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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Can the United States assert the attorney-client privilege against an Indian tribe suing it for mismanagement of tribal trust funds to withhold communications between the government and its attorneys concerning management of those funds when the communications do not involve any other governmental duty that competes with its fiduciary duty to manage the funds for the tribe's benefit?

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COUNTERSTATEMENT

1. In 2002, the Jicarilla Apache Nation (Jicarilla) commenced a breach of trust action against the United States in the Court of Federal Claims (CFC). Insofar as relevant here, the action seeks monetary damages for the government's alleged mismanagement of funds held in trust by the United States for Jicarilla.

Jicarilla sued under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, both of which vest the CFC with jurisdiction over claims against the government that are founded upon the Constitution, laws, treaties, or contracts of the United States. The complaint alleges that the government's mismanagement of Jicarilla trust funds violated various laws, including 25 U.S.C. §§ 161a and 162a, which govern the management of funds held in trust by the United States for the benefit of an Indian tribe.

2. The litigation was stayed for more than five years while the parties participated in an alternative dispute resolution (ADR) process. The parties engaged in large-scale document production, during which the government withheld a number of documents as privileged. Pet. 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 government's mismanagement of Jicarilla's trust accounts from 1972 through 1992, which had been

the focus of the ADR proceedings. Pet. App. 26a. Jicarilla alleges, among other things, that the government failed to invest its trust funds properly. Pet. App. 25a.

Jicarilla filed a motion to compel production of 226 documents withheld by the government during the ADR process based on claims of attorney-client privilege, attorney work-product, and the deliberative process privilege. The government withdrew its deliberative process privilege claims and agreed to produce 71 of the documents but maintained its claims as to the remainder, which the government delivered to the CFC for *in camera* review. Pet. App. 26a.

3. In July 2009, the CFC ruled on the parties' discovery motions and granted Jicarilla's motion to compel in relevant part. Pet. App. 24a-90a. The CFC, like all the federal courts that previously addressed the issue, concluded that the "fiduciary exception" to the attorney-client privilege required the government, as a fiduciary, to disclose to an Indian beneficiary communications relating to the management of trust funds. Pet. App. 44a. (The CFC did not, however, apply the fiduciary exception to the government's claims of work-product privilege. App. 47a).

The CFC explained that courts have advanced two principal justifications for the "fiduciary exception." The first is that the fiduciary obtains the legal advice as a proxy for the beneficiary. App. 41a. The second is that the exception derives from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration. Pet. App. 42a.

The CFC concluded that there is nothing about the fiduciary relationship between the United States and Jicarilla that renders the "fiduciary exception" inapplicable to the government. Pet. App. 45a. Accordingly, the CFC ordered the production of 75 of the documents at issue. Pet. App. 50a-63a, 69a, 71a-84a.

4. The government petitioned the Federal Circuit for a writ of mandamus. The Federal Circuit granted a temporary stay but ultimately denied the petition. Pet. App. 1a-23a. It held 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." Pet. App. 1a-2a.

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

The Federal Circuit concluded that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify

applying the fiduciary exception." Pet. 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. Pet. 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 provided to the Department of the Interior (Interior) about how to manage tribal trust funds. Pet. App. 15a. Second, as a trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary tribe, including legal advice about how to manage trust funds. Pet. 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 the government may sometimes be required to balance its fiduciary duties to tribes with other statutory duties. In this case, however, there was no allegation that the documents at issue involve any such balancing of competing interests. The court noted that this is the trust funds phase of the case and does not involve the management of assets such as land or mineral rights, where the government might have other statutory duties. The court reserved the question whether the fiduciary exception applies to communications in which a specific competing interest actually was considered. Pet. App. 18a-19a.

The court also rejected the government's argument that the fiduciary exception is inapplicable because government attorneys are paid out of congressional appropriations rather than the trust

corpus. The court saw no reason why use of public funds to pay for legal advice about trust management should bar the tribe from accessing that advice. Pet. 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, public or private, and concluded that this concern is outweighed by the rationales supporting application of the fiduciary exception. Pet. App. 20a.

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

5. The government filed a petition for rehearing and for rehearing en banc which the Federal Circuit denied on April 22, 2010. Pet. 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 preserves the government's privilege claim and prevents disclosure to third parties until the government has exhausted all of its appellate remedies. Pet. App. 93a-97a. The government thereafter produced the documents to Jicarilla pursuant to this order.

