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Teacher's Memorandum to accompany

Getches, Wilkinson, Williams & Fletcher

FEDERAL INDIAN LAW

(6th ed. 2011)

Prepared by:

Matthew L.M. Fletcher

Professor, Michigan State University College of Law

Director, Indigenous Law and Policy Center

INTRODUCTION

This teacher's memorandum includes three recent decisions of the United States Supreme Court: *United States v. Jicarilla Apache Tribe* (2011), *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak* (2012), and *Adoptive Couple v. Baby Girl* (2013). We also discuss to a lesser extent, *United States v. Tohono O'odham Nation* (2011) and *Salazar v. Ramah Navajo Chapter* (2012). Another Supreme Court case pending for the 2013 Term – *Michigan v. Bay Mills Indian Community* – is highlighted.

We have updated the casebook to note that the *Cobell* settlement has been finalized, and that apparently all challenges to the settlement are concluded. We add three recent federal circuit decisions on tribal court civil jurisdiction over nonmembers – *Crowe & Dunlevy, P.C. v. Stidham, Water Wheel Camp Recreational Area, Inc. v. LaRance*, and *Grand Canyon Skywalk Development, LLC v. 'Su' Nyu Wa*. We also discuss of a recent federal appellate decisions on aboriginal subsistence fishing rights in Alaska, state taxation of tribal gaming machine vendors, the so-called "Culverts case" subproceeding in *United States v. Washington*, and recent sovereign immunity decisions out of the federal circuits.

Comments on the memorandum and on the 6th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan at matthew.fletcher@law.msu.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon **GETCHES, WILKINSON, WILLIAMS, AND FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (6th ed. 2011)**.

Matthew Fletcher
East Lansing, Mich.
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CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 267:

5. In *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) (en banc) (per curiam), a split Ninth Circuit en banc panel held (7-4) against the subsistence fishing claims of several Native Alaskan villages in the outer continent shelf, finding that the villages failed to prove exclusive use of claimed areas. The majority found that the villages met one of the two requirements to prove aboriginal rights – “continuous use and occupancy” – but failed to prove “exclusivity”:

Aboriginal rights don’t depend on a treaty or an act of Congress for their existence. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Rather, the Villages have the burden of proving “actual, exclusive, and continuous use and occupancy ‘for a long time’” of the claimed area. *Sac & Fox Tribe of Indians of Okla. v. United States*, 179 Ct.Cl. 8, 383 F.2d 991, 998 (Ct.Cl.1967). This use and occupancy requirement is measured “in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.” *Id.*

*** The district court concluded that the Villages were unable to prove aboriginal rights because they did not show by a preponderance of the evidence that they were in a position to occupy or exercise exclusive control of the claimed areas. *See 2 McCormick on Evid.* § 339 (6th ed.) (“[A] party who has the burden of persuasion of a fact must prove it ... on the general run of issues in civil cases ‘by a preponderance of the evidence.’ ”); *see also Iowa Tribe v. United States*, 22 Ind. Cl. Comm. 232, 237–38 (1969) (“To establish Indian title under the Indian Claims Commission Act, the Iowa plaintiffs and the Sac and Fox plaintiffs each must prove by a preponderance of the evidence that their forebearers had actual exclusive and continuous use and occupancy of their respectively claimed areas for a ‘long time’ [prior to the loss of the property].”). We adopt the district court’s uncontested factual findings and conclude that the Villages have failed to prove their entitlement to aboriginal rights on the OCS.

The “difficulty of obtaining the essential proof necessary to establish Indian title” during ancient times requires the court to adopt a “liberal approach”

in weighing evidence regarding aboriginal title claims. *Nooksack Tribe of Indians v. United States*, 3 Ind. Cl. Comm. 492, 499 (1955). Nevertheless, we conclude that the district court properly found that the Villages failed to show, by a preponderance of the evidence, that they exclusively used the claimed areas.

The district court found that the Villages “made irregular use of the OCS,” and that “[s]uch use and occupancy as probably existed was temporary and seasonal.” The Secretary argues that the Villages’ use of the OCS was “too sporadic” to support a claim for aboriginal rights. This “use and occupancy” requirement is measured in accordance with the “way of life, habits, customs and usages of the Indians who are its users and occupiers.” *Sac & Fox Tribe of Indians of Okla.*, 383 F.2d at 998. Because the district court determined that the ancestral residents of the Villages “found their sustenance largely in marine waters,” and were “skilled marine hunters and fishermen,” we analyze their use of the OCS in accordance with their way of life as marine hunters and fishermen. *See Confed. Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct.Cl. 184, 194 (1966).

There’s evidence that the Villages’ ancestors traveled to Middleton Island, the Barren Islands, Cook Inlet, the Copper River Delta and Wessels Reef to hunt and fish. When traveling between Kodiak and the Middleton Islands, their ancestors traversed portions of the OCS and engaged in opportunistic fishing during the course of these travels. The 8600 record supports the finding that the Villages’ ancestors made seasonal use of “portions of the OCS nearest their respective villages and when traveling to the outlying islands.” Intermittent or seasonal use is sufficient to support aboriginal title because it’s consistent with the seasonal nature of the ancestors’ way of life as marine hunters and fishermen. *See id.* The Villages thus satisfy the “continuous use and occupancy” requirement.

Eyak, 688 F.3d at 622-23. On the question of exclusivity, the majority rejected the Villages’ argument that there was sufficient evidence of exclusivity:

[T]he Villages still failed to present sufficient evidence of exclusivity. The district court found that the Villages’ claimed area was too large and there were too few people who could control it. The Villages’ low population, which was estimated to have been between 400 and 1500, suggests that the Villages were incapable of controlling any part of the OCS. *See Osage Nation of Indians*, 19 Ind. Cl. Comm. at 490 (finding the Osages didn’t have exclusive control given their low population and evidence tending to prove that other parties used the claimed territory); *Strong v. United States*, 207 Ct.Cl. 254, 518 F.2d 556, 561 (Ct.Cl.1975) (“[O]ne of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed.”). The Villages

claim that low population density can't defeat exclusivity. *See, e.g., Zuni Tribe of N.M. v. United States*, 12 Cl.Ct. 607, 608 n. 2 (1987); *United States v. Seminole Indians of the State of Fla.*, 180 Ct.Cl. 375, 385–86 (1967). But Zuni and Seminole held only that a low population density wasn't enough to defeat aboriginal title, especially where there was other evidence that the tribes involved had dominion and control of their claimed lands. *See, e.g., Zuni*, 12 Cl.Ct. at 608 n. 2; *Seminole*, 180 Ct.Cl. at 383. Zuni and Seminole don't foreclose reliance on population density where there is no evidence that the tribes exercised full dominion and control of the claimed area.

Eyak, 688 F.3d at 624-25.

In dissent, Judge William Fletcher argued that the majority misstated the law on the question of “exclusivity,” noting that no evidence existed to prove another Indian group claimed access to the resource:

The majority reads “periphery” to mean not only the edge, but also the interior, of a territory. The majority's misreading of the word transforms the district court's finding of use by others at the edge of the Chugach territory into a finding of use within that territory. The majority writes:

The dissent adopts an understanding of the word “periphery” that's contrary to both common usage and the dictionary. Perhaps the most common use of the word “periphery” is in the phrase “peripheral vision.” What's in your peripheral vision is what you can see, not what you can't; the periphery is something at the limits of, but within, your vision. Here, as well, the “periphery” cited by the district court includes the outer boundary of the claimed area. The revered Webster's Second defines “periphery” as, among other things, “the outward bounds of a thing as distinguished from its internal regions or center; encompassing limits; confines; borderland; as, only the periphery of Greenland has been explored.” Webster's New International Dictionary 1822 (2d ed.1939). The dissent's interpretation of “periphery” was outdated even in the 1930s when Webster's Second was published. *Id.* (offering an alternate definition of “periphery” as a “[s]urrounding space; the area lying beyond the boundaries of a thing. Now Rare.”). Fish is best rare; language, not so much. As the district court clearly found, “some of the OCS areas in question” were exploited by other groups.

Eyak, 688 F.3d at 633 (W. Fletcher, C.J., dissenting) (emphases in original).

The majority's misreading of “periphery” is baffling. I understand why the majority is misreading the word: If periphery is read, as it should be, to mean edge or boundary, a rationale for the majority's decision disappears. But I do not

understand how the majority can, with a straight face, maintain that its reading is correct. Indeed, the majority quotes a Webster's definition of the word that squarely contradicts its reading. The plain meaning of the district court's finding that other groups likely used areas "on the periphery of the Chugach territory" is that they used areas on the edge or boundary of Chugach territory. The plain meaning is not that they used areas within Chugach territory.

Eyak, 688 F.3d at 633-34 (W. Fletcher, C.J., dissenting).

SECTION B.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2. TREATY ABROGATION

Add to the end of the note on *Indian Treaty Abrogation and Congressional Intent* on page 329:

On July 11, 2011, Senior Judge West in the Western District of Oklahoma enjoined a hearing on unfair labor practices before the National Labor Relations Board in *Chickasaw Nation v. NLRB*, opinion available at <http://turtletalk.files.wordpress.com/2011/07/chickasaw-judge-west-order-07-11-2011.pdf>. The court wrote:

In San Manuel, the D.C. Circuit noted that pursuant to longstanding principles, ambiguities in a federal statute must be resolved in favor of Indians. *Id.* at 440, citing County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S.Ct. 683 (1992); Montana v. Blackfeet Tribe of Indians, 105 S.Ct. 2399 (1985); Bryan v. Itasca County, 96 S.Ct. 2102 (1976); McClanahan v. Ariz. State Tax Comm'n, 176,93 S.Ct. 1257 (1973); Squire v. Capoeman, 76 S.Ct. 611 (1956); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C.Cir.2003). The court also noted the well-established principle that a clear expression of congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty. San Manuel, 475 F.3d at 440-41, citing White Mountain Apache Tribe v. Bracker, 100 S.Ct. 2578 (1980); Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978). The court found, however, that those considerable precedents were in conflict with Federal Power Commission v.

Tuscarora Indian Nation, 80 S.Ct. 543 (1960). In Tuscarora, the Supreme Court stated that “a general statute in terms applying to all persons includes Indians and their property interests.” *Id.* at 553. While the [D.C.] Circuit conceded that the Tuscarora pronouncement was of questionable significance and appeared to be dicta, it nonetheless employed that statement as a foundation for constructing a detailed balancing of the interests of the tribes against other public interests.

The Tenth Circuit firmly disavowed the reasoning employed in San Manuel. It examined Tuscarora, noting that it dealt solely with issues of land ownership, not with questions pertaining to the tribe’s sovereign authority to govern the land. The Tenth Circuit concluded that proprietary interests and sovereign interests are separate; Tuscarora governed only those situations where the tribe was exercising mere proprietary or property rights. Pueblo of San Juan, 276 F.3d at 1198-99. In situations where the tribe acts in its capacity as a sovereign, a well-established canon of Indian law dictates that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Id.* at 1191-92, quoting Montana v. Blackfeet Tribe, 105 S.Ct. 2399, 2403 (1985). “Doubtful expressions of legislative intent must be resolved in favor of the Indians.” *Id.*, quoting South Carolina v. Catawba Indian Tribe, 106 S.Ct. 2039 at 2044 (1986). The canon applies even to statutes that do not mention Indians at all, and requires that Congress make plain its intent to abrogate tribal rights before such an abrogation will be found. *Id.* at 1191-92.

Chickasaw, slip op. at 7-8. After the district court issued the injunction, the parties agreed to allow the Board to proceed with portions of the complaint against the Chickasaw Nation. In July 2013, the Board held that it could assert jurisdiction over the Nation. See *Chickasaw Nation and International Brotherhood of Teamsters*, 360 NLRB No. 1 (2013), available at <http://turtletalk.files.wordpress.com/2013/07/chickasaw-july-12-2013-board-decision.pdf>. The Nation is appealing to the Tenth Circuit.

Two other cases are currently pending before the Sixth Circuit: *Little River Band of Ottawa Indians and Local 406, International Brotherhood of Teamsters*, 359 NLRB No. 84 (2013), available at <http://turtletalk.files.wordpress.com/2013/03/board-decision.pdf>; and *Soaring Eagle Casino and Resort and International Union, UAW*, 359 NLRB No. 92 (2013), available at <http://turtletalk.files.wordpress.com/2013/04/soaring-eagle-board-decision-16apr2013.pdf>.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 1. EXECUTIVE ACCOUNTABILITY UNDER THE TRUST RELATIONSHIP

Add to the end of note 2 on page 333:

In a sort of sequel to *Leavitt*, the Supreme Court held (5-4) in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), that federal agencies with self-determination contracts must pay full indirect contract costs even where Congress has not appropriated funds for those costs. Congress may set an annual appropriations limit on contract support costs (as indirect costs are also called) for Indian self-determination contracts (for example, in fiscal year 2000 that amount was more than \$120 million), but if a tribal organization successfully proves entitlement to indirect costs, the government must pay those funds even if the agency's appropriations have been exhausted.

Add to the end of page 342.

UNITED STATES v. JICARILLA APACHE NATION

Supreme Court of the United States, 2011

___ U.S. ___, 131 S.Ct. 2313, 180 L.Ed.2d 187

Justice ALITO delivered the opinion of the Court.

The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.

In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not. Although

the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.

I

The Jicarilla Apache Nation (Tribe) [brought claims against the United States, alleging that “the Government failed to maximize returns on its trust funds, invested too heavily in short-term maturities, and failed to pool its trust funds with other tribal trusts.” During discovery, the “Government turned over thousands of documents but withheld 226 potentially relevant documents as protected by the attorney-client privilege, the attorney work-product doctrine, or the deliberative-process privilege.” Later, the government turned over some of the documents, but still “continued to assert the attorney-client privilege and attorney work-product doctrine with respect to the remaining 155 documents.” The lower court held that the documents relating to the management of the trust funds fell within the “fiduciary exception” to the attorney-client privilege doctrine. In common law trust doctrine, the trustee may not assert the privilege against the beneficiary as to trust management. The Court of Federal Claims held that the Indian trust assets in this case were sufficiently analogous to a common law trust. The United States appealed that decision, arguing that the federal trust responsibility, at least in this context, is not analogous to a common law trust.]

II

The Federal Rules of Evidence provide that evidentiary privileges “shall be governed by the principles of the common law ... in the light of reason and experience.” FED. RULE EVID. 501.

The objectives of the attorney-client privilege apply to governmental clients. “The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture.” 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74, Comment b, pp. 573–574 (1998). Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys. *Id.*, at 574 (“[G]overnmental agencies and employees enjoy the same privilege as nongovernmental counterparts”). The Tribe argues, however, that the common law also recognizes a fiduciary exception to the attorney-client privilege and that, by virtue of the trust relationship between the Government and the Tribe, documents that would otherwise be privileged must be disclosed. As

preliminary matters, we consider the bounds of the fiduciary exception and the nature of the trust relationship between the United States and the Indian tribes.

A

The leading American case on the fiduciary exception is *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del.Ch.1976). In that case, the beneficiaries of a trust estate sought to compel the trustees to reimburse the estate for alleged breaches of trust. The beneficiaries moved to compel the trustees to produce a legal memorandum related to the administration of the trust that the trustees withheld on the basis of attorney-client privilege. *** Applying the common-law fiduciary exception, the court held that the memorandum was discoverable....

The Federal Courts of Appeals applied the fiduciary exception based on the same two criteria. *** Not until the decision below had a federal appellate court held the exception to apply to the United States as trustee for the Indian tribes.

