No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION, RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is entitled to a writ of mandamus allowing it to withhold from an Indian tribe, based on the attorney-client privilege, communications between the government and its attorneys concerning the management of tribal trust funds when those communications are not alleged to involve any governmental interest competing with the fiduciary duty to manage those funds for the benefit of the tribe.

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COUNTERSTATEMENT

1. In 2002, the Jicarilla Apache Nation (Jicarilla) commenced this breach of trust action aginst the United States in the Court of Federal Claims (CFC). The litigation was stayed for more than five years while the parties participated in an alternative dispute resolution (ADR) process. By agreement, the first phase of the ADR process addressed claims relating to the government's management of certain Jicarilla trust accounts during the period from 1972 through 1992. The Government produced many thousands of documents to Jicarilla, but also withheld a large number of documents as privileged. App. 25a.

In 2008, at Jicarilla's request, the case was restored to an active litigation track. The CFC divided the case into phases for trial and established a discovery schedule. The first phase addresses the alleged mismanagement of trust accounts that had been the focus of the ADR proceedings. App. 26a.

Jicarilla filed a motion to compel the Government to produce some 226 documents withheld from production during the ADR process based on various claims of privilege. The government agreed to produce 71 of the documents but maintained its privilege claims as to the remainder, which the government delivered to the CFC for *in camera* review. App. 26a.

2. In July 2009, the CFC ruled on the parties' discovery motions and granted in relevant part Jicarilla's motion to compel. App. 24a-90a. The CFC, like all other federal courts that had previously

addressed the issue, concluded that the "fiduciary exception" to the attorney-client privilege required the government, as a fiduciary, to disclose to the beneficiary communications relating to the management of Indian trust assets. App. 44a.

The CFC explained that two principal justifications for the "fiduciary exception" have been advanced by the courts. The first is that "the fiduciary is not the exclusive client of the attorney rendering advice, but rather is obtaining that advice either as a proxy for the beneficiaries or jointly therewith." App. 41a. The second is that the exception "deriv[es] from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration." App. 42a. The CFC concluded that there is nothing about the fiduciary relationship between the United States and Indian tribes, or the statutes and treaties from which that relationship springs, that renders the "fiduciary exception" inapplicable to the government. App. 45a. Accordingly, the CFC ordered the production of 75 of the documents in issue.[1] App. 50a-63a, 69a, 71a-84a.

3. The United States petitioned the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. That court granted a temporary stay but ultimately denied the mandamus petition. App. 1a-23a. It held that "the United

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[1] The remaining documents that the CFC permitted to be withheld were primarily duplicates of documents that it ordered to be produced or were covered by the work product doctrine, which the CFC ruled is not subject to the fiduciary exception.

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." App. 1a-2a.

The Federal Circuit commenced its analysis by noting that, pursuant to Fed. R. Evid. 501, it interprets privileges on a case-by-case basis according to principles of the common law. App. 7a. The court traced the history and development of the fiduciary exception to the attorney-client privilege. It observed that the exception is well established in federal courts and that federal trial courts previously had applied this exception to the United States in at least three Indian trust cases. App. 9a-14a.

The circuit court concluded that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception." App. 14a. It cited decisions of this Court and a number of statutes that establish or recognize the existence of a trust relationship between the United States and the Indian people. App. 15a-16a. The court found that the two principal justifications for the fiduciary exception both apply in this case. First, Jicarilla was the "real client" of the advice the Department of the Interior (Interior) sought about how to manage trust funds and other tribal assets. App. 15a. Second, as a trustee, the United States has a fiduciary duty to

disclose information related to trust management to the beneficiary tribes, including legal advice on how to manage trust funds. App. 21a.

The Federal Circuit considered and rejected the government's various arguments about why these rationales should not apply to it. The court acknowledged that, unlike other trustees, the government may sometimes be required to balance its fiduciary duties to tribes with other statutory duties. In this case, however, there is no allegation that the documents at issue involve any such balancing of competing interests. Thus, the court reserved the question whether the fiduciary exception applies to communications in which a specific competing interest actually was considered. App. 18a-19a.