SUMMARY OF ARGUMENT

The government asks the Court to ignore the Federal Rules of Evidence and exempt it from the well-established principle that, in breach of trust litigation, a trustee cannot assert the attorney-client privilege against the beneficiary with respect to the legal advice it has received regarding the management of trust funds. Its arguments are unpersuasive.

1. The Federal Rules of Evidence control determinations of privilege in federal courts and provide that they "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." Fed. R. Evid. 501. The government fails to acknowledge this rule. Indeed, it urges the Court to contravene the rule by arguing that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law." Br. 30.

2. The government relies upon the common law (not any statute or regulation) in arguing that it has an attorney-client privilege. But common law provides no support for the government's argument that it deserves a broader and stronger privilege than do private trustees. To the contrary, as the United States itself has argued elsewhere, "the attorney-client privilege in the government context is weaker than in its traditional form." *In re Grand Jury Investigation*, 399 F.3d 527, 533 (2d Cir. 2005).

3. The fiduciary exception precludes any trustee from asserting the attorney-client privilege against the beneficiary with respect to communications regarding trust administration. *See Restatement (Third) of The Law Governing Lawyers* § 84 (2000); *Restatement (Third) of Trusts* § 82 cmt. f (2007). This exception is "black letter" law and the government itself has invoked the exception in litigation involving private fiduciaries. *See United States v. Mett*, 178 F.3d 1058, 1061, 1064 n.9 (9th Cir. 1999).

There are two justifications for the exception: (1) the fiduciary acts as a proxy for the beneficiary who is the "real client" of the advice, *i.e.* because the advice is sought to serve the beneficiary's interest, the beneficiary is entitled to it; and (2) the fiduciary has a duty to disclose all information related to trust management to the beneficiary. These rationales apply to the government as well as private trustees. *See* Pet. App. 14a-21a.

4. Congress unequivocally has made the government a fiduciary when it manages tribal trust funds. The applicable statutes, 25 U.S.C. §§ 161a and 162a (App. 1a-3a), could not be clearer that tribal funds are "held in trust by the United States" and are to be managed as such. Although the government, as a sovereign, may have broader responsibilities and powers than a private trustee, its sovereign status does not diminish its fiduciary duty to manage tribal trust funds solely for the benefit of the tribe. Nor does its sovereign status entitle the government to withhold from a tribal beneficiary information about how it has managed the tribe's trust funds.

5. The government contends that it sometimes has other responsibilities that may conflict with the interests of its Indian beneficiaries, but that issue is not presented here. The government did not allege below that any such conflict exists and the Federal Circuit reserved the question whether the fiduciary exception applies to communications that do consider competing interests.[1] Moreover, the government has no other duties that compete with its obligation to manage Indian trust funds solely for the benefit of the Indians. And the existence of a competing duty would not undercut the fiduciary exception in any event. The need for transparency about trust management is even greater where the trustee has divided loyalties or duties. *See Restatement (Third) of Trusts* § 79 cmt. g (2007) (emphasizing the importance of the trustee's communication with beneficiaries who have competing interests).

6. The government attacks a straw man in arguing that the Federal Circuit's ruling treats

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[1] Not until it sought review by this Court did the government first suggest that one of the 75 documents at issue in this case might involve a competing interest. Pet. at 29. Because this question was not raised before or decided by the courts below, the Court ordinarily would not review it. *See Springfield v. Kibbe*, 480 U.S. 257 (1987). "The Government . . . may lose its right to raise factual issues . . . before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v. United States*, 451 U.S. 204, 209 (1981).

tribes (and not just the government) as the client of government attorneys. The fiduciary exception only applies in the absence of an attorney-client relationship between the trustee's counsel and the beneficiary. Were the beneficiary the actual client of the attorney, resort to the exception would be unnecessary. The exception applies because the beneficiary is considered the "real client" of the legal advice about the management of its trust funds: the purpose of the advice is to serve the beneficiary's interests. The government and its officials who obtained the advice have no stake in substance of the advice, beyond their trustee role.

7. Under long-established common law principles, a trust beneficiary is entitled to "such information as is reasonably necessary to enable [it] to prevent or redress a breach of trust and otherwise to enforce [its] rights under the trust." *Restatement (Third) of Trusts* § 82 cmt. a(2). This includes legal advice provided to the trustee about management of the trust. *Id.* cmt. f. Congress has not exempted the government from these principles. Nor has it authorized the government to withhold such information from Indian trust beneficiaries.