B

In order to apply the fiduciary exception in this case, the Court of Appeals analogized the Government to a private trustee. ... We have applied that analogy in limited contexts, *see, e.g., United States v. Mitchell*, 463 U.S. 206, 226 ... (1983) (*Mitchell II*), but that does not mean the Government resembles a private trustee in every respect. On the contrary, this Court has previously noted that the relationship between the United States and the Indian tribes is distinctive, “different from that existing between individuals whether dealing at arm’s length, *as trustees and beneficiaries*, or otherwise.” *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254 ... (1935) (emphasis added). “The *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship.” *Cherokee Nation of Okla. v. United States*, 21 Cl.Ct. 565, 573 (1990) (emphasis added).

The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a “trust,” *see, e.g.,* 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law. *See United States v. Navajo Nation*, 537 U.S. 488, 506 ... (2003) (*Navajo I*) (“[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions”). As we have recognized in prior cases, Congress may style its relations with the Indians a “trust” without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is “limited” or “bare” compared to a trust relationship between private parties at common law. *United States v. Mitchell*, 445 U.S. 535, 542 ... (1980) (*Mitchell I*); *Mitchell II, supra*, at 224....

The difference between a private common-law trust and the statutory Indian trust follows from the unique position of the Government as sovereign. The distinction between “public rights” against the Government and “private rights” between private parties is well established. The Government consents to be liable to private parties “and may yield this consent upon such terms and under such restrictions as it may think just.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 283, 15 L.Ed. 372 (1856). This creates an important distinction “between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” *Crowell v. Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress. See ... *Winton v. Amos*, 255 U.S. 373, 391 ... (1921) (“Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 ... (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government”); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 ... (1902) (“The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts”)....

Because the Indian trust relationship represents an exercise of that authority, we have explained that the Government “has a real and direct interest” in the guardianship it exercises over the Indian tribes; “the interest is one which is vested in it as a sovereign.” *United States v. Minnesota*, 270 U.S. 181, 194 ... (1926). This is especially so because the Government has often structured the trust relationship to pursue its own policy goals. Thus, while trust administration “relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States.” ...

We do not question “the undisputed existence of a general trust relationship between the United States and the Indian people.” *Mitchell II*, 463 U.S., at 225.... The Government, following “a humane and self imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,” *Seminole Nation v. United States*, 316 U.S. 286, 296–297 ... (1942), obligations “to the fulfillment of which the national honor has been committed[.]” Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. See *Mitchell I*, 445 U.S., at 544 ... (Congress intended the United States to hold land “ ‘in trust’ “ under the General Allotment Act

“simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation”); *Navajo I*, 537 U.S., at 507–508 ... (Indian Mineral Leasing Act imposes no “detailed fiduciary responsibilities” nor is the Government “expressly invested with responsibility to secure ‘the needs and best interests of the Indian owner’ “).

In other cases, we have found that particular “statutes and regulations ... clearly establish fiduciary obligations of the Government” in some areas. *Mitchell II*, *supra*, at 226.... Once federal law imposes such duties, the common law “could play a role.” *United States v. Navajo Nation*, ... 129 S.Ct. 1547, 1558 ... (2009) (*Navajo II*). We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed. ... But the applicable statutes and regulations “establish [the] fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.” ... When “the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government’s ‘control’ over [Indian assets] nor common-law trust principles matter.” ... The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.

Over the years, we have described the federal relationship with the Indian tribes using various formulations. The Indian tribes have been called “domestic dependent nations,” *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 ... (1831), under the “tutelage” of the United States, ... and subject to “the exercise of the Government’s guardianship over ... their affairs,” *United States v. Sandoval*, 231 U.S. 28, 48 ... (1913). These concepts do not necessarily correspond to a common-law trust relationship. *** That is because Congress has chosen to structure the Indian trust relationship in different ways. We will apply common-law trust principles where Congress has indicated it is appropriate to do so. For that reason, the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.

III

In this case, the Tribe’s claim arises from 25 U.S.C. §§ 161–162a and the American Indian Trust Fund Management Reform Act of 1994, § 4001 et seq. These provisions define “the trust responsibilities of the United States” with respect to tribal funds. § 162a(d). ***

As we have discussed, the Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes. The two features justifying the fiduciary exception—the beneficiary’s status as the “real client” and the trustee’s common-law duty to disclose information about the trust—are notably absent in the trust relationship Congress has established between the United States and the Tribe.

A

The Court of Appeals applied the fiduciary exception based on its determination that the Tribe rather than the Government was the “real client” with respect to the Government attorneys’ advice. ... In cases applying the fiduciary exception, courts identify the “real client” based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. ... Applying these factors, we conclude that the United States does not obtain legal advice as a “mere representative” of the Tribe; nor is the Tribe the “real client” for whom that advice is intended. ...

Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. Courts look to the source of funds as a “strong indicator of precisely who the real clients were” and a “significant factor” in determining who ought to have access to the legal advice. ... We similarly find it significant that the attorneys were paid by the Government for advice regarding the Government’s statutory obligations.

The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Undoubtedly, Congress intends the Indian tribes to benefit from the Government’s management of tribal trusts. That intention represents “a humane and self imposed policy” based on felt “moral obligations.” ... This statutory purpose does not imply a full common-law trust, however. Cf. RESTATEMENT 2D, § 25, Comment b (“No trust is created if the settlor manifests an intention to impose merely a moral obligation”). Congress makes such policy judgments pursuant to its sovereign governing authority, and the implementation of federal policy remains “distinctly an interest of the United States.” [citations]⁷ We have said that “the United States continue[s] as trustee to have an active interest” in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States....

In some prior cases, we have found that the Government had established the trust relationship in order to impose its own policy on Indian lands. ... In other cases, the Government has invoked its trust relationship to prevent state interference with its policy toward the Indian tribes. ... And the exercise of federal authority thereby established has often been “left under the acts of Congress to the discretion of the Executive Department.” ... In this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes. [citations]⁸

⁷ Chief Justice Hughes, writing for a unanimous Court, insisted that the “national interest” in the management of Indian affairs “is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.” *Heckman*, 224 U.S. [413,] 437....

⁸ Congress has structured the trust relationship to reflect its considered judgment about how the Indians ought to be governed. For example, the Indian General Allotment Act of 1887, 24 Stat. 388, was “a comprehensive congressional attempt to change the role of Indians in American society.” F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.04, p. 77 (2005) (hereinafter Cohen). Congress aimed to promote the assimilation of Indians by dividing Indian lands into individually owned allotments. The federal policy aimed “to substitute a new individual

We cannot agree with the Tribe and its amici that “[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role,” Brief for Respondent 9, or that “the United States’ interests in trust administration were identical to the interests of the tribal trust fund beneficiaries,” Brief for National Congress of American Indians et al. as Amici Curiae 5. The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that “management does not manage for itself.” ... But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a “personal” rather than a fiduciary capacity....

Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication. When “multiple interests” are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down. ... That principle applies with particular force to the Government. Because of the multiple interests it must represent, “the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary’s consent.” *Nevada v. United States*, 463 U.S. 110, 128 ... (1983).

As the Court of Appeals acknowledged, the Government may be obliged “to balance competing interests” when it administers a tribal trust. ... The Government may need to comply with other statutory duties, such as the environmental and conservation obligations that the Court of Appeals discussed. ... The Government may also face conflicting obligations to different tribes or individual Indians. See, e.g., *Nance v. EPA*, 645 F.2d 701, 711 (C.A.9 1981) (Federal Government has “conflicting fiduciary responsibilities” to the Northern Cheyenne and Crow Tribes); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (C.A.9 1986) (“No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians”). Within the bounds of its “general trust relationship” with the Indian people, we have recognized that the

way of life for the older Indian communal way.” *Id.*, at 79. The Indian Reorganization Act of 1934, 48 Stat. 984, marked a shift away “from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.” Cohen § 1.05, at 84. The Act prohibited further allotment and restored tribal ownership. *Id.*, at 86. The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, and the Tribal Self-Governance Act of 1994, 108 Stat. 4270, enabled tribes to run health, education, economic development, and social programs for themselves. Cohen § 1.07, at 103. This strengthened self-government supported Congress’ decision to authorize tribes to withdraw trust funds from Federal Government control and place the funds under tribal control. American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, 4242–4244; see 25 U.S.C. §§ 4021–4029 (2006 ed. and Supp. III). The control over the Indian tribes that has been exercised by the United States pursuant to the trust relationship—forcing the division of tribal lands, restraining alienation—does not correspond to the fiduciary duties of a common-law trustee. Rather, the trust relationship has been altered and administered as an instrument of federal policy.

Government has “discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.” *Lincoln v. Vigil*, 508 U.S. 182, 195 ... (1993).... And sometimes, we have seen, the Government has enforced the trust statutes to dispose of Indian property contrary to the wishes of those for whom it was nominally kept in trust. The Government may seek the advice of counsel for guidance in balancing these competing interests. Indeed, the point of consulting counsel may be to determine whether conflicting interests are at stake.

The Court of Appeals sought to accommodate the Government’s multiple obligations by suggesting that the Government may invoke the attorney-client privilege if it identifies “a specific competing interest” that was considered in the particular communications it seeks to withhold. ... But the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable.

B

The Court of Appeals also decided the fiduciary exception properly applied to the Government because “the fiduciary has a duty to disclose all information related to trust management to the beneficiary.” ***

The United States, however, does not have the same common-law disclosure obligations as a private trustee. As we have previously said, common-law principles are relevant only when applied to a “specific, applicable, trust-creating statute or regulation.” *Navajo II*, ... 129 S.Ct., at 1550. The relevant statute in this case is 25 U.S.C. § 162a(d), which delineates “trust responsibilities of the United States” that the Secretary of the Interior must discharge. The enumerated responsibilities include a provision identifying the Secretary’s obligation to provide specific information to tribal account holders: The Secretary must “suppl[y] account holders with periodic statements of their account performance” and must make “available on a daily basis” the “balances of their account.” § 162a(d)(5). The Secretary has complied with these requirements by adopting regulations that instruct the Office of Trust Fund Management to provide each tribe with a quarterly statement of performance, 25 CFR § 115.801 (2010), that identifies “the source, type, and status of the trust funds deposited and held in a trust account; the beginning balance; the gains and losses; receipts and disbursements; and the ending account balance of the quarterly statement period,” § 115.803. Tribes may request more frequent statements or further “information about account transactions and balances.” § 115.802.

The common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government’s disclosure obligation to the Tribe. The Tribe emphasizes, Brief for Respondent 34, that the statute identifies the list of trust responsibilities as nonexhaustive. See § 162a(d) (trust responsibilities “are not limited to” those enumerated). The Government replies that this clause “is best read to refer to other

statutory and regulatory requirements” rather than to common-law duties. Brief for United States 38. Whatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. When Congress provides specific statutory obligations, we will not read a “catchall” provision to impose general obligations that would include those specifically enumerated. *** Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.

By law and regulation, moreover, the documents at issue in this case are classed “the property of the United States” while other records are “the property of the tribe.” 25 CFR § 115.1000 (2010); see also §§ 15.502, 162.111, 166.1000. Just as the source of the funds used to pay for legal advice is highly relevant in identifying the “real client” for purposes of the fiduciary exception, we consider ownership of the resulting records to be a significant factor in deciding who “ought to have access to the document.” See *Riggs*, 355 A.2d, at 712. In this case, that privilege belongs to the United States.¹¹

* * *

Courts and commentators have long recognized that “[n]ot every aspect of private trust law can properly govern the unique relationship of tribes and the federal government.” Cohen § 5.02[2], at 434–435. The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the Government’s administration of Indian trusts. The Court of Appeals denied the Government’s petition for a writ of mandamus based on its erroneous view to the contrary. We leave it for that court to determine whether the standards for granting the writ are met in light of our opinion. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice GINSBURG, with whom Justice BREYER joins, concurring in the judgment.

Justice SOTOMAYOR, dissenting.

Federal Indian policy, as established by a network of federal statutes, requires the United States to act strictly in a fiduciary capacity when managing Indian trust fund accounts. The

¹¹ The dissent tells us that applying the fiduciary exception is even more important against the Government than against a private trustee because of a “history of governmental mismanagement.” Post, at 2342. While it is not necessary to our decision, we note that the Indian tribes are not required to keep their funds in federal trust. See 25 U.S.C. § 4022 (authorizing tribes to withdraw funds held in trust by the United States); 25 CFR pt. 1200(B). If the Tribe wishes to have its funds managed by a “conventional fiduciary,” post, at 2336, it may seek to do so.

interests of the Federal Government as trustee and the Jicarilla Apache Nation (Nation) as beneficiary are thus entirely aligned in the context of Indian trust fund management. Where, as here, the governing statutory scheme establishes a conventional fiduciary relationship, the Government's duties include fiduciary obligations derived from common-law trust principles. Because the common-law rationales for the fiduciary exception fully support its application in this context, I would hold that the Government may not rely on the attorney-client privilege to withhold from the Nation communications between the Government and its attorneys relating to trust fund management.

The Court's decision to the contrary rests on false factual and legal premises and deprives the Nation and other Indian tribes of highly relevant evidence in scores of pending cases seeking relief for the Government's alleged mismanagement of their trust funds. But perhaps more troubling is the majority's disregard of our settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes. Indeed, aspects of the majority's opinion suggest that common-law principles have little or no relevance in the Indian trust context, a position this Court rejected long ago. Although today's holding pertains only to a narrow evidentiary issue, I fear the upshot of the majority's opinion may well be a further dilution of the Government's fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes.

I

A

The majority correctly identifies the two rationales courts have articulated for applying the fiduciary exception, *ante*, at 2322, but its description of those rationales omits a number of important points. With regard to the first rationale, courts have characterized the trust beneficiary as the “real client” of legal advice relating to trust administration because such advice, provided to a trustee to assist in his management of the trust, is ultimately for the benefit of the trust beneficiary, rather than for the trustee in his personal capacity. *** The majority places heavy emphasis on the source of payment for the legal advice, see *ante*, at 2322, 2326, but it is well settled that who pays for the legal advice, although “potentially relevant,” “is not determinative in resolving issues of privilege.” RESTATEMENT (THIRD) OF TRUSTS § 82, Comment f, p. 188 (2005) (hereinafter Third Restatement). Instead, the lynchpin of the “real client” inquiry is the identity of the ultimate beneficiary of the legal advice. See *Wachtel*, 482 F.3d, at 232 (“[O]f central importance ... [i]s the fiduciary's lack of a legitimate personal interest in the legal advice obtained”). If the advice was rendered for the benefit of the beneficiary and not for the trustee in any personal capacity, the “real client” of the advice is the beneficiary.

As to the second rationale for the fiduciary exception—rooted in the trustee's fiduciary duty to disclose all information related to trust management—the majority glosses over the fact

that this duty of disclosure is designed “to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.” THIRD RESTATEMENT § 82, Comment a(2), at 184. As the leading American case on the fiduciary exception explains, “[i]n order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial.” *Riggs*, 355 A.2d, at 712. Courts justifying the fiduciary exception under this rationale have thus concluded that “[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is ... ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.” *Id.*, at 714; *see Mett*, 178 F.3d, at 1063 (under this rationale, “the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle”). The majority fails to appreciate the important oversight and accountability interests that underlie this rationale for the fiduciary exception, or explain why they operate with any less force in the Indian trust context.

B

Since 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes. *See Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831) (Marshall, C. J.). Our decisions over the past century have repeatedly reaffirmed this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians. *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); *see United States v. Mitchell*, 463 U.S. 206, 225–226, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*) (collecting cases and noting “the undisputed existence of a general trust relationship between the United States and the Indian people”). Congress, too, has recognized the general trust relationship between the United States and Indian tribes. 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.” F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a], pp. 420–421 (2005 ed.) (hereinafter Cohen).