The court was unmoved by the argument that the fiduciary exception is inapplicable because government attorneys are paid out of congressional appropriations rather than the trust corpus. The court noted that the government had imposed the trust on the tribes, and it saw no reason why use of public funds to pay for legal advice about trust management should bar the tribes from accessing that advice. App. 19a-20a.

Nor did the court accept the government's argument that applying the fiduciary exception would impair the Secretary of the Interior's ability to obtain confidential legal advice. It noted that this same concern could be stated by any trustee and concluded that this concern is outweighed by the rationales supporting application of the fiduciary exception. App. 20a.

Finally, the court rejected the argument that Interior's duty to disseminate information to tribes is limited to what Congress has required in the 1994 Indian Trust Fund Management Reform Act. The court found this argument "completely without merit" because the 1994 Act explicitly recognizes the possibility of additional trust responsibilities beyond those enumerated therein. App. 21a-22a.

4. The United States filed a petition for rehearing and for rehearing en banc which the Federal Circuit denied on April 22, 2010. App. 91a-92a. Meanwhile, the CFC set a new deadline for production of the documents and, on February 19, 2010, issued a protective order that prevents disclosure to third parties until the government has exhausted all additional appellate remedies. App. 93a-97a. The government thereafter produced the documents to Jicarilla.

REASONS FOR DENYING THE PETITION

This Court should deny the petition in this case. First, it is premature because the case is interlocutory and the government has presented no substantial reason why the Court should engage in review before final judgment. The decision of the Federal Circuit does not conflict with any decision of this Court or any other federal court. The United States simply seeks error correction of a factbound determination by the Federal Circuit. Second, this case involves the denial of a writ of mandamus. The government fails to establish that it has no other adequate means to attain relief and that its

entitlement to mandamus is "clear and indisputable." Finally, and in any event, the decision below was correct.

A. The Interlocutory Posture Of This Case Makes It Inappropriate For Resolving The Applicability Of The Fiduciary Exception

1. There is no compelling reason to depart from the final judgment rule in this case

a. This Court ordinarily does not exercise its discretion to review a nonfinal judgment of a court of appeals under 28 U.S.C. § 1254(1). *See Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari). Interlocutory decisions compelling disclosure of documents contrary to a claim of attorney-client privilege are no exception. As this Court explained last Term, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009). The decision in *Mohawk* reflects the Court's "healthy respect for the virtues of the final-judgment rule" and its recognition that piecemeal, prejudgment appeals undermine efficient judicial administration and encroach upon the prerogatives of trial judges. *Id.* at 605.

The United States, which opposed interlocutory review of attorney-client privilege issues in *Mohawk*, now asks the Court to make an about-face. But the government does not squarely acknowledge the interlocutory posture of this case because it has no

credible argument that a post-judgment appeal would be ineffective.

b. There exists no circuit split or conflict in authority that might warrant setting aside the final judgment rule and considering at this juncture whether the fiduciary exception to the attorney-client privilege applies to the government when it acts as a trustee. Contrary to the government's suggestion that the decision below is novel and "upends settled expectations" regarding the applicability of the attorney-client privilege, Cert. Pet. 10, every court to have considered the issue has agreed with the Court of Appeals. In decisions dating back to 2002, federal courts uniformly have applied the fiduciary exception in Indian trust cases. *See* App. 85a-90a (May 2002 CFC Order in *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458-79 and 459-79); *Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002); *Osage Nation and/or Tribe of Indians of Oklahoma v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *see also Cavanaugh v. Wainstein*, 2007 WL 1601723, at *9 (D.D.C. 2007) (fiduciary exception recognized in breach of fiduciary duty action against members of the Federal Retirement Thrift Investment Board).