8. The government's reliance on the *Navajo Nation* decisions[2] to disclaim any duty of disclosure not spelled out by statute or regulation is misplaced. Those decisions address the CFC's jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, both of which require a

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

claim based on a statutory or regulatory obligation. In that context, principles of trust law cannot substitute for a statutory or regulatory obligation. *See Navajo II*, 129 S. Ct. at 1551-52. But this case does not involve the CFC's jurisdiction. Rather, it involves what evidence is available to prove a breach of trust claim where the jurisdictional requisites of the Tucker Act or Indian Tucker Act already have been satisfied. Pursuant to Fed. R. Evid. 501, this evidentiary issue is governed by common law principles.

ARGUMENT

A. The Evidentiary Privilege Issue Presented Here Is Governed By Fed. R. Evid. 501

The issue presented in this case is whether an Indian tribe suing the government for mismanagement of its trust funds is entitled to discover and use as evidence the legal advice provided to the government about the management of those funds.[3] This issue is controlled by Fed. R. Evid. 501, which provides that "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 the light of reason and experience."

In enacting Rule 501, Congress considered and rejected a set of proposed privilege rules that had

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[3] There is no issue in this case about the CFC's jurisdiction to adjudicate Jicarilla's claims. Nor is there yet any issue about the government's liability, which remains to be decided at trial.

defined nine specific privileges and, instead, mandated continued use of the common law. *See Trammel v. United States*, 445 U.S. 40, 47 (1980). The House of Representatives amended article V of the proposed Rules to eliminate all of the specific rules on privileges. The Senate concurred "with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply . . . ." S. Rep. No. 93-1277, at 11 (1974). "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, 803 n.25 (1984).

The government conspicuously fails to cite Rule 501 anywhere in its brief. The rule belies its arguments that the Federal Circuit erred by "imposing judicially fashioned common-law rules and concepts on the United States" (Br. 29) and that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law." Br. 30. To the contrary, the Federal Circuit correctly followed Congress' mandate in Rule 501 by applying common law principles to resolve the privilege issue presented here. The government cannot exempt itself from Rule 501 by simply disregarding it.

Furthermore, in its attempt to bypass Rule 501, the government takes an internally inconsistent position. The government argues that its disclosure obligations are governed solely by statute and regulation, not by common law. But no statute or regulation confers an attorney-client privilege on the

government. The government relies upon the common law in arguing that it has such a privilege. Thus, the government's position is that the Court should give it the benefit of the common law attorney-client privilege, but ignore the common law exception to that privilege. "This 'heads I win, tails you lose' approach cannot be correct." *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 471 (2007). The government cannot selectively invoke and disregard the common law to suit its own advantage.

B. The Government's Privilege Claim Finds No Support In Common Law

Privileges "must be strictly construed and accepted only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotations omitted). The government contends that it deserves a broader, stronger attorney-client privilege than do private fiduciaries. But it has less need for, and claim to, an attorney-client privilege than a private party. The fiduciary exception applies to the government like private trustees and precludes assertion of the attorney-client privilege against an Indian trust beneficiary.

1. The government has a weaker claim to the attorney-client privilege than a private party

Although it is well-established that corporations and individuals have an attorney-client privilege, this Court has never addressed the extent to which the privilege applies to communications between government officials and attorneys.[4] Indeed, "[i]t is far from clear that the common law attorney-client privilege could be claimed by governments . . . ." 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5475, at 124 (1986). The Executive Branch's legitimate interests in confidentiality are protected by distinct privileges, such as executive privilege, that are specifically tailored to the workings of government and that are unavailable to private persons and entities. There is a substantial argument that claims for governmental secrecy should all be adjudicated in the context of these privileges. *See id.* at 127.

The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United*

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[4] In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Court ruled that Exemption 5 of the Freedom of Information Act includes documents subject to the attorney work-product privilege. In support of this ruling, the Court cited legislative history that mentioned both work-product and the attorney-client privilege. *Id.* at 154.

States, 449 U.S. 383, 389 (1981). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). But this rationale for the privilege is not compelling when applied to the government.