Against this backdrop, Congress has enacted federal statutes that “define the contours of the United States’ fiduciary responsibilities” with regard to its management of Indian tribal property and other trust assets. *Mitchell II*, 463 U.S., at 224, 103 S.Ct. 2961. The Nation’s claims as relevant in this case concern the Government’s alleged mismanagement of its tribal trust fund accounts. *See ante*, at 2319.

The system of trusteeship and federal management of Indian funds originated with congressional enactments in the 19th century directing the Government to hold and manage Indian tribal funds in trust. *See, e.g., Act of June 9, 1837*, 5 Stat. 135; *see also Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102–

449, p. 6 (1992) (hereinafter *Misplaced Trust*). Through these and later congressional enactments, the United States has come to manage almost \$3 billion in tribal funds and collects close to \$380 million per year on behalf of tribes. Cohen § 5.03[3][b], at 407.

“[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over [trust assets] belonging to Indians.” *[Mitchell II]*, at 225, 103 S.Ct. 2961. Under the statutory regime described above, the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries. As a result, “[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [Tribe]), and a trust corpus (Indian ... funds).” *Ibid.* Unlike in other contexts where the statutory scheme creates only a “bare trust” entailing only limited responsibilities, *United States v. Navajo Nation*, 537 U.S. 488, 505, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) (*Navajo I*) (internal quotation marks omitted), the statutory regime governing the United States’ obligations with regard to Indian trust funds “bears the hallmarks of a conventional fiduciary relationship,” *United States v. Navajo Nation*, 556 U.S. —, —, 129 S.Ct. 1547, 1558, 173 L.Ed.2d 429 (2009) (*Navajo II*) (internal quotation marks omitted); see *Lincoln v. Vigil*, 508 U.S. 182, 194, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (“[T]he law is ‘well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity’”) (quoting *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707, 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987)).

II

A

When the Government seeks legal advice from a government attorney on matters relating to the management of the Nation’s trust funds, the “real client” of that advice for purposes of the fiduciary exception is the Nation, not the Government. The majority’s rejection of that conclusion is premised on its erroneous view that the Government, in managing the Nation’s trust funds, “has its own independent interest in the implementation of federal Indian policy” that diverges from the interest of the Nation as beneficiary. *Ante*, at 2327 – 2328; see also *ante*, at 2331 (GINSBURG, J., concurring in judgment).

As a conventional fiduciary, the Government’s management of Indian trust funds must “be judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S., at 296–297, 62 S.Ct. 1049. Among the most fundamental fiduciary obligations of a trustee is “to administer the

trust solely in the interest of the beneficiaries.” 2A A. Scott & W. Fratcher, *Law of Trusts* § 170, p. 311 (4th ed.1987); see *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.) (“Not honesty alone, but the punctilio of an honor the most sensitive,” is “the standard of behavior” for trustees “bound by fiduciary ties”). Although Indian trust funds are deposited in the United States Treasury, “they are not part of the federal government’s general funds and can be used only for the benefit of the tribe.” Cohen § 5.03[3][b], at 408, and n. 140 (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80–81, 28 S.Ct. 690, 52 L.Ed. 954 (1908)).

Because federal Indian policy requires the Government to act strictly as a conventional fiduciary in managing the Nation’s trust funds, the Government acts in a “representative” rather than “persona[l]” capacity when managing the Nation’s trust funds. *Riggs*, 355 A.2d, at 713. By law, the Government cannot pursue any “independent” interest, ante, at 2327 – 2328, distinct from its responsibilities as a fiduciary. See Cohen § 5.03[3][b], at 408, and n. 141 (“Federal statutes forbid use of Indian tribal funds in any manner not authorized by treaty or express provisions of law” (citing 25 U.S.C. §§ 122, 123)). In other words, any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration. It naturally follows, then, that when the Government seeks legal advice from government attorneys relating to the management of the Nation’s trust funds, the “real client” of the advice for purposes of the fiduciary exception is the Nation, not the Government.

This conclusion holds true even though government attorneys are “paid out of congressional appropriations at no cost to the [Nation].” Ante, at 2326. As noted above, although the source of funding for legal advice may be relevant, the ultimate inquiry is for whose benefit the legal advice was rendered. See supra, at 2319 – 2320. And, for all the emphasis the majority places on the funding source here, see ante, at 2322, 2326, the majority never suggests that the fiduciary exception would apply if Congress amended federal law to permit Indian tribes to pay government attorneys out of their own trust funds.

The majority’s categorical rejection of the fiduciary exception in the Indian trust context sweeps far broader than necessary. This case involves only the Government’s alleged mismanagement of the Nation’s trust fund accounts, and the Government did not claim below that the attorney-client communications at issue relate to any competing governmental obligations. See App. to Pet. for Cert. 18a–19a. To the extent the United States in other contexts has competing interests, the Government and its attorneys already have to identify those interests in determining how to balance them against their obligations to Indian tribes, and attorney-client communications relating to those interests may properly be withheld or redacted consistent with application of the fiduciary exception. See 88 Fed.Cl. 1, 13 (2009) (observing that redactions “allo[w] the privilege and exception to reign supreme within their respective spheres”).

B

Like the “real client” rationale, the second rationale for the fiduciary exception, rooted in a trustee’s fiduciary duty to disclose all matters relevant to trust administration to the beneficiary, fully supports disclosure of the communications in this case. As explained above, courts relying on this second rationale have recognized that “[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is ... ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.” *Riggs*, 355 A.2d, at 714. Because the statutory scheme requires the Government to act as a conventional fiduciary in managing the Nation’s trust funds, the Government’s fiduciary duty to keep the Nation informed of matters relating to trust administration includes the concomitant duty to disclose attorney-client communications relating to trust fund management. See THIRD RESTATEMENT § 82, Comment f, at 187–188; RESTATEMENT OF THE LAW (THIRD) GOVERNING LAWYERS § 84, pp. 627–628 (1998).

The majority’s conclusion employs a fundamentally flawed legal premise. We have never held that all of the Government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe “bears the hallmarks of a conventional fiduciary relationship,” *Navajo II*, 556 U.S., at —, 129 S.Ct., at 1558 (internal quotation marks omitted), we have consistently looked to general trust principles to flesh out the Government’s fiduciary obligations.

For example, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), we construed a statute that vested the Government with discretionary authority to “use” trust property for certain purposes as imposing a concomitant duty to preserve improvements that had previously been made to the land. *Id.*, at 475, 123 S.Ct. 1126 (quoting 74 Stat. 8). Even though the statute did not “expressly subject the Government to duties of management and conservation,” we construed the Government’s obligations under the statute by reference to “elementary trust law,” which “confirm[ed] the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” 537 U.S., at 475, 123 S.Ct. 1126. Similarly, in *Seminole Nation*, we relied on general trust principles to conclude that the Government had a fiduciary duty to prevent misappropriation of tribal trust funds by corrupt members of a tribe, even though no specific statutory or treaty provision expressly imposed such a duty. *See* 316 U.S., at 296, 62 S.Ct. 1049.

Accordingly, although the “general ‘contours’ of the government’s obligations” are defined by statute, the “interstices must be filled in through reference to general trust law.” *Cobell*, 240 F.3d, at 1101 (quoting *Mitchell II*, 463 U.S., at 224, 103 S.Ct. 2961). This approach

accords with our recognition in other trust contexts that “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.” *** Indeed, “[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.” ***

Contrary to the majority’s view, the Government’s disclosure obligations are not limited solely to the “narrowly defined disclosure obligations” set forth in § 162a(d)(5) and its implementing regulations, ante, at 2329 – 2330; rather, given that the statutory regime requires the Government to act as a conventional fiduciary in managing Indian trust funds, the Government’s disclosure obligations include those of a fiduciary under common-law trust principles. *See supra*, at 2326 – 2327. Instead of “overrid[ing]” the specific disclosure duty set forth in § 162a(d)(5) and its implementing regulations, general trust principles flesh out the Government’s disclosure obligations under the broader statutory regime, consistent with its role as a conventional fiduciary in this context.

This conclusion, moreover, is supported by the plain text of the very statute cited by the majority. Section 162a(d), which was enacted as part of the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 108 Stat. 4239, sets forth eight “trust responsibilities of the United States.” But that provision also specifically states that the Secretary of the Interior’s “proper discharge of the trust responsibilities of the United States shall include (but are not limited to) “those specified duties. 25 U.S.C. § 162a(d) (emphasis added). By expressly including the italicized language, Congress recognized that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds. Indeed, Title I of the 1994 Act is entitled “Recognition of Trust Responsibility,” 108 Stat. 4240 (emphasis added), and courts have similarly observed that the Act “recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians.” *Cobell*, 240 F.3d, at 1098; see also H.R.Rep. No. 103–778, p. 9 (1994) (“The responsibility for management of Indian Trust Funds by the [Government] has been determined through a series of court decisions, treaties, and statutes”). That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act.

The majority requires the Nation to “point to a right conferred by statute” to the attorney-client communications at issue, ante, at 2325, and finding none, denies the Nation access to those communications. The upshot of that decision, I fear, may very well be to reinvigorate the position of the dissenting Justices in *White Mountain Apache* and *Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government’s fiduciary obligations to Indian tribes. *See White Mountain Apache*, 537 U.S., at 486–487, 123 S.Ct. 1126 (THOMAS, J., dissenting); *Mitchell II*, 463 U.S., at 234–235, 103 S.Ct. 2961 (Powell, J., dissenting). That

approach was wrong when *Mitchell II* was decided nearly 30 years ago, and it is wrong today. Under our governing precedents, common-law trust principles play an important role in defining the Government’s fiduciary duties where, as here, the statutory scheme establishes a conventional fiduciary relationship. Applying those principles in this context, I would hold that the fiduciary exception is fully applicable to the communications in this case.

III

We have described the Federal Government’s fiduciary duties toward Indian tribes as consisting of “moral obligations of the highest responsibility and trust,” to be fulfilled through conduct “judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S., at 297, 62 S.Ct. 1049; *see also Mitchell II*, 463 U.S., at 225–226, 103 S.Ct. 2961 (collecting cases). The sad and well-documented truth, however, is that the Government has failed to live up to its fiduciary obligations in managing Indian trust fund accounts. *See, e.g., Cobell*, 240 F.3d, at 1089 (“The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of [Indian] trust accounts over the past twenty years”); *Misplaced Trust* 8 (“[T]he [Government’s] indifferent supervision and control of the Indian trust funds has consistently resulted in a failure to exercise its responsibility and [to meet] any reasonable expectations of the tribal and individual accountholders, Congress, and taxpayers”); *id.*, at 56 (“[H]ad this type of mismanagement taken place in any other trust arrangements such as Social Security, there would be war”).

As Congress has recognized, “[t]he Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans.” *Id.*, at 5. Given the history of governmental mismanagement of Indian trust funds, application of the fiduciary exception is, if anything, even more important in this context than in the private trustee context. The majority’s refusal to apply the fiduciary exception in this case deprives the Nation—as well as the Indian tribes in the more than 90 cases currently pending in the federal courts involving claims of tribal trust mismanagement, App. to Pet. for Cert. 126a–138a—of highly relevant information going directly to the merits of whether the Government properly fulfilled its fiduciary duties. Its holding only further exacerbates the concerns expressed by many about the lack of adequate oversight and accountability that has marked the Government’s handling of Indian trust fund accounts for decades.

But perhaps even more troubling than the majority’s refusal to apply the fiduciary exception in this case is its disregard of our established precedents that affirm the central role that common-law trust principles play in defining the Government’s fiduciary obligations to Indian tribes. By rejecting the Nation’s claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian

trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes. Because there is no warrant in precedent or reason for reaching that result, I respectfully dissent.

NOTES

1. What remains of the United States' "general" trust obligations to Indian tribes and Indian people? Does Justice Sotomayor's dissent, which characterizes the majority's view of the trust relationship as one that "must be set forth expressly in a specific statute or regulation," give notice of the end of the trust relationship as we know it? Recall Justice Thomas' dissent in *White Mountain*, where he asserted that the "general" trust relationship is defined in the earliest Supreme Court cases: "We have recognized a general trust relationship since 1831. *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 8 L.Ed. 25 (1831) (characterizing the relationship between Indian tribes and the United States as "*a ward to his guardian*") ***." 537 U.S. 465, 474 n.3 (2003) (emphasis added).
2. The *Jicarilla* decision generated an unusual amount of national press coverage. *E.g.*, Andrew Cohen, *You Can't Verify the Trust, Supreme Court Tells the Apache Nation*, THE ATLANTIC, June 13, 2011, available at <http://www.theatlantic.com/national/archive/2011/06/you-cant-verify-the-trust-supreme-court-tells-apache-nation/240359/>.
3. In a case decided earlier in the 2010 Term, *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011), the Supreme Court held that tribal money claims for breach of trust may not be brought in the Court of Federal Claims under 28 U.S.C. § 1500 where the tribe also has sued in federal district court for a trust accounting.

Add to the end of the sixth full paragraph on page 346:

On June 20, 2011, Judge Thomas F. Hogan granted a motion for final approval of the *Cobell* settlement. Some allotment holders chose to opt out of the settlement, to the extent they could. Jerilyn DeCoteau, an Indian lawyer and law professor, and a member of the Turtle Mountain Band of Chippewa Indians, wrote a powerful editorial explaining her reasons. *See* Jerilyn DeCoteau, *Why I Opted Out of the Cobell Settlement*, INDIAN COUNTRY TODAY, June 4, 2011, available at http://indiancountrytodaymedianetwork.com/ict_sbc/why-i-opted-out-of-the-cobell-settlement/.

Here is an excerpt:

I feel cheated because my grandmother was cheated and her heirs were cheated and cowed by the very lack of information, by the lack of answers when questions were asked, cowed into believing we had little or no right to ask about our interest in her allotment. This is one of the reasons I opted out: I still don't know what resources are on the allotments (there are 3) that I have interests in. To say on quarterly statement, which have miraculously appeared in recent years, that the land is leased for "business purpose" or "agriculture" tells me very little. The point is, these leased lands are the source of the trust accounts that are the subject of *Cobell* and I still don't know enough about the value of my interests to make an informed decision about whether to agree to settle.

I do know that I continue to feel cheated. My family has never benefited in any meaningful way from our allotments. Now some 110 years later, I have the offer of another paltry piece of paper with a few small numbers typed on it. What am I supposed to do with \$500? What would you do? What would you do if you didn't feel so powerless and like you deserved at least something, even if it is this silly amount called a "settlement"? My daughter pointed out the plain reality, "There are poor people who would gladly take \$500, a month's worth of fuel oil [in a cold North Dakota winter], or a couple of week's groceries in exchange for a piece of land they will never see and have no money to ever see."

The fact is, the settlement will make no real difference in the lives of most account holders and can hardly be considered justice in any real sense of the word. It is just a way to put an ugly chapter in American history to rest for the perpetrators, while conveniently ignoring that it is largely a meaningless act for most Indians.

Kimberly Craven, one of the *Cobell* class members, challenged the settlement in court, most notably a portion of the settlement in which class members have no opt-out right and some members will be over- or under-compensated. The D.C. Circuit affirmed the validity of the settlement in *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir.), *cert. denied sub nom., Craven v. Cobell*, 133 S. Ct. 543 (2012). Helpfully, the D.C. Circuit outlined the critical aspects of the settlement:

First, an amended complaint would be filed setting forth two classes:

(1) the Historical Accounting Class, consisting of individual beneficiaries who had an IIM account (with at least one cash transaction) between October 25, 1994 (the date on which the 1994 Act became law) and September 30, 2009 (the "record date" of the parties' agreement), and

(2) the Trust Administration Class, consisting of the beneficiaries who had IIM accounts between 1985 and the date of the proposed amended complaint as well as individuals who, as of September 30, 2009, “had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM [a]ccount and regardless of the proceeds, if any, generated from the [l]and”.