Heretofore, the government has avoided litigating the fiduciary exception before a court of appeals. The government filed appeals of the 2002 ruling in *Cobell*, but subsequently dismissed those appeals voluntarily. The D.C. Circuit noted pointedly that, "[i]n moving for voluntary dismissal of these appeals, the federal appellants have waived any right to pursue their currently pending

challenges to the district court's application of the fiduciary exception to the attorney-client privilege and the work product doctrine." No. 03-5063, 2003 WL 22136383 (D.C. Cir. Sept. 9, 2003); *see also* No. 03-5084, 2003 WL 22867626 (D.C. Cir. Dec. 2, 2003) (making same statement in dismissing appeal of Secretary Norton, individually).

Thus, the settled expectation is that the fiduciary exception applies to the government as it does to other trustees. It is the government that now seeks to upset this expectation.

c. The government presents two arguments for why this matter presents an important question worthy of certiorari, which presumably are meant to override this Court's reluctance to grant interlocutory review. It asserts that the Federal Circuit's decision "threatens significant adverse consequences" because it would affect some 90 pending cases seeking billions of dollars from the government, and because it allegedly will chill consultation on tribal trust issues. Cert. Pet. 30-33. Neither contention is persuasive.

First, the government claims that interlocutory review is needed in this case because of the billions of dollars in potential liability that it faces collectively in Indian trust cases. But billions of dollars were at stake in the *Cobell* case, yet the government chose to acquiesce in the district court's ruling on the fiduciary exception and dismiss its appeal. No emergency has arisen since 2003 that justifies extraordinary interlocutory review of the

fiduciary exception issue at this juncture, seven years later.

Furthermore, the issue presented here does not affect the standard for determining whether the government is liable for breach of trust. Rather, it only affects the narrow issue of whether the government can prevent discovery of certain documents that may help establish whether a breach of trust occurred. The government does not explain how delaying the answer to *that* narrow question itself potentially implicates billions of dollars. Meanwhile, the application of the fiduciary exception does no injustice to the government because it advances the "predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citation omitted).

Second, interlocutory review is not justified based on the government's argument that application of the fiduciary exception will chill consultation between agency personnel who administer Indian trust assets and the government attorneys who advise them. This Court concluded in *Mohawk* that "deferring review [of attorney-client privilege issues] until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." 130 S. Ct. at 607. The government does not explain why that general rule does not apply in this case. Nor does the government demonstrate that any chilling of consultations has resulted from the application of the fiduciary exception in Indian trust cases for the past eight years.

Applying the fiduciary exception to the government simply treats it like other trustees. No adverse consequences have resulted from the widespread application of the fiduciary exception to private trustees. Moreover, for government employees, "[t]he protection afforded by the [attorney-client] privilege is already uncertain, due to various open government provisions and political and media pressures, yet government employees continue to communicate with sufficient candor to allow government attorneys to provide effective representation." Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163, 198 (2007). The government's "chill" argument is unpersuasive; it is not grounded in reality and has already been rejected by this Court in *Mohawk*.

2. The Court of Appeals' refusal to issue a writ of mandamus is particularly unsuited to interlocutory review

The United States could have sought interlocutory review of the fiduciary exception issue by asking the CFC to certify an appeal pursuant to 28 U.S.C. § 1292(b). *See Mohawk*, 130 S. Ct. at 607. The government did not do so. Rather, it chose to petition the Court of Appeals for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). App. 5a. This case's posture as a mandamus petition renders it a particularly unsuitable vehicle for this Court to resolve the applicability of the fiduciary exception to the government.

a. Only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of the "extreme remedy" of mandamus." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). Three conditions must be satisfied before the writ may issue. "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." *Id.* at 380-81 (internal quotation marks and citations omitted). "Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks and citations omitted). And "[t]hird, 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.*

The government's petition ignores this standard and treats the case as if the only issue is whether the Court of Appeals erred in denying its claim of privilege. The government never attempts to show that it has a "clear and indisputable" right to issuance of the writ. Nor does the government demonstrate that it has no other adequate means of obtaining relief, an insurmountable burden given this Court's recent admonition that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Mohawk*, 130 S. Ct. at 606. These failures are reason enough to deny the government's petition.

b. Accepting the government's invitation to decide this case as if it were presented in an ordinary procedural posture would transform mandamus from an "extraordinary remedy," *Cheney*, 542 U.S. at 380, into a "substitute for the regular appeals process," *id.* at 380-81. The Court should reject this invitation, particularly because the government has provided no explanation for why a post-judgment appeal -- either in this case, or in one of the other cases the government identifies as pending -- would be insufficient to protect its rights.

