



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

March 30, 2011

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Proposed lodging in *United States v. Jicarilla Apache Nation*, No. 10-382

Dear Mr. Suter:

This letter is in response to the March 16 request by amici curiae Navajo Nation and the Pueblo of Laguna to lodge four documents in an appendix to their amicus brief.

The first document, a 1978 letter from the Solicitor of the Interior Department to an Assistant Attorney General at the Justice Department, was reproduced by a private party in an appendix filed with the Court in a prior case. See Resp. App. 1a-21a, *United States v. Mitchell*, No. 78-1756. The Court therefore already has access to that document through the record in the *Mitchell* case, although the United States does not oppose the lodging of that document with the Court.

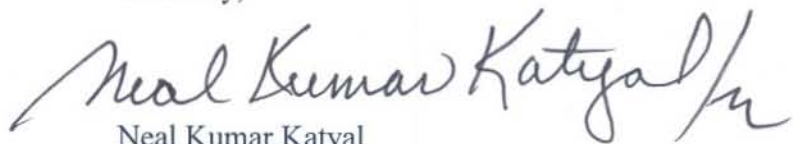
The United States respectfully opposes the lodging request with respect to the last three documents. We have confirmed that, as stated in the letter from counsel for amici, the first of three documents was filed as an exhibit to a filing in the Court of Claims, and any privilege thereby has presumably been waived as to it. Counsel's letter does not explain the details of how the Tribes that had the remaining two documents obtained them.

Each of those three documents is the subject of the protective order entered by the Court of Federal Claims (CFC) prohibiting disclosure to third parties until this case is resolved by this Court. See Pet. App. 93a-97a. The protective order has not been modified to allow the parties to disclose those documents. The United States intends to seek removal of the protective order with respect to the first of the three documents, and whether it should be modified as to the other two documents would be a matter appropriately presented to the CFC in the first instance. Although amici are not technically subject to the protective order, publicly lodging those documents obviously would frustrate the purpose of the protective order and would threaten whatever remaining privilege that the government could assert over the last two documents apparently obtained from tribal sources.

Moreover, there is no countervailing justification that supports lodging of the last three documents by amici. Each of those documents was determined by the trial court to be subject to the attorney-client privilege and, in turn, to the fiduciary exception to that privilege. Pet. App. 73a, 74a, 83a. Amici contend that “en camera inspection would be valuable for the Supreme Court in determining the existence of the privilege.” But the question presented in this case does not involve *application* of the privilege (or any fiduciary exception) to particular documents. Rather, it is limited to the threshold legal question whether the government can invoke the attorney-client privilege (unlimited by a fiduciary exception) in this context. See Pet. (I), 10-11. The specific content of the documents at issue is therefore irrelevant to proper resolution of the question presented.

For these reasons, the lodging request should be denied with respect to the last three documents specified.

Sincerely,

A handwritten signature in black ink, reading "Neal Kumar Katyal" followed by a stylized flourish.

Neal Kumar Katyal
Acting Solicitor General

cc: See Attached Service List