The settlement envisioned that the Historical Accounting Class would be certified pursuant to [FRCP] Rule 23(b)(1)(A) and 23(b)(2), in the alternative, with no individual right to opt out of the class; the Trust Administration Class would be certified pursuant to Rule 23(b)(3) with an opt-out right.

Second, the Secretaries of Interior and Treasury would deposit \$1.412 billion into a settlement fund. From this fund, each member of the Historical Accounting Class would receive \$1,000, in exchange for the release of the Secretary of Interior’s “obligation to perform a historical accounting of [the class member’s] IIM Account or any individual Indian trust asset”. The Trust Administration Class members would receive a baseline payment of \$500 plus an additional pro rata share of the remaining settlement funds in accordance with an agreed-upon compensation formula. The Trust Administration Class payment would release the Secretary from liability arising out of any past mismanagement of IIM accounts and trust properties. The scope of that release would not be unlimited: for example, claims for payment of existing account balances, breach-of-trust claims arising after September 30, 2009, and water-rights claims would fall outside of its scope.

Third, in addition to the class and compensation structure, the proposed settlement provided for:

- (1) establishment of a \$1.9 billion Trust Land Consolidation Fund for the Secretary to acquire fractional interests in trust lands;
- (2) establishment of an Indian Education Scholarship Fund;
- (3) potential tax-exempt status, at the election of Congress, for funds received by the class members;
- (4) reasonable attorneys’ fees, expenses, and costs for class counsel, to be awarded at the discretion of the district court,
- (5) incentive payments for the class representatives, to be awarded at the discretion of the district court.

The proposal also stated that the class settlement agreement was contingent upon the enactment of legislation by Congress to authorize certain aspects of the settlement.

Cobell, 679 F.3d at 914-15 (citations omitted).

The D.C. Circuit rejected all of Craven's objections to the settlement, most of which were based on non-Indian law grounds. However, the court did address the question of the overall fairness of the settlement:

Finally, Craven's general objection to the fairness of the class settlement agreement focuses on the information-deficit concern discussed previously: without an historical accounting, it is impossible to tell whether some members are being over-compensated while others are being under-compensated, and yet class members are being forced to surrender their right to an historical accounting and are thereby left without the information needed to establish the value of their claims. The protracted and contentious nature of this litigation underscores the reasonableness of the district court's evaluation of the fairness and adequacy of the class settlement agreement under Rule 23(e). Congress had shown no inclination to fund the historical accounting to which the plaintiff class was entitled under the 1994 Act. The question was could the class nonetheless benefit appropriately without it. Class counsel acknowledged that, despite significant work with existing data, efforts had failed to show significant accounting errors in the IIM accounts, *see Cobell XXI*, 569 F.Supp.2d at 238. The class settlement agreement was the result of an arms-length negotiation. What interests it protected and what benefits it provided were weighed by the district court, and considered in view of the class-member objections. The settlement acknowledged the plaintiff class' entitlement to an historical accounting and that the United States would pay for the surrender of that right and for trust claims in accordance with an agreed-upon formula. The settlement further provided that the Secretary would attempt to purchase fractional ownership shares to enable accurate accounting in the future in fulfillment of the Secretary's trust responsibilities. Congress has approved the settlement and appropriated the necessary funds. For Craven to characterize the settlement as "tak[ing] shortcuts to solve the problem at the expense of individual rights," Appellant's Br. at 13, and "tak[ing] a series of impermissible shortcuts that abuse the class action process to settle this case," *id.* at 15, is to ignore the history of this hard-fought litigation and the obstacles to producing an historical accounting.

Cobell, 679 F.3d at 923-24.

CHAPTER 6

TRIBAL SOVEREIGNTY AND THE CHALLENGE OF NATION-BUILDING

SECTION D. TRIBAL SOVEREIGN IMMUNITY

Add to the end of note 11 on page 403:

12. Tribal governments and individual on-reservation businesses have tapped into the emerging market of payday lending, with some proponents calling it the “new gaming.” Opponents refer to the practice as “rent-a-tribe.” See Mark Fogarty, *Payday Lenders “Using Tribes as Fronts”*, INDIAN COUNTRY TODAY MEDIA NETWORK, Feb. 14, 2011, available at <http://indiancountrytodaymedianetwork.com/2011/02/14/payday-lenders-%E2%80%98using-tribes-as-fronts%E2%80%99-17421>.

In late 2010, the Colorado Supreme Court decided a major tribal sovereign immunity case involving the efforts of the Colorado Attorney General to investigate payday lender franchises allegedly operated by the Miami Tribe of Oklahoma and the Santee Sioux Tribe of Nebraska, affirming that the tribes (and more specifically, their business arms) are immune from the state’s investigative process. See *Colorado ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 242 P.3d 1099 (Colo. 2010). The court noted:

The modern realities of tribal sovereignty explain the broad applicability of the doctrine of tribal sovereign immunity. As Indian law scholar Robert A. Williams, Jr. recognized twenty-five years ago, “[t]erritorial remoteness, an inadequate public infrastructure base, capital access barriers, land ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policymakers to stifle Indian Country development and investment.” Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 335-36 (1985). Because of these barriers and tribes’ virtual lack of a tax base, tribal economic development-often in the form of tribally owned and controlled businesses-is necessary to generate

revenue to support tribal government and services. *See generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D.L.REV. 759 (2004).

Unsurprisingly, tribes recognize the critical nature of economic development and provide for it in their laws and governing charters. For example, the preamble to the Constitution of the Santee Sioux Nation includes the purpose of forming businesses, and section 1(k) of article VI addressing the powers of self-government provides tribal council with authority to charter subordinate organizations for economic purposes. Similarly, the preamble to the Constitution of the Miami Tribe of Oklahoma discusses taking advantage of opportunities for self-determination and economic independence, and section 1 of article VI provides for a Business Committee with authority to transact business and enact resolutions and ordinances to that end.

Cash Advance, 242 P.3d at 1107.

Other state efforts to investigate and regulate on-reservation-based payday lenders are proceeding, *e.g.*, *State of Colorado v. Western Sky Financial, LLC*, 845 F. Supp. 2d 1178 (D. Colo. 2011) (remanding state's claim back to state court); *Western Sky Financial, LLC v. Maryland Commissioner of Financial Regulation*, 2012 WL 1284407 (D. Md., April 9, 2012) (same). Federal agency suits, which are not subject to tribal immunity defenses, are also progressing. *E.g.*, *Federal Trade Commission v. AMG Services, Inc.*, Order and Report & Recommendations, No. 12-536 (D. Nev., July 16, 2013), available at <http://www.ftc.gov/os/caselist/1123024/130722amgorder.pdf>.

Prominent scholars are beginning to weigh in on this phenomenon, worried about the potential long-term impact to tribal sovereignty. *See* Nathalie Martin & Joshua Schwartz, *The Alliance between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (2012).

13. The Ninth Circuit held in *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), that tribal public safety officials (police and ambulance workers) are not immune from suit under the tribal official immunity doctrine:

In short, our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities. We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. *See Santa Clara Pueblo*, 436 U.S. at 58 We therefore hold that sovereign immunity does not bar the suit against the Viejas Fire paramedics as individuals. The Viejas Band is not the real party in interest. The Maxwells have sued the Viejas Fire paramedics in their individual

capacities for money damages. Any damages will come from their own pockets, not the tribal treasury. ...

At oral argument, the Viejas defendants gave two reasons why the Viejas Band could be the real party in interest in this suit. First, they suggested that the Viejas Band might have indemnified the paramedics and would thus have to pay for any liability. But even if an indemnification agreement exists, it would be “a purely intramural arrangement” between a sovereign and its officers. ... The unilateral decision to insure a government officer against liability does not make the officer immune from that liability. ... Second, they suggested that liability would impact the Viejas Band’s ability to hire paramedics. But this case concerns allegedly grossly negligent acts committed outside tribal land pursuant to an agreement with a non-tribal entity. In this context, denying tribal sovereign immunity to individual employees sued as individuals will have a minimal effect, if any, on the tribe’s hiring ability.

Maxwell, 697 F.3d at 955.

The Viejas Band of Kumeyaay Indians sought en banc review of the panel decision. In their petition, the Band argued:

According to this Court’s decision, however, Indian tribes and their officers may be subject to liability for money damages under state tort law in any case where the plaintiff simply alleges claims against a tribal employee in his or her “individual” capacity. (The officer would be subject to direct liability, while the tribe would be required to indemnify or insure against the loss.) Thus, the decision has the potential of stripping Indian tribes of the fundamental protection of tribal immunity – the ability to determine when they and their officers may be sued in civil courts for actions taken on the sovereign’s behalf.

Moreover, this Court’s decision ignores the fact that this lawsuit relates to voluntary emergency services provided by the tribal entity, and that the entity here explicitly retained its sovereign immunity in the written contracts where it offered those services. ... If this Court abrogates those contracts (which were carefully negotiated by local governments and the tribal entity), Indian tribes may no longer have control over when they may be sued. Thus, it may become financially impossible for them to provide emergency services – or police, fire, or other related services – both on and off their reservations.

Petition for Rehearing and Rehearing *En Banc* at 19-20, available at <http://turtletalk.files.wordpress.com/2013/01/viejas-band-en-banc-petition.pdf>. The Ninth Circuit denied the petition.

CHAPTER 7
TRIBAL SOVEREIGNTY AND JURISDICTION:
CONGRESSIONAL AND JUDICIAL RECOGNITION
AND LIMITATIONS

SECTION A.
THE ARENA OF FEDERAL AND TRIBAL JURISDICTION:
“INDIAN COUNTRY”

**PART 1. LITIGATING “INDIAN COUNTRY”: RESERVATION DIMINISHMENT
AND DISESTABLISHMENT**

NOTE: LAND IN TRUST AS ENSURING TRIBAL JURISDICTION

Add after note 2 on page 470

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS V. PATCHAK

Supreme Court of the United States, 2012

___ U.S. ___, 132 S. Ct. 2199, 183 L.Ed.2d 211

Justice KAGAN delivered the opinion of the Court.

A provision of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire property “for the purpose of providing land for Indians.” ... The Secretary here acquired land in trust for an Indian tribe seeking to open a

casino. Respondent David Patchak lives near that land and challenges the Secretary's decision in a suit brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Patchak claims that the Secretary lacked authority under § 465 to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino's operation.

We consider two questions arising from Patchak's action. The first is whether the United States has sovereign immunity from the suit by virtue of the Quiet Title Act (QTA), 86 Stat. 1176. We think it does not. The second is whether Patchak has prudential standing to challenge the Secretary's acquisition. We think he does. We therefore hold that Patchak's suit may proceed.

I

The Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. ***

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. ... [A]n organization called Michigan Gambling Opposition (or MichGO) filed suit alleging that the Secretary's decision violated environmental and gaming statutes. The Secretary held off taking title to the property while that litigation proceeded. Within the next few years, a District Court and the D.C. Circuit rejected MichGO's claims. See *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27–28 (C.A.D.C.2008); *Michigan Gambling Opposition v. Norton*, 477 F.Supp.2d 1 (D.D.C.2007).

Shortly after the D.C. Circuit ruled against MichGO (but still before the Secretary took title), Patchak filed this suit under the APA advancing a different legal theory[, relating to *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that 25 U.S.C. § 465 authorizes the Secretary to take land into trust only for tribes that were “under federal jurisdiction” in 1934’]. ... To establish his standing to bring suit, Patchak contended that he lived “in close proximity to” the Bradley Property and that a casino there would “destroy the lifestyle he has enjoyed” by causing “increased traffic,” “increased crime,” “decreased property values,” “an irreversible change in the rural character of the area,” and “other aesthetic, socioeconomic, and environmental problems.” ... Notably, Patchak did not assert any claim of his own to the Bradley Property. ...

II

We begin by considering whether the United States' sovereign immunity bars Patchak's suit under the APA. That requires us first to look to the APA itself and then, for reasons we will describe, to the QTA. We conclude that the United States has waived its sovereign immunity from Patchak's action.

The APA generally waives the Federal Government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. That waiver would appear to cover Patchak's suit, which objects to official action of the Secretary and seeks only non-monetary relief. But the APA's waiver of immunity comes with an important carve-out: The waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *Ibid.* That provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes. The question thus becomes whether another statute bars Patchak's demand for relief.

The Government and Band contend that the QTA does so. The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28 U.S.C. § 2409a(d). The statute, however, contains an exception: The QTA's authorization of suit "does not apply to trust or restricted Indian lands." § 2409a(a). According to the Government and Band, that limitation on quiet title suits satisfies the APA's carve-out and so forbids Patchak's suit. In the Band's words, the QTA exception retains "the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." Brief for Tribal Petitioner 18.

Two hypothetical examples might help to frame consideration of this argument. First, suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations. "[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy"—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment. *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286, n. 22, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (quoting H.R.Rep. No. 94-1656, p. 13 (1976), 1976 U.S.C.C.A.N. 6121, 6133).

But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm, and raising no objection at all to the Secretary's title. The QTA could not bar that suit because even though involving Indian lands, it asserts a grievance altogether different from the kind the statute concerns. Justice SCALIA, in a

former life as Assistant Attorney General, made this precise point in a letter to Congress about the APA's waiver of immunity (which we hasten to add, given the author, we use not as legislative history, but only for its persuasive force). When a statute "is not addressed to the type of grievance which the plaintiff seeks to assert," then the statute cannot prevent an APA suit. *Id.*, at 28 (May 10, 1976, letter of Assistant Atty. Gen. A. Scalia).

We think that principle controls Patchak's case: The QTA's "Indian lands" clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is *not* a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's "Indian lands" limitation simply inapposite to this litigation.

In reaching this conclusion, we need look no further than the QTA's text. From its title to its jurisdictional grant to its venue provision, the Act speaks specifically and repeatedly of "quiet title" actions. ... That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. See, *e.g.*, Black's Law Dictionary 34 (9th ed. 2009) (defining an "*action to quiet title*" as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it....

And the QTA's other provisions make clear that the recurrent statutory term "quiet title action" carries its ordinary meaning. The QTA directs that the complaint in such an action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). If the plaintiff does not assert any such right (as Patchak does not), the statute cannot come into play. Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. § 2409a(b). That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right to the property. If the United States loses the suit, an award of just compensation to the rightful owner (whoever and wherever he might be) could do nothing to satisfy Patchak's claim.

Our decision in *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), is of a piece. There, we considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. We thought the QTA the relevant statute because the plaintiff herself asserted title to the property. Our opinion quoted the plaintiff's own description of her suit: "At no time in

this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case.” *Id.*, at 842, 106 S.Ct. 2224 (quoting Brief for Respondent in *Mottaz*, O.T. 1985, No. 546, p. 3). That fact, we held, brought the suit “within the [QTA's] scope”: “What [the plaintiff] seeks is a declaration that she alone possesses valid title.” 476 U.S., at 842, 106 S.Ct. 2224. So once again, we construed the QTA as addressing suits by adverse claimants.

But Patchak is not an adverse claimant—and so the QTA (more specifically, its reservation of sovereign immunity from actions respecting Indian trust lands) cannot bar his suit. Patchak does not contend that he owns the Bradley Property, nor does he seek any relief corresponding to such a claim. He wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it. Patchak's lawsuit therefore lacks a defining feature of a QTA action. He is not trying to disguise a QTA suit as an APA action to circumvent the QTA's “Indian lands” exception. Rather, he is not bringing a QTA suit at all. He asserts merely that the Secretary's decision to take land into trust violates a federal statute—a garden-variety APA claim. See 5 U.S.C. § 706(2)(A), (C) (“The reviewing court shall ... hold unlawful and set aside agency action ... not in accordance with law [or] in excess of statutory jurisdiction [or] authority”). Because that is true—because in then-Assistant Attorney General Scalia's words, the QTA is “not addressed to the type of grievance which [Patchak] seeks to assert,” H.R. Rep. 94–1656, at 28, 1976 U.S.C.C.A.N. 6121 at 6147—the QTA's limitation of remedies has no bearing. The APA's general waiver of sovereign immunity instead applies.

