983); United States v. Candelaria, 271 U.S. 432, 443-444 (1926); United States v. Minnesota, 270 U.S. 181, 191-192 (1926).

* Shortly after the court of appeals denied the mandamus petition, the CFC ordered the United States to produce the documents at issue. The government sought a stay, which the CFC denied in part. The government has thus produced the documents under a protective order. This Court may still provide effective relief by ordering the documents to be returned and excluded from evidence. Cf. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 606-607 (2009).

In addition, the court of appeals' rationale -- that the United States' duties are defined by reference to the common law -- raises substantial questions under the Court's decisions in cases such as United States v. Navajo Nation, 129 S. Ct. 1547 (2009), holding that the duties of the United States to Indians are defined by statutes and regulations, not the common law.

4. The Acting Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional extension of time is requested to complete consultation with interested agencies and components about the legal and practical ramifications of the court of appeals' decision and, if a petition is authorized, to prepare and print the petition.

Respectfully submitted.

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