While government officials doubtless have a legitimate need for legal advice as they go about their business, it does not follow that their consultations with counsel should be privileged in order to promote the public interest in the observance of law.[5] Government officials and attorneys are supposed to serve the public interest rather than any private interest. "Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *see also Berger v. United States*, 295 U.S. 78, 88 (1935). "The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive [as precedent for applying the attorney-client privilege to the government as an

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[5] The Uniform Rules of Evidence, for example, preclude any attorney-client privilege for communications between a public officer or agency and its lawyers "unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest." Unif. R. Evid. 502. Under this approach, the government could not assert any attorney-client privilege here even without considering the fiduciary exception.

organization]." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997). The United States has taken the position in other cases that "the attorney-client privilege in the government context is weaker than in its traditional form." *In re Grand Jury Investigation*, 399 F.3d at 533.[6]

2. The fiduciary exception precludes any claim of attorney-client privilege in this case

Whatever attorney-client privilege the government may possess in other contexts, the fiduciary exception precludes assertion of the privilege here. The fiduciary exception is firmly established in common law. The Federal Circuit traced its development back to 1855 and noted that it has been recognized by at least five circuits. App. 9a-12a. It is "black letter" law in the *Restatement (Third) of The Law Governing Lawyers* § 84, and *Restatement (Third) of Trusts* § 82 cmt. f. The government, itself, has invoked the exception in litigation involving private fiduciaries. *See Mett*, 178 F.3d at 1061, 1064 n.9.

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[6] It appears that the federal government thus far has limited this argument to criminal cases in which it is challenging an assertion of attorney-client privilege by a state government. *See In re Grand Jury Investigation, supra; In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002). This argument has twice been successfully asserted against the federal government by an Independent Counsel. *See In re Lindsey*, 158 F.3d 1263, 1278; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921. But the argument is equally applicable here, where the issue is whether the government has breached its fiduciary duty.

The fiduciary exception rests on two foundations. First, the fiduciary acts as a proxy for the beneficiary who is the "real client" for whose benefit the advice was sought. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary. Pet. App. 13a-14a. In sum, "because of the mutuality of interest between the parties, the faithful fiduciary has nothing to hide from his beneficiary." *Quintel Corp., N.V. v. CitiBank, N.A.*, 567 F. Supp. 1357, 1363 (S.D.N.Y. 1983). Put another way, "the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty." *Bland v. Fiatallis N. America, Inc.*, 401 F.3d 779, 787 (7th Cir. 2005).

The Federal Circuit 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." Pet. App. 14a. Every other court to have considered this issue has reached the same conclusion. Over the past decade, federal courts uniformly have applied the fiduciary exception in Indian trust cases. *See* Pet. App. 85a-90a (Order, *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458a-79 L and 459a-79 L (CFC May 16, 2002)); *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). The fiduciary exception also has been applied in other contexts where the government manages private funds as a trustee. *See Cavanaugh v. Wainstein*, Civil Action No. 05-123 (GK), 2007 WL 1601723, at *9 (D.D.C. June 4, 2007) (fiduciary exception

recognized in breach of fiduciary duty action against members of the Federal Retirement Thrift Investment Board).[7]

C. The Fiduciary Exception Applies To The Government Like Other Trustees

Applying the fiduciary exception to the government simply treats it like other trustees. Indian beneficiaries are equally deserving of, and entitled to, the legal advice provided to their fiduciary regarding the management of their trust funds as are beneficiaries of private trusts. "The Indian Tribes, as domestic dependent nations, were subjected to the imposition of the trustee-beneficiary relationship and have become reliant upon their trustee to carry out trustee responsibilities." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). "As early as 1929 the United States recognized its fiduciary responsibilities for Indian trust funds, and enacted 25 U.S.C. 161a, requiring the Secretary to invest funds held in trust by the Secretary on behalf of Indian tribes." H.R. Rep. No. 103-778, at 11 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3470.

Nonetheless, the government seeks to withhold from Indian beneficiaries the legal advice it has received regarding the management of the Indians' trust funds. It contends that the rationales for the fiduciary exception are vitiated in Indian trust cases

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[7] The Board manages the Thrift Savings Plan -- the largest defined contribution plan in the world -- for federal employees and members of the uniformed services.

because (1) unlike private trustees, it manages tribal trust property as a sovereign and sometimes may have other responsibilities that conflict with tribal interests, 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 fiduciary in managing Jicarilla's trust funds and its sovereign status does not diminish its fiduciary duties

It is undisputed here that the government held Jicarilla's money in trust and managed it for the benefit of Jicarilla. The government admitted the allegations in paragraph 7 of the first amended complaint that "the United States held in trust for Plaintiff proceeds derived from . . . uses of its land . . . . These monies were held in trust and managed exclusively by the United States in the United States Treasury for Plaintiff's benefit."