Last, the Band and Government argue that we should treat Patchak's suit as we would an adverse claimant's because they equally implicate the “Indian lands” exception's policies. According to the Government, allowing challenges to the Secretary's trust acquisitions would “pose significant barriers to tribes [‘] ... ability to promote investment and economic development on the lands.” Brief for Federal Petitioners 24. That harm is the same whether or not a plaintiff claims to own the land himself. Indeed, the Band argues that the sole difference in this suit cuts in its direction, because non-adverse claimants like Patchak have “the most remote injuries and indirect interests in the land.” ...

That argument is not without force, but it must be addressed to Congress. In the QTA, Congress made a judgment about how far to allow quiet title suits—to a point, but no further. (The “no further” includes not only the “Indian lands” exception, but one for security interests and water rights, as well as a statute of limitations, a bar on jury trials, jurisdictional and venue constraints, and the just compensation option discussed earlier.) Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. The Band assumes that plaintiffs like Patchak have a lesser interest than those bringing quiet title actions, and so should be precluded *a fortiori*. But all we can say is that Patchak has a different interest. Whether it is

lesser, as the Band argues, because not based on property rights; whether it is greater because implicating public interests; or whether it is in the end exactly the same—that is for Congress to tell us, not for us to tell Congress. As the matter stands, Congress has not assimilated to quiet title actions all other suits challenging the Government’s ownership of property. And so when a plaintiff like Patchak brings a suit like this one, it falls within the APA’s general waiver of sovereign immunity.

III

We finally consider the Band’s and the Government’s alternative argument that Patchak cannot bring this action because he lacks prudential standing. This Court has long held that a person suing under the APA must satisfy not only Article III’s standing requirements, but an additional test: The interest he asserts must be “arguably within the zone of interests to be protected or regulated by the statute” that he says was violated. ... Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under § 465, which authorizes the acquisition of property “for the purpose of providing land for Indians.” And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. See *supra*, at 2203. The Government and Band argue that the relationship between § 465 and Patchak’s asserted interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak’s interests relate to the land’s *use* as a casino. See Brief for Tribal Petitioner 46 (“The Secretary’s decision to put land into trust does not turn on any particular use of the land, gaming or otherwise [,] ... [and] thus has no impact on [Patchak] or his asserted interests”); Brief for Federal Petitioners 34 (“[L]and may be taken into trust for a host of purposes that have nothing at all to do with gaming”). We find this argument unpersuasive.

The prudential standing test Patchak must meet “is not meant to be especially demanding.” ... We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable.” ... The test forecloses suit only when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” ...

Patchak’s suit satisfies that standard, because § 465 has far more to do with land use than the Government and Band acknowledge. Start with what we and others have said about § 465’s context and purpose. As the leading treatise on federal Indian law notes, § 465 is “the capstone” of the IRA’s land provisions. F. Cohen, *Handbook of Federal Indian Law* § 15.07[1][a], p. 1010 (2005 ed.) (hereinafter Cohen). And those provisions play a key role in the IRA’s overall effort “to rehabilitate the Indian’s economic life,” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (internal quotation marks omitted). “Land forms the basis” of that “economic life,” providing the foundation for “tourism, manufacturing, mining, logging, ... and gaming.” Cohen § 15.01, at 965. Section 465 thus functions as a primary

mechanism to foster Indian tribes' economic development. As the D.C. Circuit explained in the *MichGO* litigation, the section "provid[es] lands sufficient to enable Indians to achieve self-support." *Michigan Gambling*, 525 F.3d, at 31 (internal quotation marks omitted); see *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (noting the IRA's economic aspect). So when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.

The Department's regulations make this statutory concern with land use crystal clear. Those regulations permit the Secretary to acquire land in trust under § 465 if the "land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 CFR § 151.3(a)(3). And they require the Secretary to consider, in evaluating any acquisition, both "[t]he purposes for which the land will be used" and the "potential conflicts of land use which may arise." §§ 151.10(c), 151.10(f); see § 151.11(a). For "off-reservation acquisitions" made "for business purposes"—like the Bradley Property—the regulations further provide that the tribe must "provide a plan which specifies the anticipated economic benefits associated with the proposed use." § 151.11(c). DOI's regulations thus show that the statute's implementation centrally depends on the projected use of a given property.

The Secretary's acquisition of the Bradley Property is a case in point. The Band's application to the Secretary highlighted its plan to use the land for gaming purposes. See App. 41 ("[T]rust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming"); *id.*, at 61–62 ("The Tribe intends to ... renovate the existing ... building into a gaming facility.... to offer Class II and/or Class III gaming"). Similarly, DOI's notice of intent to take the land into trust announced that the land would "be used for the purpose of construction and operation of a gaming facility," which the Department had already determined would meet the Indian Gaming Regulatory Act's requirements. 70 Fed.Reg. 25596; 25 U.S.C. §§ 2701–2721. So from start to finish, the decision whether to acquire the Bradley Property under § 465 involved questions of land use.

And because § 465's implementation encompasses these issues, the interests Patchak raises—at least arguably—fall "within the zone ... protected or regulated by the statute." If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits. The difference here, as the Government and Band point out, is that § 465 specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See 25 CFR §§ 151.10(c), 151.10(f), 151.11(a). And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit.

* * *

The QTA’s reservation of sovereign immunity does not bar Patchak’s suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D.C. Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

II

Three consequences illustrate the difficulties today’s holding will present for courts and the Government. First, it will render the QTA’s limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of *Block*, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an “aesthetic” interest in the land but seeking an identical practical objective—to divest the Government of title and possession. § 2409a(a), (b). Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.

Second, the majority’s holding will frustrate the Government’s ability to resolve challenges to its fee-to-trust decisions expeditiously. When a plaintiff like Patchak asserts an “aesthetic” or “environmental” concern with a planned use of Indian trust land, he may bring a distinct suit under statutes like the National Environmental Policy Act of 1969 and the Indian Gaming Regulatory Act. Those challenges generally may be brought within the APA’s ordinary 6-year statute of limitations. Suits to contest the Government’s decision to take title to land in trust for Indian tribes, however, have been governed by a different rule. Until today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review. 25 CFR § 151.12 (2011); 61 Fed.Reg. 18,082–18,083 (1996). That deadline promoted finality and security—necessary preconditions for the investment and “economic development” that are central goals of the Indian Reorganization Act. *Ante*, at 2210. Today’s result will promote the opposite, retarding tribes’ ability to develop land until the APA’s 6-year statute of limitations has lapsed.

Finally, the majority’s rule creates substantial uncertainty regarding who exactly is barred from bringing APA claims. The majority leaves unclear, for instance, whether its rule bars from suit only those who “claim any competing interest” in the disputed land in their complaint, *ante*, at 2206, or those who could claim a competing interest, but plead only that the Government’s title claim violates a federal statute. If the former, the majority’s holding would allow Patchak’s

challenge to go forward even if he had some personal interest in the Bradley Property, so long as his complaint did not assert it. That result is difficult to square with *Block* and *Mottaz*. If the latter, matters are even more peculiar. Because a shrewd plaintiff will avoid referencing her own property claim in her complaint, the Government may assert sovereign immunity only if its detective efforts uncover the plaintiff's unstated property claim. Not only does that impose a substantial burden on the Government, but it creates perverse incentives for private litigants. What if a plaintiff has a weak claim, or a claim that she does not know about? Did Congress really intend for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?

As these observations illustrate, the majority's rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the "national public interest" demanded should remain immune from challenge. Congress did not intend either result.

* * *

For the foregoing reasons, I would hold that the QTA bars the relief Patchak seeks. I respectfully dissent.

NOTE

Patchak potentially opens the door to a dramatic increase in the number of challenges to the Secretary of Interior's decisions to take land into trust. The prudential standing portion of the opinion allows virtually any private citizen objecting to proposed tribal activities on trust lands *several years* to bring suit. What that may do to the financing of tribal governmental and business opportunities is anyone's guess. As Justice Sotomayor wrote in dissent, the decision allows a "shrewd plaintiff" multiple opportunities to challenge tribal interests.

CHAPTER 8

TRIBAL-STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION A.

CIVIL ADJUDICATORY JURISDICTION IN INDIAN COUNTRY

PART 2. SUITS AGAINST NON-MEMBERS OF THE TRIBE

Add to the end of page 585:

5. In *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the Tenth Circuit held that a tribal court did not have jurisdiction to order a law firm, whose lawyers were licensed to practice in the tribal court, to return paid attorney fees to a tribe where the tribal court ordered the return of the fees pending a determination on whether the fee payments were valid. The court wrote that the *Montana* 1 exception was not met:

There is no dispute that *Montana* and its progeny govern whether the Muscogee (Creek) Nation courts have adjudicatory jurisdiction over Crowe. Judge Stidham maintains tribal court jurisdiction is appropriate under *Montana*'s first exception because, in his view, Crowe entered a "consensual relationship" with the Muscogee (Creek) Nation by enrolling in its bar association and practicing before its courts. It is true that membership in a tribe's bar association and appearances before its courts can constitute a "consensual relationship" with the tribe. But that is not the end of the *Montana* inquiry. Such a "consensual relationship" may establish tribal court jurisdiction under *Montana* only if there is a sufficient "nexus" between that relationship and the attendant "exertion of tribal authority." *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1223 (10th Cir.2002).

The question thus posed is whether there is a sufficient nexus between Crowe's practice before the Muscogee (Creek) Nation courts and Judge Stidham's order requiring Crowe to return attorneys' fees already paid to it pursuant to its contract with the Thlopthlocco pending determination of the merits of the underlying tribal court litigation. We hold there is not. The vast majority of cases Judge Stidham cites for his proposition that a tribal court has power to regulate

attorneys who practice before it are cases addressing disciplinary matters, in which courts have permitted suits against defendant-attorneys for alleged misconduct. *** Those cases are inapposite here, where there has never been any allegation that Crowe attorneys acted unprofessionally before the Muscogee (Creek) Nation courts, and where the order directing Crowe to return its fees had nothing to do with conduct of Crowe attorneys practicing before the court.

Judge Stidham's reliance on cases in which courts have exercised ancillary jurisdiction over attorneys' fees issues is equally unavailing. Those cases involve the exercise of ancillary jurisdiction where there is an actual or potential disagreement between an attorney and his client regarding attorneys' fees related to the judgment in the proceeding. *** Here, there is no allegation regarding any tension between Crowe and the Thlopthlocco regarding attorneys' fees to establish the requisite nexus in this case. To the contrary, there is every indication that the Thlopthlocco Tribe, as currently constituted, does not want Crowe to return funds paid to it for past legal services pursuant to their contract.

For ancillary jurisdiction over Crowe as a nonmember of the tribe to be appropriate under the consensual relationship exception to *Montana*, the dispute before the tribal court must arise directly out of that consensual relationship. See Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1225–26 (2010) (“[W]hether affirming or rejecting the consensual relationship exception [of *Montana*], [courts have] followed *Strate*'s admonition that the claim must arise from the consensual relationship with the tribe or tribal members.”). That is not the case here.

Crowe's contractual relationship with the Thlopthlocco government has nothing to do with Crowe attorneys' consensual relationship with the Creek Nation based on their Bar membership. Nor is Crowe's consensual relationship with the Creek Nation related to the dispute before Judge Stidham. The substance of the Anderson defendants' cross-claim in tribal court is that the January 27, 2007 election was invalid and the wrong tribal members are therefore running the government. What the Anderson defendants seek is prospective injunctive relief against the nine individual cross-claim defendants, some of whom constitute the Business Committee of the Thlopthlocco, to correct this alleged wrong. *** Even assuming the Anderson defendants should ultimately prevail on their claim, the relief they are requesting is that the January 27, 2007 election of the current government be declared invalid. Presumably, a new election would have to be conducted. Who would win that election and become the new Business Committee of the Thlopthlocco is unknown and is not a part of this tribal court litigation. Whether that Business Committee would seek to avoid any third-party contracts made by the prior Business Committee on behalf of the Thlopthlocco

and attempt to recover any amounts paid under such contracts, including the contract with Crowe, is also unknown and is not a part of the litigation before Judge Stidham. While the Creek Nation has jurisdiction to regulate its own citizens, the Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation. Judge Stidham does not suggest that the Creek Nation has any regulatory power over the contracts the Thlopthlocco makes with third parties in general. Instead, Judge Stidham contends “the issue of the Muscogee (Creek) Nation’s jurisdiction over the law firm’s contract is simply one aspect of the Muscogee (Creek) Nation’s jurisdiction over the law firm in general as attorneys practicing before its courts.” Reply Br. at 10. No case supports ancillary jurisdiction in circumstances like those here, where the claim that Crowe must return its fees has nothing to do with the reasonableness of fees. Because the validity of the fee contract is not relevant to Crowe’s practice before the Creek Nation courts or its attorneys’ membership in the Creek Nation’s bar association, Judge Stidham did not have adjudicatory authority to order Crowe to return fees it received pursuant to its contract with the Thlopthlocco.

We therefore conclude that the first *Montana* exception does not support the exercise of tribal court jurisdiction over Crowe with respect to the fees it received from the Thlopthlocco. While Crowe attorneys submitted themselves to the Muscogee (Creek) Nation tribal court when they brought the Thlopthlocco litigation, there is no basis on which to conclude they or the firm submitted themselves to the general subject matter jurisdiction of the tribal court for all purposes, especially not for the purpose of voiding their contractual relationship with the Thlopthlocco, when that contract is not, directly or indirectly, part of the Anderson defendant’s claims before the court.

Crowe & Dunlevy, 640 F.3d at 1151-53. The court’s analysis seems to turn on a factual point. The Thlopthlocco Tribal Town apparently didn’t seek the return of the attorney fees, and wasn’t a party to the underlying claims leading to the question of the attorney fees. The Tenth Circuit seemed content to find that there was no tribal sovereignty nexus to the assertion of jurisdiction. Is this persuasive?

6. In a case that seems to conflict on all of *Crowe and Dunlevy*’s salient points (except the presence of the tribe), the Ninth Circuit affirmed tribal civil jurisdiction over a nonmember corporation – and its nonmember principal – in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). The corporation was the lessor of tribal trust lands. When the lease expired, the corporation refused to budge. The Colorado River Indian Tribes sued in tribal court to force an eviction. Water Wheel denied jurisdiction in tribal court, and also refused to comply with discovery requests on the question of whether the actions of the corporate principal were sufficient to pierce the corporate veil.

The court held that the tribal power over nonmembers is informed by (and possibly superceded by) the tribe's power to exclude nonmembers from tribal lands:

As a preliminary matter, we consider the relationship between the tribe's inherent authority to exclude and its authority to exercise jurisdiction. The district court stated, and arguably held despite its footnote indicating otherwise, that a tribe's inherent authority to exclude a non-Indian from tribal land is subject to *Montana*. But the Supreme Court has recognized that a tribe's power to exclude exists independently of its general jurisdictional authority. *See Duro v. Reina*, 495 U.S. 676, 696–97, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (noting that even where tribes lack criminal jurisdiction over a non-Indian defendant, they “possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.... Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities”), superseded on other grounds by congressional statute, 25 U.S.C. § 1301.

Montana limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982)(recognizing a tribe's inherent authority to exclude non-Indians from tribal land, without applying *Montana*); *see also* *** *Montana*, 450 U.S. at 557, 101 S.Ct. 1245 (recognizing a tribe's inherent authority to condition the entry of non-Indians on tribal land as a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) [hereinafter Cohen] (explaining that “[b]ecause the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty”) ***.