B. The Federal Circuit Correctly Applied The "Fiduciary Exception" To The Government

Not only does the petition fall far short of satisfying the criteria for interlocutory review, but it is clear that the Federal Circuit, like every other federal court to have considered the issue, concluded correctly that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception." App. 14a.

At issue here is the government's management, not of public assets, but of assets that belong to Indians. Indian beneficiaries are equally deserving of, and entitled to, the legal advice provided to their fiduciary regarding the management of their trust assets as beneficiaries of private trusts. Nonetheless, the government contends that the rationales for the fiduciary exception are vitiated in Indian trust cases because (1) unlike private trustees, it manages tribal trust property as a "sovereign function" and sometimes may have other

statutory responsibilities that conflict with tribal interests -- although it does not claim that any such conflict exists here, and (2) no statute or regulation requires it to communicate all relevant information about trust management to Indian tribes and no such common law duty can be imposed on it. These contentions do not withstand scrutiny.

1. The government acts as a trustee in managing Indian trust assets

a. "[T]he law is 'well established that the Government in its dealing with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)). Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.'" Felix Cohen, *Handbook of Federal Indian Law* § 5.04(4)(a) (2005). "Courts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981).

b. In seeking to avoid the presumption that it should be treated like other trustees, the government relies principally on the decision in *Nevada v. United States*, 463 U.S. 110 (1983), where this Court permitted the government to represent Indian tribes in litigation even though Congress had obliged it to represent other interests as well. A

private trustee could not engage in such dual representations.

But *Nevada* does not hold or suggest that the rules applicable to private trustees should not generally be applied to the Government. Instead, the Court acknowledged "[i]t may be that where only a relationship between the Government and the Indian 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. Three days later the Court issued its seminal decision in *United States v. Mitchell*, 463 U.S. 206 (1983), which applied the common law of trusts to Indian breach of trust claims. Thus, the import of *Nevada* is that "[t]he government's trust obligations . . . can coexist with its other responsibilities. . . . the government may satisfy a range of statutory responsibilities while still honoring its trust obligations to Indians." *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 993 (9th Cir. 2005).

The communications at issue in this case do not involve any balancing of competing, non-fiduciary interests by the government. App. 18a. The court of appeals reserved the question whether the fiduciary exception would apply to communications in which the government or its attorneys had considered a specific competing interest. App. 19a. That issue is not presented here.[2]

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[2] Should the unusual situation arise where the government does consider a specific competing interest in the course of managing Indian trust assets, the rationale for the fiduciary

c. None of the other cases cited by the government[3] support the proposition that it has conflicting responsibilities in managing tribal trust assets, or owes a lesser duty to Indian tribes than do private trustees. Rather, these cases establish that the government, as a sovereign, may have standing to protect Indians and Indian property rights even when a private trustee might not.[4] In other words, the government sometimes can do more than a private trustee could to protect Indian trust assets. These cases do not suggest that the government has a lesser fiduciary obligation to Indians than would a private trustee.

2. Jicarilla is the "real client" of legal advice about the management of its trust assets

a. The government argues that an Indian tribe cannot be the "client" of the Attorney General and other government attorneys, but this miscasts the

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exception would not be undermined. The Indian beneficiary still would deserve access to the legal advice on which the government relied in reconciling its obligations and deciding how to manage the trust assets.

[3] *Heckman* v. *United States*, 224 U.S. 413 (1912); *United States v. Minnesota*, 270 U.S. 181, 194 (1926); *United States v. Candelaria*, 271 U.S. 432 (1926).