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)); *see also Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (holding that government owes a "distinctive obligation of trust" to Indian tribes and must adhere to "the most exacting fiduciary standards" in its dealings with Indian tribes). Further, "where the Federal Government takes on or has control or supervision

over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*) (internal quotations and citation omitted).

b. Moreover, Congress has expressly declared that tribal funds like Jicarilla's are "held in trust by the United States" and are to be managed as such. 25 U.S.C. §§ 161a, 162a (App. 1a-3a). In *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), this Court construed a statute providing that the assets of union welfare funds be "held in trust." It reasoned that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* at 329. Thus, "[c]ourts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Id.* at 330.

The government's suggestion that Sections 161a and 162a create merely a "bare trust" placing only limited responsibilities on it (Br. 34) is specious. These provisions "clearly give the Federal Government full responsibility to manage Indian [funds] for the benefit of the Indians." *Mitchell II*, 463 U.S. at 224. Indeed, they establish "pervasive federal control" over management of Indian funds. *Id.* at 225 n.29. Nothing in these provisions evinces

any congressional intent to absolve the government from traditional fiduciary duties in the course of managing these private funds.[8]

c. The government contends that, unlike private trustees, it has distinctly sovereign interests in the administration of laws concerning tribal properties. But none of the cases cited by the government supports the proposition that, as a sovereign, it owes a lesser fiduciary duty to Indian tribes where it manages trust assets. Rather, these cases establish that the government, as a sovereign, has standing to protect Indian property interests even when the property is not formally held in trust by the government.

Heckman v. *United States,* 224 U.S. 413, (1912) and *United States v. Candelaria*, 271 U.S. 432 (1926) both involved property that was not held in trust by the United States. *Heckman* concluded that the government as a guardian had standing to act "on behalf of" the Indian owners. 224 U.S. at 444. Similarly, *Candelaria* held that the United States, as guardian of an Indian pueblo, was not barred by

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[8] The government does not include the transactions of tribal trust funds in the Federal budget because the funds are owned by the tribes and held and managed in a fiduciary capacity by the government on the tribes' behalf. The government treats the Thrift Savings Fund, which holds assets for federal employees who participate in the Thrift Savings Plan, in the same fashion. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2000*, at 339-40 (1999).

judgments in prior suits, to which it was not a party, from suing to quiet title to pueblo lands.[9]

In *United States v. Minnesota*, 270 U.S. 181, 194 (1926), the United States sued Minnesota to cancel certain federal land patents made to the state because those lands previously had been appropriated or set aside for a tribe. The state challenged the standing of the United States, alleging that the Indians were the real party in interest. The Court rejected this argument, ruling that the government had a real and direct interest in the matter which arose "out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations, and in both aspects the interest is one which is vested in it as a sovereign." 270 U.S. at 194.

In sum, these cases establish that the government, as a sovereign, sometimes can do more than a private trustee could to protect Indian interests. But they provide no support for the argument that, where the government holds tribal trust funds in a traditional trust arrangement, it owes lesser fiduciary duties -- including the duty to share relevant legal advice -- to the tribal beneficiary than would a private trustee.

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[9] *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*].")

d. The government, citing *Nevada v. United States*, 463 U.S. 110 (1983), argues that it must manage potentially competing obligations that may require it to subordinate an Indian trust beneficiary's interests to other interests. In *Nevada*, the government had represented Indian tribes in litigation even though Congress had obliged it to represent other interests as well. The Court ruled, in essence, that "[t]he mere existence of a formal 'conflict of interest' does not deprive the United States of authority to represent Indians in litigation, and therefore to bind them as well." *Id.* at 145 (Brennan, J., concurring).

But *Nevada* does not hold or suggest that the rules applicable to private trustees should not generally be applied to the Government. To the contrary, 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 (emphasis added).