Water Wheel, 642 F.3d at 810-11.

Noting that the tribe's adjudicatory jurisdiction is equal to its regulatory jurisdiction, the court also held that the tribal court also retained jurisdiction over the nonmember principal:

For purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established “expressly or by [the nonmember's] actions.” *Plains Commerce Bank*, 554 U.S. at 337, 128 S.Ct. 2709. There is no requirement that Johnson's commercial dealings with the CRIT be a

matter of written contract or lease actually signed by Johnson. *See Montana*, 450 U.S. at 565, 101 S.Ct. 1245 (tribes may regulate the activities of nonmembers who enter into “*commercial dealing, contracts, leases, or other arrangements*” (emphasis added)). We are to consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might “trigger” tribal authority. *Id.* at 338, 128 S.Ct. 2709.

Johnson owned and operated Water Wheel on tribal land for more than twenty years and had extensive dealings with the CRIT before the lease expired. Additionally, Johnson was on notice through the leases’s explicit terms that Water Wheel, its agents, and employees were subject to CRIT laws, regulations, and ordinances. These facts adequately support the tribal court’s conclusion that Johnson had entered into a consensual relationship with the tribe and could reasonably anticipate that the tribe would exercise its jurisdictional authority. Johnson’s subjective beliefs regarding his relationship with the tribe do not change the consensual nature of that relationship for purposes of regulatory jurisdiction. Moreover, the tribe’s claims for unpaid rent and related damages arose directly from this relationship.

As noted above, the commercial dealings between the tribe and Johnson involved the use of tribal land, one of the tribe’s most valuable assets. Thus, if *Montana* applied to the breach of contract claim, either exception would provide regulatory jurisdiction over Johnson.

As for the trespass claim, there is no legal or logical basis to require a consensual relationship between a trespasser and the offended landowner. This is particularly true when the trespass is to tribal land, the offended owner is the tribe, and the trespasser is not a tribal member. *Merrion*, 455 U.S. at 144, 102 S.Ct. 894. If tribes lacked authority to evict holdover tenants and their agents, tribes would be discouraged from entering into financially beneficial leases with nonmembers for fear of losing control over tribal land.

Evaluating the trespass claim under *Montana*’s second exception, unpaid rent and percentages of the business’s gross receipts here totaled \$1,486,146.42 at the time of the tribal court’s judgment. Johnson’s unlawful occupancy and use of tribal land not only deprived the CRIT of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income. Thus, in addition to the tribe’s undisputed authority to eject trespassers from its own land, *Montana*’s second exception would provide regulatory jurisdiction.

Id. at 818-19.

Both *Water Wheel* and *Crowe & Dunlevy* involved nonmember actions on tribal trust lands or reservation lands. Recall that even Justice Scalia in *Hicks* acknowledged that tribal assertion of civil jurisdiction over nonmembers (excluding state officials) remains an open question. Both the Ninth and Tenth Circuits applied the *Montana* test, but no Supreme Court to date has held that *Montana* applies to nonmember activity on tribal trust lands. As the Ninth Circuit suggested, does *Merrion*'s recognition of the tribal power to exclude effectively trump the *Montana* test on tribal trust or reservation lands?

7. In a case watched nationally and generating enormous news coverage, the Hualapai Indian Tribe, doing business as 'Sa' Nyu Wa, its tribally chartered corporation, attempted to exercise eminent domain over the contract rights of its business partner, the Grand Canyon Skywalk Development company. The parties had been engaged in years of dispute over the completion of additional buildings composing the Grand Canyon Skywalk development. In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa*, 715 F.3d 1196 (9th Cir. 2013), the court affirmed the district court's order to have the case returned to tribal court under the tribal court exhaustion doctrine.

From whence does the authority of the tribal government to exercise eminent domain over a nonmember's interest in a contract? The tribe seems to be arguing that it is prepared to litigate the value of the taking in tribal court. The nonmember business argued in federal court that the tribal court's exercise of jurisdiction over it was in "bad faith," one of the exceptions to the tribal court exhaustion doctrine. Notably, the nonmember challenged the independence of the tribal judiciary from tribal political interference. The court rejected that claim:

The facts of this case do not support a finding of bad faith on the part of the tribal court. GCSD urges us to determine that the Hualapai Tribal Court Evaluation, the proffered testimony of its author, Executive Director Joseph Myers, and other evidence proved that the tribal court and tribal council were inextricably intertwined such that bad faith by the tribal council could be imputed to the tribal court. However, the proffered evidence does not conclusively support that claim. The majority of the statements in the Evaluation are broad generalizations or guiding principles. Two specific findings directly refute GCSD's contentions: (1) "no interviewee stated that there was any direct interference in court matters by tribal council members;" and (2) "[t]he judiciary is separate and apart from the tribal council." Additionally, the tribal council's act of bringing in an external auditing organization lends credibility to the tribal court system as a whole.

Grand Canyon Skywalk Development, 715 F.3d at 1202. Does the nonmember have a point, as a normative matter? The regular tribal judges in this case have recused themselves, giving some fuel to the fire of the notion that there is political interference? What remedies does the nonmember have if the tribal court issues an order finding just compensation to be significantly

lower than what the nonmember claims? Is the Indian Civil Rights Act or tribal takings law sufficient?

SECTION B.

TAXATION AND REGULATION

PART 2. STATE AUTHORITY TO TAX IN INDIAN COUNTRY: THE SCOPE OF FEDERAL PREEMPTION OVER RESERVATION ECONOMIC DEVELOPMENT

Add to the end the first paragraph of page 628:

4. In *Masantucket Pequot Tribe v. Town of Ledyard*, __ F.3d __, 2013 WL 3491285 (2d Cir., July 15, 2013), the court held that the town may impose the state’s personal property taxes on slot machine vendors of the tribe’s Foxwoods Casino Resort. The tribe argued that the Indian Trader Statutes, the Indian Gaming Regulatory Act, and federal Indian preemption law each preempted the state taxes. The court disagreed.

In the discussion involving the federal Indian law preemption doctrine, the court held that the state’s interests outweighed the tribal and federal interests:

i. The Federal Interest

For the purposes of the *Bracker* test, determining relevant federal interests “is primarily an exercise in examining congressional intent, [and] the history of tribal sovereignty serves as a necessary ‘backdrop’ to that process.” ... IGRA, described at times as Congress’s “strongest and most explicit statement in favor of tribal economic development,” Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEV. L. REV. 121, 146 (2006), “is intended to promote tribal [economic] development, prevent criminal activity related to gambling, and ensure that gaming activities are conducted fairly.” *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010), and also to “ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 U.S.C. § 2702(1)-(2). Nothing within IGRA reveals congressional intent to exempt non-Indian suppliers of gaming equipment from generally applicable state taxes that would apply in the absence of the legislation. IGRA addresses state taxation, 25 U.S.C. § 2710(d)(4), without prohibiting taxes like this personal property tax. ...

The tax, imposed on non-Indian vendors, is likely to have a minimal effect on the Tribe's economic development. While IGRA seeks to limit criminal activity at the casinos, nothing in Connecticut's tax makes it likely that Michael Corleone will arrive to take over the Tribe's operations. Moreover, IGRA presented an opportunity for Congress to preempt taxes exactly like this one; Congress chose to limit the scope of IGRA's preemptive effect to the "governance of gaming." ... As imposed on the owners of vending machines leased by the Tribe, the tax entitles the State to a tangential benefit from the Tribe's gaming operation, but it does not prevent "the Indian tribe [from being] the *primary* beneficiary of the gaming operation." 25 U.S.C. § 2702(2) (emphasis added). The tax therefore has only a minimal effect on federal interests.

The economic effect of the tax on the Tribe is minimal. From 2004 to 2011, AC Coin had paid \$69,894 in personal property tax. After several years, at the Tribe's urging, AC Coin permitted the Tribe to reimburse it for this tax while this lawsuit was pending. Assuming comparable taxes on WMS, this leads to an approximate total tax of \$20,000 per annum. Although this is a substantial sum, it constitutes less than two tenths of one percent of the \$2,300,000 (AC Coin) and \$12,900,000 (WMS) in revenue per annum that the vendors anticipate from their dealings with the Tribe.

As of September 2011, the Tribe had invested over \$1.42 billion in its gaming operations at Foxwoods. Many of the vendors' most popular games are available by lease only, and the Tribe has elected to pursue leases of a significant duration; however, the challenged tax does not significantly compromise the profitability of these leases. The Tribe's payments to the State of twenty-five percent of its gross operating revenues from video facsimile games have exceeded \$1.5 billion since 2003. Even if the Tribe were forced to reimburse the vendors, \$20,000 per year would not pose a substantial threat to the revenue the Tribe derives from the vendors' games, and it does not make the State the "primary beneficiary" of even this part of the Tribe's gaming operation. The tax's economic effect on the Tribe is less than minimal.

In this case, the Town has a cognizable economic interest in imposing the tax. The Supreme Court has recognized "the dependency of state budgets on the receipt of local tax revenues" and "appreciate[s] the difficulties encountered by [local governments] should a substantial portion of [their] rightful tax revenue be tied up in" litigation. ... The Town's economic interest therefore exceeds the

value of the taxes on slot machines, insofar as a ruling favorable to the Tribe could invite other nonIndian owners of personal property on the reservation to initiate similar actions. According to the Town, the anticipated litigation from such an event would tie up hundreds of thousands of dollars per year. ... Moreover, if the legality of the tax hinges upon the extent to which the taxed property is used by the Tribe in connection with Class III gaming—or other gaming at Foxwoods—the Town would need to take careful account of the use to which property owned by non-Indians on the reservation was put. This additional level of analysis would further frustrate the Town’s revenue collection and would render the State’s tax more difficult and expensive to administer.

There is a nexus between the tax and the services that the Town provides. The Town funds “the education and bussing [sic] of the Tribe’s children” and “[t]he maintenance of the roads to the Reservation,” *inter alia*. ... A well-maintained road system that brings in the customers is the lifeblood of the Tribe’s gaming activities. That the Tribe benefits from generalized governmental functions performed by the Town reinforces the validity of generalized taxes imposed by the Town on third parties with whom the Tribe elects to do business. ... The Town’s economic interest in the generally applicable tax is therefore connected, in some respect, to the generally available services that it provides.

The Town and State have more at stake than the Tribe. The economic effect of the tax on the Tribe is negligible; its economic value to the Town is not. The Tribe’s sovereign interest in being able to exercise sole taxing authority over possession of property is insufficient to outweigh the State’s interest in the uniform application of its generally-applicable tax, particularly where, as here, there is room for both State and Tribal taxation of the same activity.

Mashantucket, 2013 WL 3491285, at *13-16.

5. In 2012, the Department of Interior promulgated regulations on the leasing of tribal trust lands that purport to preempt state and local taxes on improvements on those lands. The relevant regulation reads:

§ 162.017 What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

25 C.F.R. § 162.017.

The Ninth Circuit, in line with the regulation (but not *relying* on the regulation), held in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, __ F.3d __ (9th Cir., July 30, 2013), *available at* <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/30/10-35642.pdf>, that a county's effort to tax Great Wolf Lodge properties on the Chehalis reservation ran afoul of the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973):

Accordingly, Mescalero makes it clear that where the United States owns land covered by [25 U.S.C.] § 465, and holds it in trust for the use of a tribe (regardless of “the particular form in which the [t]ribe chooses to conduct its business”), § 465 exempts permanent improvements on that land from state and local taxation.

Chehalis, slip op. at 10. The court noted that the federal leasing regulation “‘merely clarifies and Confirms’ what § 465 ‘already conveys,’ we need not reach the applicability of this regulation or the level of deference owed to the Bureau of Indian Affairs in this context.” *Id.* at 10 n. 6 (citation omitted).

Other local jurisdictions are concerned about their taxing power and have challenged the regulation. *See* Complaint, *Desert Water Agency v. Dept. of Interior*, No. 13-2281 (C.D. Cal.), *available at* <http://turtletalk.files.wordpress.com/2013/04/complaint2.pdf>.

SECTION D.

JUDICIAL JURISDICTION BY CONGRESSIONAL STATUTE: THE INDIAN CHILD WELFARE ACT OF 1978

Add to the end the notes on page 664.

ADOPTIVE COUPLE V. BABY GIRL

Supreme Court of the United States, 2013

__ U.S. __, 133 S. Ct. 2552, __ L.Ed.2d __

Justice ALITO delivered the opinion of the Court.

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

Contrary to the State Supreme Court’s ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent’s rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent’s “continued custody” of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the “breakup of the Indian family”—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child. We accordingly reverse the South Carolina Supreme Court’s judgment and remand for further proceedings.

“The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901–1963, was the product of rising concern in the mid–1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 ... (1989). Congress found that “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4). This “wholesale removal of Indian children from their homes” prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. *Id.*, at 32, 36....

Three provisions of the ICWA are especially relevant to this case. First, “[a]ny party seeking” an involuntary termination of parental rights to an Indian child under state law must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” § 1912(d). Second, a state court may not involuntarily terminate parental rights to an Indian child “in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” § 1912(f). Third, with respect to adoptive placements for an Indian child under state law, “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” § 1915(a).

II

In this case, Birth Mother (who is predominantly Hispanic) and Biological Father (who is a member of the Cherokee Nation) became engaged in December 2008. ... The couple’s relationship deteriorated, and Birth Mother broke off the engagement in May 2009. In June, Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights.

Birth Mother then decided to put Baby Girl up for adoption. Because Birth Mother believed that Biological Father had Cherokee Indian heritage, her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled. The inquiry letter misspelled Biological Father’s first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father’s membership in the tribal records.

Working through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. ...

It is undisputed that, for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so. Indeed, Biological Father "made no meaningful attempts to assume his responsibility of parenthood" during this period. App. to Pet. for Cert. 122a (Sealed; internal quotation marks omitted).

Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption. (This was the first notification that they had provided to Biological Father regarding the adoption proceeding.) Biological Father signed papers stating that he accepted service and that he was "not contesting the adoption." ... But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple.

Biological Father contacted a lawyer the day after signing the papers, and subsequently requested a stay of the adoption proceedings. In the adoption proceedings, Biological Father sought custody and stated that he did not consent to Baby Girl's adoption. Moreover, Biological Father took a paternity test, which verified that he was Baby Girl's biological father.

A trial took place in the South Carolina Family Court in September 2011, by which time Baby Girl was two years old. ... The Family Court concluded that Adoptive Couple had not carried the heightened burden under § 1912(f) of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody. ... The Family Court therefore denied Adoptive Couple's petition for adoption and awarded custody to Biological Father. ... On December 31, 2011, at the age of 27 months, Baby Girl was handed over to Biological Father, whom she had never met.

The South Carolina Supreme Court affirmed the Family Court's denial of the adoption and the award of custody to Biological Father. ... We granted certiorari. ...

III

It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. ... The South Carolina Supreme Court held, however, that Biological Father is a "parent" under the ICWA and that two statutory provisions—namely, § 1912(f) and § 1912(d)—bar the termination of his parental rights. In this Court, Adoptive Couple contends that Biological Father is not a "parent" and that § 1912(f) and § 1912(d) are inapplicable. We need not—and therefore do not—decide whether Biological Father is a "parent." See § 1903(9) (defining "parent"). Rather, assuming for the sake of argument that he is a "parent," we hold that neither § 1912(f) nor § 1912(d) bars the termination of his parental rights.

A

Section 1912(f) addresses the involuntary termination of parental rights with respect to an Indian child. Specifically, § 1912(f) provides that “[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, ... that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (Emphasis added.) The South Carolina Supreme Court held that Adoptive Couple failed to satisfy § 1912(f) because they did not make a heightened showing that Biological Father’s “prospective legal and physical custody” would likely result in serious damage to the child. ... That holding was error.

Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of “*continued custody* of the child by the parent.” (Emphasis added.) The adjective “continued” plainly refers to a pre-existing state. As Justice SOTOMAYOR concedes, ... (hereinafter the dissent), “continued” means “[c]arried on or kept up without cessation” or “[e]xtended in space without interruption or breach of connection.” Compact Edition of the Oxford English Dictionary 909 (1981 reprint of 1971 ed.) (Compact OED).... The phrase “continued custody” therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, § 1912(f) does not apply in cases where the Indian parent never had custody of the Indian child.

Biological Father’s contrary reading of § 1912(f) is nonsensical. Pointing to the provision’s requirement that “[n]o termination of parental rights may be ordered ... in the absence of a determination” relating to “the continued custody of the child by the parent,” Biological Father contends that if a determination relating to “continued custody” is inapposite in cases where there is no “custody,” the statutory text prohibits termination. *See* Brief for Respondent Birth Father 39. But it would be absurd to think that Congress enacted a provision that permits termination of a custodial parent’s rights, while simultaneously prohibiting termination of a noncustodial parent’s rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.

Our reading of § 1912(f) comports with the statutory text demonstrating that the primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” § 1901(4) (emphasis added); *see also* § 1902 (explaining that the ICWA establishes “minimum Federal standards for the removal of Indian children from their families” (emphasis added)); *Holyfield*, 490 U.S., at 32–34 And if the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families. *See, e.g.*, H.R.Rep. No. 95–1386, p. 8

(1978) (explaining that, as relevant here, “[t]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes” (emphasis added)); *id.*, at 9 (decrying the “wholesale separation of Indian children” from their Indian families); *id.*, at 22 (discussing “the removal” of Indian children from their parents pursuant to §§ 1912(e) and (f)). In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA’s primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.

The dissent fails to dispute that nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) shortly after the ICWA’s enactment demonstrate that the BIA envisioned that § 1912(f)’s standard would apply only to termination of a custodial parent’s rights. Specifically, the BIA stated that, under § 1912(f), “[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to do a better job”; instead, “[i]t must be shown that ... it is dangerous for the child to *remain* with his or her *present* custodians.” Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67593 (1979) (emphasis added) (hereinafter Guidelines). Indeed, the Guidelines recognized that § 1912(f) applies only when there is pre-existing custody to evaluate. ...

Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings. As an initial matter, it is undisputed that Biological Father never had physical custody of Baby Girl. And as a matter of both South Carolina and Oklahoma law, Biological Father never had legal custody either. *See* S.C.Code Ann. § 63–17–20(B) (2010) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child”); Okla. Stat., Tit. 10, § 7800 (West Cum.Supp. 2013) (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction”).

In sum, the South Carolina Supreme Court erred in finding that § 1912(f) barred termination of Biological Father’s parental rights.

B

Section 1912(d) provides that “[a]ny party” seeking to terminate parental rights to an Indian child under state law “shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed *to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful.” (Emphasis added.) The South Carolina Supreme Court found that Biological Father’s parental rights could not be terminated because

Adoptive Couple had not demonstrated that Biological Father had been provided remedial services in accordance with § 1912(d). ... We disagree.

Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship," American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's 273 (defining "breakup" as "a disruption or dissolution into component parts: an ending as an effective entity"). ... But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinu[ed]"—and no "effective entity" that would be "end[ed]"—by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable.

Our interpretation of § 1912(d) is, like our interpretation of § 1912(f), consistent with the explicit congressional purpose of providing certain "standards for the *removal* of Indian children from their families." § 1902 (emphasis added); *see also, e.g.*, § 1901(4); *Holyfield*, 490 U.S., at 32–34.... In addition, the BIA's Guidelines confirm that remedial services under § 1912(d) are intended "to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians," not to facilitate a *transfer* of the child to an Indian parent. *See* 44 Fed.Reg., at 67592 (emphasis added).

Our interpretation of § 1912(d) is also confirmed by the provision's placement next to § 1912(e) and § 1912(f), both of which condition the outcome of proceedings on the merits of an Indian child's "continued custody" with his parent. That these three provisions appear adjacent to each other strongly suggests that the phrase "breakup of the Indian family" should be read in harmony with the "continued custody" requirement. ... None of these three provisions creates parental rights for unwed fathers where no such rights would otherwise exist. Instead, Indian parents who are already part of an "Indian family" are provided with access to "remedial services and rehabilitative programs" under § 1912(d) so that their "custody" might be "continued" in a way that avoids foster-care placement under § 1912(e) or termination of parental rights under § 1912(f). In other words, the provision of "remedial services and rehabilitative programs" under § 1912(d) supports the "continued custody" that is protected by § 1912(e) and § 1912(f).⁸

Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families. It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point. The South Carolina Supreme Court held that § 1912(d) mandated measures such as "attempting to stimulate [Biological] Father's desire to be a parent." ... But if prospective adoptive parents were required to engage in the bizarre undertaking of "stimulat[ing]" a biological father's "desire to be a

parent,” it would surely dissuade some of them from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.

In sum, the South Carolina Supreme Court erred in finding that § 1912(d) barred termination of Biological Father’s parental rights.

IV

In the decision below, the South Carolina Supreme Court suggested that if it had terminated Biological Father’s rights, then § 1915(a)’s preferences for the adoptive placement of an Indian child would have been applicable. ... In so doing, however, the court failed to recognize a critical limitation on the scope of § 1915(a).

Section 1915(a) provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” Contrary to the South Carolina Supreme Court’s suggestion, § 1915(a)’s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no “preference” to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.

In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. ... Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. Moreover, Baby Girl’s paternal grandparents never sought custody of Baby Girl. ... Nor did other members of the Cherokee Nation or “other Indian families” seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings. ...

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother—perhaps contributing to the mother’s decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)’s rebuttable adoption preferences

apply when no alternative party has formally sought to adopt the child. We therefore reverse the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full but write separately to explain why constitutional avoidance compels this outcome. Each party in this case has put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act (ICWA). However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court's decision avoids those problems, I concur in its interpretation.

Justice BREYER, concurring.

I join the Court's opinion with three observations. First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers may include some who would prove highly unsuitable parents, some who would be suitable, and a range of others in between. Most of those who fall within that category seem to fall outside the scope of the language of 25 U.S.C. §§ 1912(d) and (f). Thus, while I agree that the better reading of the statute is, as the majority concludes, to exclude most of those fathers..., I also understand the risk that, from a policy perspective, the Court's interpretation could prove to exclude too many. ...

Second, ... this case does not involve a father with visitation rights or a father who has paid "all of his child support obligations." ... Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child. ...

Third, other statutory provisions not now before us may nonetheless prove relevant in cases of this kind. Section 1915(a) grants an adoptive "preference" to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.... in the absence of good cause to the contrary." Further, § 1915(c) allows the "Indian child's tribe" to "establish a different order of preference by resolution." Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court's consideration of "good cause?" I raise, but do not here try to answer, the question.

Justice SCALIA, dissenting.

*** The Court’s opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interest of the child.” It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.

Justice SOTOMAYOR, with whom Justice GINSBURG and Justice KAGAN join, and with whom Justice SCALIA joins in part, dissenting.

A casual reader of the Court’s opinion could be forgiven for thinking this an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result. In truth, however, the path from the text of the Indian Child Welfare Act of 1978 (ICWA) to the result the Court reaches is anything but clear, and its result anything but right.

The reader’s first clue that the majority’s supposedly straightforward reasoning is flawed is that not all Members who adopt its interpretation believe it is compelled by the text of the statute, *see* ... THOMAS, J., concurring[]; nor are they all willing to accept the consequences it will necessarily have beyond the specific factual scenario confronted here, *see* ... BREYER, J., concurring[]. The second clue is that the majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes. The third clue is that the majority openly professes its aversion to Congress’ explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes, ... but the Congress that enacted the statute announced its intent to stop “an alarmingly high percentage of Indian families [from being] broken up” by, among other things, a trend of “plac[ing] [Indian children] in non-Indian ... adoptive homes.” 25 U.S.C. § 1901(4). Policy disagreement with Congress’ judgment is not a valid reason for this Court to distort the provisions of the Act. Unlike the majority, I cannot adopt a reading of ICWA that is contrary to both its text and its stated purpose. I respectfully dissent.

I

Beginning its reading with the last clause of § 1912(f), the majority concludes that a single phrase appearing there—“continued custody”—means that the entirety of the subsection is inapplicable to any parent, however committed, who has not previously had physical or legal custody of his child. Working back to front, the majority then concludes that § 1912(d), tainted by its association with § 1912(f), is also inapplicable; in the majority’s view, a family bond that does not take custodial form is not a family bond worth preserving from “breakup.” Because there are apparently no limits on the contaminating power of this single phrase, the majority does

not stop there. Under its reading, § 1903(9), which makes biological fathers “parent[s]” under this federal statute (and where, again, the phrase “continued custody” does not appear), has substantive force only when a birth father has physical or state-recognized legal custody of his daughter.

When it excludes noncustodial biological fathers from the Act’s substantive protections, this textually backward reading misapprehends ICWA’s structure and scope. Moreover, notwithstanding the majority’s focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting. The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.

A

Better to start at the beginning and consider the operation of the statute as a whole. ...

ICWA commences with express findings. Congress recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” 25 U.S.C. § 1901(3), and it found that this resource was threatened. State authorities insufficiently sensitive to “the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families” were breaking up Indian families and moving Indian children to non-Indian homes and institutions. See §§ 1901(4)-(5). As § 1901(4) makes clear, and as this Court recognized in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 ... (1989), adoptive placements of Indian children with non-Indian families contributed significantly to the overall problem. See § 1901(4) (finding that “an alarmingly high percentage of [Indian] children are placed in non-Indian ... adoptive homes”).

Consistent with these findings, Congress declared its purpose “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards” applicable to child custody proceedings involving Indian children. ...

First, ICWA defines the term “parent” broadly to mean “any biological parent ... of an Indian child or any Indian person who has lawfully adopted an Indian child.” § 1903(9). It is undisputed that Baby Girl is an “Indian child” within the meaning of the statute, ... and Birth Father consequently qualifies as a “parent” under the Act. The statutory definition of parent “does not include the unwed father where paternity has not been acknowledged or established,” § 1903(9), but Birth Father’s biological paternity has never been questioned by any party and was confirmed by a DNA test during the state court proceedings....

Second, the Act's comprehensive definition of "child custody proceeding" includes not only "adoptive placement[s]," "preadoptive placement[s]," and "foster care placement[s]," but also "termination of parental rights" proceedings. § 1903(1). This last category encompasses "*any* action resulting in the termination of the *parent-child* relationship," § 1903(1)(ii) (emphasis added). So far, then, it is clear that Birth Father has a federally recognized status as Baby Girl's "parent" and that his "parent-child relationship" with her is subject to the protections of the Act.

These protections are numerous. ... Any voluntary consent Birth Father gave to Baby Girl's adoption would have been invalid unless written and executed before a judge and would have been revocable up to the time a final decree of adoption was entered. *See* §§ 1913(a), (c). And § 1912, the center of the dispute here, sets forth procedural and substantive standards applicable in "involuntary proceeding[s] in a State court," including foster care placements of Indian children and termination of parental rights proceedings. § 1912(a). ...

Section 1912(a) requires [that birth fathers receive] notice, counsel, and access to relevant documents[;] the statute ensures a biological father's meaningful participation in an adoption proceeding where the termination of his parental rights is at issue.

The immediate inference to be drawn from the statute's structure is that subsections (e) and (f) work in tandem with the rehabilitative efforts required by (d). Under subsection (d), state authorities must attempt to provide "remedial services and rehabilitative programs" aimed at avoiding foster care placement or termination of parental rights; (e) and (f), in turn, bar state authorities from ordering foster care or terminating parental rights until these curative efforts have failed and it is established that the child will suffer "serious emotional or physical damage" if his or her familial situation is not altered. Nothing in subsections (a) through (d) suggests a limitation on the types of parental relationships that are protected by any of the provisions of § 1912, and there is nothing in the structure of § 1912 that would lead a reader to expect subsection (e) or (f) to introduce any such qualification. Indeed, both subsections, in their opening lines, refer back to the prior provisions of § 1912 with the phrase "in such proceeding." This language indicates, quite logically, that in actions where subsections (a), (b), (c), and (d) apply, (e) and (f) apply too.

All this, and still the most telling textual evidence is yet to come: The text of the subsection begins by announcing, "[n]o termination of parental rights may be ordered" unless the specified evidentiary showing is made. To repeat, a "termination of parental rights" includes "*any* action resulting in the termination of the parent-child relationship," 25 U.S.C. § 1903(1)(ii) (emphasis added), including the relationship Birth Father, as an ICWA "parent," has with Baby

Girl. The majority's reading disregards the Act's sweeping definition of "termination of parental rights," which is not limited to terminations of custodial relationships.

The entire foundation of the majority's argument that subsection (f) does not apply is the lonely phrase "continued custody." It simply cannot bear the interpretive weight the majority would place on it.

In keeping with § 1903(1) and the structure and language of § 1912 overall, the phrase "continued custody" is most sensibly read to refer generally to the continuation of the parent-child relationship that an ICWA "parent" has with his or her child. A court applying § 1912(f) where the parent does not have pre-existing custody should, as Birth Father argues, determine whether the party seeking termination of parental rights has established that the continuation of the parent-child relationship will result in "serious emotional or physical damage to the child."

B

The majority also does not acknowledge the full implications of its assumption that there are some ICWA "parent[s]" to whom §§ 1912(d) and (f) do not apply. Its discussion focuses on Birth Father's particular actions, but nothing in the majority's reasoning limits its manufactured class of semiprotected ICWA parents to biological fathers who failed to support their child's mother during pregnancy. Its logic would apply equally to noncustodial fathers who have actively participated in their child's upbringing.

Consider an Indian father who, though he has never had custody of his biological child, visits her and pays all of his child support obligations.⁸ Suppose that, due to deficiencies in the

⁸ The majority attempts to minimize the consequences of its holding by asserting that the parent-child relationships of noncustodial fathers with visitation rights will be at stake in an ICWA proceeding in only "a relatively small class of cases." ... But it offers no support for this assertion, beyond speculating that there will not be many fathers affected by its interpretation of § 1912(d) because it is qualified by an "abandon[ment]" limitation. ... Tellingly, the majority has nothing to say about § 1912(f), despite the fact that its interpretation of that provision is not limited in a similar way. In any event, this example by no means exhausts the class of semiprotected ICWA parents that the majority's opinion creates. It also includes, for example, biological fathers who have not yet established a relationship with their child because the child's mother never informed them of the pregnancy, ... told them falsely that the pregnancy ended in miscarriage or termination, ... or otherwise obstructed the father's involvement in the child's life.... And it includes biological fathers who did not contribute to pregnancy expenses because they were unable to do so, whether because the father lacked sufficient means, the expenses were covered by a third party, or the birth mother did not pass on the relevant bills. ...

The majority expresses the concern that my reading of the statute would produce "far-reaching consequences," because "even a sperm donor" would be entitled to ICWA's protections. ... If there are any examples of women who go to the trouble and expense of artificial insemination and then carry the child to term, only to put the child up for adoption or be found so unfit as mothers that state authorities attempt an involuntary adoptive placement—thereby necessitating termination of the parental rights of the sperm donor father—the

care the child received from her custodial parent, the State placed the child with a foster family and proposed her ultimate adoption by them. Clearly, the father's parental rights would have to be terminated before the adoption could go forward. On the majority's view, notwithstanding the fact that this father would be a "parent" under ICWA, he would not receive the benefit of either § 1912(d) or § 1912(f). Presumably the court considering the adoption petition would have to apply some standard to determine whether termination of his parental rights was appropriate. But from whence would that standard come?