[4] *See Dir., Office of Workers Comp. Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 133 (1995) (*Heckman* held that the government's status as guardian confers standing to represent the interests of Indians); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) ("The obligation and power of the United States to institute . . . litigation to aid the Indian in the protection of his rights in his allotment were recognized in [*Heckman* and *Candelaria*].")

"real client" issue. The seminal decision in *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), articulated the "real client" concept as follows: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. . . . The very intention of the communication is to aid the beneficiaries." *Id.* at 713-14. Thus, "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust." *Id.* at 714.

Plainly, this concept applies to advice that government attorneys provide about the management of Indian trust assets -- the purpose of those communications is to aid the Indian beneficiaries. Accordingly, just as in *Riggs*, the policy of full disclosure in the trustee-beneficiary relationship outweighs the need for confidential communications between those trustees and their attorneys.

b. The "real client" concept does not turn on finding a formal attorney-client relationship between the trustee's attorney and the beneficiary. Rather, it focuses on the substance of the legal advice at issue and for whose benefit it is given. If the purpose of the advice is to aid the trust beneficiary, then the beneficiary is deemed the "real client" and is entitled to disclosure of the communications at issue.

The government's argument that there is no statutory or regulatory basis for creating an attorney-client relationship between government

attorneys and an Indian tribe is immaterial. And the views of the Department of Justice about the identity of its client and the role of its attorneys are also irrelevant to deciding the "real client" issue.

Finally, the fact that government attorneys are paid with public funds rather than the trust corpus, and that the government owns the records reflecting communications with its attorneys, are of no import.[5] In some cases involving private trustees, the source of payment may indicate for whose benefit the legal advice was being sought. But it does not do so in this case. It definitely does not alter the conclusion that advice about the management of Indian trust assets was sought to aid the trust beneficiary.

3. As a trustee, the government has a fiduciary duty to disclose legal advice about trust management to Jicarilla

The government argues that no statute or regulation imposes on it a general duty to communicate to Indian beneficiaries material facts affecting their interest in trust assets and so this common law fiduciary duty cannot be extended to it. This argument fails for multiple reasons.

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[5] It can be argued that Indians have already "paid" for the government's trust services by ceding most of their lands to the United States. As this Court noted, "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them a[] . . . dependent people, needing protection . . . . Of necessity the United States assumed the duty of furnishing that protection . . . ." *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

a. The government upends the applicable law by contending that "the absence of any statutory or regulatory duty that Interior disclose confidential communications ... about tribal trust administration is dispositive" of the privilege issue presented here. Cert. Pet. 25. To the contrary, Fed. R. Evid. 501 specifies that, "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court ... the privilege of a ... government ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984).

The salient point is not whether Congress has required the disclosure of allegedly privileged information to Indians; it is that Congress has not authorized relevant information to be withheld from Indians regarding the management of their trust assets.

b. The government also misreads the Court's jurisprudence regarding trust obligations owed to Indians. The *Navajo Nation* decisions,[6] like other decisions addressing the government's liability to Indians for breach of trust, focus on the necessity of a statutory or regulatory obligation because that is the prerequisite for jurisdiction under the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28

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[6] *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

U.S.C. § 1505. Where jurisdiction under these Acts is at issue, principles of trust law cannot substitute for a statutory or regulatory obligation, although trust principles are relevant in making the second stage determination whether Congress intended damages to remedy a breach of the statutory or regulatory obligation. *See Navajo Nation*, 129 S. Ct. at 1551-52. But the fiduciary exception has nothing to do with jurisdiction. Rather, it relates to what evidence is available to prove a breach of trust claim where the jurisdictional requisites of the Tucker Act or Indian Tucker Act have been satisfied. Those jurisdictional prerequisites have no place in the analysis here.