Nevada's import is that "[t]he 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) (citing *Nevada*, 463 U.S. at 128, 142-43). The record in *Nevada* did not establish that the government's fiduciary duties had been affected by its representation of additional interests. Rather, "[t]he record suggest[ed] that the BIA [Bureau of Indian Affairs] alone may have made the decision not to press claims for a [tribal] fishery water right,

for reasons which hindsight may render questionable, but which did not involve other interests represented by the Government." 463 U.S. at 135 n.15. Nor did the Court suggest that the government could escape liability if it had breached its fiduciary duties. The Court noted that, "[i]f, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." *Id.* at 144 n.16.

Nevada is inapposite here because, as the Federal Circuit noted, this case "involves only the management of accounts, not of other assets such as land or mineral rights, where the Secretary of the Interior might have other statutory duties." Pet. App. 18a-19a. There are no competing statutory duties that temper the government's fiduciary obligation to manage and invest Indian trust funds for the sole benefit of the Indian beneficiary. That issue is not presented here.[10]

Moreover, the applicability of the fiduciary exception would not be affected in those exceptional situations where the government does have another obligation that competes with its fiduciary duties to Indians. To the contrary, the need for transparency

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[10] The government now suggests that one of the 75 documents at issue does involve competing interests because it addresses a decision by the Interior Secretary whether to permit an individual Indian's trust account to be levied upon to pay a tribal court judgment against that individual. Br. 43. But permitting a lawful levy upon a trust account does not conflict with the fiduciary duty to manage and invest the trust account for the benefit of the beneficiary. *See Restatement (Third) of Trusts* § 56 (2003). The government did not advance this meritless argument in the courts below.

is even greater in those circumstances. Whenever a trust has two or more beneficiaries or purposes, the trustee may be faced with conflicting duties to various beneficiaries with competing economic interests, in which event the trustee has a duty of impartiality in balancing those duties. *See Restatement (Third) of Trusts* § 79 & cmt. b (2007). Such conflicting duties do not diminish the trustee's obligation to furnish information to the beneficiaries. *Id.* cmt. d. Rather, they underscore "the importance of the trustee's communication with beneficiaries." *Id.* cmt. g.

Similarly, there are some situations where a common law trustee does not owe undivided loyalty to a beneficiary. In those situations, the trustee still has a duty to act fairly, in good faith, prudently, and in the interest of the beneficiaries. *See Restatement (Third) of Trusts* § 78 cmt. c. In all of these situations, although the trustee may have conflicting duties or loyalties, the trustee still has a duty to furnish the beneficiary with information concerning the administration of the trust, including legal advice received by the trustee. *See id.* § 82 & cmt. f.

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

The government argues at great length that an Indian tribe cannot be the client of the Attorney General and other government attorneys. This is a red herring that misconstrues the fiduciary exception and its "real client" rationale. Were the beneficiary to be deemed the actual client of the trustee's attorney, resort to the fiduciary exception

would be unnecessary. Application of the fiduciary exception presupposes that there is no attorney-client relationship between the attorney and the beneficiary. The "real client" concept focuses, instead, on the substance of the legal advice at issue and for whose benefit it is given. If the purpose of the advice is to serve the interests of the trust beneficiary, then the beneficiary is entitled to disclosure of the communications at issue. But the beneficiary does not thereby become the client of the attorney.

a. 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.

Riggs focused on principles of trust law, but application of the fiduciary exception has not been limited to the trust context. Even before *Riggs* was decided, the Fifth Circuit held that, in a shareholder action, legal advice given to corporate managers by corporate counsel for the benefit of the corporation is not privileged. *See Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). The court concluded that "when all is said and done the management is not managing for itself," but rather on behalf of the

shareholders. *Id.* at 1101. "Thus, of central importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007).

Plainly, the "real client" concept applies to the documents at issue here. The purpose of seeking legal advice about the management of Indian trust funds was to aid the Indian beneficiaries. The government officials who obtained this advice had no personal stake in it. Accordingly, just as in *Riggs*, the policy of full disclosure in the trustee-beneficiary relationship outweighs any need for confidential communications between the government officials and their attorneys.

b. The government attacks a straw man by arguing that its attorneys represent the United States, not tribes, and that the circuit court's decision creates professional ethics problems for government attorneys. Jicarilla has never argued, and the Federal Circuit did not hold, that Jicarilla is the actual client of government attorneys advising federal officials regarding the management of trust monies. Indeed, it is well established that counsel for a trustee represents the trustee and not the beneficiary. "An attorney who advises his clients of their fiduciary obligations does not constructively become the beneficiary's representative." *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 180 (4th Cir. 2005). It is true that "[s]ometimes a client's duties to other persons, for example as a trustee or class representative, may impose on the lawyer similar consequential duties." *Restatement (Third) of The Law Governing Lawyers* § 16 cmt. c (2000)

(emphasis added). But this does not transform those other persons into clients of the attorney. *See id.* § 51(4) (discussing circumstances under which a lawyer for a trustee owes a duty of care to the beneficiary as a nonclient).