Not from the statute Congress drafted, according to the majority. The majority suggests that it might come from state law. ... But it is incongruous to suppose that Congress intended a patchwork of federal and state law to apply in termination of parental rights proceedings. Congress enacted a statute aimed at protecting the familial relationships between Indian parents and their children because it concluded that state authorities "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). It provided a "minimum Federal standar[d]," § 1902, for termination of parental rights that is more demanding than the showing of unfitness under a high "clear and convincing evidence" standard that is the norm in the States, *see* 1 J. Hollinger, *Adoption Law and Practice* § 2.10 (2012)....

II

The majority's textually strained and illogical reading of the statute might be explicable, if not justified, if there were reason to believe that it avoided anomalous results or furthered a clear congressional policy. But neither of these conditions is present here.

A

ICWA, on a straightforward reading of the statute, is consistent with the law of those States that protected, and protect, birth fathers' rights more vigorously. This reading can hardly be said to generate an anomaly. ICWA, as all acknowledge, was "the product of rising concern ... [about] abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families." *Holyfield*, 490 U.S., at 32.... It stands to reason that the Act would not render the legal status of an Indian father's relationship with his biological child

majority does not cite them. As between a possibly overinclusive interpretation of the statute that covers this unlikely class of cases, and the majority's underinclusive interpretation that has the very real consequence of denying ICWA's protections to all noncustodial biological fathers, it is surely the majority's reading that is contrary to ICWA's design.

fragile, but would instead grant it a degree of protection commensurate with the more robust state-law standards.

C

The majority also protests that a contrary result to the one it reaches would interfere with the adoption of Indian children. ... This claim is the most perplexing of all. A central purpose of ICWA is to “promote the stability and security of Indian ... families,” 25 U.S.C. § 1902, in part by countering the trend of placing “an alarmingly high percentage of [Indian] children ... in non-Indian foster and adoptive homes and institutions.” § 1901(4). The Act accomplishes this goal by, first, protecting the familial bonds of Indian parents and children...; and, second, establishing placement preferences should an adoption take place, see § 1915(a). ICWA does not interfere with the adoption of Indian children except to the extent that it attempts to avert the necessity of adoptive placement and makes adoptions of Indian children by non-Indian families less likely.

The majority may consider this scheme unwise. But no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about. ...

The majority further claims that its reading is consistent with the “primary” purpose of the Act, which in the majority’s view was to prevent the dissolution of “intact” Indian families. ... As we observed in *Holyfield*, ICWA protects not only Indian parents’ interests but also those of Indian tribes. ... A tribe’s interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent.

Moreover, the majority’s focus on “intact” families, ... begs the question of what Congress set out to accomplish with ICWA. In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA’s substantive protections; unhappy families all too often do not. They are families nonetheless. Congress understood as much. ICWA’s definitions of “parent” and “termination of parental rights” provided in § 1903 sweep broadly. They should be honored.

III

Because I would affirm the South Carolina Supreme Court on the ground that § 1912 bars the termination of Birth Father’s parental rights, I would not reach the question of the applicability of the adoptive placement preferences of § 1915. I note, however, that the majority does not and cannot foreclose the possibility that on remand, Baby Girl’s paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand Birth Father’s parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that § 1915 would not apply to an adoption petition that has not yet been filed. Indeed, the statute applies “[i]n any adoptive placement of an Indian child under State law,” 25 U.S.C. § 1915(a) (emphasis added), and contains no temporal qualifications. It would indeed be an odd result for this Court, in the name of the child’s best interests, cf. ante, at 2564, to purport to exclude from the proceedings possible custodians for Baby Girl, such as her paternal grandparents, who may have well-established relationships with her.

* * *

The majority casts Birth Father as responsible for the painful circumstances in this case, suggesting that he intervened “at the eleventh hour to override the mother’s decision and the child’s best interests[.]”. I have no wish to minimize the trauma of removing a 27-month-old child from her adoptive family. It bears remembering, however, that Birth Father took action to assert his parental rights when Baby Girl was four months old, as soon as he learned of the impending adoption. As the South Carolina Supreme Court recognized, “[h]ad the mandate of ... ICWA been followed [in 2010], ... much potential anguish might have been avoided[;] and in any case the law cannot be applied so as automatically to “reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.”““ ...

The majority's hollow literalism distorts the statute and ignores Congress' purpose in order to rectify a perceived wrong that, while heartbreaking at the time, was a correct application of federal law and that in any case cannot be undone. Baby Girl has now resided with her father for 18 months. However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3 ½, she is again removed from her home and sent to live halfway across the country. Such a fate is not foreordained, of course. But it can be said with certainty that the anguish this case has caused will only be compounded by today's decision.

NOTES

1. Shortly after the Supreme Court decided *Adoptive Couple*, the Birth Father, his wife, and his parents each filed court papers in Oklahoma to adopted Baby Girl. See Kate Fort, Update on Baby Girl Proceedings, Turtle Talk blog post (July 9, 2013), available at <http://turtletalk.wordpress.com/2013/07/09/update-on-baby-girl-proceedings/>.

A week later, the South Carolina Supreme Court ordered that the Adoptive Couple's adoption of Baby Girl be immediately concluded. The court held: "The Supreme Court has articulated the federal standard, and its application to this case is clear: the ICWA does not authorize Birth Father's retention of custody. Therefore, we reject Birth Father's argument that § 1915(a)'s placement preferences could be an alternative basis for denying the Adoptive Couple's adoption petition." __ S.E.2d __, 2013 WL 3752641, at *2 (S.C., July 17, 2013).

Is the South Carolina Supreme Court correct?

2. On the same day the South Carolina Supreme Court issued its order, but a few hours earlier, the Cherokee Nation District Court granted an emergency guardianship order in favor of awarding temporary custody of Baby Girl to her stepmother and parental grandparents. See Adrea Korthase, *Cherokee Nation Tribal Court Grants Custody to Father's Wife and Father's Parents in Baby Veronica Matter*, Turtle Talk blog post (July 22, 2013), available at <http://turtletalk.wordpress.com/2013/07/22/cherokee-nation-tribal-court-grants-custody-to-fathers-wife-and-fathers-parents-in-baby-veronica-matter/>.

3. Justice Thomas concurred in the result (and joined the majority) but wrote separately to argue that his understanding of Congressional powers under the Indian Commerce Clause does not allow for Congress enact ICWA at all, arguments similar to those he raised in *United States v. Lara*, 541 U.S. 193 (2004), *supra* at page 517, 524-26. Compare *Adoptive Couple*, 133 S. Ct. at 2556-57 (Thomas, J., concurring) ("Although this Court has said that the 'central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,' ... neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power."), with *Lara*, 541 U.S. at 224 ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. ... I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'") (Thomas, J., concurring in result).

CHAPTER 9

THE NATION-BUILDING CHALLENGE: FEDERAL INDIAN LAW AND RESERVATION DEVELOPMENT

SECTION B.

INDIAN GAMING

PART 2. THE CONGRESSIONAL RESPONSE TO CABAZON: THE INDIAN GAMING REGULATORY ACT

Add to the end of page 726

6. In *State of Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), *cert. granted*, ___ U.S. ___, 2013 WL 3155256 (June 24, 2013), the court addressed an unusual gaming question – what to do about a tribal gaming operation on tribally-owned fee lands off the tribe’s reservation. The Sixth Circuit first held that the federal court did not have jurisdiction:

Two insuperable Article III defects prevent adjudication of these claims. The first is that a statutory prerequisite to jurisdiction is absent. Section 2710(d)(7)(A)(ii) by its terms is conjunctive—that is, the State or tribal plaintiff must meet all of the provision’s conditions for jurisdiction to exist, rather than just one or two of them. Thus, § 2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal–State compact; and (5) the Tribal–State compact is in effect.

The plaintiffs’ own pleadings defeat their argument that the Regulatory Act supplies jurisdiction here. In their complaints, the plaintiffs expressly allege that the Vanderbilt casino is not located on Indian lands, which means the plaintiffs cannot meet the third condition (that the “gaming activity [is] located on Indian lands”) recited above. ...

*** Here, the plaintiffs allege that the Vanderbilt property is not located within the Bay Mills reservation (which is located 100 miles to the north); that title to the property is not held in trust by the United States; that title is not subject to restriction against alienation by the United States; and that Bay Mills does not exercise governmental power over the property. The plaintiffs allege these things because they are essential to the plaintiffs' claim that gaming at the Vanderbilt casino violates Bay Mills's Tribal–State compact. But the allegations mean that, even at the pleading stage, the plaintiffs cannot show federal jurisdiction over their § 2710(d)(7)(A)(ii) claims. ...

That said, we acknowledge the irony of this case: Bay Mills, the defendant here, alleges that the Vanderbilt casino is located on “Indian lands”—in which case § 2710(d)(7)(A)(ii) would supply federal jurisdiction.

Michigan, 695 F.3d at 412.

The Sixth Circuit also foreclosed a federal common law cause of action, holding that the Bay Mills Indian Community retained its immunity from suit under IGRA for violations of a gaming compact:

The State argues that Congress has abrogated Bay Mills's immunity from this suit in two federal statutes. First, the State turns again to the Regulatory Act, specifically 25 U.S.C. § 2710(d)(7)(A)(ii). By its terms, this provision supplies federal jurisdiction and abrogates tribal immunity at a single stroke. But to do so, as discussed above, all of its textual prerequisites must be met. ... It is true, as the plaintiffs point out, that the Tenth Circuit has taken the opposite approach with respect to abrogation of tribal immunity under § 2710(d)(7)(A)(ii). *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385–86 (10th Cir.1997).... But *Mescalero* offers virtually no analysis in support of its contrary reading of § 2710(d)(7)(A)(ii)—a point which the State, to its credit, concedes here; and to the extent the opinion does offer any analysis, it mistakenly cites waiver cases rather than abrogation ones. We agree with the Eleventh Circuit, therefore, that *Mescalero*'s reasoning is “muddled” rather than persuasive. [*Florida v. Seminole Tribe*, 181 F.3d [1237,] 1241 [11th Cir. 1999]]. Thus, for the same reasons that § 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case, it does not abrogate Bay Mills's immunity either.

Second, the State argues that Congress abrogated Bay Mills's immunity in 18 U.S.C. § 1166. Section 1166(a) provides the following with respect to gambling that is not conducted under an approved Tribal–State gaming compact:

for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not

limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

The State acknowledges that it may not bring criminal charges against Bay Mills under this section, since § 1166(d) vests the federal government with exclusive jurisdiction over criminal prosecutions brought under § 1166(a). But the State does argue that § 1166(a) authorizes the State to bring this civil action. Specifically, the State notes that Michigan law authorizes a State prosecutor—or even a citizen—to bring a civil-nuisance suit to enjoin “any person” from allowing a building to be used for gambling. *See* Mich. Comp. Laws §§ 600.3805, 600.3801. Thus, the State says that, by incorporating this provision, § 1166(a) abrogates Bay Mills’s immunity with respect to the State’s request for injunctive relief here.

This question is closer than the other ones. Michigan’s statute authorizing civil suits to abate a nuisance is a “State law[] pertaining to the ... regulation ... of gambling,” so “for purposes of federal law” it “shall apply” in Indian country “in the same manner” as elsewhere in Michigan. 18 U.S.C. § 1166(a). As a matter of inference, therefore, the State’s argument is coherent. But it takes more than inferential logic to abrogate tribal immunity. What it takes is an “unequivocal expression” of Congress. ... Sometimes that unequivocal expression can be implicit, as § 2710(d)(7)(A)(ii) of the Regulatory Act itself demonstrates. But the expression is too attenuated here. Section 1166(a) itself does not expressly authorize a State to sue anyone, much less an Indian tribe. ... And neither § 1166(a) nor the cited sections of Michigan law say anything about suing Indian tribes in particular. Meanwhile, the plaintiffs’ reading of § 1166(a) would elevate that subsection to a position of paramount importance for tribal-state relations: notwithstanding the particularized remedies authorized by the Regulatory Act or the Tribal–State compact, a tribe’s immunity would turn on the happenstance of a particular state’s civil anti-gambling statutes, rather than on any provision of federal law. We do not see in § 1166(a) an unequivocal expression of intent to bring about these consequences. That provision therefore does not abrogate Bay Mills’s immunity either.

Michigan, 695 F.3d at 414-15.

The Supreme Court has granted certiorari to review this decision.

CHAPTER 12

FISHING AND HUNTING RIGHTS

SECTION B.

OFF-RESERVATION FISHING AND HUNTING

PART 1. PACIFIC NORTHWEST

Add to the end of the notes on page 869:

On March 29, 2013, Judge Martinez issued a permanent injunction against the State of Washington in the culverts subproceeding. *See United States v. Washington*, 2013 WL 1334391 (W.D. Wash., March 29, 2013). The injunction order the State to correct the barrier culverts that infringe on the treaty right to fish:

14. The Tribes have demonstrated, as set forth above in Findings of Fact 6–14, that they have suffered irreparable injury in that their Treaty-based right of taking fish has been impermissibly infringed. The construction and operation of culverts that hinder free passage of fish has reduced the quantity and quality of salmon habitat, prevented access to spawning grounds, reduced salmon production in streams in the Case Area, and diminished the number of salmon available for harvest by Treaty fishermen. The Tribes and their individual members have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from Statecreated or State-maintained fish passage barriers.

15. This injury is ongoing, as efforts by the State to correct the barrier culverts have been insufficient. Despite past State action, a great many barrier culverts still exist, large stretches of potential salmon habitat remain empty of fish, and harvests are still diminished. Remedies at law are inadequate as monetary damages will not adequately compensate the Tribes and their individual members for these harms. Salmon harvests are important to Tribal members not only economically but in their traditions, culture, and religion; interests for which there is no adequate monetary relief.

16. The balance of hardships tips steeply toward the Tribes in this matter. The promise made to the Tribes that the Stevens Treaties would protect their source of food and commerce was crucial in obtaining their assent to the Treaties' provisions. ... Equity favors requiring the State of Washington to keep the promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties.

17. It was the intent of the negotiators, and the Tribes' understanding, that they would be able to meet their own subsistence needs forever, and not become a burden on the State treasury. ... The Tribes' ability to meet their subsistence and cultural needs is threatened by the depletion of salmon stocks which has resulted from the continued existence of fish passage barriers. State action in the form of acceleration of barrier correction is necessary to remedy this decline in salmon stocks and remove the threats which face the Tribes. The State has the financial ability to accelerate the pace of barrier correction over the next several years and provide relief to the Tribes. ... Under state and federal law, barrier culverts must be corrected in any case. Any marginal costs attributable to an accelerated culvert correction schedule are more than offset by the benefit that will accrue to the Tribes. Increased State spending on barrier correction will not adversely affect state programs such as education or social welfare, because the transportation and general operating budgets are separate. ...

18. The public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just Tribal fishermen, will benefit from the increased production of salmon. Commercial fishermen will benefit economically, but recreational fishermen will benefit as well. The general public will benefit from the enhancement of the resource and the increased economic return from fishing in the State of Washington. The general public will also benefit from the environmental benefits of salmon habit restoration.

19. The State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned. Instead, it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed. The roadbed crossing must be fitted with a culvert that allows not only water to flow, but which insures the free passage of salmon of all ages and life stages both upstream and down. That passage is best facilitated by a stream simulation culvert rather than the less-effective hydraulic design or no-slope culvert.

20. An injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises. The reduced effort by the State over the past three years, resulting in a net increase in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations.

United States v. Washington, 2013 WL 1334391, at *23-25.