This Court has never held that all of the government's trust responsibilities to Indians must be spelled out in a specific statutory or regulatory mandate. To the contrary, the Court has enforced duties based on the trust relationship that are not derived from any statute or regulation. In *Morton v. Ruiz*, 415 U.S. 199 (1974), for example, a unanimous Court held that Indians who lived near a reservation were entitled to general assistance benefits despite a Bureau of Indian Affairs (BIA) manual that limited the benefits to those who lived on a reservation. The court concluded that Indians living near reservations had a "legitimate expectation" of these benefits based on the BIA's representations to Congress when seeking funds. Thus, "[t]he denial of benefits to these [Indians] under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" 415 U.S. at 236.

Likewise, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a federal land patent which had granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with the Indians, and the national policy protecting Indian land occupancy, the Court found that the general statutory authority of federal officials to issue land patents was limited, even though Indian occupancy of the lands was not expressly protected by treaty, executive order, or statute. *Id.* at 227-29. The Court stated that "(t)he fact that such [Indian] right of occupancy finds no recognition in any statute or other formal Governmental action is not conclusive." *Id.* at 229.

c. Congress, for its part, has never suggested that the government's fiduciary obligations to Indians are limited to specific statutory and regulatory provisions. In 1992, for example, Congress stated that "[t]he most fundamental fiduciary responsibility of the government, and the Bureau [of Indian Affairs], is the duty to make a full accounting of the property and funds held in trust for the . . . beneficiaries of Indian trust funds." "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 at 5 (1992). Yet it was not until 1987 that Congress enacted a statute specifically requiring that Indian trust accounts be audited and reconciled. *See* Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329. Obviously, this does not mean that, prior to 1987, the government had no duty to account to Indian beneficiaries regarding the property and funds held in trust for them.

Congress later enacted the American Indian Trust Fund Management Reform Act of 1994, which "recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians ... not the least of which is a duty to account." *Cobell v. Norton,* 240 F.3d 1081, 1098 (D.C. Cir. 2001). The Act provides that "the [Interior] Secretary's proper discharge of the trust responsibilities of the United States [to Indians] shall include (but are not limited to) the following [eight categories]."[7] 25 U.S.C. § 162a(d) (emphasis added). "In other words, [Congress recognized that] the government has other responsibilities not enumerated in the 1994 Act." *Cobell v. Norton,* 240 at 1100.

d. The government, itself, has previously argued to this Court that it has common law trust obligations to Indians. In *Department of the Interior v. Klamath Water Users Protective Association,* the

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

(2) Providing adequate controls over receipts and disbursements.

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

(4) Determining accurate cash balances.

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

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

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

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

government, citing the Restatement (Second) of Trusts, asserted that it has a duty to an Indian beneficiary not to disclose to a third person information which it has acquired as trustee where the effect would be detrimental to the interest of the beneficiary. *See* 532 U.S. 1, 15 n.6 (2001), and Brief for Petitioners at 17, 36.[8]

e. In any event, the government's statutory obligation to make a full accounting to Indian beneficiaries regarding their assets includes a duty to communicate material facts affecting the beneficiaries' interest in the trust assets. This Court uses common law trust principles to flesh out the government's fiduciary duties to Indians under statutes and regulations. *See United States v. White Mtn. Apache Tribe*, 537 U.S. 465, 475 (2003) (applying the common law duty to preserve trust assets). It is firmly established at common law that "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *Restatement (Second) of Trusts* § 173 cmt. c (1959).

Congress clearly intends that this common law rule apply to the government. When it directed that Indians be given trust accountings, Congress also provided that the statute of limitations shall not commence to run on Indian breach of trust claims until an accounting is furnished from which the

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[8] The Court found it unnecessary to decide whether the government has this trust duty because, in *Klamath*, any such duty was overcome by the statutory mandate of the Freedom of Information Act. *See* 532 U.S. at 15-16 & n.6.

beneficiary can determine whether there has been a loss. *See Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1344-51 (Fed. Cir. 2004).[9] A beneficiary cannot determine whether a loss occurred unless it is furnished all the information necessary to determine whether the trust assets have been managed properly and in accordance with applicable legal requirements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[9] *See also, e.g.*, Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of Oct. 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

Respectfully submitted,

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