This case involves an issue of evidentiary privilege, not the professional responsibilities of government counsel.[11] The issue is whether the government-trustee, *i.e.* the client, can assert the attorney-client privilege against the trust beneficiary. This issue affects the client, not the attorney, because the privilege -- if it exists -- belongs to the client. *See, e.g., In re Grand Jury Proceedings #5*, 401 F.3d 247, 250 (4th Cir. 2005). The Federal Circuit ruled that the government-trustee cannot assert the privilege against Jicarilla. It did not purport to create an attorney-client relationship between government counsel and Jicarilla, nor did it impose any professional obligations upon government attorneys.

c. Finally, the fact that government attorneys are paid with public funds rather than from the trust corpus, and that the government owns the records reflecting communications with its attorneys, are of no import.[12] In some cases involving private

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[11] "[T]he rationale for the [attorney-client] privilege and its doctrinal details are derived entirely from the law of evidence, not from the substantive law of attorney-client confidences." 26 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5642, at 291 (1992).

[12] It can be argued that Indian tribes 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,

trustees, the source of payment may indicate for whose benefit the legal advice was being sought. *See Wachtel*, 482 F.3d at 235-36. But the use of public funds to pay government counsel does not alter the fact that their legal advice about the management of Indian trust funds was sought to aid the trust beneficiary.

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

The Federal Circuit correctly ruled that the United States has a fiduciary duty to disclose information related to trust fund management to Jicarilla, including legal advice about how to manage trust funds. The government argues that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law" (Br. 30), but this argument fails for multiple reasons.

a. First, as noted above, the government's argument ignores Fed. R. Evid. 501, which provides explicitly that issues of evidentiary privilege in federal courts are "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."

At common law a trustee must disclose to a beneficiary legal advice obtained about administering the trust. This obligation has been

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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).

recognized in all three Restatements of Trusts. *See Restatement (First) of Trusts* § 173 (1935); *Restatement (Second) of Trusts* § 173 (1959); *Restatement (Third) of Trusts* § 82 cmt. f (2007). Thus, the salient question is whether Congress has overridden this bedrock common law principle and required that such information be withheld from Indian trust beneficiaries. Congress has not done so.[13]

b. In pressing for a broad new rule limiting its fiduciary duties to Indians to those spelled out by statute or regulation, the government also misreads this Court's jurisprudence. *Navajo I and Navajo II*, like other decisions addressing the CFC's jurisdiction over Indian breach of trust claims, focus on the necessity of a statutory or regulatory obligation because that is the prerequisite for jurisdiction under the Tucker Act or the Indian Tucker Act. Where jurisdiction under these Acts is at issue, principles of trust law cannot substitute for a statutory or regulatory obligation, although

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[13] The government cites the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, §§ 2-6, 96 Stat. 1976, 1976-78 (codified at 28 U.S.C. § 2415 note) as recognizing that it can assert "privileges" to limit a tribe's access to information. This Act established a method for resolving limitations issues with respect to certain pre-1966 Indian claims that the claimants desired to have considered for litigation or legislation by the United States. It provided *inter alia* that, if the Interior Secretary decided to reject a claim for litigation, the Secretary shall "provide to such claimant any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim." § 5(b), 96 Stat. at 1978. The Act does not establish or recognize any particular privileges and, by its terms, is inapplicable to the post-1966 claims at issue in this action.

common law 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 II*, 129 S. Ct. at 1551-52; *Mitchell II*, 463 U.S. at 226. 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 already have been satisfied. Those jurisdictional prerequisites have no place in the analysis here.

This Court has never suggested that all of the government's trust responsibilities to Indians must be spelled out in a specific statutory or regulatory mandate. In fact, the Court has observed that "[t]here is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996). Thus, "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Id.* (emphasis in the original).

The Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. It has found and enforced trust obligations that are not specified in any statute or regulation. For example, in *Morton v. Ruiz*, 415 U.S.

199, 236 (1974), the Court invoked "the distinctive obligation of trust incumbent upon the Government in its dealings with [Indians]" in holding that Indians who lived near a reservation were entitled to general assistance benefits despite a BIA manual that limited the benefits to those who lived on a reservation. Similarly, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a land patent which granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with Indians, and the national policy protecting Indian land occupancy, the Court found that the 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 (emphasis added).

The Court also uses common law trust principles to flesh out the government's fiduciary duties to Indians under statutes and regulations.[14] For example, in *United States v. White Mtn. Apache Tribe*, 537 U.S. 465, 475 (2003), the Court ruled that "elementary trust law" imposed on the government a duty to preserve and maintain trust assets where the statute establishing the trust was silent on this subject. Similarly, in *Seminole Nation*, the Court

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[14] The Court makes similar use of the common law in other contexts. For example, it has used common law to flesh out the rights and duties of the United States on commercial paper that the government issues. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

held that well-established, common law principles imposed on the government a duty to prevent misappropriation of tribal funds held in trust by the government, notwithstanding the lack of a specific treaty provision, statute, or regulation imposing such a duty. 316 U.S. at 296. And, in *United States v. Mason*, 412 U.S. 391 (1973), the Court applied "familiar principles" of the common law of trusts to determine the scope of the United States' fiduciary duty in administering Indian trust property, in particular, whether it was a waste of trust monies to pay an arguably invalid state tax. *Id.* at 398-400.

c. The government, itself, has 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 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); Brief for Petitioners at 17, 36, *Klamath*, 532 U.S. 1 (No. 99-1871).[15] And, in *United States v. Mason*, *supra*, the government cited "general trust law" and "traditional standard[s] of fiduciary responsibility" to support its argument that it had not breached its fiduciary duty to preserve an Indian trust estate by paying a doubtful state tax claim. *See* Brief for the United States at 6-9, 12-13, *Mason*, 412 U.S. 391 (No. 72-654), 1973 WL 172578.

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[15] 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.

d. Congress 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 . . . is the duty to make a full accounting of the property and funds held in trust for the . . . beneficiaries of Indian trust funds." Comm. on Gov't Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 6 (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.

In 1994 Congress enacted the Indian Trust Reform Act, which "recognized and reaffirmed . . . that the government has longstanding and substantial trust obligations to Indians. " *Cobell v. Norton,* 240 F.3d 1081, 1098 (D.C. Cir. 2001). The legislative history of the Act noted that "[t]he responsibility for management of Indian Trust Funds by the BIA has been determined through a series of court decisions, treaties, and statutes." H.R. Rep. No. 103-778, at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468 (emphasis added). The Act amended 25 U.S.C. § 162a by adding a new subsection that "provides a list of guidelines for the Secretary's proper discharge of trust responsibilities regarding Indian trust funds." *Id.* at 16, *reprinted in*

1994 U.S.C.C.A.N. at 3474. But Congress explicitly provided that the government's trust obligations "are not limited to" these duties. 25 U.S.C. § 162a(d). In other words, the government has additional fiduciary responsibilities, which include "the common law duties of a trustee." *Cohen's Handbook of Federal Indian Law*, § 5.03[3][b], at 410 (Nell Jessup Newton et al. eds., 2005 ed.) (citing *Cobell v. Norton*, 240 F.3d at 1101).

e. In sum, there is no authority for the government's contention that it, unlike all other trustees, is not obliged to disclose to Indian beneficiaries "such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust." *Restatement (Third) of Trusts* § 82 cmt. a.

* * * * *

The government manages Indian trust funds as a fiduciary. Thus, under well-established common law principles, when the government is sued by an Indian tribe for mismanaging those funds, it cannot shield the legal advice it received regarding trust management. Contrary to the government's arguments, the Federal Circuit properly decided this privilege issue by applying common law principles, and the court did not impose any new professional responsibilities on government counsel in doing so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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25 U.S.C. § 161a.

Tribal funds in trust in Treasury Department; investment by Secretary of the Treasury; maturities; interest; funds held in trust for individual Indians

(a) All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

. . . .

25 U.S.C. § 162a.

Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

(a) Deposit of tribal trust funds in banks

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks. . . . Provided further, That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States . . . .

. . . .

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(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.

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